No. 24-5006

IN THE

Supreme Court of the United States

JASON STEVEN KOKINDA,

Petitioner,

v.

UNITED STATES,

Respondent.

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

SUPPLEMENTAL MEMORANDUM OF LAW

DAVID W. FRAME
Counsel of Record
THE LAW OFFICE OF DAVID FRAME
Nationwide Building
493 Washington Avenue, Suite 2
Clarksburg, West Virginia 26301
dwframe@framelaw.com

Counsel for Petitioner

332110

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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Introduction

On August 2, 2024, the Solicitor General filed her response to the Petition in this case. On behalf of the government, the Solicitor General recommended that the Court "should grant the petition" (p. 2, Memorandum of the United States), based on the Court's recent decision in *Loper Bright Enterprises v. Raimondo*, ___ U.S. ____, 144 S.Ct. 2244 (2024), overruling *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). This supplemental memorandum is being filed to confirm the Petitioner's agreement that *Loper Bright* is a landmark opinion, a paradigm shift, and directly applicable to the Petitioner's criminal conviction. The Petitioner will also briefly emphasize how this criminal proceeding in particular was infected from start to finish with the government's expansive interpretation of a crucial element of the criminal offense of Failure to Register as a Sex Offender, 18 U.S.C. §2250, based on selected passages from the so-called SMART (Sentencing, Monitoring, Apprehending, Registering, and Tracking) Guidelines, Office of the Attorney General's "National Guidelines for Sex Offender Registration and Notification" (hereinafter "Guidelines"), 73 FR 38030-01, 2008 WL 2594934, that were grafted on to the statutory text to craft an erroneous jury instruction. The Guidelines passages that were adopted altered the crucial element of "change of residence," making it easier to prosecute and more difficult to defend. The augmented element expanded the field of factual circumstances under which a sex offender's obligation to register would be triggered.

Loper Bright involves the administrative interpretation of a civil statute, the Magnuson-Stevens Fishery Conservation and Management Act (MSA), regulating domestic and foreign fishing in an "exclusive economic zone" off the United States' coastline and requiring the owners of fishing vessels to pay for third-party monitors. Although the MSA includes criminal sanctions as part of its enforcement mechanism, they are not implicated in the case or discussed in the opinion. In fact, the Court makes it clear that it granted certiorari to decide whether to overturn or clarify *Chevron* in the broadest sense. The explicit and categorical abrogation of the *Chevron* doctrine, which had been foreshadowed in cases leading up to *Loper Bright* (*see*, *e.g.*, Justice Gorsuch's statement, on the reasons for denying certiorari in *Guedes v. ATF*, ___ U.S. ___, 140 S.Ct. 789, 791, 206 L.Ed.2d 266 (2020)(citing *United States v. Apel*, 571 U.S. 359, 369, 134 S.Ct. 1144, 186 L.Ed.2d 75 (2014) and *Abramski v. United States*, 573 U.S. 169, 191, 134 S.Ct. 2259, 189 L.Ed2d 262 (2014)), strongly implies that overruling *Chevron* answers the repeated questions about whether or to what extent the *Chevron* doctrine supplanted the "rule of lenity." Acknowledging that "we have sent mixed signals on whether *Chevron* applies when a statute has criminal applications," 144 S.Ct. at p§§. 2269, Chief Justice Roberts cited *Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023). *Cargill* succinctly lays out the argument in favor of the rule of lenity and explains why the Fifth Circuit's "sister circuits" got it wrong when they applied *Chevron* instead. Id., §IVB, at pp. 466-468; see also *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019). If any of the circuit courts are obstinate enough to insist that *Loper Bright* did not expressly

state that the Chevron deference is dead with respect to criminal cases, there will be a time-consuming and wasteful parade of cases back to the Court until every doubt has been abolished.

Chevron deference v. the Rule of Lenity

"Since the founding, American courts have construed ambiguities in penal laws against the government and with lenity toward affected persons." *Loper Bright*, 144 S.Ct. at 2286 (quoting *Wooden v. United States*, 595 U. S. 360, 388–390 (2022) (Gorsuch, J., concurring in the judgment)). "A rich legal tradition supports the 'well known rule' that 'penal laws are to be construed strictly.'" *Cargill*, supra, at p. 451 (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 94-95, 5 L.Ed. 37 (1820). "The rule of lenity tells us to construe ambiguous statutes in favor of criminal defendants." *United States v. Castleman*, 572 U.S. 157, 172-174 (2014).

As a rule of statutory construction, the rule of lenity counsels adopting the interpretation that is most favorable to the defendant. In this case, rather than construing the elements of the offense, as articulated in the statutory text, in the light most favorable to the defendant (i.e., with "lenity"), the district court judge "leaned" into the administrative Guidelines, which were adopted with enigmatic objectives.[1] Judge Kleeh crafted a jury instruction which enlarged the universe of factual grounds on which a sex offender "must" register. The instruction completely

[1] The undersigned has argued from the outset — and this may be the crux of the case — that Part VI and Part VIII of the Guidelines express very different objectives and must be clearly distinguished to avoid the very error that occurred here. Any other interpretation places the administrative exercise in excess of the scope of its constitutionally delegated authority.

foreclosed the defense theory that Kokinda was a "digital nomad" who did not "reside" anywhere during the relevant period of time. Congress delegated power to the Attorney General, largely to provide administrative guidance to states and territories regarding their compliance with SORNA, but, to the extent that Congress delegated interpretive authority, it can not justify the administrative enactment of scenarios which would satisfy the factual basis for a "change of residence" divorced from the "ordinary English usage" of the statutory terms. The district court's and counsels' somewhat "bi-partisan" effort to craft an appropriate instruction went off the rails when it conflated interpretation of the elements of the criminal offense with the Attorney General's guidance about "pieces of information" that a sex offender must provide "*if and when"* he is required to update his registration. *Nichols*, p. 110-111 (emphasis added). See also, *United States v. Ward,* 2014 WL 6388502 (USDC N.D.Florida) (Guidelines, Part VI). The reviewing circuit court believed the expansion of the "change of residence" element was warranted because it advanced the statute's "purpose" and the Justice Department's objective of locking down all of the sex offenders who were "lost" under the previous patchwork of state-run programs. *United States v. Kebodeaux*, 570 U.S. 387, 399, 133 S.Ct. 2496, 186 L.Ed.2d 540 (2013).

Defying common sense and the "ordinary English usage" of the term "resides," as counseled very clearly in *Nichols v. United States,* 578 U.S. 104, 111, 136 S.Ct. 1113, 194 L.Ed.2d 324 (2016)(quoting *Abramski v. United States,* 573 U.S. 169, 197, 134 S.Ct. 2259, 2277, 189 L.Ed.2d 262 (2014)(Scalia, J., dissenting), one of

the passages adopted from the Guidelines gave the government the alternative of proving that the offender "resides" . . . [either] "where [he] stations himself during the day (re-defining the plain text of the statute) *or* [where he] sleeps at night (more akin to the "ordinary, English usage" of the word "resides" (brackets, parentheses and emphasis added). In *Nichols*, the Court found the meaning of "resides" to be unambiguous. Justice Alito chided the government for its resistance to a straightforward reading of the statutory text. "[N]o one in ordinary speech uses language in such a "strained and hyper-technical way." *Nichols*, at p. 109. In spite of Nichols' binding precedent, finding the statutory text unambiguous, the district court allowed the administrative agency's interpretation to supersede the judicial interpretation. *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820, (2005)

Delegation/"Skidmore deference"

The *Loper Bright* opinion does appear to carve out one vaguely defined exception for "delegated interpretive authority." SORNA §112(b), 34 U.S.C. §20912(b); and see, *Loper Bright*, 144 S.Ct., at p. 2275 (Justice Gorsuch's concurring opinion). SORNA delegated to the Attorney General of the United States the authority to issue guidelines "to interpret and implement SORNA." Guidelines, p. 38044 (I. Introduction). *Loper Bright* also cites *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) for the proposition that the courts must give respectful consideration for another branch's interpretation of the law. However, the Court "fix[es] the boundaries of [the] delegated authority." H. Monaghan, *Marbury and the*

Administrative State, 83 Columb.L.Rev. 1, 27 (1983). *Loper Bright*, 144 S.Ct., at p. 2263. The SMART Guidelines were issued principally "to provide guidance and assistance to covered jurisdictions," Guidelines, p. 38044, by describing the method and means of implementing, including the content of the sex offender registration and notification programs the jurisdictions were required to adopt in order to qualify for law enforcement funding.

SORNA and the Guidelines are vague about the extent to which the delegation of authority to interpret and implement SORNA was intended to define statutory terms. The only part of the Guidelines that explicitly undertakes such a task is Part VIII, in which "resides" and "lives" is given a temporal threshold of "at least 30 days" 73 FR38062. Trial counsel conceded this much. However, at the government's urging, the district court judge also incorporated lengthy passages from Part VI, which is expressly described as "informational content" that must be obtained by a jurisdiction and included in its registry, but only "if and when" a sex offender is required to register, according to *Nichols, supra*, pp. 110-111.

Conclusion

Whether the government continues to defend the subject jury instruction based on deference or delegation, from the presentation of this case to the grand jury through the circuit court appeal, the government'a position has been that the "change of residence" element of the failure to register offense was satisfied by the defendant's frequent visits to Elkins, West Virginia — his "base" or "hub" — where he shopped, exercised and hung out, during the day. He had no house, apartment,

tent, campsite or R.V. in Elkins, or anywhere in Randolph County, West Virginia. He did not stay overnight or sleep in his car, under a bridge, at a shelter, on a park bench or on a friend's couch in Randolph County. The Petitioner did, however, testify that he stayed at campgrounds in four (4) different counties in three (3) different states during the relevant time period. That evidence was not challenged by the government, and it was supported by the U.S. Marshals' seizure of his tent and sleeping bag at the last campground, which he was unable to return to after his September 29, 2019 arrest.

The Petitioner's conviction stands on the sandy ground of convoluted semantics and the application of a legal doctrine whose "best by" date has expired. The government insisted on the application of *Chevron* deference, which was grounded in the argument that the term "resides" was rendered ambiguous because its synonym "lives" was qualified by the adjective "habitually." The government maintained that the ambiguity created by the word "habitually" warranted *Chevron* deference. Even if/when *Chevron* did apply, the government and the district court judge deferred to the wrong part of the Guidelines. The administrative exercise included an earnest attempt to close the loophole of sex offenders "without a fixed abode." The Attorney General did this by cataloging scenarios involving transient sex offenders, but it was error to treat these scenarios as a definitive interpretation of statutory terms that triggered the obligation to register. The expanded concept of "resides/lives" included the sex offenders day-time meanderings, and not only as extrinsic evidence of where he lived, but as conclusive proof that he lived "where [he] stationed himself during the day." The undisputed facts of the case

notwithstanding, the appeals court panel distinguished *Nichols*, applied *Chevron*, and found that Kokinda's textual argument offended the "purpose" of SORNA. The panel found that Kokinda's Aristotelian travels stretched *Nichols*' hypothetical about transitory lodging beyond the breaking point, because he might travel "indefinitely." *United States v. Kokinda*, 93 F.4th 635, 646 (2024). If Kokinda's nomadic scenario is contrary to the spirit of SORNA but not contradicted by the text, it is still not for the courts to repair the breach. Returning to *Loper Bright*, and if overruling *Chevron* mandates the application of the rule of lenity, the facts of this case can not sustain a conviction. The court erred in rejecting *Nichols*' binding precedent and adopting the wrong part of the administrative guidelines. These errors compounded to blur the boundary of the factual circumstances that were deemed sufficient to trigger the obligation to register. It was plain error for the district court to give this overbroad instruction and refuse to grant a judgment of acquittal. The Court could put an end to any further speculation about the survival of some vestige of delegated *Chevron* deference vis-a-vis the rule of lenity by rendering a summary reversal and acquittal rather than a remand to an unsympathetic panel of the circuit court.

Respectfully Submitted,

/s/ David W. Frame

David W. Frame
Counsel of Record
The Law Office of David Frame
Nationwide building
493 Washington Avenue, Suite 2
Clarksburg, West Virginia 26301
dwframe@framelaw.com

Counsel for Petitioner