STEPHEN A. HIGGINSON, *Circuit Judge*, joined by DENNIS and GRAVES, *Circuit Judges*, dissenting:

I.

For the reasons stated in the panel opinion, *Cargill v. Garland*, 20 F.4th 1004 (5th Cir. 2021), *reh'g granted*, 37 F.4th 1091 (5th Cir. 2022), I respectfully dissent from our court's decision that a bump stock is not a machinegun within the meaning of 18 U.S.C. § 921(a)(24).

II.

I write further to dissent from our court's use of lenity to rewrite this statute.

The Supreme Court has repeatedly instructed that "the rule of lenity only applies, if, after considering text, structure, history, and purpose, there remains a *grievous* ambiguity or uncertainty in the statute *such that the [c]ourt must simply guess* as to what Congress intended." *Maracich v. Spears*, 570 U.S. 48, 76 (2013) (emphases added) (cleaned up); *see, e.g.*, *Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (similar); *Robers v. United States*, 572 U.S. 639, 646 (2014) (similar); *United States v. Hayes*, 555 U.S. 415, 429 (2009) (similar). Under this standard, the Supreme Court has been clear that we do not invoke lenity just because "multiple, divergent principles of statutory construction" are available, *Lockhart v. United States*, 577 U.S. 347, 361 (2016), "the statute's text, taken alone, permits a narrower construction," *Abramski v. United States*, 573 U.S. 169, 188 n.10 (2014), or "a law merely contains some ambiguity or is difficult to decipher," *Wooden v. United States*, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring). Rather, the Supreme Court lets us deploy lenity to narrow laws only as a last resort when,

having tried to make sense of a statute using every other tool, we face an unbreakable tie between different interpretations.[1]

Contrary to this authority, the majority opinion and the lead concurrence apply the rule of lenity to garden-variety ambiguity.[2] In doing so, today's ruling usurps Congress's power to define what conduct is subject to criminal sanction and creates grave ambiguity about the scope of federal criminal law.

Under the majority's rule, the defendant wins by default whenever the government fails to prove that a statute unambiguously criminalizes the defendant's conduct. The majority holds that § 921(a)(24) is "unambiguous," but claims that if the statute *were* ambiguous, it would

---

[1] Notwithstanding this Supreme Court precedent, there is robust scholarly debate about how much ambiguity triggers lenity. *See, e.g.*, David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 567 (2018) (cataloguing nine tests); Intisar S. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179 (2018) (conducting empirical study of lenity cases); Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918 (2020) (attacking the modern approach). This debate has crossed over to sitting Supreme Court Justices, who are free to explore whether they might change the law that binds us. *Compare Shular v. United States*, 140 S. Ct. 779, 788 (2020) (Kavanaugh, J., concurring), *and Wooden*, 142 S. Ct. at 1075 (Kavanaugh, J., concurring), *with Wooden*, 142 S. Ct. at 1084 (Gorsuch, J., concurring in the judgment) (questioning the "grievous" ambiguity standard).

[2] In this respect, today's ruling departs from our many cases that follow binding Supreme Court law. *See, e.g.*, *Gonzalez v. CoreCivic, Inc.*, 986 F.3d 536, 539 (5th Cir. 2021) (Ho, J.) (affirming that the rule of lenity "has force only where a law is grievously ambiguous, meaning that the court can make no more than a guess as to what the statute means" (cleaned up)). However, the recent trend in our circuit, culminating here, has been to lower the bar for lenity beneath the floor presently set by the Supreme Court. *See, e.g.*, *United States v. Hamilton*, 46 F.4th 389, 397 n.2 (5th Cir. 2022) (Elrod, J.) (applying lenity to "resolve all reasonable doubts about the meaning of [the criminal statute] in [the defendant's] favor" and asserting that lenity applies where "there is some doubt about the meaning" of the statute).

invoke the rule of lenity.[3] In making this assertion, the majority assumes that the statute would necessarily be *so* ambiguous that "all traditional tools of statutory construction" would "fail to provide meaningful guidance." Yet the majority does not explain how the tools upon which it relied to interpret the statute—dictionaries, grammar, and corpus linguistics—would be useless to resolve an interpretive debate if the statute were ambiguous. So the majority rests on an unstated and unsupported leap: ambiguous statutes are always grievously ambiguous. In effect, this means the rule of lenity would apply to decide any ambiguity in Cargill's favor.[4]

The lead concurrence adopts an equally low threshold for lenity. Unlike the majority, the concurrence concludes that § 921(a)(24) *is* ambiguous. But instead of relying on familiar techniques to resolve the ambiguity, the concurrence merely asserts that this is "an easy case for invoking the rule of lenity." The concurrence first invokes lenity because it cannot decide whether "single function of the trigger" means that "the trigger acts once" or "the shooter acts once on the trigger," and so "the statute appears to be in equipoise." This dilemma is of the concurrence's own making. The concurrence contrives an impossible task by isolating the phrase "single function of the trigger" from the rest of the provision.[5]

---

[3] The only other court to find that bump stocks are not machineguns made a similar mistake. *See United States v. Alkazahg*, 81 M.J. 764, 784 (N-M. Ct. Crim. App. 2021) (asserting that defendant would prevail thanks to lenity if the court's "statutory analysis [were] incorrect and the ambiguity could not be resolved").

[4] The majority insists that this rule is limited to "this statute." But by devising a special rule of lenity for guns, the majority substitutes its own policy preferences for Congress's.

[5] Notably, the concurrence ignores the phrase "without manual reloading," which immediately precedes "by a single function of the trigger" and refers to the action of a shooter (implied subject) on a gun (object). *See* 26 U.S.C. § 5845(b). It does so because

Further, the concurrence refuses to explain why it could not weigh relevant evidence, including legislative history and District Judge Ezra's inferences drawn from expert testimony at trial, *see Cargill*, 20 F.4th at 1010, 1013, to determine whether the "mechanistic" interpretation prevails.

The lead concurrence next invokes lenity because the text does not "definitive[ly] answer" the question of whether the statutory term "automatically" means "no human input," not "less human input." But just because both Cargill and the government "put[] forth [their] competing theories with great force" does not mean we are left to guess at and then invalidate what Congress intended. *Maracich*, 570 U.S. at 76 (cleaned up).

More fundamentally, our court's new lenity regime violates separation-of-powers principles. Article I gives Congress, "not the [c]ourt," the power to "define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). As the Supreme Court has resolved, when properly limited to *grievous* ambiguity, lenity furthers this design. By breaking interpretive ties for the defendant where no other tool yields an answer, this canon keeps us from accidentally legislating crimes from the bench. But lenity is the enemy of Article I when applied to any ambiguity that might arise during statutory interpretation and that could be resolved using other interpretive tools. This is because statutory language can be ambiguous enough to bear multiple interpretations—even here, a

---

"no rule of grammar" would compel us to read the statute "from the shooter's perspective." But the grammar is clear: a shooter is the implied subject of the sentence. Even if this conclusion were not apparent from context, we do not decide what statutes mean by drawing inferences from the absence of a grammatical postulate—we use common sense. *See United States v. Castleman*, 572 U.S. 157, 183 (2014) (Scalia, J., concurring in part and concurring in the judgment); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (Scalia, J.). Here, the concurrence's reading has the strange effect of anthropomorphizing the gun and eliding the shooter from the statute.

"mechanistic" one—yet still evince intent to sanction specific conduct. *Compare Hayes*, 555 U.S. at 429 (acknowledging that a statute was "not a model of the careful drafter's art" but declining to apply lenity where "text, context, purpose, and what little there is of drafting history all point in the same direction"), *and United States v. Palomares*, 52 F.4th 640, 647 (5th Cir. 2022) (declining to apply lenity where "one approach [stood] prominently above the other interpretations"), *with Ladner v. United States*, 358 U.S. 169, 178 (1958) (applying lenity where the choice between interpretations would "be based on no more than a guess as to what Congress intended"); *cf.* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2196 (2002) (In the criminal law context, "judicial resolution of statutory ambiguities does not tread on the legislative role, but rather executes the legislative instructions as best as judges can."). Invoking lenity to avoid all ambiguity thwarts the meaning of the text and substitutes our judgment for the People's about what counts as a crime.[6]

Because our court holds that we have the power to narrow federal criminal law where ambiguity appears, today's ruling, which conflicts with how every other circuit has interpreted § 921(a)(24), calls into question the range of conduct subject to criminal sanction.[7] Among other recent

[6] Such an expansive rule of lenity also "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). The Article III judicial power "requires a court to exercise its independent judgment in interpreting and expounding upon the laws" and "include[s] the power to resolve . . . ambiguities." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in the judgment). Therefore, when lenity is used as a get-out-of-interpretation-free card—here, to avoid passing on the legality of machineguns—it is especially inconsistent with our constitutional role.

[7] Of course, most criminal statutes are drafted by state legislatures, responding to imminent and present threats to public safety. Prohibitions on dangerous weapons are myriad. Many ban machineguns and define them, unambiguously I would say, along similar lines as Congress did in 1934. *See, e.g.*, TEX. PENAL CODE § 46.01(9).

decisions, we may have wrongly held that criminal defendants are ineligible for the First Step Act's "safety valve" provision, 18 U.S.C. § 3553(f), if they fail to meet any one of the statute's three requirements, *see Palomares*, 52 F.4th at 647, and that 26 U.S.C. § 7202 criminalizes the willful failure to "*either* truthfully account for taxes *or* pay them over," *United States v. Sertich*, 879 F.3d 558, 562 (5th Cir. 2018), because those statutes are not unambiguous. Moreover, given the ambiguities the concurrence perceives in "single function of the trigger" and "automatically," it is probable that other machineguns cannot be outlawed under § 921(a)(24)—even guns that fire multiple bullets when the shooter holds down the trigger. After all, the concurrence says that it's plausible that "automatically" means "no human input," and the pressure needed to depress a trigger is plausibly human input within the meaning of the statute.[8]

The concurrence argues that Congress could pass an "Analogue Act" that would explicitly go device by device, mechanistically, and define bump stocks as machineguns. This would work, the concurrence hypothesizes, because Congress passed a similar statute in the controlled substances context to regulate chemicals that were analogues to drugs named in an earlier act. *See* 21 U.S.C. §§ 802(32)(A), 813, 841(a)(1); *McFadden v. United States*, 576 U.S. 186, 188 (2015). Setting aside the obvious differences between guns and drugs—including the fact that a drug can be described with

[8] For example, devices called "auto-sears" that allow semiautomatic weapons to fire multiple rounds while the trigger is pulled are increasingly accessible to criminals. *See* Alain Stephens & Keegan Hamilton, *The Return of the Machine Gun*, THE TRACE (Mar. 24, 2022). Even though these devices gravely threaten public safety and law enforcement, *see* Michelle Homer & Melissa Correa, *'This Has to Stop': 19 Houston-Area Suspects Charged in Federal Crackdown on Illegal Gun Switches*, KHOU (Feb. 24, 2022); Florian Martin, *The Man Who Shot and Killed an HPD Officer Last Week Used an Illegally Modified Handgun, Bodycam Footage Shows*, HOUS. PUB. MEDIA (Oct. 13, 2021), it is uncertain after today's ruling whether federal law can reach them.

a molecular formula and a gun cannot—the concurrence is mistaken. Under our court's new lenity regime, it is unclear how Congress could draft such a statute while avoiding ambiguity as to what counts as a bump stock. As I explained, any ambiguity in the statute could be exploited to evade liability because those ambiguities must be construed in favor of defendants.

Indeed, after our court's ruling today, it is not clear that the Controlled Substance Analogue Enforcement Act of 1986 is even operable in practice. In relevant part, this statute defines a "controlled substance analogue" as a substance "the chemical structure of which is *substantially similar* to the chemical structure of a controlled substance in schedule I or II." 21 U.S.C. § 802(32)(A)(i) (emphasis added). Whether two substances have a "substantially similar" chemical structure may, in many cases, be ambiguous such that lenity would shield a manufacturer, distributor, or possessor of the analogue. This is not the result Congress intended.

III.

Today, our court extends lenity, once a rule of last resort, to rewrite a vital public safety statute banning machineguns since 1934. In conflict with three other courts of appeals, our court employs its new lenity regime to carve out from federal firearms regulation the bump stock—a device that helped the Las Vegas shooter fire over a thousand rounds during an eleven-minute-long attack, at times shooting about nine bullets per second, killing at least 58 people and wounding hundreds more. *See* Larry Buchanan et al., *What Is a Bump Stock and How Does It Work?*, N.Y. TIMES (updated Mar. 28, 2019). Therefore, our court uses lenity to legalize an instrument of mass murder. This is evident from our court's attempt to confine its new lenity regime only to this statute, giving machinegun owners immunity from prosecution that is not shared by other offenders under the federal code.

For those reasons and the reasons stated in the panel opinion, I respectfully dissent.