No. 22-976

In The
Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

MICHAEL CARGILL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PACIFIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is one of the most experienced nonprofit legal foundations of its kind. It frequently litigates questions of *Chevron*[2] deference, including whether *Chevron* applies to statutes carrying criminal penalties, and PLF attorneys have participated in numerous cases before this Court addressing judicial deference to agency interpretations. *See, e.g.*, *Sackett v. EPA*, 598 U.S. 651 (2023); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109 (2018); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006).

Although the government does not argue for deference in this case, *see* Pet. Br. at 43, at least three circuit courts in related cases have concluded that ATF's interpretation of the firearms statutes at issue is entitled to *Chevron* deference, trumping the rule of lenity. *See Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 909 (6th Cir. 2021) (op. of White, J.), *cert. denied*, 143 S. Ct. 83 (2022);[3] *Aposhian v. Barr*, 958 F.3d 969, 975, 982 (10th Cir. 2020), *cert. denied*, 143 S. Ct. 84 (2022); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 27 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020). Indeed, those courts deferred to ATF's interpretation even though, as here,

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[1] No party's counsel authored any part of this brief. No person or entity, other than Amicus Curiae and its counsel, paid for the brief's preparation or submission.

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

[3] The circuit court in *Gun Owners* affirmed the district court decision by an equally divided court.

ATF "consistently refused to invoke *Chevron* deference." *Aposhian v. Wilkinson*, 989 F.3d 890, 896 (10th Cir. 2021) (Tymkovich, C.J., dissenting after *en banc* consideration).

In contrast, eight judges on the Fifth Circuit below correctly concluded that ATF is not entitled to deference in part because "the statute which the Final Rule interprets imposes criminal penalties." Pet. App. 36a. That conclusion is correct. PLF files this amicus brief to urge the Court to make clear that the rule of lenity, rather than *Chevron* deference, applies to ambiguous statutes that carry criminal penalties.

SUMMARY OF ARGUMENT

The rule of lenity requires that ambiguous statutes must be interpreted in favor of criminal defendants if other standard interpretive tools cannot resolve the ambiguity. This longtime rule promotes the principle of due process and the separation of powers. And although it applies most obviously in criminal cases, consistency requires that the rule of lenity apply equally in civil cases where the statute at issue carries criminal penalties for the same alleged conduct, as many federal statutes do.

This Court has not resolved the tension that arises when an agency promulgates a statutory interpretation of an ambiguous statute that is at odds with the interpretation required by the rule of lenity. Amicus urges the Court to use this case to clarify that the conflict should be resolved in favor of lenity. Lenity is a traditional interpretive tool that should apply before asking whether an agency interpretation is reasonable. And deferring to an agency under

Chevron would be contrary to the Court's non-deferential approach in other areas of criminal law; it would also undermine due process and the separation of powers.

That conclusion is further supported by this Court's decision in *Sackett v. EPA*, 598 U.S. 651 (2023), where it declined to defer to EPA's interpretation of the Clean Water Act. Noting the criminal penalties in the Act, the Court held that EPA must provide "clear evidence that it is authorized to regulate in the manner it proposes." *Id.* at 679. The Court should follow that same reasoning and hold that the rule of lenity trumps administrative interpretations of ambiguous statutes.[4]

ARGUMENT

I. The rule of lenity promotes due process and the separation of powers.

The rule of lenity is a "venerable," "time-honored interpretive guideline," *Liparota v. United States*, 471 U.S. 419, 427 (1985), that predates the Constitution and "is perhaps not much less old than [statutory] construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 343 (2012) (lenity "reflect[s] the spirit of the common law"). It requires that once other standard interpretive tools have been applied, remaining ambiguity or uncertainty in the scope of criminal

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[4] Amicus takes no position on whether the firearms statutes in this case are ambiguous or whether that ambiguity can be resolved by other standard interpretive tools.

statutes must be resolved in favor of defendants. *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019); *see also United States v. Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (en banc) ("[I]f [Congress'] directions are unclear, the tie goes to the presumptively free citizen and not the prosecutor.").

This rule reinforces two vital constitutional principles. *See United States v. R.L.C.*, 503 U.S. 291, 308–09 (1992) (Scalia, J., concurring). First, it protects due process by "ensur[ing] that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota*, 471 U.S. at 427. Because there is no "fair warning" when a statute fails to use language "that the common world would understand," *McBoyle v. United States*, 283 U.S. 25, 27 (1931), fundamental fairness requires that unclear criminal statutes be construed against the drafter—*i.e.*, the government.

Second, the rule of lenity safeguards the separation of powers, "assuring that the society, through its representatives, has genuinely called for the punishment to be meted out." *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring). In requiring ambiguous language to be construed against the government, the rule "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota*, 471 U.S. at 427; *see also United States v. Kozminski*, 487 U.S. 931, 952 (1988) (lenity "maintain[s] the proper balance between Congress, prosecutors, and courts"). It ensures that criminal sanctions are established by the branch of government most accountable to the people, rather than by an unaccountable bureaucracy or interested prosecutor.

II. The rule of lenity applies in civil cases regarding statutes that carry criminal penalties.

The rule of lenity applies not only during criminal prosecutions, but in civil actions brought under any of the numerous regulatory statutes that authorize federal agencies to impose both criminal and civil penalties for the same conduct, such as the Gun Control Act. *See* 18 U.S.C. §§ 922, 923.[5] That is because lenity is a rule of construction that instructs a court how to "cho[ose] . . . between two readings" of a statute, *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221 (1952), and "help[s] give authoritative meaning" to ambiguous language, *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality op.). A statute's "authoritative meaning" cannot vary depending on whether a case is civil or criminal; if lenity requires a particular interpretation, that interpretation must apply across the board. *See United States v. Santos*, 553 U.S. 507, 523 (2008) (plurality op.) ("[T]he rule of lenity is an additional reason to remain consistent [in statutory interpretation]."); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring) ("[A] statute is not a chameleon" whose meaning "change[s] from case to case."); *Moore v. Smith*, 360 F. Supp. 3d 388, 398 n.8 (E.D. La. 2018) ("A court cannot waffle between opposing

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[5] Other prominent examples include: the Clean Water Act, 33 U.S.C. § 1319(b) & (c); the Sherman Antitrust Act, 15 U.S.C. §§ 1–37a; the Securities Exchange Act, 15 U.S.C. § 78j; and the Occupational Safety and Health Act, 29 U.S.C. § 666.

interpretations of a statute depending on a civil or criminal context[.]”).

That conclusion is well supported by this Court’s precedent. For example, in *Thompson/Ctr. Arms Co.*, the Court applied lenity “in a civil setting” to resolve ambiguity in a statute with “criminal applications.” 504 U.S. at 517–18. Similarly, in *Leocal v. Ashcroft*, it applied lenity “[b]ecause we must interpret the statute consistently, whether . . . in a criminal or noncriminal context.” 543 U.S. 1, 11 n.8 (2004). Other decisions have reached the same conclusion.[6]

III. The rule of lenity takes precedence over *Chevron* deference.

Even with Petitioners’ disclaiming deference in this case, the decisions in *Gun Owners of America*, *Aposhian*, and *Guedes*—granting *Chevron* deference to ATF’s interpretation of the firearms statutes despite that same disclaimer of deference—raise the question: if an agency promulgates an interpretation of an ambiguous statute that is contrary to the interpretation required by the rule of lenity, which should a court follow? Indeed, because of the lower courts’ dogged application of deference and explicit rejection of the rule of lenity, despite ATF’s disavowal of *Chevron*, this case demonstrates the pernicious force of reflexive deference to agency interpretation.

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[6] *See, e.g.*, *Kasten v. Saint–Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011); *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (a statute can have only a single meaning and “[t]he lowest common denominator, as it were, must govern”); *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003); *see also* Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 Harv. L. Rev. F. 179, 207 & n.146 (2018).

See, e.g., *Aposhian*, 989 F.3d at 896 (Tymkovich, C.J., dissenting) ("Under the panel majority's theory, a party that challenges an agency's interpretation of a rule is forced to dance around *Chevron*, even where the government has not invoked it. *Chevron* becomes the Lord Voldemort of administrative law, 'the-case-which-must-not-be-named.'").

This Court has not conclusively resolved the tension between *Chevron* and lenity. *See Esquivel-Quintana v. Sessions*, 581 U.S. 385, 397–98 (2017). To the extent that any form of *Chevron* deference survives this Court's forthcoming decisions in *Loper Bright Enters. v. Raimondo* (No. 22-451) and *Relentless, Inc. v. Dep't of Commerce* (No. 22-1219), this Court should conclude that the time-honored rule of lenity prevails over the relatively recent doctrine of *Chevron* deference.

In interpreting any statute, the court's first obligation is to "exhaust all the traditional tools of construction." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quotation omitted). Only if those tools cannot resolve statutory ambiguity is *Chevron* deference even a possibility. Thus, *Chevron* regularly gives way to other interpretive tools and canons, such as the doctrine of constitutional avoidance, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001), the presumption against retroactivity, *I.N.S. v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001), and the presumption against implied causes of action, *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001). In such cases, "there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." *St. Cyr*, 533 U.S. at 320 n.45. Likewise, even

though lenity is an interpretive rule of last resort, it is nonetheless a traditional tool that a court must apply to ambiguous statutes *before* asking whether an agency interpretation is reasonable. *See United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity [to] resolve the ambiguity . . . .").

That conclusion is a necessary corollary of the rule that there is no deference to the executive when it comes to the scope of a criminal law. For example, in *Abramski v. United States*, 573 U.S. 169 (2014), this Court noted that ATF—as in this case—had changed its view of how to interpret a criminal statute. But even "put[ting] aside" that inconsistency, the Court stated, "[w]e think ATF's old position no more relevant than its current one—which is to say, not relevant at all." *Id.* at 191. Instead, "criminal laws are for courts, not for the Government, to construe." *Id.* (citing *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.")). Where criminal penalties are at stake, a court may not defer to an agency's preferred statutory interpretation.

Deferring to the government's interpretation would undermine the due process and separation of powers values that animate the rule of lenity. Indeed, due process concerns are heightened as to agency interpretations, which change more frequently and erratically than general legislation (as typified by the ATF's inconsistency in this case). *See Carter*, 736 F.3d at 732 (Sutton, J., concurring) (criminal liability based

on "a remote statement issued by an administrative agency" violates due process).

And even where an agency regulation is thought to give fair notice to the public of prohibited conduct, deference still undermines the principle that "only the *legislature* may define crimes" and that "Congress cannot, through ambiguity, effectively leave that function to the courts—*much less to the administrative bureaucracy*." *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J., statement respecting the denial of certiorari) (second emphasis added); *see also Carter*, 736 F.3d at 731 (Sutton, J., concurring) ("[O]nly the legislature, the most democratic and accountable branch of government, should decide what conduct triggers these consequences."). Put simply, when a statute implicates the rule of lenity, there is no room for *Chevron* deference.[7]

This Court's recent decision in *Sackett v. EPA*, 598 U.S. 651 (2023), supports the view that deference to agency interpretations must give way to the rule of lenity. That case involved application of the Clean Water Act, which carries both civil and criminal

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[7] The Fifth Circuit opinions below disagreed as to how much ambiguity is necessary to invoke the rule of lenity. *Compare* Pet. App. 63a–65a (Higginson, J., dissenting) (asserting that lenity is not implicated because this case involves only "garden-variety ambiguity," not "*grievous* ambiguity"), *with* Pet. App. 61a n.3 (Ho, J., concurring in part and in the judgment) (discussing the "longstanding commitment to lenity in cases of 'reasonable doubt'"). But regardless of the terminology used, in amicus's view, any ambiguity serious enough to satisfy Step One of *Chevron* is also enough to implicate the rule of lenity.

penalties. *See* 33 U.S.C. § 1319(b) & (c).[8] In defining the term "waters of the United States" under the Act, EPA in *Sackett* requested deference regarding its preferred "significant nexus test." 598 U.S. at 679. That test, although developed in the civil context, has been used to prosecute criminally for alleged violations of the Act. *See, e.g.*, *United States v. Robertson*, 704 F. App'x 705, 705 (9th Cir. 2017), *cert. granted and judgment vacated*, 139 S. Ct. 1543 (2019).

This Court rejected EPA's plea for deference, holding that under well-established canons of statutory construction, EPA must provide "clear evidence that it is authorized to regulate in the manner it proposes." 598 U.S. at 679. Although the *Sackett* majority did not invoke the rule of lenity by name, it noted that "EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties" and that "[d]ue process requires Congress to define penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 680 (quotations omitted). Following the logic of *Sackett*, the Court should hold that where other interpretive tools cannot resolve statutory ambiguity, the rule of lenity trumps administrative interpretations.

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[8] Notably, the Tenth Circuit in *Aposhian* relied on its past deference to EPA's interpretation of the Clean Water Act to conclude that *Chevron* trumps the rule of lenity. 958 F.3d at 984 (citing *United States v. Hubenka*, 438 F.3d 1026 (10th Cir. 2006)).

IV. Lower court decisions preferring deference over lenity are unpersuasive.

All three circuit court decisions preferring *Chevron* deference over lenity rely on footnote 18 from this Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). *See Gun Owners*, 19 F.4th at 901; *Guedes*, 920 F.3d at 24; *Aposhian*, 958 F.3d at 982–83. In that footnote, the Court asserted that it "ha[s] 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." *Babbitt*, 515 U.S. at 704 n.18.

That opaque statement cannot bear the weight that lower courts have placed upon it, for four reasons highlighted by the dissents in those cases. First, the *Babbitt* footnote consisted of "abbreviated reasoning" that "did not create any binding rule about the relationship between lenity and *Chevron*." *Aposhian*, 989 F.3d at 901 (Tymkovich, C.J., dissenting); *see also id.* at 904 (Eid, J., dissenting) (asserting that the *Babbitt* footnote "is not a mandate").

Second, later Supreme Court decisions undermined the *Babbitt* footnote's rationale by recognizing that "*Chevron* review does not apply to a statute/rule with criminal sanctions." *Guedes*, 920 F.3d at 41 (Henderson, J., concurring & dissenting in part) (citing *Apel*, 571 U.S. at 369, and *Abramski*, 573 U.S. at 191). Given those decisions, the *Babbitt* footnote should properly be read as only "suggest[ing] . . . that a regulation with a criminal sanction *can* violate the rule of lenity but conclud[ing] that the

regulation at issue . . . did not do so." *Id.*; *see Babbitt*, 515 U.S. at 704 n.18 (noting that "[e]ven if" some administrative regulations "offend the rule of lenity," the regulation at issue in *Babbitt* "cannot be one of them").

Third, applying *Chevron* rather than lenity is particularly inappropriate for a statute such as the Gun Control Act, "[g]iven the breadth of the criminal prohibition and the limited nature of the exceptions giving rise to civil ramifications." *Aposhian*, 989 F.3d at 905 (Eid, J., dissenting). In that context, there is "ample reason to doubt that Congress would have intended that deference be paid" to agency interpretations. *Id.* at 906.

Fourth, and crucially, the *Babbitt* footnote "addresses only one of the concerns underlying the rule of lenity—fair notice—but not the other—the separation of powers." *Aposhian*, 989 F.3d at 901 (Tymkovich, C.J., dissenting). Lenity's separation-of-powers concern is particularly acute when, as here, an agency redefines a statute to criminalize behavior that Congress has not deemed "worthy of punishment." *Id.* at 900.

In sum, *Babbitt*'s superficial reference to the interplay of *Chevron* deference and lenity is outdated and an outlier. As Justice Scalia noted almost 20 years later, the *Babbitt* footnote is irreconcilable with "the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Whitman*, 135 S. Ct. at 354–55 (Scalia, J., statement respecting denial of certiorari) (calling *Babbitt* a "drive-by ruling" that "deserves little weight").

CONCLUSION

If the definition of "machinegun" is ambiguous (a question on which amicus takes no position), then the rule of lenity applies, instead of *Chevron* deference.

DATED: January 2024.

Respectfully submitted,

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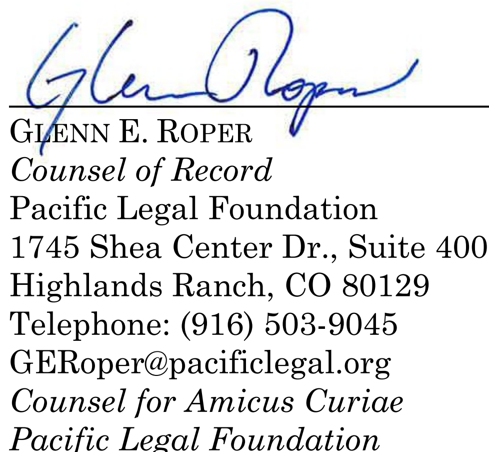
for the Fifth Circuit

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the BRIEF OF PACIFIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT contains 3,138 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 26, 2024.



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AFFIDAVIT OF SERVICE

I, Renee Goss, of lawful age, being duly sworn, upon my oath state that I did, on the 26th day of January, 2024, send out from Omaha, NE 3 package(s) containing 3 copies of the BRIEF OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

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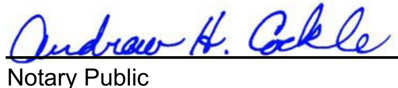
Subscribed and sworn to before me this 26th day of January, 2024.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

State of Nebraska – General Notary
ANDREW COCKLE
My Commission Expires
April 9, 2026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