

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MICAH KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

In *Gonzales v. Oregon*, this Court said the Controlled Substances Act (CSA) “gives the Attorney General limited powers, to be exercised in specific ways.” 546 U.S. 243, 259 (2006). The questions presented are:

- I. Whether the temporary drug scheduling statute, 21 U.S.C. § 811(h), is ambiguous as to the agency’s power to criminalize isomers.
- II. Whether the rule of lenity or *Chevron* deference applies to resolve an ambiguous criminal statute.

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Petition for a Writ of Certiorari

Petitioner Micah Kelly respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions and Orders Below

The opinion of the Ninth Circuit Court of Appeals is published at 874 F.3d 1037. The Ninth Circuit denied rehearing en banc on January 8, 2018. App. at 10. The order of the United States District Court for Nevada is unpublished, but appears at 2016 WL 3769339. The report and recommendation of the Magistrate Judge is also unpublished, but appears at 2016 WL 8732182.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in this case on January 8, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). This Petition is timely under Supreme Court Rule 13.3.

Relevant Constitutional and Statutory Provisions

Pursuant to Supreme Court Rule 14.1(f), the relevant constitutional and statutory provisions are included in the attached Appendix.

Statement of the Case

For many years, this Court and other courts have been asked whether administrative agencies can criminalize conduct in the absence of an express congressional grant of authority to do so. But lower courts lack guidance on how to interpret federal statutes contemplating both criminal and administrative enforcement. In the rise of the administrative state, how to resolve ambiguous federal statutes that give agencies some power to criminalize conduct is of utmost importance to criminal defendants. Yet this Court has not been presented with a petition for certiorari cleanly presenting the issue of whether a court owes deference to an executive agency's interpretation of a criminal law. This petition does.

The government charged Kelly with distributing and possessing with intent to distribute a Schedule I controlled substance under 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), alleging he sold and possessed the substance ethylone. Kelly moved to dismiss the indictment because ethylone was not a Schedule I controlled substance at the time he allegedly sold and possessed it. The government argued ethylone was a Schedule I substance because the Drug Enforcement Administration (DEA) temporarily scheduled butylone in Schedule I, and ethylone is a positional isomer of butylone.¹ The district court denied Kelly's motion to dismiss on this theory, giving

¹ Generally, an "isomer" is "one of two or more compounds, radicals, or ions that contain the same number of atoms of the same elements but differ in structural arrangement and properties." *Isomer*, *Merriam-Webster Dictionary*, available at <https://www.merriam-webster.com/dictionary/isomer> (last visited Apr. 6, 2018). Isomers can be classified in a variety of ways, including optical, geometric, and positional, as will be explained further herein.

deference to the DEA's interpretation of its authority to schedule isomers under the temporary scheduling statute. App. at 14, 26.

Kelly appealed. A panel of the Ninth Circuit affirmed by published opinion, holding that when the DEA temporarily scheduled butylone, it also temporarily scheduled ethylone. *United States v. Kelly*, 874 F.3d 1037 (9th Cir. 2017). In so holding, the Ninth Circuit applied *Chevron* deference and not the rule of lenity. *Id.* at 1049-50 ("The rule of lenity does not apply to Kelly's case. . . . The district court properly accorded *Chevron* deference to the agency interpretation."). Kelly filed a petition for rehearing en banc, which the Ninth Circuit denied. App. at 10.

Reasons for Granting the Writ

"The [Controlled Substances Act (CSA)] gives the Attorney General limited powers, to be exercised in specific ways." *Gonzales v. Oregon*, 546 U.S. 243, 259 (2006). The Attorney General has delegated those limited powers to the DEA. 28 C.F.R. § 0.100. This Court has deemed the Attorney General's delegation to the DEA constitutional. *Touby v. United States*, 500 U.S. 160, 169 (1991). Included in the limited delegated powers are the abilities to permanently and temporarily schedule drugs, so long as the DEA complies with the procedures set forth by statute. 21 U.S.C. § 811(a)-(c) (permanent scheduling procedure); 21 U.S.C. § 811(h) (temporary scheduling procedure).

A criminal prosecution is the only context in which courts can review the DEA's temporary scheduling practices. Congress otherwise has prohibited judicial review of

any DEA temporary scheduling order. 21 U.S.C. § 811(h)(6). This Court deemed that prohibition an acceptable limitation on constitutional checks and balances in large part because the temporary scheduling statute “does not preclude an individual facing criminal charges from bringing a challenge to a temporary scheduling order as a defense to prosecution.” *Touby*, 500 U.S. at 168-69 (internal citation and quotations marks omitted). Searching judicial review is therefore required in this case.

The Ninth Circuit’s opinion here upsets the careful separation-of-powers balance approved by *Touby*. The opinion holds the temporary scheduling statute unambiguously delegates to the DEA the power to temporarily schedule myriad unidentified isomers, and therefore declines to construe the statute in Kelly’s favor under the rule of lenity. Yet, the opinion also applies deference under *Chevron*, *U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to the DEA’s interpretation of its authority. But both propositions cannot be true. Either the temporary scheduling statute plainly delegates a certain authority to the DEA, or it does not. And if the statute is ambiguous on this point, then the next step is to resolve the ambiguity, which implicates the rule of lenity and *Chevron* deference.

Neither this Court nor the Circuits have determined how to reconcile the rule of lenity and *Chevron* deference when interpreting an ambiguous statute that contemplates both criminal and administrative enforcement. This Court should grant certiorari to decide whether and how *Chevron* deference factors in when interpreting a criminal statute that an agency is charged with enforcing.

I. Under the unambiguous language of the temporary scheduling statute, the DEA lacks authority to temporarily schedule a substance's unidentified isomers.

Congress delegated to the DEA the authority to permanently or temporarily add drugs to the federal schedules. 21 U.S.C. § 811. For both permanent and temporary scheduling, the DEA must follow enumerated procedures for “each drug or other substance proposed to be controlled.” 21 U.S.C. § 811(c). The enumerated procedures are mandatory. *See* 21 U.S.C. § 811 (using “shall” 51 times).

The temporary scheduling statute authorizes the DEA to place a substance “in schedule I on a temporary basis” if the agency provides certain notice and makes specific findings. 21 U.S.C. § 811(h)(1). The DEA must:

- Provide notice to the Secretary of Health and Human Services (HHS) of the proposed order and take into consideration any comments HHS submits, § 811(h)(1)(B), (h)(4);
- Publish a 30-day notice in the Federal Register of the intent to issue a temporary scheduling order “and the grounds upon which such an order is to be issued,” § 811(h)(1)(A);
- Find that temporarily scheduling the substance in Schedule I “is necessary to avoid an imminent hazard to the public safety,” § 811(h)(1), considering the substance’s “history and current pattern of abuse,” “[t]he scope, duration, and significance of abuse,” “[w]hat, if any, risk there is to the public health,” § 811(h)(3); and
- Issue an agency order temporarily scheduling the substance in Schedule I. § 811(h)(1), (5).

The temporary scheduling statute does not mention isomers. 21 U.S.C. § 811(h). Rather, it delineates how the DEA shall temporarily schedule “a” particular substance. *See* 21 U.S.C. § 811(h) (referencing “a substance,” “the substance,” and

“such substance”). Thus, under the plain language of the temporary scheduling statute, the DEA may temporarily schedule “the substance” for which it provides notice and makes particular findings. The temporary scheduling statute is silent about that substance’s isomers.

In contrast, the permanent scheduling statute provides a procedure for the DEA to schedule a substance and its isomers. The permanent scheduling statute authorizes the DEA to permanently place drugs “in the schedules established by section 812.” 21 U.S.C. § 811(a). Section 812 establishes Schedules I(a)-(d), II(a)-(c), III(a)-(e), IV, and V. 21 U.S.C. § 812. Depending on where the DEA permanently places a drug, particular isomers of that drug are also scheduled.

The term “isomer” means the optical isomer, except as used in schedule I(c) and schedule II(a)(4). As used in schedule I(c), the term “isomer” means any optical, positional, or geometric isomer. As used in schedule II(a)(4), the term “isomer” means any optical or geometric isomer.

21 U.S.C. § 802(14). Isomers are thereby permanently scheduled by operation of §§ 802, 811(a), and 812.

Thus, the CSA instructs that, once a substance goes through the rigors and testing of permanent scheduling, it is placed in a Schedule and Subsection. 21 U.S.C. § 812(b). Then, and only then, are its particular isomers brought under control pursuant to § 802(14). Congress did not include such a mechanism for temporarily scheduling isomers in the temporary scheduling statute. 21 U.S.C. § 811(h).

The Ninth Circuit held “[t]he plain language of the CSA evinces Congress’ intent to permit the DEA to temporarily schedule a parent substance and its isomers, such as butylone and ethylone.” *Kelly*, 874 F.3d at 1050-51. While referencing the

CSA’s “plain language,” the opinion does not identify the language the Ninth Circuit had in mind. It is unclear to which provision the opinion refers. The temporary scheduling statute does not address “parent substances” or “isomers.” 21 U.S.C. § 811(h). Parent substances are neither defined nor referenced in the CSA. *See* 21 U.S.C. §§ 801-904.

The temporary scheduling statute does not delegate to the DEA the authority to temporarily schedule the unidentified isomers of a substance that the DEA temporarily schedules. The Ninth Circuit’s opinion substantially broadens the DEA’s authority beyond what Congress specifically delegated in 21 U.S.C. § 811(h). *Cf. Touby*, 500 U.S. at 167 (“Congress has placed multiple specific restrictions on the Attorney General’s discretion to define criminal conduct.”). Accordingly, the judgment against Kelly adjudicating him guilty of selling and possessing such an unnamed isomer, is erroneous.

Given that this Court has recognized the CSA gives the DEA limited powers, to be exercised in specific ways, whether the DEA has overstepped its limited powers by criminalizing unidentified isomers is an important federal question. This Court should address this question of first impression.

II. If the temporary drug scheduling statute is ambiguous, the rule of lenity controls over *Chevron* deference.

At the least, the temporary scheduling statute creates ambiguity about whether the DEA may temporarily control unidentified isomers, and if so what types. The rule of lenity requires courts to interpret ambiguous criminal laws in favor of the defendant. *See United States v. Santos*, 553 U.S. 507, 514 (2008). “This venerable

rule . . . vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.” *Id.* For statutes imposing criminal liabilities, such as the CSA, “it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute’s coverage.” *Crandon v. United States*, 494 U.S. 152, 158 (1990).

Assuming the temporary scheduling statute is ambiguous as to the temporary scheduling of isomers, Kelly should prevail under the rule of lenity. Under the CSA, the subsection in Schedule I in which a substance is placed determines which isomers of that substance are also controlled by Schedule I. *See* 21 U.S.C. § 812 (Schedule I subsections). For a substance placed in Subsections I(a), I(b), and I(d), only the optical isomers of that substance are also controlled. 21 U.S.C. § 802(14). For a substance placed in Subsection I(c), its optical, positional, and geometric isomers are controlled. 21 U.S.C. § 802(14). Thus, positional isomers are controlled as Schedule I substances only if the named substance is placed in Subsection I(c).

The temporary scheduling statute authorizes the DEA to place a substance in Schedule I as whole. 21 U.S.C. § 811(h)(1). It does not further authorize the DEA to temporarily schedule a substance into one of the Schedule I subsections. 21 U.S.C. § 811(h)(1). Accordingly, which statutory definition of “isomers” applies to temporarily scheduled substances is ambiguous. It could be the definition of isomer that includes only optical isomers, or it could be the definition of isomers that includes optical, positional, and geometric isomers. Both readings are equally plausible.

Construing the ambiguity in Kelly's favor, the temporary scheduling statute authorizes the DEA to temporarily schedule only a substance and its optical isomers. Below, the government argued that butylone and ethylone are positional isomers of each other. The district court denied Kelly's request for an evidentiary hearing on the matter, App. at 13, so it is unclear whether the government's position is accurate. But even assuming ethylone is a positional isomer of butylone, the DEA did not have authority to temporarily schedule butylone's *positional* isomers. Accordingly, ethylone was not a Schedule I substance at the time of Kelly's offense, and the indictment must be dismissed.

Despite the temporary scheduling statute's silence on unidentified isomers, the Ninth Circuit declined to apply the rule of lenity because it believed the statute was not ambiguous. *Kelly*, 874 F.3d at 1049 ("The rule of lenity does not apply to Kelly's case. . . . There is no ambiguity here."). But the Ninth Circuit then purported to apply *Chevron* deference to the DEA's interpretation of its authority under the temporary scheduling statute. *Kelly*, 874 F.3d at 1050-51. The Ninth Circuit concluded: "The district court properly accorded *Chevron* deference to the agency interpretation." *Id.* at 1051. This conclusion is inconsistent with this Court's precedents, as well as both the lenity and *Chevron* interpretive principles.

First, agency deference is appropriate only if a statute is ambiguous. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Either the temporary scheduling statute is ambiguous

or it is not. And, if ambiguous, because this is a criminal statute, the rule of lenity should control.

Second, this Court instructed in *Touby* that judicial review in a criminal case of the DEA's temporary scheduling of substances is necessary "to permit courts to ascertain whether the will of Congress has been obeyed." *Touby*, 500 U.S. at 168-69. The Ninth Circuit's decision to apply *Chevron* deference to the DEA's interpretation of its own temporary scheduling authority is at odds with *Touby*.

Third, this Court has declined to defer to agency interpretation of criminal statutes. *See, e.g., Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014) (finding ATF's interpretation of a "false statement" for 18 U.S.C. § 922(a)(6) in a criminal prosecution to be "not relevant at all," as "criminal laws are for courts, not for the Government, to construe"); *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."). The Circuits have also questioned whether *Chevron* deference is ever appropriate when a criminal statute is at issue. *See, e.g., United States v. Douglas*, 974 F.2d 1046, 1048 n.1 (9th Cir. 1992) (doubting "whether an agency's interpretation of a *criminal* statute is entitled to deference under *Chevron*"); *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987) ("We are, in short, far outside *Chevron* territory here.").

As Justice Scalia recognized almost 30 years ago, *Chevron* has no role when courts are called to interpret criminal statutes:

[T]he vast body of *administrative* interpretation that exists . . . is not an administrative interpretation that is entitled to deference under *Chevron* The law in question, a criminal statute, is not administered by any agency but by the courts.

Crandon, 494 U.S. at 177 (Scalia, J., concurring); *see also Santos*, 553 U.S. at 519 (“We interpret ambiguous criminal statutes in favor of defendants, not prosecutors.”) (Scalia, J., writing for a plurality of the Court).

Judge Sutton of the Sixth Circuit has expressed a similar view, stating “*Chevron* has no role to play in interpreting ordinary criminal statutes.” *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring). This view is supported this Court’s precedents, the rule of lenity, the *Chevron* framework, and the policies driving both lenity and *Chevron*. *Id.* at 729-36. “*Chevron* describes how judges and administrators divide power.” *Id.* at 732. “But power to define crimes is not theirs to divide.” *Id.* “Making something a crime is serious business.” *Id.* at 731. “The rule of lenity carries into effect the principle that only the legislature, the most democratic and accountable branch of government, should decide what conduct triggers these consequences.” *Id.* (citing *United States v. Bass*, 404 U.S. 336, 348 (1971)). “By giving unelected commissioners and directors and administrators carte blanche to decide when an ambiguous statute justifies sending people to prison, the government’s theory diminishes this ideal.” *Id.* “The accommodation then becomes straightforward: Allowing agencies to fill gaps in

criminal statutes would impair the rule of lenity’s purposes, and interpreting these statutes leniently would respect *Chevron*’s aims.” *Id.*

More recently, Judge Sutton further explained: “In 227 years and counting, the federal courts have never presumed that, when an ambiguity arises in a criminal statute, the congressional silence signals that Congress wants an executive branch agency to fill the gap.” *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., concurring in part) (emphasis in original). The *Chevron* doctrine “does not give the Department of Justice (or for that matter any other federal agency) *implied* gap-filling authority over ambiguous criminal statutes.” *Id.* (emphasis in original). “Otherwise, that would leave this distasteful combination: The prosecutor would have the explicit (executive) power to enforce the criminal laws, an implied (legislative) power to fill policy gaps in ambiguous criminal statutes, and an implied (judicial) power to interpret ambiguous criminal laws.” *Id.* (citation omitted). “The application of *Chevron* to criminal laws also would leave no room for the rule of lenity, a rule that resolves ambiguities in criminal statutes in favor of the individual and a rule of construction that Chief Justice Marshall described as ‘perhaps not much less old than construction itself.’” *Id.* (quoting *United States v. Wiltberger*, 5 L. Ed. 37 (1820)).

This Court reversed the Sixth Circuit’s majority decision in *Esquivel-Quintana v. Sessions*. 137 S. Ct. 1562 (2017). In doing so, this Court left open whether the rule of lenity or *Chevron* receives priority when a criminal statute is at issue. *Id.* at 1572 (“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.”).

In a statement respecting the denial of certiorari in a different case, Justice Scalia, joined by Justice Thomas, expressed a desire to squarely decide the issue: “Does a court owe deference to an executive agency’s interpretation of a law that contemplates both criminal and administrative enforcement?” *Whitman v. United States*, 574 U.S. ____ (2014) (Scalia, J., statement respecting denial of certiorari, joined by Thomas, J.). “Undoubtedly Congress may make it a crime to violate a regulation, but it is quite a different matter for Congress to give agencies—let alone for us to *presume* that Congress gave agencies—power to resolve ambiguities in criminal legislation.” *Id.* (emphasis in original) (citations omitted). However, Justice Scalia indicated that “when a petition properly presenting the question comes before [the Court],” he would be “receptive to granting it.” *Id.* This petition presents that question.

If the temporary scheduling statute is ambiguous as to the DEA’s authority to temporarily schedule isomers, this case squarely raises whether lenity or *Chevron* should control when the meaning of a criminal statute is challenged in a criminal proceeding. This Court should decide this important question that has never before been decided by any appellate court.

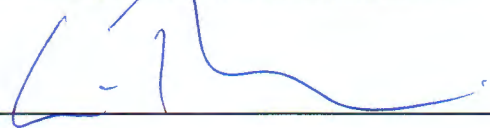
Conclusion

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

/s/  _____

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/s/  _____

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