No. 19-4036

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W. CLARK APOSHIAN,
Plaintiff - Appellant,

v.

WILLIAM BARR, Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; THOMAS E. BRANDON, Acting Director 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 District of Utah
No. 2:19-CV-00037-JNP-BCW (Hon. Jill N. Parrish)

AMICUS CURIAE BRIEF OF ROGER J. ("JACK") LAPANT, JR., IN SUPPORT OF NEITHER PARTY

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Jack LaPant is a California farmer and the defendant in *United States v. LaPant*, No. 2:16-cv-01498-KJM-DB (E.D. Cal.). The United States sued Mr. LaPant civilly under the Clean Water Act, alleging that by plowing his own farmland he violated the Act's prohibition on unpermitted discharges of dredged or fill material into navigable waters. *See* 33 U.S.C. §§ 1311(a), 1344(a). Whether his plowing is subject to the Act depends on whether the Act's exemption for "normal farming . . . activities such as plowing," *id.* § 1344(f)(1)(A), applies. The United States argues it does not because the term "normal farming activities" is ambiguous and Army regulations that narrowly interpret the term, *see* 33 C.F.R. § 323.4(a)(1)(ii), are entitled to *Chevron*[2] deference. In response, Mr. LaPant contends that any ambiguity in the statute should be resolved through application of the rule of lenity.

Resolution of Mr. LaPant's case will thus depend on the choice between *Chevron* deference and the rule of lenity, where the underlying statute carries both civil and criminal penalties for the same conduct. *See*

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[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 and his counsel contributed money intended to fund preparing or submitting the brief.

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

33 U.S.C. § 1319(b) & (c). Because the case before this *en banc* Court likewise presents a choice between deference and lenity, and because other courts will look to this Court's decision on that issue, Mr. LaPant submits this brief addressing question 3 of the Court's supplemental order: "Is *Chevron* step-two deference applicable where the government interprets a statute that imposes both civil and criminal penalties?" If it reaches that question, the Court should answer that the rule of lenity takes precedence over *Chevron* deference.

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* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 343 (2012) (lenity "reflect[s] the spirit of the common law").[3] The rule requires, once other standard interpretive tools have been

[3] *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 applying the rule of lenity).

considered, that remaining serious ambiguity or uncertainty in the scope of criminal statutes be resolved in favor of defendants. *See United States v. Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (en banc) ("Our job is always in the first instance to follow Congress's directions. But if those directions are unclear, the tie goes to the presumptively free citizen and not the prosecutor."); *see also United States v. Smith*, 756 F.3d 1179, 1191 (10th Cir. 2014); *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019).

The rule of lenity arises from—and reinforces—two vital constitutional principles. *Rentz*, 777 F.3d at 1113; *see also United States v. R.L.C.*, 503 U.S. 291, 308–09 (1992) (Scalia J., concurring). First, the rule of lenity 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 criminal 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.

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); *see also Rentz*, 777 F.3d at 1113 ("The rule of lenity seeks to

ensure legislatures, not prosecutors, decide the circumstances when people may be sent to prison."). 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

Numerous regulatory statutes 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. Another is the Clean Water Act, under which amicus Mr. LaPant has been sued civilly and under which the same conduct can subject a defendant to civil or criminal liability.[4] *See* 33 U.S.C. § 1319(b) & (c). These "dual-application" statutes raise the question: does lenity require that ambiguities be construed against the government in a *civil* action where the underlying statute carries criminal penalties?

[4] Other examples include, *e.g.*, 15 U.S.C. §§ 1–37a (Sherman Antitrust Act); 15 U.S.C. § 78j (Securities Exchange Act); 21 U.S.C. § 333 (Food, Drug, and Cosmetic Act); 29 U.S.C. § 666 (Occupational Safety and Health Act).

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, 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.").

As a panel of this Court has noted, that conclusion is well supported by Supreme Court precedent, under which "a narrowing interpretation . . . driven by the rule of lenity must apply equally to civil litigants to whom lenity would not ordinarily extend." *In re Woolsey*, 696 F.3d 1266, 1277 (10th Cir. 2012). 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).[5] These cases confirm that a statute carrying civil and 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

The case before the *en banc* Court raises an additional question: if an agency promulgates a statutory interpretation that is contrary to the interpretation required by the rule of lenity, which should a court follow?[6] There, too, 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

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[5] *See also Kasten v. Saint–Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011); *Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003); *Crandon v. United States*, 494 U.S. 152, 158 (1990); Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 Harv. L. Rev. F. 179, 207 & n.146 (2018).

[6] The Supreme Court has not conclusively resolved this question. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017). To the extent that the panel decision in *Olmos v. Holder*, 780 F.3d 1313 (10th Cir. 2015), holds that *Chevron* overrides lenity, it should be overruled.

(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 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 "is a rule of last resort," *United States v. Richter*, 796 F.3d 1173, 1188 (10th Cir. 2015), it is nonetheless a traditional interpretive tool that a court must apply *before* turning to 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 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 holds true for dual-application statutes where the government has sued civilly. 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 Rentz*, 777 F.3d at 1113. 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 (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) (second emphasis added); *see also Carter*, 736 F.3d at 730 (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 prefer *Chevron* in civil cases but follow the rule of lenity in criminal cases. But that would lead to the 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 is to universally apply *Chevron* deference, even in criminal cases. Not only is that contrary to precedent, *Abramski*, 573 U.S. at 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, where it applies, takes precedence over *Chevron* deference.[7]

CONCLUSION

If the Court concludes that the definition of "machinegun" in 26 U.S.C. § 5845(b) is ambiguous (a question on which amicus takes no position), then it should apply the rule of lenity, rather than *Chevron* deference.

DATED: October 13, 2020.

Respectfully submitted,

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[7] The panel relied on *Babbitt v. Sweet Home Chapter of Communities* as a case that seemingly preferred *Chevron* deference over lenity. *Aposhian v. Barr*, 958 F.3d 969, 982–84 (10th Cir. 2020) (citing 515 U.S. 687 (1995)). But *Babbitt* is an outdated outlier that 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 (Scalia, J., statement respecting denial of certiorari) (calling *Babbitt* a "drive-by ruling" that "deserves little weight").

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because this brief contains 2,257 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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DATED: October 13, 2020.

s/Glenn E. Roper
GLENN E. ROPER

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s/ Glenn E. Roper
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