No. 22-976

In the Supreme Court of the United States

MERRICK GARLAND, 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 MANHATTAN INSTITUTE AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a bump stock device is a "machinegun" as defined in 26 U.S.C. 5845(b).

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INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has historically sponsored scholarship and filed briefs supporting economic freedom against government overreach.

This case interests *amicus* because it involves an agency regulation that was not explicitly authorized by statute. Indeed, it gives the Court a chance to clarify that statutory silence does not require judicial deference, particularly in the context of rules that impose criminal consequences.

SUMMARY OF ARGUMENT

The government in this case forgoes reliance on *Chevron* deference, but numerous courts have addressed whether *Chevron* applies to the Bureau of Alcohol, Tobacco, and Firearms (ATF)'s Bump Stock Rule at issue. The Fifth Circuit concluded below that the government had forfeited reliance on *Chevron* and that it would be inapplicable anyway, *see* Pet.App.32a–41a, but the D.C. Circuit has concluded that *Chevron* cannot be forfeited or waived in this context, *see Guedes v. ATF*, 920 F.3d 1, 23 (D.C. Cir. 2019); *see also Aposhian v. Barr*, 973 F.3d 1151, 1151 (10th Cir. 2020) (asking for briefing on whether *Chevron* can be waived).

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* and its counsel funded its preparation or submission.

As a threshold matter, the Fifth Circuit was correct that the government can waive and forfeit *Chevron* by declining or failing to rely on it, and that alone precludes recourse to it here. *See* Pet.App.32a–35a. But because disputes over the applicability of *Chevron* have arisen throughout litigation over the Bump Stock Rule, *amicus* explains below why this Court should decline to defer to ATF's interpretation *even if* the *Chevron* framework were available.

First, in abruptly reversing 11 years of its own findings that bump stocks are not machine guns, ATF's actions were not based on an alleged statutory ambiguity or agency expertise. Instead, they were done solely as a political expediency to avoid the need for legislation.

Second, *Chevron* deference raises serious separation of powers and political accountability concerns, especially in this context, where the executive branch can single-handedly criminalize previously lawful behavior.

Third, the ATF's asserted authority would allow it to unilaterally criminalize possession of an unknowable number of firearms and accessories, without any intervening change in statutory law.

ARGUMENT

I. *CHEVRON* DOES NOT APPLY BECAUSE THE ATF'S RULE WAS NOT BASED ON STATUTORY AMBIGUITY OR AGENCY EXPERTISE BUT WAS PURELY A POLITICAL EXPEDIENCY

The degree of deference that courts owe to agency interpretations is one of "the most crucial and contested legal issue[s] respecting agency decision

making." Maxwell L. Stearns, Todd J. Zywicki & Thomas Miceli, *Law and Economics: Private and Public* 767 (2018). *Chevron* itself stated that the main reasons for judicial deference to agency interpretations are that agencies possess unique expertise and knowledge, and that Congress intended agencies to address recognized statutory ambiguities. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 865 (1984).

Here, no deference is owed to the Bump Stock Rule for the simple reason that it was adopted without even the pretense of satisfying those threshold *Chevron* purposes.

The Gun Control Act of 1968 criminalizes the possession of a machine gun. "[I]t shall be unlawful for any person to transfer or possess a machinegun." 18 U.S.C. § 922(o)(1). In ten classification letters from 2008 to 2017, the ATF repeatedly excluded bump stocks and related devices from the definition of machine gun. *See, e.g.*, Letter for David Compton from ATF's Firearm Technology Branch Chief (June 7, 2010); Letter for Michael Smith from ATF's Firearm Technology Branch Chief (April 2, 2012).

After the 2017 Las Vegas mass shooting, and in response to significant public pressure, the ATF abruptly reversed course and promulgated the Bump Stock Rule, which extended the prohibition on machine guns to bump stocks. *See Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices,* 82 Fed. Reg. 60,929 (Dec. 26, 2017); *Bump-Stop-Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018); 18 U.S.C. §§ 922(o)(1), 921(a)(23); 26 U.S.C. § 5845(b).

What prompted ATF's reversal on whether a bump stock was a machine gun? The ATF's actions were not based on agency expertise or a purported statutory ambiguity. The statute had been uniformly interpreted for over a decade. Nor is there any evidence the ATF brought scientific expertise to bear on the matter. Instead, the Bump Stock Rule was issued solely as a political expediency.

For example, on February 28, 2018, President Trump hosted a meeting with members of Congress to discuss school and community safety. Senator John Cornyn, the majority whip, suggested that Congress could pass legislation "on a bipartisan basis" to deal with "the bump stock issue." Remarks by President Trump, Vice President Pence, and Bipartisan Members of Congress in Meeting on School and Community Safety (Feb. 28, 2018), https://bit.ly/2M6Mjvz. President Trump interjected that there was no need for legislation because he would deal with bump stocks through executive action:

> And I'm going to write that out. Because we can do that with an executive order. I'm going to write the bump stock; essentially, write it out. So you won't have to worry about bump stock. Shortly, that will be gone. We can focus on other things. Frankly, I don't even know if it would be good in this bill. It's nicer to have a separate piece of paper where it's gone. And we'll have that done pretty quickly. They're working on it right now, the lawyers.

Id. Later during the meeting, Rep. Steve Scalise, the House majority whip, proposed other gun-control

measures that Congress could vote on. Again, the President reiterated that there was no need to legislate on bump stocks, because his administration would prohibit the devices through executive action:

> And don't worry about bump stock, we're getting rid of it, where it'll be out. I mean, you don't have to complicate the bill by adding another two paragraphs. We're getting rid of it. I'll do that myself because I'm able to. Fortunately, we're able to do that without going through Congress.

Id.

Moments before the Bump Stock Rule was announced, President Trump tweeted: "Obama Administration legalized bump stocks. BAD IDEA. As I promised, today the Department of Justice will issue the rule banning BUMP STOCKS with a mandated comment period. We will BAN all devices that turn legal weapons into illegal machine guns." Donald Trump (@realDonaldTrump), Twitter (Mar. 23, 2018, 1:50 PM), https://bit.ly/2DPV1cY.

Twenty-five federal appellate judges have written that section 5845(b) is best read as excluding non-mechanical bump stocks from the definition of machineguns. And the Sixth Circuit recently noted "the myriad and conflicting judicial opinions on this issue, but also the ATF's own flip-flop in its position." *Hardin v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 65 F.4th 895, 898 (6th Cir. 2023). That "flip-flop," further worsened by the ATF's failure bring its expertise to bear on the matter, undercuts the stated purpose of *Chevron*. *See* Pet.App.39a–41a ("[A]n agency

interpretation that 'conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.'") (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)).

Because the Bump Stock Rule was promulgated solely as a political expediency, *Chevron* does not apply.

II. *CHEVRON* RAISES SEPARATION OF POWERS AND POLITICAL ACCOUNTABILITY CONCERNS, ESPECIALLY IN THE CONTEXT OF RULES WITH CRIMINAL CONSEQUENCES.

1. Article I of the United States Constitution provides that "[a]ll legislative powers . . . shall be vested in . . . [C]ongress." U.S. Const. art. I. Increasingly, agency overreach, aided and abetted by the concept of *Chevron* deference, means that Congress's ability to legislate is either usurped or gladly handed over to the executive branch. *See*, *e.g.*, Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015); Thomas Griffith & Haley Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 2022 Yale L. J. Forum 693, 693 (Nov. 21, 2022).

Deferring to agency interpretations as here with the ATF's redefinition of "machinegun" short-circuits the legislative process and lessens political accountability. Banning bump stocks was hardly out of congressional reach. Instead, as discussed above, the executive branch pushed the ban through for political expediency, even discouraging Congress from taking up the

issue. Although the president's approach may have been quicker and required fewer compromises than going through the proper channels of bicameralism and presentment, there are good reasons to be wary of this method of policymaking.

Allowing an agency to reinterpret existing statutes in ways that directly contradict past legal interpretation to achieve new policy goals leads to bad law and bad politics. The executive branch is designed to execute existing laws, not write new ones. Its powers are limited by the language of the statutes that it is interpreting and enforcing. When an existing statute is stretched to accomplish a policy objective it wasn't meant to address, it leads to law that has been wholly created by the executive branch rather than by Congress.

This dynamic also disincentivizes Congress from acting. Government actions are rarely if ever universally loved. There will always be some level of political opposition. Executive policy-making gives members of Congress an out by "solving" a policy problem without political accountability for members. "*Chevron* effectively allows, and indeed encourages, Congress to abdicate its role as the most politically-accountable branch by deferring politically-difficult questions to agencies in ambiguous terms." Justin (Gus) Hurwitz, *Chevron's Political Domain: W(h)ither Step Three*, 68 DePaul L. Rev. 615, 618 (2019).

One role of the judiciary is to police the constitutional lines between the other branches and thereby limit the extent to which Congress can pass the buck. If courts don't step in, members of Congress grow more dependent on the executive branch to do their job for them and less willing to deal with national issues.

Congress is also far more accountable to the people than is the executive branch. The president and vice president are elected, to be sure, but they represent fewer distinct views than Congress does—and their millions of agents across the federal bureaucracy are even further removed from the people. Holding a president responsible for every decision his administration makes is impractical. Members of Congress, by contrast, are elected by smaller constituencies that can hold them accountable for their speeches, bills, and votes on a variety of topics.

Getting a bill through Congress is difficult. In fact, "the framers went to great lengths to make lawmaking difficult" in order to protect liberty and "promote deliberation." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting). The lawmaking process was "also designed to promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules." *Id.* The number of elected officials and governmental bodies required to pass a new statute ensure that the process can't be undone on a whim. By contrast, "if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice." *Gundy*, 139 S. Ct at 2135 (Gorsuch, J., dissenting). Instead, they would create an unsteady legal environment and an unconstitutional arrangement of government power.

The Bump Stock Rule is an excellent example. A previously legal device become illegal overnight, without any new bill being passed into law. "The ATF's interpretation of 'machinegun' gives anything but fair warning—instead, it does a *volte-face* of its almost 11-

years' treatment of a non-mechanical bump stock as not constituting a 'machinegun.'" *Guedes*, 920 F.3d at 41 (Henderson, J., concurring in part and dissenting in part).

The Bump Stock Rule thus "bring[s] into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference." *Michigan v. EPA*, 576 U.S. 743, 763 (2015) (Thomas, J., concurring).

2. *Chevron* deference also raises serious separation of powers concerns for the judiciary itself. When the judiciary defers to an agency interpretation, it effectively cedes a portion of judicial power to the executive branch and prevents the judiciary from fulfilling its "duty . . . to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137 (1803).

Chief Justice Marshall famously wrote that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. Less frequently quoted is the next sentence: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* Expound and interpret, not defer.

Chevron and its progeny have thus shifted "interpretive authority from courts to agencies—it was a 'counter-Marbury for the administrative state.'" Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. Online 174, 176 (2022). *Chevron* deference, especially for laws that carry criminal penalties, is plainly inconsistent with the duties of the judiciary under the Constitution. A doctrine that requires the courts to subjugate their own legal and constitutional determinations

of the meaning and limits of executive power is incompatible with the principle of judicial review. It would make little sense for the Constitution to give the judiciary the duty to determine the constitutional limitations of the other branches while also permitting the judiciary to fulfill that duty through deference to the other branch in question.

As a judicially created doctrine, *Chevron* deference and its harms are easily remediable by this Court. Doing away with *Chevron* deference would open the Court to critically examining executive action to ensure that it remains within constitutional bounds. Enforcing the separation of powers would not "dictate any conclusion about the proper size and scope of government," but would simply require that, whatever their scope, the powers of government are exercised by the appropriate branches. *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting).

3. Deferring to executive rulemaking is even more concerning here because the Bump Stock Rule purports to *criminalize* previously legal conduct. The Fifth Circuit correctly held that *Chevron* deference is inappropriate for that very reason. *See* Pet.App.36a–39a.

If courts defer to the ATF's criminalization of bump-stock ownership, then the executive branch will have created an entirely new crime beyond what Congress itself criminalized by statute. Applying *Chevron* to criminal statutes would thus "permit the aggregation" of executive and legislative power "in the one area where its division matters most: the removal of citizens from society." *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part). "Since the founding, it has been the job of Article III courts, not Article

II executive-branch agencies, to have the final say over what criminal laws mean," and thus courts should "reject the idea that Congress can end-run this principle by giving a criminal statute a civil application." *Id*. at 1032.

Indeed, this 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). That is so because "criminal laws are for the courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). Granting deference to the Bump Stock Rule would therefore represent an unprecedented step, with significant deleterious consequences for the separation of powers.

III. THE ATF'S ASSERTED AUTHORITY WOULD ALLOW IT TO CRIMINALIZE POSSESSION OF AN UNKNOWABLE NUMBER OF FIREARMS.

As explained above, *Chevron* deference encourages agency overreach. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2382 (2023) (Barrett, J., concurring) (likening an agency overstepping its power to a person, who, when told to "pick up dessert," orders a four-tiered wedding cake). If accepted, the ATF's extraordinary claim to authority in the Bump Stock Rule would thus allow it not just to criminalize possession of a device that had long been uniformly recognized as legal, but also give it the greenlight to criminalize an unknowable number of firearms and other products.

For example, crank-operated Gatling guns have never been considered "machineguns" under the NFA. *See* Rev. Rul. 55-528, 1955-2 C.B. 482. Gatling guns fire when the operator rotates a crank, which cocks

and releases a series of strikers, firing successive rounds of ammunition. The crank mechanism of a Gatling gun requires far less "manual input" than does a bump stock. Accordingly, under the logic of the Bump Stock Rule, Gatling guns may be made illegal—or maybe already *are* illegal.

There are also many novel semi-automatic firing mechanisms that exist. *See*, *e.g.*, Miles, Bullpup 2016: Vadum Electronic eBP-22 Bullpup, TheFirearmBlog, Sept. 28, 2016, https://bit.ly/2IAieb1; Chris Dumm, *Electric Cartridge Primers: Gone But Not Lamented*, The Truth About Guns, Dec. 19, 2013, https://bit.ly/2NLkhbb. These new approaches can improve the accuracy of a firearm, provide access to the disabled, and even make guns safer.

Notably, there is little reason to believe the ATF will not eventually try to expand its asserted authority, absent judicial intervention. This Court has recently rebuffed numerous attempts by agencies to piggyback sweeping policy agendas onto narrow statutes unrelated to their powers, and there is little evidence that executive agencies have been chastened by those rulings. *See, e.g., Alabama Assn. of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (CDC tried to issue a nationwide eviction moratorium); *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (OSHA tried to mandate employee vaccinations); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (EPA attempted to use the Clean Air Act to restructure electricity generation); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (Secretary of Education purported to forgive student loans).

Congress may in the future decide to update existing statutes to cover innovations in firearms technology. In so doing, it can take testimony and weigh the

pros and cons of expanding the ban on certain firing mechanisms. But that's Congress's job, not the president's. Those laws must be crafted in the legislative halls and on the floors of Congress, not in an agency office building. Allowing the executive branch to reinterpret existing statutes in ways that directly contradict past legal interpretation sets a dangerous precedent; it leads to both bad law and bad politics.

CONCLUSION

For these reasons and those presented by the respondent, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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