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 *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Petitioners herein seek a determination that a rule redefining legal bump-stock-type devices as illegal "machineguns" is invalid where the lower courts have reached the conclusion by granting *Chevron* deference to the interpretation of a criminal statute in the face of ambiguity. In December 2018, the Bureau of Alcohol, Tobacco, Firearms, and Explosives expanded its interpretation of the statutory term "machinegun" to include guns with a bump-stock-type device attached. Petitioners immediately sought a preliminary injuction.

By a divided vote, the District of Columbia Circuit affirmed, deferring to the Bureau of Alcohol, Tobacco, Firearms, and Explosives, determining that guns with bump-stock-type devices can be classified as "machinceguns" under a reasonable interpretation of the statutory term.

The question presented is:

1. Whether *Chevron* deference is constitutionally permissible in the context of criminal law?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that the authority to "declare what the law is" is vested in the judicial branch of government and the law making power is vested in the legislative branch. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Kisor v. Wilkes*, 139 S.Ct. 2400 (2019); *Gundy v. United States*, 139 S.Ct. 2116 (2019); *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015); *Department of Transportation v. Association of American Railroads*, 135 S.Ct. 1225 (2015).

SUMMARY OF ARGUMENT

Criminal law is distinct. Because personal liberties and freedoms are at stake, the line between criminal and non-criminal behavior must always be drawn clearly such that the reasonable person is on notice as to where his or her actions fall with respect to that line. Moreover, the Framers by design placed the power to construct criminal statutes with the legislative branch comprised of the people's representatives. The judicial and executive branches do not wield that

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made made a monetary contribution to fund the preparation and submission of this brief.

power, nor should they attempt to infringe on the right of the legislature to do so. The requisite supporting pillars of criminal law are therefore due process and separation of powers.

The Court should grant review to clarify that true ambiguity in criminal statutes must be cured by the lawmaking power itself, not by the Courts and not by executive or independent agencies.

REASONS FOR GRANTING THE WRIT

I. Basic Principles of Due Process and Separation of Powers Require That Federal Criminal Law Be Drafted With *Clarity*, By *Congress*

Our country's approach to criminal law is based on "twin constitutional pillars of due process and separation of powers," such that the mere possibility that a man's conduct has violated the law will never be enough to "justify taking his liberty." *United States v. Davis*, 139 S.Ct. 2319, 2335 (2019). Due Process requires that the criminal law be framed with sufficient clarity that reasonable people are put on notice of its commands, because "[i]n our constitutional order, a vague law is no law at all." *Id.* at 2323. But separation of powers requires that the necessary clarity be provided the legislative authority itself, in accord with the very first command of the Constitution that the "legislative powers herein granted are vested in a Congress of the United States." U.S. Const. art. I, § 1.

When dealing with statutory ambiguity, the longstanding Rule of Lenity is consistent with these principles; deference under *Chevron* to enforcement agencies is not.

II. The Rule Of Lenity Resolves Ambiguity In Favor Of The Defendant

The Rule of Lenity requires that "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S.Ct. at 2333. This is true even if the statute has both criminal and non-criminal applications. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see also Whitman v. United States*, 135 S.Ct. 352, 353–54 (2014) (Scalia & Thomas, JJ., statement respecting denial of certiorari) ("[I]f a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings."); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–16 (1992) (applying the lenity to a tax statute in a civil setting because it carries criminal sanctions).

The Rule of Lenity has a rich history, predating the Founding, and has been suggested to be "perhaps not much less old than" statutory construction itself. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.). The "touchstone" of the rule is statutory ambiguity (though such ambiguity must be genuine, not contrived). *Bifulco v. United States*, 447 U.S. 381, 387 (1980). This is because the lenity doctrine is based on the law's "tenderness" for individual rights given by fair notice. *Davis*, 139 S.Ct. at 2333. That is, special care is taken in criminal law to ensure that criminal behavior is well-defined. Where such definition lacks clarity, the tie goes to the defendant because he must *know* where the line has been drawn between criminal and non-criminal behavior before he is to be held accountable for stepping over that line. As Judge Henry Friendly once noted, we

have an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 209 (1967).

To be sure, the ambiguity must be genuine. This Court has cautioned that a statute is not ambiguous "merely because it was *possible* to articulate a construction more narrow," or because there exists a "division of judicial authority." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (emphasis in original). *See Albernaz v. United States*, 450 U.S. 333, 342 (1981) ("Lenity thus serves only as an aid for resolving ambiguity; it is not to be used to beget one."). Rather, "reasonable doubt" must persist "even *after* resort to 'the language and structure, legislative history, and motivating policies'." *Moskal*, 498 U.S. at 108 (emphasis in original). *See also Callanan v. United States*, 364 U.S. 587, 596 (1961) ("The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed.").

But when a law is determined to be truly ambiguous, such as the court below determined here, Pet.App. A52, it is the legislative branch that must cure the ambiguity, for it is the legislative branch that has "the power of punishment." *Davis*, 139 S.Ct. at 2333. In *Davis*, this Court held that *the courts* are not "in the business" of writing new laws or correcting existing criminal statutes. *Id.* at 2336. Because of this judicial limitation, when a genuine ambiguity arises, the courts must treats the law "as a nullity and invite *Congress* to try again." *Id.* at 2323 (emphasis added. Even if "statutory ambiguity 'effectively' licenses [the

courts] to write a brand-new law, [the courts] cannot accept that power in a criminal case, where the law must be written by Congress." *United States v. Santos*, 553 U.S. 507, 523 (2008). In other words, it is not the judiciary's role to take any additional steps to "fix" a statute which has failed under the rule of lenity.

What is true for the judiciary is (or should be) at least equally true for the executive, for the latter has no more *lawmaking* power under our Constitution than the former, and it does not even have the *interpretive* power assigned to the Judiciary under Article III.

III. Particularly In The Context of Criminal Law, *Chevron* Deference Violates Separation of Powers.

As is well known, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) , this Court set out a two-step process for judicial review of statutory construction by a federal agencies charged with the statute's enforcement. In Step One, a court determines if "Congress has spoken directly to the precise question at issue." *Id.* at 842. If Congress has been clear, "that is the end of the matter." *Id.*

Of course, determining whether a statute has the requisite clarity requires "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 842-43, 843 n.9). In the *Kisor* case last term, this Court saw fit to narrow the scope of *Auer* deference (agency deference given when ambiguity exists in the meaning of agency regulations) by instructing that courts "must carefully consider the text, structure, history,

and purpose" of an agency's regulations since "[d]oing so will resolve many seeming ambiguities out of the box." *Kisor v. Wilkie,* 139 S.Ct. 2400, 2415 (2019). The Court's call for an "all tools exhausted" standard is equally necessary in the context of *statutory* construction at issue in *Chevron* Step One, not only because lower courts have been inconsistent in rigorous application of a uniform standard, but also because the original wording of the *Chevron* decision itself calls for such an exacting standard. *See, e.g., TransAm Trucking, Inc. v. Admin. Review Bd., United States Dep't of Labor*, 833 F.3d 1206, 1211 (10th Cir. 2016) (Gorsuch, J., dissenting) (then-Judge Gorsuch noting that simple use of a dictionary can resolve ambiguity); Barnett & Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) (summarizing case opinions at the court of appeals level from 2003-2013 and finding "circuit-by-circuit disparity in . . . invocation of *Chevron*"); *Chevron*, 467 U.S. at 843 n.9.

Only if a statute is determined to be truly ambiguous, after "employing traditional tools of statutory construction," *id.*, is *Chevron* Step Two triggered, in which deference is given to an agency's reasonable interpretation. That deference has recently been called into question by several members of this Court, both on non-delegation grounds (as contravening Article I's assignment of lawmaking powers to Congress) and judicial review grounds (as contravening Article III's assignment of the interpretive power to the courts to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). *See, e.g.*, *Michigan v. EPA*, 135 S.Ct. 2699, 2712-14 (2015) (Thomas, J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199,

1211-13 (2015) (Scalia, J., concurring); *see also Loving v. United States*, 517 U.S. 748, 758 (1996) ("The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress … and may not be conveyed to another branch").

Moreover, *Chevron* itself was a civil case, not a criminal one.[2] In the latter context, which is presented here, the concerns about *Chevron* deference are even more pronounced. Criminal penalties and punishments are weighty, representing the "moral condemnation of the community," and therefore the decision whether and when to impose such penalties has been assigned to the legislative branch. *United States v. Bass*, 404 U.S. 336, 348 (1971); *Davis*, 139 S.Ct. at 2333. As this Court held just last term, *the courts* must respect this assignment of power to the legislature and not undertake to rewrite laws "in order to save Congress the trouble." *Davis*, 139 S. Ct. at 2333. But neither should the courts sanction a delegation of that lawmaking power to the executive. *Id.* at 2323.

The Constitution vests specific types of government power in each branch of government; power vested in one branch cannot be exercised by another. James Madison, Federalist 48, THE FEDERALIST PAPERS 305 (Charles R. Kesler & Clint Rossiter, eds.,

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[2] *Chevron* addressed the interpretation of the term "stationary source" in the Clean Air Act. 467 U.S. at 840 (citing 42 U.S.C. § 7502(a)(1), (b)(6) (1982)). The court below noted that another provision of the Clean Air Act, 42 U.S.C. § 7413(c)(1), imposed criminal penalties, Pet.App. A41-A42, but acknowledged that this Court in *Chevron* "did not specifically address whether the criminal context should have afforded a basis for denying deference to the agency's interpretation," Pet.App. A42-A43.

2003). This system makes the exercise of government more difficult — but it does so by design. *Dept. of Trans. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225 (2015) (Alito, J., concurring). But just as one branch may not usurp the power of the others, neither can any of the branches delegate away their vested powers. *Id. See also* Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L.R. 1187, 1193 (2016) (quoting commentaries by Justices Breyer and Scalia).

It is for Congress to make the laws. And, especially in criminal law, "it is appropriate . . . to require that *Congress* should have spoken in language that is clear and definite." *Bass*, 404 U.S. at 347 (emphasis added). Again, "a vague law is no law at all"; it is *not* an excuse for judicial deference to the executive. *Davis*, 139 S.Ct. at 2323. Prosecutorial deference under *Chevron* permits the executive to exercise lawmaking power. This should not be. "Only the people's elected representatives in Congress have the power to write . . . statutes that give ordinary people fair warning about what the law demands of them." *Davis*, 139 S.Ct. at 2323. In law, there is "no excuse for ambiguous language or vague descriptions," and a finding of vagueness or ambiguity is no excuse for the executive to assume the lawmaking power of the legislative, no matter how slight the usurpation. *Merrill v. Yeomans*, 94 U.S. 568, 573 (1876).

As Justices Scalia and Thomas noted in their separate opinion respecting denial of certiorari in *Whitman,* "a court owes no deference to the prosecution's interpretation of a criminal law." *Whitman*, 135 S.Ct. at 352. This Court specified five years ago that it has

"never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014). That same term, this Court noted that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). A few years later, then-Judge Gorsuch, in his concurrence in *Gutierrez-Brizuela v. Lynch*, stated "The Supreme Court has expressly instructed us *not* to apply *Chevron* deference when an agency seeks to interpret a criminal statute." *Gutierrez-Brizuela v. Lynch,* 834 F.3d 1142, 1155 (10th Cir. 2016) (emphasis in original). Although the Justice Department has the "specific responsibility" to determine what a statute means, that determination is merely an exercise in understanding *when* the executive believes prosecution is warranted. *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring). As Justice Scalia noted, this Court has "never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Id.* That is, federal administrators should not be allowed to "create (and uncreate) new crimes at will" in contravention of properly separated powers. *Whitman*, 135 S.Ct. at 353.

IV. Certiorari Is Warranted To Correct The Violation of These Core Due Process and Separation of Powers Principles.

After determining that the statutory phrase, "machine gun," was ambiguous as to whether it included guns equipped with a "bump stock," the court below deferred to the recent regulation of the Bureau of Alcohol, Tobacco, Firearms, and Explosives extending the statutory ban on fully automatic machine guns to

semi-automatic weapons equipped with bump stocks. It did so based on *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 704 n.18 (1995), in which this Court deferred to an agency's interpretation on a statute with criminal implications and rejected a Rule of Lenity argument in a footnote. And it did so over the Government's own contention that if the court deemed the statutory language to be ambiguous, its bump stock rule should "be set aside rather than upheld under *Chevron*" Step Two deference, because *Chevron* deference is not appropriate in the criminal context. Pet.App. A36, A41.

In their separate statement respecting denial of certiorari in *Whitman*, Justices Thomas and Scalia correctly noted that the *Babbitt* footnote "contradicts 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. They further commented that although *Whitman* did not seek review on *Babbitt*-based deference, they would be receptive to granting a petition when the matter was properly brought before the Court. *Id.* at 354. This is that case, and this Court should grant the petition to address the important question of whether *Chevron* deference is appropriate in a criminal matter.

CONCLUSION

Criminal law and its power to constrain the liberties and freedoms of individuals is too important to approach in a casual manner. It is founded on the well-established pillars of due process and separation

of powers and serious attention is warranted whenever a threat to undermine these pillars arises. The application of *Chevron* deference to ambiguity in criminal statutes is one such threat. The Court should grant review in this case to clarify, reiterate, and emphasize that no deference is owed to the executive's interpretations of criminal statutes.

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Respectfully submitted,

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