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

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether *Chevron* deference can be waived in the course of litigation and on appeal?

2. 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?

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INTERESTS OF AMICUS CURIAE

The New Civil Liberties Alliance (NCLA) is a nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and sometimes even the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent.[2] This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's attention.

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[1] In accordance with Supreme Court Rule 37.6, NCLA certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the amicus curiae and its counsel made a monetary contribution intended to fund preparation or submission of this brief. As required by Supreme Court Rule 37.2(a), the parties' counsel of record received timely notice of amicus curiae's intent to file this brief. The petitioners' and respondents' counsel of record have consented to the filing of this brief.

[2] *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

In this case, NCLA is particularly concerned with the D.C. Circuit's decision to eschew its fundamental duty to interpret the law by deferring to the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) interpretation of the National Firearms Act pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Because the statute is criminal in nature and was promulgated by the very agency responsible for criminally prosecuting alleged violations, not even the ATF asked the court below to defer to its interpretation. Nevertheless, the court improperly sustained the validity of the regulation by elevating agency deference to a jurisdictional imperative, at the expense of the constitutionally required rule of lenity.

SUMMARY OF ARGUMENT

The D.C. Circuit has created a new version of *Chevron* deference—one that is unwaivable and superior to the rule of lenity. Whatever one thinks of *Chevron* deference, this variant of it is untenable. It requires judges to defer to an agency interpretation even when the agency itself asks them to exercise their duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The D.C. Circuit version of *Chevron* also violates the rule of lenity. In such ways, the D.C. Circuit has deepened divisions amongst the circuits on two different issues affecting the rights of litigants across the country. It has also created an absolute deference doctrine that is at odds with this Court's precedent.

This Court should grant at least the first two questions presented in the petition for a writ of certiorari to repudiate the D.C. Circuit's expansion of *Chevron* deference.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO UNIFY THE CIRCUITS AND REJECT THE D.C. CIRCUIT'S TREATMENT OF *CHEVRON* DEFERENCE AS UNWAIVABLE

Chevron deference is bad enough on its own, for it unconstitutionally requires judges to abandon their independent judgment and, where the government is a party, it requires them to engage in systematic bias in favor of the most powerful of parties.[3] But the D.C. Circuit's decision expands *Chevron* deference so that it applies even when agencies disclaim it. Even if one accepts the reasoning underlying *Chevron* deference, one should reject the D.C. Circuit's expanded version of this doctrine and thereby unify circuit court approaches to *Chevron*.

A. MAKING *CHEVRON* DEFERENCE UNWAIVABLE EXPANDS THIS ALREADY DUBIOUS DOCTRINE

The inflexibility of the D.C. Circuit's approach is an initial reason for worrying about an expansion of *Chevron* deference. Interpretive deference to an agency began

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[3] NCLA agrees with Petitioners' view that *Chevron* deference is unconstitutional. *See Is Administrative Law Unlawful?* at 315, 316; Philip Hamburger, "*Chevron* Bias" 84 G.W. L. Rev. 1187 (2016). However, it is not necessary for this Court to reach that question here. As discussed below, it is enough for this Court to say that *Chevron* deference does not prevail when an agency does not rely on it and that it does not supersede constitutionally-required canons of construction such as the rule of lenity.

as a pragmatic doctrine built on the assumption that administrators have "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Accordingly, *Chevron* deference is not an inflexible mandate for a court.

In response to criticism of judicial deference, this Court has defended a version of the doctrine by "reinforc[ing] its limits." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). Indeed, three members of this Court recently defended *Chevron* deference as nothing more than "a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1364 (2018) (Breyer, J., dissenting, joined by Ginsburg, J. and Sotomayor, J.). Even its strongest proponents caution courts against treating *Chevron* "like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision." *Id.*

It is therefore an expansion of *Chevron* deference to treat it as an inflexible rule that prevails notwithstanding an agency's unwillingness to rely on it. So rigid is the D.C. Circuit's version of *Chevron* deference that it precludes an agency from disclaiming *Chevron* deference in order to preserve a constitutionally required rule of construction such as the rule of lenity.

A further reason for considering the D.C. Circuit's decision an expansion of *Chevron* deference is that it goes beyond the justifications for such deference. The putative grounds for *Chevron* deference center on the dual logic of expertise and accountability. On the one hand, "practical agency expertise is one of the principal justifications behind *Chevron* deference." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990). On the other,

Chevron deference assumes that an agency, not the judiciary, should be politically accountable for a range of policy choices. *See Chevron U.S.A., Inc.*, 467 U.S. at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices[.]"). Though this accountability is highly attenuated and very different from that established by the Constitution, it is, together with alleged agency expertise, a supposed foundation for the deference regime: "Judges are not experts in the field, and are not part of either political branch of the Government." *Id.*

Allowing an agency to waive reliance on deference follows from both premises. An agency may or may not have relevant expertise in the interpretation at issue, and who better than the *agency* to decide something is not within its area of expertise? Moreover, an agency's sense of its political accountability may lead it to decline *Chevron* deference. Policy choices come in a variety of manifestations. Though they include the underlying reason for an agency rule, they also extend to how aggressively an agency defends its actions in court. If the agency has decided, for reasons of policy (or unconstitutionality), that it does not wish to invoke *Chevron* deference, a court cannot second-guess that choice without abandoning the alleged justifications for *Chevron* deference.[4]

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[4] The agency here declined to invoke *Chevron* deference after correctly noting that this Court "has 'never held that the Government's reading of a criminal statute is entitled to any deference.'" Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction, Doc. 16, at 29 (quoting *United States v. Apel*, 571 U.S. 359, 369 (2014)). Presumably this was a recognition by the agency that, despite the D.C. Circuit's contrary precedent, the application of *Chevron* deference in place of the rule of lenity would be unlawful.

The D.C. Circuit's refusal to allow a waiver here ignores both premises. The court's ruling bespeaks more a disagreement over litigation strategy than a genuine reflection of respect for the agency's position. Indeed, the court refused to accept the waiver of *Chevron* deference because it thought the "agency's lawyers" had not properly captured what the court thought the agency had "plainly believed" when enacting the regulation. *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 21, 23 (D.C. Cir. 2019). That is not "deference" to the agency's expertise or political choices; it is the court acting in place of the agency.

This Court should grant review to give clear guidance to the circuit courts that they cannot force *Chevron* deference on an agency that does not seek it. Allowing the decision below to stand would enable the D.C. Circuit to expand *Chevron* deference into uncharted territory, enlarging rather than limiting its unconstitutionality.

B. THE D.C. CIRCUIT'S VERSION OF *CHEVRON* DEFERENCE HAS CREATED A DEEP DIVIDE AMONG THE CIRCUIT COURTS

In light of the pragmatic character of *Chevron* deference and the reasoning said to underlie it, at least three circuits—in contrast to the D.C. Circuit—have allowed agencies to forgo deference to their interpretations of statutes. As Justice Gorsuch recognized while writing for the en banc Tenth Circuit, when an agency declines to exercise its interpretive authority and "doesn't ask for deference to its statutory interpretation, '[the Court] need not resolve the … issues regarding deference which would be lurking in other circumstances.'" *Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1146 (10th Cir. 2010) (en

banc) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)). The Fifth and Sixth Circuits have reached the same conclusion. *See Albanil v. Coast 2 Coast, Inc.*, 444 F. App'x 788, 796 (5th Cir. 2011) (unpublished) ("Plaintiffs did not raise their *Chevron* argument in the district court …. Thus, they have waived this argument."); *C.F.T.C. v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) ("[T]he CFTC waived any reliance on *Chevron* deference by failing to raise it to the district court.").

The D.C. Circuit rejected all of these principles and adopted a rigid rule of mandatory *Chevron* deference, so that the agency is not permitted to disclaim it even in compliance with the constitutionally required rule of lenity. *Guedes*, 920 F.3d at 23.

The D.C. Circuit has thereby created a deep divide among the circuits, and this division, on its own, warrants this Court's review.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE SIMMERING CONFLICT BETWEEN *CHEVRON* DEFERENCE AND THE RULE OF LENITY

Whether or not *Chevron* deference is constitutional, it cannot defeat the constitutionally required rule of lenity. As the circuits are split on this question, this Court should seize upon the opportunity to resolve this important conflict.

A. THIS COURT NEEDS TO CLARIFY THAT THE RULE OF LENITY CANNOT BE CAST ASIDE

The rule of lenity is constitutionally *required*. It dictates that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010); *see also United States v. Kozminski*, 487 U.S. 931, 952 (1988). The rule of lenity holds that a law must speak "in language that is clear and definite" if it is to render something a crime. *United States v. Bass*, 404 U.S. 336, 347 (1971) (citation and internal quotation marks omitted).

The rule has layered constitutional foundations. "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). "[E]qually important, [the rule of lenity] vindicates the principle that only the *legislature* may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to

the courts—much less to the administrative bureaucracy." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement regarding denial of certiorari, joined by Thomas, J.).

This Court has emphatically declared, "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014); *see also United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."). And this Court has repeatedly applied the rule of lenity to ambiguous statutes with both civil and criminal penalties, without regard to *Chevron* deference. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 8 (2004); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality op.); *id*. at 519 (Scalia, J., concurring).

Yet this Court's opinion in *Babbitt v. Sweet Home Chapter of Comm's for a Great Oregon*, 515 U.S. 687 (1995) has clouded the picture. In an opinion authored by Justice Stevens, this Court deferred to an agency interpretation of a civil statute with criminal penalties, and opined in a footnote that the Court had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Id*. at 704, n. 18.

Babbitt's "drive by" footnote has been heavily criticized by members of this Court as "contradict[ing] the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Whitman*, 135 S. Ct. at 353-54. More significantly, applying deference instead of the rule of lenity would "upend ordinary principles of interpretation" and allow "federal administrators [to] in effect create (and uncreate) new crimes at

will, so long as they do not roam beyond ambiguities that the laws contain." *Id.* at 353. As Justice Gorsuch has noted, "*Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

The D.C. Circuit concluded it was bound by *Babbitt*'s footnote and refused to apply the rule of lenity at all. *See Guedes*, 920 F.3d at 27-28. It thus applied deference to expand the reach of a criminal law *instead* of the constitutional presumption of lenity. *Id.*

This case thus presents a perfect opportunity for this Court to resolve the conflict between *Chevron* deference and the rule of lenity and, moreover, to correct the constitutional harms that have been brought on by *Babbitt*'s ill-considered dicta. *See Whitman*, 135 S. Ct. at 354. If *Chevron* prevails over lenity, then no one has fair notice of a criminal statute's reach. As Judge Sutton has observed, "[I]f agencies are free to ignore the rule of lenity, the state could make an act a crime in a remote statement issued by an administrative agency. The agency's pronouncement need not even come in a notice-and-comment rule. All kinds of administrative documents, ranging from manuals to opinion letters, sometimes receive *Chevron* deference." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731-32 (6th Cir. 2013) (Sutton, J., concurring) (citing *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002)). It is therefore essential that this Court protect the rule of lenity from the inroads created by an overbroad reading of *Chevron.*

B. THE CIRCUITS ARE DEEPLY SPLIT OVER THE RULE OF LENITY'S RELATIONSHIP TO *CHEVRON* DEFERENCE

The courts of appeals are intractably divided on the role the rule of lenity plays when it confronts *Chevron* deference. In addition to the D.C. Circuit in this case, four circuits consider themselves bound bv *Babbitt*'s footnote. *See Sash v. Zenk*, 439 F.3d 61, 67 (2d Cir. 2006) ("The Supreme Court has rejected the idea that the rule of lenity should trump the deference we traditionally afford to administrative regulations."); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526 (4th Cir. 2005) ("Deference trumps lenity when courts are called upon to resolve disputes about ambiguous statutory language[.]") (quoting *Sash v. Zenk*, 344 F.Supp.2d 376, 383 (E.D. N.Y. 2004)); *Perez-Olivo v. Chavez*, 394 F.3d 45, 48 (1st Cir. 2005) ("furthermore, the rule of lenity does not foreclose deference to an administrative agency's reasonable interpretation of a statute."); *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1271 (9th Cir. 2001) ("The rule of lenity, however, does not prevent an agency from resolving statutory ambiguity through a valid regulation.").

In contrast, three circuits have acknowledged that the rule of lenity has continuing vitality even when deference may otherwise apply. *See United States v. Phifer*, 909 F.3d 372, 383-84 (11th Cir. 2019) ("*Auer* deference does not apply in criminal cases," "when a criminal regulation is ambiguous … the rule of lenity governs instead[.]"); *United States v. Ortellana*, 405 F.3d 360, 369, 371 (5th Cir. 2005) (noting that "the level of deference due an agency's interpretation of a statute imposing criminal liability is uncertain" and applying the "rule of lenity" instead); *N.L.R.B. v. Oklahoma Fixture Co.,* 332

F.3d 1284, 1287 (10th Cir. 2003) (en banc) ("If we determine the statute is ambiguous, therefore, it is appropriate to afford some deference to the Board interpretation as long as it is a reasonable or permissible one, and not in conflict with interpretive norms regarding criminal statutes.").

Other judges have emphasized the constitutional consequences of replacing the rule of lenity with judicial deference. The application of *Chevron* deference in such a setting "threatens a complete undermining of the Constitution's separation of powers, while the application of the rule of lenity preserves them by maintaining the legislature as the creator of crimes." *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030 (6th Cir. 2016) (Sutton, J., concurring and dissenting in part) (emphasis added), *reversed on other grounds by* 137 S.Ct. 1562 (2017); *see also Guedes*, 920 F.3d at 42 (Henderson, J., dissenting in part) ("Unlike with civil statutes, then, ambiguity in the criminal law is presumptively for the Congress—not the ATF—to resolve.").

The circuits are thus in disarray—making the validity of many criminal prosecutions depend on geography rather than statutory text. This presents yet another compelling reason for this Court to grant review.

C. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE CONFLICT

Recognizing the importance of resolving the tension between *Chevron* deference and the rule of lenity, this Court has *twice* granted review to determine which prevails. Both times, this Court resolved the cases without reaching this issue. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve

whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation."); *Barber v. Thomas*, 560 U.S. 474, 488-89 (2010) ("Having so considered the statute, we do not believe that there remains a 'grievous ambiguity or uncertainty' in the statutory provision before us[,]" so as to apply the rule of lenity over *Chevron* deference.).

Unlike both *Barber* and *Esquivel-Quintana*, this case presents an ideal vehicle for resolving the conflict between *Chevron* deference and the rule of lenity. The D.C. Circuit resolved this case in favor of ATF *only* because of its application of *Chevron* deference instead of the rule of lenity. *Guedes*, 920 F.3d at 27. The court not only concluded the statutory provision was ambiguous, but also rejected the notion that ATF's interpretation was the best reading of the text. *Id.* at 20. The regulation was only saved by being one of several "permissible" readings, once deference applied. *Id.* at 31. Had lenity applied instead, this case would have come down the opposite way. It thus squarely presents the conflict between the doctrines and provides a perfect opportunity for this Court to resolve this important issue.

CONCLUSION

This Court should grant review of at least the first two questions presented in Guedes' petition for a writ of certiorari.

Respectfully submitted, on October 4, 2019.

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