No. 19-296

In The

Supreme Court of the United States

DAMIEN GUEDES; SHANE RODEN; FIREARMS POLICY FOUNDATION, a non-profit organization; MADISON SOCIETY FOUNDATION, INC., a non-profit organization; FLORIDA CARRY, INC., a non-profit organization; DAVID CODREA; SCOTT HEUMAN; and OWEN MONROE,
Petitioners,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; WILLIAM P. BARR, in his official capacity as Attorney General of the United States; REGINA LOMBARDO, in his official capacity as Acting Deputy Director; and the UNITED STATES OF AMERICA,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The government effectively concedes the importance of the questions presented, opting instead for a peculiar strategy somewhere between a cross-petition and a claim of, in effect, harmless error. All parties seem to agree that the decision below is fatally flawed and cannot be sustained on its own terms. But the government's audacious conclusion that certiorari should be denied and the result (and precedent) allowed to stand borders on the absurd. Indeed, had the court of appeals merely flipped a coin to reach the same result, the government's arguments would sound the same.

If, after the questions presented are resolved, the government thinks it has alternative grounds to sustain the Final Rule, it will have ample opportunity to press such arguments on remand. Not a single judge in this case accepted those arguments and all found the statutory language at best ambiguous or at worst contrary to the government's new interpretation. While the government is welcome to its unwarranted optimism, it is not reasonable to ask this Court effectively to affirm on alternative grounds in the first instance without full briefing and without the lower courts first having considered the issues under the proper legal framework.

The questions presented in the Petition go not to the ultimate interpretation of the statutory language at issue, but the method by which such language will be interpreted – whether under *Chevron* deference, the rule of lenity, or otherwise. Once the methodological questions are resolved the case can be remanded for further proceedings in accordance with that methodology. At worst the government's refusal to defend

the decision below supports a GVR or summary reversal. But given the importance and broad applicability of the *Chevron* holdings below, plenary review is the better choice.

I. The Decision Below Incorrectly Applies *Chevron* Deference Rather than the Rule of Lenity to a Criminal Statute that also Has Administrative Application.

As noted in the Petition, at 14, the decision below applying *Chevron* deference to the mixed criminal and civil statutes at issue here conflicts with numerous decisions of this Court. Indeed, the government *agrees* that *Chevron* should not have been applied in this case. BIO 14. And it does not dispute that whether to apply *Chevron* to agency construction of mixed criminal-civil statutes is an important issue worthy of this Court's attention. Pet.13-14. Justices Scalia and Thomas expressly said as much in their opinion in *Whitman* v. *United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J, joined by Thomas, J., statement respecting denial of certiorari). And then-Judge Gorsuch in *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring), likewise recognized that deference does not apply to agency interpretations of a criminal statute.

The only arguments the government makes that go to whether this case is cert. worthy are its claims that this is not a suitable vehicle because the questions supposedly are abstract and hypothetical, are not squarely presented, and do not address the final merits of the statutory construction. The first two are wrong and none are grounds for denying certiorari.

First, contrary to the government's suggestions, BIO 13, the questions presented are not abstract. Both courts below expressly held that the statute was ambiguous and thus relied on *Chevron* to sustain the Final Rule. Pet. 6, 8. Indeed, notwithstanding the government's claim that it would rather lose than rely on deference, Pet. 7; Pet. App. 36 (citing oral argument), the panel forced the issue, suggesting that it could not have reached its result in any other manner. Given that express and laborious application of *Chevron* by the court of appeals, with no alternative grounds offered, the questions would seem the exact opposite of "abstract."

Second, that the government will not defend the decision below, but remains content to keep the outcome without further review, BIO 14, is no reason to deny certiorari. Declining review precisely *because* the government agrees the panel decision is wrong is perverse at best and creates perverse incentives for the government to refuse to defend doubtful victories to insulate them from review. If the government will not defend the decision below, it should either acquiesce to a GVR or summary reversal or step aside and let an appointed *amicus* do what it can to defend the decision below. But for the government to abandon decades of public and agency understanding of a criminal statute, take or destroy millions of dollars in property, threaten potential felony sanctions against hundreds of thousands of people, and then seek to keep the result from a decision it refuses to defend offends the most fundamental notions of fairness and due process.

Third, the procedural posture of this case – appeal from denial of a preliminary injunction – also is no barrier to review. Both decisions below were based entirely on questions of law, not on any uncertain probabilities or discretionary issues bearing upon whether to grant a preliminary injunction. Waiting for a final judgment where the district and circuit courts have already given their views on the legal merits just introduces delay with no benefit. While the appeal is technically interlocutory, BIO 14, 20, it raises none of the concerns of interlocutory review. Indeed, the government does not suggest otherwise and is simply throwing phrases against the wall to see if anything will stick in order to avoid review.

Given the existing precedent and law of the case, it is difficult to imagine the courts below adding anything meaningful before entering final judgment. The government's alternative grounds not already rejected will never be litigated because they are currently unnecessary, and Petitioners will have no opportunity to properly savage the government's misleading statutory interpretation and application. Without removing *Chevron* from the equation, the courts below will avoid taking a hard look at the text, history, and application of the statutory language, and will do nothing to correct their flawed decisions.

Fourth, the government's claim, at 14-19, that there is no conflict on the ultimate interpretation of the law is cynical misdirection. The courts below did not hold that the government was *correct* in its interpretation, merely that it was a *permissible* interpretation of an ambiguous statute. That methodological approach was necessary to the decisions below. It is

optimistic, at best, to speculate that the decisions would have been the same without *Chevron*. The current conflict presented by this case involves methodology, not outcome. The issue is important regardless whether other courts eventually reach the same result under a different approach.

Furthermore, as noted in the Petition, at 24-25, the issues are important regardless whether the courts of appeals are uniform in their error. The more meaningful conflict is with decisions of this Court on *Chevron*, lenity, and delegation. How this case ultimately will be decided under proper legal principles is a question for remand, not for speculation at the petition stage.

Fifth, the government's suggestion, at 20, that this Court wait for other cases hopefully to endorse its interpretation without relying on *Chevron* is again a cynical tactic to preserve a fatally flawed decision reaching the government's preferred result. Regardless how such other cases came out, it would do nothing to alter the decision below, the grounds given by the court of appeals, or the importance of the questions presented. [1]

While the government did not want *Chevron* deference, the court of appeals applied it anyway, presumably because it thought it could not reach its result otherwise. That the government disagrees with the application of *Chevron* for its own reasons and imagi-

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[1] That the government managed to persuade a single judge in Utah to endorse its construction without *Chevron*, BIO 19, but has failed to do so anywhere else, is no reason to deny cert. Both courts and all four judges below rejected the government's claim that the Final Rule applied the plain meaning of the statute.

nes that it could win on different grounds does not bear upon the certiorari decision. This Court reviews numerous cases where the prevailing party thinks it could win under a different rule – challenges to jury instructions, pleading standards, burdens of proof, and more. Such parties might even be proven right and prevail again on remand. But that possibility does not alter the importance of procedural questions or whether they are genuinely presented merely because the ultimate result will be decided on remand. And it does not require the Court to "assume" anything beyond what the courts below expressly held. This case is a far cry from involving harmless error, and the government sensibly avoids making that express claim. But that surely is the false implication of its argument. If the government is correct that the issues are not properly presented because *Chevron* does not apply for *other* reasons rejected by the court, and that it would win anyway under a *Chevron*-free analysis, then the proper approach would be for it to acquiesce in a GVR or summary reversal, not seek denial of certiorari. [2]

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[2] While the Court need not revisit the rulings below that the statute is ambiguous, the government's contention to the contrary borders on the frivolous and Petitioners stand more than ready to address those issues should the Court wish to add a further question. For now, it should be enough to note that several generations of Treasury and ATF officials, including those who are experts in firearms, interpreted the definition of "machine gun" far more narrowly than the Final Rule's revisionism. Saying that they were wrong or confused only proves the ambiguity, it does not refute it. Indeed, to this day, even the government's own description reflects that in order to fire multiple shots with a "bump-stock" the trigger must "function" more than a single time. BIO 5-6. One of the central linguistic fights is

Sixth, the government's suggestion, at 28-29, that the conflict with the rule of lenity is contrived and that lenity would not apply anyway, is meritless. Petitioners squarely raised the rule of lenity and the courts below rejected it by prioritizing *Chevron* deference. No judge said that lenity would not apply regardless, and the government's argument that there is insufficient ambiguity is frivolous. Certainly, a statute supposedly misinterpreted by the ATF for over 80 years qualifies as sufficiently ambiguous to trigger the rule of lenity. Whether the test is gross ambiguity as the government asserts, or the more straight-forward test of whether "there are two rational readings of a criminal statute, one harsher than the other," the statute here would trigger the rule. See *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987) ("when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language").

In any event, such objections to applying the rule of lenity remain available to the government on re-

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not, as the government suggests, whether one "pulls," "pushes," or "bumps" the trigger to make it "function," but rather whether such event happening over and over for every shot fired entails more than a "single function of the trigger." 26 U.S.C. § 5845(b). A bump-stock only facilitates the *release* of the trigger, BIO 6; each subsequent pull or bump is caused by the individual pushing the trigger into his or her stationary finger. Each "single" function of the trigger *ends* when the trigger is released. The next pulls or bumps of the trigger are simply the second and subsequent functions of the trigger. None of this, however, need give the Court pause, as it can all be litigated on remand under the proper standards. Suffice it to say the government's confidence in the strength of its interpretation is wildly overblown.

mand and will hopefully get the reception they deserve. But the refusal of the courts below even to *consider* the application of the rule of lenity because they opted for *Chevron* instead is more than sufficient to present the issue and is far from "contrived."

Seventh, the suggestion, at 29-30, that there is no conflict with this Court's lenity or non-deference cases is incorrect. Judge Henderson expressly recognized that *United States* v. *Apel*, 571 U.S. 359, 369 (2014), *Abramski* v. *United States*, 573 U.S. 169, 191 (2014), and other cases supported rejecting *Chevron* here. App. A79-A82. Indeed, the government itself cited *Apel* in the district court and in other cases in order to explain its rejection of deference. The government's attempt to distinguish these and other of this Court's cases as not involving agency rulemaking seems to miss the point that non-deference and lenity apply to criminal or dual-use statutes, regardless of how the government seeks a broader interpretation of ambiguous language. Judge Henderson recognized as much and Justices Scalia and Thomas in *Whitman*, 135 S. Ct. at 353-54, likewise identified the exact same cases as conflicting with court of appeals decisions applying *Babbitt* v. *Sweet Home Chapter*, 515 U.S. 687, 704 n. 18 (1995).

Furthermore, a conflict does not require a decision of this Court exactly on all fours on these issues. That the courts of appeals continue to apply *Babbitt* rather than this Court's non-deference and lenity cases is precisely why review is needed to address those conflicting lines of precedent. Demanding a more flagrant conflict would be overly restrictive and allow only those cases where courts of appeals openly

displayed their rebellion against precedent. Cf. *Caetano* v. *Massachusetts*, 136 S. Ct. 1027, 1028 (2007) (per curiam summary vacatur for expressly contradicting Supreme Court precedent). For the majority of other cases, important issues arise in the spaces between two conflicting lines of precedent that have yet to be reconciled. This is one of those cases and the need for review of these issues has been recognized in this Court and others.

Finally, the government's closing hope that it can get other courts to endorse its construction of the statute without *Chevron*, BIO 30, does not negate the importance of the questions presented here. The court of appeals in *this* case relied on *Chevron* to reach its result and there is ample reason to believe that Judge Henderson's view would have carried the day without it. The error here was *not* harmless, and the government's backhanded suggestion that it might have been is wishful thinking and a question for remand, not for speculation at the cert. stage

II. The Decision Below Incorrectly Holds that the Government May Not Waive *Chevron* Deference.

The government says little about the second question other than to oddly suggest that waiver is not implicated because Petitioners assume *Chevron* applied. BIO 28. That response imagines the decision the government wishes it were defending rather than the actual decision below. The court of appeals recognized that the Final Rule was a sea-change in how the agency has read the statute not just regarding bump-stocks but dating back many decades.

Pet. App. A31-A33. It was understandably incredulous that ATF miraculously discovered a plain meaning it had been getting "wrong" for decades. Pet. App. A31-A33 (interpretive-rule theory "would mean that bump-stock owners have been committing a felony for the entire time they have possessed the devices" and have "always" been felons, notwithstanding years of government assurances to the contrary); Cf. *Id*. at A66 (noting holding of prospective legislative rule avoids any constitutional concerns that might attend a retroactive reinterpretation).

Ultimately, however, this Court need not address whether this was a legislative or interpretive rule – the court below held that it was legislative, and the government has not cross-petitioned. This Court thus should just review the decision below as it is, which squarely raises the questions presented. [3]

If this Court agrees with Petitioners that *Chevron* does not apply notwithstanding the panel's view that this was a legislative rule, then the government is returned to the position it claims to have wanted from the outset – having its Final Rule measured against the statute on its own merits with no *Chevron* thumb on the scales. That is hardly cause for complaint from the government. If this Court instead holds that *Chevron* can apply to the Final Rule in this case, then the question of waiver – or simply refusal to acknowledge and intentionally exercise "legislative" discretion – would be squarely presented. One would

[3] Such a situation is hardly unusual, as this Court only grants cert. on specific issues and routinely takes the other aspects of the case as a given for purposes of addressing the issues properly raised and decided below.

think the Executive Branch would welcome having the choice whether to avoid the separation of powers concerns that an exercise of delegated legislative power entails.

III. If *Chevron* Deference Applies and Cannot Be Waived by the Government, *Chevron* Should Be Overruled.

The many difficulties of the decision below, and the aggressive use of *Chevron* to support a desired result in the criminal context where the government itself rejects deference, perhaps reflect the bigger question whether *Chevron* is a problematic doctrine and poses an attractive nuisance. As noted in the Petition, at 30-33, and by many Justices, judges, and commentators, it may be that the time has come to reconsider *Chevron* outright. This case certainly highlights the dangers of that doctrine. And the fact that the government also finds so much to dislike in the decision below highlights the morass that has evolved in this area. Indeed, the decision below presents the issue it exactly the terms that makes the doctrine so problematic: a delegation of legislative discretion in an area presenting significant separation of powers concerns. Pet. 19-23.

If *Chevron* deference applies in the manner decided below, this Court should consider the more fundamental question whether such deference should exist at all.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari. Alternatively, this

Court should summarily reverse and remand for further proceedings in which the government could raise, and the courts below could rule on, its non-*Chevron*-dependent arguments.

Respectfully submitted,

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Dated: December 19, 2019