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.

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

BRIEF FOR NATIONAL SPORTS SHOOTING FOUNDATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
BRIAN J. FIELD
KENNETH A. KLUKOWSKI
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
cbartolomucci@schaerr-jaffe.com

Counsel for Amicus Curiae

July 24, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Federal Agencies Such as ATF Rely on *Chevron* and Alleged Statutory Ambiguity After Whipsawing Regulated Industries, Such as the Firearm Industry, With Changed Statutory Interpretations. 3

A. Shifting Agency Regulations Affect the Firearm Industry and Many Other Industries. 4

B. ATF Often Seeks and Courts Often Grant *Chevron* Deference to Support Changing Interpretations of Laws Affecting Second Amendment Rights. 6

II. By Continuing to Apply *Chevron* Deference, Courts Deprive Regulated Entities from Being Able to Rely on Agency Positions. 11

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

10 Ring Precision, Inc. v. *Jones*,
722 F.3d 711 (5th Cir. 2013) 7

Abramski v. *United States*,
573 U.S. 169 (2014) 8

Agostini v. *Felton*,
521 U.S. 203 (1997) 11

Aposhian v. *Barr*,
958 F.3d 969 (10th Cir.), *vacated en banc,*
973 F.3d 1151 (10th Cir. 2020), *and*
reinstated sub nom. Aposhian v. *Wilkinson*,
989 F.3d 890 (10th Cir. 2021),
cert. denied sub nom. Aposhian v. *Garland*,
143 S. Ct. 84 (2022) 16

Arizona v. *Rumsey*,
467 U.S. 203 (1984) 11

Atlantic Mut. Ins. Co. v.
Commissioner of Internal Revenue,
523 U.S. 382 (1998) 8

Bastias v. *U.S. Att'y Gen.*,
42 F.4th 1266 (11th Cir. 2022),
petition for cert. docketed sub nom.
Bastias v. *Garland*,
No. 22-868 (U.S. Mar. 10, 2023) 16

Buffington v. *McDonough*,
143 S. Ct. 14 (2022) 14, 16, 18

Cargill v. *Garland*,
57 F.4th 447 (5th Cir. 2023),
petition for cert. docketed,
No. 22-976 (U.S. Apr. 7, 2023) 9

Chevron, U.S.A., Inc. v.
Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 3

Citizens United v. *Federal Election Comm'n*,
558 U.S. 310 (2010) 6

Dada v. *Mukasey*,
554 U.S. 1 (2008) 8, 16

Daibo v. *Attorney Gen.*,
265 F. App'x 56 (3d Cir. 2008) 10

District of Columbia v. *Heller*,
554 U.S. 570 (2008) 6

Gamble v. *United States*,
139 S. Ct. 1960 (2019) 11, 12

Guedes v. *Bureau of Alcohol, Tobacco,*
Firearms and Explosives,
45 F.4th 306 (D.C. Cir. 2022),
reh'g denied, 66 F.4th 1018 (D.C. Cir. 2023),
petition for cert. docketed,
No. 22-1222 (U.S. June 20, 2023) 7, 8

Guedes v. *Bureau of Alcohol, Tobacco,*
Firearms and Explosives, 920 F.3d 1 (D.C.
Cir. 2019), *superseded by*, 45 F.4th 306 (D.C.
Cir. 2022), *reh'g denied,* 66 F.4th 1018 (D.C.
Cir. 2023), *petition for cert. docketed,* No. 22-
1222 (U.S. June 20, 2023) 7, 8

Gun Owners of Am., Inc. v. *Garland*,
19 F.4th 890 (6th Cir. 2021), *cert. denied*,
143 S. Ct. 83 (2022) 9

Hardin v. *Bureau of Alcohol, Tobacco,*
Firearms & Explosives,
65 F.4th 895 (6th Cir. 2023) 9

In re Murchison,
349 U.S. 133 (1955) 16

Janus v. *American Fed'n of State, Cnty.,*
& Mun. Emps., Council 31,
138 S. Ct. 2448 (2018) 11

Marbury v. *Madison*,
1 Cranch 137 (1803) 15

McDonald v. *City of Chicago*,
561 U.S. 742 (2010) 6

Michigan v. *Environmental Prot. Agency*,
576 U.S. 743 (2015) 15

National Cable & Telecomms. Ass'n v.
Brand X Internet Servs.,
545 U.S. 967 (2005) 16

Palmore v. *United States*,
411 U.S. 389 (1973) 17

Payne v. *Tennessee*,
501 U.S. 808 (1991) 11

Reed v. *Rhodes*,
934 F. Supp. 1492 (N.D. Ohio 1996),
aff'd, 179 F.3d 453 (6th Cir. 1999) 17

Ron Peterson Firearms, LLC v. *Jones*,
760 F.3d 1147 (10th Cir. 2014) 7

Scialabba v. *Cuellar de Osorio*,
573 U.S. 41 (2014) 15

UC Health v. *National Lab. Relations Bd.*,
803 F.3d 669 (D.C. Cir. 2015) 15

United States v. *Anaya-Acosta*,
629 F.3d 1091 (9th Cir. 2011) 9

United States v. *Apel*,
571 U.S. 359 (2014) 8

United States v. *Atandi*,
376 F.3d 1186 (10th Cir. 2004) 10

United States v. *Bazargan*,
992 F.2d 844 (8th Cir. 1993) 10

United States v. *Flores*,
404 F.3d 320 (5th Cir. 2005),
abrogated by Abramski as recognized by
United States v. *Garcia*,
707 F. App'x 231 (5th Cir. 2017) 10

United States v. *Orellana*,
405 F.3d 360 (5th Cir. 2005) 9

Vasquez v. *Hillery*,
474 U.S. 254 (1986) 11

West Virginia v. *Environmental Prot. Agency*,
142 S. Ct. 2587 (2022) 17, 18

Statutes

18 U.S.C. § 921 12

18 U.S.C. § 922 .... 4, 9, 10

18 U.S.C. § 923 7

18 U.S.C. § 924 10

26 U.S.C. § 5845 .... 9, 12

Gun Control Act of 1968,
Pub. L. No. 90-618, 82 Stat. 1213............................ 4

National Firearms Act of 1934,
Pub. L. No. 73-474, 48 Stat. 1236............................ 4

Regulations

Bump-Stock-Type Devices,
83 Fed. Reg. 66,514 (Dec. 26, 2018) 4, 7

Definition of "Frame or Receiver" and
Identification of Firearms,
87 Fed. Reg. 24,652 (Apr. 26, 2022) 5, 6

Factoring Criteria for Firearms with
Attached "Stabilizing Braces",
88 Fed. Reg. 6,478 (Jan. 31, 2023)........................ 6, 12

Other Authorities

Bumpstocks and Acceleration Devices Act,
H.R. 4594, 116th Cong. (2019) 13

Closing the Bump Stock Loophole Act of 2021,
H.R. 5427, 117th Cong. (2022) 13

Closing the Bump Stock Loophole Act of 2023,
H.R. 396, 118th Cong. (2023) 13

Closing the Bump-Stock Loophole Act,
H.R. 4168, 115th Cong. (2017) 13

The Federalist No. 11
(Alexander Hamilton) (Clinton Rossiter ed.,
1961) 17

The Federalist No. 37
(James Madison) (Clinton Rossiter ed., 1961) 18

Joseph G.S. Greenlee,
The American Tradition of Self-Made Arms,
54 St. Mary's L. J. 35 (2023) 5

High Speed Gunfire Prevention Act,
H.R. 3606, 116th Cong. (2019) 13

Henry J. Kauffman,
Early American Gunsmiths 1650–1850
(1952) 5

Protecting Our Communities Act,
H.R. 3299, 117th Cong. (2021) 13

Protecting Our Kids Act,
H.R. 7910, 117th Cong. (2022) 13

Christopher J. Walker,
Inside Agency Statutory Interpretation,
67 Stan. L. Rev. 999 (2015) 14

What is a ghost gun?,
CBS News (Apr. 11, 2022) 5

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The National Shooting Sports Foundation, Inc. (NSSF) is the trade association of the firearm, ammunition, hunting and shooting sports industry.[1] Founded in 1961, NSSF is a Connecticut nonprofit corporation recognized under Section 501(c)(6) of the Internal Revenue Code as a professional association. Today, NSSF has approximately 10,000 members, including federally licensed firearm and ammunition manufacturers, distributors, and retailers, as well as manufacturers, distributors, and retailers of products for the hunting, shooting and self-defense market, public and private shooting ranges, gun clubs, sportsmen's organizations, and endemic media. NSSF's mission is to promote, protect and preserve hunting and the shooting sports.

NSSF members produce and sell products such as those discussed in this brief, products that a federal agency previously assured them were legal under federal law. After the agency decides a product is lawful, however, it may suddenly reverse course and declare the product is now illegal, even without any intervening change in the statute. Invoking this Court's *Chevron* doctrine, the lower federal courts often defer to these shifting agency determinations,

[1] Counsel for *amicus curiae* certifies, pursuant to Supreme Court Rule 37.6, that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

adversely affecting both NSSF's members and the purchasing public.

SUMMARY OF ARGUMENT

Federal agencies such as the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) rely on the *Chevron* doctrine—and supposed statutory ambiguity—to abruptly reverse course from their longstanding regulatory determinations. Like other industries, the firearm industry suffers from regulatory whipsaw as a result of changing agency interpretations of statutes that have not changed. ATF regularly seeks *Chevron* deference for its whipsawing rules, and, all too often, courts are willing to oblige. Ongoing litigation in the lower courts over firearm accessories such as bump stocks and stabilizing arm braces are only the latest examples of this unfortunate phenomenon. The fact that federal courts give *Chevron* deference to ATF policy shifts that regulate and restrict a fundamental constitutional right confirms that the time has come for *Chevron* to be reconsidered—and rejected.

By deferring under *Chevron* to an agency's changed interpretation of an unchanged statute, courts make it impossible for companies in regulated industries, such as the firearm industry, to rely upon an agency's existing interpretation—contrary to one of the primary values underlying the doctrine of *stare decisis* and, indeed, contrary to the rule of law itself. These norms serve an important function, and the fact that Congress has repeatedly rejected proposed measures that would have changed the relevant statutes makes clear that ATF should not be able to whipsaw the

firearm industry with the stroke of a pen, to say nothing of courts deferring to that whipsaw.

Chevron imposes an unwarranted disadvantage on those seeking to challenge this regulatory whipsaw in court—especially when a reviewing court says it does not agree with the agency's interpretation but that the interpretation clears the low bar of being "reasonable." This is not the system that the Framers devised, nor is it the system that due process promises when a member of a regulated industry seeks to challenge government overreach.

ARGUMENT

I. Federal Agencies Such as ATF Rely on *Chevron* and Alleged Statutory Ambiguity After Whipsawing Regulated Industries, Such as the Firearm Industry, With Changed Statutory Interpretations.

Federal government agencies often argue that a statutory provision at issue in litigation is ambiguous, and that the court should therefore defer to the agency's interpretation under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). A prime example is in litigation involving federal gun control laws where ATF asserts a statutory interpretation and insists that it receive deference.

A. Shifting Agency Regulations Affect the Firearm Industry and Many Other Industries.

Like many highly regulated industries, the firearm industry is subject to continually shifting agency regulations. In the case of the firearm industry, the regulating agency is the ATF. This regulatory whipsaw imposes significant costs on members of this industry, impacting both the companies comprising that industry, and the prices and choices available to consumers.

An example currently in litigation, as discussed below in Part I-B, concerns "bump stocks" on firearms. ATF had previously allowed certain models of bump stocks. Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,517 (Dec. 26, 2018). However, ATF reversed course in 2018 and issued a new rule designating bump stocks as machineguns under 26 U.S.C. § 5845(b). *Id.* at 66,553-66,554. Ever since the passage of the National Firearms Act of 1934 (NFA), Pub. L. No. 73-474, 48 Stat. 1236, and subsequent federal firearms statutes such as the Gun Control Act of 1968 (GCA), Pub. L. No. 90-618, 82 Stat. 1213, it is generally illegal to own a machinegun, 18 U.S.C. § 922(o)(1); indeed, it is a felony carrying up to 10 years in prison, *id.* § 924(a)(2). Thus, through this regulatory about face, ATF was able to accomplish by regulation something that Congress had not done—making illegal a product that was legally possessed by many law-abiding Americans, despite Congress not changing the underlying statute in any way.

Firearm accessories are made from raw materials that cost money and are transformed into final products by skilled craftsmen using precision-engineered heavy machinery. The financial impact of a product suddenly becoming illegal is therefore significant both to those companies and to the purchasing public.

Bump stocks are not alone in their ever-changing treatment by ATF. Another is the frame or receiver rule, which proponents of a particular political narrative refer to as "ghost guns" in order to grab as many headlines as possible. See, *e.g.*, *What is a ghost gun?*, CBS News (Apr. 11, 2022), https://www.cbsnews.com/news/what-is-a-ghost-gun/. ATF recently changed the regulatory definition of the statutory term "frame or receiver," as well as related terms such as "firearm," "gunsmith," and "complete weapon." Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652, 24,652, 24,653 (Apr. 26, 2022). This had a substantial and unexpected impact on the many Americans who are part of a cottage industry of private firearms manufacturers who make various custom firearm parts. *Id.* at 24,654-24,658.[2] In promulgating its new rule, ATF superseded several of its own previous policy determinations upon which the firearm industry relied, determinations under which these

---

[2] This small industry goes back to the Founding era and is woven into the history and tradition of private firearm ownership in the United States. Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's L. J. 35, 45-71 (2023); see also generally Henry J. Kauffman, *Early American Gunsmiths 1650–1850* (1952).

gunsmithing activities were legal. *Id.* at 24,730. Now they are significantly curtailed. See *id.* at 24,727-24,730.

Another recent example concerns stabilizing arm braces. ATF is now regulating these firearm accessories. See Factoring Criteria for Firearms with Attached "Stabilizing Braces", 88 Fed. Reg. 6,478 (Jan. 31, 2023). In addition to asserting the illegality of this rule under the Second Amendment, firearms statutes, and the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, *id.* at 6,499-6,507, critics point out that this rule makes it more difficult for some individuals with physical limitations to use a firearm and it imposes additional costs on companies in the firearm industry. *Id.* at 6,507-6,521. There are substantial costs of various types imposed here because of reliance on the previous regulatory framework. *Id.* at 6,507-6,508.

B. ATF Often Seeks and Courts Often Grant *Chevron* Deference to Support Changing Interpretations of Laws Affecting Second Amendment Rights.

ATF often expects *Chevron* deference in litigation, which is extraordinary given that the right to keep and bear arms is a fundamental constitutional right. *McDonald* v. *City of Chicago*, 561 U.S. 742, 778 (2010); *District of Columbia* v. *Heller*, 554 U.S. 570, 598 (2008). Such enumerated rights are "[p]remised on mistrust of governmental power." *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 340 (2010). Given that Second Amendment rights can be exercised only if individuals can lawfully obtain a firearm, it is

astounding that the government would request or receive deference on laws regulating the exercise of such rights. But that is precisely what happens frequently with *Chevron* regarding federal firearms laws, often at the request of ATF.

Sometimes ATF prevails without that deference. For instance, the Fifth Circuit upheld ATF's demands that firearm retailers report certain information. *10 Ring Precision, Inc.* v. *Jones*, 722 F.3d 711, 714 (5th Cir. 2013). The court held that the relevant provision of the GCA, codified at 18 U.S.C. § 923(g)(5)(A), unambiguously conferred this authority. *Id.* at 718. But the court also opined that *Chevron* would otherwise apply, *id.* at 717-718, so ATF would have prevailed even without clear congressional authorization. The Tenth Circuit similarly held that, although a different GCA provision unambiguously authorized ATF's demand for information, *Chevron* would have saved the case for ATF even without it. See *Ron Peterson Firearms, LLC* v. *Jones*, 760 F.3d 1147, 1155 (10th Cir. 2014) (interpreting 18 U.S.C. § 923(g)(1)(A)).

A prime example of courts allowing ATF to tack one way and then another concerns ATF's regulation of bump stocks. Take *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1 (D.C. Cir. 2019) (denying preliminary injunction) (*Guedes I*), *superseded by*, 45 F.4th 306 (D.C. Cir. 2022) (*Guedes II*) (final judgment), *reh'g denied,* 66 F.4th 1018 (D.C. Cir. 2023), *petition for cert. docketed,* No. 22-1222 (U.S. June 20, 2023), which concerns the bump stock rules, 83 Fed. Reg. 66,514. The D.C. Circuit followed this Court's reasoning that, under *Chevron*, an "agency

need not adopt * * * the best reading of the statute, but merely one that is permissible." *Guedes I*, 920 F.3d at 17 (quoting *Dada* v. *Mukasey*, 554 U.S. 1, 29 n.1 (2008) (Scalia, J., dissenting)); *id.* at 28 (quoting *Atlantic Mut. Ins. Co.* v. *Commissioner of Internal Revenue*, 523 U.S. 382, 389 (1998) (holding the test is "not whether [the agency's interpretation is] the best interpretation, of the statute but whether it represents a reasonable one.") (alteration in original)). The court applied *Chevron* deference and upheld the regulation. *Id.* at 29, 32. In *Guedes I*, the D.C. Circuit disregarded this Court's instruction that "'criminal laws are for courts, not for the Government, to construe.'" 920 F.3d at 23 (quoting *Abramski* v. *United States*, 573 U.S. 169, 191 (2014))[3]; see also *United States* v. *Apel*, 571 U.S. 359, 369 (2014). The Court did so by taking a winding road of precedents that were plainly irrelevant because they predated *Abramski*. See *Guedes I*, 920 F.3d at 23-25. But such is the appeal of *Chevron*.

This Court denied certiorari in *Guedes I*, after the preliminary injunction denial, but not without a comment from Justice Gorsuch criticizing *Chevron*'s applicability. 140 S. Ct. at 789-791 (GORSUCH, J., statement respecting the denial of certiorari). Upon final judgment, the panel concluded that the statute unambiguously favored the government and thus that *Chevron* deference was unnecessary. *Guedes II*, 45 F.4th at 313.

---

[3] *Abramski* is of particular interest to *Amicus* NSSF, given that it concerned a federal gun-control statute. *Abramski* v. *United States*, 573 U.S. 169, 172 (2014).

Other circuits, however, disagree. One appeals court held that 26 U.S.C. § 5845(b) is ambiguous and upheld ATF's rule under *Chevron* step two, a judgment that was affirmed by an evenly divided *en banc* court. See, *e.g.*, *Gun Owners of Am., Inc.* v. *Garland*, 19 F.4th 890, 898, 906-907 (6th Cir. 2021) (en banc), *cert. denied*, 143 S. Ct. 83 (2022) (mem.).[4] Another court sitting *en banc* agreed that the statute is ambiguous but held that courts must *not* defer under *Chevron* on the bump stock rule, setting aside the rule. *Cargill* v. *Garland*, 57 F.4th 447, 465, 471-473 (5th Cir. 2023) (en banc), *petition for cert. docketed,* No. 22-976 (U.S. Apr. 7, 2023).

Chevron's outsized influence is witnessed when ATF interprets other federal gun-control provisions. Even when adjudicating immigration cases, some courts afford deference to ATF's interpretation of who qualifies as an illegal alien under 18 U.S.C. § 922(g)(5)(A), even though ATF has no expertise in immigration matters. *United States* v. *Anaya-Acosta*, 629 F.3d 1091, 1093-1094 (9th Cir. 2011) (per curiam).[5] On occasion, other federal agencies will receive the same deference under *Chevron* that ATF typically enjoys, such as the Board of Immigration Appeals regarding whether an alien here on a student

---

[4] The Sixth Circuit subsequently held that the rule of lenity prevails over *Chevron* deference regarding the bump stock rule. *Hardin* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 65 F.4th 895, 900 (6th Cir. 2023).

[5] That proved to be a bridge too far for the Fifth Circuit, which denied deference and instead invoked the rule of lenity to dismiss an indictment under the same provision. *United States* v. *Orellana*, 405 F.3d 360, 361, 366-369 (5th Cir. 2005).

visa falsified information when filling out a Form 4473 to purchase a firearm. *Daibo* v. *Attorney Gen.*, 265 F. App'x 56, 57-58 (3d Cir. 2008).

Still other times *Chevron*'s gravity is observed by a court taking the confusing middle ground of holding that *Chevron* is not warranted in a particular case in which ATF claimed *Chevron*, but that the court will nonetheless extend a nebulous, milder form of deference. The Eighth Circuit did so regarding 18 U.S.C. §§ 922(g)(5)(A), 924(a)(2), in a case involving an alien who no longer had legal status. *United States* v. *Bazargan*, 992 F.2d 844, 845, 848 (8th Cir. 1993). The Tenth Circuit later did so in another case involving 18 U.S.C. § 922(g)(5)(A), holding ATF should receive "some deference" but the court would not decide whether to grant "full *Chevron* deference." *United States* v. *Atandi*, 376 F.3d 1186, 1189 (10th Cir. 2004) (citation omitted). The Fifth Circuit likewise afforded "some degree of deference," but not "full *Chevron* deference," in another case involving the same statute. *United States* v. *Flores*, 404 F.3d 320, 326-327 (5th Cir. 2005), *abrogated by Abramski as recognized by United States* v. *Garcia*, 707 F. App'x 231, 234 (5th Cir. 2017). The *Flores* approach raises troubling questions. How does a court decide when full *Chevron* deference is appropriate versus "*Chevron* Lite"? What is the test? Evidently *Chevron*'s pull is so intense that, when it comes to ATF and gun control, *Chevron* applies even when it doesn't.

II. By Continuing to Apply *Chevron* Deference, Courts Deprive Regulated Entities from Being Able to Rely on Agency Positions.

As noted, the firearm industry is subject to many statutes where Congress has imposed rules and limitations on their activities. Putting aside whether those rules and limitations pass constitutional muster, absent *Chevron* and its progeny, the industry would be able to rely on the consistent application of those statutes. Indeed, that is what *stare decisis* demands, as "it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (citing *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986)). If courts simply applied statutes based on their text, without routinely relying on shifting interpretations from agencies, regulated entities would be able to rely on those judicial interpretations going forward.

True, there are instances when this Court departs from precedent. But such departure "'demands special justification.'" *Gamble* v. *United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)). And it is more likely to occur in the context of constitutional matters, where "[t]he doctrine [of *stare decisis*] 'is at its weakest … because [the Court's] interpretation can be altered only by constitutional amendment or by overruling our prior decisions.'" *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (quoting *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997)). In contrast, where a court has interpreted a statute, it

can "override [the Court's] errors by ordinary legislation." *Gamble*, 139 S. Ct. at 1969.

These norms serve an important purpose for regulated entities such as the firearm industry. When an applicable statute has not changed, businesses must be able to rely on the statute's consistent application going forward. Companies in a regulated industry should be able to rely upon the agency's interpretation of a statute and count on the agency adhering to that interpretation even when changing it would be politically expedient.

In the case of ATF, the agency determined bump stocks did not convert a firearm into a machinegun. Following a single high-profile tragic misuse of the accessory by a criminal, ATF reinterpreted the statute, 26 U.S.C. § 5845(b), to conclude that they now made a firearm a machinegun. Neither the applicable statute nor the product changed, only the politics.

Similarly, ATF previously determined that a stabilizing arm brace affixed to a pistol did not convert the firearm into a rifle under NFA, 26 U.S.C. § 5845(c), or short barreled rifle under the GCA, 18 U.S.C. § 921(a)(7)-(8). See 88 Fed. Reg. 6,479-6,480. A cottage industry consequently developed over almost a decade in full view of ATF. See *id.* at 6,479. Then after two instances of the accessory being criminally misused, ATF reversed its interpretation, saying the accessory henceforth makes the pistol a rifle (or short barreled rifle). See *id.* at 6,569-6570. Once again, nothing but the politics changed.

The implications for companies and consumers are significant. A consistent statutory interpretation allows a company to design new business lines based

on an understanding of what is permitted by the applicable statute. That includes hiring personnel, purchasing property, designing equipment, and many other activities. The markets for bump stocks and stabilizing arm braces are examples of an industry relying on previous guidance from an agency with regulatory authority over the industry, producing and selling products the agency had determined was legal, then suddenly that same regulator pulls the rug out from under the industry.

Additionally, if courts relied on the text of statutes, rather than agency interpretations, businesses would be able to track Congressional action (or inaction) to understand what activities are permitted. For instance, the firearm industry could rely on the fact that Congress has considered and rejected a host of legislative proposals that would have further regulated that industry. See, *e.g.*, Closing the Bump Stock Loophole Act of 2023, H.R. 396, 118th Cong. (2023); Protecting Our Kids Act, H.R. 7910, 117th Cong. (2022); Closing the Bump Stock Loophole Act of 2021, H.R. 5427, 117th Cong. (2022); Protecting Our Communities Act, H.R. 3299, 117th Cong. (2021); Bumpstocks and Acceleration Devices Act, H.R. 4594, 116th Cong. (2019); High Speed Gunfire Prevention Act, H.R. 3606, 116th Cong. (2019); Closing the Bump-Stock Loophole Act, H.R. 4168, 115th Cong. (2017).

But *Chevron*, and the general sense that agencies are due judicial deference, throws all this out the window. Instead, *Chevron* allows significant decisions impacting millions of Americans to change with the political winds. Indeed, "[w]hen one administration departs and the next arrives, a broad reading of

Chevron frees new officials to undo the ambitious work of their predecessors and proceed in the opposite direction with equal zeal." *Buffington* v. *McDonough*, 143 S. Ct. 14, 20 (2022) (GORSUCH, J., dissenting from denial of cert.).

And, as noted in Part I, this is not a hypothetical concern. Rather, this is the norm. Indeed, this is precisely what occurred in *Buffington*, where officials at the Department of Veterans Affairs "revise[d] their rules * * * to place new burdens on veterans" despite "Congress * * * not amend[ing] its laws in any relevant way." 143 S. Ct. at 20. Thus, while the Government may be taking steps to avoid subjecting *Chevron* to judicial scrutiny by "rarely invoke[ing] it" in litigation, *id.* at 22, the doctrine is clearly front of mind for the bureaucrats writing these changing interpretations. In fact, 90% of bureaucrats surveyed in a recent study stated that they used *Chevron* when drafting regulations. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1061-1062 & fig. 11 (2015). Thus, the constantly changing positions from agencies is not an incidental consequence of *Chevron*. Rather, *Chevron* "*encourage[s]* and reward[s] just these sorts of self-serving gambits." *Buffington*, 143 S. Ct. at 20 (GORSUCH, J., dissenting from denial of cert.) (emphasis added). Indeed, the development of an expansive *Chevron* doctrine has "encourage[d] executive agents not to aspire to fidelity to the statutes Congress has adopted, but to do what they might while they can." *Id.* And the impact is that "individuals can never be sure of their legal rights and duties." *Id.* This turns due process on its head.

What's more, this system imposes a disadvantage on anyone who attempts to challenge an agency's shifting interpretation in court. In any such judicial proceeding, the agency starts with ten points on the board, as *Chevron* requires the reviewing court to begin with the proposition that the agency's interpretation is correct, provided the interpretation is at least "reasonable." *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 57 (2014). That is true even when the court, which is given "the ultimate interpretative authority to 'say what the law is,'" believes that the agency's interpretation is inaccurate. *Michigan* v. *Environmental Prot. Agency*, 576 U.S. 743, 761 (2015) (THOMAS, J., concurring) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)); see also *Scialabba*, 573 U.S. at 57 (stating that, when an agency's interpretation is "reasonable," the Court should not "substitute its own reading").

Indeed, courts frequently state that, when applying *Chevron*, they are not necessarily in agreement that the agency's interpretation is correct. See, *e.g.*, *UC Health* v. *National Lab. Relations Bd.*, 803 F.3d 669, 688 (D.C. Cir. 2015) (Silberman, J., dissenting) ("[the] governing law, *Chevron* * * * for over thirty years has banned courts of appeal from * * * rejecting an agency statutory interpretation of supposedly ambiguous language in favor of what a reviewing court believes is a better or best reading"). For instance, the Eleventh Circuit explains that "[a]n agency's interpretation * * * deserve[s] deference at *Chevron* step two [] if it's reasonable and consistent with the statute." *Bastias* v. *U.S. Att'y Gen.*, 42 F.4th 1266, 1273 (11th Cir. 2022) (cleaned up), *petition for cert. docketed sub nom.*

Bastias v. *Garland*, No. 22-868 (U.S. Mar. 10, 2023). And, the Eleventh Circuit continued, this is true "even if the agency's reading differs from what [we] believe[] is the best statutory interpretation." *Id.* (alterations in original) (quoting *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)). This is the impact of *Chevron*, "[f]or better or worse[.]" *Id.*

The Tenth Circuit has held similarly, noting that, where "*Chevron*'s two-step framework is inapplicable, we accept ATF's interpretation only if it is the *best reading* of the statute." *Aposhian* v. *Barr*, 958 F.3d 969, 979 (10th Cir.) (emphasis added), *vacated en banc,* 973 F.3d 1151 (10th Cir. 2020), *and reinstated sub nom*. *Aposhian* v. *Wilkinson*, 989 F.3d 890 (10th Cir. 2021), *cert. denied sub nom*. *Aposhian* v. *Garland*, 143 S. Ct. 84 (2022). But once *Chevron* is implicated, the Court is no longer allowed to interpret a statute in accordance with its "best reading." *Id.* ("At this second step, an 'agency need not adopt * * * the best reading of the statute, but merely one that is permissible.'") (alterations in original) (quoting *Dada*, 554 U.S. at 29 n.1 (Scalia, J., dissenting)).

But this is not the system the Framers established. Rather, "[a] fair trial *in a fair tribunal* is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955) (emphasis added). That is likely why "we like to boast that persons who come to court are entitled to have independent judges, not politically motived actors, resolve their rights and duties under law." *Buffington*, 143 S. Ct. at 18 (GORSUCH, J., dissenting from denial of cert.). While individuals may ordinarily "appeal to neutral magistrates," *id.*,

Chevron has created an exception. When anyone dares challenge a bureaucrat's decision, the court may not treat the parties equally.

Of course, due process cannot withstand such a flawed application of the judiciary's role in resolving disputes. And this becomes particularly problematic when a court is called upon to address a politically sensitive issue such as the regulation of firearms. It is in those situations where a neutral judgment is especially important. See, *e.g.*, *Palmore* v. *United States*, 411 U.S. 389, 412 (1973) (Douglas, J., dissenting) (an independent judiciary was "designed to protect litigants with unpopular or minority causes or litigants who belong to despised or suspect classes"); *Reed* v. *Rhodes*, 934 F. Supp. 1492, 1496 (N.D. Ohio 1996) (emphasizing importance of "fundamental principles that ensure fair, impartial, and equitable treatment of all interested parties" in case involving "highly controversial area[s]"), *aff'd*, 179 F.3d 453 (6th Cir. 1999). *Chevron*, however, distorts the fundamental guarantee that a party will receive a fair hearing in court.

Moreover, *Chevron* further twists the system by imposing barriers to a regulated entity's ability to challenge Government overreach outside of the judicial system. In the Framers' estimation, "a republic * * * would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'" *West Virginia* v. *Environmental Prot. Agency*, 142 S. Ct. 2587, 2617 (2022) (GORSUCH, J., concurring) (quoting The Federalist No. 11 at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Importantly, the Framers

"vest[ed] the law-making power in the people's elected representatives * * * to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be keep in dependence on the people.'" *Id.* (alternations in original) (quoting The Federalist No. 37 at 227 (James Madison) (Clinton Rossiter ed., 1961)). When Congress passes laws that impose onerous burdens on the citizenry, citizens may respond by removing members of Congress through elections. But the Framers could not have conceived of unelected and unaccountable bureaucrats having the power to legislate across broad swaths of the economy with citizens having no recourse. Such a system strips the Government of all accountability.

Thus, if *Chevron* remains in place, Americans cannot rely on an agency to provide a consistent interpretation of statutes. And industries subject to those changing rules are deprived of their rights to a neutral arbiter. For those who this does not force out of the industry, they must plan for a substantial increase in the cost of doing business to chase the government's ever-changing views. Once again, this simply benefits "[t]he powerful and wealthy [who] can plan for and predict future regulatory changes." *Buffington*, 143 S. Ct. at 20 (GORSUCH, J., dissenting from denial of cert.).

The Court should return to the system the Framers designed and remove the administrative state from the judicial process of interpreting statutes.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
BRIAN J. FIELD
KENNETH A. KLUKOWSKI
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
cbartolomucci@schaerr-jaffe.com

Counsel for Amicus Curiae

July 24, 2023