No. 22-451

IN THE
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, *ET AL.*,
Petitioners,
v.
GINA RAIMONDO, SECRETARY OF COMMERCE, *ET AL.*,
Respondents.

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

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, Tennessee Firearms Association, Virginia Citizens Defense League, Grass Roots North Carolina, Rights Watch International, America's Future, DownsizeDC.org, Downsize DC Foundation, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, Tennessee Firearms Association, Virginia Citizens Defense League, Grass Roots North Carolina, Rights Watch International, America's Future, DownsizeDC.org, Downsize DC Foundation, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

On April 20, 2017, the New England Fishery Management Council ("NEFMC"), an agency of the U.S. Department of Commerce ("DOC"), adopted an "omnibus amendment" which created the "industry-funded monitoring" program and, on February 7, 2020, published a Final Rule which mandated the "industry-

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

funded monitoring" of on-board DOC "monitors." *See* Brief for Petitioners at 11-13.

Petitioners, "four family-owned and family-operated companies that participate in the Atlantic herring fishery," filed suit in district court to challenge the regulation. *Id.* at 13. Petitioners argued, *inter alia*, that requiring fishing vessels to pay the costs of onboard monitors at $710 a day per vessel was never explicitly authorized by the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). *See id.* at 47.

The district court upheld the rule based on the MSA's broad language allowing the NEFMC to adopt "such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery." 16 U.S.C. § 1853(b)(14). The court found that the NEFMC's claim of authority to require the vessels to pay for onboard monitors was a permissible construction of the MSA, and ruled against Plaintiffs. *Loper Bright Enters. v. Raimondo*, 544 F. Supp. 3d 82, 125-26 (D.D.C. 2021) (*"Loper Bright I*").

The D.C. Circuit affirmed holding that, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), federal courts must defer to agency interpretations where a statute is ambiguous and an agency's interpretation is reasonable. *Loper Bright Enters. v. Raimondo*, 45 F.4th 359, 364 (D.C. Cir. 2022) ("*Loper Bright II*"). The D.C. Circuit held that the DOC's interpretation of the

MSA was reasonable given the "necessary and appropriate" language of the Act. *Id.* at 370.

This Court granted review on the following issue:

> Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency. [Petition for Certiorari at i-ii.]

SUMMARY OF ARGUMENT

Loper Bright illustrates one of the many types of problems that have arisen in the lower courts as they seek to apply this Court's *Chevron* decision. Clearly there was no express authorization for payment of monitors on board Petitioners' fishing vessels, and the fact they were authorized in other circumstances should have given rise to the conclusion that they were not authorized here. Yet even in the absence of a classic ambiguity of language, the majority below found that a combination of statutory silence, plus general rulemaking authority, plus a perceived need to have monitors, required the court to defer to the agency's harsh Rule under *Chevron* even in the absence of a "permissible construction of the statute." The historic rules of statutory construction have been dramatically altered by the *Chevron* Court, placing a heavy thumb on the scales of justice to uphold decrees of the Administrative State against the People.

During the nearly four decades since it was handed down, *Chevron* has had the perverse effect of not only encouraging Congress to delegate legislative rulemaking power to the Executive, but also encouraging the Judiciary to delegate its judicial interpretative powers. Infused with the trifecta of executive, legislative, and judicial power, the Executive branch agencies have undermined the liberties of the American people almost entirely without redress. The problems wrought by *Chevron* have not been limited to undermining the separation of powers understood by the Framers to be essential to the preservation of a federal government of limited powers. *Chevron* also compromises due process and equal protection protections. Congress has not only failed to guard against the Executive's seizure of legislative power, it has found *Chevron* to be helpful in having the administrative state do the dirty work of imposing unpopular controls on Americans. But even if powerful incumbent Congressmen benefit from *Chevron*, that is no excuse for this Court to allow it to continue to contaminate our Constitutional Republic.

Loper Bright provides this Court with an illustration of only some of the ways that *Chevron* has compelled unjust decisions, and these *Amici* seek to provide additional illustrations in an area many of them have been litigating for some years — the ATF Rule deeming bumpstocks to be machineguns, reversing a long-standing policy and series of rulings to the contrary. The bumpstock rulemaking demonstrates that agencies are capable of promulgating rules based on uncertain, even fabricated, records, while disregarding tens of

thousands comments made by the public, to achieve their goal. The legislative process designed by the Framers is different, where Congressmen and Senators, persons in positions of authority, have the opportunity to publicly challenge and expose phony facts. *Chevron* implicitly assumes that agency rulemaking occurs in pursuit of the "public interest," when the truth is that many agencies have been captured by those they purport to regulate, while other agencies are misused to punish a disfavored industry.

The bumpstock litigation also provides a revealing case study, with judges serving on various district and circuit courts coming to diametrically opposite understandings of what *Chevron* requires. Some judges believe that Chevron deference may be waived, while others believe it is a rule of statutory construction that court's must apply. Some judges believe that Chevron deference may be used to support the creation of new federal crimes by agencies, while others believe that the job of interpreting criminal laws is vested only in the judiciary.

These *Amici* urge this Court to use this case to end the rule of the Administrative State over the People, by reversing the D.C. Circuit, and overruling *Chevron* once and for all.

ARGUMENT

I. THE D.C. CIRCUIT OPINION ILLUSTRATES THE CONFUSION WROUGHT BY *CHEVRON*.

The D.C. Circuit stated the rule of *Chevron* as follows: "[a]t *Chevron* Step One, the court, employing traditional tools of statutory interpretation, evaluates whether Congress has directly **spoken** to the precise question at issue.... If the statute considered as a whole is **ambiguous**, then at *Chevron* Step Two the court defers to any **permissible** construction of the statute adopted by the agency." *Loper Bright II* at 365 (cleaned up) (emphasis added). Certainly Judge Walker was correct when he noted in dissent that "Congress unambiguously did not" authorize "the National Marine Fisheries Service to make herring fishermen in the Atlantic pay the wages of federal monitors." *Id.* at 372 (Walker, J., dissenting). The majority below found no express delegation of authority, rather asserting that the statute "leaves unanswered whether the Service must pay for those monitors or may require industry to bear the costs...." *Id.* at 365. However, because "the Act considers monitoring 'necessary and appropriate' to further the Act's conservation and management goals," the majority concluded there is a "reasonable basis for the Service to infer that the practical steps to implement a monitoring program, including the choice of funding mechanism and cost-shifting determinations, are likewise 'necessary and appropriate.'" *Id.* at 369. In essence, the court below believed that "*Chevron* instructs that judicial deference is appropriate 'if the statute is silent *or* ambiguous with respect to the

specific issue.'" *Id.* However, what *Chevron* actually states is that, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is **based on a permissible construction** of the statute." *Chevron*, 467 U.S. 837, 843 (1984) (emphasis added). Courts cannot presume a grant of authority from silence or even from Congress including a standard provision granting rulemaking authority.

As Judge Walker wrote in dissent: "It is hard to believe that, when Congress decided to *explicitly* allow industry-funding for observers in one way (fees) in one place (the North Pacific), it also decided to *silently* allow all fisheries to fund observers in any other way they choose." *Loper Bright II* at 378 (Walker, J., dissenting). This Court has long recognized that same principle: "[w]e have long held that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius v. Cloer*, 569 U.S. 369, 378 (2013) (cleaned up).

Therefore, without either an explicit or implicit congressional grant of authority to impose the costs on the industry, Judge Walker's dissent was certainly correct: "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Loper Bright II* at 374 n.23 (Walker, J., dissenting) (quoting *Railway*

Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994)). Nevertheless, the majority below believed that, since an asserted power was not *expressly withheld* by Congress, the agency asserting the power should be granted deference. "Under *Chevron*, such **silence** in the context of a comprehensive statutory fishery management program for the Service to implement ... **is a lawful delegation**...." *Loper Bright II* at 370 (emphasis added). Thus, the first flaw with *Chevron* is that it is susceptible to being applied as the majority below applied it.

The D.C. Circuit is not alone, as its approach was used by the district court in *Empire Health Found. v. Price*, 334 F. Supp. 3d 1134 (E.D. Wash. 2018), rev'd on other grounds by *Empire Health Found. v. Azar*, 958 F.3d 873 (9th Cir. 2020). As one commentator observed, there:

> [r]ather than asking whether the agency's interpretation is reasonable under the statute, which is how this second step [of *Chevron*] is supposed to operate, the district court asked whether the statute "precludes" the agency's reading. The result is to **condone any interpretation that isn't expressly forbidden** by the law, which is **far more generous** to the government than standard *Chevron* deference. Indeed, the district court deferred despite having conceded that the agency's interpretation "does not appear entirely reasonable." Under a "normal" *Chevron* step two, HHS's unreasonable

> interpretation would have failed. Yet under the district court's souped-up version of the *Chevron* doctrine, the government prevailed. The district court's *Chevron* shenanigans went unadmonished by the Ninth Circuit. [W. Yeatman, "The *Becerra* Cases: How Not to Do *Chevron*," 97, 105-106 CATO SUPREME COURT REVIEW, Vol. 2021-2022 (emphasis added).]

As Judge Raymond Kethledge has warned, "the federal courts have become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first. In too many cases, courts do so almost reflexively, as if doing so were somehow a virtue, or an act of judicial restraint — as if our duty were to facilitate violations of the separation of powers rather than prevent them."[2]

II. *CHEVRON* HAS UNDERMINED THE CONSTITUTION'S SEPARATION OF POWERS.

A. *Chevron* Deference Undermines Congressional Accountability.

The Framers of our Constitution anticipated that each branch of government would defend its own powers and, pitting ambition against ambition, the

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[2] *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting); *see also Arangure v. Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) ("[A]ll too often, courts abdicate th[eir] duty [to say what the law is] by rushing to find statutes ambiguous, rather than performing a full interpretive analysis.").

separation of powers would be preserved. *See* Federalist No. 51, The Federalist (G. Carey & J. McClellan, eds.: Liberty Press 2001). Unfortunately, political factors have worked to undermine this model, several of which have been exacerbated by *Chevron* deference.

First, the Framers did not anticipate the creation of the administrative state — what is sometimes called the fourth branch of government.[3] Those powerful agencies serve the interests of incumbents, as they enable Congress to duck accountability to the electorate. Having created an agency with authority to address a public policy problem, the Congressman is immunized from criticism. Responding to a constituent who criticizes an agency action, the Congressman can reply, "I didn't do it," and deflect the blame. Yet responding to a constituent who praises an agency action, the Congressman can reply, "We created that agency," and take the credit.

As one legal author noted:

> [If] Chevron is overruled ... a happy consequence of the change will be to shift more policy responsibility back to Congress. Elected

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[3] "In 1790, [the federal government] it had just 1,000 nonmilitary workers. Today, we have 2,840,000 federal workers in 15 departments, 69 agencies and 383 nonmilitary sub-agencies. [These numbers can be themselves misleading since much federal work is now done by contractors as part of "downsizing" but the work of the agencies has continued to expand.]" J. Turley, "The Rise of the Fourth Branch of Government," *jonathanturley.org* (May 26, 2013)

> representatives have been all too happy to stay out of the business of governing, punting tough decisions to the vicissitudes of presidential and agency politics... [Often,] Congress is more than happy to accept an inferior solution so long as the blame falls on agencies. [J. Wood, "Overruling Chevron Could Make Congress Great Again," *Regulatory Review* (Sept. 12, 2018).]

Some in Congress have admitted this scheme: "[f]or decades, Congress has ducked its constitutional responsibilities, passing vague laws and leaving the real lawmaking up to unaccountable Executive Branch bureaucrats," argued Sen. Mike Lee (R-UT) in 2016. "Under *Chevron*, Congress *and* the Supreme Court have conspired to give the Administrative State powers — unaccountable powers — no one branch of government should ever have."[4] Senator Lee continued: "*Chevron* deference empowers this government-without-consent. It conveniences lazy and accountability-resistant politicians and power-hungry bureaucrats at the expense of the American people's rights. And so *Chevron* must go...."[5]

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[4] Sen. Mike Lee, "A1P: Ending *Chevron* Deference," (Mar. 17, 2016).

[5] R. Ponnuru, "Senator Lee: Restore Separation of Powers, End Chevron Deference," *National Review* (Mar. 17, 2016); *see also* M. Pepson, "Chevron Deference Meets Madison's 'Very Definition of Tyranny,'" *RealClearPolicy* (Dec. 22, 2021).

B. *Chevron* Empowers Courts to Cede Their Constitutional Responsibility to Interpret the Law.

Chevron has a similar pernicious effect on the judiciary. As multiple justices of this Court have noted, *Chevron* deference allows the courts to avoid their key Article III duty to "say what the law is,"[6] instead deferring that role to the "fourth branch."

Numerous current and recent justices of this Court have pointed out the constitutional infirmity of *Chevron*. Justice Kennedy noted that "[t]he type of reflexive deference exhibited [by Courts of Appeal] in some of these cases is troubling," and "suggests an abdication of the Judiciary's proper role in interpreting federal statutes." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

Justice Thomas has explained that "*Chevron* compels judges to abdicate the judicial power without constitutional sanction." *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari). Criticizing this toxic mixture, Justice Thomas noted that:

> *Chevron* also gives federal agencies unconstitutional power. Executive agencies enjoy only "the executive Power." Art. II, §1. But when they receive *Chevron* deference, they arguably exercise "[t]he judicial Power of the

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[6] *Marbury v. Madison*, 5 U.S. 137 (1803).

> United States," which is vested in the courts. *Chevron* cannot be salvaged by saying instead that agencies are "engaged in the 'formulation of policy.'" If that is true, then agencies are unconstitutionally exercising "legislative Powers" vested in Congress. [*Id.* at 691 (citations omitted).]

Then-Judge Gorsuch has opined that "[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Justice Gorsuch also noted that:

> In this country, we like to boast that persons who come to court are entitled to have independent judges, not politically motivated actors, resolve their rights and duties under law. Here, we promise, individuals may appeal to neutral magistrates to resolve their disputes about "what the law is...." Everyone, we say, is entitled to a judicial decision "without respect to persons," 28 U.S.C. § 453, and a "fair trial in a fair tribunal...." Under a broad reading of *Chevron*, however, courts often fail to deliver on all these promises.... [*Buffington v. McDonough*, 143 S. Ct. 14, 18 (2022) (citations omitted).]

Thus, *Chevron* empowers the judiciary to avoid the sometimes taxing job of statutory interpretation, and the often unpalatable prospect of having to weigh in on politically divisive issues. It is no wonder, then, that Sixth Circuit Judge Kethledge has quipped that "[t]here is nothing so liberating for a judge as the discovery of an ambiguity." R. M. Kethledge, "Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench," 70 VAND. L. REV. 315, 316 (2017).

C. *Chevron* Allows Accumulation of Power in the Executive Branch, to the Destruction of the Separation of Powers, and an Erosion of Individual Liberty.

As James Madison warned in Federalist No. 47 "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." The Federalist (G. Carey & J. McClellan, eds.: Liberty Press 2001) at 249. Far preferable is: "[a] government of diffused powers, [which] is a government less capable of invading the liberties of the people." *Gutierrez-Brizuela* at 1149 (Gorsuch, J., concurring).

As Justice Gorsuch has noted, *Chevron* "encourages executive officials to write ever more ambitious rules on the strength of ever thinner statutory terms, all in the hope that some later court will find their work to be at least marginally reasonable." *Buffington* at 20 (Gorsuch, J., dissenting from denial of certiorari). And, as Justice Gorsuch suggests, *Chevron's* effect in accumulating power in

the "fourth branch" is not merely a hypothetical academic exercise. Rather, in one survey, fully 80% of federal agency rule drafters admitted "that a federal agency is more aggressive in its interpretive efforts [more inclined to expand its own powers] if it is confident that *Chevron* deference ... applies."[7]

Since its inception, *Chevron* represented a radical departure from the structure designed by the Founders to carefully separate power among the branches. Indeed, at least until 1932, this Court still declared, "[t]he Court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons." *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932). As Justice Kavanaugh has noted, *Chevron* is "an atextual invention by courts."[8] Professor Aditya Bamzai agreed: "there was no rule of statutory construction requiring judicial deference to executive interpretation *qua* executive interpretation in the early American Republic."[9]

Chevron enables the slow drift toward concentrated power, and therefore toward tyranny: "The accretion of dangerous power does not come in a

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[7] C. Walker, "Legislating in the Shadows," 165 U. PA. L. REV. 1377, 1418-1419 (May 2017).

[8] B. Kavanaugh, "Fixing Statutory Interpretation," 129 HARV. L. REV. 2118, 2150 (June 2016).

[9] A. Bamzai, "The Origins of Judicial Deference to Executive Interpretation," 126 YALE L.J. 908 (Feb. 2017).

day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions" of the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

III. COURTS HAVE USED *CHEVRON* TO DEFER TO ABRUPT POLITICAL REVERSALS OF AGENCY POLICY, USUALLY IN VIOLATION OF STATUTORY TEXT, AND EVEN AFTER WAIVER OF *CHEVRON* BY THE AGENCY.

When this Court granted review on only the second issue sought by Petitioners as to whether *Chevron* should be overruled or limited, it indicated a broader inquiry than merely the question of how a single fisheries regulation was to be viewed under the *Chevron* framework. To be sure, *Loper Bright* raises thorny issues that this Court must address, such as whether statutory silence concerning a power expressly but narrowly granted elsewhere in the statute constitutes an ambiguity requiring *Chevron* deference. However, this case is far from the only time that *Chevron* has been abused in recent memory, having caused thorny factual and legal problems in the course of other litigation, including some in which some of these *amici* have been involved for years.

For example, numerous challenges were brought to the 2018 rule promulgated by Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), reversing longstanding agency policy and suddenly declaring a firearm accessory known as a "bumpstock" to be a

machinegun under the National Firearms Act ("NFA"). These bumpstock cases demonstrate other constitutional, statutory, and procedural complexities faced by judges seeking to utilize *Chevron*, including:

(i) May *Chevron* deference be **waived** by the government, or must courts apply it as a rule of construction even when the government asks that it not be applied?[10]

(ii) Should *Chevron* deference be granted when an agency is **reversing** long-standing positions as the result of purely political presidential decisions?[11]

(iii) May *Chevron* deference be given to agencies when they interpret statutes to create new federal **crimes** and, if so, how does the application of *Chevron* interact with the Rule of Lenity?

(iv) Should courts consider Congress's **failure to enact** bills that have been submitted to accomplish the same end that an agency later implements through regulation, when deciding to apply *Chevron*?

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[10] *See HollyFrontier Cheyenne Refinery, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021) (although the government "asked the court of appeals to defer to its understanding under *Chevron* ... the government does not ... repeat that ask here.... We therefore decline to consider whether any deference might be due....").

[11] *See Gutierrez-Brizuela at* 1152 (Gorsuch, J., concurring) (criticizing the ever-present "possibility that[, under *Chevron*,] the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail.").

A. It Is Easier for Regulations to Be Adopted on a Fabricated Record than for Legislation to Be Enacted Based on Fabrications.

Before addressing the *Chevron*-related **legal** issues litigated in the bumpstock cases, it is worth noting that the bumpstock rulemaking demonstrates the way in which *Chevron* deference contaminates the **factual** predicate for administrative action. The Brief for Petitioners correctly explains that *Chevron* has altered the role of the legislative and executive branches as designed by the Framers:

> *Chevron* has seriously distorted how the political branches operate. Thanks to *Chevron*, **Congress does far less** than the Framers envisioned and the **executive branch does far more**, as roughly half of Congress can count on friends in the executive branch to tackle controversial issues via executive action without the need for compromise, bicameralism, or presentment. That creates a dynamic where the "law" on important and divisive issues **changes radically with every change of administration**, with the latest executive action predictably challenged.... [Brief for Petitioners at 16 (emphasis added).]

By encouraging administrative actions in lieu of legislation, decisions can be made based on incomplete or incorrect facts. With the exception of the occasions that provisions are slipped into bills in the dark of

night, generally when Congress passes a law, there are procedural hurdles that first must be cleared. Beginning with the drafting of bills by legislative counsel, the public criticism of submitted bills, committee hearings, committee markup, floor consideration, conference committee review, and presentment provide multiple opportunities for those with powerful voices to examine and challenge the facts undergirding the bill.

On the other hand, administrative agencies face fewer steps in rulemaking, sometimes involving only those inside the current administration. In the case of bumpstocks, the reversal of agency policy was not the result of any new factual findings or thoughtful re-examination of the statute, but instead was ordered by one person — the President. The temptation to claim credit for addressing pressing public policy concerns by executive action has been yielded to by both parties. Former advisor to President Bill Clinton, Paul Begala, described Executive Orders in this memorable way: "Stroke of the pen. Law of the land. Kind of cool."[12]

Even when the change bubbles up through the bureaucracy, the law Congress wrote can be disregarded because other agendas are present. On the one hand, as many economists have explained, agencies often have been captured by the industry or businesses they regulate. *See, e.g.*, George J. Stigler, "The Theory of Economic Regulation," *The Bell Journal of Economics and Management Science*, vol. 2,

[12] J. Bennet, "True to Form, Clinton Shifts Energies Back to U.S. Focus," *New York Times* (July 5, 1998).

no. 1 (Spring 1971) (Many believe that regulations are "instituted primarily for the protection and benefit of the public at large..." but "[a] central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.") Exacerbating the problem with the assumption that agency action protects the public is the federal conflict of interest law, 18 U.S.C. § 207, which is generally considered to be weak, requiring only a 12-month "cooling off" period for certain "senior" officials to return to influence persons in their former agency.[13]

On the other hand, the Bureau of Alcohol, Tobacco, Firearms, and Explosives has been used by anti-gun administrations to hammer a politically disfavored firearms industry. *See, e.g.,* H. Keene, "Internal ATF

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[13] *See* J. Maskell, "Post-Employment, 'Revolving Door,' Laws for Federal Personnel," *Congressional Research Service* (Jan. 7, 2014). This problem has been exposed by voices across the political spectrum. *See generally* C. Holman and C. Esser, "Slowing the Federal Revolving Door: Reforms to Stop Lobbying Activity by Former Public Officials and States that Lead the Way," *Public Citizen* (July 22, 2019); M. Jacobs, "The Regulatory Capture of the FDA," *The American Conservative* (June 12, 2021). Former White House COVID response coordinator Dr. Deborah Birx pushed COVID-19 vaccines on the nation, but recently admitted: "I knew these vaccines were not going to protect against infection.... And I think we overplayed the vaccines...." Fox News Staff, "Dr. Deborah Birx says she 'knew' COVID vaccines would not 'protect against infection,'" *Fox News* (July 22, 2022). After the pharmaceutical companies made untold billions, the pharmaceutical industry has honored her service, as Dr. Birx has been hired as Chief Executive Officer of Armata Pharmaceuticals. *See* "Management" Armata Pharmaceuticals website.

docs show 'zero tolerance' guidelines for shutting down gun stores," *Fox News* (Feb. 10, 2023) ("The [ATF] guidance says the ATF can 'use inspection reports to establish willfulness even if the inspection found no violations'").

Agencies can act based on purely internal memoranda shielded from public examination under FOIA (Exemption 5 governing "inter-agency or intra-agency memorandums or letters"; 5 U.S.C. § 552(b)(5)), and public comments can be reviewed quickly and dissenting voices having only the power of persuasion can be disregarded by the agency. In that way, the rule can be adopted based on an incorrect or even fabricated factual record. That may have happened with the bumpstock rulemaking.

After the nation's deadliest shooting in Las Vegas on October 1, 2017, bumpstocks were found in the hotel room of Stephen Paddock, and many simply assumed they were used in that shooting, even though no law enforcement agency has reported such. To the contrary, there was an FBI report stating that Paddock "illegally **possessed** prohibited firearms in violation of 26 U.S.C. Section 5841 [the National Firearms Act]" and "**utilized** prohibited firearms in the mass shooting incident...."[14] At that time

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[14] *See* FBI memorandum dated October 2, 2017, reproduced in D. Codrea, "FBI's Las Vegas Shooter Report Raises Serious Unanswered Questions. What NFA Weapons?" *Ammoland* (Oct. 2, 2022) (emphasis added). *See also* *Amicus Curiae* Brief of Gun Owners of America, *et al.* in *Damien Guedes v. ATF*, U.S. Supreme Court No. 22-1222 at 12-14 (July 20, 2023).

bumpstocks were *not* regulated as machineguns, and thus the FBI report indicates that some of the rifles in Paddock's room may have been converted to fully automatic fire. If this is the case, it is conceivable that the Las Vegas shootings were not facilitated by the use of bumpstocks.

Although Congress considered legislation to ban bumpstocks, those bills failed. Had ATF's rulemaking not cut short congressional consideration of bills to deem bumpstocks machineguns, it is likely that the facts as to whether bumpstocks were used (rather than merely present) in Las Vegas would have been more fully examined.[15] Yet in an obvious political response to the shooting, President Trump simply publicly directed ATF to reverse its longstanding policy and to ban non-mechanical bumpstocks.[16] In response, ATF promulgated a regulation to reinterpret the statutory term "machinegun" found in 26 U.S.C. § 5845(b) to include popular "bump stock" accessories used on semi-automatic rifles. *See* 83 *Fed. Reg.* 66,514 (Dec. 26, 2018).

The ATF Rule was expressly predicated on the notion that bumpstocks had been used in the Las Vegas shooting which, as noted above, appears never to have been established. Nevertheless, the ATF Rule substantially revised key terms in the statutory

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[15] The FBI later reported it had no records whatsoever that demonstrated the use of bumpstocks in the crime. *See id.* at 14 and 14 n.13.

[16] *Id.* at 7-12.

definition of machineguns in a way that is at odds with the statute, and then additionally added — in so many words — regulatory language that bumpstocks are now classified as machineguns. In sum, in enacting perhaps its most inflammatory rulemaking in recent history, ATF may have acted on an incomplete, incorrect, or perhaps even fabricated record, banning possession of an estimated 519,927 bumpstocks, ordering their surrender or destruction and threatening criminal sanction for their continued possession. *Id.* at 66,514, 66,546.

B. *Gun Owners of America v. Barr*.

The legal problems raised in the application of *Chevron* to the bumpstocks rulemaking were equally troublesome. Three of these *amici* brought a challenge to the Rule in the U.S. District Court for the Western District of Michigan, which applied *Chevron* deference and denied plaintiffs' motion for preliminary injunction, as follows:

> 1. Even though all parties agreed *Chevron* deference did not apply, and although the court did not expressly discuss whether it could be waived, nevertheless the court asserted: "this Court cannot ... avoid *Chevron*...."[17] *Gun Owners of Am. v. Barr*, 363 F. Supp. 3d 823, 830 (W.D. Mich. 2019).

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[17] The district court referred to the doctrine as "'already-questionable,'" noting that "'[m]any members of the Supreme Court have called *Chevron* into question.'" *Id.* at 830, n.2.

2. The court believed Congress's routine grant to the Department of Justice of "authority to prescribe necessary rules and regulations" showed "inten[t] th[at] ATF speak with the force of law when addressing ambiguity or filling a space in the relevant statutes," and thus "the Court should apply the *Chevron* analysis." *Id.*

3. Purporting to "apply[] the ordinary tools of statutory construction," the court concluded that each of ATF's 180-degree reinterpretations constituted "a permissible interpretation" of the statute. *Id.* at 831-32.

4. The district court never addressed whether an agency is owed deference when interpreting a criminal statute or how the rule of lenity might affect the Final Rule.

On appeal, a Sixth Circuit panel reversed the district court's denial of plaintiffs' preliminary injunction motion. *See Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021). Writing for the court, Judge Batchelder extensively addressed the issue disregarded by the district court, as to whether *Chevron* should apply to ATF having created a new federal crime, concluding that "*Chevron* deference categorically does not apply to the judicial interpretation of statutes that ... impose criminal penalties," relying on this Court's "'clear, unequivocal, and absolute'" statements in *United States v. Apel*, 571 U.S. 359, 369 (2014), and *Abramski v. United States*, 573 U.S. 169, 191 (2014). *Id.* at 454, 455.

First, noting "ATF's frequent reversals on major policy issues," the Sixth Circuit panel explained that "only the people's representatives in Congress may enact federal criminal laws" that "subject ... heretofore law-abiding citizens ... to substantial fines, imprisonment, and damning social stigmas...." *Id.* at 461, 462.

Second, observing that "'judges are experts on one thing — interpreting the law,'" the panel concluded that delegating the duty to "'say what the law is'" to "unaccountable bureaucrats" "would violate the Constitution's separation of powers and pose[] a severe risk to individual liberty...." *Id.* at 462, 464, 465, 466.

Third, the panel noted that "ambiguities in criminal statutes have always been interpreted against the government," and held that "deference in the criminal context conflicts with the rule of lenity and raises serious fair-notice concerns." *Id.* at 466-467.

The panel then proceeded to "decide the *best* meaning of the statute without putting a thumb on the scale in the government's favor" (*id.* at 470) and rejected the rule as being inconsistent with the statutory definition of machinegun and this Court's decision in *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994).

This panel decision did not stand, however, as on June 25, 2021, the Sixth Circuit granted the government's Petition for Rehearing *En Banc*, vacating the panel's decision. After further briefing and

argument, the *en banc* court "divided evenly, with eight judges voting to affirm the judgment of the district court and eight judges voting to reverse." *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 896 (6th Cir. 2021). That split in the Sixth Circuit generated several opinions which demonstrate the difficulty of applying *Chevron*.

1. *En Banc* Opinions Supporting Affirmance. Judge White, joined by four judges, concluded that "***Chevron* provides the standard of review**," that the statute "remains ambiguous ... after exhausting the traditional tools of statutory construction,"[18] and that "ATF's interpretation ... is a permissible construction ... and is reasonable...." *Id.* at 898 (emphasis added).[19] Although concluding that "neither party's interpretation of either term is unambiguously compelled by the statute," Judge White also determined that, "ignoring all deference, ATF's interpretation of the statute is the best one." *Id.* at 906, 908.

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[18] Judge White continued to reject the rule of lenity as grounds for invalidating the Final Rule, acknowledging it to be "a canon of construction," but one to be applied only at "the end of the *Chevron* analysis." *Id.* at 904, n.10.

[19] Judge White rejected other reasons for dispensing with *Chevron*, reiterating the conclusion from her panel dissent that the government may not waive *Chevron*, and claiming that this Court's decision in *HollyFrontier Cheyenne Refinery, LLC* at 2180 "does not alter this conclusion." *Id.* at 899, n.5. Judge White found no separation-of-powers concern because "legislative delegation" in the criminal context "is a reality." *Id.* at 902.

Judge Gibbons did not join Judge White's opinion or its application of *Chevron* deference, writing separately that "***Chevron* application is unnecessary** here" because "ATF's interpretation ... is unambiguously the **best** interpretation ... using ordinary tools of statutory construction." *Id.* at 909 (emphasis added). Judge Gibbons explained that, to conclude "otherwise would allow gun manufacturers to circumvent Congress's longtime ban on machineguns...." *Id.* at 910.

Judges White, Moore, Cole, and Stranch joined *both* opinions in favor of upholding the Final Rule, thus opining both that "*Chevron* provides the standard of review" and that "*Chevron* application is unnecessary here." *Id.* at 898, 909.

2. *En Banc* Opinion Supporting Reversal. Supporting reversal, Judge Murphy and seven others agreed with Judge White that the Final Rule "creates a new regulatory crime," expressing "concern[] with the way in which the federal government has enacted that policy into law." *Id.* at 918, 911. Noting that, "[a]t bottom, [this case] raises a pure question of statutory interpretation" which is "not ... particularly difficult to answer," Judge Murphy explained that this case also "implicates administrative-law questions with significance for many statutes." *Id.* at 911.

Addressing the serious problems with affirmance, Judge Murphy explained that, if Congress wishes to allow agencies to create federal crimes, it must speak clearly and explicitly while, on the other hand, *Chevron* only "comes into play when a statute *lacks* an

express delegation," such as is the case here. *Id.* at 917. Second, Judge Murphy questioned the district court's finding of implied delegation, because the NFA and GCA "merely ... gave ... **general authority to enact regulations**." *Id.* at 916 (emphasis added). Even so, Judge Murphy explained, "Congress does *not* impliedly delegate ... [the courts'] duty to interpret the criminal laws," which would violate the rule of lenity and permit an agency to "adopt[] the 'harsher alternative' without the 'clear and definite' statement that we usually expect." *Id.* at 921-22. Finally, Judge Murphy criticized application of *Chevron* through "'reflexive deference'" "without even attempting to interpret the statute...." *Id.* at 925-26.

C. Bumpstock Decisions of Other Courts.

Interestingly enough, the Sixth Circuit's multi-way fracture on the application of *Chevron* is merely a microcosm. Indeed, other circuits have considered bumpstock challenges and applied *Chevron* in different ways, including the following:

In *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), a Tenth Circuit panel concluded that precedent required application of *Chevron*, with Judge Carson dissenting. *Id.* at 991. Thereafter, the Tenth Circuit granted rehearing *en banc*, but then decided that it had "improvidently granted" the petition, reinstating the panel opinion. *Aposhian v. Wilkinson*, 989 F.3d 890, 891 (10th Cir. 2021). Five judges dissented in four separate opinions, each joined by the other dissenters. *Id.* at 891, 903, 904, 906.

In *United States v. Alkazahg*, 81 M.J. 764 (N-M Ct. Crim. App. 2021), the U.S. Navy-Marine Corps Court of Criminal Appeals overturned a Marine's conviction for possession of a bumpstock, accepting the government's waiver of reliance on *Chevron* deference, and concluding that a bumpstock does not meet either criterion under the statute to be a machinegun. The government did not appeal that decision.

Initially, in *Guedes v. BATFE*, 920 F.3d 1 (D.C. Cir. 2019), the D.C. Circuit upheld the Final Rule, determining the statute to be ambiguous, finding itself bound to apply *Chevron* deference, and finding the Final Rule to be a "reasonable" interpretation. Judge Henderson dissented. *Id.* at 35. On subsequent review, the D.C. Circuit avoided *Chevron* altogether by holding that the bumpstock rule was the "best construction of the statute." *See Guedes v. BATFE*, 45 F.4th 306, 313 (D.C. Cir. 2022).

In *Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023), the Fifth Circuit *en banc* struck down the bumpstock rule, refusing to apply *Chevron* for several reasons: "First, *Chevron* does not apply for the simple reason that the Government does not ask us to apply it." *Id.* at 465. It then applied "a second, independent reason: the statute ... imposes criminal penalties." *Id.* at 466. Finally, it determined that *Chevron* did not apply in the context of a statute with criminal liability implications where the agency "has adopted an interpretive position that is inconsistent with its prior position." *Id.* at 468.

Thus, the bumpstock litigation has resulted in cases in which judges took the following inconsistent positions on *Chevron*:

1. *Chevron* deference was required. *Guedes v. BATFE*, 920 F.3d 1 (D.C. Cir. 2019).

2. *Chevron* deference was not required. *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021).

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3. The government may waive reliance on *Chevron*. *United States v. Alkazahg*, 81 M.J. 764 (N-M Ct. Crim. App. 2021).

4. The government may not waive reliance on *Chevron*. *Gun Owners of Am. v. Barr*, 363 F. Supp. 3d 823, 830 (W.D. Mich. 2019).

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5. *Chevron* deference may be used to support administrative creation of new federal crimes. *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 902 (6th Cir. 2021).

6. *Chevron* deference may not be used to support administrative creation of new federal crimes. *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 466-467 (6th Cir. 2021).

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed, and this Court's *Chevron* decision, along with its scheme of judicial deference to the administrative state, should be overruled.

Respectfully submitted,

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