No. 21-159

In the Supreme Court of the United States

W. CLARK APOSHIAN,
Petitioner,

v.

MERRICK GARLAND, Attorney General of the United States, *ET AL.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, MONTANA, AND 18 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(1) Whether courts should defer under *Chevron* to an agency interpretation of federal law when the federal government affirmatively disavows *Chevron* deference.

(2) Whether the *Chevron* framework applies to statutes with criminal law applications.

(3) Whether, if a court determines that a statute with criminal law applications is ambiguous, the rule of lenity requires the court to construe the statute in favor of the criminal defendant, notwithstanding a contrary federal agency construction.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

"[S]ometimes who adopts a rule of law is more important than what that rule provides."

Paul J. Larkin, Jr., *Chevron and Federal Criminal Law*, 32 J. L. & Pol. 211, 212 (2017).

The concept of *Chevron* deference[2]—which admonishes courts to defer to agency decisions when Congress's lawmaking directives are not clear—is based on the idea that unelected, unaccountable agencies may wield significant policy power in areas central to American's day-to-day lives. Almost since first adopted in 1984, the *Chevron* doctrine has been questioned, debated, and modified. This case is appropriate to resolve yet more questions that call for the Court's review in the critical area of *Chevron*'s intersection with criminal law. The Tenth Circuit majority believed that *Chevron* gives the Bureau of Alcohol, Tobacco, and Firearms ("ATF") power to impose new criminal liability carrying up to 10 years imprisonment in an area where fundamental rights are at stake, based on statutory language that does not plainly require this result. Even worse, it extended this policymaking discretion where the agency itself *did not ask for it* and instead believed (incorrectly) that it was following Congress's unambiguous command.

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file an *amicus curiae* brief in support of Petitioner.

[2] See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Amici States West Virginia, Montana, Alabama, Alaska, Arizona, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming have a special interest in protecting their citizens against agency overreach, particularly when aided by an improperly deferential judiciary. These interests are weightier still where challenged regulations impose criminal sanctions, which go to the heart of liberty interests and bump against principles of federalism given the States' primary responsibility for criminal law, in contrast to the federal government's more limited array of constitutionally enumerated powers. And *amici* States have strong interests in the specific facts of this case consistent with their responsibility to help preserve the fundamental right to keep and bear arms enshrined in the Bill of Rights. The decision below raises serious concerns about ATF's power to adopt a rule that subjects hundreds of thousands of law-abiding gun owners in the States to criminal sanctions.

SUMMARY OF ARGUMENT

Amici States agree with Petitioner that all three questions presented are important and worthy of the Court's review. In particular, certiorari is warranted for at least two reasons:

First, this Court's intervention is necessary to resolve confusion among the lower courts regarding the proper application of *Chevron* deference to agency interpretations that criminalize otherwise lawful conduct. Multiple aspects of this problem have troubling implications for liberty interests—and have unsurprisingly led to contradictory results in courts across the country. *Chevron* deference stands in

considerable tension with the traditional "rule of lenity," which counsels that ambiguity in criminal statutes should be construed in favor of the defendant, not in favor of an agency. Applying *Chevron* in criminal contexts also magnifies reliance and notice concerns that have led to some courts' increasingly critical eye where individuals relied on an agency's previously settled, now-repudiated position. And the need to resolve these concerns is even greater where, as here, an agency's interpretation raises serious constitutional questions by criminalizing possession of a device Americans use while exercising their Second Amendment rights.

Second, this Court's review is urgently needed given the far-reaching consequences of the decision below. For almost two decades ATF has taken the opposite position from its new rule when it came to bump stock accessories and similar devices. Many thousands of Americans have purchased these accessories and used them for lawful purposes in that time; ATF's new rule extinguishes those property and liberty interests. The lower court's improper view of *Chevron* deference also exposes nearly every American to the risk of criminal liability without proper legislative and judicial safeguards. The vast majority of federal crimes in force today are regulatory crimes, defined and prosecuted by executive agencies. Given the liberty interests at stake and the concerns inherent where the same (here, unelected) officials both write and enforce regulations with the force and effect of criminal law, it is essential to resolve when courts retain their duty to say what the law actually is.

REASONS FOR GRANTING THE PETITION

I. Review Is Necessary To Resolve Whether Courts May Apply *Chevron* Deference When Reviewing Regulations Imposing Criminal Liability.

Foundational to the Constitution is the Framers' belief that keeping the "different powers of government" "separate and distinct" is "essential to the preservation of liberty." THE FEDERALIST NO. 51, at 318 (James Madison) (Signet Classics ed. 2003). They "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty," and so "went to great lengths to make lawmaking difficult." *Gundy* v. *United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (citing THE FEDERALIST NO. 48 (James Madison)). These concerns are more pressing when it comes to criminal laws, because "the consequences of criminal guilt" represent some of the most "serious deprivations of liberty" our system of government allows. *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 551 (1971) (White, J., concurring).

The judiciary, in turn, is a critical backstop to preserve these interests. It keeps the Legislative Branch within constitutional parameters, and ensures that those in the Executive Branch charged with enforcing statutes do not stray from those laws' bounds. There is thus "no liberty" if the "power of judging [is] not separated from the legislative and executive powers." THE FEDERALIST NO. 78, at 464-65 (Alexander Hamilton) (Signet Classics ed., 2003).

Congress's decisions to delegate gap-filling power to agencies' expertise necessarily sacrifice some of the structural safeguards around the power to make laws. And *Chevron* deference compounds that sacrifice by

transferring to agencies some portion of the judiciary's "province and duty" "to say what the law is." *United States* v. *Windsor*, 570 U.S. 744, 762 (2013) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). Whatever may be said about the merits of those tradeoffs generally, they raise particular concerns where agencies—not electorally accountable legislators—adopt regulations that impose new criminal liability.

This case presents especially compelling aspects of this problem in light of the agency's longstanding prior position and lack of clear support for the change in the governing statute. Bump stocks are accessories for semi-automatic rifles designed for those with limited hand mobility. Pet.6. After a horrific and high-profile crime where it is believed the shooter used a bump stock-equipped rifle, ten States regulated or criminalized the possession of bump-stock-type devices.[3] The United States Congress, however, declined to do so.[4] ATF took up that task instead and criminalized bump stocks using

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[3] Nicholas Simons, *A Multistate Review of Government Response to Bump Stocks in High-Casualty Mass Shootings*, SUNY Nelson A. Rockefeller Inst. of Gov't Blogs (Jan. 14, 2019), https://rockinst.org/blog/a-multistate-review-of-government-responses-to-bump-stocks-in-high-casualty-mass-shootings/.

[4] H.B. 3999, 115th Cong. (2018); Benjamin Siegel, *Democrats, Republicans Push Compromise Bill to Ban Bump Stocks After Las Vegas*, ABC News (Oct. 10, 2017, 8:20 p.m.), https://abcnews.go.com/Politics/democrats-republicans-push-compromise-bill-ban-bump-stocks/story?id=50402907.

the regulatory process. See 83 Fed. Reg. 66514 (Dec. 26, 2018).

ATF's new regulation is an about-face from its position on bump-stock-type rifle accessories dating back to 2002. Then, it determined that the "Atkins Accelerator"—a spring mechanism that increases the rate of fire of a semi-automatic rifle—was not an illegal "machine gun" under federal law. Pet.7. Upon subsequent testing of that device, ATF reversed its decision and redefined it as a machine gun, but with a carve-out that allowed it to remain in legal use if modified to remove its internal spring mechanisms. Pet.7. Between 2008 and 2017, ATF also issued multiple "classification decisions concluding that other bump-stock-type devices were not machineguns." 83 Fed. Reg. 13442, 13442-43 (Mar. 29, 2019).[5]

As the Petition explains, ATF's new rule does not flow from the governing statute's clear and unambiguous language, as multiple judges across the country have explained in recent months. Pet.36-37. Even with a bump stock a firearm's trigger must be pressed, released, and reset for every shot, Pet.6—placing this accessory in significant tension with Congress's understanding of a "machinegun" as a firearm capable of "more than one shot . . . by a single function of the trigger." 26 U.S.C. § 5845(b). Notably, the decision below did not agree with

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[5] See also, *e.g.*, Letter from Richard Marianos, Asst. Dir., ATF, to Hon. Ed Perlmuter, U.S. House of Representatives (Apr. 16, 2013), https://perlmutter.house.gov/uploadedfiles/atf_response_04.16.13.pdf; ECF No. 60, Findings of Fact and Conclusions of Law ¶ 64, *Cargill* v. *Barr*, No. 1:19-cv-349 (W.D. Tex. 2020) (citing 25 documents where ATF "determined that several proposed bump stocks were not machine guns").

ATF's insistence that its new rule reflects the "best interpretation of the statute" under its "plain meaning." 83 Fed. Reg. at 66518, 66527. It held instead that the rule is a permissible interpretation of ambiguous text—over ATF's express and repeated insistence that the statute mandates the rule and thus *Chevron* deference was inapplicable. *E.g.*, Pet.3, 10-12.

These factors make the case a striking example why it is important to resolve whether courts should *ever* afford *Chevron* deference to administrative interpretations of statutes with criminal penalties. See also Pet.23-26. The majority's *sua sponte* decision to insert the idea of statutory ambiguity into the case also shines a light on several unresolved facets of that central problem with which courts nationwide have struggled. Because this case exists at a confluence of multiple important questions surrounding *Chevron*'s applicability, the Court should grant review to clarify if and how criminal liability requires limits on its reach.

A. By holding that the rule of lenity does not apply in cases involving *Chevron*, App.20a, the decision below squarely presents whether the rule plays a meaningful role when courts interpret criminal *regulations*, as opposed to criminal *statutes*. A well-established canon of statutory interpretation, the rule of lenity counsels that "if two rational readings [of a criminal statute] are possible, the one with the less harsh treatment of the defendant prevails." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 296 (2012) (citing *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987)). On one hand there should be no doubt that this doctrine applies to administrative interpretation cases—*Chevron* deference is appropriate only if a statute is ambiguous after using all the tools of statutory

construction, and the rule of lenity is one of those tools. Pet.33-34. This Court has also "never held that the Government's reading of a criminal statute is entitled to any deference." *United States* v. *Apel*, 571 U.S. 359, 369 (2014); see also *Abramski* v. *United States*, 573 U.S. 169, 191 (2014) ("criminal laws are for courts, not the Government, to construe").

Yet it is also understandable why the interplay between lenity and deference has bred confusion. The rule of lenity presumes two reasonable interpretations of a statute, just like *Chevron*. Yet whereas the rule of lenity gives the benefit of the doubt to the defendant instead of the government, *Chevron* gives it to the agency no matter what the individual might reasonably have concluded otherwise. The doctrines are thus operating at cross-purposes: Giving "persuasive effect" to the government's interpretation of criminal statutes "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon* v. *United States*, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring in the judgement).

Further, the Court's decisions have contributed to this confusion—underscoring that certiorari review is the only way to resolve it. In *United States* v. *Thompson/Center Arms Co.*, for example, the Court interpreted the phrase "making" a "firearm" as used in the National Firearms Act. 504 U.S. 505 (1992) (interpreting 26 U.S.C. § 5821). The plurality construed the statute narrowly under the rule of lenity, and concluded that the defendant had not "made" a firearm by packaging an unregulated pistol with a kit that allowed for conversion into a firearm that would be regulated under federal law. *Id.* at 517-18. Notably, the plurality gave no deference to ATF's contrary interpretation of the text. *Id.*

Three years later the Court took a seemingly different approach in *Babbitt* v. *Sweet Home Chapter,* 515 U.S. 687 (1995). While the Court neither engaged in a full-blown *Chevron* analysis nor held that *Chevron* applies to criminal statutes generally, it used some form of deference to bless the Department of the Interior's broad interpretation of the terms "take" and "harm" in the Endangered Species Act. *Id.* at 703. The Court also rejected an argument that the rule of lenity should govern because the statute has both criminal and civil applications. Instead, it "brushed the rule of lenity aside in a footnote," insisting that the Court had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations," even though that position contradicted "many cases before and since." *Whitman* v. *United States,* 135 S. Ct. 352, 353-54 (2014) (statement of Scalia, J., respecting denial of certiorari) (citing *Babbitt*, 515 U.S. at 704 n.18).

Nine years later, in an immigration case, the Court applied seemingly the same rule it had found unpersuasive in *Babbitt*: It held that the rule of lenity applies 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. 1, 11 n.8 (2004) (citing *Thompson/Center Arms*, 504 U.S. at 517-18). The Court did not defer to the Board of Immigration Appeals' contrary interpretation, and it did not clarify the tension the ruling created with its earlier holding in *Babbitt*, either.

The result of this conflicting guidance has, predictably, been inconsistent application of *Chevron* in criminal contexts in the courts below. Looking at ATF cases alone, the Tenth and D.C. Circuits have deferred to ATF's interpretations of criminal law, the Second and Ninth have

not, and the Sixth is currently evaluating which approach to take. See Pet.23-25. Confusion abounds over *Babbitt*'s scope more generally, too, both in the courts, *e.g.*, Pet.28, and among legal scholars and commentators. See, *e.g.*, Nicholas R. Bednar, *The Clear-Statement* Chevron *Canon*, 66 DePaul L. Rev. 819, 861 (2017); William T. Gillis, *An Unstable Equilibrium: Evaluating the "Third Way" Between* Chevron *Deference and the Rule of Lenity*, 12 NYU J. L. & Liberty 352, 353 (2019); Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 Baylor L. Rev. 1, 1 (2006); Michael Kagan, Chevron's *Liberty Exception*, 104 Iowa L. Rev. 491 (2019); Larkin, *supra* p. 1, at 211.

The best reading of *Babbitt* is that its approach to lenity should not be applied outside the case's limited context. The Court held it owed only "some" deference to the agency's interpretation and evaluated it under the statute's plain text, structure, and purpose. *Babbitt*, 515 U.S. at 703-05. The Court also noted that its analysis was aimed at a "facial challenge[] to administrative regulations" with both criminal and civil applications, rather than a criminal prosecution specifically. *Id.* at 704 n.18. Yet it cannot be denied that many courts across the country—including the Tenth Circuit below—have come away from *Babbitt* with different marching orders. The Court should grant review to end that confusion and hold that *Chevron* does not erase the rule of lenity's longstanding protection against surprise criminal liability.

B. This case also demonstrates the significant and sometimes harmful effects of extending *Chevron* deference where an agency reverses a longstanding interpretation to impose criminal liability on previously legal conduct. Congress faces political constraints when it changes the law or engages in ping-pong reversals where

individual liberties are at stake—for better or worse, Congress did not change the definition of "machinegun" in 2018 to include bump stocks. Yet agencies are structurally *un*accountable to voters.

It follows that in situations where an agency changes direction, the agency must take into account whether its "prior policy has engendered serious reliance interests." *Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2126 (2016) (citation omitted). An "[u]nexplained inconsistency in agency policy" can render the new decision arbitrary and capricious, and therefore outside the scope of *Chevron* deference. *Id.* (citation omitted). This can be so regardless of whether a new agency interpretation rises to the level of imposing new criminal penalties. See *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1913 (2020).

Regulators and the regulated alike would benefit from additional guidance over what type of reliance interests can doom an agency's changed position and the strength of the reasons needed to overcome them. And clarity on this issue is especially needed in the criminal context, where rescinding "decades-old" guidance can expose private parties to new and costly liability—not just in terms of dollars and cents, *Encino*, 136 S. Ct. at 2123-24, 2126, but potential prison time too.

As Justice Gorsuch highlighted when discussing a prior case addressing the same ATF rule, the problem is that "[t]he law hasn't changed, only an agency's interpretation of it." *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives,* 140 S. Ct. 789, 790-91 (2020) (statement of Gorsuch, J., respecting denial of certiorari). Here, many individuals have relied for the better part of two decades on what the law itself says. Petitioner bought a non-mechanical bump stock when it was entirely legal. Pet.9.

Bump-firing techniques have existed almost as long as there have been semi-automatic firearms. *Gun Owners of Am., Inc.* v. *Garland*, 992 F.3d 446, 452 (6th Cir. 2021), *reh'g en banc granted* 2 F.4th 576 (6th Cir. 2021). And many common-place (and decidedly not criminal) items can achieve the same effect, like "rubber bands, belt loops, and even shoestrings." *Id.* at 452 n.2 (citing 83 Fed. Reg. 66532-33).

Giving agencies the benefit of *Chevron* deference in contexts like these thus has significant and often unexpected consequences for the individuals whose liberty is at stake. In dissent below, Chief Judge Tymkovich called out the government for "expect[ing] an uncommon level of acuity from average citizens to know that they must conform their conduct not to the statutory language, but to the interpretative gap-filling of an agency which may or may not be upheld by a court." App.97a. Justice Gorsuch similarly deemed it too much to ask lay people to "keep up" with changed agency readings of criminal laws. *Guedes*, 140 S. Ct. at 790-91 (statement of Gorsuch, J., respecting denial of certiorari). Rather than asking them to "conform their conduct to the fairest reading of the law they might expect from a neutral judge," *Chevron* means they must guess if the statute will be deemed ambiguous, guess whether an agency's first interpretation will be deemed reasonable, and guess whether the new—often opposite—position will be, too. *Id.* Fair notice becomes a moving target, and it is a real and unresolved question whether courts should participate in "such bureaucratic pirouetting" when it comes to criminal liability. *Id.*

C. Finally, this case allows the Court to resolve whether—even if *Chevron* deference is appropriate in some criminal contexts—the standard varies where an

agency's interpretation places new limits on fundamental rights. One of the tenets of our system of government is that "statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly." SCALIA ET AL., *supra* p. 7, at 249. The Court has accordingly long recognized that courts should construe statutes to avoid interpretations—even reasonable ones—that raise serious constitutional concerns. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

This canon raises questions as soon as *Chevron* joins the mix. *Chevron* deference is premised on the notion that the statute in question is "ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 843. In the ordinary case, the "clear statement" rule suggests that if a statute is ambiguous whether it implicates a fundamental constitutional right, then reviewing courts should err on the side of liberty. *Chevron* allows agencies to flip that rule on its head.

Here, for example, the ATF rule criminalizes conduct connected to the exercise of Second Amendment rights. The Second Amendment's guarantee of the right to keep and bear arms is a "true palladium of liberty," and "among those fundamental rights necessary to our system of ordered liberty." *District of Columbia* v. *Heller*, 554 U.S. 570, 606 (2008) (quoting 2 Blackstone's Commentaries 143 (St. George Tucker ed., 1803)); *McDonald* v. *City of Chi.*, 561 U.S. 742, 778 (2010). And bump stocks, like myriad other firearm accessories, are used with firearms for lawful purposes within the Second Amendment's scope, such as "home defense, militia use, sporting competitions, hunting, [and] target practice." *Miller* v. *Bonta*, No. 19-CV-1537-BEN, 2021 WL 2284132, at *39 (S.D. Cal. June 4, 2021).

If Congress or a state legislature passed a law that allegedly infringed Second Amendment rights, courts would apply some degree of heightened scrutiny when reviewing challenges to those laws. See, *e.g.*, *Ezell* v. *City of Chi.*, 651 F.3d 684, 703 (7th Cir. 2011) (courts "are left to choose an appropriate standard of review from among the heightened standards of scrutiny the Court applies to governmental actions alleged to infringe enumerated constitutional rights" (citations omitted)); *Bauer* v. *Becerra*, 858 F.3d 1216, 1222-23 (9th Cir. 2017) ("Similarly, our sister circuits have overwhelmingly applied intermediate scrutiny when analyzing Second Amendment challenges under *Heller*'s second step."). But importantly, courts could avoid that analysis altogether if a fair reading of the statute bypassed those constitutional concerns. *Chevron* deference, by contrast, gives the agency the choice which of two competing interpretations to adopt—and counsels deference even if the one it chooses raises troubling constitutional questions.

This Court has not always spoken with one voice when it comes to the interplay between *Chevron* and the avoidance canon. At times it has rejected application of constitutional avoidance in favor of applying *Chevron*, such as when reviewing statutes setting formulas for establishing utility lease rates. *Verizon Commc'ns, Inc.* v. *F.C.C.*, 535 U.S. 467, 525 (2002). But it has also recognized it "would not extend *Chevron* deference" where an agency's interpretation of a statute would both "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power" and regulate activity that it "is not clear" "substantially affects interstate commerce." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001). Assuming that *Chevron* should ever trump the

avoidance canon, the Court should resolve which circumstances fall on either side of the line.

II. The Wide-Reaching Implications Of This Case Underscore The Need For Review.

The validity of ATF's bump stock rule directly affects the lives of as many as half a million individuals who purchased previously lawful bump stocks. In reliance on ATF's prior interpretations of the statutory definition of "machinegun," Americans across the country legally purchased an estimated 280,000-520,000 bump stocks at a total cost of between $59,000,000 and $102,000,000. See 83 Fed. Reg. at 66547. The agency's new rule requires these Americans to either surrender or destroy their devices on pain of serious fines and imprisonment. Indeed, one bump stock manufacturer has already been forced to destroy over $20,000,000 worth of inventory as well as stop manufacturing more.[6]

This impact alone merits review. But the broader question—whether any federal agencies should receive *Chevron* deference when criminalizing otherwise-lawful conduct through regulatory interpretation—has still broader consequences.

The separation of powers is based on the idea that "accumulation of all powers, legislative, executive, and judiciary . . . may justly be pronounced the very definition

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[6] See *Mod. Sportsman, LLC* v. *United States*, 145 Fed. Cl. 575, 576 (Fed. Cir. 2019); Avery Anapol, *Gun Company Sues US Over Bump Stock Ban, Claiming $20M in Losses*, The Hill (Apr. 9, 2019, 1:49 p.m.), https://thehill.com/regulation/court-battles/438066-gun-company-sues-us-over-bump-stock-ban-claiming-20-million-in.

of tyranny." THE FEDERALIST NO. 47, at 298 (James Madison) (Signet Classics ed. 2003). Yet agencies are part of the Executive Branch, and by its very nature delegating power to define the conduct subject to civil or criminal penalties transfers to agencies some degree of "power to enact laws restricting the people's liberty." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting). *Chevron* completes the trilogy by establishing circumstances where courts stand aside from their ordinary role interpreting statutes using all the canons of construction and defer to an agency's read instead.

For the past several decades we have tolerated this consolidation in light of the nature of modern governance and the benefits of having regulators who are experts in their discrete fields. Yet the potential costs are high, and can be particularly dangerous in the context of criminal liability and punishment. This concern makes granting review all the more important to ensure that the rules governing agencies' unique blend of powers are exceedingly clear in cases like these.

Organizations of many stripes and philosophies agree that over-criminalization is a serious problem in America today.[7] Even Congress has created a task force to study

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[7] See, *e.g.*, TIM LYNCH, CATO INST., CATO HANDBOOK FOR POLICYMAKERS 193-99 (8th ed. 2017); *Overcriminalization*, The Heritage Found., https://heritage.org/crime-and-justice/heritage-explains/overcriminalization (last visited Sept. 1, 2021); *Task Force on Overcriminalization*, Am. Bar Ass'n, https://americanbar.org/groups/litigation/initiatives/overcriminalization/ (last visited Sept. 1, 2021); James R. Copland & Rafael Mangual, *Overcriminalizing America*, Manhattan Inst. for Pol'y Rsch., Inc., https://www.manhattan-

it.[8] And criminalization via regulation is one of the phenomenon's "core drivers": Nearly "98 percent of the more than 300,000 crimes on America's books were never voted on by Congress."[9]

It is not difficult to see why. The Department of Justice alone has many departments tasked with power to issue regulations that interpret laws governing criminal liability or prison time—ATF, the Antitrust Division, the Criminal and Civil Rights Divisions, the Drug Enforcement Administration, and the Financial Fraud Enforcement Task Force to name a few. Likewise, there are multiple executive agencies with similar powers. See, *e.g.*, 7 U.S.C. §§ 87b(a)(13), (d)(2)(E), (3), 87c (Agriculture's power to promulgate criminally enforceable regulations governing grain standards and transactions); 12 U.S.C. §§ 1953, 1956-1957 (Treasury's authority to promulgate criminal regulations requiring reporting by uninsured banks). And

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institute.org/overcrim (last visited Sept. 1, 2021); Charles G. Koch & Mark V. Holden, *The Overcriminalizaton of America*, Politico Magazine (Jan. 7, 2015), *available at* https://www.politico.com/magazine/story/2015/01/overcriminalization-of-america-113991/.

[8] *Overcriminalization*, U.S. House of Representatives Judiciary Committee, https://judiciary.house.gov/issues/issue/?IssueID=14900 (last visited Sept. 1, 2021).

[9] James R. Copland & Rafael A. Mangual, *Let's End Criminalization Without Representation*, Manhattan Inst. for Pol'y Rsch., Inc., https://www.manhattan-institute.org/html/lets-end-criminalization-without-representation-9911.html (last visited Sept. 1 2021).

individual regulations from any one of these agencies can have sweeping effects. In a "telling moment" before the Court in a 2009 honest-services law case, for example, Justice Breyer challenged a Department of Justice lawyer's interpretation of the law on the basis that of "150 million workers in the United States," "possibly 140 million of them flunk [the] test."[10]

While *Chevron* deference cannot be blamed for the entirety of regulatory over-criminalization, it must take some responsibility. Agencies overwhelmingly win under *Chevron*: One article studying the doctrine from 2003 through 2013 concluded that agencies won "77.4 percent of the time when courts applied the *Chevron* framework and *93.8 percent* of the time when courts found the statute ambiguous and thus assessed the agency's interpretation for reasonableness." Christopher J. Walker, *Lawmaking Within Federal Agencies and Without Judicial Review*, 32 J. Land Use & Env't L. 551, 554 (2017) (emphasis added). Knowing they will go into any legal challenges with such strong odds in their favor is bound to affect how agencies exercise their delegated powers. Consciously or subconsciously, it stands to reason that with only a minimal check on rulemaking authority, regulators may push the boundaries more and more.

Indeed, this case illustrates just how serious a factor *Chevron* can be when it comes to upholding overly numerous regulations. One of the potential checks on agency overreach in this space comes from within, as agencies—not only reviewing courts—have a duty to determine whether Congress has spoken clearly before purporting to exercise gap-filling powers. *E.g.*, *Chevron*, 467 U.S. at 842-43. ATF followed that duty here,

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[10] Lynch, *supra* note 7, at 194.

concluding (albeit incorrectly) that Congress spoke clearly in the governing statute and thus its rule was a natural outgrowth of the unambiguous text. 83 Fed. Reg. at 66527; Pet.16-17. Had the court below held the agency to its word, the rule would have been vacated as contrary to the statute or else remanded for ATF to determine whether to promulgate the same rule as a matter of agency discretion as opposed to statutory command. The decision below thus used *Chevron* to apply deference the agency did not want or seek.

At bottom, over-criminalization through agency rulemaking is a problem because it exponentially increases the risk that citizens will be subject to the "serious deprivations of liberty" that flow from "the consequences of criminal guilt," *McKeiver*, 403 U.S. at 551 (White, J., concurring)—and it does so without the ordinary checks the separation of powers and political accountability provide. *Chevron*, in turn, exacerbates these concerns because it stands at odds with the judiciary's critically important "duty . . . to insure that the specific guarantees of liberty . . . are guarded for the benefit of defendants." *Hutcheson* v. *United States*, 369 U.S. 599, 630 (1962) (Warren, J., dissenting). Where the doctrine affects such a large number of criminal regulations and the stakes are so high for so many, it is urgent to resolve the questions presented and make clear when courts should—and should *not*—defer to ever-expanding criminalization through rulemaking.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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