No. 20-51016

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,
Plaintiff - Appellant,

v.

ROBERT M. WILKINSON, Acting U.S. Attorney General;
UNITED STATES DEPARTMENT OF JUSTICE;
REGINA LOMBARDO, in her official capacity as Acting Director
of the Bureau of Alcohol, Tobacco, Firearms and Explosives;
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Texas
No. 1:19-CV-349-DAE (Hon. David Alan Ezra)

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, IN SUPPORT OF NEITHER PARTY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded in 1973 and is widely regarded as one of the most experienced and successful nonprofit legal foundations of its kind. PLF attorneys have participated as lead counsel or counsel for amici in cases addressing judicial deference to agency interpretations of statutes and regulations. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018) (interpretation of Clean Water Act venue statute); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016) (*Auer* deference to agency staff testimony); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (*Auer* deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "navigable waters").

[1] All parties consent to the filing of this brief. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person other than amicus contributed money intended to fund preparing or submitting the brief.

PLF frequently litigates questions of *Chevron*[2] deference on behalf of its clients, including the question of whether *Chevron* applies to statutes carrying criminal penalties. In this case, the district court below correctly concluded that ATF is not entitled to any deference for its statutory interpretation because "the law before [the Court] carries the possibility of criminal sanctions." ROA.549 (quoting *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari)). And as the district court correctly noted, "*Chevron* does not apply to criminal statutes." ROA.549. That is because the rule of lenity requires that ambiguity be construed in favor of criminal defendants, not the government.

Other courts, however, have concluded that *Chevron* deference *does* apply to ATF's interpretation of the statutes at issue in this case, trumping the rule of lenity. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 27 (D.C. Cir. 2019) (concluding that when both *Chevron* and the rule of lenity are applicable, courts should

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

follow *Chevron*), *cert. denied*, 140 S. Ct. 789 (2020); *Aposhian v. Barr*, 958 F.3d 969, 975, 982 (10th Cir. 2020) (concluding that there is no "general rule against applying *Chevron* to agency interpretations of statutes with criminal law implications"). PLF files this amicus brief to emphasize the importance of the rule of lenity and to urge the Court not to follow these contrary cases.

ARGUMENT

I. THE RULE OF LENITY PROMOTES DUE PROCESS AND THE SEPARATION OF POWERS

The rule of lenity is a "venerable" and "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 United States v. Reedy*, 304 F.3d 358, 367 n.13 (5th Cir. 2002) ("[T]his principle [of lenity] has a long and established history in the Supreme Court and this circuit."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 343 (2012) (lenity "reflect[s] the spirit of the common law"); Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. Pub. Int. L.J. 101, 108–11 (2016) (discussing early Supreme Court cases).

The rule of lenity requires, once other standard interpretive tools have been considered, that remaining serious ambiguity or uncertainty in the scope of criminal statutes be resolved in favor of defendants. *See United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (discussing "the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor"); *United States v. Orellana*, 405 F.3d 360, 371 (5th Cir. 2005) (stating that the rule of lenity should be used "after other canons of construction have proven unsatisfactory") (internal quotation marks omitted).

The rule of lenity arises from—and reinforces—two vital constitutional principles: due process and the separation of powers. *See United States v. R.L.C.*, 503 U.S. 291, 308–09 (1992) (Scalia J., concurring). It protects due process by "ensur[ing] that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota*, 471 U.S. at 427; *see also United States v. Singleton*, 946 F.2d 23, 24 (5th Cir. 1991) (lenity "requires that ambiguous statutes be construed in favor of defendants, so that members of an innocent citizenry are not surprised by being prosecuted for acts that they could not know were criminal"). Because there is no "fair warning" when a criminal statute fails to use

language "that the common world will understand," *Orellana*, 405 F.3d at 371 (quoting *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.

The rule of lenity also 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); *see also United States v. Marek*, 238 F.3d 310, 322 (5th Cir. 2001) (lenity is based on the "awareness that it is the legislature and not the courts that should define criminal activity"). 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. It thereby ensures that the branch of government most accountable to the people establishes criminal sanctions, rather than an unaccountable bureaucracy, interested prosecutor, or remote judiciary.

II. THE RULE OF LENITY APPLIES IN CIVIL CASES TO STATUTES THAT CARRY BOTH CRIMINAL AND CIVIL PENALTIES

The rule of lenity's application during criminal prosecutions is clear. But what of *civil* actions under one of the numerous regulatory statutes that authorize federal agencies to impose both criminal and civil penalties? The Gun Control Act is one such statute. *See* 18 U.S.C. §§ 922, 923. Other 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; the Food, Drug, and Cosmetic Act, 21 U.S.C. § 333; and the Occupational Safety and Health Act, 29 U.S.C. § 666. Does lenity require that ambiguities in such "dual-application" statutes be construed against the government in civil actions, when no criminal prosecution has been brought?

The answer is yes. Lenity is a rule of construction that instructs a court how to "cho[ose] . . . between two readings," *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221 (1952), and that "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 from case to case; if lenity

applies to ambiguous statutory language, it 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 [as to a statute's proper 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, 399 n.8 (E.D. La. 2018) ("A court cannot waffle between opposing interpretations of a statute depending on a civil or criminal context[.]").

That conclusion is well supported by Supreme Court precedent. For example, in *United States v. Thompson/Ctr. Arms Co.*, the Supreme 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*, the Court applied lenity "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." 543 U.S. 1, 11 n.8 (2004). Other decisions of the Court have reached the same conclusion.[3] These cases confirm that a

[3] *See 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,

statute that could lead to either civil or criminal penalties for the same conduct must be interpreted under the rule of lenity, even in civil cases.

III. THE RULE OF LENITY TAKES PRECEDENCE OVER *CHEVRON* DEFERENCE

This case potentially[4] raises an additional question: if an agency promulgates a rule interpreting an ambiguous statute in a way that is contrary to the interpretation required by the rule of lenity, which interpretation should a court follow? The Supreme Court has not conclusively resolved this question. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017). But as explained below, in that context the time-honored rule of lenity must prevail over the relatively recent doctrine of *Chevron* deference.

Of course, in interpreting a 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.

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must govern"); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003); *Crandon v. United States*, 494 U.S. 152, 158 (1990); *see also* Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 Harv. L. Rev. F. 179, 207 & n.146 (2018).

[4] *Amicus* takes no position on whether the statutes at issue in this case are ambiguous.

Thus, *Chevron* regularly gives way to other interpretive tools and canons, such as the doctrine of constitutional avoidance, *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 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 "represents a last resort," *United States v. Arrieta*, 862 F.3d 512, 516 (5th Cir. 2017), it is nonetheless one of the traditional interpretive tools that a court must apply *before* turning to whether an agency's statutory 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 . . . .").

The conclusion that lenity must take precedence over *Chevron* is a necessary corollary of the rule that there is no deference to the executive in the area of criminal law. For example, in *Abramski v. United States*, 573 U.S. 169 (2014), the Supreme 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.")). In other words, where criminal penalties are at stake, a court may not defer to an agency's preferred statutory interpretation.

The same conclusion must hold true for dual-application statutes in a civil context. Whatever *Chevron*'s virtues, deferring to the government's statutory interpretation in that setting undermines the due process and separation of powers values that animate the rule of lenity. *See Marek*, 238 F.3d at 322. 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 730, 732 (Sutton, J., concurring) (arguing that 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" of prohibited conduct, alleviating the due process concerns, deference to the agency in this context still undermines the "equally important" 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 730–31 (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.

There are only two alternatives to this conclusion, both of which are unpalatable. The first is to apply *Chevron* in civil cases but give preference to the rule of lenity in criminal cases. But that would lead to the exact same statutory language carrying a different meaning in different contexts, resulting in a fractured and confusing trap for the unwary—and conflicting with the bedrock principle that a court "must interpret [a] statute consistently." *Leocal*, 543 U.S. at 11 n.8. The second

option is to universally apply *Chevron* deference, even in criminal cases. Not only is that contrary to precedent, *Abramski*, 573 U.S. 169, but requiring courts to accept prosecutors' pronouncements of law would do incalculable damage to the separation of powers and the liberty it seeks to preserve. The *only* option consistent with justice and fairness is to hold that the rule of lenity takes precedence over *Chevron* deference.

IV. DECISIONS BY OTHER CIRCUITS PREFERRING DEFERENCE OVER LENITY ARE UNPERSUASIVE

As noted above, panels of the D.C. and Tenth Circuits have concluded that *Chevron* deference trumps the rule of lenity with regard to the gun-control statutes at issue in this case. *See Guedes*, 920 F.3d at 27; *Aposhian*, 958 F.3d at 983. Neither of those decisions is persuasive—both garnered strong dissents, and the Tenth Circuit decision avoided *en banc* rehearing by the slimmest of margins. *See Aposhian v. Wilkinson*, No. 19-4036, 2021 WL 833986, at *1 (10th Cir. Mar. 5, 2021) (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, and Carson, JJ.).[5] If the

[5] The Tenth Circuit panel decision was originally vacated and set for rehearing, *see Aposhian v. Barr*, 973 F.3d 1151 (10th Cir. 2020), but after supplemental briefing and argument, a bare 6-5 majority of the en banc court vacated the rehearing order as improvidently granted, reinstating the panel decision, 2021 WL 833986, at *1.

Court reaches the question of lenity versus *Chevron* deference, it should decline to follow these decisions.

Both the D.C. and Tenth Circuit panel majorities rested their decisions on a single footnote from the Supreme Court decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). *See Guedes*, 920 F.3d at 24; *Aposhian*, 958 F.3d at 982–83. In that footnote, the Supreme 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. It further stated that "[e]ven if" some regulations interpreting criminal statutes "provide such inadequate notice of potential liability as to offend the rule of lenity," the regulation at issue in *Babbitt* "cannot be one of them." *Id.*

That footnote cannot bear the weight that the D.C. and Tenth Circuit panel majorities placed upon it, for four reasons. First, it consisted of "abbreviated reasoning" that "did not create any binding rule about the relationship between lenity and *Chevron* in all circumstances." *Aposhian*, 2021 WL 833986, at *9 (Tymkovich, C.J., dissenting); *see also*

id. at *12 (Eid, J., dissenting) (asserting that the *Babbitt* footnote "is not a mandate" and that just because it "may *allow* application of *Chevron* when criminal penalties are involved does not mean that it *commands* deference be applied").

Second, Supreme Court decisions following *Babbitt* undermined the 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., dissenting) (citing *Apel*, 571 U.S. at 369, and *Abramski*, 573 U.S. at 191). In light of those later decisions, the *Babbitt* footnote "suggests . . . that a regulation with a criminal sanction *can* violate the rule of lenity but concluded that the regulation at issue . . . did not do so." *Id.* (emphasis added).

Third, the application of *Chevron* rather than the rule of lenity is particularly inappropriate as to a statute such as the Gun Control Act, "given the breadth of the criminal prohibition and the limited nature of the exceptions giving rise to civil ramifications." *Aposhian*, 2021 WL 833986, at *12 (Eid, J., dissenting). There is "ample reason to doubt that Congress would have intended that deference be paid given the substantial criminal consequences at stake." *Id.* at *13.

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*, 2021 WL 833986, at *9 (Tymkovich, C.J., dissenting). This concern is particularly acute when, as here, an agency seeks to redefine a statute to criminalize behavior that Congress has not deemed "worthy of punishment." *Id.* at *8 (Tymkovich, C.J., dissenting).

Both the D.C. and Tenth Circuit panels failed to recognize that *Babbitt*'s superficial analysis of the interplay of *Chevron* deference and the rule of lenity is outdated and an outlier. As Justice Scalia noted when looking back at *Babbitt* almost 20 years after its issuance, the footnote on which the D.C. and Tenth Circuit panels relied 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"). This Court should therefore decline to follow the D.C. and Tenth Circuit panel majorities.

CONCLUSION

If the Court concludes that the definition of "machinegun" in the statutes at issue in this case is ambiguous (a question on which amicus takes no position), then it should apply the rule of lenity, rather than *Chevron* deference.

DATED: March 15, 2021.

Respectfully submitted,

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Dated: March 15, 2021.

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