Lenity Before *Kisor*: Due Process, Agency Deference, and the Interpretation of Ambiguous Penal Regulations

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When interpreting ambiguous punitive regulations, lower courts face a choice: either follow the Supreme Court's instruction in Kisor v. Wilkie *and defer to the enforcing agency's typically more severe interpretation, or rely on the venerable rule of lenity — also endorsed by the Supreme Court — and adopt a less severe interpretation. This choice need not be made.* Kisor *deference and lenity do not clash when properly applied because these two doctrines operate at different levels of ambiguity. Lenity tips in favor of a defendant when a regulation's meaning is subject to "reasonable doubt," whereas agency deference applies only when a regulation is "genuinely ambiguous" — a more searching standard. Lenity, therefore, must apply* before *agency deference. This order of operations makes sense of both the doctrines and their justifications. Lenity's constitutional underpinnings — in particular, the due process requirements of "fair notice" and conviction "beyond a reasonable doubt" — take precedence over the lower-order policy rationales behind agency deference.*

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I. INTRODUCTION

When a punitive regulation is unclear, who should get the benefit of the doubt: the enforcing agency or the subject of the enforcement? In administrative law, it is oft-recited doctrine that courts must give "controlling weight" to the responsible agency's interpretation of its own ambiguous regulations, "unless it is plainly erroneous or inconsistent with the regulation."[1] No less established, however, is the doctrine of strict construction of penal laws.[2] This canon of construction, commonly known as the 'rule of lenity,' requires courts to resolve ambiguities — reasonable doubts about what the law means — in favor of defendants who might otherwise face punitive sanctions.[3] Thus, when a court is called to decide a case involving an ambiguous regulation that provides for penal

1. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

2. United States v. Wiltberger, 18 U.S. 76, 95 (1820) (referring to this doctrine's venerable station in the construction of legal texts); Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 751 (1935) (noting the genesis of the common law rule prescribing penal statute's strict construction in early American legal history).

3. The Enterprise, 8 F. Cas. 732, 735 (C.C.D.N.Y. 1810) (No. 4499) ("[A] court has no option where any considerable ambiguity arises on a penal statute, but is bound to decide in favour of the party accused."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 296 (2012) ("The rule of lenity [is] sometimes cast as the idea that '[p]enal statutes must be construed strictly' and sometimes as the idea that if two rational readings are possible, the one with the less harsh treatment of the defendant prevails[.]" (alteration in original) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 88 (4th ed. 1770))). Lenity may also be couched as a clear statement rule: "When acts are to be made penal and are to be visited with loss or impairment of life, liberty, or property, . . . political liberty requires *clear and exact* definition of the offense." Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387 (1908) (emphasis added); *see also* United States v. Santos, 553 U.S. 507, 514 (2008) ("Th[e] venerable rule [of lenity] . . . vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not *clearly* prescribed." (emphasis added)).

This doctrine goes by various names: it is sometimes referred to as the "strict construction of . . . penal statutes," John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189, 198 (1985), or the "rule of narrow construction," Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 211 app. (2018) (internal quotation marks omitted); or, it goes unnamed even as it is applied, *see, e.g.*, McDonnell v. United States, 136 S. Ct. 2355, 2367–68, 2372–73 (2016) (applying the rule of lenity without referring to it by any of its common names).

enforcement, the doctrine of agency deference and the rule of lenity typically[4] pull in different directions.[5]

Conflict between lenity and agency deference[6] may manifest in any of three contexts. First, the clash is most apparent when a *criminal* conviction or sentencing turns upon an agency's reasonable interpretation of an ambiguous regulation.[7] Second, the tension arises when the government seeks to impose penalties on a private party in a *civil* action premised upon an agency's reasonable interpretation of the ambiguous punitive regulation.[8] Third, the problem presents in subtler guise when a case involving an ambiguous legal provision does not *itself* involve the imposition of

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4. Ordinarily, an agency seeking judicial deference in litigation will be advancing an interpretation that is adverse to the party opposing the government entity. *See, e.g.*, Howmet Corp. v. EPA, 614 F.3d 544, 548 (D.C. Cir. 2010) (clearly stating the "dueling interpretations" of the enforcing agency and the adverse party). But there are situations in which a relevant agency's interpretation could serve the interests of the defendant in a criminal or civil enforcement action — for instance, when the agency that promulgated the regulation is different from the enforcing agency, *see, e.g.*, United States v. Lachman, 387 F.3d 42, 53–55 (1st Cir. 2004) (promulgating agency's interpretation of allegedly ambiguous criminal regulation invoked by the defendants to support their interpretation), or when an agency has broadly interpreted an *exception* to a criminal provision, *see, e.g.*, NLRB v. Oklahoma Fixture Co., 332 F.3d 1284, 1289 (10th Cir. 2003) (en banc) (deferring to an agency's *broad* interpretation of an exception to a criminal provision, albeit in the statutory — rather than regulatory — context).

5. Prior scholarship has noted and addressed this conflict in the context of agency interpretations of ambiguous *statutes*. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 844 (1984) (holding that courts must defer to reasonable agency interpretations of ambiguous statutes they are authorized to administer); *see, e.g.*, Mark D. Alexander, Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612, 616 (1992) ("The doctrines [i.e. *Chevron* and lenity] are at odds to the extent that the agency interpretation that provides the justification for a criminally punishable rule resolves otherwise ambiguous language to the detriment of the defendant."); Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 4–6 (2006) (noting the same tension). One scholar recently flagged this conflict in the regulatory arena but asserts that Supreme Court precedent in *Chevron*'s domain has settled the issue. *See* Paul J. Larkin, Jr., *Agency Deference After* Kisor v. Wilkie, 18 GEO. J.L. & PUB. POL'Y 105, 131–140 (2020). For further discussion, see *infra* Part III.A.

6. This Note will generally refer to regulatory agency deference as "*Kisor* deference" after the Court's most recent case to uphold the rule. Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019). However, when discussing the doctrine prior to the *Kisor* decision this past term, this Note may refer to it as *Seminole Rock* or *Auer* deference in order to avoid anachronism. *See Seminole Rock*, 325 U.S. at 414; Auer v. Robbins, 519 U.S. 452, 461 (1997).

7. United States v. Phifer, 909 F.3d 372, 383–85 (11th Cir. 2018) (identifying the conflict and holding that lenity trumps *Seminole Rock–Auer* deference); United States v. Winstead, 890 F.3d 1082, 1092 n.14 (D.C. Cir. 2018) (noting the tension between lenity and deference in criminal sentencing).

8. *E.g.*, *Howmet*, 614 F.3d at 544, 549, 553–54. The rule of lenity applies in the civil as well as the criminal context. *See* SCALIA & GARNER, *supra* note 3, at 297 ("[T]he rule [of lenity] . . . applies not only to crimes but also to civil penalties."). This proposition is, however, not without controversy. *See infra* notes 163–63; *see also infra* Parts II.C.2 and III.B.2.

criminal or civil penalties, but a deferential interpretation of that provision could, in *another* case involving the same provision, result in penalties.[9]

This problem is of increasing salience. Over the past few decades, the domain of federal criminal law has grown exponentially, propelled primarily by agency regulations.[10] Nobody knows how many federal criminal regulations are on the books. Estimates span literal orders of magnitude — from 10,000 to 1,000,000 — and that is without even trying to count punitive civil regulations, criminal sentencing guidelines, and prison regulations.[11] Driven by twin inflationary pressures — 'tough on crime' politics and technocratic regulatory enforcement — legislators and agency officials have little incentive to roll back penal bloat. As penal regulations proliferate, new interpretive questions arise, generating ever-more areas of conflict between the rule of lenity and the doctrine of judicial deference to agencies' interpretations of their own regulations.

The Supreme Court recently had the opportunity to moot this increasingly pressing issue by doing away with agency regulatory deference outright. But in *Kisor v. Wilkie*, a slim majority of the Court upheld the doctrine, albeit with several limiting qualifications on its applicability.[12] Importantly, Justice Kagan, writing for the Court, emphasized the need to identify "genuine ambiguity" in the regulation before deferring to the agency, while reaffirming the Court's previous holding that deference is not warranted when an agency interpretation would cause a regulated party "unfair surprise."[13] Still, the Court did not comment on deference in penal cases, let alone allow for a 'lenity exception.' Whether lenity trumps deference (or vice versa) thus remains, at least ostensibly, an open question.

A recent development in lenity jurisprudence, however, suggests an answer: lenity and agency deference do not actually conflict. To be sure, lenity favors defendants, and deference typically

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9. *E.g.*, Foster v. Vilsack, 820 F.3d 330, 335 (2016) (deferring to agency interpretation of key regulatory term for administrative determination of wetlands at request of landowners, which in a different action could support civil or criminal penalties). *Cf.* Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2213 (2003) ("When courts interpret a statute broadly enough in civil cases to further its regulatory goals, the broad interpretations sometimes spill over to criminal cases, causing an increase in criminal liability.").

10. *See infra* Part II.A.

11. *Id.*

12. 139 S. Ct. at 2407–08 (2019).

13. *Id.* at 2417–18 (internal quotation marks and citations omitted).

favors the government. If both doctrines were to apply simultaneously, they *would* clash. But, to *apply* lenity or deference, a court must first reach the preliminary conclusion that the regulation in question is 'ambiguous.' And ambiguity admits of greater and lesser degrees.

Over the past two terms, the Supreme Court has indicated that lenity applies at a low level of ambiguity. The presumption in favor of defendants kicks in when a penal law admits of "a reasonable doubt."[14] This contrasts markedly with *Kisor*'s command that only "genuine ambiguity" — intractable uncertainty after exacting interpretive scrutiny — is sufficient to trigger agency deference.[15] In short, lenity's ambiguity threshold is lower than *Kisor*'s. If lenity is warranted even when there is only "a reasonable doubt" about a penal regulation's meaning, *a fortiori*, lenity would be warranted when such a regulation is found to be "genuinely ambiguous" after taxing interpretive scrutiny. The logical upshot is that lenity necessarily precedes and precludes the application of *Kisor* in the penal context.

This Note proceeds in three Parts. First, Part II traces the growth of federal criminal regulation that is accelerating the tension between lenity and agency deference; briefly describes the state of agency deference doctrine after *Kisor*; and explains the rule of lenity, its justifications, and its application. Second, Part III details the present confusion in the law as to the relationship between agency deference and the rule of lenity, with particular attention to the as-yet unresolved tension between *Auer* — now, *Kisor* — deference and lenity, as well as the contexts in which this tension is most likely to arise. Finally, Part IV makes the case for

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14. *See* Shular v. United States, 140 S. Ct. 779, 787 (2020) (finding "no ambiguity for the rule of lenity to resolve . . . [when] text and context leave no doubt" about the statutory meaning); *id.* at 787–89 (Kavanaugh, J., concurring) (writing separately — and only for himself — to urge the view that lenity only applies when a law is "grievously ambiguous, meaning that the court can make no more than a guess as to what [it] means[]"); United States v. Davis, 139 S. Ct. 2319, 2333 (2019) (intimating that lenity applies not only when a law is intractably ambiguous, but also when "it's *impossible* to say that [the lawmaker] *surely* intended [the more severe] result" (second emphasis added)); *id.* at 2351–52 (Kavanaugh, J., dissenting) (drawing attention to the majority's view and arguing that, to the contrary, "lenity is a tool of last resort that applies 'only when, after consulting traditional canons of statutory construction,' *grievous ambiguity* remains" (emphasis added) (quoting United States v. Hayes, 555 U.S. 415, 429 (2009))); SCALIA & GARNER, *supra* note 3, at 299 (proposing that lenity applies when a law's meaning simply admits of "a reasonable doubt" (quoting Moskal v. United States, 498 U.S. 103, 108 (1990))); *see also infra* notes 85–86 and Part IV.A.

15. 139 S. Ct. at 2415.

lenity's logical and constitutional priority over *Kisor* deference: in any case involving a regulation with punitive application, any reasonable doubts about the regulation's proper application should be resolved in favor of the defendant, without any deference to the enforcing agency.

II. AGENCY DEFERENCE AND LENITY

Agency deference and the rule of lenity push judges in opposite directions: *Kisor* and *Chevron*[16] require deference to agencies' reasonable interpretations of regulations and statutes, respectively. Lenity requires judicial solicitude towards the subjects of penal sanction, whose interests in litigated prosecutions or enforcement actions are seldom advanced by a governmental body's legal interpretation. In the ever-expanding penal context, one doctrine must ultimately take precedence.

A. THE VAST GROWTH OF FEDERAL REGULATORY CRIME ACCENTUATES THE LENITY–DEFERENCE TENSION

Since the birth of the administrative state, federal criminal law has burgeoned.[17] Congress's wide-ranging power to define crime by statute under the Supreme Court's expansive modern interpretation of the Commerce Clause[18] and federal agencies' ability — by delegation from Congress — to further define criminal acts prohibited by statute[19] have pushed the number of federal crimes beyond our ability to count.[20] As of 2007, there were at least 4,450 federal

16. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (setting out deference doctrine in statutory context).

17. *See generally* TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW (1998), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/federalization_of_criminal_law.pdf [https://perma.cc/76NL-AEB9] (explaining "how the catalog of federal crimes grew from an initial handful to . . . several thousand").

18. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 32 (2005).

19. United States v. Mersky, 361 U.S. 431, 437–38 (1960) ("Once promulgated, these regulations, called for by the statute itself, have the force of law, and violations thereof incur criminal prosecutions, just as if all the details had been incorporated into the congressional language.").

20. *See* Neil M. Gorsuch, *Law's Irony*, 37 HARV. J.L. & PUB. POL'Y 743, 747 (2014) ("There are so many crimes cowled in the numbing fine print of [the Federal Register] that scholars actually debate their number."); Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), https://www.wsj.com/articles/SB10001424052702304319804576389601079728920 (recounting failed efforts by the Department of Justice and by the American Bar Association

crimes defined *by statute alone*.[21] Add to that all acts prohibited *by regulation* pursuant to statutory delegation to executive agencies and the number balloons. In the early 1990s, one criminal defense expert estimated that there were 300,000 federal crimes,[22] a figure still regularly cited three decades later.[23] While an exact tally remains elusive,[24] what can be said with certainty is that the reach of federal criminal law today is immense[25] — and growing.[26]

Federal criminal laws and regulations, however, represent only the most extreme use of the federal government's coercive penal power. Criminal law authorizes the state to punish violators by stripping them of their property, their liberty, and even of their lives. But, in recent decades, civil law has increasingly been deployed for the same purpose, albeit usually with less severe consequences.[27] Despite the traditional distinction between the

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to count all the crimes defined in the U.S. Code, and noting that rough "[e]stimates of the number of regulations [that carry the force of federal criminal law] range from 10,000 to 300,000[ ]").

21. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. (June 16, 2008), https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes [https://perma.cc/P9L9-FH6V].

22. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 & n.94 (1991) (referencing the remarks of Stanley Arkin at a conference at George Mason University in October of 1990).

23. Nearly every recent source ultimately cites some other source that ultimately stems from the Arkin estimate noted in Coffee, *supra* note 22. *See, e.g.*, GianCarlo Canaparo & Zack Smith, *Count the Crimes on the Federal Law Books. Then Cut Them*, HERITAGE FOUND. (June 24, 2020), https://www.heritage.org/crime-and-justice/commentary/count-the-crimes-the-federal-law-books-then-cut-them [https://perma.cc/K7DD-WVW8] (citing the 300,000 estimate from Coffee's 1991 article as recently as last summer, and noting that "estimates are all we have"); Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, ENGAGE, July 2014, at 11, 16 & n.64 (2014) (citing Coffee, who cites Arkin, for the 300,000 figure).

24. Most recently, two researchers created a regulatory database that calculated approximately one million "restrictions" in the Code of Federal Regulations (CFR) — the compilation of executive agencies' dictates — as of 2012. Omar Al-Ubaydli & Patrick A. McLaughlin, *RegData: A Numerical Database on Industry-Specific Regulations for All United States Industries and Federal Regulations, 1997–2012*, 11 REGUL. & GOVERNANCE 109, 112 (2017). However, the study does not break out civil versus criminal "restrictions." *Id.*

25. *See generally* MIKE CHASE, HOW TO BECOME A FEDERAL CRIMINAL: AN ILLUSTRATED HANDBOOK FOR THE ASPIRING OFFENDER (2019) (satirically cataloging some peculiar manners in which one can run afoul of federal criminal law to illustrate the federal criminal law's vast domain).

26. *See* Cass, *supra* note 23, at 15, 18 (noting the trend towards the use of criminal sanctions and observing that "growing numbers of federal crimes[ ] [are] driven largely by the immense number of administrative rules that are criminally enforceable").

27. *But see* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 (1992) ("[Civil] sanctions are sometimes more severely punitive than the parallel criminal sanctions for the same conduct.").

purposes of civil and criminal law — namely, "the criminal law is meant to punish, while the civil law is meant to compensate"[28] — the rapid rise of "punitive civil sanctions" has effectively blurred the two categories, even as the procedural distinctions remain.[29] Layered on top of the already-swollen federal criminal law, the increasing scope of federal civil law carrying penal sanctions further expands the federal government's ability to impose punishment.

This remarkable expansion of federal penal law by statute and regulation alone has sparked concerns about overcriminalization and overpenalization[30] — concerns that span the political spectrum.[31] It should be all the more alarming, then, that any *ambiguities* in that voluminous mass of federal criminal and punitive civil law could be exploited to inflate the domain of punitive law further still. If administrative agencies can count on judicial indulgence of their broad readings of punitive regulations, the reach of federal penal law is effectively only bounded by the furthest reasonable interpretations of the already-expansive laws and regulations on the books. Thus, unless limited to the nonpenal sphere, *Chevron* and *Kisor* deference threaten to exacerbate this ever-growing problem.[32]

B. AGENCY DEFERENCE FROM *SEMINOLE ROCK* TO *KISOR*[33]

What effect, if any, should an executive agency's interpretation of regulation have on a reviewing court? In *Bowles v. Seminole Rock & Sand Co.*, Justice Murphy wrote that "a court must

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28. *Id.* at 1796.

29. *Id.* at 1798.

30. *See, e.g.*, Baker, *supra* note 21, at 1 (observing, with concern, that the "growth of federal crimes continues unabated").

31. Overcriminalization has attracted bipartisan attention. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703, 746 (2005) (remarking that "a seemingly peculiar but nonetheless potent coalition of interests" has formed to fight overcriminalization); *see also, e.g.*, *id.* at 729–42 (libertarian leanings); Cass, *supra* note 23, at 18 (conservative concerns); Rabb, *supra* note 3, at 188 (progressive perspective).

32. *Kisor* deference, the focus of this Note, likely poses a bigger problem than *Chevron* deference vis-à-vis the rule of lenity for three reasons that are explained *infra* Part III.

33. This Note offers only the broadest contours of deference doctrine development to contextualize the latest case in this area, *see* Kisor v. Wilkie, 139 S. Ct. 2400 (2019), and to provide a backdrop for the clash between agency deference and the rule of lenity. For more thorough discussions of how agency deference doctrine developed, see generally Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (history of deference to agency statutory interpretations); Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47 (2015) (history of deference to agency interpretations of their own regulations).

necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt."[34] In resolving such ambiguity, he continued, "the ultimate criterion is the administrative interpretation, which becomes of *controlling* weight unless it is plainly erroneous or inconsistent with the regulation."[35]

Nearly four decades after *Seminole Rock*, the Court addressed the same question in the statutory context, and thus was born *Chevron*'s canonical two-step test.[36] First, the *Chevron* Court instructed, "a court review[ing] an agency's construction of the statute which it administers" must ask "whether Congress has directly spoken to the precise question at issue."[37] If it has, the analysis concludes; but if not — that is, "if the statute is silent or ambiguous with respect to the specific issue" — the court must next ask "whether the agency's answer is based on a permissible construction of the statute."[38] If so, the court must defer.

In recent decades, both deference doctrines have collected a variety of qualifications. *Chevron*, for example, was modified by *United States v. Mead Corp.*, which narrowed that doctrine's application to cases where "Congress delegated authority to the agency generally to make rules carrying the force of law," and "the agency interpretation claiming deference was promulgated in the exercise of that authority."[39] *Chevron* caselaw now contains a host of other limitations.[40] Although reaffirmed by *Auer v. Robbins* in 1997,[41] the doctrine of *Seminole Rock* — subsequently known as '*Auer* deference' — similarly garnered its share of qualifications. For instance, an agency interpretation of its own regulation must "reflect

34. 325 U.S. 410, 413–14 (1945).
35. *Id.* at 414 (emphasis added).
36. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).
37. *Id.* at 842.
38. *Id.* at 843.
39. 533 U.S. 218, 226–27 (2001).
40. *E.g.*, Smith v. Berryhill, 139 S. Ct. 1765, 1778 (2019) (exception for agency interpretations concerning the appropriate scope of judicial review); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) (exception for cases in which "the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable"); Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (exception for unexplained breaks with prior agency interpretations); King v. Burwell, 576 U.S. 473, 485–86 (2015) (exception when interpreting agency lacks expertise in the regulated field); Procopio v. Wilkie, 913 F.3d 1371, 1386 (Fed. Cir. 2019) (O'Malley, J., concurring) (pro-Indian canon exception); Neustar, Inc. v. FCC, 857 F.3d 886, 893–94 (D.C. Cir. 2017) (*Chevron* deference refused when waived); NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 543 (6th Cir. 2015) (exception when an agency interpretation is based on a judicial opinion).
41. 519 U.S. 452, 461 (1997).

the agency's fair and considered judgment" and thus cannot be "a 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack."[42]

Despite limitations on *Auer*'s application, the doctrine begat fierce opposition. Opponents deemed *Auer* and its close cousin, *Chevron*, threats to separation of powers and due process: deference doctrines seem to transfer judicial interpretive authority to the executive branch,[43] and to load the dice in favor of agencies.[44] Some scholars suggested that *Auer* is especially pernicious because it incentivizes agencies — who are the drafters of the texts subject to interpretation — to frame loose regulations in order to preserve wide-ranging interpretive discretion to which judges would meekly defer.[45] These criticisms found a receptive audience at the Supreme Court: several justices' comments ominously suggested that *Seminole Rock* and *Auer* were on their last legs.[46]

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42. *Id.* at 462 (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)); *see also* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–57 (2012) (no deference when it would cause a regulated party "unfair surprise"). To take another broad example, agency regulatory interpretations are given credence only when they are within the scope of the agency's expertise such that it is reasonable to infer that Congress impliedly granted the agency the power to interpret the regulation as well as to promulgate it. *See* Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 152–53 (1991). A more particular example of this qualification is the so-called "anti-parroting" exception, according to which no *Auer* deference is warranted when the agency's regulation merely rehashes the statutory language, because parroting evinces a lack of substantive regulatory expertise. *See* Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

43. *See* Peter M. Torstensen, Jr., Note, *The Curious Case of* Seminole Rock*: Revisiting Judicial Deference to Agency Interpretations of Their Ambiguous Regulations*, 91 NOTRE DAME L. REV. 815, 830, 836–38 (2015) (recapitulating the much-discussed separation of powers issue).

44. *See* PHILIP HAMBURGER, THE ADMINISTRATIVE THREAT 46 (2018) (criticizing deference doctrine as "systematic judicial bias" and arguing that deference doctrines "grossly violate[ ] the most basic due process right to be judged without any judicial precommitment to the other party"); *cf.* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 309–17 (2014) ("If [the Due Process Clause] means anything, it surely requires a judge not to defer to one of the parties, let alone to defer systematically to the government.").

45. *E.g.*, John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612, 655 (1996).

46. *See, e.g.*, Garco Const., Inc. v. Speer, 138 S. Ct. 1052, 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) ("*Seminole Rock* deference is constitutionally suspect." (citation omitted)); United Student Aid Funds, Inc. v. Bible, 578 U.S. 989, 989 (2016) (Thomas, J., dissenting from denial of certiorari) (asserting that *Seminole Rock–Auer* deference appears to be "on its last gasp[ ]"); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 112 (2015) (Scalia, J., concurring in the judgment) (author of *Auer* asserting, "I would . . . abandon[ ] *Auer*."); Decker v. Nw. Environmental Def. Ctr., 568 U.S. 597, 615 (2013) (Roberts, C.J., joined by Alito, J., concurring) (flagging "serious questions" about *Seminole Rock–Auer* deference that "may be appropriate to reconsider . . . in an appropriate case" (citations omitted)).

Instead, in *Kisor v. Wilkie*, a slim 5–4 majority preserved *Auer* deference, albeit with considerable limitations.[47] Justice Kagan, writing for the *Kisor* majority, articulated a new deference paradigm built upon *Chevron*'s two-step framework.[48] *Kisor* deference applies if (1) an agency's own regulation is "genuinely ambiguous," and (2) its interpretation is "reasonable" — that is, it "come[s] within the zone of the ambiguity the court . . . identified after using all its interpretive tools."[49]

Justice Kagan takes pains to mention, however, that both steps — but especially the preliminary finding of ambiguity[50] — are serious obstacles to agency deference. "[A] court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read," she says.[51] Rather, the regulation must be "genuinely ambiguous" after the court has "exhaust[ed] all the 'traditional tools' of construction" in examining "the text, structure, history, and purpose of a regulation."[52] Some judicial hesitance or doubt is not enough.

After these first two beefed-up *Chevron*-esque steps, Justice Kagan adds three additional steps for the purpose of conducting "an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[53] First, interpretations eligible for deference "must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views."[54] Second, the "agency's interpretation must in some way implicate its substantive expertise."[55] The last of *Kisor*'s five nonexclusive[56] steps demands that the agency's regulatory interpretation "reflect 'fair and considered

47. 139 S. Ct. 2400, 2408 (2019).

48. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984); *supra* text accompanying notes 36–38.

49. *Kisor*, 139 S. Ct. at 2414–18.

50. The reasonableness prong, Justice Kagan simply warns, is "a requirement an agency *can* fail." *Id.* at 2416 (emphasis added). The exacting standard of the first prong, by contrast, "*will* resolve many seeming ambiguities . . . without . . . deference." *Id.* at 2415 (emphasis added).

51. *Id.*

52. *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9).

53. *Id.* at 2416.

54. *Id.* This step incorporates the *Mead* exception to *Chevron*. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

55. *Kisor*, 139 S. Ct. at 2417.

56. *See id.* at 2414 ("[T]he limits of *Auer* deference are not susceptible to any rigid test."). Thus, while the case itself suggests a five-part test, there could be other exceptions to the application of *Kisor* deference — for instance, a "lenity exception." *See infra* Part IV.

judgment.'"[57] Hence, no ex post justification of agency action or facile litigious posturing will warrant judicial deference, nor will any "new interpretation . . . that creates 'unfair surprise' to regulated parties."[58]

Before *Kisor*, the rationale for judicial deference to agency interpretations of their own regulations long went unsettled.[59] Most justifications emerging over the years tended to hinge on the legal fiction — long considered the basis for *Chevron* deference[60] — of Congressional intent: Congress implicitly intends to empower agencies to interpret their own regulations. Why might this be? For one thing, agencies have the technical expertise necessary to resolve ambiguities in complex regulations in the best possible way.[61] Another reason is that agencies, as members of the Executive Branch, are more politically accountable than Article III judges, and so, they are better suited to decide ambiguities that may simply turn on policy rationales.[62] Also, requiring courts to defer to agency interpretations has the felicitous consequence of ensuring nationwide interpretive uniformity, whereas courts of different jurisdictions might otherwise reach differing conclusions.[63] Justice Kagan merged all of these justifications in *Kisor*.[64]

C. THE RULE OF LENITY

The rule of lenity is a venerable canon of construction that, in its broadest formulation, requires ambiguous punitive legal provisions to be construed, text permitting, in favor of the defendant.[65]

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57. *Kisor*, 139 S. Ct. at 2417 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988); and then quoting Auer v. Robbins, 519 U.S. 452, 462 (1997))).

58. *Id.* at 2417–18 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007)).

59. Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1454 (2011).

60. Thomas W. Merrill & Kristen E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001) ("The Supreme Court . . . has endorsed the notion that *Chevron* rests on implied congressional intent.").

61. Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 151 (1991).

62. *Cf.* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991) ("Judicial deference to an agency's interpretation . . . reflects a sensitivity to the proper roles of the political and judicial branches . . . . When Congress . . . delegate[s] policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited." (citations omitted)).

63. *Kisor*, 139 S. Ct. at 2412–14.

64. *Id.* at 2412. This part of the opinion was joined by only four justices, however.

65. SCALIA & GARNER, *supra* note 3, at 296.

Like *Kisor*, lenity serves to resolve ambiguity; lenity, however, favors the defendant's — rather than the government's — reasonable interpretation of the law. This section describes how lenity wound its way from early English jurisprudence into American federal courts and how the latter have come to apply the rule in a manner similar to agency deference.

1. *Lenity from English Common Law to Modern American Jurisprudence*

Lenity developed centuries ago[66] as a judicial tool to counter the English Parliament's disproportionately severe punishment of felonies prior to nineteenth century reforms.[67] Seeking to stanch the flow of petit criminals to the gallows, juries would often vote to acquit regardless of guilt, and many judges would construe the law in favor of defendants to the extent it contained sufficient ambiguity.[68] This judicial tendency eventually developed into an interpretive doctrine that American courts imported along with the English common law in the early days of the republic.[69]

As American courts adopted the rule of lenity, however, they inverted its justification. The initial reason for the rule among early English judges was to temper the legislature: Parliament's penal statutes were often too harsh, so judges narrowed their

66. United States v. Wiltberger, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). The oldest known English treatise on statutory interpretation contains a simple formulation of the rule: "[W]hen the lawe is penall, . . . *Poenas interpretatione augeri non debere*: for the lawe alwaies favoureth hym that goeth to wracke, nor it will not pulle hym on his nose that is on his knees." THOMAS EGERTON, A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES 154–55 (Samuel E. Thorne ed., 1942). The Latin maxim is attributed to William Paston, a fifteenth century English jurist, and translates roughly to: "Penalties ought not to be expanded by interpretation." Arguably, the rule of lenity stems from more ancient roots. Renowned thirteenth century English judge and legal scholar Henry de Bracton, for instance, cited Justinian's *Digest* and Gratian's *Decretals* for the proposition that "[p]unishments are rather to be mitigated than increased." 2 HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ 229 n.26 (Samuel E. Thorne trans., 1977).

67. Hall, *supra* note 2, at 751. For a brief history of the rule as it developed from the fourteenth century expansion of 'benefit of clergy' to its eventual transplantation in America, see *id.* at 749–56.

68. G. M. Trevelyan, English Social History 348 (1942).

69. *Cf. Wiltberger*, 18 U.S. at 95. For other early examples of lenity's application in American federal courts, following the example of their English predecessors, see, *e.g.*, Bray v. The Atalanta, 4 F. Cas. 37, 38 (D.S.C. 1794) (No. 1819) (first case after American founding to apply the rule that "a penal law . . . must be construed strictly"); The Enterprise, 8 F. Cas. 732, 734–35 (C.C.D.N.Y. 1810) (No. 4499) (citing an unnamed "eminent English judge" for the lenity principle).

content inasmuch as the statutory text allowed. The judiciary counteracted the legislature. By contrast, when lenity took root in American jurisprudence in the eighteenth and nineteenth centuries, courts viewed themselves more as 'faithful agents' of the legislature.[70] Accordingly, they justified lenity as a salutary tool to ensure legislative supremacy over the definition of crime.[71] As the body most representative of the people, the legislature — not the judiciary — is the proper institution to define conduct deserving punishment and the community's moral approbation. For a court to extend a statute to cover conduct not clearly within it would be for the court to "create" a crime,[72] thereby transgressing the American government's separation of legislative and judicial powers.

Today, lenity is considered a 'substantive' canon — that is, it tips the scales towards a certain outcome, favoring a particular result on the basis of some legal principle or judicial policy.[73] Three reasons justify lenity's weighting towards criminal defendants: (1) the constitutional due process requirements that would-be criminal defendants have 'fair notice' before their lives, liberty, or property are confiscated,[74] and that criminal defendants may only be convicted if found guilty of violating the law beyond a reasonable

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70. *Cf.* G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 329, at 452 (1888) (remarking in the late nineteenth century that "it has become more and more generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning, and to promote its object[ ]").

71. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 128–34 (2010).

72. *See* United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."); *cf.* ENDLICH, *supra* note 70, at 455 ("[U]nless the proper meaning of the language of the statute brings a case within its letter, the rule of strict construction forbids the court to *create* a crime or penalty by construction, and requires it to avoid the same by construction[.]" (emphasis added)).

73. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12–14 (2005). Unlike so-called 'linguistic' or 'textual' canons, substantive canons like lenity do not purport to 'clarify' the meaning of the text; they simply operate as background presumptions that pick winners when the text's meaning is otherwise in doubt. *Id.*

74. *See* FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws . . . must give fair notice of conduct that is forbidden or required." (citation omitted)); McBoyle v. United States, 283 U.S. 25, 27 (1931) ("[F]air warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."). This principle long antedates the U.S. Constitution and Supreme Court precedent. Indeed, it is an ancient principle that clear "[p]romulgation is of the very essence of law, and a *sine qua non* of legal obligation." Gilbert Bailey, *The Promulgation of Law*, 35 AM. POL. SCI. REV. 1059, 1059–60 (1941).

doubt;[75] (2) the reinforcement of the separation of powers;[76] and (3) traditional judicial clemency.[77] In the service of the first two, lenity functionally serves as a clear statement rule:[78] to penalize or impose more severe penalties for engaging in certain conduct, the legal drafter — the legislative body — must state the conduct and its penalty clearly, leaving no room for reasonable doubt.

2. *Applying the Rule: A Lenity Two-Step?*

Lenity and *Kisor* rhyme in their application: they are similar, but materially different.[79] Much like the *Chevron* two-step that became the foundation for the new *Kisor* standard, lenity's application also comes with two steps — three, if you count the lenity analogue of *Chevron*'s so-called "step zero."[80]

At lenity step zero, courts decide if the lenity framework has any bearing on the law or regulation, the interpretation of which is at issue. Generally, the question is quite simple: Is the law criminal? If yes, lenity applies; if not, generally it does not. Importantly, however, there are two exceptions. First, punitive *civil* sanctions warrant the application of the lenity framework because, like criminal sanctions, they bring the coercive force of the state to bear on the subjects of enforcement through punishment.[81] Second, nonpenal cases may warrant the application of lenity when the provision at issue has criminal or otherwise punitive implications that could arise in the future on the basis of the court's precedent.[82]

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75. *See* The Enterprise, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4499) (reasonable doubt standard applies equally to judges vis-à-vis the law as to juries vis-à-vis the facts). *Cf. In re* Winship, 397 U.S. 358, 364 (1970) (factfinder constitutionally held to 'beyond reasonable doubt' standard).

76. United States v. Bass, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.").

77. *See supra* notes 66–69 and accompanying text.

78. *E.g.*, McNally v. United States, 483 U.S. 350, 359–60 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." (citations omitted)); *see also* SCALIA & GARNER, *supra* note 3, at 298 (noting that a clear-statement rule understanding of lenity "comport[s] with the original basis for the canon").

79. *Cf.* Rabb, *supra* note 3, at 183, 188–93 (discussing the parallels between *Chevron* and lenity).

80. *Cf.* Merrill & Hickman, *supra* note 60, at 836.

81. *See infra* Part IV.A.

82. *See infra* Part III.B.2.

At lenity step one, as in *Chevron*, the court must examine the legal provision in question for ambiguity. If the law or regulation is ambiguous, courts move to step two;[83] if not, the analysis stops. But how much ambiguity is enough to get to step two? On this point, the Supreme Court has sent mixed messages. Some cases cleave to an exacting standard like that of *Muscarello v. United States*: Lenity applies only if the legal provision at issue contains a "*grievous* ambiguity or uncertainty" even "after seizing *everything* from which aid can be derived."[84] This standard is much like that of *Kisor*: only "genuine ambiguity" — as opposed to, say, facial ambiguity or some doubts — will trigger agency deference.[85] Other cases, by contrast, deploy a lighter standard like that in *Moskal v. United States*: lenity applies when "a *reasonable doubt* persists about a [penal provision's] intended scope . . . ."[86] Most recently, the Supreme Court deployed this 'reasonable doubt' standard in *United States v. Davis* in 2019[87] and again in *Shular v. United States* in 2020.[88] As the doctrine stands, therefore, lenity requires a lesser degree of ambiguity than *Kisor*.

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83. At lenity step two, courts must decide whether the defendant's interpretation is reasonable. For the purposes of this Note, only steps zero and one require extended discussion.

84. 524 U.S. 125, 138 (1998) (emphasis added) (internal quotation marks omitted) (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994); and then quoting United States v. Wells, 519 U.S. 482, 499 (1997)); *see, e.g.*, Dolan v. United States, 560 U.S. 605, 621 (2010) ("[W]e . . . cannot find a statutory ambiguity *sufficiently 'grievous'* to warrant [lenity's] application in this case." (emphasis added) (quoting *Muscarello*, 524 U.S. at 139)).

85. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415–16 (2019); Shular v. United States, 140 S. Ct. 779, 788 (2020) (Kavanaugh, J., concurring) (citing *Kisor* in support of the view that lenity — *precisely like agency deference* — will seldom apply, because rigorous application of the "traditional tools of construction" should clear up "any perceived ambiguity" or uncertainty).

86. 498 U.S. 103, 108 (1990) (emphasis added) (citations omitted); *see, e.g.*, Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 575 U.S. 650, 661 (2015) (dictum) (suggesting that only "*some* ambiguity" (emphasis added) in the relevant statute would be enough to trigger lenity); Burrage v. United States, 571 U.S. 204, 219 (2014) (Ginsburg, J., concurring) ("'[I]n the interpretation of a criminal statute subject to the rule of lenity,' where there is *room for debate*, one should not choose the construction 'that disfavors the defendant.'" (emphasis added) (quoting *id.* at 216 (opinion of Scalia, J.))).

87. 139 S. Ct. 2319, 2333 (2019) (applying lenity as an alternative ground for the court's holding and indicating that even a mere *possibility* that Congress did not "surely" intend the government's harsher reading of the law is sufficient to trigger lenity); *see also id.* at 2352 (Kavanaugh, J., dissenting) (calling attention to the majority's application of the less exacting standard: "[T]o the extent that there is any ambiguity in [the provision], that ambiguity is far from grievous[ ]").

88. 140 S. Ct. at 787 (declining to apply lenity because the relevant statute's "text and context le[ft] *no doubt*" (emphasis added) as to its meaning); *see also id.* at 788 (Kavanaugh, J., concurring) (writing separately to emphasize that lenity should "rarely come[] into play[ ]" because "a court must find not just ambiguity but 'grievous ambiguity' before

III. LENITY'S RELATIONSHIP WITH AGENCY DEFERENCE REMAINS POORLY DEFINED

Courts have grappled with the problematic relationship between the rule of lenity and the judicial deference usually accorded agency interpretations of *statutes* under the famous doctrine established by the Supreme Court in *Chevron*.[89] That conflict has yet to be resolved definitively by the Supreme Court, and circuit courts remain divided on the issue.[90] While the Supreme Court may revisit the issue before long,[91] it is not clear that its answer there would necessarily answer the related question of how to resolve the conflict between lenity and agency interpretation of *regulations*.[92]

This latter question is the more important of the two for at least three reasons. First, the volume of penal *regulations* vastly exceeds that of penal *laws*. Thus, the scope of the conflict is potentially much larger. Moreover, the problem is likely to grow at a faster rate, given the relative ease with which agencies issue regulations and guidance.

Second, the growth in penal regulation is largely driven by *mala prohibita* offenses — conduct that is criminal not because the act is necessarily bad in itself, but rather because the law prohibits it.[93] This is significant, because *mala prohibita* offenses are much less likely to be understood as unlawful by the regulated public in

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resorting to the rule of lenity[ ]"). Unlike *Davis*, which was a 5–4 decision, *Shular* was unanimous, with no other justice joining Justice Kavanaugh's concurrence on the lenity issue. This bolsters the view that the 'reasonable doubt' standard commands a Court majority.

89. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 838 (1984).

90. *See infra* Part III.B.3.

91. *See* Guedes v. ATF, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari) (flagging the Court's interest in the issue).

92. *Cf.* Shane Pennington, *Kisor vs. Chevron*, ADMIN DOT LAW, https://www.admin.law/kisor-vs-chevron/ [https://perma.cc/5HFK-F8G8] (last visited July 3, 2021) (identifying material differences between agency deference doctrines in the statutory (*Chevron*) and regulatory (*Kisor*) contexts).

93. *See* John G. Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUND. (Aug. 6, 2014), https://www.heritage.org/crime-and-justice/report/criminal-law-and-the-administrative-state-the-problem-criminal-regulations [https://perma.cc/ZL5X-MYB6] ("Regulatory crimes are not, for the most part, *malum in se* offenses in which the prohibited conduct is clearly understood to be morally blameworthy . . . . Most regulatory crimes are *malum prohibitum* offenses, . . . [which] are 'wrongs' only because the state has said so[.]").

the absence of very clear promulgation.[94] Unlike laws against, say, robbery, perjury, or murder, which are grounded in universal moral intuitions,[95] regulation mandating disclosure of "substandard fill" on ketchup labels (and the font thereof),[96] for instance, is not. In addition, such technical regulation is often complicated and, therefore, rife with ambiguities.[97] The likely lack of fair notice that accompanies ambiguously-defined *mala prohibita* offenses lends particularly strong force to the application of lenity in the regulatory arena.

And judicial deference to broader agency interpretations of ambiguous provisions in this vast body of regulation poses a correspondingly acute threat of injustice.[98]

Third, in the regulatory context, agencies — rather than Congress — draft the relevant legal rules. This heightens the stakes of the lenity question because agencies themselves are responsible for the clarity of their own punitive regulations. Thus, they are likely to be particularly responsive to a clear statement rule like lenity.[99] Without judicial pressure to speak clearly, however, agency incentives invert: if courts defer to agency interpretations of their own ambiguous regulations, an agency seeking to preserve maximal discretion in its enforcement ability will draft regulations

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94. *See* John W. Lundquist, *"They Knew What We Were Doing": The Evolution of the Criminal Estoppel Defense*, 23 WM. MITCHELL L. REV. 843, 866–67 (1997) ("[T]he presumption that every citizen knows the law has little basis in fact, especially with respect to laws that are *malum prohibitum* . . . such as [technical] *administrative regulations*." (emphasis added)); ST. THOMAS AQUINAS, SUMMA THEOLOGICA, II[a]-IIae q. 57 a. 2 ad 3 (Fathers of the English Dominican Province trans., 2d. ed. 1920) (distinguishing acts "forbid[den] . . . because they are evil" from those that are "evil because they are forbidden").

95. Such crimes are traditionally termed *mala in se*.

96. 21 C.F.R. § 130.14.

97. *See* Brief for Mark Ellison et al. as Amici Curiae Supporting Petitioner at 15–19, Ellison v. United States, 138 S. Ct. 2675 (2018) (No. 17-1134), 2018 WL 1378533 (stating that the "inherent complexity" of laws defining *malum prohibitum* offenses "often leads to ambiguity").

98. This idea is hardly new. While riding circuit, Chief Justice John Marshall noted that lenity applies "*especially* in cases where the act to be punished is in itself indifferent, and is rendered culpable only by positive law." The Adventure, 1 F. Cas. 202, 204 (C.C.D. Va. 1812) (No. 93), *rev'd on other grounds*, 12 U.S. 221 (1814) (emphasis added). In other words, *mala prohibita* crimes — criminal acts that are wrong only because the positive law says so — should be given strict construction because the ordinary person would not ordinarily have reason to believe that such acts are wrong, absent particularly clear notice.

99. In *Chevron* territory, by contrast, a clear statement rule tosses the ball back in *Congress*'s court. To apply lenity instead of *Seminole Rock* sends the issue back to the *agency* to clarify its *own* regulation in the manner prescribed by the Administrative Procedure Act. 5 U.S.C. § 553.

broadly, in ways amenable to flexible interpretation.[100] Thus, regulatory deference creates a troubling incentive for agencies to draft penal regulations loosely and interpret ambiguities severely, thereby elevating the clash between deference and lenity.

A. LENITY AND *CHEVRON*

Whether *Chevron* defeats the rule of lenity in criminal cases remains a live debate.[101] The Supreme Court has spoken out of both sides of its mouth[102] and has failed to clarify the matter despite several opportunities to do so in recent years. Another case posing the question was recently denied certiorari,[103] but with similar cases percolating up from the courts of appeals,[104] the Court may again have the opportunity to resolve the lenity-deference tension in the *Chevron* context for good. Such resolution could, but need not, carry over into *Kisor*'s domain.[105]

The uneasy relationship between lenity and *Chevron* was first broached at the Supreme Court in 1990 in *Crandon v. United States*. In his concurring opinion, Justice Scalia argued that *Chevron* has no role to play in the criminal context, because deferring to the government "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity."[106] Although the concurrence lacks precedential value, lower court judges have repeatedly cited Justice Scalia's opinion in *Crandon* for the proposition that lenity trumps *Chevron*

100. Manning, *supra* note 45, at 655 ("The right of self-interpretation . . . removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean . . ., the agency bears little, if any, risk of its own opacity or imprecision.").

101. *Cf.* Julian R. Murphy, *Lenity and the Constitution: Could Congress Abrogate the Rule of Lenity?*, 56 HARV. J. ON LEGIS. 423, 447 (2019) (noting that the question of whether "*Chevron* is applicable to criminal statutes . . . is not beyond debate").

102. *Compare* 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." (emphasis added) (citation omitted)), *with* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 703–04 & n.18 (1995) (applying *Chevron* deference in the criminal context and expressly asserting, "[w]e have *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[ ]" (emphasis added)).

103. Guedes v. ATF, 140 S. Ct. 789 (2020) (denying cert. to Guedes v. ATF, 920 F.3d 1).

104. *Id.* at 791 (statement of Gorsuch, J., respecting denial of certiorari).

105. *Cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring) ("Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress." (citation omitted)).

106. Crandon v. United States, 494 U.S. 152, 177–78 (1990) (Scalia, J., concurring).

deference.[107] A Supreme Court *majority* first touched on the *Chevron*–lenity issue in passing in 1995. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court deferred to the EPA's interpretation of an ambiguous statutory provision.[108] In a footnote, the Court dismissed respondents' lenity argument, reasoning in part that the interpretive regulation at issue gave the regulated community fair warning.[109] Like Justice Scalia's *Crandon* concurrence, this footnote is also frequently cited by lower courts — but for the opposite conclusion: that *Chevron* deference defeats — or at least, is not defeated by — lenity.[110]

Subsequent Supreme Court cases have not provided closure.[111] A pair of 2014 cases cited Justice Scalia's *Crandon* concurrence favorably, but in both — oddly enough — the agency interpretations to which the Court refused deference would have treated the criminal defendant *more leniently*.[112] The Court did *not* apply the rule of lenity *instead* of *Chevron*; rather, the Court set aside *Chevron* in the unusual situation in which *Chevron* and lenity were aligned. Thus, even though a majority of the Court appears to approve some aspect of Justice Scalia's *Crandon* opinion, the proposition that deference has no role to play in criminal cases — let alone that lenity necessarily defeats *Chevron* deference — has yet to attain precedential status.

Since 2010, the Court has twice granted certiorari on the question of how to reconcile or decide between *Chevron* deference and the rule of lenity. Both times, the Court resolved the cases on the grounds that the statutory provisions in question were not ambiguous, thus obviating the need to address the lenity issue.[113] Still, this pressing question continues to arise: Twice in the past two

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107. *See, e.g.*, Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring).

108. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 703–04 (1995).

109. *Id.* at 704 n.18.

110. *See, e.g.*, Guedes v. ATF, 920 F.3d 1, 27 (D.C. Cir. 2019) (citing *Babbitt*, 515 U.S. at 703–04) (explaining that *Chevron* defeats lenity), *judgment entered*, 762 F. App'x. 7 (D.C. Cir. 2019), and *cert. denied*, 140 S. Ct. 789 (2020); United States v. Granados-Alvarado, 350 F. Supp. 3d 355, 359–60 (D. Md. 2018) (citing *Babbitt* for the proposition that lenity does not preclude deference).

111. *But see* Larkin, *supra* note 5, at 113 & n.41 (making the opposite claim).

112. *See* United States v. Apel, 571 U.S. 359, 368–69 (2014); Abramski v. United States, 573 U.S. 169, 191 (2014) (citing *Apel*, 571 U.S. at 369 (citing Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment))).

113. Barber v. Thomas, 560 U.S. 474, 488–89 (2010); Esquivel-Quintana v. Lynch, 137 S. Ct. 1562, 1572 (2017).

years, the Court denied certiorari to cases presenting the question, most recently in the controversial 'bump-stock' gun case, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*.[114] Nevertheless, the problem promises to reach the Court again before long.[115]

B. LENITY AND *SEMINOLE ROCK*, *AUER*, AND *KISOR*

Though the relationship between *Chevron* and lenity is as-yet unresolved, recent dicta suggest that deference is out of place in the penal context.[116] When it comes to agency interpretations of their own regulations, however, Supreme Court precedent leans troublingly — though hardly definitively — towards deference doctrine. While the Court has deferred to agency regulatory interpretations that result in criminal convictions, penal civil sanctions, and longer prison sentences, only once has the Court squarely addressed the issue of lenity vis-à-vis agency regulatory deference — and in that early case, lenity won the day, albeit with only a plurality.[117] Because a Court *majority* has not explicitly addressed a lenity-based argument in this realm, the issue remains undecided.[118]

Given the vast expanse of federal regulatory crime on the books, the issue will likely percolate up to the Court before long. When it does, it will appear in a case involving an agency regulatory interpretation resulting in either a criminal conviction, civil penalties, or a precedential interpretation that could, in the future, lead to either or both. Such cases have already reached the Circuit courts, and those that have decided between lenity and *Auer* deference are

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114. *See Guedes*, 920 F.3d 1, *cert. denied*, 140 S. Ct. 789 (2020); Petition for Writ of Certiorari at *i, Guedes v. ATF, 920 F.3d 1 (D.C. Cir. 2019) (No. 19-296), 2019 WL 4235518 (asking "[w]hether *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[ ]"); *see also* Weed v. United States, 138 S. Ct. 2011 (2018) (denying certiorari); Petition for Writ of Certiorari at *i, *15–30, Weed v. United States, 873 F.3d 68 (1st Cir. 2017) (No. 17-1430), 2018 WL 1794391 (asking "[w]hether a court can invoke an executive agency's reading of a statute to declare conduct criminal, without asking whether that reading is correct[ ]").

115. *See Guedes*, 140 S. Ct. at 790 (statement of Gorsuch, J., respecting denial of certiorari) (noting that the Court's "waiting should not be mistaken for lack of concern[ ]").

116. *See supra* notes 111–12 and accompanying text; *see also* Whitman v. United States, 574 U.S. 1003, 1003 (2014) (statement of Scalia, J., respecting denial of certiorari) ("A court owes no deference to the prosecution's interpretation of a criminal law.").

117. M. Kraus & Bros., Inc. v. United States, 327 U.S. 614, 622, 627–29, 632 (1946).

118. *See* Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (citations omitted)).

divided on the issue.[119] While the Trump administration recently attempted to squelch agency guidance that now receives *Kisor* deference,[120] it is hardly clear that President Trump's executive orders would have mooted the issue, and, in any event, President Biden swiftly revoked these orders during his first days in office.[121] More likely than not, the Supreme Court will need to face the conflict between lenity and *Kisor* deference — and, at long last, resolve it.

1. *Supreme Court Precedent is Unclear*

In the immediate wake of *Seminole Rock*, the Court faced a case that squarely presented the conflict between lenity and deference. In *M. Kraus & Bros. v. United States*, decided only a year later and in a plurality opinion written by *Seminole Rock*'s own author, Justice Murphy,[122] the Supreme Court applied lenity instead of giving any deference to an agency's interpretation of its own regulation.[123] In this curious old case, the government prosecuted a wholesale poultry business for allegedly evading price controls by tying sales of turkey to sales of chicken feet just before Thanksgiving at the height of World War II. The company was convicted and fined $22,500.[124]

When the case reached the Supreme Court, Justice Murphy, writing for a plurality, observed that in specifying what behavior constituted price control evasions, the Price Administrator, the official in charge of wartime price controls under the Emergency Price Control Act of 1942, was in effect able to define crime — a "grave responsibility."[125] For this reason, Justice Murphy wrote, "to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action" —

119. *See infra* Part III.B.3.
120. *See* Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 9, 2019); Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (Oct. 9, 2019).
121. Exec. Order No. 13,992, 86 Fed. Reg. 7,049 (Jan. 20, 2021).
122. *M. Kraus & Bros.*, 327 U.S. at 614–15.
123. *Id.* at 622.
124. *Id.* at 619. Adjusted for inflation, this fine amounts to almost $335,000 in today's dollars.
125. *Id.* at 621.

that is, the rule of lenity.[126] Responding obliquely to the government's request for deference,[127] Justice Murphy added:

> *Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language*. The prohibited conduct must, for criminal purposes, be set forth with *clarity in the regulations and orders* which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source *alone* to discover what conduct is evasive and hence . . . criminal . . . .[128]

The plurality, in short, denied deference in the criminal context in favor of a strong clear-statement-rule formulation of lenity.[129] However, as a plurality opinion, its reasoning lacks precedential value.[130]

In 1971, the Court again faced a criminal case involving an agency interpretation of a regulation. In *Ehlert v. United States*, the defendant had been convicted of draft evasion during the Vietnam War because he declined to submit to induction.[131] Writing for the majority, Justice Stewart deferred to the Selective Service's interpretation of its own regulation to affirm Ehlert's conviction.[132] The majority found that "[t]he Government's interpretation [was]

126. *Id.*

127. *See* Brief of Respondent, at 28–29, M. Kraus & Bros., Inc. v. United States, 327 U.S. 614 (1946) (No. 198) ("The interpretation placed by the Price Administrator on his own regulations is controlling unless clearly erroneous or inconsistent with the regulations" (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945))).

128. *M. Kraus & Bros.*, 327 U.S. at 621 (emphasis added) (citation omitted).

129. *Id.* ("[T]he Administrator's provisions must be *explicit and unambiguous* in order to sustain a criminal prosecution[.]" (emphasis added) (citation omitted)).

130. *See id.* at 622, 627–29, 632. Justices Rutledge and Frankfurter agreed with Justice Murphy, stating that they "do not think that administrative regulations, given by statute the function of defining the substance of criminal conduct, should have broader or more inclusive construction than statutes performing the same function." *Id.* at 628. Justices Black, Reed, Burton, and Douglas dissented, but they rested their argument not on deference but on their *own* view that M. Kraus & Bros.' course of conduct "[wa]s a violation, both of the letter and spirit of the Price Control laws." *Id.* at 629–32 (Black, J., dissenting).

131. Ehlert v. United States, 402 U.S. 99, 100 (1971). Ehlert received a two-year prison sentence. *No Use to Object, Draftees; Pleas Void After Induction*, DAILY UNIVERSE (Provo), Apr. 22, 1971, at 12.

132. *Ehlert*, 402 U.S. at 100, 105, 108, 119. Strangely, Ehlert did not raise a lenity argument, and neither the majority nor the dissent addressed the question of whether lenity had application in relation to *Seminole Rock* deference. *See generally id.*; *see also* Brief of Petitioner at *15–16, Ehlert v. United States, 402 U.S. 99 (1971) (No. 120), 1970 WL 122152 (neglecting to raise a lenity-based argument, but arguing that narrow construction is preferable to protect the rights of sincere conscientious objectors).

a plausible construction of the language of the actual regulation, though admittedly not the only possible one," and was one that "ha[d] been consistently urged" before the present litigation.[133] "[S]ince the meaning of the language is not free from doubt," the Court concluded, "we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation . . . ."[134]

Two decades later, the Court again addressed a case involving punitive — but this time, noncriminal — sanctions and an agency's interpretation of its own regulations.[135] In *Martin v. Occupational Safety & Health Review Commission*, the Court deferred to the Secretary's reading of an OSHA regulation — which authorizes both civil *and criminal* enforcement[136] — to uphold a $10,000 civil penalty.[137] As in *Ehlert*, the defendant did not raise the issue of lenity but did make two related arguments: (1) Vesting both "enforcement and interpretive powers" in the Secretary exposes "regulated employers [to] biased prosecutorial interpretations of the Secretary's regulations," and (2) "interpretations furnished in the course of administrative penalty actions . . . are mere 'litigating positions,' undeserving of judicial deference."[138] While the Court "f[ound] these concerns to be important," it concluded that OSHA's governance structure and citation review process cured the problem.[139]

Just two years after *Martin*, the Supreme Court revisited agency deference in the criminal context — but this time, the regulatory interpretation at issue did not define the *substance* of the criminal activity, but rather the *sentence* to be meted out to a criminal defendant already convicted of a substantive offense. In *Stinson v. United States*, the Court unanimously held that Sentencing Guidelines commentary warrants deference like an Executive Branch agency's interpretation of its own legislative rule.[140] This holding seems, at first blush, to suggest that *Seminole Rock* deference applies where the rule of lenity should have a strong

133. *Ehlert*, 402 U.S. at 105.

134. *Id.* (citing, among other cases, Udall v. Tallman, 380 U.S. 1, 16–17 (1965), and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–414 (1945)).

135. Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 146–47 (1991).

136. 29 U.S.C. § 666(e) (authorizing a maximum fine of $10,000, up to six months' imprisonment, or both).

137. *Martin*, 499 U.S. at 148, 157–59.

138. *Id.* at 155 (citation omitted).

139. *Id.* at 155–57.

140. Stinson v. United States, 508 U.S. 36, 44–45 (1993).

countervailing application.[141] Indeed, the D.C. Circuit has openly wondered "how the rule of lenity [can be] squared with *Stinson*'s description of the commentary's authority to interpret guidelines,"[142] and just this past term a dozen petitions for certiorari asked the Court to resolve this tension.[143]

Yet it is hardly clear that *Stinson* itself precludes — or is even in tension with — the application of lenity. Although Justice Kennedy's opinion offers a broad justification for the application of *Seminole Rock* deference,[144] it does not necessarily imply that deference to the Commission's interpretation of the Guidelines must invariably defeat the longstanding judicial policy of lenity. In fact, the very posture of the case itself arguably suggests the opposite. In *Stinson*, the *criminal defendant* advanced the argument that courts should defer to the Commission's interpretation of the

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141. *Cf.* United States v. R.L.C., 503 U.S. 291, 305–06 (1992) ("[Lenity] has been applied not only to resolve issues about the substantive scope of criminal statutes, but [also] to answer questions about the severity of sentencing[.]" (citing Bifulco v. United States, 447 U.S. 381, 387 (1980))).

142. United States v. Winstead, 890 F.3d 1082, 1092 n.14 (D.C. Cir. 2018). Notably, the court nevertheless concluded, "[w]e are inclined to believe that the rule of lenity still has some force." *Id.* Other circuit and district courts' discomfort with the tension is quite evident in their readiness to find the Sentencing Guidelines "unambiguous" or the commentary "plainly erroneous or inconsistent" in order to avoid deferring when doing so would adversely affect a criminal defendant. *See, e.g.*, United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019) ("[W]e are troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of 'controlled substance offense' in this way, without any grounding in the text of [the relevant Guideline] . . . ." (citation omitted)); United States v. Havis, 927 F.3d 382, 386–87 (6th Cir. 2019) (finding that "the Commission used [commentary] to *add* an offense not listed in the guideline[,]" (emphasis in original) and therefore "deserves no deference[ ]"), *reh'g denied*, 929 F.3d 317 (6th Cir. 2019); *see also* United States v. Bond, 418 F. Supp. 3d 121, 123 (S.D. W. Va. 2019) ("The severity of the career offender designation reinforces the importance of courts strictly interpreting guideline text and scrutinizing commentary for inconsistencies.").

143. *See, e.g.*, Petition for Writ of Certiorari at *i, United States v. Broadway, 815 F. App'x 95 (8th Cir. 2020) (No. 20-836), 2020 WL 7631388 (asking, in the second question presented, "[d]o the rule of lenity and the right to due process preclude *Stinson* deference when commentary to a Sentencing Guideline would increase a sentence?"); Petition for Writ of Certiorari at *2, *27, United States v. Tabb, 949 F.3d 81 (2d Cir. 2020) (No. 20-579), 2020 WL 6470007 (asking the Court to add *Kisor*-like rigor to *Stinson* deference and noting that "concerns with judicial deference to agency interpretations of their own regulations are at their apex in the criminal context"); *see also* The Federalist Society, *Certiorari and* Stinson *Deference*, YOUTUBE (June 29, 2021), www.youtube.com/watch?v=sClEX4nw8XU [https://perma.cc/7NZU-KHTK] (observing that at least a dozen such petitions were filed with the Court this past term). After six months' consideration, these petitions were denied. *See, e.g.*, Broadway v. United States, No. 20-836, 2021 WL 2519098 (June 21, 2021); Tabb v. United States, No. 20-579, 2021 WL 2519097 (June 21, 2021).

144. *Stinson*, 508 U.S. at 45 ("[T]he interpretations . . . contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied . . . .").

Guidelines,[145] because the Commission's latest commentary afforded the more lenient reading of the Guidelines than the one advanced by the prosecution in the absence of the commentary. In other words, the Commission's interpretation warranting deference was *in accord with* lenity.[146]

In 2012, the Supreme Court took a new tack, explicitly limiting rather than extending *Auer* deference applicability in a penalty case. Confronted with a case involving "massive liability" imposed retroactively due to a subsequent agency interpretation of a regulation, the Court in *Christopher v. SmithKline Beecham Corp.* placed a significant new limitation on the application of *Auer* deference: Deferring to agency interpretations of their regulations is not proper when doing so would "unfair[ly] surprise" regulated parties and subject them to considerable penalties.[147] In so ruling, the Court gave its imprimatur to the doctrine of 'fair warning'[148] as articulated by then-Judge Scalia on the D.C. Circuit,[149] intimating that *Auer* deference might not be suitable when penalties are at issue — at least when the regulated community had no reasonable advance warning.[150]

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145. Brief of Petitioner at *8, Stinson v. United States, 508 U.S. 36 (1993) (No. 91-8685), 1993 WL 468407 ("Sentencing Commission commentary is analogous to administrative agency rules, which must be deferred to by the courts so long as they are not plainly inconsistent with [statutory] authority.").

146. This reading of *Stinson* suggests a solution: Guidelines commentary may warrant deference when it favors criminal defendants; but if it tends to subject criminal defendants to longer sentences, lenity kicks in first. *Cf.* United States v. Nasir, 982 F.3d 144, 179 (3d Cir. 2020) (Bibas, J., concurring) ("Only when a comment to an otherwise ambiguous [sentencing] guideline has a clear tilt toward harshness will lenity tame it. Some provisions may have no consistent tilt across all defendants. If so, *Auer* deference might still apply.").

147. 567 U.S. 142, 155–57 (2012). While this new limitation bears some semblance to the rule of lenity, it is consistent with *Ehlert* and *Stinson* in that the primary fault found with the agency interpretation was its inconsistency with prior interpretations and its detrimental retroactive effect on prior conduct, neither of which were present in *Ehlert* or *Stinson*. *See* Ehlert v. United States, 402 U.S. 99, 105 (1971) ("[T]his position has been *consistently* urged by the Government . . . ." (emphasis added)); *Stinson*, 508 U.S. at 47–48 (declining to address the government's argument that the commentary should not be given retroactive effect).

148. To avoid confusion with the "fair notice" rationale for the rule of lenity, this Note will refer to this doctrine by its alternate name, the "fair warning" doctrine. *See* United States v. S. Indiana Gas & Elec. Co., 245 F. Supp. 2d 994, 1010–11 (S.D. Ind. 2003).

149. *Christopher*, 567 U.S. at 156 ("To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" (alteration in original) (quoting Gates & Fox Co. v. Occupational Safety & Health Rev. Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986))).

150. *Id.* at 156–57 n.15 (citing 1 R. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.11, at 543 (5th ed. 2010), for the proposition that "[i]n *penalty cases*, courts will not accord substantial deference to an agency's interpretation of an ambiguous rule in circumstances

This 'fair warning' doctrine, embodied in the cases and treatise cited by Justice Alito,[151] is arguably both broader and narrower than the rule of lenity. On the one hand, it is arguably broader, given its undisputed application to civil penalty cases.[152] On the other hand, the fair warning doctrine is *narrower* than the rule of lenity in at least two respects. First, it does not explicitly dictate, as lenity does, that ambiguity concerning penal sanctions tips in favor of the defendant; rather, the fair warning doctrine simply prevents or limits judicial deference to the agency interpretation in penalty cases.[153] Second, the fair warning doctrine is narrower than the rule of lenity in *what it demands*. Whereas lenity demands that the regulation *itself* be clear, fair warning merely

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where the rule did not place the individual or firm on notice that the conduct at issue constituted a violation of a rule" (emphasis added)). The current version of the treatise goes on to say:

> This distinction [between penalty and non-penalty cases] seems entirely sensible as a way of reflecting the due process concern that no one should be punished, *even with a civil penalty*, for engaging in conduct in the absence of some form of prior notice that the conduct was unlawful. Of course, the notice need *not* be provided in the form of a legislative rule that clearly prohibits the conduct at issue. The *adequate prior notice requirement can be satisfied in other ways*, e.g., through an interpretative rule, policy statement, or warning letter in which the agency states that it considers the conduct at issue to be a violation of a legislative rule.

Kristin E. Hickman & Richard J. Pierce, Jr., Administrative Law Treatise § 6.11, at 543 (6th ed. 2018) (emphasis added) (citation omitted).

151. *Christopher*, 567 U.S. at 156 n.15 (citing Phelps Dodge Corp. v. Fed. Mine Safety & Health Rev. Comm'n, 681 F.2d 1189, 1192 (9th Cir. 1982); Kropp Forge Co. v. Sec'y of Labor, 657 F.2d 119, 122 (7th Cir. 1981); Dravo Corp. v. Occupational Safety & Health Rev. Comm'n, 613 F.3d 1227, 1232–33 (3d Cir. 1980); Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 528 F.2d 645, 649 (5th Cir. 1976); 1 R. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.11, at 543 (5th ed. 2010)).

152. *See, e.g.*, U.S. v. Trident Seafoods, 60 F.3d 556 (9th Cir. 1995) ("[W]hen 'violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.'" (quoting *Phelps Dodge Corp.*, 681 F.2d at 1193)); *Kropp Forge Co.*, 657 F.2d at 123 (considering the distinction between "criminal" and civil "penal sanctions" immaterial as to the requirement that regulations give "reasonable notice of the conduct said to be prohibited"); S. Indiana Gas & Elec. Co., 245 F. Supp. 2d at 1010 (noting that "[t]hough this principle arises most often in the criminal context, the fair notice concept has been recognized in the civil administrative context, and is now thoroughly incorporated into administrative law[,]" and providing a litany of illustrative cases). By contrast, judges and scholars debate whether lenity has application in the civil sphere. *See infra* note 164 and accompanying text.

153. *Christopher* itself provides a case-in-point: after deeming "*Auer* deference . . . unwarranted," the Court proceeded to apply the more-limited *Skidmore* deference, according to which an agency's interpretation is weighed only according to its "power to persuade." 567 U.S. at 159 ("We instead accord . . . a measure of deference proportional to . . . 'all those factors which give it power to persuade.'" (quoting United States v. Mead Corp., 533 U.S. 218, 228 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)))).

requires the enforcing agency "to articulate its interpretation" resolving the ambiguity "*before* imposing a penalty."[154]

In adopting the 'fair warning' doctrine, *Christopher* pulled precedent in the direction of lenity but stopped well shy of announcing a rule that would foreclose deference in all penalty cases, let alone a rule mandating lenity instead of deference. Seven years later, the Court in *Kisor* upheld a rearticulated version of *Auer* deference that incorporated the teaching of *Christopher*, but nowhere in the opinion is the rule of lenity mentioned;[155] after all, *Kisor* itself was not a penal case.[156] Seemingly little can be gleaned as to the new deference regime's relationship with lenity. But the majority's emphatic demand that courts only defer when a regulation is "genuinely ambiguous"[157] may supply an important clue. Because both *Kisor* deference and lenity kick in when a regulation is ambiguous, deciding which doctrine triumphs hinges on their relative thresholds for determining ambiguity — and *Kisor* set a high bar.[158]

2. *Areas of Conflict Between Lenity and* Kisor *Deference*

There are three contexts in which lenity and *Kisor* deference clash. The most clear-cut instance in which the rule of lenity and *Kisor* deference conflict is when an agency interpretation directly gives rise to criminal liability that would not otherwise exist, or when an agency reads a criminal rule to impose more severe punishment than it otherwise might. Such cases may not arise

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154. U.S. v. Lachman, 387 F.3d 42, 57 (1st Cir. 2004) (emphasis added) (citation omitted). Unlike the rule of lenity, the doctrine of fair warning assumes, as stated here, if a regulated entity is unable to ascertain what the regulation means using by reading the regulation, it must proceed to seek out agency guidance. Only *after* seeking the agency opinion and failing to garner a clear answer does the fair warning doctrine kick in. *See id.*

155. In his concurrence, Justice Gorsuch does intimate that agency deference pursuant to the majority's reasoning in the criminal sentencing context would be problematic. He posits a "statute that tells a court to 'determin[e]' an appropriate sentence in a criminal case[,]" then asks: "If the judge said he was sending a defendant to *prison* for *longer* than he believed appropriate *only in deference* to the government's 'reasonable' sentencing recommendation, would anyone really think that complied with the law?" Kisor v. Wilkie, 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., concurring) (emphasis added) (quoting 18 U.S.C. § 3553(a)). The rhetorical effect of the question draws implicitly on the intuitive appeal of lenity. It seems inappropriate for a court to err on the side of more severe criminal punishment solely on the basis of deference to the government, especially when there is a textual basis for the court to choose the more lenient outcome.

156. *See generally Kisor*, 139 S. Ct. 2400 (no discussion of lenity).

157. *Id.* at 2414 ("[W]hen we use that term, *we mean it* — genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." (emphasis added)).

158. *See infra* Part IV.A (arguing that lenity's ambiguity threshold is lower).

frequently,[159] since well-advised would-be defendants likely avoid activities that agencies have warned would violate ambiguous criminal regulations.[160] Nevertheless, such cases have arisen,[161] and prosecutors continue, post-*Kisor*, to seek judicial deference towards agency regulatory interpretations.[162] In such cases, lenity and deference collide head-on.

The second situation in which lenity and deference conflict is when an agency's interpretation of a regulation directly gives rise to *civil penalties* that would not otherwise be imposed.[163] While authorities both judicial and academic disagree about the applicability of the rule of lenity to civil penalty cases,[164] the same

159. *See* United States v. Ward, No. CRIM. 00-681, 2001 WL 1160168, at *7 (E.D. Pa. Sept. 5, 2001) ("We have found only a few cases in the criminal context that have deferred to an agency's interpretation of an ambiguous regulation." (citations omitted)).

160. Consider, for instance, the fate of Arthur Anderson. Though ultimately vindicated as to its view of the law by the Supreme Court, Arthur Andersen LLP v. U.S., 544 U.S. 696, 708 (2005), the firm's criminal initial indictment and conviction led, in effect, to its demise as a going-concern. In light of such consequences, a corporation's general counsel may have a better interpretation of a regulation than the agency itself, but nevertheless conclude that it would be poor business judgement not to abide by the agency's guidance, especially when courts are known to defer to agency interpretations of regulations. For this reason, many cases in which an agency's interpretation of a regulation could expose a business entity to criminal liability may never reach the courthouse. *Cf.* Rachelle Holmes Perkins, *The Threat of Law: Regulatory Blackmail or an Answer to Congressional Inaction?*, 65 U. KAN. L. REV. 621, 621–22, 641–47 (2017) (providing an example of this dynamic in the tax context).

161. *See, e.g.*, United States v. Kanchanalak, 192 F.3d 1037, 1042–43, 1045–47 & n.15 (D.C. Cir. 1999) (deferring to the Federal Election Commission's interpretation of its own regulation, leading defendants to plead guilty to criminal charges); United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 980, 985 (7th Cir. 1999) (affirming a company's $1m fine and 5 years' probation by deference to OSHA's interpretation of its own regulation in a warning letter forwarded to the company). Also, citing *Stinson v. United States*, 508 U.S. 36, 38 (1993), circuit courts routinely defer to the government's interpretation of the Sentencing Guidelines, which often results in more severe penalties. *See, e.g.*, United States v. Tabb, 949 F.3d 81, 87–89 & n.8 (2d Cir. 2020) (examining and following Sentencing Guidelines commentary and dismissing defendant's lenity argument); United States v. Allen, 909 F.3d 671, 673–74 (4th Cir. 2018) (noting that "[c]ourts regularly apply the [Sentencing Guidelines] commentary" and finding the commentary "controlling" in applying a sentence enhancement), *cert. denied*, 139 S. Ct. 1575 (2019). And as the Fifth Circuit recently noted, "*Kisor* did not discuss the Sentencing Guidelines." United States v. Cruz-Flores, 799 F. App'x 245 (5th Cir. 2020) (continuing to defer per *Stinson* "[b]ecause there is currently no case law from the Supreme Court or this court addressing the effect of *Kisor* on the Sentencing Guidelines").

162. *See, e.g.*, United States v. Rowold, 429 F. Supp. 3d 469, 474–75 (N.D. Ohio 2019).

163. *See, e.g.*, Howmet Corp. v. EPA, 614 F.3d 544, 548–49 (D.C. Cir. 2010).

164. For academic disagreement, *compare* SCALIA & GARNER, *supra* note 3, at 297 (lenity applies in civil penalty cases), *with* Alexander, *supra* note 5, at 614–15 (lenity limited to strictly criminal context), *and* Greenfield, *supra* note 5, at 16 (same, but noting some exceptions). For judicial disagreement, *compare, e.g.*, Ocasio v. United States, 136 S. Ct. 1423, 1434 n.8 (2016) ("[Lenity] applies *only* when a *criminal* statute contains a 'grievous ambiguity or uncertainty.'" (emphasis added) (quoting Muscarello v. United States, 524 U.S. 125, 139 (1998))), *and* United States v. Turner, 689 F.3d 1117, 1125 (9th Cir. 2012) (recognizing

justifications for lenity also apply to civil penalty cases, especially as the civil–criminal distinction grows ever fainter.[165]

The third set of cases that implicate the uneasy relationship between lenity and *Kisor* deference are those that do not *themselves* involve criminal or punitive civil liability, but the disposition of which would affect future cases that *do* involve such liability.[166] If a court were to defer to an agency interpretation in a case not implicating a regulation's punitive aspect, that precedent would nevertheless bind the court in future cases; thus, the former would indirectly lead to penalties in the latter.[167] Although applying lenity in nonpenal cases may seem paradoxical, if it were otherwise, a more absurd result would follow: Deference in nonpenal cases could inflate regulatory language, which enforcing agencies and

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that lenity "does not generally apply to a civil statute[,]" and permitting an exception only because the relevant statute "*directly implicates* [the defendant's] supervised release, which is *part and parcel* of his *criminal* sentence[ ]" (emphasis added)), *with* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 16 (2011) (dictum) ("[T]he rule of lenity can apply when a statute with criminal sanctions is applied in a noncriminal context." (citation omitted)), and Leslie Salt Co. v. United States, 55 F.3d 1388, 1398 (9th Cir. 1995) (O'Scannlain, J., dissenting in part) ("The rule of lenity has not been limited to criminal statutes, particularly when the civil sanctions in question are punitive in character." (citation omitted)), and United States v. One 1973 Rolls Royce, V.I.N. SRH-16266, 43 F.3d 794, 801 (3d Cir. 1994) (applying lenity in construing a civil forfeiture statute because, though not criminal, it "is *punitive* in nature[ ]" (emphasis added)). The latter view appears to be the older view. *See, e.g.*, Prescott v. Nevers, 19 F. Cas. 1286, 1288–89 (C.C.D. Me. 1827) (No. 11390) (early nineteenth century case describing a civil property law statute providing for treble damages as "highly penal" and applying the rule of lenity).

165. John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models — And What Can Be Done About It*, 101 YALE L.J. 1875, 1875 (1992) ("[T]he line between civil and criminal penalties is rapidly collapsing[.]"); Mann, *supra* note 27, at 1798 ("With more punishment meted out in civil proceedings, the features distinguishing civil from criminal law become less clear.").

166. *See, e.g.*, Foster v. Vilsack, 820 F.3d 330, 335 (8th Cir. 2016) (deferring to an Agriculture Department nonbinding circular interpreting of its own regulation concerning soil types, which could lead to criminal liability under the Clean Water Act in the future), *cert. denied*, 137 S. Ct. 620 (2017).

167. Generally, law is to be construed consistently, regardless of context. *See* Whitman v. U.S., 574 U.S. 1003, 1005 (2014) (statement of Scalia, J., respecting denial of certiorari) ("[I]f a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." (citations omitted)); Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (dictum) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." (citation omitted)). *But see* Justin Levine, *A Clash of Canons: Lenity,* Chevron*, and the One-Statute, One-Interpretation Rule*, 107 GEO. L.J. 1423, 1438–40, 1448–52 (2019) (making the case that different interpretations of a single law for criminal and civil contexts would be appropriate and workable).

courts could rely on to the detriment of future defendants in penal cases.[168]

3. *Circuit Courts are Divided on the Issue*

Since the decision in *Kisor* last year, no lower court has yet addressed the relationship between its revamped rendition of *Auer* deference and the rule of lenity. However, *prior* lower court cases under the *Auer* regime demonstrate a circuit split that *Kisor* did not resolve or render moot, given its upholding (if constricting) of *Auer*. While the Eleventh and Fifth Circuits hold that *Auer* deference must bow to the rule of lenity, the D.C. Circuit — widely regarded as the circuit with the greatest expertise in administrative law — maintains that judicial deference prescribed by the *Seminole Rock–Auer* doctrine remains applicable even in criminal cases.

In *United States v. Kanchanalak*, the D.C. Circuit applied *Auer*'s deferential standard of review in the criminal context.[169] Given its reasoning, *Kanchanalak* likely passes muster under the new *Kisor* standard: The regulation's text could be found "genuinely ambiguous" after applying all "traditional tools" of interpretation, and the agency interpretation at issue was "reasonable."[170] Additionally, "the character and context of the agency interpretation entitles it to controlling weight" under the new three-part test that *Kisor* grafted onto the *Chevron* framework (though leaving room for additional qualifications).[171]

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168. *Cf.* Solan, *supra* note 9, at 2213 (proposing a theory of interpretive "statutory inflation"); but *cf.* Levine, *supra* note 167, at 1426 ("reject[ing] a categorical application of the one-statute, one-interpretation rule").

169. 192 F.3d 1037, 1042–50 (D.C. Cir. 1999). Though two decades old, *Kanchanalak* was recently cited in 2019 — with approval — by the D.C. Circuit in *Guedes v. ATF*. *See* 920 F.3d 1, 27 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020).

170. Kisor v. Wilkie, 139 S. Ct. 2400, 2414–15 (2019). After establishing "the substantial deference that [it] owe[s] the agency," the court in *Kanchanalak* undertakes an examination of the regulatory text, explicitly deploying several "traditional tools" of interpretation in the process. 192 F.3d at 1043–50. The court cites a dictionary in examining the meaning of a key term, and it uses the surplusage canon — a semantic canon that favors the interpretation that gives effect to every word of a provision, rather than one that renders some element nugatory, SCALIA & GARNER, *supra* note 3, at 174 — to support its conclusion that the agency's interpretation of its regulation was "eminently reasonable," 192 F.3d at 1043–45. Nonetheless, these interpretive tools did not settle the matter: the *Kanchanalak* court "[u]ltimately" acknowledges that the "agency's interpretation of [the rule] . . . may overshoot the mark a bit," but concludes, in deferential fashion, that the agency's interpretation "stay[ed] in reasonable range." *Id.* at 1046.

171. *See Kisor*, 139 S. Ct. at 2416; *supra* notes 47–58 (delineating the new test).

First, the agency interpretation at issue in *Kanchanalak* was a policy statement published in the Federal Register contemporaneously with the agency promulgation of the regulation.[172] This satisfies *Kisor*'s demand that, to warrant judicial deference, the interpretation "must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views."[173] Second, the agency interpretation of its own regulation falls squarely within the scope of the agency's expertise,[174] in keeping with *Kisor*'s fourth prong.[175] Finally, the interpretation does not run afoul of *Christopher v. SmithKline Beecham*,[176] which *Kisor* incorporated, because the relevant agency interpretation was longstanding, consistent, and predated the litigation.[177] The D.C. Circuit thus maintains, through analysis not inconsistent with the Supreme Court's holding in *Kisor*, that judicial deference to agency interpretations of their own regulations takes precedence over the rule of lenity.[178]

The Fifth and Eleventh Circuits hold the contrary.[179] In 2018, the Eleventh Circuit, in *United States v. Phifer* expressly held that

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172. 192 F.3d at 1045–46 & n.15.

173. *See* 139 S. Ct. at 2416 (citations omitted) (publication in Federal Register satisfies authoritativeness prong).

174. The agency was the Federal Election Commission, and the regulation at issue concerned federal election campaign finance. *Kanchanalak*, 192 F.3d at 1038.

175. 139 S. Ct. at 2417 (expertise prong).

176. 567 U.S. 142, 155 (2012); *see supra* notes 57–58, 147–48, and accompanying text (discussing the teaching of *Christopher* and its incorporation into *Kisor*).

177. *Kanchanalak*, 192 F.3d at 1046, 1049 ("[T]he FEC has interpreted [the regulation] as such [i.e. consistently] *since its promulgation* and announced its . . . purpose *at that time*." (emphasis added)). In fact, the *Kanchanalak* court expressly found that the FEC's interpretation provided the criminal defendants with "fair notice . . . of what conduct is forbidden," thus dispelling any argument that they were subjected to the kind of "unfair surprise" proscribed by *Christopher*. *Id.* at 1046–47.

178. Though the court in *Kanchanalak* does not expressly say that "agency deference trumps lenity," its deferential treatment of the FEC's regulatory interpretation in the criminal context under the standard of review established by *Seminole Rock* and its progeny clearly demonstrates that order of priority. *Id.* at 1042–43. This conclusion is bolstered by the court's express statements to the same effect in the *Chevron* statutory interpretation context elsewhere in the *Kanchanalak* opinion. *See, e.g.*, *id.* at 1047 n.17 ("That criminal liability is at issue does not alter the fact that reasonable interpretations of the act are entitled to deference." (citation omitted)).

179. United States v. Moss, 872 F.3d 304, 308, 314 (5th Cir. 2017) (citing Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 528 F.2d 645, 649 (5th Cir. 1976)); United States v. Phifer, 909 F.3d 372, 383–85 (11th Cir. 2018) (also citing *Diamond Roofing Co.*, 528 F.2d at 649). The Eleventh Circuit was formerly part of the Fifth Circuit, before Congress split it off in 1981. *Diamond Roofing*, the key precedent cited by the Eleventh Circuit in holding that lenity trumps *Auer* deference, is a Fifth Circuit case prior to the split, which binds both circuits. *Id.* at 385.

lenity defeats *Auer* deference.[180] Jason Phifer was convicted of possessing a controlled substance with intent to distribute.[181] His conviction hinged on whether or not the substance that he possessed was in fact controlled, which turned on an ambiguous regulatory definition of the technical term "positional isomer."[182] The ambiguity stemmed from an intractable conflict between the plain meaning of a general definitional provision and two linguistic canons as applied to a more specific provision.[183]

Because the provision was ambiguous, the court considered the government's request for deference to the Drug Enforcement Agency (DEA) interpretation.[184] In all respects, the DEA interpretation appeared to warrant *Kisor* (or at the time, *Auer*) deference: the regulation's text was "genuinely ambiguous,"[185] the DEA's reading was reasonable, and there was "no 'reason to suspect that the [DEA's] interpretation does not reflect the agency's fair and considered judgment on the matter in question.'"[186] After all, the DEA interpretation was consistent and predated the litigation.[187] Furthermore, the DEA interpretation was "actually made by the agency."[188] The agency's official public website clearly listed "controlled substances," which included the substance Phifer possessed.[189] Finally, the DEA's interpretation of its hypertechnical controlled drug classifications clearly "implicate[s] its substantive expertise."[190] Thus, unless *Kisor* were subject to a 'lenity exception,'[191] the DEA in *Phifer* deserved deference.

The Eleventh Circuit held that lenity wins out. After dispensing with the government's reliance on *Ehlert*,[192] the court

180. *Phifer*, 909 F.3d at 383–85 ("[W]e hold that *Auer* deference does not apply in criminal cases, and instead, we must look solely to the language of the regulatory provision at issue to determine whether it *unambiguously* prohibits the act charged." (emphasis added)).
181. *Id.* at 375.
182. *Id.*
183. *Id.* at 381–82.
184. *Id.* at 382–83.
185. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019).
186. *Phifer*, 909 F.3d at 383 (alteration in original) (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).
187. *Id.* The DEA interpretation had been posted to the DEA's public website before Phifer's possession. *Id.* at 383. Phifer could have gone online and seen it. In this sense at least, he had "fair notice." *Cf. supra* note 154 and accompanying text (noting the narrowness of the "fair warning" doctrine).
188. *Kisor*, 139 S. Ct. at 2416 (authoritativeness prong).
189. *Phifer*, 909 F.3d at 383.
190. *Kisor*, 139 S. Ct. at 2417 (expertise prong).
191. *See supra* note 56 (noting that *Kisor* leaves the door open to further qualifications).
192. *Phifer*, 909 F.3d at 384 (discussing Ehlert v. United States, 402 U.S. 99 (1971)).

uncovered a lenity exception embedded in former Fifth Circuit precedent. In *Diamond Roofing Co. v. Occupational Safety & Health Review Commission*, the Eleventh Circuit's predecessor Circuit held that agency intent cannot expand the meaning of an unclear punitive regulation.[193] Identifying in *Diamond Roofing* the twin bases of lenity,[194] the *Phifer* court held that lenity triumphs over *Auer* deference.[195] Thus, the Eleventh and Fifth Circuits part ways with the D.C. Circuit on this important question of administrative law.

4. *Executive Action Is Unlikely to Resolve the Problem*

In October of 2019, President Donald Trump issued twin executive orders designed to curtail the common agency practice of regulation by guidance.[196] On their face, the orders prevented executive agencies from using guidance to alter the meaning of regulations passed through notice-and-comment rulemaking.[197] Had these executive orders been both immutable and airtight, *Kisor* deference itself — and its uneasy relationship with lenity — would have become moot.

But Executive Orders 13,891 and 13,892 were neither immutable nor airtight. Indeed, on his first day in office, President Joseph Biden revoked both of President Trump's orders in one fell

193. 528 F.2d 645, 649 (5th Cir. 1976) ("If a violation of a regulation subjects private parties to *criminal or civil sanctions*, a regulation *cannot* be construed to mean what an agency intended but did not adequately express." (emphasis added) (citations omitted)). This holding was recently reaffirmed by the modern Fifth Circuit, albeit in dicta, in *Moss*. 872 F.3d 304, 308, 314 (5th Cir. 2017).

194. *Phifer*, 909 F.3d at 384 (citing *Diamond Roofing*, 528 F.3d at 649).

195. *Id.* at 385.

196. Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 9, 2019) (order entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents"); Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (order entitled "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication").

197. *See* 84 Fed. Reg. at 55,235 (preamble stating order's objective); 84 Fed. Reg. at 55,239 (same). Specifically, for an agency to issue significant new guidance, Executive Order 13,891 required notice-and-comment, agency head approval, and review by the White House's Office of Information and Regulatory Affairs (OIRA). 84 Fed. Reg. at 55,237. In addition, the order required agencies to scrub their books of existing guidance, either by subjecting their guidance to certain procedural demands and cataloging it in a uniform agency database or else withdrawing it. *Id.* at 55,236. Executive Order 13,892, meanwhile, specifically stated that "[w]hen an agency takes an administrative enforcement action, . . . it must establish a violation of law by applying *statutes or regulations*[,] . . . [and] only standards of conduct that have been publicly stated in a manner that would not cause *unfair surprise*." *Id.* at 55,240–41 (emphasis added) (citing Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 & n.15 (2012), for the definition of "unfair surprise").

swoop.[198] Even on their own terms, President Trump's orders appeared to "embrace the continued use of the practice" of regulation through guidance,[199] and deference doctrine itself was mostly unaffected.[200] The orders also came with significant exceptions.[201] Of particular salience to the lenity issue, both orders expressly stated that "nothing in th[ese] order[s] shall apply[ ] . . . to any action related to a criminal investigation or prosecution . . . or any civil enforcement action . . . ."[202] Thus, President Trump's directives did not — even temporarily — moot the yet unresolved issue of whether courts must defer to agency regulatory interpretations in penal cases.

IV. LENITY BEFORE *KISOR*: A LENITY EXCEPTION TO AGENCY DEFERENCE

Defendants in agency enforcement actions and criminal prosecutions should get the benefit of the doubt when a regulation is unclear. Under a 'lenity exception' to *Kisor* deference, agency interpretations should receive no judicial deference within lenity's domain for three reasons. First, this 'exception'[203] follows as a logical consequence of lenity's application at a lower relative

198. Exec. Order No. 13,992, 86 Fed. Reg. 7,049 (Jan. 20, 2021) (order entitled "Revocation of Certain Executive Orders Concerning Federal Regulation"). Executive orders are subject to rapid revocation. A change in administration or an administration's policy easily results in prior orders' undoing with just a stroke of the president's pen. *See* VANESSA K. BURROWS, CONG. RSCH. SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE AND REVOCATION 6–7 (2010) (listing examples of executive order revocations).

199. David Zaring, *Guidance Is Unkillable*, 37 YALE J. ON REG.: NOTICE & COMMENT (Oct. 10, 2019), https://www.yalejreg.com/nc/guidance-is-unkillable-by-david-zaring/ [https://perma.cc/CYE9-7EXX]; *see also* Bridget C.E. Dooling, *New OIRA Guidance on Guidance*, 37 YALE J. ON REG.: NOTICE & COMMENT (Nov. 8, 2019), https://www.yalejreg.com/nc/new-oira-guidance-on-guidance/ [https://perma.cc/RS29-MSWV] (observing that Exec. Order No. 13,891, rather than do away with the use of guidance, simply required proposed agency guidance to get clearance from OIRA — essentially, "guidance on guidance").

200. The orders' sole reference to judicial deference doctrine merely forbade agencies from "seek[ing] judicial deference to its interpretation of *a document arising out of litigation* . . . in order to establish a new or expanded claim . . . *unless* it has published the document or a notice of availability in the Federal Register. . . ." 84 Fed. Reg. at 55,241 (emphasis added).

201. For example, Executive Order 13,891's procedural requirements applied only to "*significant* guidance documents," which were expected to "lead to an annual effect on the economy of $100 million or more" (among other factors). *See* 84 Fed. Reg. at 55,236. Lesser guidance was exempt.

202. *See* 84 Fed. Reg. at 55,238; 84 Fed. Reg. at 55,243.

203. As argued here, lenity is less an "exception" to an otherwise applicable doctrine of *Kisor* deference because it properly applies *before Kisor*. Still, the term "exception" remains useful shorthand.

threshold of ambiguity. Second, even if lenity and *Kisor* both applied at the same level of legal ambiguity, lenity should win out because its *constitutional* underpinnings necessarily defeat the mere *policy* bases for agency deference. Finally, given the trajectory of Supreme Court precedent, a lenity exception to *Kisor* deference would be a natural outgrowth of both the Court's renewed emphasis on lenity and its increasing skepticism of *Chevron* deference in the criminal setting, and *Auer* (now, *Kisor*) deference in the retroactive penalty context.

A. LENITY LOGICALLY — AND CONSTITUTIONALLY — MUST PRECEDE *KISOR* IN APPLICATION

A lenity exception to *Kisor* deference follows logically from two premises. When the meaning of a punitive law or regulation admits of a "reasonable doubt," the rule of lenity demands that it be construed favorably toward the defendant.[204] This "reasonable doubt" threshold for ambiguity is less demanding than the exacting "genuine ambiguity" standard emphatically announced in *Kisor* for agency deference.[205] Logically, therefore, lenity must apply before — and thus defeat — *Kisor* deference.

To this simple argument there are three possible objections: (1) Applying lenity in cases of "reasonable doubt" is merely a matter of judicial policy — not a constitutional requirement — and so, can be defeated by competing policy reasons; (2) precedent supports the proposition that lenity actually applies at a higher ambiguity threshold than "reasonable doubt"; and (3) *Kisor*'s "genuine ambiguity" standard is no more demanding than a "reasonable doubt" standard. Each objection fails.

To the first, there are indeed good policy reasons for a "reasonable doubt" standard. For one, supposing lenity only applied in the face of some ambiguity so severe as to cause judicial equipoise,[206] the rule in effect would collapse into vagueness doctrine — the

204. *See* United States v. Davis, 139 S. Ct. 2319, 2333 (2019) ("Even if you think it's *possible* to read the statute to impose such additional punishment, it's *impossible* to say that Congress *surely* intended that result[.]" (emphasis in original)); SCALIA & GARNER, *supra* note 3, at 299 (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)).

205. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019); *see also supra* notes 50–52 and accompanying text.

206. *See* Ladner v. United States, 358 U.S. 169, 178 (1958) (suggesting that lenity kicks in when "an interpretation can be based on *no more than a guess* as to what Congress intended[ ]" (emphasis added)).

constitutional prohibition against enforcing woefully unclear penal provisions.[207] As "a sort of '*junior version* of the vagueness doctrine,'"[208] lenity is better understood as applying to *lesser* ambiguities — legal uncertainties admitting of reasonable doubts, but not necessarily so perplexing as to leave the ordinarily intelligent judge searching in vain for the right answer.[209] In addition, a "reasonable doubt" standard better comports with lenity's status as a clear statement rule. If lenity is to promote reasonable clarity in penal law,[210] that goal is better served by a standard that construes provisions admitting of reasonable doubts in favor of defendants instead of an elevated standard requiring "grievous" ambiguity to trip the default presumption against the drafter. Still, these reasons operate on the level of judicial policy and, accordingly, are defeasible.

But lenity's "reasonable doubt" ambiguity threshold sounds in deeper waters: the Constitution's Due Process Clauses.[211] This standard mirrors the jury's "beyond a reasonable doubt" standard to convict, which the Supreme Court has long held a requirement of due process.[212] If *jurors* in a criminal case must find the *facts* required for conviction to be shown beyond a reasonable doubt, then so must *judges* the *law*.[213] As the Supreme Court has unanimously held, a jury cannot convict only because its doubts about material facts are not "substantial" or "grave" enough.[214] A judge

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207. *See* United States v. Lanier, 520 U.S. 259, 266 (1997) ("[V]agueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926))).

208. *Id.* (emphasis added) (quoting Herbert L. Packer, The Limits of the Criminal Sanction 95 (1968)).

209. *See* United States v. Beam, 686 F.2d 252, 258 n.10 (5th Cir. 1982) ("[I]t is obvious that to be subject to the rule of strict construction it is not necessary that the regulation be so ambiguous or imprecise as to also be subject to challenge on void for vagueness grounds." (citation omitted)). The dividing line between ambiguity and vagueness is, alas, vague — and beyond the scope of this Note.

210. *Cf.* SCALIA & GARNER, *supra* note 3, at 299 ("[W]hen the government means to punish, its commands must be *reasonably clear*. When they are not clear, the consequences should be visited on the party more able to avoid and correct the effects of shoddy legislative drafting." (emphasis added)).

211. *See* U.S. CONST. amends. V, XIV.

212. *In re* Winship, 397 U.S. 358, 364 (1970).

213. Justice Livingston made this point while riding circuit in 1810. The Enterprise, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4499) ("If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law . . . where he labours under . . . uncertainty as to the meaning of the legislature.").

214. *See* Cage v. Louisiana, 498 U.S. 39, 41 (1990) (finding a jury charge in violation of *Winship* because it described a reasonable doubt as a doubt that is "substantial" or "grave,"

likewise should not refuse lenity merely because the asserted legal ambiguity is not "sufficiently grievous."[215] Rather, when reasonable doubts exist, the presumption of innocence[216] — another fixed star in the constellation of constitutional due process rights[217] — indefeasibly prohibits conviction and penal sanction.

To the second objection, while recent decades' precedent is indeed jumbled as to when lenity applies,[218] the broader arc of American lenity jurisprudence points in the direction of the "reasonable doubt" standard.[219] Moreover, the Supreme Court's latest guidance in *Davis* and *Shular* suggests that a majority of the current bench accepts the "reasonable doubt" rather than the "grievous ambiguity" standard,[220] a suggestion not lost on lower courts.[221]

To the third objection, *Kisor*'s "genuine ambiguity" threshold was clearly intended to be exacting.[222] For deference to apply,

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which "suggest[s] a higher degree of doubt than is required for acquittal"), *overruled on other grounds by* Estelle v. McGuire, 502 U.S. 62, 72 n.4 (1991).

215. *Cf.* Dolan v. United States, 560 U.S. 605, 621 (2010) (citation and internal quotation marks omitted). Doubts need only be *reasonable* — that is, not irrational or contrived. This is undoubtedly a lower bar than "grievousness." *See Grievous*, BLACK'S LAW DICTIONARY (11th ed. 2019) (connoting "very serious" or "intense" degrees of distress).

216. Victor v. Nebraska, 511 U.S. 1, 8 (1994) ("'All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty.'" (quoting Commonwealth v. Webster, 59 Mass. 295, 320 (1850) (opinion of Shaw, C.J.))).

217. *See* Nelson v. Colorado, 137 S. Ct. 1249, 1256 n.9 (2017) (presumption of innocence is "unquestionably" a fundamental principle of due process); Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary[.]").

218. *See supra* notes 84–87 (discussing the precedential jumble).

219. *See, e.g.*, The Enterprise, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4499) ("It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offence unless it be created and promulgated in terms which leave no *reasonable doubt* of their meaning." (emphasis added)); Harrison v. Vose, 50 U.S. 372, 378 (1850) ("In the construction of a penal statute, it is well settled, . . . that all reasonable doubts concerning its meaning ought to operate in favor of the [defendant]."); ENDLICH, *supra* note 70, at 456 ("[T]he rule of strict construction[ ] . . . requires, that, where an act contains such an ambiguity as to leave *reasonable doubt* of its meaning, it is the duty of the court not to inflict the penalty[.]" (emphasis added)); *see also* Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 108 (2016) ("The 'reasonable doubt' standard is one of the oldest standards of lenity[.]").

220. *See* Shular v. United States, 140 S. Ct. 779, 787 (2020); *see also* United States v. Davis, 139 S. Ct. 2319, 2333 (2019); *supra* notes 87–88.

221. *See, e.g.*, United States v. Craig, 401 F. Supp. 3d 49, 78 (D.D.C. 2019) (finding the criminal defendant's textual analysis "strained and unpersuasive," but nevertheless applying lenity in the manner *Davis* suggests because the statute's legislative history "d[id] not *unequivocally* support the government's position[,]" relevant case law left "*some lingering doubt*," and the statutory structure "[gave] the Court *reason to pause*[ ]" (emphasis added)).

222. Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019) ("[T]he possibility of deference can arise *only* if a regulation is *genuinely* ambiguous. *And when we use that term, we mean it*

courts following *Kisor* must first endeavor to dispel all doubts — even reasonable doubts — about a regulation's meaning by scrutinizing its text, structure, history, and purpose, and they must conclude that the interpretive dilemma between two (or more) interpretations is ultimately intractable.[223] Though the opinion makes no mention of the reasonable doubt standard, its tenor indicates that the Court intended a more stringent standard. For instance, the Court warns against "wav[ing] the ambiguity flag" too readily in the face of "hard interpretive conundrums" — the sorts of problems that admit of reasonable doubts.[224] Later, the Court emphasizes that *Kisor* deference "often doesn't [apply]," in large part because the demanding "genuine ambiguity" threshold significantly narrows its scope.[225]

B. LENITY'S CONSTITUTIONAL UNDERPINNINGS DEFEAT *KISOR*'S POLICY RATIONALES

Fair notice and separation of powers[226] overcome a weak presumption about Congressional intent concerning the relative interpretive abilities of agencies versus courts.[227] The former are fundamentally *constitutional* justifications, rooted in the Due Process Clauses[228] and in the Constitution's three-branch blueprint of the federal government, respectively. Implicit Congressional intent, said to justify *Kisor*, is rooted in more prudential concerns.[229]

— genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." (emphasis added)).

223. *Id.*

224. *Id.*

225. *Id.* at 2418.

226. *See supra* notes 74–76 (discussing lenity's traditional justifications).

227. *Kisor*, 139 S. Ct. at 2412.

228. Constitutional due process also requires that lenity apply at a lower ambiguity threshold. *See supra* Part IV.A.

229. *Kisor*, 139 S. Ct. at 2412–13 (citing better knowledge of original agency intent, agency technical expertise, and interpretive uniformity nationwide as practical reasons why Congress might implicitly intend agency interpretations to govern in cases of ambiguous regulations); *see also supra* notes 61–64 and accompanying text.

Worthy of note, an early policy justification for judicial deference to agency interpretations of their own regulations — the avoidance of unnecessary upsetting of regulated community reliance — may even cut *against* the application of agency deference in the penal context. *See* Udall v. Tallman, 380 U.S. 1, 18 (1965) (indicating, as a reason for deferring to an agency's interpretation of a regulation, the "very great expense" that regulated parties incurred "in reliance upon the Secretary's interpretation"). In criminal and civilly punitive matters, no regulated community reliance interests are at stake that would counsel in favor of judicial deference to the enforcing agency. If anything, regulated persons and entities

Because constitutional mandates invariably trump policy reasoning, *Kisor* must yield to lenity, even if both were to apply at the same level of ambiguity.[230]

1. *Fair Notice*

Some scholars have suggested that agencies' issuance of guidance actually serves to alleviate fair notice concerns: if an agency shares its interpretation of its own regulation ex ante, the regulated community surely has "fair notice" of what the agency regulation demands — and certainly better notice than in the absence of such guidance.[231] Therefore, the argument goes, judicial deference to interpretations found in guidance documents poses no fair notice problem, provided the relevant interpretation was issued *before* the conduct subject to prosecution or civil enforcement such that the regulated person or entity could have known of it before acting.[232]

This argument rests on a thin conception of fair notice. For notice to be *fair*, it surely must be earlier in time relative to whatever is being noticed. But important as it is, prior notice is only a *necessary* — not a *sufficient* — condition for fairness. For notice to be *fair*, it must satisfy two other conditions. First, it must be given by a person or entity in authority.[233] And second, notice must be given in the proper manner suited to the source of the authority.[234]

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relying strictly on the regulatory text are likely to have a reliance interest in the more lenient reading, rather than the harsher interpretation put forth by the agency.

230. *But see supra* Part IV.A.

231. *See, e.g.*, Derek A. Woodman, *Rethinking* Auer *Deference: Agency Regulations and Due Process Notice*, 82 GEO. WASH. L. REV. 1721, 1744 (2014) ("Once an agency's reasonable interpretation is publicly known, there is no reason to think it will result in unfair surprise.").

232. *Cf.* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–56 (2012) (holding it unfair "to impose potentially massive liability . . . for conduct that occurred well before [the relevant] interpretation was announced[ ]").

233. If an officious fellow citizen purports to inform you of the meaning of a legal prohibition that you interpret differently, you might understandably respond, "Who are you to say this?" For the government then to point to your interlocutor's remarks as having given you "fair notice" would surely seem perverse. *Cf.* City of Chicago v. Morales, 527 U.S. 41, 58–59 (1999) (plurality opinion) (rejecting the government's contention that "[w]hatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do[ ]").

234. Because the United States is a government of laws and not of men, reasonable people look to the law — not the makers of the law — to know what is required of them. *Cf. id.* at 58 ("[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to *the law*." (emphasis added)). Drafters of law (and regulation) are

Put plainly, to have fair notice, the reasonable person must be able to discern *ex ante* what *the law* requires, and the law is the set of rules promulgated by a legitimate authority by legitimate procedure. Commentators who suggest that an agency's earlier-in-time guidance is sufficient to establish *fair* notice for purpose of judicial deference neglect these second and third necessary elements: authority of the promulgator and propriety of the promulgation.[235]

Kisor explicitly specified two of these three elements of fair notice. By incorporating *Christopher*, the Court reiterated that *prior* notice is a necessary condition for judicial deference to an agency interpretation in a penalty case, since defendants in such cases deserve fair notice.[236] And by introducing an authoritativeness requirement — akin to *Mead* in the *Chevron* context[237] — *Kisor* implicitly recognized the importance of authority to fair notice.[238] While the Court did not make the final leap and specify that, in penal cases, fair notice also demands strict procedural propriety in promulgating regulatory pronouncements given the binding force

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free to opine on the law's meaning, but their interpretation does not thereby become binding. *Cf.* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 110 (2015) (Scalia, J., concurring) (arguing that agencies' interpretive rules are nonbinding, but if courts grant agencies deference as to such interpretations, they illicitly become binding de facto). For courts to make binding what is not legally binding is to upset the reasonable person's fair expectation that the laws — and not men — are sovereign. Binding extralegal 'notice' cannot be called *fair*.

235. These elements of fair notice suggest a link between fair notice and its twin rationale behind the rule of lenity: the separation of powers. The authority to legislate or regulate is subject to procedural requirements and must ultimately stem either directly from the Constitution or by means of appropriate delegation between branches. The latter issue, however, is the subject of controversy well beyond the scope of this Note.

236. Kisor v. Wilkie, 139 S. Ct. 2400, 2417–18 (2019).

237. *Id.* at 2416 ("[T]he regulatory interpretation must be one actually made by the agency. . . . [I]t must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views." (citing United States v. Mead, 533 U.S. 218, 257–59, 258 n.6 (2001) (Scalia, J., dissenting))); *see also supra* notes 39 & 54 and accompanying text.

238. *See Kisor*, 139 S. Ct. at 2416 ("The interpretation must . . . emanate from [agency heads or their chief advisors], using those vehicles, *understood* to make *authoritative* policy in the relevant context." (emphasis added)). The latter clause is presumably relevant because it is important for regulated parties' fair notice that agency pronouncements be made authoritatively and in a manner that the regulated parties would know to be binding. Tellingly, the cases cited for this proposition connect authority and regulated community reliance interests, which also suggests a nexus between authority and fair notice. *See, e.g.*, N.Y. State Dep't of Soc. Servs. v. Bowen, 835 F.2d 360, 365–66 (D.C. Cir. 1987) (contrasting "formal agency action *upon which affected parties could reasonably rely*[ ]" with "the informal, non-authoritative nature of [an internal memorandum by mid-level officials]" (emphasis added)).

of law,[239] it did not rule out further qualifications on the applicability of deference.[240]

Lenity should further limit *Kisor* deference. As a clear statement rule requiring that penal statutes and regulations give fair notice of what they, in themselves, require or proscribe, lenity is just the sort of "countervailing reason[ ]" that "outweigh[s]" the presumption undergirding *Kisor* deference that Congress implicitly delegates to agencies the authority to interpret their own regulations.[241] That an agency wrote the regulation and therefore knows best what it means is clearly irrelevant: lenity necessarily defeats a lawmaker's unstated punitive intentions, demanding that the law itself be clear. That an agency has unique expertise in the regulated subject matter is similarly beside the point: to bring the force of its expert lawmaking to bear in a punitive manner upon regulated parties, it must reduce its expertise to a clearly articulated standard in the regulation itself. Finally, although agency deference may have the happy consequence of ensuring that a regulation is applied consistently nationwide,[242] such pragmatic considerations cannot overcome a *constitutional* concern like fair notice, which undergirds the rule of lenity.

2. *Separation of Powers*

Kisor deference might be said to protect the separation of powers like lenity. "[S]ometimes the law runs out, and policy-laden choice is what is left over," so deferring to agencies in such cases protects the executive's prerogative to execute the law from intermeddling by the judiciary in policy matters.[243] This argument is not without force in other areas of law. But in penal cases, lenity

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239. As Justice Scalia has argued, it would violate the APA to require notice-and-comment for *interpretive* rules, but that does not mean that courts must defer to interpretive rules. *Perez*, 575 U.S. at 109–10. Rather, interpretive rules are inherently nonbinding. *Id.* They merely provide guidance that the regulated public may find useful, but which it need not treat as binding law. Judicial deference to interpretive rules in the penal context is improper because it transforms rules that reasonable citizens need not regard as binding into binding rules. This violates fair notice.

240. *See Kisor*, 139 S. Ct. at 2414 (disavowing "any rigid test[ ]").

241. *See id.*; *supra* notes 60–64 and accompanying text; *see also infra* notes 244–42 and accompanying text.

242. *But cf.* Daniel Lutfy, Note, Auer *2.0: The Disuniform Application of* Auer *Deference After* Kisor v. Wilkie, 88 FORDHAM L. REV. 2011, 2035–44 (2020) (demonstrating how lower courts have inconsistently applied *Kisor* itself, thus undermining the suggestion that *Kisor* deference will produce uniform regulatory interpretations).

243. *Kisor*, 139 S. Ct. at 2415.

nevertheless claims superior constitutional warrant as defender of the separation of powers, because crime creation has traditionally resided in the legislative branch. Penal sanction is not a policy matter customarily within the purview of executive discretion. Executive agencies only create crimes derivatively — as authorized and pursuant to prescribed regulatory means. When courts rule against regulations' drafters in penal cases, they do not usurp a presumptively executive function, picking sides in a policy dispute in which they do not belong. Rather, courts applying lenity ensure that executive agencies' crime-creation power does not stray beyond its legislatively authorized bounds via legislatively unauthorized means. Lenity thus preserves the separation of powers where *Kisor* deference would inhibit the judiciary's proper ability to do so.

C. SUPREME COURT PRECEDENT TILTS TOWARDS A LENITY EXCEPTION

In recent decades, the Supreme Court has tended to prefer clear statement canons over agency deference doctrines.[244] This makes sense: such substantive canons — lenity included — tend to protect deep-seated constitutional values that outweigh the deference doctrines' defeasible presumptions about Congressional intent.[245] While the Court has yet to announce a precedential 'lenity exception' to *Chevron*,[246] it has already indicated strong reservations about deference in the criminal context.[247] The Court has said even less about lenity's relationship with *Seminole Rock* deference since its early 1945 plurality opinion in *M. Kraus & Bros.*[248] However, its recent incorporation of 'fair warning' doctrine in *Christopher* and *Kisor* evinces the Court's attention to a key concern animating

244. *Cf.* Greenfield, *supra* note 5, at 38 ("The developing trend is that at least those canons which have attained the status of clear statement rules are found to trump the *Chevron* rule.").

245. *See, e.g.*, Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001) (federalism canon protecting "federal-state framework" trumps *Chevron*); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) (constitutional avoidance canon defeats *Chevron*); *see also supra* Part IV.B.

246. At most, the Court has refused deference to an agency interpretation in the criminal context when that interpretation would have been more lenient to the criminal defendant. *See supra* Part III.A.

247. *See, e.g.*, Abramski v. United States, 573 U.S. 169, 191 (2014) ("[C]riminal laws are for courts, not for the Government, to construe." (citation omitted)).

248. *See* M. Kraus & Bros., Inc. v. United States, 327 U.S. 614, 621–22 (1946); *supra* notes 117–29.

the rule of lenity — namely, fair notice.[249] A lenity exception to *Kisor* would flow naturally from this precedent. It is only a matter of time before the issue finds its way to the Supreme Court's docket.[250]

V. CONCLUSION

When an agency broadly interprets its own ambiguous regulation that implicates criminal or civil penalties, *Kisor* deference ostensibly clashes with the venerable rule of lenity. Lenity should triumph. Lenity operates as a clear statement rule, requiring the government to speak clearly in advance when it means to bring its coercive power to bear on a regulated individual or entity. When a *reasonable doubt* exists as to a penal regulation's meaning, that regulation should be construed in favor of the defendant. This "reasonable doubt" threshold is less exacting than the "genuine ambiguity" standard required for agency deference. So, as a matter of logic, lenity should precede *Kisor* in application. Even if both doctrines were to apply at the same threshold level of ambiguity, however, the constitutional concerns underlying the rule of lenity defeat the more policy-oriented concerns that motivate *Kisor*. A 'lenity exception' to *Kisor* deference would protect the legislative prerogative to define conduct deserving penal sanction. And it would vindicate the foundational due process principle that no one should be subject to sanction absent fair notice and conviction beyond a reasonable doubt.

249. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2417–18 (2019) (citing Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–56 (2012)).

250. *Cf.* Guedes v. ATF, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari).