No. 21-159

In The Supreme Court of the United States

W. CLARK APOSHIAN,

Petitioner,

v.

MERRICK GARLAND, Attorney General of the United States; U.S. DEPARTMENT OF JUSTICE; BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES; and MARVIN RICHARDSON, Acting Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE DUE PROCESS INSTITUTE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether courts should defer under *Chevron* to an agency interpretation of federal law when the federal government affirmatively disavows *Chevron* deference.

2. Whether the *Chevron* framework applies to statutes with criminal-law applications.

3. Whether, if a court determines that a statute with criminal-law applications is ambiguous, the rule of lenity requires the court to construe the statute in favor of the criminal defendant, notwithstanding a contrary federal agency construction.

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INTEREST OF AMICUS CURIAE[1]

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, because due process is the guiding principle that underlies the Constitution's solemn promises to "establish justice" and to "secure the blessings of liberty." U.S. Const., pmbl.

The Due Process Institute believes 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 this case in the court of appeals and in two other recent cases raising the question whether the rule of lenity prevails over *Chevron* deference: *Cargill v. Garland*, No. 20-51016 (5th Cir.) (pending oral argument), and *Guedes v. BATFE*, 140 S. Ct. 789 (2020) (on petition for writ of certiorari).

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[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice of amicus' intention to file this amicus brief ten days before the due date. Petitioner has filed a blanket consent to amicus filings. A letter of consent from counsel for respondents has been received by undersigned counsel.

SUMMARY OF ARGUMENT

This case presents an ideal opportunity to decide an important, unresolved, and recurring question: 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?[2] For the reasons that follow, amicus contends that in all such instances, the statute should be construed in accordance with the rule of lenity. That is the only approach that ensures fair warning to criminal defendants and preserves the separation of powers, a crucial bulwark against government encroachment on individual liberty.

ARGUMENT

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

As Chief Justice Marshall observed, the rule of lenity "is perhaps not much less old than construction itself. It 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."

[2] Although amicus supports the entire petition, we focus on the third question presented.

McNally v. United States, 483 U.S. 350, 359-60 (1987); *see, e.g., Skilling v. United States*, 561 U.S. 358, 410-11 (2010); *Scheidler v. NOW*, 537 U.S. 393, 409 (2003). Although it may not be constitutionally mandated, the rule of lenity is "rooted in a constitutional principle." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 332 (2000).

Chevron deference has a far shorter pedigree.[3] In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), this Court declared that

> the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those

[3] As Chief Judge Tymkovich (joined by four other judges) observed below, "*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*, 989 F.3d 890, 899 (10th Cir. 2021) (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting from denial of rehearing en banc) (quotation and citations omitted).

> factors which give it power to persuade, if lacking power to control.

Id. at 140. *Skidmore*, in other words, 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, this 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 must 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.

What happens when the rule of lenity and *Chevron* deference conflict? In other words, when an ambiguous statute has criminal application and an agency has formally adopted a broad (and reasonable) interpretation--whether, as here, through formal rulemaking, or through some other agency process--must a court defer to that interpretation, or must it instead construe the statute strictly, as the rule of lenity requires?

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[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).

The law is settled that a court must apply the rule of lenity, rather than *Chevron* deference, when interpreting a purely criminal statute. As this 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.").

But the 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 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.,

[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).

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; *cf. Gun Owners of America, Inc. v. Garland*, 992 F.3d 446 (court declines to apply *Chevron* deference to bump stock regulation; "[w]hile *Babbitt* certainly mentioned deference, it did not hold that an agency's interpretation of a criminal statute is entitled to *Chevron* deference, and thus falls within the Court's proclamations in *Apel* and *Abramski*"), *vacated for rehearing en banc*, 2 F.4th 576 (6th Cir. 2021).[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

[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; *Gun Owners*, 992 F.3d at 456-57; *Aposhian v. Wilkinson*, 989 F.3d 890, 901 (10th Cir. 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); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030-31 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev'd on other grounds*, 137 S. Ct. 1562 (2017); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734-36 (6th Cir. 2013) (Sutton, J., concurring).

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 statute with both criminal and civil applications. Some, like the court of appeals majority in this case, urge *Chevron* deference.[7] Others invoke the rule of lenity.[8] This Court's decisions do not clearly resolve the question. As we discuss in the next part, considerations of fair warning and separation of powers require use of the rule of lenity in construing

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[7] *Aposhian v. Barr,* 958 F.3d 969, 982-84 (10th Cir. 2020), *reinstated*, 989 F.3d 890 (10th Cir. 2021) (en banc); *see, e.g., Guedes v. BATFE,* 920 F.3d 1, 17-28 (D.C. Cir. 2019), *on remand*, 2021 U.S. Dist. LEXIS 30926 (D.D.C. Feb. 19, 2021) (applying *Chevron* deference and granting BATFE motion for summary judgment); *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 the denial of certiorari); *Gun Owners of America, Inc. v. Garland*, 992 F.3d 446, 468, *vacated for rehearing en banc*, 2 F.4th 576 (6th Cir. 2021); *Aposhian v. Wilkinson*, 989 F.3d 890, 901 (10th Cir. 2021) (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting from denial of rehearing en banc); *Gallardo v. Barr*, 968 F.3d 1053, 1059-61 (9th Cir. 2020) (dicta); *Guedes v. BATFE*, 920 F.3d 1, 35-42 (D.C. Cir. 2019) (Henderson, J., dissenting in part); *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.

ambiguous statutes with both criminal and civil applications.

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

The statute at issue--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).

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 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) (citing *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002)); *see, e.g., Aposhian v. Wilkinson,* 989 F.3d 890, 899-900 (10th Cir. 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.[9] 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

[9] The BATFE has done here exactly what Justices Scalia and Thomas warned against: after taking the position for years that possession of a bump stock was legal, it then changed course and decided that (as of March 26, 2019) possession of a (lawfully acquired) bump stock is illegal. This ability to shift positions at will illustrates the danger of an unconstrained Executive Branch and also creates grave fair warning concerns.

> 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). As the now-vacated Sixth Circuit panel decision in *Gun Owners* explained:

> [D]eferring to the executive branch's interpretation of a criminal statute presents at least three serious separation-of-powers concerns: (1) it puts individual liberty at risk by giving one branch the power to both write the criminal law and enforce the criminal law; (2) it eliminates the judiciary's core responsibility of determining a criminal statute's meaning; and (3) it reduces, if not eliminates, the public's ability to voice its moral judgments because it transfers the decision-making from elected representatives in the legislature to unaccountable bureaucrats in the executive's administrative agencies.

Gun Owners, 992 F.3d at 464-65. By maintaining the proper allocation of responsibility among the three branches, the rule of lenity protects criminal defendants against the concentration of executive power (and the corresponding diminution of the judiciary's role) 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 below, "ATF has no authority to substitute its moral judgment concerning what conduct is worthy of punishment for that of Congress." *Aposhian v.*

Wilkinson, 989 F.3d 890, 900 (10th Cir. 2021) (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting from denial of rehearing en banc); *see Gun Owners*, 992 F.3d at 462 ("Whether ownership of a bump-stock device should be criminally punished is a question for our society. . . . It is not the role of the executive--particularly the unelected administrative state--to dictate to the public what is right and what is wrong.").

To ensure fair warning and preserve the separation of powers--which, in turn, protects individual liberty against government overreach--the Court should apply the rule of lenity, "the most venerable and venerated of interpretive principles." *Carter*, 736 F.3d at 731 (Sutton, J., concurring).

CONCLUSION

This case presents an ideal opportunity to address whether the rule of lenity prevails over *Chevron* deference when interpreting a statute with criminal and civil applications. The court of appeals squarely addressed that question and relied on *Chevron* deference in upholding the bump stock regulation. This Court has not spoken clearly on the issue; in particular, *Babbitt*'s opaque footnote 18 has engendered great confusion in the lower federal courts.

The petition for a writ of certiorari should be granted, the Court should hold that the rule of lenity trumps *Chevron* deference, and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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September 2021