No. 19-296

In the Supreme Court of the United States

DAMIEN GUEDES, ET AL., PETITIONERS

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
MICHAEL S. RAAB
ABBY C. WRIGHT
BRAD HINSHELWOOD
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly denied a preliminary injunction where petitioners failed to demonstrate a likelihood of success on their contention that devices known as bump stocks, which permit users to fire a semiautomatic rifle repeatedly with a single pull of the trigger, do not qualify as "machinegun[s]" under the National Firearms Act, 26 U.S.C. 5845(b).

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statement ... 1
Argument ... 13
  A. The lower courts correctly determined that petitioners are not likely to succeed in challenging the rule ... 14
  B. This case would be an unsuitable vehicle for addressing petitioners' *Chevron* questions ... 19
    1. This case does not properly present questions about *Chevron* deference and the rule of lenity ... 20
    2. In any event, petitioners' *Chevron* questions do not warrant review ... 29
Conclusion ... 31

TABLE OF AUTHORITIES

Cases:

Abramski v. *United States*, 573 U.S. 169 (2014) ... 30
Akins v. *United States*, 312 Fed. Appx. 197 (11th Cir.), cert. denied, 557 U.S. 942 (2009) ... 5, 7, 15, 22
Aposhian v. *Barr*, 374 F. Supp. 3d 1145 (D. Utah 2019), appeal pending, No. 19-4036 (10th Cir. oral argument scheduled for Jan. 22, 2020) ... 19
Atlantic Mut. Ins. Co. v. *Commissioner*, 523 U.S. 382 (1998) ... 12, 29
Babbitt v. *Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995) ... 26, 29
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ... 9, 13, 25
Edelman v. *Lynchburg Coll.*, 535 U.S. 106 (2002) ... 30

Cases—Continued: Page

Encino Motorcars, LLC v. *Navarro*, 136 S. Ct. 2117 (2016) ... 20

Gun Owners of Am. v. *Barr*, 363 F. Supp. 3d 823 (W.D. Mich. 2019), appeal pending, No. 19-1298 (6th Cir. oral argument scheduled for Dec. 11, 2019) ... 19

Leocal v. *Ashcroft*, 543 U.S. 1 (2004) ... 29, 30

Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007) ... 25

Muscarello v. *United States*, 524 U.S. 125 (1998) ... 28

Perez v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) ... 20, 22

Shalala v. *Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995) ... 21

Staples v. *United States*, 511 U.S. 600 (1994) ... 16, 28

United States v. *Apel*, 571 U.S. 359 (2014) ... 30

United States v. *Grimaud*, 220 U.S. 506 (1911) ... 26

United States v. *Mead Corp.*, 533 U.S. 218 (2001) ... 20

United States v. *O'Hagan*, 521 U.S. 642 (1997) ... 26

United States v. *Olofson*, 563 F.3d 652 (7th Cir.), cert. denied, 558 U.S. 948 (2009) ... 10, 18

United States v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992) ... 29

United States v. *Wells*, 519 U.S. 482 (1997) ... 28

Constitution, statutes, and regulations:

Act of June 26, 1934, ch. 757, 48 Stat. 1236 ... 2

Administrative Procedure Act, 5 U.S.C. 706 ... 9

Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102(9), 100 Stat. 452-453 (18 U.S.C. 922(*o*)) ... 2

§ 101(6), 100 Stat. 450-451 (18 U.S.C. 921(a)(23)) ... 2

Statutes and regulations—Continued: Page

Gun Control Act of 1968, Pub. L. No. 90-618, Tit. II, sec. 201, § 5845(b), 82 Stat. 1231 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 29
National Firearms Act, 26 U.S.C. 5801 *et seq.* 1, 2
26 U.S.C. 5841(c) 3
26 U.S.C. 5845(b) ..... *passim*
Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, Tit. XI, Subtit. A, §§ 110102, 110105, 108 Stat. 1196-1198, 2000 3
15 U.S.C. 78n(e) 26
16 U.S.C. 1540(b)(1) 26
16 U.S.C. 1540(f) 26
18 U.S.C. 16(b) 29
18 U.S.C. 921(a)(30) (2000) 3
18 U.S.C. 922(m) 27
18 U.S.C. 922(v) (2000) 3
18 U.S.C. 923 27
18 U.S.C. 924(a)(2) 12
18 U.S.C. 926(a) 3, 25
26 U.S.C. 7801(a)(2)(A) 12
26 U.S.C. 7801(a)(2)(A)(i) 3
26 U.S.C. 7805(a) 3, 12, 25
27 C.F.R.:
Section 447.11 ..... 7, 8, 24
Section 478.11 ..... 7, 8, 24
Section 479.11 ..... 7, 8, 24
28 C.F.R.:
Section 0.130(a)(1) 3
Section 0.130(a)(2) 3

Miscellaneous: Page

ATF, U.S. Dep't of Justice, *National Firearms Act Handbook* (Apr. 2009) 3, 15

ATF Ruling 2006-2 (Dec. 13, 2006), https://go.usa.gov/xpbEX 5, 16

82 Fed. Reg. 60,929 (Dec. 26, 2017) 6

83 Fed. Reg. 7949 (Feb. 20, 2018) 7

83 Fed. Reg. 13,442 (Mar. 29, 2018) 7

83 Fed. Reg. 66,514 (Dec. 26, 2018) .... *passim*

H.R. Rep. No. 1780, 73d Cong., 2d Sess. (1934) 16

H.R. Rep. No. 495, 99th Cong., 2d Sess. (1986) 2

National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means, 73d Cong., 2d Sess. (1934) 16, 17

S. Rep. No. 1444, 73d Cong., 2d Sess. (1934) 16

In the Supreme Court of the United States

No. 19-296

DAMIEN GUEDES, ET AL., PETITIONERS

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A97) is reported at 920 F.3d 1. The opinion of the district court (Pet. App. C1-C81) is reported at 356 F. Supp. 3d 109.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2019. On June 24, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 29, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since the 1934 enactment of the National Firearms Act, 26 U.S.C. 5801 *et seq.*, federal law has imposed various requirements on persons possessing or

engaged in the business of selling machineguns and certain other firearms. See Act of June 26, 1934, ch. 757, 48 Stat. 1236. The Act, in its present form, defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. 5845(b). Since 1968, the definition has also encompassed parts that can be used to convert a weapon into a machinegun. See Gun Control Act of 1968, Pub. L. No. 90-618, Tit. II, sec. 201, § 5845(b), 82 Stat. 1231. A "machinegun" thus includes "the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. 5845(b).

In 1986, Congress generally criminalized the sale and possession of new machineguns, making it "unlawful for any person to transfer or possess a machinegun" unless a governmental entity is involved in the transfer or possession. Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102(9), 100 Stat. 452-453 (18 U.S.C. 922(*o*)). In enacting that ban, Congress incorporated the preexisting definition of "machinegun" from the National Firearms Act. § 101(6), 100 Stat. 450-451 (18 U.S.C. 921(a)(23)); cf. H.R. Rep. No. 495, 99th Cong., 2d Sess. 2, 7 (1986) (describing the machinegun-related amendments as among the "benefits for law enforcement" of the bill, and explaining "the need for more effective protection of law enforcement officers from the proliferation of machine guns").

Congress has authorized the Attorney General to prescribe rules and regulations to enforce the National Firearms Act and other legislation regulating firearms. See 26 U.S.C. 7801(a)(2)(A)(i), 7805(a); 18 U.S.C. 926(a). The Attorney General in turn has delegated that authority to the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). 28 C.F.R. 0.130(a)(1) and (2).

ATF encourages manufacturers to submit novel weapons or devices to ATF, on a voluntary basis, for a classification of whether the weapon or device qualifies as a machinegun or other prohibited firearm under the National Firearms Act. See ATF, U.S. Dep't of Justice, *National Firearms Act Handbook* 41 (Apr. 2009) (*NFA Handbook*). The classification process enables ATF to provide manufacturers with "the agency's official position concerning the status of the firearms under Federal firearms laws," to assist manufacturers with "avoid[ing] an unintended classification and violations of the law" before a manufacturer "go[es] to the trouble and expense of producing" the weapon or device. *Ibid.*; cf. 26 U.S.C. 5841(c) (requiring manufacturers to "obtain authorization" before making a covered firearm and to register "the manufacture of a firearm"). ATF has made clear, however, that "classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." *NFA Handbook* 41.

2. a. In 2004, the federal ban on certain semiautomatic "assault weapons" expired.[1] Since that time, ATF

[1] 18 U.S.C. 921(a)(30), 922(v) (2000). Those provisions had been enacted in 1994 with a 10-year sunset provision. See Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, Tit. XI, Subtit. A, §§ 110102, 110105, 108 Stat. 1996-1998, 2000.

has received a growing number of classification requests from inventors and manufacturers seeking to produce "devices that permit shooters to use semiautomatic rifles to replicate automatic fire," but that do so "without converting these rifles into 'machineguns.'" 83 Fed. Reg. 66,514, 66,515-66,516 (Dec. 26, 2018); see *id.* at 66,516 ("Shooters use [these devices] with semiautomatic firearms to accelerate the firearms' cyclic firing rate to mimic automatic fire."). Whether such devices fall within the statutory definition of a "machinegun," 26 U.S.C. 5845(b), turns on whether they allow a shooter to fire "automatically more than one shot * * * by a single function of the trigger," *ibid.*

One such type of device is generally referred to as a "bump stock." ATF first encountered this type of device in 2002, when it received a classification request for the "Akins Accelerator." 83 Fed. Reg. at 66,517. The Akins Accelerator, which attached to a standard semiautomatic rifle, used a spring to harness the recoil energy of each shot, causing "the firearm to cycle back and forth, impacting the trigger finger" repeatedly after the first pull of the trigger. *Ibid.* Thus, by pulling the trigger once, the shooter "initiated an automatic firing sequence" that was advertised as firing "approximately 650 rounds per minute." *Ibid.*

ATF initially declined to classify the Akins Accelerator as a machinegun because the agency "interpreted the statutory term 'single function of the trigger' to refer to a single movement of the trigger." 83 Fed. Reg. at 66,517. In 2006, however, ATF revisited that determination and concluded that "the best interpretation of the phrase 'single function of the trigger' includes a 'single pull of the trigger.'" *Ibid.* The agency explained that the Akins Accelerator created "a weapon that 'with

a single pull of the trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is exhausted.'" *Ibid.* (brackets and citation omitted). Accordingly, ATF reclassified the device as a machinegun under the statute. See *ibid.*

When the inventor of the Akins Accelerator challenged ATF's action, the Eleventh Circuit upheld the determination. It explained that interpreting the phrase "single function of the trigger" in 26 U.S.C. 5845(b) to mean "'single pull of the trigger' is consonant with the statute and its legislative history," and it rejected a vagueness challenge because "[t]he plain language of the statute defines a machinegun as any part or device that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly." *Akins* v. *United States*, 312 Fed. Appx. 197, 200, 201 (11th Cir.) (per curiam), cert. denied, 557 U.S. 942 (2009).

Expecting further classification requests for devices designed to increase the firing rate of semiautomatic weapons, ATF also published a public ruling announcing its interpretation of the phrase "single function of the trigger" and explaining, on the basis of the National Firearms Act and its legislative history, that the phrase denotes a "single pull of the trigger." ATF Ruling 2006-2 (Dec. 13, 2006).[2] When it reclassified the Akins Accelerator, ATF also advised owners of the device that "removal and disposal of the internal spring * * * would render the device a non-machinegun under the statutory definition," because the device would no longer operate "'automatically.'" 83 Fed. Reg. at 66,517.

---

[2] https://go.usa.gov/xpbEX.

ATF soon received classification requests for bump stock devices that did not include internal springs. These bump stocks replaced the standard stock on an ordinary semiautomatic firearm. Unlike a regular stock, a bump stock channels the recoil from the first shot into a defined path, allowing the weapon contained within the stock to slide back a short distance—approximately an inch and a half—and shifting the trigger away from the shooter's trigger finger. 83 Fed. Reg. at 66,532. This separation allows the firing mechanism to reset. *Ibid.* When the shooter maintains constant forward pressure on the weapon's barrel-shroud or fore-grip, the weapon slides back along the bump stock, causing the trigger to "bump" the shooter's stationary finger and fire another bullet. *Ibid.* In a series of classification decisions between 2008 and 2017, ATF concluded that such devices did not enable a gun to fire "'automatically'" and were therefore not "machineguns." *Id.* at 66,517.

b. In 2017, a shooter armed with semiautomatic weapons and bump stock devices of the type at issue here murdered 58 people and wounded 500 more in Las Vegas. 83 Fed. Reg. at 66,516.

In the wake of the Las Vegas mass shooting, ATF reviewed its prior classifications of bump stock devices. 83 Fed. Reg. at 66,516. As part of its review, ATF published an advance notice of proposed rulemaking in the *Federal Register* in December 2017, seeking public comment on "the scope and nature of the market for bump stock type devices." 82 Fed. Reg. 60,929, 60,930 (Dec. 26, 2017).

On February 20, 2018, after the comment period had ended, the President issued a memorandum concerning bump stocks to then-Attorney General Jefferson B.

Sessions III. See 83 Fed. Reg. 7949 (Feb. 20, 2018). The President instructed the Department of Justice, working within established legal protocols, "to dedicate all available resources to complete the review of the comments received, and, as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." *Ibid.*

On March 29, 2018, the Attorney General published a notice of proposed rulemaking regarding amendments to the definition of "machinegun" in three ATF regulations, 27 C.F.R. 447.11, 478.11, and 479.11. See 83 Fed. Reg. 13,442, 13,457 (Mar. 29, 2018). The notice explained that, although ATF had recognized that some bump stock devices qualified as machineguns since its reclassification of the Akins Accelerator in 2006, subsequent classification letters addressing bump stock devices did "not reflect the best interpretation of the term 'machinegun.'" *Id.* at 13,443. The notice thus proposed to "clarify that all bump-stock-type devices are 'machineguns'" under federal law. *Ibid.* The notice observed that ATF had "applied different understandings of the term 'automatically'" over time in reviewing bump stock devices and that the agency had "authority to 'reconsider and rectify' potential classification errors." *Id.* at 13,445, 13,446 (quoting *Akins*, 312 Fed. Appx. at 200); see also *id.* at 13,447 (observing that ATF's classifications between 2008 and 2017 "did not reflect the best interpretation of the term 'automatically'"). The notice elicited over 186,000 comments. See 83 Fed. Reg. at 66,519.

The agency published a final rule on December 26, 2018. 83 Fed. Reg. at 66,514. The rule amended regulations issued under the National Firearms Act and the Gun Control Act to address the terms "single function

of the trigger" and "automatically" as used in the definition of "machinegun," in order to clarify that bump stock devices are machineguns under 26 U.S.C. 5845(b). See 83 Fed. Reg. at 66,553-66,554. In particular, the agency reiterated that the phrase "'single function of the trigger'" means a "'single pull of the trigger'" and that the term includes "analogous motions." *Id.* at 66,515. The agency also explained that the term "automatically" means "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger." *Id.* at 66,519. In its view, those definitions "represent the best interpretation of the statute." *Id.* at 66,521; see *id.* at 66,553-66,554 (amending 27 C.F.R. 447.11, 478.11, and 479.11 to incorporate those definitions of "single function of the trigger" and "automatically").

The agency further explained that, upon review, it had concluded that bump stocks qualify as machineguns under those definitions. Bump stocks enable a shooter to engage in a firing sequence that is "automatic." 83 Fed. Reg. at 66,531. As the shooter's trigger finger remains stationary on the ledge provided by the design of the device, and the shooter applies constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the weapon, the firearm's recoil energy can be directed into a continuous back-and-forth cycle without "the need for the shooter to manually capture, harness, or otherwise utilize this energy to fire additional rounds." *Id.* at 66,532. A bump stock thus constitutes a "self-regulating" or "self-acting" mechanism that allows the shooter to attain continuous firing after a single pull of the trigger and, accordingly, is a machinegun. *Ibid.*; see also *id.* at 66,514, 66,518.

Consistent with the amended regulation, the agency rescinded its prior, erroneous classification letters treating certain bump stocks as unregulated firearms parts. See 83 Fed. Reg. at 66,514, 66,523, 66,530-66,531, 66,549. The agency also provided instructions for "[c]urrent possessors" of bump stocks "to undertake destruction of the devices" or to "abandon [them] at the nearest ATF office" to avoid liability under the statute, and it specified that the rule would not take effect until ninety days after publication in the *Federal Register. Id.* at 66,530. The agency stated that individuals who complied with the rule "will not be in violation of the law or incarcerated as a result." *Id.* at 66,539.

3. Petitioners—five individuals and three organizations of gun owners—brought two separate suits challenging the rule on various grounds. As relevant here, petitioners asserted that the rule was contrary to law and arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. 706; petitioners also sought a preliminary injunction. The two cases were consolidated, and the district court issued a single opinion denying a preliminary injunction. Pet. App. C1-C81.

The district court concluded that petitioners were not likely to prevail on the merits. Pet. App. C20. Although the government had not contended that the agency's interpretation of the statute should be given deference, the district court applied the two-step framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in upholding the Department of Justice's conclusion that bump stocks allow a shooter to fire "automatically" with a "single function of the trigger." Pet. App. C21-C28. The court found the statutory language ambiguous but concluded that the Department "acted reasonably in defining the

phrase 'single function of the trigger' to mean a 'single pull of the trigger and analogous motions,'" *id.* at C27 (quoting 83 Fed. Reg. at 66,553), in light of "contemporaneous dictionary definitions and court decisions" such as *Akins*, *id.* at C27. The court also concluded that the rule "correctly defined 'automatically' to mean 'functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger,'" based on "contemporaneous dictionary definitions" and a decision of the Seventh Circuit. *Id.* at C27-C28 (citation omitted); see *United States* v. *Olofson*, 563 F.3d 652, 658 (7th Cir.) (holding that "'automatically'" means "as the result of a self-acting mechanism * * * that is set in motion by a single function of the trigger"), cert. denied, 558 U.S. 948 (2009).

The district court further held that the agency had reasonably applied its understanding of the statute in determining that the bump stocks are machineguns. Pet. App. C28-C32. The court observed that "a bump stock operates with a single 'pull' of the trigger because a bump stock permits the shooter to discharge multiple rounds by, among other things, 'maintaining the trigger finger on the device's extension ledge with constant rearward pressure.'" *Id.* at C29-C30 (quoting 83 Fed. Reg. at 66,532). The court also concluded that "it was reasonable for ATF to determine that a bump stock relieves a shooter of enough of the otherwise necessary manual inputs to warrant the 'automatic' label," because a bump stock "controls the distance the firearm recoils and ensures that the firearm moves linearly—two tasks the shooter would ordinarily have to perform manually." *Id.* at C30-C31.

4. The court of appeals affirmed in a per curiam decision, with Judge Henderson concurring in part and dissenting in part. Pet. App. A1-A66. As relevant here, the court concluded that petitioners had failed to demonstrate a substantial likelihood of success on their claim "that the statutory definition of 'machinegun' cannot be read to include bumpstock devices." *Id.* at A26.

a. The court of appeals first concluded that the applicability of *Chevron* turned on what kind of rule the bump stock rule represents, Pet. App. A27, and then further concluded that the rule is a legislative rule rather than an interpretive rule, *id.* at A27-A33. The court believed that the references in the rulemaking notice to an "effective date" and the notice's statement that individuals in possession of a bump stock would be subject to prosecution after that date meant that the rule was intended as an act of legislative rulemaking. *Id.* at A29, A32-A33. The court also stated that a discussion of *Chevron* in the preamble indicated that the agency intended to engage in legislative rulemaking. *Id.* at A29-A30. And the court noted that the rule cited the Attorney General's rulemaking authority under the National Firearms Act and the Gun Control Act. *Id.* at A30.

The court of appeals then addressed (and rejected) arguments advanced by petitioners against the application of *Chevron*—which, again, the government had not invoked in defending the rule. The court determined that *Chevron* deference cannot be "waive[d]" in litigation because it is "a doctrine about * * * how courts should construe a statute" that implicates a court's "'independent power' to identify and apply the correct law." Pet. App. A37-A39. The court similarly rejected petitioners' argument that an agency interpretation of a statute is categorically ineligible for *Chevron* deference

if the statute has "criminal-law implications." *Id.* at A41. The court observed that this Court has deferred to agency interpretations of certain statutes, notwithstanding potential criminal penalties for violating the statutes, and that the D.C. Circuit has done the same. *Id.* at A41-A45. The court also concluded that Congress had conferred rulemaking authority on the Attorney General to make legislative rules regarding the implementation of the National Firearms Act and the Gun Control Act. *Id.* at A45-A46 (citing 18 U.S.C. 924(a)(2); 26 U.S.C. 7801(a)(2)(A), 7805(a)).

The court of appeals rejected petitioners' argument that the rule of lenity precluded the application of *Chevron* deference. Pet. App. A48-A51. The court observed that the rule of lenity is "a canon of 'last resort'" that applies only when tools of statutory construction do not yield a satisfactory answer to the interpretive question at issue and that *Chevron* deference "is a rule of statutory construction." *Id.* at A49-A50. The court also noted that the purposes of the rule of lenity were not offended by the application of *Chevron* deference in this case, because the rule itself provides notice of what conduct is proscribed. *Id.* at A50-A51.

Having decided to apply *Chevron*, the court of appeals then concluded that the statutory terms "single function of the trigger" and "automatically" were each ambiguous, Pet. App. A53-A57, and that the agency's interpretations of those terms were reasonable, *id.* at A58-A60. In reaching that conclusion, the court emphasized that it was not considering whether the rule advanced "the best interpretation of the statute, but whether it represents a reasonable one." *Id.* at A51-A52 (quoting *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U.S. 382, 389 (1998)); see *id.* at A54-A55, A60.

b. Judge Henderson concurred in part and dissented in part. Pet. App. A67-A96. She would not have applied *Chevron*, because she perceived no "clear statement" from Congress delegating authority to the agency to determine which weapons or devices qualify as machineguns. *Id.* at A82; see *id.* at A75-A83. She also would have concluded, on *de novo* review, that the statutory text excludes bump stocks from the definition of "machinegun" in the National Firearms Act and the Gun Control Act. *Id.* at A83-A96.

c. After issuing its opinion and judgment, the court of appeals stayed the effective date of the rule for 48 hours to permit petitioners to seek a stay from this Court. Pet. App. D2-D3. Petitioners sought a stay from this Court, which was denied. 139 S. Ct. 1474. Justices Thomas and Gorsuch would have granted the stay. *Ibid.*

ARGUMENT

The court of appeals correctly affirmed the district court's denial of petitioners' request for a preliminary injunction. The decision below does not conflict with any decision of this Court or another court of appeals. Nor does the decision otherwise warrant this Court's review. Notably, petitioners do not ask the Court to determine whether the statutory scheme prohibits the types of bump-stock devices used to perpetrate the Las Vegas massacre. Indeed, they contend (Pet. 11) that the Court should *not* consider the statutory text, or ATF's analysis of it, and should instead use this case as an opportunity to address abstract questions regarding the interaction of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the rule of lenity. This case, however, would be a par-

ticularly unsuitable vehicle for addressing those questions. The government has urged throughout this litigation that the agency's application of the statutory definition of machine gun to the bump stocks at issue is the best interpretation of the statute—wholly apart from any question of deference. The government has also consistently maintained that *Chevron* is not applicable (and that it would not apply in any future criminal prosecution), and petitioners agree. ATF has never proceeded by legislative rule in determining whether particular devices are machine guns, it has not asserted the statutory authority to do so, and it did not do so here. The court of appeals erred in concluding otherwise, but that error is of no practical significance because the agency's interpretation is the best interpretation. In any event, the *Chevron* questions that petitioners seek to present should not be addressed in a case in which no party urges the application of *Chevron*. Finally, other challenges to the bump stock rule are pending in the Sixth and Tenth Circuits. Review of the D.C. Circuit's decision at this interlocutory juncture would be premature. Accordingly, the petition for a writ of certiorari should be denied.

A. The Lower Courts Correctly Determined That Petitioners Are Not Likely To Succeed In Challenging The Rule

The court of appeals correctly affirmed the district court's denial of petitioners' request for a preliminary injunction to prevent the rule from taking effect, and that decision does not conflict with the decision of any other court to have considered the rule.

1. As explained above (see p. 3, *supra*), ATF has established a process that allows manufacturers to obtain a classification of their devices that will provide "the agency's official position concerning the status of the

firearms under Federal firearms laws" in order to assist manufacturers with "avoid[ing] an unintended classification and violations of the law" before a manufacturer "go[es] to the trouble and expense of producing" the weapon or device. *NFA Handbook* 41. ATF has made explicit, however, that "classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." *Ibid.*

As part of the classification process, ATF regularly receives applications from inventors and manufacturers for devices with the same rate of fire as machineguns. In classifying these devices, the agency considers whether they shoot (1) "automatically more than one shot" (2) "by a single function of the trigger." 26 U.S.C. 5845(b).

As to the term "single function of the trigger," petitioners have contended that the term encompasses only a single "mechanical act of the trigger." Pet. App. A53 (citation omitted); see *id.* at A54. Although ATF at first accepted that view in 2002 in declining to classify the Akins Accelerator as a machinegun, it has recognized that a "single function of the trigger" includes a "single pull of the trigger" since its reclassification of the Akins Accelerator in 2006, which was upheld by the Eleventh Circuit in *Akins* v. *United States*, 312 Fed. Appx. 197 (per curiam), cert. denied, 557 U.S. 942 (2009). Like the bump stocks at issue here, the Akins Accelerator bump stock enabled the weapon to recoil within the stock, "permitting the trigger to lose contact with the finger and manually reset." 83 Fed. Reg. at 66,517. "Springs in the Akins Accelerator then forced the rifle forward, forcing the trigger against the finger" in a back-and-forth cycle that enabled continuous firing. *Ibid.* The

Akins Accelerator "was advertised as able to fire approximately 650 rounds per minute." *Ibid.*

After reviewing the Akins Accelerator "based on how it actually functioned when sold," ATF corrected its erroneous earlier decision classifying the device as a non-machinegun. 83 Fed. Reg. at 66,517; see ATF Ruling 2006-2. This interpretation reflects the common-sense understanding of how most weapons are fired: by the shooter's pull on a curved metal trigger. See *Staples* v. *United States*, 511 U.S. 600, 602 n.1 (1994) (noting that the National Firearms Act treats a weapon that "fires repeatedly with a single pull of the trigger" as a machinegun, in contrast to "a weapon that fires only one shot with each pull of the trigger"). Moreover, that understanding was prevalent when Congress first enacted the definition of "machinegun." The committee report accompanying the bill that became the National Firearms Act noted that the bill "contain[ed] the usual definition of machine gun as a weapon designed to shoot more than one shot without reloading and by a single pull of the trigger." H.R. Rep. No. 1780, 73d Cong., 2d Sess. 2 (1934); accord S. Rep. No. 1444, 73d Cong., 2d Sess. 1-2 (1934) (reprinting House committee report's "detailed explanation" of the bill's provisions, including the quoted language). The then-president of the National Rifle Association had proposed during earlier hearings that a machinegun should be defined as a weapon "which shoots automatically more than one shot without manual reloading, by a single function of the trigger." *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong., 2d Sess. 40 (1934) (statement of Karl T. Frederick, President, National Rifle Association of America).

Explaining that proposal, he stated that "[t]he distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire as long as there is any ammunition," and that any weapon "which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun." *Ibid.*

The question under the statute is thus whether the shooter initiates the automatic firing with a single function, not whether the trigger or other parts of the firearm move after that single function. Bump stocks are "machineguns" because they permit a shooter to automatically fire more than one shot "by a single function of the trigger." With respect to the typical protruding curved trigger on a semiautomatic rifle, the action that initiates the firing sequence is the shooter's pull on the trigger. On an unmodified semiautomatic weapon, that single pull results in the firing of a single shot. For a subsequent shot, the shooter must release his pull on the trigger so that the hammer can reset and the shooter can pull the trigger again. But on a machinegun—including a weapon equipped with a bump stock—that same single pull of the trigger initiates a continuous process that fires bullets until the ammunition is exhausted. Once the trigger has performed its function of initiating the firing sequence in response to the shooter's pull, the weapon fires "automatically more than one shot, without manual reloading," 26 U.S.C. 5845(b).

The only interpretive change in the rule is thus in its interpretation of the term "automatically." In reclassifying the bump stocks at issue here, the agency recognized that it had not provided "substantial or consistent

legal analysis regarding the meaning of the term 'automatically.'" 83 Fed. Reg. at 66,518. It explained that the crucial question was whether the "firing sequence is 'automatic,'" *id.* at 66,519, and that prior rulings had either provided no analysis or had erroneously focused on the absence of "mechanical parts or springs" in concluding that bump stocks were not machineguns, *id.* at 66,518. Instead, the agency explained in the rule that a weapon fires "'automatically'" when it fires "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds." *Id.* at 66,554; accord *United States* v. *Olofson*, 563 F.3d 652, 658 (7th Cir.), cert. denied, 558 U.S. 948 (2009). A bump stock, by design, meets that definition. Its basic purpose is "to eliminate the need for the shooter to manually capture, harness, or otherwise utilize th[e] [recoil] energy" of each shot "to fire additional rounds," by "'directing the recoil energy of the discharged rounds into the space created by the sliding stock,'" ensuring that the rifle moves in a "'constrained linear rearward and forward path[]'" to enable continuous fire. 83 Fed. Reg. at 66,532 (citation omitted).

Petitioners have contended that "a gun cannot be said to fire 'automatically' if it requires both a single pull of the trigger *and* constant pressure on the gun's barrel." Pet. App. A56. But, as the court of appeals explained, "a quite common feature of weapons that indisputably qualify as machine guns is that they require both a single pull of the trigger and the application of constant and continuing pressure on the trigger after it is pulled." *Ibid.* (emphasis omitted). That a bump stock utilizes a shooter's pressure on the barrel of the weapon while the weapon repeatedly fires does not alter its status as a machinegun.

In sum, the rule correctly interprets the component terms of the statutory definition of "machinegun," correctly applies the statutory definition to conclude that bump stocks are machineguns, and persuasively explains that ATF's prior classification of those devices as non-machineguns was erroneous.

2. Petitioners identify no conflict among the lower courts on the question whether the rule at issue in this case validly interprets the statute. Every court to consider the matter—three district courts and the court of appeals here—has declined to enjoin the rule. See *Aposhian* v. *Barr*, 374 F. Supp. 3d 1145 (D. Utah 2019), appeal pending, No. 19-4036 (10th Cir. oral argument scheduled for Jan. 22, 2020); *Gun Owners of Am.* v. *Barr*, 363 F. Supp. 3d 823 (W.D. Mich. 2019), appeal pending, No. 19-1298 (6th Cir. oral argument scheduled for Dec. 11, 2019). And they have done so both with and without reference to principles of *Chevron* deference. Compare *Gun Owners of Am.*, 363 F. Supp. 3d at 831-832 (applying *Chevron*), with *Aposhian*, 374 F. Supp. 3d at 1151 & n.8 (holding that the rule provides the "best interpretation" of the statutory text and that the court need not consider whether deference would be appropriate). As the decision in *Aposhian* demonstrates, petitioners are not entitled to a preliminary injunction without regard to *Chevron*.

B. This Case Would Be An Unsuitable Vehicle For Addressing Petitioners' *Chevron* Questions

Petitioners contend (Pet. 11) that it is a virtue of their petition that they seek to present only abstract "methodological" questions about *Chevron* and do not ask the Court to review the statutory language at issue, the agency's interpretation of it, "or the technical as-

pects of bump stocks." But petitioners sought a preliminary injunction for the purpose of preventing application of the agency's rule interpreting the term "machinegun" to include bump stocks. Their failure to argue the merits of that issue itself weighs against review at this interlocutory stage, particularly given the pendency of similar challenges in other circuits.

In any event, the particulars of this case would make it an especially unsuitable vehicle to address petitioners' *Chevron* questions. No party contends that *Chevron* deference applies to the agency's interpretation. The court of appeals mistakenly concluded otherwise, but that case-specific error does not warrant this Court's review. Moreover, even if petitioners' *Chevron* questions were properly presented here, further review would not be warranted at this time.

1. This case does not properly present questions about* Chevron *deference and the rule of lenity

a. The court of appeals reasoned that *Chevron* deference applied here because the bump stock rule is a legislative rule. See Pet. App. A27-A33. Contrary to the court of appeals' premise, however, the Department of Justice did not issue the rule as an exercise of delegated authority to issue regulations "with the force of law." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016); see *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001). Indeed, neither petitioners (see Pet. 27-28) nor the Department of Justice endorses the court of appeals' premise. The agency has consistently maintained that the rule is an interpretive rule, not a legislative rule. Pet. App. A31. "[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez*

v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (quoting *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). They do not, however, "have the force and effect of law." *Ibid.* (citation omitted).

The rulemaking notice makes clear that the only source of legal force for the prohibition on bump stocks is Congress's statutory ban on new machineguns, not the rule itself. See, *e.g.*, 83 Fed. Reg. at 66,529 ("[T]he impetus for this rule is the Department's belief, after a detailed review, that bump-stock-type devices satisfy the statutory definition of 'machinegun.'"); *ibid.* ("ATF must * * * classify devices that satisfy the statutory definition of 'machinegun' as machineguns."); *id.* at 66,535 ("[T]he Department has concluded that the [National Firearms Act] and [Gun Control Act] require regulation of bump-stock-type devices as machineguns."). Thus, the agency concluded that bump stocks *are* machineguns under the statute, not that the agency had (and was exercising) discretion to classify them as such.

The agency issued the rule using notice-and-comment procedures, but that does not transform it into a legislative rule. Instead, as the rulemaking notice itself explained, the agency made use of notice-and-comment procedures because they were "specifically designed to notify the public about changes in ATF's interpretation of the [National Firearms Act] and [Gun Control Act] and to help the public avoid the unlawful possession of a machinegun." 83 Fed. Reg. at 66,523; see *ibid.* (stressing the need to "ensur[e] that the public is aware of the correct classification of bump-stock-type devices"); *id.* at 66,529 ("The proposed rule is * * * necessary to provide public guidance on the law."). Providing the public with notice of an agency's understanding of the statutes

that it administers is the purpose of interpretive rules. See *Mortgage Bankers*, 135 S. Ct. at 1204.

That approach is also consistent with ATF's past practice. In reviewing the technical specifications of devices that alter the function of a semiautomatic weapon, ATF has not proceeded by legislative rule. On the contrary, it has made classifications by letter, with the explicit caveat that its classification letters may be subject to change. See p. 3, *supra*. Here, ATF could have revoked its prior classification letters through a letter ruling, as it has done in the past—including when it reclassified the Akins Accelerator. See *Akins*, 312 Fed. Appx. at 200. Nor was it necessary to amend regulatory definitions of the term machinegun; the agency could instead have begun applying the relevant requirements to bump stocks without altering the definitions—again, as it did with the Akins Accelerator. The agency chose instead to employ notice-and-comment procedures to address an issue of intense public interest in the wake of the Las Vegas mass shooting. But its reclassification of bump stocks was no more an exercise of legislative rulemaking than was its earlier reclassification of the Akins Accelerator.

b. In erroneously concluding otherwise, the court of appeals cited three main considerations. First, the court emphasized the preamble's reference to *Chevron* deference. The court stated that the preamble "elaborat[es] at length as to how *Chevron* applies to the Rule." Pet. App. A29. That discussion of *Chevron* consists of three paragraphs in the 41-page rulemaking, and the analysis in those paragraphs begins with the statement that the agency's interpretation of the relevant terms "accord[s] with the plain meaning of those terms." 83 Fed. Reg. at 66,527. Only then does the preamble

state that "even if those terms are ambiguous, this rule rests on a reasonable construction of them." *Ibid.* The preamble then observes that the rule simply "conform[ed]" the regulatory definition of the term "automatically" "to how that word was understood and used when the [National Firearms Act] was enacted in 1934" and that it "reaffirm[ed]" ATF's view "that a single pull of the trigger is a single function of the trigger, consistent with the [National Firearm Act's] legislative history, ATF's previous determinations, and judicial precedent." *Ibid.* That the agency believed its correct interpretation of the statutory terms would be reasonable even if the statutory terms were deemed ambiguous does not indicate that the agency believed it was undertaking legislative rulemaking.

Second, the court of appeals observed that the rule contains an "effective date." Pet. App. A32 (citing 83 Fed. Reg. at 66,523). But the rule clearly explained that the agency was correcting its own past errors, and not, as the court mistakenly believed, prospectively changing the law. In particular, ATF explained that it had "misclassified some bump-stock-type devices and therefore initiated this rulemaking." 83 Fed. Reg. at 66,523; see also *id.* at 66,531 (observing that the agency has "authority to 'reconsider and rectify' its classification errors") (citation omitted); *id.* at 66,516 (same). Consistent with the interpretive rule's purpose of providing public guidance, the agency specified the date on which it would begin to enforce the corrected classification. The agency also stated, as the court below emphasized, that bump stocks "will be prohibited" after the effective date. Pet. App. A29 (quoting 83 Fed. Reg. at 66,514) (emphasis omitted); see also, *e.g.*, 83 Fed. Reg. at 66,523 (stating that "[a]nyone currently in possession

of a bump-stock-type device is not acting unlawfully unless they fail to relinquish or destroy their device after the effective date of this regulation"); *id.* at 66,530 (similar). Those statements, however, reflected the government's decisions (1) not to prosecute individuals who possessed bump stocks during the period in which the Department had erroneously classified them, and (2) to provide a reasonable grace period for individuals who already possessed bump stocks to come into compliance with the law. The court was thus wrong to infer from them that the agency believed it was issuing a legislative rule that would prospectively change the law. To the contrary, the agency explained at length that bump stocks were previously "misclassified," 83 Fed. Reg. at 66,523—*i.e.*, that they were already machineguns under the statute and should have been classified as such.

Third, the court of appeals noted that the preamble to the rulemaking referred to the Attorney General's rulemaking authority under the National Firearms Act and the Gun Control Act and that the rule itself consisted of amendments to three definitions in the Code of Federal Regulations. Pet. App. A30-A31; see 27 C.F.R. 447.11, 478.11, 479.11. But those actions are unremarkable. The statutes the agency referred to are a source of authority to promulgate interpretive rules as well as legislative rules. And the agency amended the definitional language appearing in three regulations in order to make clear on the face of those definitions that, in its view, bump stocks qualify as machineguns, as part of its broader effort to ensure that the public receives notice of its corrected classification of those devices. Doing so did not alter the character of the interpretive rule or give it the force and effect of law.

c. The court of appeals' invocation of *Chevron* also rests on a misunderstanding of the Attorney General's rulemaking authority under the National Firearms Act, 26 U.S.C. 7805(a), and the Gun Control Act, 18 U.S.C. 926(a). A basic premise of *Chevron* deference is that, in certain contexts, Congress delegates to an agency the authority to fill gaps or resolve ambiguities in a statute the agency administers. The relevant threshold question is therefore "whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority." *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 173 (2007) (emphasis omitted); see *Chevron*, 467 U.S. at 843-844 (deference appropriate where "Congress has explicitly left a gap for the agency to fill" or where there is an "implicit" "legislative delegation to an agency on a particular question").

The statutory scheme at issue here does not suggest that Congress intended to grant the Attorney General the authority to engage in such "gap-filling" with respect to the classification of the firearms at issue here. The court of appeals believed that the Attorney General's general rulemaking authority to implement the National Firearms Act and the Gun Control Act extended to redefining the term "machinegun." 26 U.S.C. 5845(b). But the court reached that conclusion without significant analysis. It did not, for example, identify any reason to think that, when Congress borrowed the preexisting definition of "machinegun" in the National Firearms Act in the course of enacting a criminal prohibition on possession of new machineguns, see p. 2, *su-*

pra, Congress intended to confer on the Attorney General any legislative-rulemaking authority to fill in gaps with respect to that new crime.

The court of appeals drew an analogy to cases in which this Court has afforded *Chevron* deference to agency interpretations of statutes that may carry criminal consequences (*e.g.*, for willful violations). Pet. App. A42-43, A47-48. Those cases, however, involved far clearer delegations of legislative rulemaking authority than the statutes at issue here. For example, the court relied on this Court's decision in *United States* v. *O'Hagan*, 521 U.S. 642 (1997), which "accorded *Chevron* deference to an SEC rule that interpreted a provision of the Act in a manner rendering the defendant's conduct a crime." Pet. App. A42. But the statute at issue in *O'Hagan* delegated to the SEC the authority to "'by rules and regulations define'" the relevant prohibited conduct, and this Court held that the SEC had not "exceed[ed] its rulemaking authority" in promulgating the rule that led to the defendant's conviction. 521 U.S. at 666-667 (quoting 15 U.S.C. 78n(e)).

The court of appeals' reliance on *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995), was equally misplaced. Pet. App. A43. That case addressed an agency's interpretation of a statute for which the agency had authority to "promulgate such regulations as may be appropriate" and for which Congress had expressly imposed criminal penalties on any person who "knowingly violate[d] * * * any regulation issued in order to implement" designated parts of the law. 16 U.S.C. 1540(b)(1) and (f); see also *United States* v. *Grimaud*, 220 U.S. 506, 517-519 (1911) (statute criminalizing "'any violation of the provisions of this act or such rules and regulations'" issued under

the act "indicated [the] will" of Congress to "give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished" in the manner prescribed by Congress). Here, by contrast, while Congress has specifically criminalized the violation of regulations governing licensing for firearms manufacturers, importers, dealers, and collectors, it has given no indication that such consequences attach to all regulations issued pursuant to the Attorney General's rulemaking authority. See 18 U.S.C. 922(m), 923.

d. As the foregoing demonstrates, *Chevron* does not apply to the rule at issue here. Petitioners agree. Pet. 23 n.4, 27. Nonetheless, they would have this Court grant review to resolve hypothetical conflicts between *Chevron* and the rule of lenity that would arise in this case if one accepted the premise that the rule is a valid legislative rule that carries the force of law. And petitioners pointedly do *not* seek review of that logically antecedent issue.

Instead, they would have the Court assume—without deciding, and inconsistent with their own stated position and the government's position—that the rule is a legislative rule. Pet. 8, 11, 21, 27-28. Petitioners would have this Court further assume—again without deciding, and contrary to their own view and that of the government —that the Attorney General had the delegated authority to issue a legislative rule to control the scope of the statutory term "machinegun." Pet. 11, 23 n.4. And petitioners would apparently also have this Court assume —once more without deciding—that the statutory text is ambiguous as applied to bump stocks, thus triggering

a putative choice between *Chevron* and the rule of lenity. Pet. 11. Having assumed all these premises that they themselves reject, petitioners would then have this Court address whether the government can "waive" *Chevron* deference and determine how, in a criminal prosecution, a court should resolve potential tensions between *Chevron* and the rule of lenity. Pet. i, 12-30.

The Court should decline to address potentially significant questions of administrative law about *Chevron* and the rule of lenity in such a contrived posture. If, as petitioners contend (Pet. 11, 23-25), the issue is important and recurring, the Court should await a case in which it is actually properly presented. Indeed, the rule of lenity would not apply here even on its own terms. This Court has explained that "[t]he simple existence of some statutory ambiguity * * * is not sufficient to warrant application of th[e] rule, for most statutes are ambiguous to some degree." *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998). Instead, what is required is a "grievous ambiguity," such that, at the end of the interpretive process, the Court can still make "no more than a guess" as to what Congress intended. *Id.* at 138-139 (quoting *Staples*, 511 U.S. at 619 n.17, and *United States* v. *Wells*, 519 U.S. 482, 499 (1997)). No court has found 26 U.S.C. 5845(b) to be grievously ambiguous with respect to bump stocks.

Petitioners thus err in assuming (Pet. 11) that if the rule of lenity may be considered before *Chevron* deference, "the government loses." The court of appeals did not endorse that assertion; in fact, it declined to address whether, if the statute is ambiguous to some degree, the government's reading is nevertheless the best reading. See Pet. App. A51-A52 (stating that the court would consider not whether the agency's interpretation advanced

"the best interpretation of the statute, but whether it represents a reasonable one") (quoting *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U.S. 382, 389 (1998)).

2. *In any event, petitioners'* **Chevron** *questions do not warrant review*

Further review would be unwarranted even if this case properly presented the questions petitioners identify. Petitioners identify no relevant conflict on those questions. Indeed, petitioners do not contend that the decision below conflicts with any decision of this Court, instead suggesting that the court of appeals should not have relied on this Court's decision in *Sweet Home* because it "contradicts the broader principles and holdings" of other cases. Pet. 15. But the other cases of this Court invoked by petitioners involved situations in which no agency interpretation warranting *Chevron* deference was at issue. For example, in *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992), no regulation was present, see *Sweet Home*, 515 U.S. at 704 n.18, and the plurality explained that it did not need to address the role of *Chevron* deference because neither of the Revenue Rulings to which the Court was asked to defer went "to the narrow question presented" in that case, *Thompson/Center Arms*, 504 U.S. at 518 n.9. Similarly, *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), did not involve a question of *Chevron* deference at all. The agency's application of the term "crime of violence" in 18 U.S.C. 16(b) was instead governed by the relevant court of appeals' interpretation of federal criminal law. See 543 U.S. at 5 n.2. Moreover, Section 16(b) was incorporated into the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, from the criminal code in Title 18 and was a "criminal statute," even though it had "noncriminal applications" in the INA. *Leocal*, 543 U.S.

at 11 n.8. And neither *United States* v. *Apel*, 571 U.S. 359, 369 (2014), nor *Abramski* v. *United States*, 573 U.S. 169, 191 (2014), involved *Chevron*. See Pet. App. A44.

Petitioners also do not identify any conflict among the courts of appeals on these issues, observing that the courts of appeals have been consistent in their application of this Court's cases. Pet. 23-24.

Finally, even apart from the other reasons for denying the petition, review would at the very least be premature at this time. Appeals from the denials of preliminary injunctions in two other cases challenging the bump stock rule are now pending in the Sixth and Tenth Circuits. See p. 19, *supra*. In both of those cases, as in this case, the government has urged the courts of appeals to affirm the denial of preliminary injunctions without regard to *Chevron* deference. If either or both of those courts determine that the rule reflects the best interpretation of the statute, then petitioners' *Chevron* questions would be all the more academic. See *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (observing that "there is no occasion to defer and no point in asking what kind of deference, or how much," would apply where the agency has adopted "the position [the court] would adopt" when "interpreting the statute from scratch").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
MICHAEL S. RAAB
ABBY C. WRIGHT
BRAD HINSHELWOOD
Attorneys

DECEMBER 2019