No. 19-1298

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GUN OWNERS OF AMERICA, INC., et al.

Plaintiffs-Appellants,

GUN OWNERS OF CALIFORNIA, INC.,

Movant,

v.

MERRICK B. GARLAND, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan

SUPPLEMENTAL BRIEF FOR APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Legislative Materials:

Other Authorities:

INTRODUCTION

Congress has generally banned the possession of a machinegun, which it has defined as a weapon that can shoot "automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b) (definition); 18 U.S.C. § 922(o) (criminal prohibition). The definition also encompasses parts that can be used to "convert[] a weapon into a machinegun." 26 U.S.C. § 5845(b). In the decades since Congress enacted the bar on machineguns, manufacturers have created various devices that permit rifles to replicate continuous machinegun fire, while attempting to design the devices in ways that they hope will take them outside the scope of the statute.

The question in this case is whether one such device—a "bump stock"—falls within the scope of the statutory prohibition. A bump stock replaces a semiautomatic rifle's standard stationary stock—the part that typically rests against the shooter's shoulder—with a sliding stock. When the shooter pulls the trigger, the bump stock harnesses and channels the recoil energy of the shot so that the rifle slides backwards within the stock, allowing the trigger to reset, and then forwards, "bumping" the trigger into the shooter's stationary trigger finger and creating a continuous fire-recoil-fire cycle. The earliest bump stocks relied on an internal spring to capture recoil energy, and it has long been recognized that these devices fall within the statutory definition of machinegun because they fire "automatically more than one shot" after a "single function of the trigger." *See Akins v. United States*, 312 F. App'x 197, 200 (11th

Cir. 2009) (per curiam) (upholding the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF's) classification of a spring-operated bump stock as a machinegun against claim that it did not operate by "a single function of the trigger").

Although ATF initially concluded that in the absence of internal springs or other mechanical parts bump stocks do not fire "automatically," the agency revisited that conclusion in 2018 after a lone shooter in Las Vegas, Nevada, killed 58 people and wounded 500 more, using bump stocks that lacked internal springs. On completion of its review, ATF concluded that such bump stocks fall within the scope of the statute. *See Bump-Stock Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018). ATF explained that the only functional difference between the bump stocks at issue in this case and bump stocks already classified as machineguns is that, in firing a spring-less bump stock, the shooter must maintain forward pressure with his non-trigger hand on the front of the rifle when firing in order to replicate continuous machinegun fire. Consistent with its earlier views, ATF explained that spring-less bump stocks, like bump stocks with internal springs, operate with a "single function of the trigger." The agency further concluded that there was no sound basis for its earlier view that a weapon outfitted with a spring-less bump stock does not fire "automatically." Examining the meaning of that term as defined in dictionaries contemporary with the enactment of the National Firearms Act, *id.* at 66,518-19, ATF explained that a firearm equipped with a bump stock operates "automatically" whether it requires constant pressure on the trigger, or constant pressure on the front of the weapon (as

in the case of guns outfitted with spring-less bump stocks). In either case, the bump stock is "[s]elf-acting under conditions fixed for it," namely the initial trigger pull and the pressure applied by the shooter to the weapon. *Id.* at 66,519 (quotation omitted).

The panel majority erred in concluding that a bump stock does not permit a shooter to fire more than one shot by a "single function of the trigger." *See* Op. 29-34. The panel believed that the statute created a dichotomy between a "mechanical process (*i.e.*, the act of the trigger's being depressed, released, and reset) [and] the human process (*i.e.*, the shooter's pulling, or otherwise acting upon, the trigger)." Op. 30. The panel acknowledged that if the statute were concerned with "the human process," the definition would encompass a bump stock "because the firearm shoots multiple shots despite the shooter's pulling the trigger only once." *Id.* The panel declared, however, that the statute is concerned solely with "the mechanical process" and that a bump stock did not fall within its understanding of the definition because it is "not capable of firing more than one shot for each depressed-released-reset cycle the trigger completes." *Id.*

The panel's reasoning is incompatible with the statutory text. The question under the statute is whether "a single function of the trigger" causes the weapon to shoot "automatically more than one shot." 26 U.S.C. § 5845(b). That is the case here, where the shooter's initial pull on the trigger initiates an automatic fire-recoil-fire sequence that continues until the shooter stops the process or runs out of ammunition. The panel's reasoning is squarely at odds with the Eleventh Circuit's

decision upholding the classification of the Akins Accelerator, an early type of bump stock, and with decisions of several other circuits holding weapons to be machineguns that would fall outside the scope of the statute under the panel's reasoning.

Plaintiffs' supplemental brief focuses not on the controlling statutory question, but on whether ATF's interpretation of the statute is entitled to *Chevron* deference. But there is no need for the Court to resolve whether the agency's interpretation is entitled to *Chevron* deference. As discussed below and in our principal brief, ATF's classification should be upheld because it is the best interpretation of the statutory text. And as the Supreme Court made clear in *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021), because "the government is not invoking *Chevron*," the Court should "decline to consider whether any deference might be due." *Id.* (quotation omitted). *HollyFrontier*, which the Supreme Court handed down after the panel issued its decision, confirms that there is no occasion for this Court to resolve the question of *Chevron* deference here or to address the panel's *Chevron* analysis, which departs from Supreme Court precedent in crucial respects.

DISCUSSION

I. In Issuing the 2018 Rule, ATF Correctly Determined That Bump Stocks Fall Within the Statutory Definition of "Machinegun"

The question before the Court is whether bump stocks allow a shooter to fire "automatically more than one shot . . . by a single function of the trigger." 26 U.S.C. § 5845(b). As ATF explained in detail, bump stocks meet both parts of this

definition.

A. Bump Stocks Permit a Shooter To Produce Automatic Fire "by a Single Function of the Trigger"

1. A bump stock replaces the standard stationary stock on an ordinary semiautomatic rifle—the part of the weapon that typically rests against the shooter's shoulder. It is composed of a sliding stock attached to a grip fitted with an "extension ledge" where the shooter rests his trigger finger while shooting the firearm. 83 Fed. Reg. at 66,516. With a single pull of the trigger, the bump stock "harnesses and directs the firearm's recoil energy to slide the firearm back and forth so that the trigger automatically re-engages by 'bumping' the shooter's stationary finger without additional physical manipulation of the trigger by the shooter." *Id.* This creates a fire-recoil-fire sequence that converts a semiautomatic weapon into a machinegun capable of firing hundreds of rounds per minute with a single pull of the trigger.

The statutory definition of machinegun encompasses any weapon where a "single function of the trigger" can cause the weapon to fire "automatically more than one shot." As ATF explained well before the Rule at issue here, "single function of the trigger" refers to the "single pull of the trigger" or similar motion that initiates the weapon's automatic firing sequence. The agency addressed this issue in 2006, when it classified an early bump stock, the "Akins Accelerator," as a machinegun. 83 Fed. Reg. at 66,517. The Akins Accelerator, which attached to a standard semiautomatic rifle, used a spring to harness the recoil energy of each shot, causing "the firearm to

cycle back and forth, impacting the trigger finger" repeatedly after the first pull of the trigger. *Id.* Thus, by pulling the trigger once, the shooter "initiated an automatic firing sequence" that was advertised as firing "approximately 650 rounds per minute." *Id.*

ATF initially concluded that the Akins Accelerator was not a machinegun on the ground that the statutory term "single function of the trigger" should be understood to refer to a "single movement of the trigger." 83 Fed. Reg. at 66,517 (quotation omitted). But in revisiting that determination in 2006, ATF recognized that its prior interpretation erroneously restricted the scope of the statute. The agency explained that "single function of the trigger'" should be understood to reflect a "single pull of the trigger." *Id.* (quotation omitted). The Akins Accelerator—which created "a weapon that '[with] a single pull of the trigger initiates an automatic firing cycle that continues until the [shooter's] finger is released, the weapon malfunctions, or the ammunition supply is exhausted"—was thus properly classified as a machinegun. *Id.* (first alteration in original) (quoting *Akins v. United States*, No. 8:08-cv-988, 2008 WL 11455059, at *3 (M.D. Fla. Sept. 23, 2008)).

Anticipating further classification requests for devices designed to increase the firing rate of semiautomatic weapons, ATF also published a public ruling announcing its interpretation of "single function of the trigger," in which it reviewed the National Firearms Act and its legislative history and explained that the phrase denoted a "single

pull of the trigger." ATF, ATF Ruling 2006-2, *Classification of Devices Exclusively Designed to Increase the Rate of Fire of a Semiautomatic Firearm* (Dec. 13, 2006).[1]

When the inventor of the Akins Accelerator challenged ATF's action, the Eleventh Circuit sustained ATF's determination, explaining that interpreting "single function of the trigger" as "'single pull of the trigger' is consonant with the statute and its legislative history." *Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009). It also rejected a vagueness challenge to the statute because "[t]he plain language of the statute defines a machinegun as any part or device that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly." *Id.* at 201.

Over the next decade, ATF issued classification letters that applied the "single pull of the trigger" interpretation to bump-stock-type devices, and also to "other trigger actuators, two-stage triggers, and other devices." 83 Fed. Reg. at 66,517; *see id.* at 66,518 n.4 (listing examples of other ATF classifications using the definition).

ATF's interpretation of "single function of the trigger," and the *Akins* decision sustaining that interpretation, reflect the common-sense understanding of the statute and the means by which most weapons are fired. As the Supreme Court has observed, a weapon that "fires repeatedly with a single pull of the trigger" is generally regarded as a machinegun, in contrast to "a weapon that fires only one shot with each pull of the trigger." *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994).

[1] https://go.usa.gov/xHd89

2. The panel wrongly concluded that a bump stock does not permit a shooter to fire more than one shot by a "single function of the trigger." *See* Op. 29-34. The panel interpreted the statute to establish a dichotomy between a "mechanical process" and a "human process." It thus framed the interpretive question as "whether 'function' is referring to the mechanical process (*i.e.*, the act of the trigger's being depressed, released, and reset) or the human process (*i.e.*, the shooter's pulling, or otherwise acting upon, the trigger.)" Op. 30. The panel acknowledged that if the statute were concerned with "the human process," the definition would encompass a bump stock "because the firearm shoots multiple shots despite the shooter's pulling the trigger only once." *Id.* The panel declared, however, that the statute is concerned solely with "the mechanical process" and that a bump stock did not fall within its understanding of the definition because it is "not capable of firing more than one shot for each depressed-released-reset cycle the trigger completes." *Id.*; *accord* Op. 34 ("'[T]he single function of the trigger' refers to the mechanical process of the trigger, not the shooter's pulling of the trigger.").

The panel's dichotomy misunderstands the statutory text. The question under the statute is whether "a single function of the trigger" causes the weapon to shoot "automatically more than one shot." 26 U.S.C. § 5845(b). That is the case here: the shooter's initial pull on the trigger initiates an automatic fire-recoil-fire sequence that continues until the shooter stops the process or runs out of ammunition. The specific mechanical process that the trigger goes through after that initial function is not

determinative. The statute instead looks to the "action that enables the weapon to 'shoot . . . automatically . . . without manual reloading,' not the 'trigger' mechanism." *United States v. Evans*, 978 F.2d 1112, 1113 n.2 (9th Cir. 1992) (alterations in original); *accord United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009) (noting that "a single function of the trigger" "set[s] in motion" the automatic firing of more than one shot); *Akins*, 312 F. App'x at 201 (the "plain language" encompasses a weapon "that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly").

The "function of the trigger" that concerned Congress was the initial pull of the trigger (or other similar action) that permits continuous firing, not the movement of the trigger during the continuous firing, which has no significant bearing on the deadliness of the weapon. The panel's observation that the statute and 2018 rule refer to a "single function *of the trigger*" and not "the trigger finger" thus misses the critical point. *See* Op. 32; Supp. Br. 5 (same). The 2018 rule does not interpret the statute to substitute a "single function of the trigger finger" for a "single function of the trigger." The point, as ATF had made clear even prior to the 2018 rule, is that it takes only one function of the trigger itself—here, the initial pull—to engage a bump stock's automatic firing system. That bump stocks automate the back-and-forth movement of the trigger rather than the internal movement of the hammer does not take them outside the statutory definition.

The legislative history of the National Firearms Act confirms that the focus of congressional concern was with devices that enable a shooter to initiate a firing sequence with a single action rather than on subsequent movements of the trigger not initiated by additional motions of the shooter. The report of the House Committee on Ways and Means that accompanied the bill that ultimately became the National Firearms Act, *see* H.R. 9741, 73d Cong. (1934), stated that the bill "contains the usual definition of machine gun as a weapon designed to shoot more than one shot without reloading and by a single pull of the trigger." H.R. Rep. No. 73-1780, at 2 (1934); *see* S. Rep. No. 73-1444 (1934) (reprinting the House's "detailed explanation" of the provisions, including the quoted language). Similarly, the then-president of the National Rifle Association proposed that a machinegun should be defined as a weapon "which shoots automatically more than one shot without manual reloading, by a single function of the trigger." *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. 40 (1934) (statement of Karl T. Frederick, President, National Rifle Association of America). Thus, any weapon "which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded . . . as a machine gun," while "[o]ther guns [that] require a separate pull of the trigger for every shot fired . . . are not properly designated as machine guns." *Id.*

3. The panel majority's contrary reasoning would legalize the Akins Accelerator and call into question the status of a number of weapons that ATF

described in the 2018 rule. *See* 83 Fed. Reg. at 66,517-18, 66,518 n.4. For example, in 2016, ATF classified "LV-15 Trigger Reset Devices" as machinegun parts. *Id.* at 66,518 n.4. These devices attached to an AR-15 rifle and used a battery-operated "piston that projected forward through the lower rear portion of the trigger guard" to push the trigger forward, enabling the shooter to pull the trigger once and "initiate and maintain a firing sequence" by continuing the pressure while the piston rapidly reset the trigger. *Id.* ATF applied the same reasoning in classifying another device—a "positive reset trigger"—that used the recoil energy of each shot to push the shooter's trigger finger forward, *see id.*; Gov't Br. Add. 5-10, and in classifying the "AutoGlove," a glove with a battery-operated piston attached to the index finger that pulled and released the trigger on the shooter's behalf when the shooter held down a plunger to activate a motor, *see* Gov't Br. Add. 22-28.

The panel majority's reasoning would call into doubt the status of weapons recognized as machineguns by other courts of appeals. In *United States v. Camp*, 343 F.3d 743 (5th Cir. 2003), the Fifth Circuit considered a rifle that had been modified with a switch-activated, motorized fishing reel placed within the trigger guard. As a result, whenever a shooter operated the switch, the reel would rotate and "that rotation caused the original trigger to function in rapid succession." *Id.* at 744. Because the shooter needed to perform only "one action—pulling the switch he installed—to fire multiple shots," the court held that the rifle was a "machinegun" that fired more than one shot "by a *single* function of the trigger." *Id.* at 745 (quoting

26 U.S.C. § 5845(b)). Under the panel majority's reasoning, however, the weapon would still fire only after the original trigger is "released, reset, and pulled again," or after the original "trigger is released and the hammer of the firearm is reset." Op. 33.

Courts have also uniformly rejected attempts to evade the scope of the statute by dispensing with a traditional trigger altogether, recognizing that the critical question is whether a single action can initiate a firing sequence. In *United States v. Fleischli*, 305 F.3d 643 (7th Cir. 2002), for example, the defendant activated his firearm with an electronic on-off switch rather than a more traditional mechanical trigger. The Seventh Circuit "join[ed] our sister circuits in holding that a trigger is a mechanism used to initiate a firing sequence." *Id.* at 655 (first citing *United States v. Jokel,* 969 F.2d 132, 135 (5th Cir.1992); then citing *Evans,* 978 F.2d at 1113-14 n.2). The court observed that "Fleischli's definition 'would lead to the absurd result of enabling persons to avoid the [National Firearms Act] simply by using weapons that employ a button or switch mechanism for firing.'" *Id.* (quoting *Evans,* 978 F.2d at 1113-14 n.2). Similarly, under the reasoning of the panel majority here, a shooter could evade the statute and initiate continuous firing with a single action as long as the device caused the weapon's trigger to move in rapid succession. *Akins v. United States*, No. 8:08-cv-988, 2008 WL 11455059, at *7 (M.D. Fla. Sept. 23, 2008) ("This unhindered capability would be wholly inconsistent with the strict regulation of machineguns imposed by the NFA and the prohibition on post-1986 machineguns imposed by the GCA.")

The panel majority cited no case adopting its understanding of the statutory language. Although the panel believed its interpretation found support in the Supreme Court's decision in *Staples,* that case, as discussed above, is wholly consistent with ATF's understanding, and the panel itself acknowledged that it "may not necessarily foreclose the ATF's interpretation." Op. 33. The panel majority did not reference the decisions in *Camp*, *Olofson*, *Fleischli*, or *Evans*. The panel acknowledged the Eleventh Circuit's decision in *Akins* in a footnote, but mistakenly believed that the decision concluded only that ATF's interpretation was "consistent enough with the statute's text and legislative history so as to survive the APA's arbitrary-and-capricious standard." Op. 31 n.7. As discussed, however, *Akins* explained that "[t]he plain language of the statute defines a machinegun as any part or device that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly" and thus plainly encompassed the Akins Accelerator. 312 F. App'x at 201.

Plaintiffs briefly and mistakenly assert that a bump stock does not function by a single "pull" of the trigger. *See* Supp. Br. 6 n.6. This contention is based on plaintiffs' assertion that a separate "pull" occurs each time the trigger bumps into the shooter's stationary finger during the bump stock's automatic cycle. *Id.* That assertion reflects the same mistaken dichotomy between "human" and "mechanical" operations adopted by the panel, under which a weapon is not a machinegun if its trigger resets during the firing sequence. As discussed, the question instead is whether a single

function sets in motion an automatic firing sequence, as is indisputably the case with bump stock-equipped weapons.

B. Bump Stocks Permit a Shooter To Fire "Automatically"

1. The only way in which the 2018 rule alters ATF's prior interpretation of the statutory definition is with respect to its understanding of the term "automatically." When ATF issued the Akins Accelerator determination, it advised that removal of the internal spring would render the device a non-machinegun, based on its view at the time that the device would no longer fire "automatically." 83 Fed. Reg. at 66,517. Manufacturers accordingly began producing spring-less bump stocks that, like bump stocks with internal springs, allow a shooter to fire hundreds of rounds per minute with the single pull of the trigger. Between 2008 and 2017, ATF issued several classification decisions for such bump stocks, concluding that these devices did not fire automatically because they lacked internal springs or other mechanical parts. *Id.* at 66,517-18.

The only functional difference between a bump stock with springs and a bump stock without springs is that, in the case of a bump stock without springs, the shooter must maintain forward pressure on the front of the rifle with his non-trigger hand. *See* 83 Fed. Reg. at 66,518. In issuing the 2018 rule, the agency acknowledged that its prior classification decisions had erroneously concluded that such weapons do not fire "automatically," and it explained that those decisions "did not provide substantial or consistent legal analysis regarding the meaning of the term 'automatically.'" *Id.*

ATF correctly concluded that bump stocks allow a shooter to fire semiautomatic weapons "automatically." *See* Gov't Br. 28-29. The definition of "automatically" in the 2018 rule "is borrowed, nearly word-for-word, from dictionary definitions contemporaneous to the [National Firearms Act]'s enactment." *Aposhian v. Barr*, 374 F. Supp. 3d 1145, 1152 (D. Utah 2019). "'[A]utomatically' is the adverbial form of 'automatic,' meaning '[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation.'" 83 Fed. Reg. at 66,519 (alteration in original) (quoting *Webster's New International Dictionary* 187 (2d ed. 1934); citing *Oxford English Dictionary* 574 (1933) (defining "automatic" as "[s]elf-acting under conditions fixed for it, going of itself')). Thus, a weapon fires "automatically" when it fires "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds." *Id.* at 66,554; *see Olofson*, 563 F.3d at 658 ("automatically" in § 5845(b) means "as the result of a self-acting mechanism").[2]

The entire point of a bump stock is to permit a semiautomatic rifle to fire "automatically." It "performs a required act at a predetermined point" in the firing

[2] The panel majority believed that it was required to consult dictionary definitions from 1968, when Congress amended the statutory definition of "machinegun," but recognized that there was no "material change in the meaning of 'function'" over time. Op. 31 n.8. The same would be true here. *See* Op. 59-60 (White, J., dissenting) (explaining that the dictionary definitions of "automatically" did not meaningfully differ over time); *Olofson*, 563 F.3d at 658 (consulting the same dictionaries used in the rule). The focus on the 1968 amendments is also misplaced; those amendments did not add or alter the terms "single function of the trigger" or "automatically," both of which appeared in the original statute.

sequence by "directing the recoil energy of the discharged rounds into the space created by the sliding stock," ensuring that the rifle moves in a "constrained linear rearward and forward path[]" to enable continuous fire. 83 Fed. Reg. at 66,519, 66,532 (quotation omitted). This process is also "[s]elf-acting under conditions fixed for it." *Id.* at 66,519 (alteration in original) (quotation omitted). The shooter's positioning of the trigger finger on the extension ledge and application of pressure on the front of the rifle with the other hand provide the conditions necessary for the bump stock to repeatedly perform its basic purpose: "to eliminate the need for the shooter to manually capture, harness, or otherwise utilize th[e] [recoil] energy to fire additional rounds." *Id.* at 66,532.

2. In light of its holding with respect to "single function of the trigger," the panel did not reach the question whether bump stocks fire "automatically." Op. 35. Plaintiffs' abbreviated discussion of the term is premised on their mistaken view that a bump stock cannot fire multiple rounds by a single function of the trigger. *See* Supp. Br. 4 (arguing that a bump stock does not fire "automatically" because it goes "'Click, bang, click' versus 'Click, bang, bang, bang, bang, click'" (quotation omitted)).

In a footnote, plaintiffs also cite Judge Henderson's dissent in *Guedes*, in which she concluded that bump stocks without an internal spring do not fire automatically because they require the shooter to maintain pressure on the front of the rifle while firing. Judge Henderson described this as "a single function *plus*." Supp. Br. 4-5, n.4 (quoting *Guedes v. ATF*, 920 F.3d 1, 35 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789, 789

(2020)). As plaintiffs acknowledge, however, even prototypical machineguns require the shooter to maintain pressure on the weapon after the initial pull. *See id.* A firearm operates "automatically" whether it requires constant pressure on the trigger or constant pressure on the front of the weapon. In either case, the weapon is "[s]elf-acting under conditions fixed for it"; in the case of a bump stock, the initial trigger pull and the pressure applied by the shooter to the weapon. 83 Fed. Reg. at 66,519.

C. Resolution of this Case Does Not Require the Court to Address the Applicability of *Chevron* Deference

1. The Court need not determine whether *Chevron* deference or some other form of deference is applicable, and it need not reach the several subsidiary issues posed by plaintiffs' argument, which consumes the bulk of their brief. This is because the Supreme Court has made clear that there is no need to consider *Chevron* both where the rule adopts the best understanding of the statute, *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002), and where the government has not invoked *Chevron*, *HollyFrontier*, 141 S. Ct. at 2180.

That *Chevron* deference is not at issue here does not require ignoring ATF's considered views. A court may properly gather wisdom from an agency charged with implementing a statute, particularly when it has done so in a formal process that involved receipt of close to 200,000 comments. As the Supreme Court has explained, even when *Chevron* deference is inapplicable, "we often pay particular attention to an agency's views in light of the agency's expertise in a given area, its knowledge gained

through practical experience, and its familiarity with the interpretive demands of administrative need." *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020). Even aside from *Chevron*, a court can properly consider the extent to which its interpretation of a term it believes to be ambiguous is consonant with a statute's purpose—in this case to protect the safety of the public and law enforcement officers.

2. Although the Court need not and should not address the applicability of *Chevron* deference, the panel's reasoning in reaching out to discuss such issues squarely conflicts with Supreme Court precedent and misunderstands the statutory scheme, as discussed in Judge White's dissent. Op. 43-55. Congress often delegates authority to the Executive Branch to promulgate rules the violation of which will carry criminal consequences, and the Supreme Court has regularly "upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal." *Loving v. United States*, 517 U.S. 748, 768 (1996). That was true in *Chevron* itself, which involved the Environmental Protection Agency's interpretation of the term "stationary source" for purposes of a provision of the Clean Air Act that required private parties to obtain permits related to "new or modified . . . stationary sources." 42 U.S.C. § 7502(a)(1), (b)(6) (1982). A knowing violation of that requirement was a federal crime punishable by a fine or up to a year in prison. *Id.* § 7413(c)(1) (1982). Similarly, in *United States v. O'Hagan*, 521 U.S. 642 (1997), the Supreme Court applied *Chevron* deference to a regulation issued by the Securities and Exchange Commission in the context of reviewing a criminal conviction. The

relevant statute delegated authority to "by rules and regulations define" the prohibited conduct, 15 U.S.C. § 78n(e), and specified that violations of such regulations were criminally punishable, *id.* § 78ff(a). The Court made clear that the SEC's regulation defining the prohibited conduct pursuant to its delegated authority received "controlling weight." *O'Hagan*, 521 U.S. at 673 (quoting *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). And in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court explained that the agency's "reasonable" interpretation of the relevant ambiguous statutory term was sufficient "to decide th[e] case," even though a violation of the regulation at issue carried criminal consequences. 515 U.S. 687, 703 (1995) (citing *Chevron*, 467 U.S. 837); *see id.* at 704 n.18.

The panel majority believed these cases were not controlling because they did not involve a "purely criminal" statute. Op. 15. That conclusion misunderstands the statute at issue here: the definition at issue is not "purely criminal," and has both civil and criminal applications. Op. 44 n.6 (White, J., dissenting). And in any event, the panel's reasoning elides the central question of whether an agency is acting in the exercise of delegated authority in promulgating a rule. The decisions the panel relied on did not involve regulations, much less regulations promulgated under a specific delegation of authority to establish standards or requirements. In *United States v. Apel*, 571 U.S. 359, 369 (2014), the defendant sought to rely on statements in the United States Attorneys' Manual and opinions of the Air Force Judge Advocate General. As the Court explained, "those opinions are not intended to be binding," and, in this

context, the Court stated that "we have never held that the Government's reading of a criminal statute is entitled to any deference." *Id.* at 368, 369 (citing *Crandon v. United States,* 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment)); *see also Abramski v. United States*, 573 U.S. 169, 191 (2014) (same regarding ATF view abandoned by the agency twenty years previously). Similarly, Justice Scalia's concurrence in *Crandon* explained that "the vast body of *administrative* interpretation that exists—innumerable advisory opinions not only of the Attorney General, the OLC, and the Office of Government Ethics, but also of the Comptroller General and the general counsels for various agencies—is not an administrative interpretation that is entitled to deference under [*Chevron*]." 494 U.S. at 177 (Scalia, J., concurring in judgment). In contrast, cases such as *Chevron, O'Hagan*, and *Sweet Home* concerned regulations issued under a clear delegation of authority.

For similar reasons, the panel majority erred in identifying a circuit split over whether *Apel* and *Abramski* "*mandate* that a court may not, or merely *permit* that it need not, defer to an agency's interpretation of a criminal statute." Op. 16. Courts have consistently applied *Chevron* after concluding the agency was exercising delegated authority. *See Aposhian v. Barr*, 958 F.3d 969, 982 (10th Cir.), *vacated on reh'g*, 973 F.3d 1151 (10th Cir. 2020), *reinstated*, 989 F.3d 890 (10th Cir. 2021), *petition for cert. pending*, No. 21-159 (U.S. Aug. 2, 2021); *Guedes*, 920 F.3d at 20. In none of the cases cited by the panel majority did a court hold that an agency regulation issued in the exercise of delegated authority was not entitled to deference. *See, e.g., United States v. Kuzma*, 967

F.3d 959, 971 (9th Cir. 2020) ("This is not a situation in which an agency has been delegated authority to promulgate underlying regulatory prohibitions.").

The panel majority also erred in concluding that regulations issued under authority to promulgate prohibitions trigger the rule of lenity. Op. 26-28. Lenity has a role only when "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich v. Spears*, 570 U.S. 48, 76 (2013) (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)); *accord Liparota v. United States*, 471 U.S. 419, 427 (1985). "*Chevron* established a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (quotations omitted). An express or implied delegation to an agency to resolve ambiguities is thus an instruction about congressional intent, making it unnecessary for courts to "simply guess as to what Congress intended." *Maracich*, 570 U.S. at 76 (quoting *Barber*, 560 U.S. at 488). And *Sweet Home* establishes that a regulation, no less than a law, can provide the requisite fair notice of prohibited conduct required by the rule of lenity. *Sweet Home*, 515 U.S. at 704 n.18; *see Guedes*, 920 F.3d at 28.

Finally, in their supplemental brief plaintiffs argue for the first time that the 2018 rule is not entitled to *Chevron* deference because President Trump "politically

forced" ATF to adopt it. Supp. Br. 12; *see* Supp. Br. 9-12. Plaintiffs forfeited this argument by failing to raise it in their panel briefs, *Scott v. First S. Nat'l Bank*, 936 F.3d 509, 522 (6th Cir. 2019), and it does not bear on the resolution of this case, in which the government has not invoked *Chevron* deference to defend the rule. The premise of the argument is, in any event, incorrect. As the D.C. Circuit explained in rejecting an argument that the 2018 rule was arbitrary and capricious due to political pressure, "the administrative record reflects that the agency kept an open mind throughout the notice-and-comment process and final formulation of the Rule." *Guedes*, 920 F.3d at 34. To the extent plaintiffs mean to suggest that *Chevron* deference is never appropriate when an agency's rulemaking is initiated or informed by a "political agenda," Supp. Br. 11, they are plainly wrong. *See, e.g.*, *Chevron*, 467 U.S. at 865 ("[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.").[3]

II. Plaintiffs Would Not Be Entitled to a Nationwide Injunction Even If Their Challenge to the Rule Were Meritorious

In a footnote, plaintiffs ask the Court to grant them a nationwide injunction if it concludes that injunctive relief is appropriate. *See* Supp. Br. 25 n.27. The panel

[3] Plaintiffs also devote part of their supplemental brief to criticizing other pending ATF actions. Supp. Br. 23-24. Those potential actions do not interpret the statutory definition at issue here and have no relevance to the interpretive question before this Court.

majority correctly declined to order such relief. Op. 36. Assuming that the Court were to hold the rule invalid, its holding, absent Supreme Court review, would be controlling law in this Circuit. Article III and basic principles of equity require that the Court decline plaintiffs' invitation to extend the law of this Circuit nationwide.

Plaintiffs are individuals who wish to own bump stocks but cannot under ATF's interpretation of the statute, as well as organizations that count such individuals as members. That alleged injury would be completely redressed by an injunction limited to the plaintiffs, and plaintiffs would not be injured by the application of the challenged rule to third parties. They therefore "lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties." *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997). The Supreme Court recently reaffirmed this principle in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), where it "caution[ed]" that "standing is not dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Id.* at 1934 (quotation omitted).

Even apart from Article III's jurisdictional constraints, injunctions that go beyond a plaintiff's own injuries exceed the equitable power of a court. The rule in equity is that injunctions should "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quotation omitted). And courts have routinely applied this rule even in cases under the APA, underscoring that the APA's direction to "set

aside" agency action does not mandate nationwide relief. *See, e.g.*, *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (concluding agency regulation was facially invalid but narrowing injunction to apply only to plaintiff); *Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n*, 263 F.3d 379, 392-94 (4th Cir. 2001) (narrowing injunction to apply only to plaintiff and observing that "[n]othing in the language of the APA . . . requires us to exercise such far-reaching power").

Related principles of equity reinforce this basic rule. Issuing injunctions that provide relief to non-parties subverts the class-action mechanism provided under the Federal Rules of Civil Procedure. *See McKenzie*, 118 F.3d at 555; *Zepeda v. U.S. Immigration & Naturalization Serv.*, 753 F.2d 719, 727-28 (9th Cir. 1983). And the availability of nationwide injunctions without class certification creates a fundamentally inequitable "asymmetr[y]," whereby non-parties can claim the benefit of a single favorable ruling, but are not bound by a loss. *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). Moreover, an injunction that extends beyond a plaintiff's injury to cover potential plaintiffs nationwide undermines the Supreme Court's holding that nonparties to a judgment cannot assert collateral estoppel as plaintiffs "against the government," while also limiting the benefit of percolation of important legal issues before Supreme Court review. *United States v. Mendoza*, 464 U.S. 154, 160, 162 (1984); *see New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring).

These concerns are particularly relevant here. Both the Tenth Circuit and the D.C. Circuit have upheld the 2018 rule, *see Aposhian*, 958 F.3d 969; *Guedes*, 920 F.3d 1, while the Fifth Circuit is currently considering an appeal from another district court's denial of an injunction, *Cargill v. Garland*, No. 20-51016. As the panel here reasoned, a nationwide injunction would effectively "overrule the decision of a sister circuit," a step the panel correctly concluded was not "within [its] authority." Op. 36.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order of June 25, 2021, because it is 25 pages long. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brad Hinshelwood
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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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