No. 20-51016

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,
Plaintiff-Appellant,

v.

MERRICK 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.

On Appeal From the United States District Court
For the Western District of Texas, No. 1:19-cv-349
Honorable David A. Ezra

BRIEF FOR AMICUS CURIAE DUE PROCESS INSTITUTE IN SUPPORT OF APPELLANT AND URGING REVERSAL

John D. Cline
LAW OFFICE OF JOHN D. CLINE
50 California St., Suite 1500
San Francisco, CA 94111
Telephone: (415) 662-2260

Attorney for Amicus Curiae
DUE PROCESS INSTITUTE

CERTIFICATE OF INTERESTED PERSONS
Cargill v. Garland
Case No. 20-51016

The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Bates, Christopher A.

Bureau of Alcohol, Tobacco, Firearms and Explosives

Cargill, Michael

Cato Institute

Chenoweth, Mark

Cline, John D.

Due Process Institute

Ezra, Honorable David A.

Garland, Merrick, U.S. Attorney General

Glover, Matthew J.

Hinshelwood, Bradley

Kruckenberg, Caleb

Lombardo, Regina, in her official capacity as Acting Director of BATFE

Mitchell, Jonathan F.

Samp, Richard

Shapiro, Ilya

Simpson, Steven M.

Soskin, Eric J.

United States Department of Justice

Wright, Abby Christine

DATED: March 15, 2021

Respectfully submitted,

/s/
John D. Cline
Attorney of Record for Amicus Curiae Due Process Institute

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND RULES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the criminal justice system. Formed in 2018, the Due Process Institute has participated as amicus curiae in a number of cases before the Supreme Court and the courts of appeals presenting important criminal justice issues. We believe that the rule of lenity--"the most venerable and venerated of interpretive principles," *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring)--should take precedence over conflicting canons of construction for statutes with criminal application, given the risk to life and liberty. In defense of this principle, the Due Process Institute participated as amicus in two previous bump stock cases raising the question whether the rule of lenity prevails over *Chevron* deference: *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), *reinstated*, 2021 U.S. App. LEXIS 6706 (10th Cir. Mar. 5, 2021) (en banc), and *Guedes v. BATFE*, 140 S. Ct. 789 (2020) (on petition for writ of certiorari).[1]

All parties have consented to the filing of this amicus brief.

---

[1] Counsel for amicus states that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

When *Chevron* deference and the rule of lenity conflict in the interpretation of an ambiguous statute with both criminal and civil applications, which should prevail? For the reasons that follow, the statute should be construed in accordance with the rule of lenity. That is the only approach that preserves the separation of powers and ensures fair warning to criminal defendants.[2]

I. THE RULE OF LENITY AND *CHEVRON* DEFERENCE.

As Chief Justice Marshall observed, the rule of lenity "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60

[2] The government did not rely on *Chevron* deference in the district court, ROA.546, and that court concluded that *Chevron* does not apply to statutes with criminal application, ROA.549-50. We address the issue nonetheless, because two courts of appeals considering the bump stock regulation have applied *Chevron* deference despite the government's refusal to rely on it. *See Guedes v. BATFE*, 920 F.3d 1, 17-28 (D.C. Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 789 (2020); *Aposhian v. Barr,* 958 F.3d 969, 982-84 (10th Cir. 2020), *reinstated*, 2021 U.S. App. LEXIS 6706 (10th Cir. Mar. 5, 2021) (en banc).

(1987); *see, e.g., Skilling v. United States*, 561 U.S. 358, 410-11 (2010); *Scheidler v. NOW*, 537 U.S. 393, 409 (2003).

Chevron deference has a far shorter pedigree.[3] In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court instructed courts to *consider* agency "interpretations" and to give them such weight as their persuasiveness suggested. But *Skidmore* did not require courts to *adopt* those interpretations; courts remained free to construe statutes as they thought best.

Forty years later, the Supreme Court appeared to make deference to agency interpretations of statutes mandatory under some circumstances. In *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), the Court held that where Congress has empowered an agency to interpret a statute, courts should defer to the agency's reasonable interpretation of an ambiguous statutory provision. *See id*. at 844-45. Although *Chevron* deference has always been controversial,[4] it remains the law.

---

[3] As Chief Judge Tymkovich (joined by four other Tenth Circuit judges) recently observed, "*Chevron* is of recent provenance. It is a rule of interpretive convenience, rooted in notions of agency expertise and political accountability. The rule of lenity, by contrast, provides a time-honored interpretive guideline. It addresses core constitutional concerns: fair notice and the separation of powers." *Aposhian v. Wilkinson*, No. 19-4036, slip op. at 20-21 (10th Cir. Mar. 5, 2021) (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting from denial of rehearing en banc) (quotation and citations omitted).

[4] *See, e.g.,* Paul J. Larkin, Jr., *Chevron and Federal Criminal Law*, 32 J.L. & Politics 211, 218-19 & n.33 (2017) (citing articles critical of *Chevron*); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring) (criticizing *Chevron* primarily on separation of powers grounds).

What happens when the rule of lenity and *Chevron* deference conflict? When an ambiguous statute has criminal application and an agency has formally adopted a broad and, apart from the rule of lenity, reasonable interpretation, must a court defer to that interpretation, or must it instead construe the statute strictly, as the rule of lenity requires?

The law is settled that a court must apply the rule of lenity, rather than *Chevron* deference, when interpreting a purely criminal statute. As the Supreme Court declared, "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014); *see, e.g., 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."); *United States v. Garcia*, 707 Fed. Appx. 231, 234 (5th Cir. 2017) (*Abramski* clarified that no deference is due agency interpretation of criminal statute).

But the Supreme Court's decisions are less clear when a statute has both civil and criminal applications.[5] In *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), a civil tax case, the Court interpreted the phrase "making" a "firearm" in the National Firearms Act, 26 U.S.C. § 5821. Because the statute had both civil and criminal applications, the plurality invoked the rule of lenity, construed the statute

[5] The Court has held that a particular statutory term must be given the same meaning in both civil and criminal contexts. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

narrowly, and found that the defendant had not "made" a firearm and therefore was not subject to tax. *See id*. at 517-18. The plurality gave no deference to the BATF's conclusion that the defendant's conduct--packaging an unregulated pistol with a kit allowing its conversion into a regulated "firearm"--amounted to "making" a "firearm." The plurality rejected Justice Stevens' contention in dissent that the rule of lenity should not apply in a civil setting and that "the Court should approach this case like any other civil case testing the Government's interpretation of an important regulatory statute." *Id*. at 526 (Stevens, J., dissenting); *see id*. at 518 n.10 (plurality responds to Justice Stevens' dissent).

Thompson/Center stands for the proposition that the rule of lenity prevails over an agency interpretation of an ambiguous statute with both civil and criminal applications. In *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995), however, the Court (in an opinion by Justice Stevens) clouded the picture. *Babbitt* involved interpretation of the terms "take" and "harm" in the Endangered Species Act. The Department of Interior adopted a broad interpretation of those terms, which a group of small landowners and logging companies challenged. The challengers invoked the rule of lenity, because the Endangered Species Act has both civil and criminal applications. The Court rejected this argument in a footnote. It declared:

> We have applied the rule of lenity in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute--whether pistols with short barrels and attachable shoulder stocks are short-barreled rifles--where no

> regulation was present. See [*Thompson/Center Arms Co.*]. We have 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. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the "harm" regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them.

Id. at 704 n.18. Instead of the rule of lenity, the Court applied *Chevron* deference and upheld the regulation interpreting the statute. *See id*. at 708.[6]

Nine years later, in an immigration case, the Court found the rule of lenity applicable to 18 U.S.C. § 16 (defining "crime of violence"), because the statute has criminal as well as civil applications. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (citing *Thompson/Center Arms*). The Court gave no deference to the interpretation of the Board of Immigration Appeals, and it did not cite *Babbitt*.

In the wake of *Thompson/Center Arms*, *Babbitt*, and *Leocal*, judges and law professors have differed over the proper interpretive approach to an ambiguous

[6] For critiques of *Babbitt*'s "drive-by" footnote 18, *Whitman v. United States*, 574 U.S. 1003, 1005 (2014) (statement of Scalia & Thomas, JJ., respecting the denial of certiorari), see, e.g., *id*. at 1004-05; *Aposhian v. Wilkinson*, No. 19-4036, slip op. at 25-27 (10th Cir. Mar. 5, 2021) (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting from denial of rehearing en banc); *Guedes v. BATFE*, 920 F.3d 1, 40-41 (D.C. Cir. 2019) (Henderson, J., dissenting in part), *cert. denied*, 140 S. Ct. 789 (2020); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030-31 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev'd*, 137 S. Ct. 1562 (2017); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734-36 (6th Cir. 2013) (Sutton, J., concurring).

statute with both criminal and civil applications. Some urge *Chevron* deference.[7] Others invoke the rule of lenity.[8] This Court's decisions do not clearly resolve the question. *See, e.g., Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360, 379 n.14 (5th Cir. 2018); *United States v. Orellana*, 405 F.3d 360, 369 (5th Cir. 2005); *United States v. Flores*, 404 F.3d 320, 326-27 (5th Cir. 2005).

For the reasons that follow, the rule of lenity should prevail when interpreting an ambiguous statute with both criminal and civil applications.

---

[7] *See, e.g., Aposhian v. Barr,* 958 F.3d 969, 982-84 (10th Cir. 2020), *reinstated*, 2021 U.S. App. LEXIS 6706 (10th Cir. Mar. 5, 2021) (en banc); *Guedes v. BATFE,* 920 F.3d 1, 17-28 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020); *United States v. Royer*, 549 F.3d 886, 899 (2d Cir. 2008); Sanford N. Greenberg, *Who Says It's a Crime? Chevron Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. Pitt. L. Rev. 1 (1996).

[8] *See, e.g., Guedes v. BATFE*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari); *Whitman v. United States*, 574 U.S. 1003, 1005 (2014) (statement of Scalia & Thomas, JJ., respecting denial of certiorari); *Aposhian v. Wilkinson*, No. 19-4036, slip op. at 19-27 (10th Cir. Mar. 5, 2021) (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting from denial of rehearing en banc); *Guedes v. BATFE*, 920 F.3d 1, 35-42 (D.C. Cir. 2019) (Henderson, J., dissenting in part), *cert. denied*, 140 S. Ct. 789 (2020); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155-56 (10th Cir. 2016) (Gorsuch, J., concurring); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027-32 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev'd*, 137 S. Ct. 1562 (2017); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729-35 (6th Cir. 2013) (Sutton, J., concurring); Larkin, *supra* note 4, 32 J.L. & Politics at 232-38.

II. WHEN BOTH THE RULE OF LENITY AND *CHEVRON* DEFERENCE CAN APPLY, A COURT SHOULD APPLY THE RULE OF LENITY.

The statute at issue here--26 U.S.C. § 5845(b)--has both criminal and civil applications. This Court should not give *Chevron* deference to the BATFE interpretation of the statutory term "machinegun." It should instead interpret the statute narrowly, in accordance with the rule of lenity. As Justice Gorsuch put it recently, "[W]hatever else one thinks about *Chevron*, it has no role to play when liberty is at stake." *Guedes v. BATFE*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari).[9]

The rule of lenity should control for several reasons. To begin, applying *Chevron*, rather than lenity, undermines the principle that "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *see, e.g., Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."). As Judge Sutton

[9] We assume for purposes of this argument that § 5845(b) is sufficiently ambiguous to trigger both *Chevron* deference and the rule of lenity. We recognize that appellant contends otherwise, Brief for Appellant at 40-48, and we take no position on that question.

has observed, "[I]f agencies are free to ignore the rule of lenity, the state could make an act a crime in a remote statement issued by an administrative agency. The agency's pronouncement need not even come in a notice-and-comment rule. All kinds of administrative documents, ranging from manuals to opinion letters, sometimes receive *Chevron* deference." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731-32 (6th Cir. 2013) (Sutton, J., concurring); *see, e.g., Aposhian v. Wilkinson*, No. 19-4036, slip op. at 22 (10th Cir. Mar. 5, 2021) (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting from denial of rehearing en banc) ("The government expects an uncommon level of acuity from average citizens to know that they must conform their conduct not to the statutory language, but to the interpretive gap-filling of an agency which may or may not be upheld by a court."). The presumption that citizens know the law is already strained in a world chock-full of crimes; it will lose all contact with reality if extended to the emanations of federal agencies.

But the right to fair warning is not the only reason to apply the rule of lenity rather than *Chevron* deference to statutes with criminal application. "[E]qually important, [the rule of lenity] vindicates the principle that only the *legislature* may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts--much less to the administrative bureaucracy."

Whitman v. United States, 574 U.S. 1003, 1005 (2014) (statement of Scalia & Thomas, JJ., respecting the denial of certiorari) (emphasis in original).

These separation of powers concerns have powerful implications for individual liberty. Choosing *Chevron* deference over the rule of lenity concentrates the power to prosecute and punish in a single branch of government, contrary to the constitutional design of dispersed powers. "With deference to agency interpretations of statutory provisions to which criminal prohibitions are attached, federal administrators can in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Id*. at 1004. In the words of then-Judge Gorsuch,

> *Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive). Add to this the fact that today many administrative agencies wield vast power and are overseen by political appointees (but often receive little effective oversight from the chief executive to whom they nominally report), and you have a pretty potent mix.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) (quotation and brackets omitted). By maintaining the allocation of responsibility among the three branches, the rule of lenity protects criminal defendants against the concentration of executive power that *Chevron* encourages.

In addition to concentrating legislative and judicial power in the executive branch--and thus risking prosecutorial overreach--*Chevron* deference in the criminal context shifts responsibility for pronouncing moral judgments from the people's representatives to unelected bureaucrats:

> Making something a crime is serious business. It visits the moral condemnation of the community upon the citizen who engages in the forbidden conduct, and it allows the government to take away his liberty and property. The rule of lenity carries into effect the principle that only the legislature, the most democratic and accountable branch of government, should decide what conduct triggers these consequences. By giving unelected commissioners and directors and administrators carte blanche to decide when an ambiguous statute justifies sending people to prison, [*Chevron* deference] diminishes this ideal.

Carter, 736 F.3d at 731 (Sutton, J., concurring); *see, e.g.,* Larkin, *supra* note 4, 32 J.L. & Politics at 235 ("The criminal law reflects underlying moral judgments that it is the responsibility of the people to make in a democracy. Agencies lack expertise in making these moral judgments; their skills lie elsewhere."). As Chief Judge Tymkovich observed in another bump stock case, "ATF has no authority to substitute its moral judgment concerning what conduct is worthy of punishment for that of Congress." *Aposhian v. Wilkinson*, No. 19-4036, slip op. at 23 (10th Cir. Mar. 5, 2021) (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting from denial of rehearing en banc).

CONCLUSION

For the foregoing reasons, the Court should give no deference to the BATFE interpretation of 26 U.S.C. § 5845(b) and should construe the statute strictly, in accordance with the rule of lenity.

DATED: March 15, 2021

Respectfully submitted,

/s/ John D. Cline

John D. Cline

Attorney for Amicus Curiae
DUE PROCESS INSTITUTE

CERTIFICATE OF COMPLIANCE

Case No. 20-51016

I certify that pursuant to Fed. R. App. P. 29(a)(5) and 32(a), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 3009 words.

/s/ John D. Cline
John D. Cline

CERTIFICATE OF SERVICE
When All Case Participants Are Registered For
The Appellate CM/ECF System

U.S. Court of Appeals Docket Number: 20-51016

I hereby certify that on the 15th day of March 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ John D. Cline
John D. Cline