No. 20-51016

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,
Plaintiff - Appellant,

v.

MERRICK B. GARLAND, 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 REHEARING *EN BANC*

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, undersigned counsel of record certifies that the following listed persons and entities have an interest in this amicus brief. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae:

> Pacific Legal Foundation, a nonprofit corporation organized under the laws of California. *Amicus* 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) is one of the most experienced nonprofit legal foundations of its kind. It frequently litigates questions of *Chevron* deference, including whether *Chevron* applies to statutes with criminal penalties, and PLF attorneys have participated in numerous cases addressing judicial deference to agency interpretations. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (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 panel in this case declined to address whether *Chevron* deference applies, *see Cargill v. Garland*, 20 F.4th 1004, 1009 n.4 (5th Cir. 2021), the district court concluded that ATF is not entitled to deference because "*Chevron* does not apply to criminal statutes." ROA.549 (quotation omitted). That conclusion is correct because the rule of lenity requires that ambiguity in the scope of criminal statutes be construed in favor of defendants, not the government.

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[1] No party's counsel authored this 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.

Other courts, however, have concluded that *Chevron* deference *does* apply to ATF's interpretation, 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.); *Aposhian v. Barr*, 958 F.3d 969, 975, 982 (10th Cir. 2020); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 27 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020).[2] PLF files this amicus brief to emphasize the importance of the rule of lenity and to urge the *en banc* Court to grant rehearing, weigh in on the burgeoning split of authority, and address the important *Chevron*-versus-lenity issue.

ARGUMENT

The rule of lenity is a "venerable," "time-honored interpretive guideline," *Liparota v. United States*, 471 U.S. 419, 427 (1985), that "is perhaps not much less old than [statutory] construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also* 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). It requires that once other standard interpretive tools have

[2] *But see United States v. Alkazahg*, 81 M.J. 764, 778 (N-M. Ct. Crim. App. 2021) (concluding that the statute was not ambiguous but that the rule of lenity would apply if it were).

been applied, remaining ambiguity in the scope of criminal statutes be resolved in favor of defendants. *See United States v. Davis*, 139 S. Ct. 2319, 2333 (2019); *United States v. Orellana*, 405 F.3d 360, 371 (5th Cir. 2005) (lenity applies "after other canons of construction have proven unsatisfactory").

I. Lenity Promotes Due Process and the Separation of Powers

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 prevents "an innocent citizenry" from "being prosecuted for acts that they could not know were criminal"). Because there is no "fair warning" when a criminal statute fails to specify penalties using language "that the common world will understand," *Orellana*, 405 F.3d at 371 (citation omitted), fundamental fairness requires that unclear criminal statutes be construed against the drafter—*i.e.*, the government.

The rule 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) ("[I]t is the legislature and not the courts that should define criminal activity[.]"). In construing ambiguity against the government, the rule "strikes the appropriate balance between the legislature, the prosecutor, and the court." *Liparota*, 471 U.S. at 427. It ensures that the most accountable branch of government establishes criminal sanctions, rather than an unaccountable bureaucracy or interested prosecutor.

II. Lenity Applies to Civil Actions Brought Under Statutes That Carry Criminal Penalties

The rule applies not only during criminal prosecutions, but in *civil* actions under the numerous regulatory statutes that authorize federal agencies to impose both criminal and civil penalties, such as the Gun Control Act. *See* 18 U.S.C. §§ 922, 923.[3] Lenity is a rule of construction that instructs a court how to "cho[ose] . . . between two readings," *United*

[3] 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; and the Occupational Safety and Health Act, 29 U.S.C. § 666.

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.). Because a statute's "authoritative meaning" cannot vary from case to case, if lenity applies, 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 [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 interpretations of a statute depending on a civil or criminal context[.]").

That conclusion is well supported by Supreme Court 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*, the Court 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,[4] confirming that even in civil actions, a statute containing civil and criminal penalties for the same conduct must be interpreted under the rule of lenity.

III. Lenity Takes Precedence Over *Chevron* Deference

This case raises a question the Supreme Court has not conclusively resolved: if an agency by rule interprets an ambiguous[5] statute contrary to the interpretation required by the rule of lenity, which should a court follow? *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017). As explained below, the time-honored rule of lenity must prevail over the relatively recent doctrine of *Chevron* deference.

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 ambiguity is *Chevron* deference even possible. Thus, *Chevron* regularly

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[4] *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).

[5] Amicus takes no position on whether the statute at issue here is ambiguous, although the Tenth and D.C. Circuits have concluded that it is. *Aposhian*, 958 F.3d at 975; *Guedes*, 920 F.3d at 27.

gives way to other interpretive tools and canons, such as 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 . . . 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), and applies only "where text, structure, and history fail to establish that the Government's position is unambiguously correct," *United States v. Granderson*, 511 U.S. 39, 54 (1994), it is nonetheless a traditional interpretive tool that a court must apply *before* turning to Step Two of *Chevron*.

That lenity takes precedence over *Chevron* is a necessary corollary of the rule that there is no deference to the executive regarding criminal laws. 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. "[P]ut[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 interpretation.

The same holds true for statutes containing both civil and criminal penalties for the same conduct. Whatever *Chevron*'s virtues, deferring to the government's 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 with 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, deference 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); *see also Carter*, 736 F.3d at 730–31 (Sutton, J., concurring) (setting criminal consequences must be left to "the legislature, the most democratic and accountable branch of government"). When a statute implicates the rule of lenity, there is no room for *Chevron* deference.

Both alternatives to this conclusion are unacceptable. The first would be to apply *Chevron* civilly but lenity in criminal cases. But that would lead to the same statutory language carrying a different meaning in different contexts, resulting in a 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 would be to apply *Chevron* deference even in criminal cases. Not only is that contrary to precedent, *Abramski*, 573 U.S. 169, but requiring courts to accept the prosecutor's 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 for lenity to take precedence over *Chevron* deference.

IV. Decisions Preferring Deference Over Lenity Are Unpersuasive

The Tenth and D.C. Circuits majority opinions concluding that *Chevron* trumps lenity as to the gun-control statutes at issue in this case are unpersuasive. Both garnered strong dissents, and the Tenth Circuit opinion avoided *en banc* rehearing by the slimmest of margins. *See Aposhian v. Wilkinson*, 989 F.3d 890, 891 (10th Cir. 2021) (Tymkovich, C.J., dissenting).[6] The Court should decline to follow those opinions.

Both relied on a single footnote 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.

That statement 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

[6] A bare 6-5 majority of the *en banc* Tenth Circuit vacated its earlier rehearing order as improvidently granted, reinstating the panel decision.

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 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). Given those decisions, the *Babbitt* footnote should be read as "suggest[ing] . . . that a regulation with a criminal sanction can violate the rule of lenity but . . . 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, "given 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." *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). That 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 analysis of the interplay of *Chevron* deference and lenity is outdated and an outlier. As Justice Scalia noted almost 20 years later, 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 decline to follow the Tenth and D.C. Circuit panel majorities and instead follow the far more persuasive reasoning of the district court below that "deference 'has no role to play when liberty is at stake.'" ROA.549 (quoting *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., statement concerning the denial of certiorari)).

CONCLUSION

The Court should grant the petition for rehearing *en banc* and hold that the rule of lenity takes precedence over *Chevron* deference.

DATED: February 4, 2022.

Respectfully submitted,

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