No. 21-159

IN THE

Supreme Court of the United States

W. CLARK APOSHIAN,

Petitioner,

v.

MERRICK B. GARLAND, Attorney General, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE AMERICAN CORNERSTONE INSTITUTE AND ITS FOUNDER/CHAIRMAN DR. BENJAMIN S. CARSON, SR. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The American Cornerstone Institute is a nonpartisan, not-for-profit organization founded by pediatric neurosurgeon and 17th Secretary of the U.S. Department of Housing and Urban Development, Dr. Benjamin S. Carson, Sr. The Institute's mission is to educate the public on the importance of faith, liberty, community, and life to the continued success of the United States of America.

The decision below impacts this mission. By deferring to a federal administrative agency's interpretation of a criminal statute—even though the federal agency itself denied that it was entitled to deference—the Tenth Circuit abdicated the judicial role and enabled the executive branch to make criminal law. Such violations of the separation of powers would threaten individual liberty in any context, and they are especially egregious here in light of the criminal penalties at stake.

The Institute firmly believes that defending the structural protections afforded by our Constitution, including the separation of powers, is critical to preserving our system of ordered liberty and securing its blessings "to ourselves and our posterity." Accordingly, the Institute urges the Court to grant the Petition and to hold that federal administrative

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this *amicus curiae* brief.

agencies are not entitled to *Chevron* deference when interpreting criminal statutes or when the agency affirmatively disclaims entitlement to deference, as the Government did here. The Institute takes no position on the merits of the underlying statutory question at issue in this case.

SUMMARY OF THE ARGUMENT

This Court has long held that federal administrative agencies are entitled to varying levels of judicial deference for statutory interpretations. The most deferential form of review takes its name from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron*, the Court held that "[w]hen a court reviews an agency's construction of the statute which it administers," the reviewing court must begin by determining whether the statute is "silent or ambiguous with respect to the specific issue." *Id.* at 842–43. If it is, then the agency's interpretation will be upheld so long as it is "reasonable." *Id.* at 845.

In recent years, several Justices have expressed concerns about an overbroad application of *Chevron*. *See, e.g.*, *City of Arlington, Texas v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056–57 (2019) (Thomas, J., concurring); *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 904–09 (2019) (Gorsuch, J., dissenting). Such concerns are at their apex in cases like this one, where the underlying statute is backed by criminal penalties, and the agency administrating the statute has affirmatively denied that it is exercising policy

discretion or substantive expertise that may be entitled to deference. Perhaps because of those concerns, this Court 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).

This Court's reluctance to extend *Chevron* to the criminal context is well founded. The separation of powers principles incorporated into the structure of our constitutional Republic require courts to exercise their independent judgment in interpreting the laws and prohibit the executive branch from legislating. The Tenth Circuit panel bypassed these structural principles to affirm an interpretation of a criminal statute advanced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") and, in the process, also skipped over the venerable "rule of lenity" that should have caused the court to read any ambiguity to favor Petitioner rather than the Government.

In addition, the panel majority erred by applying *Chevron* when the Government affirmatively denied that it was exercising policy discretion or substantive expertise that could provide a rationale for deference. The correct approach under those circumstances is to treat the Government like any other litigant and for the court to exercise its constitutional obligation to interpret the statute for itself.

The Tenth Circuit's errors merit the Court's intervention. As the Petition explains, the Tenth Circuit itself and its sister courts of appeals are divided over the application of *Chevron* in the criminal context and over whether the Government

can waive or forfeit *Chevron* deference. Pet. 19, 23–26. In just the cases that have considered the ATF regulation under review below, eight federal appellate judges have written or joined opinions explaining that ATF should not have been afforded *Chevron* deference for its statutory interpretation. *See* App. 79a–115a (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting); *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021) (Batchelder, J., joined by Murphy, J.) *reh'g en banc granted, opinion vacated*, 2 F.4th 576 (6th Cir. 2021); *Guedes v. ATF*, 920 F.3d 1, 35 (D.C. Cir. 2019) (Henderson, J., concurring in part), *cert. denied*, 140 S. Ct. 789 (2020). The remaining eight judges in those cases have reached a contrary conclusion or declined to address the issue.

This Court should grant the Petition to resolve this division by holding that federal administrative agencies are not entitled to *Chevron* deference when interpreting criminal statutes. In addition, this Court should make clear that federal administrative agencies are not entitled to *Chevron* deference when the agency affirmatively disclaims entitlement to that deference.

REASONS FOR GRANTING CERTIORARI

I. The Tenth Circuit's Deference To ATF's Interpretation Of A Criminal Statute Merits Review.

A. The Separation Of Powers Requires Courts To Exercise Independent Judgment In Interpreting Criminal Statutes.

The Tenth Circuit's decision below rejected "a rule against deference to agency interpretations with criminal law implications." App. 24a. The panel majority brushed aside this Court's teaching that "criminal laws are for courts, not for the Government, to construe," *Abramski v. United States*, 573 U.S. 169, 191 (2014), and wrongly determined that ATF's interpretation of a criminal statute in a rulemaking proceeding "merits . . . deference" under *Chevron*, App. 33a.

Affording such deference violates the separation of powers. In our constitutional system, "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)); *see also* John Locke, Second Treatise of Government 87 (Richard Cox ed., 1982) ("the legislative can have no power to transfer their authority of making laws, and place it in other hands"). The executive, for its part, has "exclusive authority and absolute discretion to decide whether to prosecute a case," *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *Confiscation*

Cases, 74 U.S. 454 (1868)).[2] Finally, it is for the courts to "say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), including by holding the executive to account when "the Government interprets a criminal statute too broadly," *Abramski*, 573 U.S. at 191.

The structural safeguards embedded in the constitutional design are fundamental to our Republican form of government. This Court has repeatedly taught that "individual liberty is compromised" whenever "the constitutional structure of our Government" is violated. *Bond v. United States*, 564 U.S. 211, 223 (2011) (collecting cases).

The risk to individual liberty is especially severe when, as happened below, structural safeguards are cast aside to authorize executive expansion of criminal sanctions through legislative rulemaking that is not subjected to serious judicial examination. "With deference to agency interpretations of statutory provisions to which criminal prohibitions are attached, federal administrators can in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman v. United States*, 574 U.S. 1003 (2014) (statement of Scalia, J.); *see also City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting) ("the danger posed by the growing power of the administrative state cannot be dismissed"). And such "accumulation of all powers, legislative, executive,

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[2] While this may be true in any individual case, there may be circumstances where exempting from prosecution entire classes of violations undermines other constitutional requirements.

and judiciary, in the same hands," the Founders warned, "may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). Although these concerns apply to *Chevron* generally, *see, e.g.*, *PDR Network*, 139 S. Ct. at 2056–57 (Thomas, J., concurring), they have particular salience in the criminal context.

That is why, "whatever else one thinks about *Chevron*, it has no role to play when liberty is at stake." *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J.). This Court has "never held that the Government's reading of a criminal statute is entitled to any deference." *Apel*, 571 U.S. at 369. And five appellate judges below would have rightly held that the separation of powers prevents judicial deference to agency interpretation of criminal statutes. App. 79a–115a (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting). Three more appellate judges in two other circuits held or would have held the same. *See Gun Owners of Am.*, 992 F.3d at 446 (Batchelder, J., joined by Murphy, J.); *Guedes*, 920 F.3d at 35 (Henderson, J., concurring in part).

As the five dissenters recognized, the panel majority's deference to ATF's interpretation of a criminal statute unlawfully made "ATF the expositor, executor, *and* interpreter of criminal laws." App. 98a–99a. Because the Petition squarely presents this important question, it merits this Court's review.

B. The Rule Of Lenity Requires The Court To Resolve Statutory Ambiguity In Favor Of Lenity.

By deferring to the agency's interpretation of an ambiguous statute, the panel decision below ignores ordinary principles of statutory interpretation that are designed to safeguard individual liberty. The rule of lenity instructs courts that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010) (citation omitted). This venerable rule not only "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain," *United States v. Santos*, 553 U.S. 507, 514 (2008), it also reenforces the axiom that only Congress can make an act a crime, *see, e.g.*, *Skilling*, 561 U.S. at 410–11.

Application of the rule of lenity under the *Chevron* framework is straightforward. *Chevron* teaches that reviewing courts must begin by determining whether a statute is "silent or ambiguous" using the "traditional tools of statutory construction." 467 U.S. at 842, 843 n.9. As the Petition explains, the rule of lenity fits comfortably within the *Chevron* framework because it is one of the ordinary tools of statutory construction. Pet. 32–33.

If the panel majority had applied the rule of lenity it would not have deferred to ATF's interpretation of the criminal statute at issue below. Instead, the panel would have had to choose between holding that ATF's interpretation was required by the statute or,

if the court found ambiguity, ruling for Petitioner. Either result would have been consistent with the rule.[3] And the rule would have prohibited what the panel majority did here—that is, finding an ambiguity and then *deferring to ATF*. *See, e.g.*, *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring) ("If an ordinary criminal law contains an uncertainty, every court would agree that it must resolve the uncertainty in the defendant's favor. No judge would think of deferring to the Department of Justice.").

The panel majority bypassed the rule of lenity in reliance on a footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). There, this Court suggested in passing that the rule of lenity might not apply when "reviewing facial challenges to administrative regulations." *Id.* at 704 n.18. But, as the dissenters below recognized, the decision did not purport to "create any binding rule about the relationship between lenity and *Chevron* in all circumstances." App. 101a; *accord Gun Owners of Am.,* 992 F.3d at 467 ("the scope of the *Babbitt* footnote certainly appears limited"). And the *Babbitt* footnote did not even address one of the key liberty-enhancing

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[3] Of course, only one of these results would reflect the correct interpretation of the statute. "A single law should have one meaning, and the 'lowest common denominator, as it were, must govern' all of its applications." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring) (quoting *Clark v. Martinez*, 543 U.S. 371, 380 (2005)). The Institute takes no position on the meaning of the criminal statute at issue below.

rationales for the rule of lenity, namely, that *only Congress*—not the executive or judicial branches—can define a crime.

Moreover, 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*, 574 U.S. at 1003 (statement of Scalia, J.); *see, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."). As these cases recognize,

> [t]he rule of lenity . . . is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation.

United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 n.10 (1992) (plurality opinion); *id.* at 519 (Scalia, J., concurring in judgment). Accordingly, the rule of lenity cannot be brushed aside as easily as the panel majority would have liked. And because *Babbitt* has introduced confusion among the lower courts, this Court should clarify its meaning. *Cf. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018).

As before, the Petition ably sets forth the need for this Court to clarify the proper relationship between *Chevron* and the rule of lenity. Pet. 32–34. Because the decision below upended ordinary principles of statutory interpretation embodied in that rule, it merits the Court's review.

II. The Tenth Circuit's Refusal To Permit ATF To Waive Deference Merits Review.

Not only did the majority below incorrectly apply *Chevron* to a criminal statute, it did so notwithstanding the Government *expressly disclaiming* any entitlement to deference. As the Petition recounts, ATF repeatedly told the Tenth Circuit (and other federal courts) that its interpretation did not reflect its policy judgment or agency expertise but only its understanding of the "plain meaning" of the statute. Pet. 16.

Confronted with this position, the Tenth Circuit should have treated the Government like any other litigant and exercised its constitutional obligation to interpret the statute for itself. At most, the court should have given ATF's interpretation only that "weight" consistent with "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020) (applying *Skidmore* where the Government did not invoke *Chevron*). Indeed, given that this Court has often found reason to deny *Chevron* deference even where the Government has

affirmatively sought it, *see generally* Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 Rutgers U. L. Rev. 441 (2021), applying it over the Government's objection was especially problematic.

That the Government might waive or forfeit *Chevron* deference is not as unusual as the Tenth Circuit panel majority imagined. After all, "[i]f the justification for *Chevron* is that "policy choices" should be left to executive branch officials directly accountable to the people," *Guedes*, 140 S. Ct. at 790 (statement of Gorsuch, J.) (quoting *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1630 (2018)), "then courts must equally respect the Executive's decision *not* to make policy choices in the interpretation of Congress's handiwork," *id. See also* Pet. 15–22.

Indeed, there may be good reasons for the Government to waive *Chevron*. An agency might appropriately recognize, for example, that Congress is unlikely to delegate to it questions "of deep 'economic and political significance,'" *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)), or questions that touch on areas where the agency "has no expertise," *id.* (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006)).[4] The criminal law is one such area because,

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[4] Even for questions that appear more appropriate for agency resolution, the Government may have reason to forego *Chevron*. By describing its position as required by the unambiguous text, the Government may be able to deflect political criticism or to bind future administrations to the same result. *See* Jeremy J. Broggi, *With En Banc Review, Tenth Circuit Foreshadows Potential Split with D.C. Circuit On* Chevron *Waiver*, 35 Wash.

as Judge Batchelder explained in a litigation parallel to this one, "interpreting criminal statutes falls within the expertise of the courts," not "bureaucrats in the nation's capital who are physically, and often culturally, distant from the rest of the country." *Gun Owners of Am.*, 992 F.3d at 462; *accord* App. 110a (Eid, J., dissenting) ("there is ample reason to doubt that Congress would have intended that deference be paid given the substantial criminal consequences at stake").

The lower courts are in need of this Court's guidance. As the Petition explains, the courts of appeals are in disarray on the question of whether *Chevron* deference can be waived by the Government. Pet. 19–21; *see also Amaya v. Rosen*, 986 F.3d 424, 430 n.4 (4th Cir. 2021) ("Courts and scholars continue to grapple with the circumstances in which *Chevron* deference can be forfeited or waived." (collecting cases and other authorities)).

The lack of guidance makes litigation difficult for those inclined to challenge government overreach. Where litigants cannot rely on the Government's forfeiture or even express waiver, they are forced to conjure and rebut arguments the Government may decline to make on its own behalf. That perversion of the "normal rules that govern party presentation and waiver" disserves "the adversarial process" on which our system of justice typically relies. App. 92a

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L. Found. 19 (Sept. 25, 2020), https://tinyurl.com/rxu8tpxh. Resolving litigation in this posture may have the salutary public benefit of preventing future "bureaucratic pirouetting." *Guedes*, 140 S. Ct. at 791 (statement of Gorsuch, J.).

(Tymkovich, C.J., dissenting); *cf. Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) ("we need not resolve the difficult issues regarding deference" where "[t]he agency does not ask this"). It also "tip[s] the scales in favor of the government" by "unfairly" enlisting the courts to make arguments the Government was not willing to raise itself. App. 113a (Carson, J., dissenting).

The important issue of *Chevron* waiver thus also merits the Court's review. The Court should grant the Petition and hold that *Chevron* does not apply where it is affirmatively waived by the Government.

CONCLUSION

For the foregoing reasons, and for those set forth in the Petition, the Court should grant the Petition.

Respectfully submitted,

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