United States Court of Appeals

for the

Fifth Circuit

Case No. 20-51016

MICHAEL CARGILL,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

BRIEF OF *AMICUS CURIAE* GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF DEFENDANTS-APPELLEES

NATE ASHER
SHANE A. HUNT
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036

IAN SIMMONS
ELENA ZARABOZO
RACHEL A. CHUNG
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006

ANNA PLETCHER
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

SCOTT SNYDER
TYLER HELMS
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071

Counsel for Giffords Law Center To Prevent Gun Violence

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 28.2.1 and 29.2, the undersigned counsel of record for *amicus curiae* provides this supplemental statement of interested parties to fully disclose all those with an interest in the *amicus* brief. These representations are made to permit the judges of this Court to evaluate possible disqualification or recusal.

Amicus Curiae on this Brief

Amicus Curiae Giffords Law Center to Prevent Gun Violence has no parent and no corporation owns stock in it.

Counsel for *Amicus Curiae*

Nate Asher
Shane A. Hunt
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036

Ian Simmons
Elena Zarabozo
Rachel A. Chung
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006

Anna Pletcher
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

Scott Snyder
Tyler Helms
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071

s/ Ian Simmons
Ian Simmons

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") is a nonprofit organization dedicated to researching, writing, enacting, and defending laws and programs proven to reduce gun violence and save lives. The organization was founded in 1993 after a gun massacre at a San Francisco law firm and was renamed Giffords Law Center in 2017 after joining forces with the gun-safety organization founded by gun-violence survivor and former Congresswoman Gabrielle Giffords.

Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizens who seek to make their communities safer from gun violence. Its attorneys track and analyze firearm legislation, evaluate gun-violence-prevention research and policy proposals, and participate in gun-related litigation nationwide.

Giffords Law Center has provided analysis as an *amicus* in numerous other important firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Mance v. Sessions*, 896 F.3d 699 (5th Cir. 2018); *Glass v. Paxton*, 900 F.3d 233 (5th Cir.

[1] Giffords Law Center submits this brief pursuant to Federal Rule of Appellate Procedure 29(a), and all parties have consented to the filing of this brief. Undersigned counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any of the parties; no party or a party's counsel contributed money for the brief; and no one other than *amicus curiae* has contributed money for this brief.

2018); and *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019). It has a strong interest in Congress's restrictions on machineguns and the Bureau of Alcohol, Tobacco, Firearms and Explosive's ("ATF") ability to properly enforce those prohibitions.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress banned machineguns, it crafted a broad definition whose ordinary meaning captures efforts to circumvent the ban, including mechanisms that convert semi-automatic weapons into automatic weapons. Taking advantage of a then-unregulated workaround, a gunman used devices known as "bump stocks" to fire over a thousand rounds in just minutes into a crowd of some 20,000 concertgoers from the 32nd floor of a Las Vegas hotel, killing 60 and wounding hundreds more. ATF realized that manufacturers had gotten out ahead of it and initiated a rulemaking that ultimately classified the offending bump stock technology as a banned machinegun. *See* Bump-Stock Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018).

Giffords Law Center agrees with the government's statutory analysis in its response brief defending ATF's classification of bump stocks as illegal machineguns. *See generally* Br. for Appellees. It writes separately (i) to provide additional insight into the historical context and purpose of Congress's machinegun ban, (ii) to provide additional technical explanation of why a bump stock is properly understood as a fully automatic weapon, and (iii) to rebut

Appellant's invitation for courts to replace ATF as the country's principal regulators of guns simply because many laws designed to combat gun violence have criminal implications.

When Congress first decided to regulate machineguns nearly a century ago, it did so based on a policy judgment that machineguns have no legitimate civilian purpose. In that law and its subsequent revisions, Congress crafted an intentionally broad definition to address the legitimate concerns of numerous stakeholders—including the National Rifle Association ("NRA")—that manufacturers would sidestep the regulations through innovative technological workarounds.

Bump stocks are simply one of several recent efforts by manufacturers to do just that. The key distinguishing feature between automatic and semi-automatic weapons is whether the pace of firing is controlled by a "disconnector," which requires an operator to fire each shot manually, or an "auto-sear," which harnesses internal gun movements from the combustion reaction that fires each round to start the reaction again, allowing a continuous stream of firing until the trigger is released or the ammunition supply is exhausted. Manufacturers designed the bump stock to allow the disconnector to operate like an auto-sear, harnessing movement from the combustion reaction to allow a continuous stream of fire until the trigger is disengaged. In doing so, it converts a semi-automatic weapon into an automatic one.

Finally, Congress delegated enforcement of the machinegun ban to a regulatory agency—now ATF—understanding the usual discretion such delegation would entail, while simultaneously providing for criminal enforcement. That judgment was sound, given Congress's concern that manufacturers would use technological developments to innovate their way around its ban. Appellant asks this Court to sideline ATF because Congress deemed those laws important enough to carry criminal penalties. But courts do not gain special insight over technical questions like "auto–sears" and "disconnectors" simply because Congress has provided for criminal enforcement of ATF's regulations. This Court should resist Appellant's invitation to seize control of not only the nation's gun policy, but also its drug policy, financial policy, and environmental policy—to name a few—all of which involve complex regulatory schemes with criminal penalties.

Several federal appellate courts have already considered and rejected Appellant's arguments. This Court should do the same and affirm.

ARGUMENT

I. CONGRESS WROTE ITS MACHINEGUN BAN TO WITHSTAND MANUFACTURERS' EFFORTS TO DEVISE TECHNICAL WORKAROUNDS

Recognizing the unique danger that fully automatic weapons pose, Congress first regulated machineguns nearly a century ago and, in 1986, banned the manufacture of new machineguns outright. Each legislative milestone has

reflected three consistent policy judgments: First, machineguns are particularly dangerous and serve no lawful civilian purpose; second, the definition of machineguns should stand up to manufacturers' efforts to innovate their way around that policy judgment; and finally, enforcement of the ban is properly delegated to an agency—now ATF—with principal rulemaking authority to run a complex regulatory regime.

A. 1934: Congress First Recognizes That Machineguns Have No Legitimate Civilian Purpose

As the 20th century dawned, breakthroughs in rapid-fire weaponry added a wrinkle to America's long relationship with guns. Technological advances had transformed firearms from unreliable rifles into highly efficient killing machines. *See* John Ellis, *The Social History of the Machine Gun* 17–20 (1975). The first machinegun was created in 1883 by the inventor Hiram Maxim and harnessed a gun's natural recoil to permit continuous, truly automatic fire. *Id.* at 9–14, 16, 33. By the 1920s and '30s, these hyper-destructive firearms had escaped their military origins and were contributing to the rise of armed violence, particularly by organized crime. *See* Robert J. Spitzer, *Gun Law History and Second Amendment Rights*, 80 L. & Contemp. Prob. 55, 68 (2017) (noting gun "ownership spread in the civilian population in the mid-to-late 1920s, and the gun became a preferred weapon for gangsters"); David B. Kopel, *The Great Gun Control War of the Twentieth Century - And Its Lessons for Gun Laws Today*, 39 Fordham Urb. L.J.

1527, 1531 (2012).

In response to the explosion of armed violence by organized crime, Congress passed the first federal gun law, the National Firearms Act of 1934 ("NFA"), Pub. L. No. 73-474, 48 Stat. 1236 (1934). The NFA imposed a national registration regime and a hefty tax on three firearms that Congress determined were "weapon[s] of choice" among would-be criminals: machineguns, sawed-off shotguns, and silencers. *See, e.g.*, S. Rep. No. 73-1444, at 1–2 (1934) ("[The] law violator must be deprived of his most dangerous weapon, the machine gun."); H.R. Rep. No. 73-1780, at 1 (1934) (same). The NFA reflected Congress's judgment that machineguns have no legitimate civilian purpose, as they were neither useful nor necessary for self-defense or sport. *See* S. Rep. No. 73-1444, at 2 (1934) ("[T]here is no reason why anyone except a law officer should have a machine gun or sawed-off shotgun."); H.R. Rep. No. 73-1780, at 1 (1934) (same).

Congress defined "machinegun" with an eye toward frustrating efforts to circumvent the regulation. The legislation as originally proposed defined "machinegun" as "any weapon designed to shoot automatically or semiautomatically twelve or more shots without reloading." *See* Hearings Before A Subcommittee of the Committee on Commerce of the United States Senate on S.885, S.2258 And S. 3680, at 75 (1934). But the then-President of the NRA, Karl T. Frederick, worried that the definition was too narrow and that manufacturers

could bypass the new restrictions by simply limiting a gun's ammunition-feeding device to hold eleven rounds or fewer. *See* Hearings Before The Committee on Ways and Means, House of Representatives on H.R. 9066, at 39–40 (1934) ("House NFA Hearing") ("A gun which fires automatically or semiautomatically less than 12 shots is not under this definition a machine gun. And yet, in my opinion, it is in fact a machine gun and should be so classified.").

Based on this concern, Frederick proposed a revised definition, which Congress adopted: a weapon that "shoots automatically more than one shot without manual reloading, by a single function of the trigger." *Id.* at 40. Frederick explained that this definition was based on the limiting feature of non-machineguns: how "fast ... you can pull your trigger." *Id.* at 41. This focus on the human factor—on the need manually to pull a trigger—tracked Congress's intent to distinguish guns used for sport and self-defense from those only useful for crime. *See* Pub. L. No. 73-474 § 1(b).

Finally, in passing the NFA, Congress did not simply criminalize machinegun possession, but rather enacted a *regulatory* scheme, by which it delegated to the Internal Revenue Commissioner "discretionary authority" over licensing, with usual recourse to the courts. *See* House NFA Hearing at 131 ("[T]here is, of course, a right of appeal from the decision of the Commissioner in this case, just as there is in any other case where the Commissioner is *delegated*

with a discretionary power."). Thus, machineguns had to be registered with the Commissioner, Pub. L. No. 73-474 § 9, who Congress authorized to "prescribe rules and regulations as may be necessary for carrying the provisions of this Act into effect," *id.* § 12. Criminal penalties resulted only from failing to register a machinegun with the Commissioner. *Id.* § 14. By providing for criminal enforcement, however, Congress did not alter the long-established deferential standard courts used to evaluate delegated authority. *See, e.g.*, *Shields v. Utah Idaho Cent. R. Co.*, 305 U.S. 177, 187 (1938) (court deferred to agency's classification of a railroad, despite possible criminal implications).

B. 1968: Congress Reiterates That Machineguns Have No Legitimate Civilian Purpose And Expands Their Regulation To Anticipate Technological Workarounds

With gun violence continuing to plague the nation, Congress looked to tighten its safety measures and took up a bill that would become the Gun Control Act of 1968 ("GCA"). Throughout the legislative hearings, witnesses once again distinguished between weapons useful for self-defense or sport and machineguns that have no place in civil society. *See Bills to Assist State and Local Governments in Reducing the Incidence of Crime, To Increase the Effectiveness, Fairness, and Coordination of Law Enforcement and Criminal Justice Systems at All Levels of Government, and for Other Purposes: Hearing Subcomm. No. 5 of the H. Comm. on the Judiciary*, 90th Cong. 779 (1967) (statement of Rep. James F. Battin, R-

Mont.) (distinguishing "machineguns" that are "only ... destructive devices" from "sporting and defensive guns"). Consistent with its 1934 position, the NRA reaffirmed that "[m]achine guns ... hav[e] no place in the sporting world." *Id.* at 666 (statement of John M. Schooley, Chairman, Legislative Committee, NRA).

At the same time—and just as the NRA had predicted three decades earlier—even the NFA's broad machinegun definition did not entirely deter creative circumvention efforts. In particular, some used ingenious means to convert unregulated, semi-automatic weapons to fully automatic machineguns. In the 18 months preceding the GCA's adoption, such converted machineguns accounted for 20 percent of machineguns seized or purchased by ATF. *See* Sen. Comm. on the Judiciary, 97th Cong., Federal Regulation of Firearms, at 26 (1982) (Atty Gen.'s Task Force on Violent Crime: Recommendations Related to Firearms). In response, a governmental task force recommended that Congress authorize ATF to expand its machinegun definition to include these conversion kits. *Id.*

When Congress adopted the GCA, it reaffirmed the NFA's core machinegun definition and adopted the recommended expansion of machinegun to include "any combination of parts designed and intended for use in converting a weapon into a machinegun." *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 1231 (June 19, 1968) *codified* at 28 U.S.C. § 5845(b).

C. 1986: The Firearm Owners' Protection Act Completes The Ban On Machineguns And Strengthens The Definition Against Technological Manipulation

In 1986, Congress escalated the earlier machinegun registration scheme into a complete ban on civilian ownership of newly manufactured machineguns. Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (May 19, 1986) ("1986 Act"). Hearings leading up to the revision continued to emphasize the lethality of machineguns and their near-exclusive criminal use. *See Firearms Enforcement Efforts of the Bureau of Alcohol, Tobacco and Firearms: Hearing Before the Subcomm. On Crime of the H. Comm. on the Judiciary*, 96th Cong. 33 (1980) (connecting machineguns to narcotics traffickers).

Once again faced with workarounds, Congress further broadened the definition of machinegun to capture not only "combination[s] of parts" that could convert a weapon into a machinegun, but *any part* used to convert a weapon into a machinegun. 1986 Act § 109(a). This broadened definition targeted firearms manufacturers who avoided the "combination of parts" definition by designing individual parts that could themselves convert semi-automatic weapons into automatic weapons. *See* Pub. L. No. 90-618, 82 Stat. 1214 § 5845(b) (Oct. 22, 1968); David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 668 (1987).

II. BUMP STOCKS TRANSFORM SEMI-AUTOMATIC RIFLES INTO AUTOMATIC RIFLES

Bump stocks exist for a single reason: to convert semi-automatic rifles into machineguns. They are thus conversion kits that fall under the plain meaning of Congress' machinegun definition. This interpretation is confirmed by the fact that bump stocks have no lawful civilian purpose—a fact tragically borne out by the Las Vegas shooter's use of bump stocks to fire over 1,000 rounds in under 10 minutes on a crowd of some 20,000 Las Vegas concertgoers, killing 60 and wounding hundreds more in a matter of minutes.

A. Attaching A Bump Stock To A Semi-Automatic Rifle Mechanically Transforms It Into An Automatic Rifle.

As described below, automatic and semi-automatic weapons are technologically similar, primarily differing in whether the firing process is controlled by a "disconnector," which requires the operator to fire each shot manually, or an "auto-sear," which harnesses movement from the combustion reaction that fires each round to start the reaction again without additional operator intervention. *See* Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. at 668 n.454 ("[A]n automatic arm, like an internal-combustion engine, is naturally designed to continue its cycle. It is generally necessary in the design to add a part or system ... to inhibit this and limit it to one shot per trigger squeeze."). A bump stock re-tools the disconnector to act

like an auto-sear, harnessing movement from that same combustion reaction to allow a continuous stream of fire until the bump stock is disengaged. In doing so, it "convert[s]" a semi-automatic weapon into an automatic one—exactly what Congress intended to prevent through its statutory definition.

1. Automatic Versus Semi-Automatic Weapons

Most automatic and semi-automatic guns use an "internal piston" system to eject and reload rounds after firing. ArmaLite, Inc., Technical Note 54: Direct Impingement Versus Piston Drive (July 3, 2010 Rev. 2).[2] Take the military's M16 automatic rifle and its civilian counterpart, the AR-15 semi-automatic rifle:

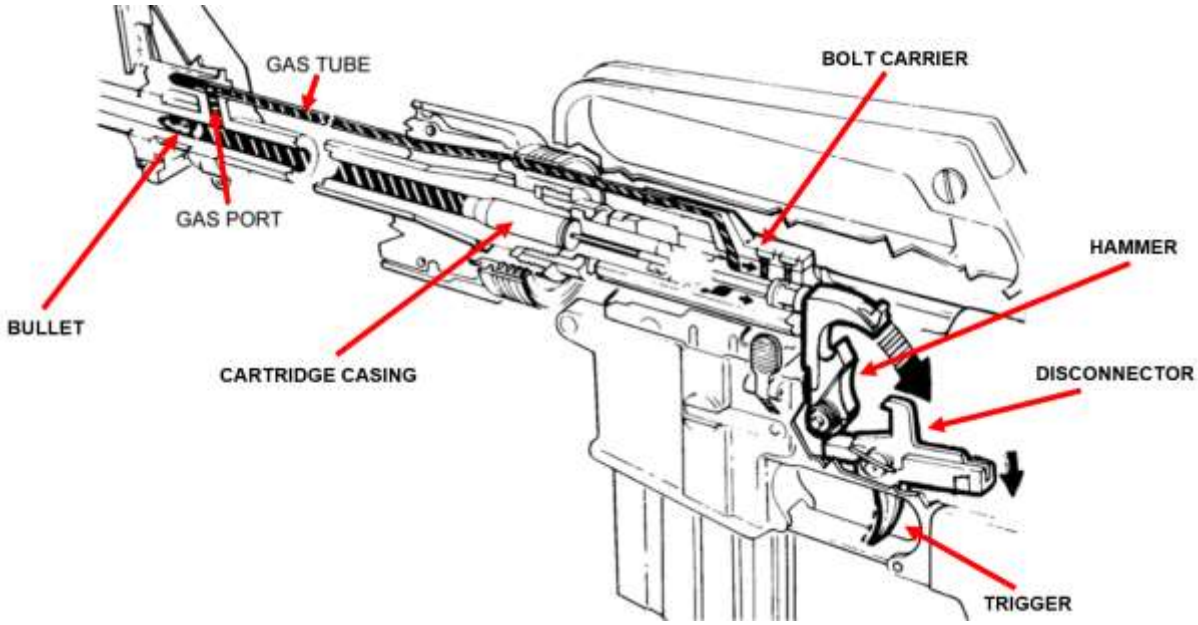

Figure 1: Diagram of Internal Piston System of M16- and AR-15-style rifles[3]

[2] https://wayback.archive-it.org/all/20120905024032/http:/www.armalite.com/images/Tech Notes%5CTech Note 54, Gas vs Op Rod Drive, 020815.pdf.
[3] U.S. Dep't of Army, Field Manual 23-9, *Rifle Marksmanship M16A1, M16A2/3, M16A4, and M4 Carbine*, ¶ 4-2 (Sep. 13, 2006) ("FM 23-9").

To prepare one of these guns to fire, a part called the bolt locks a cartridge into firing position. FM 23-9 ¶ 4-2. When the operator pulls the trigger, the hammer strikes the firing pin to ignite the gunpowder housed in the cartridge, and the explosion causes rapidly expanding gas to propel the bullet forward. *Id.* As the bullet leaves the rifle, the gun channels some of that gas back through the gas tube, pushing the bolt carrier—a component that houses the bolt—backwards. *Id.*

Moving the bolt carrier backwards pulls the bolt backwards to eject the spent casing and resets the hammer. *Id.* A buffer spring at the back of the gun then propels the bolt carrier forward again. *Id.* On its way forward, the bolt carrier collects a new cartridge and locks it into firing position. *Id.*

Figure 2: Post-fire forward motion of bolt carrier[4]

[4] 45Snipers, *How An AR-15 Rifle Works: Part 2, Function*, YouTube (Jan. 11, 2017), https://youtu.be/wAqE-KLbiYc.

The primary difference between automatic and semi-automatic rifles is the firing mechanism. For both rifles, the initial pull of the gun's trigger releases the hammer to fire a round. *See* FM 23-9 ¶¶ 4-2, 4-3. The internal piston system then cocks the hammer back, readying it for the next shot. *See id.* ¶ 4-2. In a semi-automatic rifle, once the hammer is released, a spring pushes a part called the disconnector up to catch the returning hammer to prevent it from releasing until the operator again pulls the trigger. *Id.* In the plain language of the statute, the disconnector disrupts the otherwise "automatic[]" cycle of firing brought about by the internal piston system and links the "function of the trigger" to each pull of the trigger by the operator. *See* House NFA Hearing at 39–40 (Frederick using "function" interchangeably with "pull").

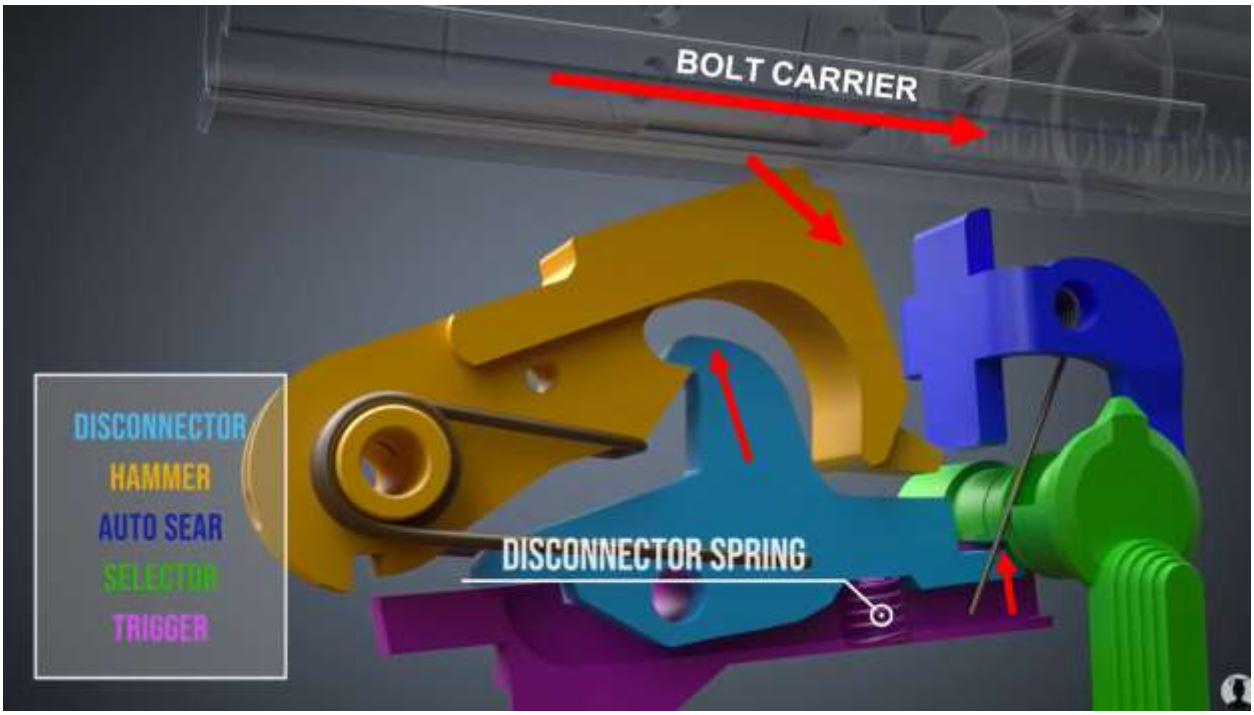

Figure 3: Post-Fire Mechanism - M16 In Semi-Automatic Mode[5]

In an automatic gun, by contrast, a post keeps the disconnector spring depressed until the trigger is released, preventing it from catching the hammer after each shot. *See* FM 23-9 ¶ 4-3.

[5] Thomas Schwenke, M16 and AR-15 – How firearms work!, YouTube (Feb. 23, 2019), https://youtu.be/wMIBUIN30yU.

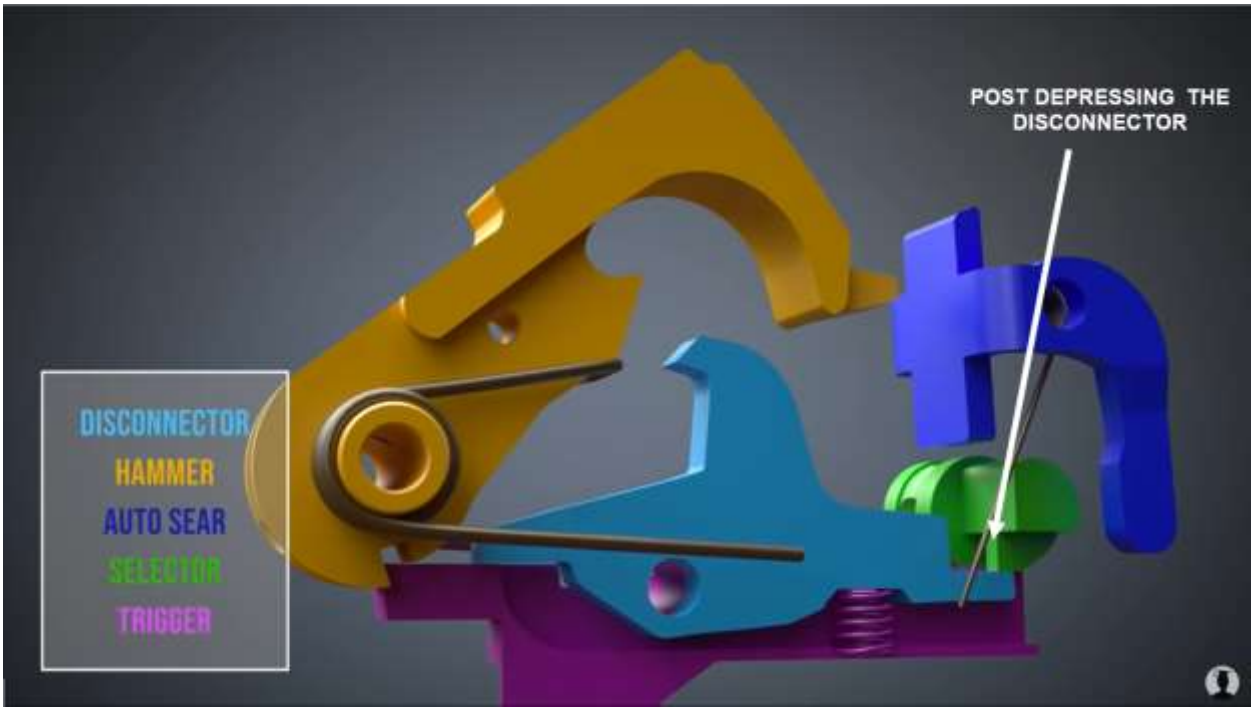

Figure 4: Firing Mechanism - M16 in Fully Automatic Mode[6]

The automatic gun instead engages a separate part called the auto-sear. *See* FM 23-9 ¶ 4-3. When the expanding gas sends the bolt carrier backwards to re-cock the hammer, the auto-sear catches the hammer. *Id.* When the bolt carrier rebounds off the buffer spring, it pushes the auto-sear down, releasing the hammer and firing another round. *Id.*

[6] Thomas Schwenke, M16 and AR-15 – How firearms work!

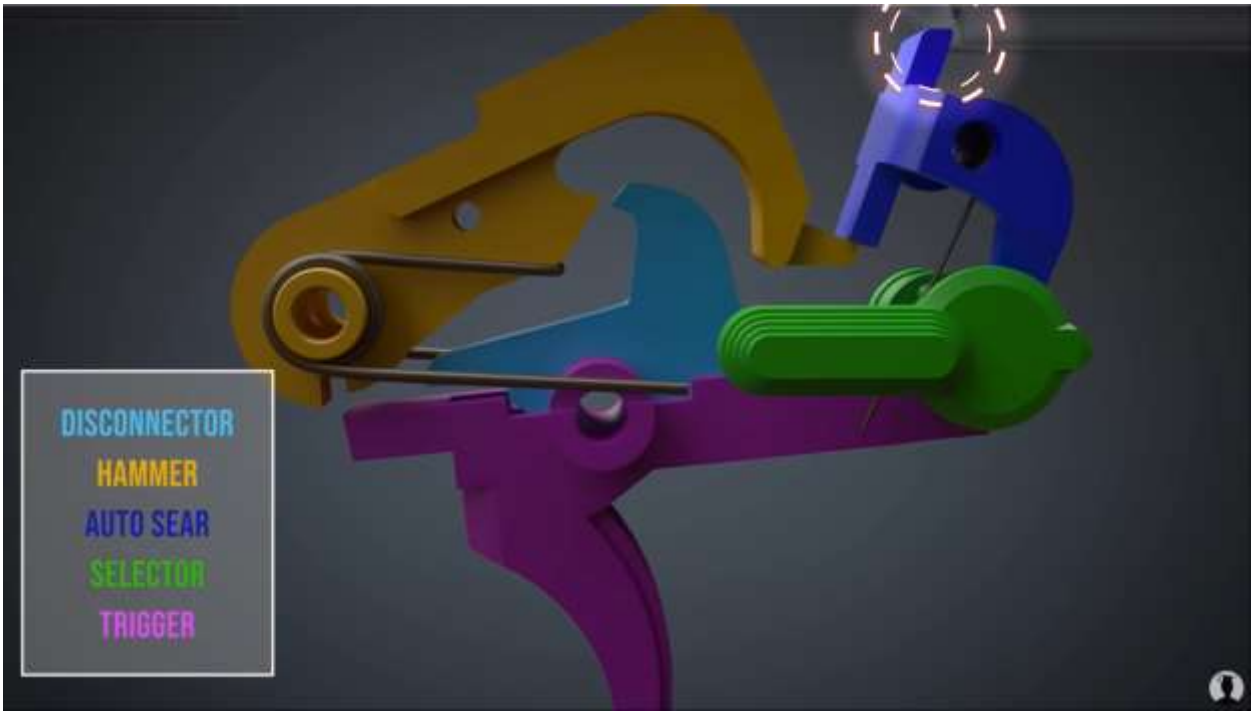

Figure 5: Firing in Fully-Automatic Mode - Bolt Carrier Pushing Auto-Sear[7]

Thus, in automatic mode, the auto-sear allows the gun to harness the back-and-forth motion of the bolt carrier caused by the combustion reaction of firing the weapon to fire rounds continuously until the trigger is released or the ammunition supply is exhausted. In the plain language of the statute, the first trigger pull, or "function," in an automatic weapon serves to initiate "automatically" "more than one shot," with each subsequent round triggered not by the operator, but by the previous round. 26 U.S.C. § 5845(b).

[7] Thomas Schwenke, M16 and AR-15 – How firearms work!

2. Bump Stocks

A bump stock is a device the operator connects to a semi-automatic gun that allows the disconnector to operate like an auto sear, channeling the same combustion reaction to re-engage the hammer after each round is fired. The bump stock takes advantage of the same combustion reaction on which the automatic gun relies: energy that causes the gun to recoil backwards. A bump stock acts as a type of buffer spring to propel the gun backward and forward, "bumping" the trigger against the shooter's stationary finger. This releases the disconnector, permitting the hammer to strike and fire another round.[8]

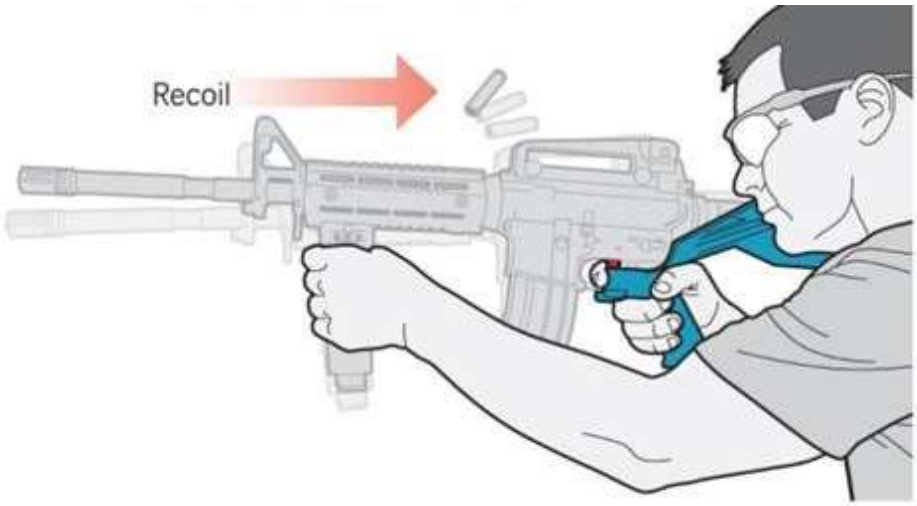

Figure 6: Bump Stock Firing[9]

[8] Nicole Chavez, *What are the 'bump stocks' on the Las Vegas shooter's guns?*, CNN (Oct. 5, 2017), https://www.cnn.com/2017/10/04/us/bump-stock-las-vegas-shooting/index.html.
[9] Powerful US gun lobby group backs new curbs on rapid-fire accessories, The Straits Times (Oct. 6, 2017), https://www.straitstimes.com/world/united-states/after-las-vegas-shooting-momentum-builds-for-ban-of-rapid-fire-devices.

Like an automatic gun, the bump stock links the firing of each round to the backward and forward motion caused by the rapidly expanding gas from firing a round, rather than individual pulls of the trigger by an operator. The only difference is how the back-and-forth energy is harnessed: by the bolt carrier (in a traditional automatic weapon) or by the entire gun (in a bump-stock weapon). Either way, these mechanics allow bump stocks to work around the inherent human limitations in firing a trigger that motivated the NRA to propose—and Congress to adopt—its machinegun definition. *See supra* at 7. Or, in the plain language of the statute, a "single function of the trigger" initiates "automatically" "more than one shot," with each subsequent shot triggered by the previous round rather than the shooter.

B. Like Other Automatic Weapons, Weapons Equipped With a Bump Stock Have No Legitimate Civilian Purpose

A bump stock mechanically converts a semi-automatic weapon into an automatic one, making it every bit as dangerous the typical machineguns that Congress has long kept out of civilian hands. This is demonstrated by (i) the weapon's cyclic rate of fire; (ii) manufacturer advertising; and (iii) the Las Vegas shooter's choice of bump stocks.

1. The Rate of Fire

The cyclic rate of fire is the rate at which a firearm completes the cycle of firing a loaded cartridge to locking a new one into firing position. *See* FM 23-9 at

Glossary-7. The military's M16A4 machinegun is capable of a cyclic fire rate of 800 rounds per minute. *Id.* ¶ 2-1. The limiting factor of a semi-automatic weapon is the shooter's trigger finger, and estimates place the firing rate of top professional sport shooting competitors at 180 rounds per minute. Steven Koff, *Assault weapons, semi-automatic rifles and the AR-15: Defining the debate*, Cleveland.com (Jan. 30, 2019).[10] Estimates peg the cyclic rate of fire of a bump-stock-outfitted semi-automatic rifle to be between 400 and 800 rounds per minute. *See The "bump stocks" used in the Las Vegas shooting may soon be banned*, The Economist (Oct. 6, 2017).[11] Thus, the least-skilled gun operator can use bump stocks to rival military weapon fire rates, 440% faster than even the most skilled operator of an unmodified semi-automatic rifle.

The increased firing speed of an automatic weapon is inherently dangerous, and because it generally comes at the cost of accuracy, it carries no self-defense or sporting advantage. *See* James Clark, *These Marines Explain Why They Only Use Fully Automatic Fire During the Most Intense Firefights*, National Interest (Mar. 6, 2020).[12] Bump stocks are no different. Because they rely on the give and take of the rifle between the shoulder and trigger finger, bump-stock-equipped semi-

[10] https://www.cleveland.com/nation/2018/04/assault_weapons_semi-automatic_1.html.
[11] https://www.economist.com/graphic-detail/2017/10/06/the-bump-stocks-used-in-the-las-vegas-shooting-may-soon-be-banned.
[12] https://nationalinterest.org/blog/buzz/these-marines-explain-why-they-only-use-fully-automatic-fire-during-most-intense.

automatic firearms are *less* accurate in their simulated automatic fire than the automatic weapons used by the military. *See* Shooting Range Industries, LLC, *How Effective is Full Auto? Do Soldiers Use Fully or Semi Automatic Rifles & Weapons?*[13]

2. Manufacturer Advertising

The automatic firing capacity of bump-stock-equipped weapons—and their blatant circumvention of federal law—is confirmed by their manufacturers' marketing. As one manufacturer crowed, "Bumpfire Stocks are the closest you can get to full auto and still be legal." *See* Midsouth Shooters, *Bumpfire Systems*.[14] Another manufacturer left behind the pretense of civilian use altogether, marketing its product as "Standard Battle Style." *See* Firequest, *Slide Fire SSAR-15 Bump Fire Stock – Right Hand Model*.[15] All avoid the physical limitations on firing rate created by the shooter's trigger finger.[16] The NRA's 1934 prediction has proved prescient: Bump stocks are the latest manufacturer effort to circumvent Congress' repeated efforts to limit machinegun use to military and law enforcement.

[13] http://www.shootingrangeindustries.com/how-effective-is-full-auto-do-soldiers-use-fully-or-semi-automatic-rifles-weapons/.
[14] https://www.midsouthshooterssupply.com/b/bumpfire-systems.
[15] https://www.firequest.com/AB227.html.
[16] *See* https://www.youtube.com/watch?v=hCCT8JtwQeI&ab_channel=SlideFire (hailing the Bump Fire Stock's ability to allow gun owners to fire their rifles as "quickly as desired"); https://www.firequest.com/product654.html ("Simple modification for an AK-47 rifle that allows operator to shoot *as quickly as desired"*)

3. Las Vegas Shooting

The barrage of bullets that made a killing field of Las Vegas's Route 91 Harvest Festival confirms that bump stocks are a technological innovation used to transform a civilian weapon into a military one. *See* LVMPD Criminal Investigative Report of the 1 October Mass Casualty Shooting, Joseph Lombardo, Sheriff, August 3, 2018.

The Las Vegas assailant wanted to be known for "having the largest casualty count," and he planned for that result, carefully selecting "the hotel, the room, the floor, and the concert venue below." *Id.* at 116-18. His choice of weapon was no different. The police report reveals that the shooter possessed 49 guns, 14 of which were equipped with bump stocks. *Id.* at 96-106. While he left almost half of his guns at home, he brought *all 14 guns equipped with bump stocks* with him. *Id*. at 96–103. That choice was deliberate; of the 1,057 rounds of ammunition he sprayed at the concertgoers over the course of minutes, an astounding 1,049 rounds were fired from rifles *equipped with bump stocks*. *Id.* at 103–06.

This deadly gunfire shows that bump-stock-equipped semi-automatic weapons are indistinguishable from the automatic weapons Congress banned. Their similarity fooled even security professionals. The first security officer to approach the shooter's perch described hearing "automatic gunfire" coming from

the room.[17] Other security officers agreed, as did the responding police officer. *Id.* at 56 (describing "gunfire from ... an automatic rifle"); *id.* at 57 (describing "automatic gunfire"); *id.* at 73.

III. Agency Deference Is Particularly Appropriate Here

For the reasons explained above and in the government's brief, ATF has correctly classified bump stocks as devices that convert semi-automatic weapons into automatic ones based on the plain language of the statute. But affirmance is required for an additional reason: Even if Congress's definition of machinegun is subject to different interpretations, ATF's interpretation is unquestionably reasonable, and therefore, the Court must defer to it under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). And even without full *Chevron* deference, the Court should find ATF's technical expertise persuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).[18]

A. Courts Routinely Defer To ATF's Classifications Under The NFA And GCA

As with other statutes involving complex technical determinations, Congress empowered ATF to "prescribe all needful rules and regulations for the enforcement

[17] *Id.* at 7 (emphasis added).

[18] For the reasons explained by the Tenth and D.C. Circuits, the government's failure to raise *Chevron* in its brief does not result in forfeiture. *See Guedes v. ATF*, 920 F.3d 1, 22-23 (D.C. Cir. 2019); *Aposhian v. Barr*. 958 F.3d 969, 981–82 (10th Cir. 2020). The Tenth Circuit initially agreed to rehear *Aposhian en banc*, 973 F.3d 1151 (10th Cir. 2020), but ultimately determined a rehearing *en banc* was unnecessary and reinstated the panel opinion, 989 F.3d 890 (10th Cir. 2021).

of" the NFA, *see* 26 U.S.C. § 7805(a), and to "prescribe only such rules and regulations as are necessary to carry out the provisions of" the GCA, *see* 18 U.S.C. § 926(a). Through this language, Congress has delegated interpretative authority to ATF, meaning *Chevron* necessarily applies. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); House NFA Hearing at 131 (noting Congress "delegated ... discretionary power" to agency); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989).

There are good reasons to defer to ATF's expertise here. Whether a manufacturer's manipulations make a particular gun a machinegun under the statutory framework will depend on a technical understanding of how exactly the firearm mechanically operates. *See supra* Part II.A. As Judge Wilkinson explained, ATF's "technical expertise [is] essential to determinations of statutory enforcement" and makes the agency "better equipped than the courts" to interpret these laws, especially because it can provide "nationally uniform interpretations of statutory terms." *See Nat'l Rifle Ass'n v. Brady*, 914 F.2d 475, 479 & n.3 (4th Cir. 1990) (quotation omitted).

For example, in *Sig Sauer, Inc. v. Brandon*, 826 F.3d 598 (1st Cir. 2016), a gun manufacturer tried to get around the GCA's gun silencer rules by arguing that its device reduced recoil and so was not a "part intended only for use in" "assembling or fabricating a firearm silencer." *Id.* at 599–600. ATF saw through

the manufacturer's ruse; after a careful technical comparison, it concluded that the disputed part "was identical to the interior of a silencer." *Id.* at 602. The First Circuit "defer[red] to ATF's interpretation of this evidence," given that "proper evaluation of this evidence requires a high level of technical expertise." *Id.* at 603.[19]

Similarly, in *Akins v. United States*, 2008 WL 11455059, at *6 (M.D. Fla. Sept. 23, 2008), *aff'd*, 312 F. App'x 197 (11th Cir. 2009), the court addressed ATF's classification of the Akins accelerator as a machinegun. This device, like bump stocks, uses a gun's recoil to increase the gun's firing speed after the trigger is depressed only a single time. Emphasizing ATF's expertise in light of the "technological innovation" and the need "to protect the public from dangerous firearms," the court deferred to ATF's classification of an Akins accelerator as a machinegun. *Id.* at *5–6.

Unsurprisingly, this Court and others have followed suit, deferring to ATF on a bevy of issues, including the bump stock classification here. *See 10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 717 (5th Cir. 2013) ("review[ing] ATF's interpretation of the GCA under *Chevron*" (quotation omitted)); *Kuhn v. Bureau of*

[19] *Sig Sauer* addressed an arbitrary and capricious challenge to an agency determination letter and did not directly implicate *Chevron*. But ATF is engaging in the same type of classification exercise here, and the agency should not be penalized for using the additional procedure inherent in rulemaking. *See, e.g.*, *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974).

Alcohol, Tobacco, Firearms, & Explosives (ATF), 2008 WL 5069125, at *1 (5th Cir. Dec. 2, 2008); *Guedes*, 920 F.3d at 25; *Aposhian*, 958 F.3d at 984; *see also Vineland Fireworks Co. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 544 F.3d 509, 517 (3d Cir. 2008); *Nat'l Rifle Ass'n*, 914 F.2d at 479; *United States v. Anaya-Acosta*, 629 F.3d 1091, 1094 (9th Cir. 2011); *Gun S., Inc. v. Brady*, 877 F.2d 858, 864 (11th Cir. 1989).

B. The Criminal Implications Of ATF's Regulation Do Not Render Deference Inappropriate

Seeking to escape this precedent, Appellant principally argues that the rule of lenity displaces ATF's usual authority because the regulations are enforced through criminal, as well as civil, penalties. *See* Appellant's Br. at 48–51; *Gun Owners of Am. v. Garland*, 992 F.3d 446, 467 (6th Cir. 2021). But this argument ignores binding Supreme Court precedent and would enmesh courts in policy decisions inherent in not only the many classifications ATF must make under the GCA, but in countless statutes across the U.S. Code.

First, Appellant overlooks *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). There, the Supreme Court rejected Appellant's exact argument when deferring to the Secretary of the Interior's construction of the Endangered Species Act. Despite the statute's potential for criminal penalties, the Court explained that it has "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative

regulations whenever the governing statute authorizes criminal enforcement." *Id.* at 704 n.18. Because Appellant makes just such a facial challenge to an administrative regulation, *Babbitt* controls, as the D.C. Circuit and the Tenth Circuit have correctly held. *See Guedes*, 920 F.3d at 24; *Aposhian*, 958 F.3d at 984. It is therefore unsurprising that courts deferring to ATF have done so with full knowledge of the implications for criminal penalties. *See Sig Sauer*, 826 F.3d at 600; *Nat'l Rifle Ass'n*, 914 F.2d at 479 & n.3; *Mod. Muzzleloading, Inc. v. Magaw*, 18 F. Supp. 2d 29, 33-34 (D.D.C. 1998).

To be sure, the Supreme Court once refused to defer to ATF's interpretation of a statute in a specific criminal prosecution, as has this Court in a non-precedential decision. *See United States v. Abramski*, 573 U.S. 169, 191 (2014); *United States v. Garcia*, 707 F. App'x 231, 234 (5th Cir. 2017). But no deference was owed to the informal agency statements at issue in *Abramski*, *see Guedes*, 920 F.3d at 24, and *Abramski* never called the squarely applicable holding of *Babbitt* into question. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (quotation omitted)).

This is for good reason. Appellant's proposed ban on agency deference anytime Congress has criminalized noncompliance with an agency's regulation

goes far beyond the limited statements in *Abramski*. Indeed, Congress imposed criminal penalties *while also* granting regulatory authority to ATF. *See supra* at 8, 23–24; *Mead*, 533 U.S. at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure…."). And the vast majority of ATF's regulations are criminally enforceable, so accepting Appellant's theory would override Congress's intent for ATF, not courts, to be the primary gun regulator in this country. *See supra* at 23–24.

This deference does not leave ATF to make inappropriate decisions about "community morality." *Cf. Gun Owners of Am.*, 992 F.3d at 462. *Congress* has already made the relevant moral judgment about machineguns. *See supra* Part I. Congressional judgment regarding machineguns, however, does not resolve the *technical* issue with which Congress tasked ATF: whether a particular device transforms a semi-automatic firearm to an automatic one. The sources of moral expertise on which the Sixth Circuit explained courts could draw—"family and upbringing[,] ... relationships with friends and neighbors, the practice of one's faith, and participation in civic life," 992 F.3d at 461—do not arm a judge with the detailed knowledge of auto-sears and disconnectors relevant to that question. *See supra* Part II.A; *Sig Sauer*, 826 F.3d at 602 (relying on ATF's expertise on "baffle" arrangements).

Nor would Appellant's argument stop with ATF. "[M]any statutes authorize implementing regulations and then impose criminal liability on entities or individuals for violating the regulations." *United States v. Moss*, 872 F.3d 304, 312 (5th Cir. 2017). These include drug laws, financial regulations, and environmental regulations.[20] As the D.C. Circuit has pointed out, Appellant's position would invalidate *Chevron* itself, as the environmental statute there likewise had criminal implications. *See Guedes*, 920 F.3d at 24.

Finally, Appellant's proposal would embroil courts in the very policy decisions that *Chevron* deference was intended to avoid. *See Chevron*, 467 U.S. at 866 (deferring when challenge "really centers on the wisdom of the agency's policy"). The Eleventh Circuit ran into exactly this problem after adopting a related version of Appellant's argument. In *United States v. Phifer*, 909 F.3d 372 (11th Cir. 2018), the Eleventh Circuit agreed that the rule of lenity meant it could not rely on the Drug Enforcement Agency's ("DEA") regulatory definition of "positional isomer" in a drug prosecution. *Id.* at 375. But the court lacked the expertise it needed to resolve the issue and so instructed the district court to receive

[20] *See also* 7 U.S.C. § 13(a)(5) (criminalizing willful violations of the Commodities Exchange Act or "any rule or regulation thereunder"); 15 U.S.C. § 78ff(a) (criminalizing willful violations of Securities and Exchange Act "or any rule or regulation thereunder"); 16 U.S.C. § 825o (criminalizing willful violations of Federal Power Act); 15 U.S.C. § 717t (criminalizing willful violations of Federal Power Commission regulations); 42 U.S.C. § 6928(d)(7) (criminalizing storage, treatment, or transportation of waste in willful violation of "any material condition or requirement of any applicable regulations or standards" under Resource Conservation and Recovery Act of 1976).

non-agency expert testimony, weigh each expert's credibility, and thereby choose what constituted a "positional isomer." *Id.* But by admitting it needed an evidentiary hearing where a factfinder would choose between competing expert definitions, the court abandoned its role of "say[ing] what the law is" and started making criminal policy for itself. *Cf. Gun Owners of Am.*, 992 F.3d at 465–66. The better choice is that of the D.C. Circuit, which, when facing a challenge to an agency's determination of whether marijuana was properly classified as a criminal Schedule 1 substance under the relevant statutory criteria, deferred to DEA's "policy judgment." *See All. for Cannabis Therapeutics v. Drug Enf't Admin.*, 930 F.2d 936, 939 (D.C. Cir. 1991).[21]

This Court, too, should respect Congress's judgment that ATF is the proper decision-maker to resolve technical questions raised by the GCA and NFA. *See Gun S., Inc.*, 877 F.2d at 863 (explaining Congress's grant of "fairly broad discretion" to ATF based on the difficulty of classification decision); *P.W. Arms, Inc. v. United States*, 2016 WL 9526687, at *8 (W.D. Wash. Aug. 10, 2016)

[21] To the extent the Sixth Circuit's contrary ruling rested on a theory that deferring to ATF's interpretations violates separation of powers principles, *Gun Owners of Am.*, 992 F.3d at 463-66; Br. at 56, it runs into squarely conflicting Circuit precedent. *See United States v. Palazzo*, 558 F.3d 400, 407 (5th Cir. 2009) (defendant criminally charged for violation of validly promulgated agency regulations); *United States v. Womack*, 654 F.2d 1023, 1038 (5th Cir. 1981) (rejecting delegation challenge to ATF's authority to classify "explosives"). Indeed, it likely conflicts with binding Supreme Court precedent. *See Touby v. United States*, 500 U.S. 160, 166 (1991) (affirming Attorney General's delegated authority to add new drugs to controlled substance schedule and thereby "define criminal conduct").

(noting "technical nature" of interpretative questions). That is the only way to respect Congress's express judgment to delegate rulemaking authority to ATF and to designate it as the country's principal gun regulator. *Cf. United States v. McGill*, 74 F.3d 64, 67 (5th Cir. 1996) ("We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications.").

C. If *Chevron* Does Not Apply, *Skidmore* Does

If the Court were to conclude that *Chevron* is inapplicable, it should nonetheless defer to ATF's interpretation as persuasive under *Skidmore*, a tack this and other courts have taken. *See, e.g.*, *United States v. Brooks*, 681 F.3d 678, 693 (5th Cir. 2012) (affording agency *Skidmore* deference in criminal prosecution); *United States v. One Harrington & Richardson Rifle, Model M-14, 7.62 Caliber Serial No. 85279*, 378 F.3d 533, 534–35 (6th Cir. 2004) (deferring to ATF under *Skidmore*); *United States v. Granados-Alvarado*, 350 F. Supp. 3d 355, 360 (D. Md. 2018) (according ATF's regulations "some degree of deference"); *Freedom Ordnance Mfg., Inc. v. Brandon*, 2018 WL 7142127, at *6 (S.D. Ind. Mar. 27, 2018) (ATF "entitled to deference" even absent *Chevron*.).

CONCLUSION

For the reasons explained above, and those set out by the Government in its brief, the district court's decision should be affirmed.

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Respectfully submitted,

s/ Ian Simmons

Nate Asher
Shane A. Hunt
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036

Anna Pletcher
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

Ian Simmons
Elena Zarabozo
Rachel A. Chung
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006

Scott Snyder
Tyler Helms
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071

Counsel for Giffords Law Center to Prevent Gun Violence

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2021, I electronically filed a true and correct copy of the foregoing *Amicus Curiae* Brief with the Clerk of Court by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Ian Simmons
Ian Simmons

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

s/ Ian Simmons
Ian Simmons