No. _____

In The

Supreme Court of the United States

DAMIEN GUEDES; SHANE RODEN; FIREARMS POLICY FOUNDATION, a non-profit organization; MADISON SOCIETY FOUNDATION, INC., a non-profit organization; FLORIDA CARRY, INC., a non-profit organization; DAVID CODREA; SCOTT HEUMAN; and OWEN MONROE,
Petitioners,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; WILLIAM P. BARR, in his official capacity as Attorney General of the United States; REGINA LOMBARDO, in her official capacity as Acting Deputy Director; and the UNITED STATES OF AMERICA,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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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?

PARTIES TO THE PROCEEDINGS BELOW

This Petition stems from two consolidated cases and appeals in the D.C. Circuit.[1]

Petitioners Damien Guedes and Shane Roden were plaintiffs in case No. 18-cv-2988 in the district court and the appellants in appeal No. 19-5042 in the D.C. Circuit.

Petitioners Firearms Policy Foundation, Madison Society Foundation, Inc., and Florida Carry, Inc., are non-profit corporations and were also plaintiffs in No. 18-cv-2988 in the district court and appellants in No. 19-5042 in the D.C. Circuit. No corporate Petitioner is publicly traded, and none has a parent corporation.

Petitioners David Codrea, Scott Heuman, and Owen Monroe were plaintiffs in No. 18-cv-3086 in the district court and appellants in appeal No. 19-5044 in the D.C Circuit.

Appellant Firearms Policy Coalition, Inc., was the plaintiff in consolidated case No. 18-cv-3083 in the district court and the appellant in consolidated appeal No. 19-5043 in the D.C. Circuit. That appeal was voluntarily dismissed for further proceedings in the district court, App. E1-E2, and is not part of this Petition.

Respondent Bureau of Alcohol, Tobacco, Firearms, and Explosives was a defendant in Nos. 18-cv-2988, 18-cv-3083, and 18-cv-3086 in the district court and

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[1] A third case and appeal, *Firearms Policy Coalition, Inc.* v. *Whitaker*, also was consolidated with these cases but raised only a discrete issue regarding the appointment of Acting Attorney General Whitaker and is not part of this Petition.

was an appellee in Nos. 19-5042, 19-5043, and 19-5044 in the D.C. Circuit.

Respondent William P. Barr is the current Attorney General of the United States and the successor to Matthew Whitaker, the Acting Attorney General of the United States at the time this litigation commenced. Acting General Whitaker was a defendant in case Nos. 18-cv-2988, 18-cv-3083, and 18-cv-3086 in the district court until replaced by General Barr. General Barr was substituted as a defendant in Nos. 18-cv-2988, 18-cv-3083, and 18-cv-3086 in the district court and was an appellee in Nos. 19-5042, 19-5043, and 19-5044 in the D.C. Circuit.

Respondent Regina Lombardo is Acting Deputy Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and is the successor to Acting Director Thomas E. Brandon, who was a defendant in Nos. 18-cv-2988 and 18-cv-3083 in the district court and, until replaced by Acting Deputy Director Lombardo, an appellee in Nos. 19-5042 and 19-5043 in the D.C. Circuit.

Respondent United States was a defendant in Nos. 18-cv-2988 and 18-cv-3083 in the district court and was an appellee in Nos. 19-5042 and 19-5043 in the D.C. Circuit.

RELATED CASES

Cases consolidated in the district court:

- *Guedes* v. *ATF*, No. 18-cv-2988 (lead case), District Court for the District of Columbia. Order denying preliminary injunction entered February 25, 2019.
- *Firearms Policy Coalition* v. *Whitaker*, No. 18-cv-3083, District Court for the District of Columbia. Order denying preliminary injunction entered February 25, 2019.
- *Codrea* v. *ATF*, No. 18-cv-3086, District Court for the District of Columbia. Order denying preliminary injunction entered February 25, 2019.

Appeals consolidated in the court of appeals:

- *Guedes* v. *ATF*, No. 19-5042, Court of Appeals for the District of Columbia Circuit. Judgment affirming denial of preliminary injunction entered April 1, 2019.
- *Firearms Policy Coalition, Inc.* v. *ATF*, No. 19-5043, Court of Appeals for the District of Columbia Circuit. Appeal dismissed March 23, 2019.
- *Codrea* v. *ATF*, No. 19-5044, Court of Appeals for the District of Columbia Circuit. Judgment affirming denial of preliminary injunction entered April 1, 2019.

Applications to Chief Justice Roberts:

- *Guedes* v. *ATF*, No. 18A964, Supreme Court of the United States. Application for a stay denied March 26, 2019.

- *Guedes* v. *ATF*, No. 18A1019, Supreme Court of the United States. Application for a stay (on behalf of both Guedes and Codrea Petitioners) denied April 5, 2019.
- *Guedes* v. *ATF*, No. 18A1352, Supreme Court of the United States. Application for an extension of time to file petition for writ of certiorari (on behalf of both Guedes and Codrea Petitioners) granted June 24, 2019, to and including August 29, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The memorandum opinion of the District Court for the District of Columbia denying a preliminary injunction is available at 41 F. Supp.3d 927 and is attached at Appendix C1-C81. For convenience, the portions of that opinion relevant to the issues in this Petition are C1-C12, C16-C40, and C81.

The decision of the D.C. Circuit affirming the district court's denial of a preliminary injunction is available at 920 F.3d 1 and is attached at Appendix A1-A97. For convenience, the portions of that opinion relevant to the issues in this Petition are A1-A12, A26-A66, and A67-A97 (dissent).

The judgment of the D.C. Circuit is available at 762 Fed. Appx. 7 and is attached at Appendix D1-D3.

JURISDICTION

The D.C. Circuit issued its decision and judgment affirming the denial of a preliminary injunction on April 1, 2019. Chief Justice Roberts granted Petitioners an extension of time to file this Petition to and including August 29, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS

The National Firearms Act of 1934 (NFA), 26 U.S.C. § 5845, Definitions, provides, in relevant part:

For the purposes of this chapter --

* * *

> (b) The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

The Gun Control Act of 1968 (GCA), 18 U.S.C. § 921, Definitions, provides, in relevant part:

> (a) As used in this chapter --
>
> * * *
>
> (23) The term "machinegun" has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).

The Firearm Owners Protection Act of 1986 (FOPA), 18 U.S.C. § 922(o), provides:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection does not apply with respect to--
>
> > (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
> >
> > (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

27 C.F.R. §§ 478.11 and 479.11, Meaning of Terms, each provide, in relevant part:

* * *

> Machine gun. Any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts

> are in the possession or under the control of a person. For purposes of this definition, the term "automatically" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions. The term "machine gun" includes a bump-stock-type device, i.e., a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.
>
> * * *

STATEMENT OF THE CASE

1. In its determination to uphold a rule redefining legal firearm accessories called bump-stocks as illegal "machineguns," the court of appeals, in a 2-1 decision, applied *Chevron* deference in a manner that stretches that doctrine beyond its breaking point. Although the agency had never sought and expressly eschewed *Chevron* deference for its interpretation of a central element of a criminal statute, the panel majority held that the statutory definition of "machinegun" was ambiguous and that deference, rather than the rule of lenity, applied and could not be waived by the government.

That holding conflicts with numerous holdings of this Court, mischaracterizes the nature of *Chevron* deference, distorts the litigation process and the government's prerogative regarding whether and how to exercise any implicitly delegated authority, and undermines fundamental tenets of our constitutional structure. Certiorari should be granted to correct the court of appeals' deeply flawed and dangerous holding regarding the nature and reach of *Chevron* deference or, if necessary, to overrule *Chevron* entirely.

2. On December 26, 2018, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) published a Final Rule greatly expanding its interpretation of the statutory term "machinegun" as used in the National Firearms Act of 1934 (NFA) and the Gun Control Act of 1968 (GCA). App. C1. The expanded definition had the express purpose of encompassing so-called bump-stocks under the definition of machinegun. The Final Rule was a dramatic departure from ATF's repeated and long-standing construction of that statutory term yet was bizarrely defended, from the beginning, as the term's plain meaning. The Final Rule had an effective enforcement date of March 26, 2019, at which point persons still in possession of bump-stocks would be subject to felony prosecution. App. A7. Petitioners immediately challenged the Final Rule and sought a preliminary injunction.

Throughout the litigation, the government properly recognized that *Chevron* deference did not apply to interpretations of criminal statutes. See, *e.g.*, App. A36 ("in its briefing before the district court, the government expressly disclaimed any entitlement to *Chevron* deference"). Accordingly, it defended against

the motions for preliminary injunction by arguing there was no likelihood of success because the Final Rule was required by the plain statutory language.

On February 25, 2018, the district court denied the motions for preliminary injunction, but not for the reason urged by the government. Instead, it held that the words "single function of the trigger" and "shoot * * * automatically" in the statutory definition of machinegun were ambiguous. App. C25, C28. Despite the terms being part of a criminal statute and a central element of various crimes, the court applied *Chevron* deference and held that ATF's expansive redefinition was permissible and thus entitled to deference. App. C3 ("Most of the plaintiffs' administrative law challenges are foreclosed by the *Chevron* doctrine * * *. Congress * * * did not further define the terms 'single function of the trigger' or 'automatically.' Because both terms are ambiguous, ATF was permitted to reasonably interpret them"); see also App. C17-C18, C22-C23, and C25-C231 (applying deferential *Chevron* standard). The district court did not address the other factors for obtaining a preliminary injunction. App. C20.

Petitioners noticed their appeals the same day.

4. Following expedited briefing and argument, the court of appeals affirmed the denial of a preliminary injunction. App. A2.

Throughout the appeal, the government once again eschewed reliance on *Chevron*, declined to defend the deference-based reasoning of the district court, relied on the supposed plain meaning of the statutory definition of machinegun, and expressly and repeatedly informed the court that *Chevron* should not be ap-

plied, even if it meant they would lose their appeal. See, *e.g.*, App. A27 ("none of the parties presents an argument for applying the *Chevron* framework (the plaintiffs contend that *Chevron* is inapplicable and the government does not argue otherwise)"); App. A31 ("The government's briefing says that the Rule is 'not an act of legislative rulemaking,' and that the Rule instead only 'sets forth the agency's interpretation of the best reading of the statutory definition of "machinegun." ' Gov't Br. 38."); App. 35 ("the parties (including the government) submit that *Chevron* deference is inapplicable in the context of criminal statutes"); App. A36 ("[I]n this appeal, the government affirmatively disclaims any reliance on *Chevron*. *See* Gov't Br. 37. And at oral argument, the government went so far as to indicate that, while it believes the Rule should be upheld as the best reading of the statute without any need for *Chevron* deference, if the Rule's validity turns on the applicability of *Chevron*, it would prefer that the Rule be set aside rather than upheld under *Chevron*. Oral Argument at 42:38–43:45.").

Despite the government's emphatic litigating position, the court affirmed on other grounds.[2]

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[2] The consolidated appeals also involved the issue whether Acting Attorney General Whitaker had been properly appointed and thus was empowered to approve the Final Rule. One of the appeals involving that issue, No. 19-5043, was voluntarily dismissed for further district court proceedings regarding mootness, App. A10, but the court of appeals declined to dismiss the Codrea appeal, No. 19-5044, also raising that issue in addition to the APA issues. The court then held that the confirmation of Attorney General Barr and his eventual ratification of the Final Rule mooted the Whitaker appointment issue. App. A15-A25.

In a *per curiam* opinion over the dissent of Judge Henderson, the court held that:

> the Final Rule was a "legislative rule" by which the agency exercised delegated legislative power from Congress, rather than an interpretive rule, App. 27-28;
>
> as a legislative rule the Final Rule was entitled to *Chevron* deference, App. A33-35;
>
> *Chevron* deference was an interpretive tool for the courts and could not be waived or forfeited by the government during litigation, App. A37-A41;
>
> such deference applied, despite the definition of "machinegun" being a central component of a criminal law, because ATF's interpretation was embodied in a regulation enacted pursuant to the agency's generic rulemaking authority and having both civil and criminal application, citing *Babbitt* v. *Sweet Home Chapter*, 515 U.S. 687, 704 n. 18 (1995) and *Competitive Enterprise Institute v. United States Department of Transportation*, 863 F.3d 911 (D.C. Cir. 2017), App. A41-A43;
>
> the rule of lenity did not apply despite the definition at issue being a central component of criminal law because lenity only applies *after* ordinary canons of statutory construction, and "*Chevron* is a rule of statutory construc-

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The Whitaker issues are not part of this Petition but represent a substantial portion of the opinions below. For convenience, the portions of the court of appeals opinion relevant to this Petition are App. A1-A12, A26-A66, and A67-A97 (dissent).

> tion, insofar as it is a doctrine that 'construe[s] what Congress has expressed,' " App. A49-A50 (citation omitted);
>
> the statutory terms were ambiguous, and the plain meaning did not necessarily encompass bump stocks, App. A52-A57; and
>
> the government's expanded definition was "permissible" under *Chevron*, regardless whether it was the "best" reading of the statute; App. A58-A60.

Because it found no likelihood of success on the merits, the court of appeals did not discuss the other preliminary injunction factors. App. A11, A66.

Judge Henderson dissented in relevant part, writing that the Final Rule "impermissibly adds to the language" of the statutory definition of "machinegun," thereby expanding the reach of Congress's definition. App. A68.

She began her analysis by recognizing that because the denial of a preliminary injunction turned solely on the district court's legal determination regarding the definition of a machinegun, review was *de novo*. App A75. She then rejected the majority's reliance on *Chevron* deference, noting that recent cases such as *United States* v. *Apel*, 571 U.S. 359, 369 (2014) and *Abramski* v. *United States*, 573 U.S. 169, 191 (2014) have rejected deference to the government regarding criminal statutes. App. A77. Judge Henderson thus agreed with and quoted then-Judge Gorsuch for the proposition that, "[i]n its *Apel* and *Abramski* decisions, then, '[t]he Supreme Court has expressly instructed us *not* to apply *Chevron* deference when an agency seeks to interpret a criminal

statute.' " *Id*. (quoting *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring)).

Regarding the majority's reliance on a footnote in *Babbitt* v. *Sweet Home Chapter*, 515 U.S. at 704 n. 18, Judge Henderson was "not convinced," App. A79, and suggested that providing deference to agency construction of statutes with mixed criminal and civil applications generally would run afoul of the limits in *Apel* and *Abramski* and this Court's requirement of a lowest-common-denominator single meaning for mixed-use provisions. *Id*. (citing *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005) and *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004)). She further agreed with Justice Scalia's view in *Whitman* v. *United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J, joined by Thomas, J., statement respecting denial of certiorari), that ambiguities in criminal laws are not for agencies to resolve, at least absent a clear statement expressly delegating the resolution of such ambiguities or intended gaps. App. A82. Finding no such clear statement, she concluded that "*Chevron* is inapplicable," that "the applicable standard of review is *de novo*," and that "we should go 'the old-fashioned' route and 'decide for ourselves the best reading' of 'machinegun.' " *Id*. (citations omitted).[3]

Having determined the standard of review, Judge Henderson then analyzed the statute, the regulation,

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[3] Regarding whether *Chevron* could be waived, Judge Henderson felt no need to reach that issue but understood and accepted "ATF's stance to be that *Chevron* is inapplicable—period." App. A79 n. 10.

and the operation of bump stocks, and concluded that ATF's interpretation generally, and its application of the "machinegun" definition to encompass bump stocks specifically, was contrary to the statutory definition. App. A83-A97.

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition for three reasons: (1) the decision below conflicts with multiple decisions of this Court by elevating *Chevron* deference above the rule of lenity as applied to ambiguous criminal statutes; (2) the decision improperly finds *Chevron* deference to be unwaivable; and (3) the decision so grossly interprets *Chevron* deference as to raise the question whether *Chevron* should be overruled.

Because both the district and circuit court below agreed that the statutory definition of machinegun was ambiguous, there is no need for this Court to address the precise terms of the definition, the details of the agency redefinition, or the technical aspects of bump stocks. The sole issues in this Petition are methodological and procedural and are pure questions of law to be reviewed *de novo*. The court of appeals itself recognized that the decision whether to apply *Chevron* was of great consequence in this case, App. A27-A28, and there is little question that if the rule of lenity applies, the government loses. In short, this case is the perfect vehicle for considering important *Chevron*-related questions without the distraction or potential interference of the underlying statutory construction.

I. The Decision Below Incorrectly Applies *Chevron* Deference Rather than the Rule of Lenity to a Criminal Statute that also Has Administrative Application.

This Court should grant certiorari to review the decision below giving *Chevron* deference priority over the rule of lenity where an agency construes a criminal statute that also has administrative applications.

In rejecting the rule of lenity and applying *Chevron* deference, the panel below relied on a footnote in *Babbitt* and rejected application of *Apel*, *Abramski*, and other cases as not involving agency rulemaking. App. A44. But Judge Henderson had the better argument that cases such as *Apel* and *Abramski* broadly reject deference to agency interpretations of criminal statutes, at least absent a clear statement of delegated authority to make legislative rules defining crimes, App. A76-A77, A81.

Judge Sutton similarly has rejected the notion that *Babbitt* elevates *Chevron* deference over the rule of lenity, opining that such a reading "is a lot to ask of a footnote, more it seems to me than these four sentences can reasonably demand." *Carter* v. *Welles-Bowen* Realty, Inc., 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring); *Esquivel-Quintana* v. *Lynch*, 810 F.3d 1019, 1030 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (criticizing *Babbitt* footnote and doubting that it "ha[d] (silently) overruled an entire line of cases that 'hold that, if Congress wants to assign responsibility for crime definition to the executive, it must speak clearly' " (citations omitted)), *rev'd*, 137 S. Ct. 1562 (2017).

Then-Judge Gorsuch also has understood *Apel* and *Abramski* to limit deference for criminal laws, though he questioned the civil/criminal distinction and suggested *Chevron* is likely inappropriate for all laws and should be overruled. *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d at 1156-58 (Gorsuch, J., concurring). Commentators likewise have been critical of the *Babbitt* footnote's elevation of *Chevron* deference above the rule of lenity. See, *e.g.*, Paul J. Larkin, Jr., *Chevron and Federal Criminal Law*, 32 J.L. & POLITICS 211, 232-33 nn. 104-07 (2017) (discussing *Babbitt* and other cases).

The conflict between the decision below and this Court's many cases rejecting *Chevron* deference for interpretations of criminal statutes amply warrants this Court's review.

Indeed, the need for this Court's review of the conflict was recognized five years ago by Justices Scalia and Thomas. In *Whitman*, Justice Scalia, joined by Justice Thomas, wrote that *Babbitt*'s "drive-by" 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." 135 S. Ct. at 354-55 (statement of Scalia & Thomas, JJ., respecting the denial of certiorari). Applying *Chevron* deference to ambiguous statutory language with criminal applications, he wrote, would "upend ordinary principles of interpretation * * * 'replacing the doctrine of lenity with a doctrine of severity,' " and would undermine "the principle that only the *legislature* may define crimes and fix punishments." *Id.* at 354 (emphasis in original). While Justice Scalia viewed *Whitman* as a poor vehicle giv-

en the procedural history of the case and petitioner's failure to raise the deference issue, he concluded that "when a petition properly presenting the question comes before us, I will be receptive to granting it." *Id*.

This is that petition.

Absent review, *Babbitt*'s footnote will continue erroneously to negate this Court's many cases regarding deference and lenity as applied to criminal and mixed-use laws. Even if *Babbitt* plausibly can be read to support the result below, that is all the more reason to grant certiorari. Insofar as *Babbitt*'s footnote elevates *Chevron* over the rule of lenity, it is wrong and only this Court can correct that error.

A. The Decision Below Improperly Applied Deference Rather than the Rule of Lenity, in Conflict with Numerous Decisions of This Court.

As Justice Scalia observed in his *Whitman* statement, *Babbitt*'s footnote contradicted this Court's cases holding that *Chevron* deference does not apply to criminal statutes and does violence to the underlying principles of those cases. 135 S. Ct. at 354-55.

1. Three years prior to *Babbitt*, a plurality of this Court expressly rejected Justice Stevens's similar (then-dissenting) view, in a case involving one of the same statutes at issue here. See *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality) (refusing to apply deference and instead applying the rule of lenity to two other terms in the National Firearms Act with both civil and crimi-

nal applications, despite civil nature of suit and Justice Stevens' dissent to the contrary).

Nine years after *Babbitt*, in an immigration case, a majority of this Court endorsed the plurality opinion in *Thompson/Center* and held that the rule of lenity applied to 18 U.S.C. § 16 (defining "crime of violence") because the statute has criminal as well as civil applications. *Leocal* v. *Ashcroft*, 543 U.S. at 11 n. 8. The Court gave no deference to the interpretation of the Board of Immigration Appeals, and it did not cite *Babbitt*. Ten years further on, this Court continued to apply the rule of lenity and to reject deference in two cases involving statutes with criminal and civil applications, including one of the statutes at issue here. See *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."); *Abramski* v. *United States*, 573 U.S. 169, 191 (2014) (ATF's position regarding the interpretation of a Gun Control Act prohibition "not relevant at all"; "criminal laws are for courts, not for the Government, to construe," citing *Apel*).

None of those cases turned on whether deference was sought in the context of a rulemaking or some other form of agency interpretation that would have been entitled to deference under *Chevron* for a purely civil statute. Cf. *Carter*, 736 F.3d at 729-35, 736 (Sutton, J., concurring) ("All kinds of administrative documents, ranging from manuals to opinion letters, sometimes receive *Chevron* deference.").

Thus, while it is doubtful that *Babbitt*'s footnote was or remains good law, there is little doubt that it contradicts the broader principles and holdings of

this Court's cases. This Court has long held that "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987); see *Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion); *Skilling* v. *United States*, 561 U.S. 358, 410-11 (2010); *Scheidler* v. *NOW*, 537 U.S. 393, 409 (2003). As Judge Henderson observed in dissent, App. A82, there certainly is no clear statement here directing or specifically authorizing ATF to adopt the harsher version of ambiguous definitions of crimes.

2. In contrast to *Bobbitt*'s doubtful pedigree and subsequent treatment, the rule of lenity is one of "the most venerable and venerated of interpretive principles," *Carter*, 736 F.3d at 731 (Sutton, J., concurring), and is deeply "rooted in a constitutional principle," Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000). As Chief Justice Marshall observed, the rule of lenity "is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

Narrow construction of ambiguous criminal laws is especially important in the administrative context. Because agencies have a natural tendency to broadly interpret the statutes they administer, deference in the criminal context "would turn the normal con-

struction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

The court of appeals' suggestion that *Chevron* is simply a rule of construction that applies to eliminate ambiguity *before* lenity kicks in gets things exactly backwards. One central purpose of lenity is to avoid improper delegation of lawmaking authority in the criminal realm. Sunstein, 67 U. CHI. L. REV. at 332 ("One function of the lenity principle is to ensure against delegations."). The rule of lenity "is *not* a rule of administration," but "a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language." *Thompson/Ctr. Arms*, 504 U.S. at 518-19 n.10.

Lenity is an interpretive rule that resolves ambiguity in favor of potential defendants and is part of the traditional toolkit for determining the meaning of statutory language. "Rules of interpretation bind all interpreters, administrative agencies included. That means an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Carter*, 736 F.3d at 731. Lenity thus comes *before* applying any questionable inference that Congress intentionally delegated legislative authority to executive agencies through ambiguous drafting. "If you believe that *Chevron* has two steps, you would say that the relevant interpretive rule—the rule of lenity—operates during step one. Once the rule resolves an uncertainty at this step, 'there [remains], for *Chevron* purposes, no ambiguity * * * for an agency to resolve.' " *Carter*, 736 F.3d at 731 (Sutton, J., concur-

ring) (quoting *INS* v. *St. Cyr,* 533 U.S. 289, 320 n. 45 (2001)). That *Chevron* deference depends on such inferred delegation is all the more reason to apply other rules of construction first. "Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I." *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion).

3. The due process and separation-of-powers concerns that animate the rule of lenity would suffer great violence if agencies were given deference when purporting to define ambiguous terms in a criminal statute.

As Judge Sutton has explained, the fair notice aspect of the rule of lenity would be meaningfully diminished if agencies could define and, as here, redefine, crimes. *Carter*, 736 F.3d at 731-32 (Sutton, J., concurring) (citing *Barnhart* v. *Walton*, 535 U.S. 212, 221-22 (2002)).

Furthermore, if trumped by *Chevron* deference, the separation-of-powers function of the rule of lenity would be severely compromised.

> Making something a crime is serious business. It visits the moral condemnation of the community upon the citizen who engages in the forbidden conduct, and it allows the government to take away his liberty and property. 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. By giving unelected commissioners and directors and administrators carte blanche

> to decide when an ambiguous statute justifies sending people to prison, [*Chevron* deference] diminishes this ideal.

Carter, 736 F.3d at 731 (Sutton, J., concurring); see also *Whitman*, 135 S. Ct. at 353 (statement of Scalia & Thomas, JJ., respecting the denial of certiorari) ("[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.") (emphasis in original).

4. The interplay between *Chevron* deference and delegation is no small matter, and the decision below implicates serious concerns raised by members of this Court in recent cases involving delegation more broadly.

For example, in *Gundy*, 139 S. Ct. at 2128-29, a plurality of this Court read extremely narrowly the discretion expressly delegated to the Attorney General regarding whether to impose sex offender registration obligations on persons convicted before the enactment of the statute. Based on that narrowly construed discretion and the guidance the plurality discerned therein, it upheld the statute against a delegation doctrine challenge. *Id*. at 2129.

Justice Alito concurred in the judgment under an application of existing delegation doctrine cases but noted he would be willing to reconsider such doctrine in an appropriate case with a full Court. 139 S. Ct. at 2131 (Alito, J. concurring). With Justice Kavanaugh recused from the case, however, reconsideration risked an evenly divided Court.

But in an opinion that could have been written with this case in mind, Justice Gorsuch, joined by the Chief Justice and Justice Thomas, rejected the expansive delegation of legislative powers permitted under modern and mistakenly evolved delegation doctrine. 139 S. Ct. at 2131-48 (Gorsuch, J., dissenting).

Justice Gorsuch recognized the Framers' view that the "federal government's most dangerous power was the power to enact laws restricting the people's liberty" and that "that it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Id.* at 2134-35. And he recognized, too, the dangers posed by allowing Congress to "pass off its legislative power to the executive branch," including circumventing "the demands of bicameralism and presentment," risking supposed "legislation * * * becoming nothing more than the will of the current President," and losing accountability for the eventual choices made. *Id.* Legislators might seek "to take credit for addressing a pressing social problem by sending it to the executive for resolution" and "blam[e] the executive for the problems that attend whatever measures he chooses to pursue." *Id.* at 2136. The "executive might point to Congress as the source of the problem," take the "temptingly advantageous" "opportunities for finger-pointing," and thereby disguise responsibility for the decisions. *Id.* Such are the dangers of the "mutated version of the 'intelligible principle'" test for delegation, which "has no basis in the original meaning of the Constitution,

in history, or even in the decision from which it was plucked." *Id*. at 2140.

Justice Gorsuch could just as easily have been describing the dangers of *Chevron's* version of implied delegation and the actual circumstances surrounding this case. Indeed, as described by the *amicus* brief of the Cato Institute in the court of appeals, the desire to do something in response to the perceived use of bump-stocks in the Las Vegas shooting was followed by Congress beginning to consider legislation, the President instead relieving them of their legislative responsibility by asserting he would fix it himself, his throwing the longstanding ATF understanding of the definition of machinegun overboard, claiming a newly discovered (and frivolous) recognition of the plain meaning of the existing statute, and pointing fingers at his predecessors. See Cato Br., *Guedes* v. *ATF*, No. 19-5042, Doc. 1776768 (Mar. 8, 2019), at 3-6.

As in *Gundy*, the decision below "gives the Attorney General the authority to 'prescrib[e] the rules by which the duties and rights' of citizens are determined, a quintessentially legislative power." 139 S. Ct. at 2144 (Gorsuch, J., dissenting). And it "sounds all the alarms the founders left for us." *Id*. Because "Congress could not achieve the consensus necessary to resolve the hard problems associated with" bump stocks, "it passed the potato to the Attorney General" (or the President grabbed the potato from Congress's hands), the Attorney General was unable to "afford the issue the kind of deliberative care the framers designed a representative legislature to ensure," and thus "the executive branch found

itself rapidly adopting different positions across different administrations." *Id.*

Like the delegation at issue in *Gundy*, it "would be easy enough to let this case go. After all," bump stock owners (and perhaps gun owners generally), are rapidly becoming "one of the most disfavored groups" in at least some quarters of our society. *Id.* "But the rule that prevents Congress from giving the executive *carte blanche* to write laws for" bump stock owners "is the same rule that protects everyone else." *Id.* This Court thus should not shy away from addressing the *Chevron* issues in this case out of concern for the underlying subject matter. Indeed, it is precisely the controversial nature of the subject that highlights the need to ensure proper congressional exercise of legislative power: The requirement for separation of powers "is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions like those implicated by" by firearms. *Id.* at 2145.

This case is well-positioned for addressing such systemic concerns given that it provides the concrete context in which to consider the continued viability or scope of *Chevron*'s implied delegations. And the ambiguity-driven implied delegation underlying *Chevron* is, in many ways, worse than an express delegation because it lacks express congressional principles to guide it. *Chevron*'s implied delegation thus provides a good starting point for these broader issues and presents an easier case than any truly considered and

express congressional delegation of discretion to the executive branch.[4]

This case is thus an ideal vehicle for both presenting issues at the intersection of delegation and deference and for starting to develop more sensible lines around those doctrines.

B. The Courts of Appeals Are Confused and Wrong Regarding the Interaction Between *Chevron* Deference and the Rule of Lenity.

In addition to being fundamentally in conflict with a broad range of this Court's cases, not to mention first principles of constitutional governance, the decision below reflects significant confusion and error in the courts of appeals. While those courts generally have given deference to agency interpretations of statutes with both civil and criminal applications, it has not been without sharp criticism. *Esquivel-Quintana*, 810 F.3d at 1027-32 (Sutton, J., concurring in part and dissenting in part) (rejecting application of *Chevron* to criminal laws and to dual-application statutes); *Carter*, 736 F.3d at 729-35, 736 (Sutton, J., concurring); Larkin, 32 J.L. & POLITICS at 232-38.

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[4] Although there is a rulemaking clause empowering the Attorney General to make rules to implement the statute, App. A3-A4, A82, that clause does not give the Attorney General power to interpret, much less expand, fundamental statutory terms defining crimes. Justice Gorsuch's discussion in *Gundy*, 139 S. Ct. at 2141, of the more detailed and constrained delegation in *Touby* v. *United States*, 500 U.S. 160 (1991) once again seems tailored towards the majority's erroneous reliance on *Touby* in this case. App. A47, A50.

Many courts of appeals, at one time or another, have accepted the lure of *Babbitt*'s footnote and given *Chevron* deference to agency interpretation of statutes with mixed criminal and civil application. *Whitman*, 135 S. Ct. at 353 (citing multiple examples). Some have taken mixed positions or sought to avoid the issue. *United States* v. *White*, 782 F.3d 1118, 1135 n.18 (10th Cir. 2015) (court finds that it "need not address the thorny issue of whether it is appropriate to defer to a prosecuting agency's interpretation of a criminal statute"; citing cases reaching conflicting results); *United States* v. *Atandi*, 376 F.3d 1186, 1189 (10th Cir. 2004) (court does not decide whether to give *Chevron* deference; it gives "some deference" to agency interpretation, which it finds "both reasonable and consistent with our interpretive norms for criminal statutes"); *NLRB* v. *Oklahoma Fixture Co.*, 332 F.3d 1284, 1286-87 (10th Cir. 2003) (en banc) (same).

That the courts of appeals have generally applied or avoided *Babbitt* does not negate the need for review, and in many ways, increases that need. In *Whitman*, Justices Scalia and Thomas recognized that the consistent, and consistently wrong, approach to the *Chevron*-versus-lenity issue adopted by the circuit courts highlighted the need to grant review, albeit not in the particular case at hand. 135 S. Ct. at 353. This Court has previously granted review in cases where the lower courts have taken uniformly questionable positions, particularly in matters involving delegation or *Chevron* deference. See, *e.g., Gundy*, 139 S. Ct. at 2122-23 (plurality opinion) (noting uni-

formity of eleven courts of appeals in rejecting delegation claim prior to grant of cert.).

The importance of the question presented and the continuing error of the lower courts thus support the need for this Court's review.

II. The Decision Below Incorrectly Holds that the Government May Not Waive *Chevron* Deference.

Assuming, *arguendo*, that *Chevron* deference theoretically could trump the rule of lenity in this case, the court of appeals further erred in holding that *Chevron* deference was tantamount to a mere canon of statutory construction that could not be waived during litigation. App. A37-A38. That holding is wrong for a variety of reasons but, at a minimum, conflicts with various holdings of this Court and with decisions finding waiver of *Chevron* deference in the courts of appeals.

As an initial matter, the court of appeals' treatment of *Chevron* as akin to other ordinary rules of construction contradicts *Chevron* and its progeny. Indeed, *Chevron* step 1 contemplates that ordinary rules of construction apply to determine whether an ambiguity even exists before one ever gets to implied delegation of the power to pick and choose within such ambiguity. *Carter*, 736 F.3d at 731 (Sutton, J., concurring) ("If you believe that *Chevron* has two steps, you would say that the relevant interpretive rule—the rule of lenity—operates during step one. Once the rule resolves an uncertainty at this step, 'there [remains], for *Chevron* purposes, no ambiguity * * * for an agency to resolve.' " (quoting *St. Cyr,* 533

U.S. at 320 n. 45); *Cf. Gundy*, 139 S. Ct. at 2123 (plurality) ("Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I."); *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. [quoting *Chevron*] * * * [O]nly when that legal toolkit is empty" can there be genuine ambiguity for purposes of deference).

Ambiguity is the common predicate of both *Chevron* and lenity. *Lewis v. United States*, 445 U.S. 55, 65 (1980) ("[T]he touchstone" of the lenity principle "is statutory ambiguity."). *Chevron* does not eliminate any statutory ambiguity; it is merely an allocation of ongoing "legislative" decision-making discretion to act within the space created by such ambiguity. Giving deference at the interpretive stage thus begs the question.

As an implied grant of discretion to the agency, *Chevron* does not oblige the agency to invoke such discretion, either during rulemaking or during its defense of its rule.[5] And it is improper for a court to re-

[5] Here, of course, the "agency" and the litigators are largely the same, Attorney General Barr both ratified the Final Rule and authorized the waiver of any claim of deference for the Final Rule. The agency position in litigation, filed under Attorney General Barr's name and supervision, certainly can be considered the position of the agency, at least where it is the *agency* itself that is being bound by that position. It is one thing to say that third parties may not be regulated by the litigating positions of an agency as opposed to its formal rules, but it is quite something else to say the agency cannot be constrained or bound

solve any seeming tension between the agency's litigation choices and its rulemaking, at least where it is the agency, not the challengers, that bears any adverse consequences of those litigation choices.[6]

Ignoring the government's firm and definitive position that it was not altering the meaning of the words or filling in any ambiguities – *i.e.*, that it was *not* performing a discretionary legislative exercise and did not recognize that it even *had* discretion in the matter – the court of appeals instead cited to a passing reference to *Chevron* in the Final Rule and to the notion that courts do not defer to litigating positions of attorneys rather than the official position of the agency itself. App. A29-A33.

The court of appeals' reliance on the brief discussion of *Chevron* in the Final Rule's response to comments, App. A29-30, fails to mention that the Final Rule also repeatedly claimed a *lack* of discretion when it sought to avoid considering alternatives to making all bump-stocks illegal. See, *e.g.*, App. A76 n. 6 (Henderson, J., dissenting) ("I would note that the ATF in fact declared that the Rule's interpretations of 'single function of the trigger' and 'automatically' 'accord with the *plain meaning* of those terms.' *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,527 (emphasis added). Its 'fallback' position at that stage

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by the litigating positions of its own in-house lawyers. That would be revolutionary.

[6] In an adversarial, rather than an inquisitorial, system, such choices are for the litigants and courts overstep their role by choosing sides or directing the scope of the arguments the adversaries choose to present, at least for issues that do not involve the court's jurisdiction.

was '*even if* those terms are ambiguous, this rule rests on a reasonable construction of them.'); App. B55 (Final Rule rejecting comment seeking alternative to the reclassification, stating that "the Department has concluded that the NFA and GCA require regulation of bump-stock-type devices as machineguns, and that taking no regulatory action is therefore not a viable alternative to this rule.").[7] If the statutory language is ambiguous and ATF has "legislative" authority, then presumably it has authority to elect options anywhere within the range of ambiguity, including continuing the prior view that bump-stocks are not machineguns. That it claimed to lack such authority to choose such alternatives confirms that it believed itself bound by the statutory language, not free to "legislate" pursuant to an implied delegation.

Insofar as *Chevron* is an exercise of agency discretion, the necessary predicate of such exercise is the agency's *recognition* that it has discretion. If the agency believes it is bound by the supposedly plain meaning of a statute, it is not making any legislative judgment but acceding to an erroneously perceived

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[7] See also App. B36 (Final Rule discussing *Chevron* step 1 and expressing view that definitions comport with "plain meaning" of statute, but would be reasonable in any event); App. B39-B40 (rejecting comment calling for policy-based explanation for change in regulation because they have "no bearing on whether these devices are appropriately considered machineguns based on the statutory definition"; bump-stock "rule is not a discretionary policy decision based upon a myriad of factors that the agency must weigh, but is instead based only upon the functioning of the device and the application of the relevant statutory definition").

statutory constraint on its discretion. That, on its face, would be an abuse of discretion, as analogous cases in the judicial context demonstrate. See *Munoz-Pacheco* v. *Holder*, 673 F.3d 741, 745 (7th Cir. 2012) ("Failure to exercise discretion is not exercising discretion; it is making a legal mistake"); *United States* v. *Coleman*, 188 F.3d 354, 357 (6th Cir. 1999) (abuse of discretion review includes inquiry into whether 'district court judge "incorrectly believed that [s]he lacked any authority to consider defendant's mitigating circumstances as well as the discretion to deviate from the guidelines.' " (citation omitted)).

At least one other court faced with the government's waiver or forfeiture of *Chevron* deference has accepted and enforced such waiver. *Commodity Futures Trading Comm'n* 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."). In this case the waiver was far more intentional and emphatic and accordingly should have been permitted.

And just this past term the question of how to treat the government's rejection of *Chevron* deference was raised, but not decided in a Social Security case. See *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1778-79 (2019) ("We need not decide whether the statute is unambiguous or what to do with the curious situation of an amicus curiae seeking deference for an interpretation that the Government's briefing rejects. *Chevron* deference ' "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." ' * * * [H]aving concluded that Smith and the

Government have the better reading of § 405(g), we need go no further." (citation omitted)).

If this Court decides in this case that *Chevron* can apply to the criminal statutes at issue, then it should also consider the further question whether the government and the courts are obliged to apply *Chevron* deference and whether the government is precluded from waiving it.

III. If *Chevron* Deference Applies and Cannot Be Waived by the Government, *Chevron* Should Be Overruled.

Finally, if this Court somehow concludes that *Chevron* both can and must be applied to agency interpretations of criminal or mixed-use statutes, that would be a sign, if not of the apocalypse, at least that something is seriously broken in the surrounding jurisprudence. At that point, *Chevron* should be overruled, and the court should start again from first principles.

As many members of this Court and commentators have observed, *Chevron* does considerable violence to separation of powers and represents a meaningful abdication of the judicial power to say what the law is. See *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057 (2019) (Thomas, J., joined by Gorsuch, J., concurring in the judgment) ("The decision below rested on the assumption that Congress can constitutionally require federal courts to treat agency orders as controlling law, without regard to the text of the governing statute. A similar assumption underlies our precedents requiring judicial deference to certain agency inter-

pretations. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). This case proves the error of that assumption and emphasizes the need to reconsider it."); *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("Given the concerns raised by some Members of this Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.") (citations omitted); *Gutierrez-Brizuela*, 834 F.3d at 1149-58 (Gorsuch, J., concurring) (sharply criticizing *Chevron* on separation of powers grounds). Larkin, 32 J.L. & POLITICS at 218-19 & n.33 (citing articles critical of *Chevron*); Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 750 (2014) (*Chevron* doctrine "an incoherent, imprecise, and arbitrarily applied set of principles for reviewing agency statutory construction").

The many arguments for and against *Chevron* need not be further expanded upon here. Suffice it to say, *Chevron*'s scope and continued viability are widely recognized as important issues and, if *Chevron* deference is now to apply to the criminal law and is to be imposed upon the government over its express objection, it truly has gone too far and should be overruled.

And because *Chevron* concerns implied delegations of legislative authority, reconsidering *Chevron* would also allow this Court to address related problems with the delegation doctrine. It is difficult, to say the least, to reconcile an implied delegation of legislative discretion based on silence or ambiguity with a requirement that any delegation of such power

be accompanied with sufficiently intelligible principles to guide the exercise of that discretion.[8] This case thus squarely presents the very concerns that have led several members of this Court to express a willingness to reconsider the questionable evolution of delegation doctrine. *Gundy*, 139 S. Ct. 2116, 2131 (Gorsuch, J. dissenting) (joined by Roberts, C.J. and Thomas, J.).

An incomplete Court in *Gundy* made such reconsideration problematic there. *Id.* at 2131 (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the [delegation] approach we have taken for the past 84 years, I would support that effort."). This case would suffer no such disability. It is thus an ideal vehicle for addressing such related delegation questions in the context of cabining or reconsidering *Chevron*. *Id*. at 2148 (Gorsuch, J., dissenting) ("In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That 'is delegation running riot.' " (citation omitted)).

This Petition provides a clean vehicle, unencumbered by the need for detailed factual or linguistic briefing, for addressing the legal questions of *Chev-*

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[8] The clear statement rule concerning delegations of rulemaking authority that involve criminal statutes is one way to attempt such reconciliation. See, *e.g.*, *United States* v. *Grimaud*, 220 U.S. 506, 519 (1911); *Touby*, 500 U.S. at 165-67; *Carter*, 736 F.3d at 734 (Sutton, J., concurring).

ron's scope and/or its continued viability. The consistent rulings below that the statutory language is, at best, ambiguous, can simply be accepted as a predicate and the court can move straight to the legal consequences of such ambiguity.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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