No. 19-933

In the Supreme Court of the United States

MONEX DEPOSIT COMPANY, ET AL., PETITIONERS

v.

COMMODITY FUTURES TRADING COMMISSION, RESPONDENT

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

BRIEF AMICUS CURIAE OF THE NEW CIVIL LIBERTIES ALLIANCE URGING GRANT OF CERTIORARI

PHILIP HAMBURGER
MARK CHENOWETH
ADITYA DYNAR
Counsel of Record
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Adi.Dynar@NCLA.legal
Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Whether 7 U.S.C. § 9, the Commodity Exchange Act's "Prohibition Against Manipulation," empowers CFTC to punish conduct that does *not* manipulate any commodities market, simply because the conduct involves a retail transaction in a commodity.

2. Whether CFTC violated fundamental principles of due process when it abruptly reversed its 30-year position that petitioners' business model was not subject to CFTC's regulatory authority and retroactively applied its new and incorrect position in this $290 million enforcement action.

CORPORATE DISCLOSURE STATEMENT

Amicus curiae New Civil Liberties Alliance is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The New Civil Liberties Alliance is a nonprofit, nonpartisan civil rights organization and public-interest law firm. NCLA was founded to challenge multiple constitutional defects in the modern Administrative State through original litigation, amicus curiae briefs, and other means.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to be subject only to penalties that are both Constitutional and have been promulgated by Congress. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress and federal administrative agencies like the Commodity Futures Trading Commission (CFTC) have trampled them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the Administrative State. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

In this instance, NCLA is particularly disturbed by the way CFTC has expanded its own authority by relying on judicial deference to its statutory and/or

---

[1] All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

regulatory interpretation—an interpretation that it offered for the first time during unrelated litigation. It thereby has outlawed the actual-delivery-within-28-days business model that petitioners, with Congress's and CFTC's endorsement, have operated under for decades. This abuse of power by a federal agency is not consistent with the Fifth Amendment's Due Process Clause.

SUMMARY OF THE ARGUMENT

Federal agencies exerting power beyond their statutory authority is a common problem that is fraught with danger. Whatever legitimacy administrative agencies have under acts of Congress will be lost if agencies are permitted to use their own interpretations to stretch such statutory authorization and even go beyond it.

The CFTC has not identified whether it is relying on any specific brand of deference. Regardless, any judicial deference to an agency interpretation—whether under *Chevron*, *City of Arlington*, *Auer, Kisor, Mead,* or *Skidmore*—is an abandonment of the judicial duty under Article III to exercise independent judgment, and exhibits systematic bias in violation of the due process of law.[2]

The due process problem is especially serious because the agency introduced its interpretation by taking a convenient litigating position in an unrelated case.[3] CFTC's argument in this case transforms all

---

[2] *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *City of Arlington v. FCC*, 569 U.S. 290 (2013); *Auer v. Robbins*, 519 U.S. 452 (1997); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[3] "[CFTC] has now reversed its position with regard to the delivery issue without any notice to Defendants—indeed after assuring Defendants and the Court of the opposite—and seeks to impose penalties on [Defendant] for its delivery process. … Where [CFTC] itself concedes that it is changing its own prior interpretation of a statute based on its interpretation of a recent court opinion, it certainly cannot claim that the Defendants had 'fair notice' that its conduct would be considered by [CFTC] to be illegal under that statute." *CFTC v. Worth Grp., Inc.*, No. 13-80796-CIV-RYSKAMP/HOPKINS, 2014 WL 11350233, *3 (S.D. Fla. Oct. 27, 2014).

briefs it files, even in trial court, and even motions such as a motion for leave to amend the complaint, into binding regulations. *See CFTC v. Worth Grp.*, *supra*.

The danger is all the greater because this case, which involves a $290 million enforcement action, including "civil monetary penalties," is in reality criminal in nature. The court below therefore should have applied the rule of lenity, as required by the Due Process Clause, to protect the petitioners (who were the defendants below).

Most profoundly, the case raises a question of legitimacy. If an agency such as the CFTC can redefine the scope of its own regulatory authority in order to bring proceedings that are criminal in nature, for conduct that both statute and the agency's rules had previously permitted, it will call into question not only the Constitution's standards for due process but even the Administrative State's standards, revealing that there is no constitutional constraint on the grossest of agency denials of due process.

ARGUMENT

I. CFTC's AMBIGUITY ABOUT AMBIGUITY DENIES DUE PROCESS TO MONEX

One of the foundational problems in this case is that CFTC has studiously avoided asserting any specific brand of deference.[4] Although its position seems to rely on *City of Arlington* and, underlying that, *Chevron*, it has not placed complete reliance on these sorts of deference to interpretations of statutes, thus leaving open the possibility that it is relying on *Auer–Kisor* deference to its interpretation of its rules or even on *Mead–Skidmore*.

In the district courts below, CFTC relied on *Auer*, *Chevron*, and possibly *City of Arlington*. And the Ninth Circuit speculatively alluded to *Skidmore* deference without resting its opinion on it. But these

---

[4] The district court refused to defer to CFTC's interpretation under *Chevron*. App.51a ("Because § 6(c)(1) unambiguously forecloses the CFTC's interpretation, the Court owes no deference to … its interpretation of the *statute*." (emphasis added)). The phrase "interpretation of the statute" in the trial court's opinion suggests that CFTC was relying on *City of Arlington* and *Chevron* deference in district court. But in the very next sentence, the district court noted that "CFTC's interpretation of the statute and its regulations is not entirely inconsistent with the Court's construction," App.51a–52a, which suggests that CFTC at least in part relied on *Auer–Kisor* deference. The Ninth Circuit cited *Skidmore* in passing but did not discuss any specific deference doctrine. App.17a.

In the Ninth Circuit, CFTC argued its interpretation was owed deference under *Chevron*, CA9 Opening Br. 17, 22, 25–26, 30–31, 41–42, as well as *Auer*, *id.* at 23, 43.

In the district court, CFTC argued its interpretation was owed deference under *Chevron*, C.D. Cal. Case No. 8:17-cv-01868-JVS-DFM, ECF No. 164 at 22, as well as *Auer*, *id.* at 23.

precedents cannot be considered merely alternative litigating positions or alternative judicial justifications, as they demarcate the very foundation of the agency's regulatory position and authority in bringing this $290 million enforcement action.

In relying on *Auer* or *Chevron*, for example, CFTC leaves open whether its regulatory position rests on the ambiguity of the statute or of the rule. The two are very different, and the CFTC's ambiguity about the ambiguity that underlies its regulatory position denies the petitioners their due process right to know the legal basis of the charges against them.

This is all the more sobering because (as discussed in Part IV below) this "civil" enforcement action is criminal in nature. CFTC's smoke and mirrors about the legal foundation for its enforcement action would already be a due process problem if the case were really civil, and it is all the worse because in reality it is criminal in nature.

The Dodd–Frank Act, Pub. L. 111-203, 124 Stat. 1376 (2010), extended the regulatory authority of CFTC over some markets and *prohibited* it from regulating "contract[s] of sale that … resul[t] in actual delivery within 28 days." 7 U.S.C. § 2(c)(2)(D)(ii)(III)(aa).

Three years after Dodd–Frank was enacted, CFTC issued a notice-and-comment rule stating that actual delivery "will have occurred if, within 28 days" the commodity is purchased, "including any portion … made using leverage, margin, or financing, whether in specifically segregated or fungible bulk form, into the possession of a depository other than the seller and its affiliates." 78 Fed. Reg. 52426, 52428 (Aug. 23, 2013). This rule was consistent with the longstanding state law understanding of what "actual delivery"

means—and more importantly, as highlighted by petitioners, Pet.3–17, it was in line with the statutory text that Congress enacted.

Shortly thereafter, however, CFTC abruptly changed course and adopted a new "interpretation" of "actual delivery" as a litigating position in another suit. CFTC "conceded that it was changing its own prior interpretation of actual delivery." *CFTC v. Worth Grp.*, 2014 WL 11350233, at *1, *3 (S.D. Fla. Oct. 27, 2014).

Based on this new interpretation, *i.e.*, the litigating position CFTC took in an unrelated case, CFTC brought a civil enforcement action against petitioners and asked for civil penalties totaling at least $290 million. The Ninth Circuit adopted CFTC's newly minted argument. App.17a.

Petitioners call on this Court to "fulfill th[is Court's] obligation" "not only to confine itself to its proper role, but to ensure that the other branches do so as well." Pet.34 (quoting *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting)). CFTC, indeed, "has stepped well beyond its proper role as defined by the statute and the Constitution"—a question this "Court has frequently reviewed … even without a clear disagreement among the circuits." Pet.34 (collecting cases). *Amicus curiae* NCLA wishes to highlight just how far from the Constitutional tree CFTC's apple has fallen to show certiorari is warranted in this case.

Can a federal agency interpret the term "actual delivery" in a statute that defines the scope of its authority to expand the scope of its own authority? The answer should be "no" because such interpretive self-aggrandizement by an executive agency violates, among other things, the fundamental principles of due process of law.

But the problem is especially acute in this case because CFTC it seems has studiously refused to specify which sort of deference—whether *Chevron–City of Arlington* or *Auer–Kisor* or *Mead–Skidmore*—it is claiming for its argument, advanced in the court below, that its prior litigating position binds third parties like a regulation. This ambiguity about the relevant ambiguity leaves the petitioners in the perilous position of having to defend themselves from a $290 million enforcement action without knowing the exact legal foundation of the government's proceeding against them.

The CFTC's proceeding against the petitioners does not rest simply on the statute. Nor does the proceeding rest on the CFTC's regulation published in the Federal Register, as that is contrary to the CFTC's position in this case. 78 Fed. Reg. 52426, 52428 (Aug. 23, 2013). Instead, its position rests on an interpretation offered in an unrelated case, which CFTC has not thus far placed squarely on *Chevron*, *City of Arlington*, *Auer*, *Kisor, Mead,* or *Skidmore*. The Ninth Circuit said that "if the statute were ambiguous, we would find the CFTC's interpretive guidance persuasive"—citing, among other things, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). App.17a. But the CFTC's position remains a mystery.

The Due Process Clause does not allow the government—whether in the Justice Department or CFTC—to play such games. When proceeding against Americans, whether for a parking ticket or an alleged $290 million offense, the government must identify the legal foundation of its proceedings. Nonetheless, the legal foundation for this enforcement action is not a law, nor a rule, but a litigating position in an unrelated case, which apparently is an interpretation with

legal significance under one deference doctrine or another, but the government will not say which one. The government thus hides the ball, leaving the petitioners uncertain what they must challenge in order to defend themselves.

In NCLA's view, the CFTC's interpretation fits most closely under *City of Arlington* and illustrates the danger of allowing agencies to interpret their authorizing statutes to expand their jurisdiction. The exertion of agency power beyond statutory authority is a common problem that is fraught with danger. Indeed, the "U.S. reports are shot through with applications of *Chevron* to agencies' constructions of the scope of their own jurisdiction." *City of Arlington*, 569 U.S. at 303. Those cases don't lessen the danger; they deepen it.

But this brief cannot focus narrowly on *City of Arlington* because CFTC has been assiduously ambiguous about the sort of ambiguity that justifies its proceedings—which is the initial due process violation.

II. Any Deference Doctrine Requires Judges to Abandon Their Article III Duty of Independent Judgment

The duty of a judge under Article III is to exercise independent judgment in interpreting the law. As put by Chief Justice Marshall, it is the "province and duty of the Judicial Department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Echoing Marshall, Justice Thomas has written: "'The judicial power … requires a court to exercise its independent judgment in interpreting and expounding upon the laws.'" *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring).

It is to protect this independent judgment that the Constitution secures the judges in their tenure and salaries. These institutional protections reveal how much the Constitution attends to the more profound personal independence in judgment that is the core of judicial office.

Nonetheless, *City of Arlington* and the other deference doctrines require Article III judges to abandon their independence by giving controlling weight to an agency's interpretation of a statute or one of its own rules—not because of the agency's persuasiveness, but rather simply because the agency itself has addressed the interpretive question before the Court. This abandonment of judicial responsibility has not been tolerated in any other context—and it should never be accepted by a truly independent judiciary.

Defenders of *City of Arlington*, starting with the Court's majority opinion in that very case, have tried to avoid this problem by pretending that there cannot

be any meaningful distinction drawn between "jurisdictional" and "nonjurisdictional" statutes. 569 U.S. at 296–301. That the underlying statute—regardless of whether it is viewed as jurisdictional or nonjurisdictional—authorizes the agency to choose from among a menu of "reasonable" options, thereby creating an implied "delegation" of lawmaking authority that binds subsequent judicial decision-making. *Id.* at 305–07; *see also Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by an administrator of an agency."); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 Yale J. on Reg. 283, 308–09 (1986).

From this perspective, a court that applies *City of Arlington* deference is not actually deferring to an agency's interpretation of a statute. Instead, the court interprets the statute broadly to vest the agency with discretion to choose among multiple different policies, which makes the agency's choice conclusive and binding on the courts. This notion supposedly enables "deference" to co-exist with the judicial duty of independent judgment, and it is often invoked to reconcile deference with § 706 of the Administrative Procedure Act and *Marbury v. Madison*'s pronouncement.[5]

---

[5] *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 6 (1983) ("A statement that judicial deference is mandated to an administrative 'interpretation' of a statute is more appropriately understood as a judicial conclusion that some substantive law-making authority has been conferred upon the agency.").

This theory might make some sense if a statute were to say that an administrative official is vested with discretion in carrying out his statutory duties. Many statutes authorize the executive to choose from among various policies and forbid the courts to second-guess those determinations. *See, e.g.*, 8 U.S.C. § 1182(f) ("Whenever the President finds [a particular fact], and for such period as he shall deem necessary, [perform a specified action].").

In these situations, there is no need to invoke any "deference" doctrine; a court simply reads the statute and sees that it empowers the executive—or does not—rather than the judiciary having to decide the matter. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2410 (2018) (upholding the President's travel ban under 8 U.S.C. § 1182(f), not invoking *Chevron*, but by observing that the President's proclamation "does not exceed any textual limit on the President's authority").

Such decisions do not sacrifice the Court's duty of independent judgment, nor do they place a thumb on the scale in favor of the executive's preferred interpretation of the law. They simply interpret the statute according to the only possible meaning that it can bear. The executive decides within the parameters established in the statute, and courts (and everyone else) must accept the executive's decision as conclusive and binding.

But the only time *City of Arlington* and other deference doctrines come into play is when the underlying statutory language is *ambiguous*. Such doctrines instruct courts to treat that statutory ambiguity as if it were an explicit vesting of discretionary powers in the agency that administers the statute. But the notion that ambiguity itself creates an "implied delega-

tion" of lawmaking or interpretive powers to administrative agencies is a transparent fiction, as jurists and commentators have repeatedly acknowledged.[6] *See generally* Philip Hamburger, Chevron *on Stilts: A Response to Jonathan Siegel*, 72 Vand. L. Rev. En Banc 77, 90 (2018). An agency's authority to act must be granted by Congress, and one cannot concoct that congressional authority when there is no statutory language that empowers the agency to act in a particular manner.

This Court has sought to alleviate this problem by claiming that deference depends on a "congressional intent" to delegate. *See Mead*, 533 U.S. at 227. But congressional intent must be discerned most basically from Congress's statutes and its words, and in the ambiguous statutes to which *City of Arlington* and *Chevron* apply, Congress does not grant agency lawmaking or interpretive power. Although Congress gives agencies rulemaking power in some of its authorizing statutes, this is precisely what it does *not* do in laws such as 7 U.S.C. § 2(c)(2)(D)(ii)(III)(aa).

So, in the end, *City of Arlington* and the other deference doctrines are nothing more than commands that the courts must abandon their duty of independent judgment. Such a doctrine is no different from an instruction that courts must assign weight and defer to statutory interpretations announced by a congressional committee, a group of expert legal scholars, or

---

[6] *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (describing "*Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law."); Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753, 759 (2014) ("Even *Chevron*'s most enthusiastic champions admit that the idea of an 'implied delegation' is a fiction.").

the *New York Times* editorial page. In each of these scenarios, the courts would be following another entity's interpretation of a statute as long as it is "reasonable"—even if the court's own judgment would lead it to conclude that the statute means something else.

Article III not merely empowers but requires judges to resolve "cases" and "controversies" that come before them.[7] Article III makes no allowance for judges to abandon their duty to exercise their own independent judgment, let alone to rely upon the judgment of entities that are not judges and do not enjoy life tenure or salary protection.

To be clear, there is nothing at all wrong or constitutionally problematic about a court that considers an agency's interpretation and gives it weight according to its persuasiveness. *See, e.g.*, *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them"). An agency is entitled to have its views heard and considered by the court, just as any other litigant or *amicus*, and a court may and should consider the "unique insights" an agency may bring on account of its expertise and experience. *Id.* "'[D]ue weight' means 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law"—due weight "is a matter of persuasion, not deference." *Id.*

---

[7] *See Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.").

Recognizing an argument's persuasive weight does not compromise a court's duty of independent judgment. But *City of Arlington* and the other deference doctrines require far more than respectful consideration of an agency's views; they command that courts give weight to those views simply because the agency espouses them, and they instruct courts to subordinate their own judgments to the views preferred by the agency. The Article III duty of independent judgment allows (indeed, requires) courts to consider an agency's views and to adopt them *when persuasive*, but it absolutely forbids a regime in which courts "defer" or give any controlling weight to a nonjudicial entity's interpretation—particularly when that interpretation does not accord with the court's sense of the best interpretation.

III. Any Deference Doctrine Denies the Due Process of Law by Requiring Judicial Bias in Favor of Agencies

A related and more serious danger and problem with *City of Arlington* and the other deference doctrines is that they require the judiciary to display systematic bias in favor of agencies whenever they appear as litigants and seek deference to their interpretations. *See generally* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). It is bad enough that a court would abandon its duty of independent judgment by "deferring" to a non-judicial entity's interpretation of a statute. But for a court to abandon its independent judgment in a manner that favors an actual *litigant* before the court is an abomination. This Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Yet *City of Arlington* and the other deference doctrines institutionalize a regime of systematic judicial bias by requiring courts to "defer" to agency litigants whenever a disputed question of interpretation arises. Rather than exercise their own judgment about what the law is, judges under such doctrines must defer to the judgment of one of the litigants before them.

A judge who openly admitted that he or she favors a government-litigant's interpretation—and disfavors the competing interpretation offered by the non-government litigant—would ordinarily be impeached and removed from the bench for bias and abuse of power. Yet this is exactly what judges do whenever they apply *City of Arlington* or any of the other deference doctrines in cases where an agency appears as a litigant. The government litigant wins simply by showing that

its preferred interpretation of the statute is "reasonable" even if it is wrong—while the opposing litigant gets no such latitude from the court and must show that the government's view is not merely wrong but *unreasonably* so.

Judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon me," and judges are ordinarily very careful to live up to these commitments. 28 U.S.C. § 453. Nonetheless, under *City of Arlington* and the other deference doctrines, otherwise scrupulous judges who are sworn to administer justice "without respect to persons" must remove the judicial blindfold and tilt the scales in favor of the government's position.

In short, no rationale can defend a practice that weights the scales in favor of a *government* litigant—the most powerful of parties—and that commands systematic bias in favor of the government's preferred interpretations of federal statutes. Whenever *City of Arlington* is applied in a case in which the government is a party, the courts are denying due process by showing favoritism to the government's interpretation of the law. *See Tetra Tech*, 914 N.W.2d at 50 (prohibiting *Chevron* deference in the Wisconsin state courts because its "systematic favor deprives the non-governmental party of an independent and impartial tribunal").

IV. THE COURT SHOULD TAKE THE CASE TO CLARIFY THAT THE RULE OF LENITY PRECLUDES DEFERENCE TO AGENCY INTERPRETATIONS IN CASES THAT ARE CRIMINAL IN NATURE

Even if this Court is not inclined to tackle the deference doctrines that underlie this case, it should take the case to clarify that no deference doctrine can defeat the constitutionally required rule of lenity.

One of the dangerous trends in contemporary American law is the government's use of "civil enforcement" actions to evade the burden of bringing criminal prosecutions. By this means, the government increasingly sidesteps the Constitution's protections for criminal defendants.

A "civil enforcement" proceeding is already close to an oxymoron, as it recategorizes as "civil" what traditionally would have been a criminal prosecution. In this case, CFTC is bringing a $290 million enforcement action, including "civil monetary penalties." The amount sought by the government and its candid demand for "penalties" confirm that the case is, in reality, criminal in nature.

The *in terrorem* effect will be to render *per se* fraudulent a range of long-established, lawful and honest business practices that have been carried out for centuries. Rather than a civil proceeding, this looks like an aggressive criminal proceeding—but without the inconvenience of the Constitution's usual protections for criminal defendants.

This Court should therefore take this case to clarify that the rule of lenity is constitutionally required. The rule of lenity has layered constitutional foundations. It ensures that statutes such as the scope-of-authority and penalty statutes at issue here (7 U.S.C.

§§ 2(c)(2)(D)(ii)(III)(aa), 9) "provide fair warning concerning conduct rendered illegal and strik[e] the appropriate balance between the legislature, the prosecutor, and the court" in defining the scope of liability. *Liparota v. United States*, 471 U.S. 419, 427 (1985).

Equally important, the rule of lenity "vindicates the principle that only the *legislature* may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement regarding denial of certiorari, joined by Thomas, J.). And underlying both concerns is the due process presumption of innocence. Not only as to the facts but also as to the law, the defendant must be presumed innocent and therefore cannot be found guilty on the basis of a law that does not clearly define his offense. *Cf. In re Winship*, 397 U.S. 358, 365–66 (1970) (discussing the importance of the presumption of innocence; "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards").

This Court has repeatedly applied the rule of lenity to ambiguous statutes with both civil and criminal penalties, without regard to *Chevron* deference. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (plurality opn.); *id.* at 519 (Scalia, J., concurring). But this Court's opinion in *Babbitt v. Sweet Home Chapter of Comm's for a Great Oregon*, 515 U.S. 687 (1995) has clouded the picture. This Court deferred to an agency interpretation of a civil statute with criminal penalties, and opined that the Court had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the

governing statute authorizes criminal enforcement." *Id.* at 704 n.18.

This Court has heavily criticized *Babbitt*'s gratuitous footnote: "if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Whitman*, 135 S. Ct. at 353–54. Deferring in this context "upend[s] ordinary principles of interpretation" and allows "federal administrators [to] in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Id.* at 353.

This case thus presents a good opportunity for this Court to resolve the conflict between deference doctrines and the rule of lenity, and, importantly, to correct the constitutional harms that have been brought on by *Babbitt*'s dicta. Thus, even if the Court is unwilling at this date to confront the unconstitutionality of the deference doctrines, it at least should wrestle with *Babbitt*'s dilution of the rule of lenity.

V. ANY LEGITIMACY ENJOYED BY ADMINISTRATIVE AGENCIES DEPENDS ON PRIOR CONGRESSIONAL AUTHORIZATION AND SUBSEQUENT JUDICIAL REVIEW, BOTH OF WHICH ARE UNDERCUT BY DEFERENCE DOCTRINES

The constitutional legitimacy of the Administrative State has long rested on two fundamental assumptions: that agencies enjoy prior legislative authorization and that they are subject to subsequent judicial review. On these dual foundations, which offer popular and judicial accountability, the constitutional defects of administrative power have seemed excusable. Though agencies might usurp powers of Congress and the courts, this has seemed tolerable because the agencies were so dependent on these more respectable institutions.

But these foundations of administrative legitimacy depend on Congress's actually authorizing agency rulemaking beforehand and on the courts' forthrightly reviewing it afterward. It is therefore sobering that this Court has imposed deference doctrines that simultaneously undermine both foundations of the legitimacy of administrative power.

When judges defer to agency interpretations of statutes, they enable an agency such as CFTC to introduce its own intent where Congress left its intent ambiguous and thereby to control its own authorization. Moreover, when an agency such as CFTC brings an enforcement action and the judges defer to the agency's interpretation, the agency can escape unbiased judicial review of agency action.

The result has been to provoke widespread concern about administrative agencies and about the judiciary. *Chevron* and the other deference doctrines

leave agencies without the legitimizing effect of congressional authorization and unbiased judicial review, and thereby raise constitutional doubts about the entire administrative enterprise.

Accordingly, even if this Court supports this unconstitutional venture, it should pause to consider the danger of deference doctrines that liberate the Administrative State from prior congressional authorization and subsequent unbiased judicial review. Such constraints may seem, to some, more inconvenient than valuable, but they anchor administrative agencies in more legitimate institutions. So, if this Court, through its deference doctrines, continues to leave agencies incompletely tethered by Congress and the courts, the agencies will increasingly be recognized as loose cannons, which are too dangerous to be permitted.

The danger of illegitimacy of course reaches beyond administrative agencies. Even more worrisome is the reputation of Congress and the Judiciary. Both branches seem to have surrendered their duties, and the significance for the courts is particularly worrisome. Americans expect their courts to engage in unbiased and searching review, and if the courts cannot do this, it is not only the Administrative State that will put its legitimacy at risk.

* * *

CFTC, wishing the Court not to reach either question, has waived its right to file a response to the petition for a writ of certiorari. Given the deep constitutional problems presented by the facts in this case, the Court should request a response. A call for a response would be the first time the Solicitor General of the

United States would weigh in on this issue. The Court's call would oblige the Solicitor General to state what brand of deference, if any, CFTC is seeking from the Court in this case—*Chevron*, *City of Arlington*, *Auer*, *Kisor, Mead,* or *Skidmore*—so that petitioners will have fair notice of exactly what they are up against. It would also be telling if the Solicitor General's response is silent as to deference or the rule of lenity. Silence would signal that CFTC no longer endorses any brands of deference the agency has been peddling to date. The Court will, therefore, only enhance the integrity of the certiorari process by calling for a response.

In the absence of a circuit split, the Court may be inclined to doubt whether this case deserves a writ of certiorari. But by refusing certiorari, this Court would leave CFTC to take advantage of the Court's deference doctrines to engage in massive "civil" enforcement actions on the basis of un-enunciated and ambiguous legal foundations. If the certiorari process is to remain robust and maintain its legitimacy, it is precisely these types of "important question[s] of federal law" that deserve to be "settled by this Court" without regard to circuit splits or percolation. Supreme Ct. R. 10(c) (2019).

CONCLUSION

The recurring dangers of non-independent judgment, of bias, of ambiguity in criminal statutes, and of illegitimacy have potent solutions: judicial independence, judicial impartiality, the rule of lenity, and searching judicial review. The petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP HAMBURGER
MARK CHENOWETH
ADITYA DYNAR
Counsel of Record
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Adi.Dynar@NCLA.legal
Counsel for Amicus Curiae