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.,

Respondents.

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

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONERS

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
FRANK D. GARRISON
ALYSSA K. HAZELWOOD
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Ste. 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org

Counsel for Amicus

QUESTIONS PRESENTED

1. Whether *Chevron* deference, rather than the rule of lenity, takes precedence in the interpretation of statutory language defining an element of various crimes where such language also has administrative applications?

2. Whether, if *Chevron* deference applies and takes priority over the rule of lenity, such deference can be waived in the course of litigation and on appeal?

3. Whether, if *Chevron* deference applies and cannot be waived, *Chevron* should be overruled?

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INTEREST OF *AMICUS CURIAE*[1]

The National Right to Work Legal Defense Foundation, Inc. has been the nation's leading litigation advocate for employee free choice concerning unionization since 1968. To advance this mission, Foundation staff attorneys have represented individual employees in many cases before this Court. *E.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988).

The Foundation has a particular interest in the third question presented—whether, if *Chevron* deference applies and cannot be waived, the Court should overrule *Chevron*—because Foundation staff attorneys currently represent hundreds of employees across the nation whose free choice to refrain from unionization and monopoly bargaining depends on the National Labor Relations Board's proper implementation of the National Labor Relations Act. Courts have applied *Chevron* deference in several cases involving the rights of individual employees. *See*, *e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998); *Pirlott v. NLRB*, 522 F.3d 423, 434 (D.C. Cir. 2008) ("The general chargeability issue is a matter for the Board to decide in the first instance."); *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 766 (9th Cir.

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[1] Pursuant to Supreme Court Rule 37.3(a), both parties received timely notice of *amicus curiae*'s intent to file this brief and consented to its filing. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission.

2002) (en banc) ("Courts are required to defer to the NLRB on statutory interpretation under *Chevron*."). Whether this Court should abandon the *Chevron* doctrine is therefore important to the Foundation's mission.

SUMMARY OF ARGUMENT

The Court should grant the petition and jettison *Chevron* deference. The Framers constructed the Constitution to safeguard the people's liberty by separating governmental powers.[2] At the federal level, the Constitution specifically delegates these powers—legislative, executive, and judicial—to the three separate federal branches.[3] *Chevron* deference is an anathema to that design, causes serious damage to individual liberty, and should be overruled.[4]

A. *Chevron* deference violates the Constitution's separation of powers for at least two reasons. *First*, *Chevron* deference circumvents Article I's lawmaking process. It allows executive agencies to exercise legislative power by rewriting laws without going through

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[2] *See* The Federalist, No. 51 (C. Rossiter ed. 1961) (J. Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.").

[3] *Dep't of Transp. v. Ass'n of Am. R.R.s.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment) ("[T]he Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government.").

[4] Past and current members of this Court, circuit court judges, and legal scholars have recognized *Chevron*'s incompatibility with the Constitution. *See, e.g.*, Pet. Br. 30-32.

bicameralism and presentment, which, in turn, creates serious fair notice problems. *Second*, *Chevron* allows executive agencies to exercise core judicial power that the Constitution delegates to the judiciary alone. When a court defers to an executive agency's statutory construction, it hands the executive the judicial power to interpret the law. That creates serious due process problems by depriving litigants of a fair hearing in court.

B. Whether this Court should overrule *Chevron* is a question that has important ramifications for federal law that reach beyond this case. *Chevron* is a ubiquitous problem in administrative law. Federal agencies like the NLRB routinely use *Chevron* deference to change the meaning of federal statutes—causing serious damage to the rights and liberties of the regulated public.

ARGUMENT

Whether this Court should overrule *Chevron* is an important constitutional question that affects the regulated public's rights and liberties.

A. *Chevron* deference is unconstitutional.

The Constitution is clear: each separate, co-equal branch of the federal government has specific and enumerated powers. Article I vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States," U.S. Const. art. I, § 1; Article II vests "[t]he executive Power . . . in a President of the United States," *id.* art. II, § 1; and Article III vests "[t]he judicial Power of the United States . . . in one supreme Court" and inferior courts established by Congress, *id.* art. III, § 1.

"The declared purpose of separating and dividing the powers of government, of course, was to diffus[e] power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (alteration in original) (quotation marks and citation omitted). The Constitution's protection of individual liberty through the separation of powers was the product of "centuries of political thought and experiences." *Perez v. Mortg. Bankers Ass'n.*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring). And these experiences taught the Framers that delegating to each separate federal branch certain limited, enumerated powers would protect the republic and its citizens better than any enumeration of rights ever could.[5] Indeed, the Framers knew the abandonment of the separation of powers would lead directly to the "loss of due process and individual rights." Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1538 (1991).[6]

Chevron deference is a two-step process. At the first step, the reviewing court determines whether a

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[5] *See NLRB v. Noel Canning*, 573 U.S. 513, 570–71 (2014) ("[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights. Indeed, so convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary.") (Scalia, J., concurring) (alteration, internal quotation marks, and citation omitted).

[6] James Madison thought that "[n]o political truth is . . . stamped with the authority of more enlightened patrons of liberty" than dividing the powers of government because "[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (J. Madison) (Clinton Rossiter ed., 1961).

statute is ambiguous. If the court determines the statute is ambiguous, then the court defers to the administrating agency's interpretation of the statute as long as it is a reasonable or permissible interpretation. *Chevron*, 467 U.S. at 844.

This regime undermines the separation of powers in at least two ways. *First*, it allows the legislature and executive to short-circuit Article I's deliberately onerous lawmaking process. It allows the legislature to delegate large swaths of its power to executive agencies, which then fill in these statutory "gaps"—i.e., define the law's meaning—without going through bicameralism and presentment. Article I vests *all* legislative power in Congress—not some, but *all*. *See* U.S. Const. art. I, § 1.[7] Article I's plain meaning should prevent the legislative branch from sub-delegating its legislative power to another branch.[8] But, unfortunately, this Court has not always—indeed, rarely—policed that line.[9]

Chevron is the inevitable upshot of abandoning Article I's text. *Chevron* deference is based on a legal fiction. That fiction assumes Congress implicitly delegates its power through ambiguous statutory language (or no statutory language at all) so that an administrative agency can make binding legislative rules and regulations. *See Chevron*, 467 U.S. at

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[7] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("Article I, § 1 . . . permits no delegation of those powers . . . .").

[8] *See Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); *see also* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 336–37 (2002).

[9] *Ass'n of Am. R.R.s.*, 135 S. Ct. at 1250 (Thomas, J., concurring in the judgment).

833–44.[10] *Chevron* deference thus creates a situation when, on a whim, the executive can change the meaning, scope, and practical implications of the legislature's unchanged statutory text. This case presents an obvious example. Before ATF's new regulation, bump stocks were *legal* under the applicable statutory provisions Congress passed, and individuals were therefore able to purchase and lawfully possess these devices. *See* Pet. Br. 4; Pet. App. A7–8. ATF's 2019 regulation changed the interpretation of the statute to render these devices *illegal* and possession of them a *criminal act*. *See* Pet. Br. 4; Pet. App. A7–8.

This regime undercuts the Framers' design to prevent excessive lawmaking—which the Framers thought was one of "the diseases to which our governments are most liable." *Gundy*, 139 S. Ct. at 2134 (footnote omitted). Article I requires a law to "win the approval of two Houses of Congress—elected at different times, by different consistencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto." *Id.* This gauntlet, the Framers thought, was a "bulwark[] of liberty." *Id.*[11]

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[10] "Statutory ambiguity . . . becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress." *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

[11] It is a feature and not a bug of our constitutional structure that laws are hard to enact. *See* John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2d 191, 202 (2007); *see also Ass'n. of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring).

The Framers also designed these rigorous political gauntlets to prevent factions—interest groups in modern parlance—from capturing the legislative process, and to protect minorities from the government wielding arbitrary power in favor of majorities with no accountability. *See id*; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) ("The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.") (citation and quotation marks omitted).

When congressional delegation makes lawmaking easy through delegation, moreover, the citizenry is susceptible to having their due process rights taken from them without fair notice. A fundamental tenet of the Due Process Clause requires that laws "which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citations omitted). A punishment will thus violate due process when a "regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* (citations and quotation marks omitted). *Chevron* turns this fundamental principle on its head, because an executive agency can decide—after a person has acted—what an ambiguous law means and bind that person to the agency's post-hoc interpretation.

Second, *Chevron* violates Article III by requiring the judiciary to defer to an executive branch agency's interpretation of a statute. In doing so, *Chevron* either subjugates the judiciary to the executive or impermissibly delegates core judicial power to the executive. In

either case, the practical effect is the same—through *Chevron* the judiciary gives the executive the judicial power to interpret the law. This creates serious due process problems by depriving a litigant of a fair hearing in court.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Judicial review is essential to the broader "liberal tradition, which is the dominant tradition in American constitutional law, emphasiz[ing] limited government, checks and balances, and strong protection of individual rights." Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 477 (2016) (internal punctuation and footnote omitted). The Framers thus entrusted judges—and only judges—with judicial power under Article III. This power, in turn, came with a court's judicial duty to "exercise its independent judgment in interpreting and expounding upon the laws." *Perez,* 135 S. Ct. at 1217; *see also* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 316–26 (2008).

This duty requires judges to interpret the laws before them and "to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through either internal or external sources." *Perez*, 135 S. Ct. at 1218. The judiciary, the Framers thought, would thus provide a "check" against the other branches—including administrative agencies—when they try to expand their enumerated powers. *See id*. at 1220.

The executive, as a co-equal, coordinate branch of government has an important and legitimate role in interpreting the laws to execute them. Yet the co-

equal judicial branch, in carrying out its constitutionally mandated duty, has a no less important role to "say what the law is" in a judicial proceeding. *Chevron* favors the former at the expense of the latter. If *Chevron* is rationalized structurally, this rationalization is misguided. *Chevron* violates the separation of powers by subjugating the judiciary's core power to the executive.

Moreover, if *Chevron* deference is a conscious choice of the judiciary to delegate its authority to "say what the law is" to the executive, it is an impermissible delegation. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."). Through its implementation of *Chevron*, the federal judiciary has essentially abandoned its core function to exercise independent and impartial judgment in litigation and its structural duty to check the legislative and executive branches.

What is more, by reflexively deferring to agencies under *Chevron*, federal courts give one side an advantage over the other during litigation. *See Pereira v. Sessions,* 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring); s*ee also* Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1209–10 (2016). This creates serious Fifth Amendment Due Process problems. "What is at stake here is the due process of law in Article III courts." *Id.* at 1231.

The Constitution tasks judges to provide a fair and neutral process and not engage in bias toward one party. But under *Chevron*, courts have become participants "in systematic bias." *Id.* This "[d]eference to administrative interpretation is a systematic precommitment in favor of the interpretation or legal position

of the most powerful of parties"—the federal government. *Id.* When they apply *Chevron* Judges thus fail in their duty to be the neutral arbiters of the law. They are no longer the impartial decision-maker due process requires—an essential element of individual liberty.[12]

The Court should thus take this opportunity to revisit and overrule *Chevron* deference to ensure, in cases such as this one, the proper separation of powers balance and to ensure each litigant has the due process of law that the Constitution requires.

B. *Chevron* deference has serious consequences for the regulated public that reach beyond this case.

Petitioners' case is not an anomaly. Although it is a prime example of the significant, illiberal ramifications of *Chevron* deference, this case is merely another in a litany of cases in which *Chevron* deference has operated against the Constitution and done violence to individual liberty.[13]

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[12] Despite this breakdown when it comes to administrative agencies, this Court has repeatedly affirmed that a neutral decision-maker is essential to a fair process: "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). And when a judge fails to "apply the law to [a party] in the same way he applies it to any other party[,]" *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002), he has failed in his judicial duty to provide due process.

[13] The modern administrative state has ballooned into a behemoth that "wields vast power and touches almost every aspect of daily life." *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010)).

For example, *Chevron* deference has for years allowed administrative agencies like the NLRB to make federal law—sometimes retroactively—based on political decisions. One of the primary rationales for *Chevron* deference is that agency "experts" are better equipped to determine the evolving policy for the nation:

> Judges are not experts in the field, and are not part of either political branch of the Government . . . . In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.

Chevron, 467 U.S. at 865.

But, what administrative agencies engage in is not always based on "expertise." Judges and scholars have criticized the NLRB in particular for engaging in excessive legal and policy oscillation from administration to administration based on political considerations, not expert policymaking. As one federal judge has described the problem:

> Sometimes the claim to expertise is entirely fraudulent; the most well-documented case is that of the National Labor Relations Board, the partisan majority of which routinely displaces the previous majority's psychological assertions about what employer tactics do or do not coerce workers when they are deciding whether to vote for union representation. Most often, however, expertise is simply a eu-

> phemism for policy judgments. The permanent staff of an agency may have a great deal of technical expertise, but the agency's ultimate decisions are made by the experts' political masters, who have sufficient discretion that they can make decisions based upon their own policy preferences, fearing neither that the expert staff will not support them nor that a court will undo their handiwork.

Ginsburg & Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY at 482–83 (footnote omitted).

To be sure, granting agencies like the NLRB deference to say what the law is prevents "ossification of large portions of our statutory law." *United States v. Mead Corp.*, 533 U.S. 218, 247–48 (2001) (Scalia, J., dissenting). Even so, a fundamental underpinning of the rule of law and separation of powers *is* the ossification (i.e., stabilization) of the law, unless Congress acts through its Article I power to change it. *Chevron*, however, allows an executive agency to change the law with the political winds (or for no apparent reason at all). Consequently, regulated individuals do not have fair notice before the government charges them with a legal violation.

Aided in large part by *Chevron* deference, agencies across the federal government, like the NLRB, for decades have abruptly changed legal and policy positions on dozens of major issues affecting individual liberty. They have done so not by applying the statutes Congress passed, but by using vague statutory language to instill their political preferences.

In sum, the Court should take this case, overrule *Chevron*, and revert to the first principle that Congress makes the law, the executive enforces the law, and the judiciary interprets the law.

* * *

Before retiring from this Court, Justice Kennedy noted that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron*[.]" *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring). This is such a case.

CONCLUSION

For all these reasons, and those Petitioners stated, the Court should grant the petition.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
FRANK D. GARRISON
ALYSSA K. HAZELWOOD
C/O NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org

October 4, 2019