No. 22-976

In The
Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

MICHAEL CARGILL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a non-mechanical bump stock device is a "machinegun" as defined in 26 U.S.C. § 5845(b).

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INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a keen interest in the issue presented. Multiple circuit courts of appeals have raised the applicability of the Rule of Lenity to interpretation of the statute prohibiting possession of machine guns and the proposed ATF regulations of bump stocks. The Rule of Lenity figures prominently throughout our nation's history of criminal law and deserves strengthening and clarification as a bulwark of civil rights protections in our federal republic.

[1] Rule 37 Statement: *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel has made monetary contributions to its preparation and submission.

SUMMARY OF ARGUMENT

The Court has long upheld the common law maxim of the Rule of Lenity: Unclear or ambiguous provisions of criminal law that are susceptible to multiple interpretations must be read in favor of the defendant. The present case turns in large part upon views and application of the Rule of Lenity to the subject statute. The case also provides the Court with an opportune vehicle for setting standards as to when and how to properly apply the Rule of Lenity.

The provision of the National Firearms Act at issue in this case has spawned opposing views across the circuit courts whether the language prohibiting machine guns and their component parts is clearly enough written to encompass non-mechanical bump stocks, or if the relevant provisions are too ambiguous to apply to bump stocks. Where previously the Department of Justice and the ATF maintained the statute did not cover these devices, the agency has reversed its position.

The Fifth Circuit en banc reached a majority decision for that court denying application of the statute to bump stocks, but the court's members were not unified in their views of the law's clarity or ambiguity. The per curiam opinion determined that the statute was clear and unambiguous in that it did not apply to the bump stocks. Nonetheless, the per curiam court continued to decide that if ambiguity were assumed, the Rule of Lenity would nonetheless invalidate the ATF Final Rule. Concurring opinions of the Fifth Circuit found

the statute is indeed ambiguous, and the Rule of Lenity does control the case. Finally, the dissenting opinion below suggested the relevant portion of the statute may be ambiguous, but it is not so "grievously" ambiguous as to justify invocation of the Rule of Lenity – thereby raising a dispute that has been brewing among the circuits, and indeed between some of the Court's own opinions, as to the appropriate standard for applying the Rule of Lenity.

The Rule of Lenity applies to this case, and it compels affirmance of the Fifth Circuit ruling. The Rule of Lenity is foundational to American common law, and has been well-known and applied since before the Founding. The Framers of the Constitution were well aware, and approving, of the Rule of Lenity.

The Rule of Lenity furthers and strengthens key constitutional values of our justice system. Due Process calls for fair and full notice to citizens of what conduct is criminal. Separation of powers mandates that courts not supplant the Congress, even when they might think they know what Congress wanted but failed to articulate – the penal consequences for individual liberty are too great to be risked.

The Court in this case can address the split of opinions as to how and when the Rule of Lenity should be invoked. The lately nascent view that Lenity should come to play only when such ambiguity that may be present is "grievous" threatens to nullify the saving power of the doctrine. The better view is to uphold the classic understanding of the Rule of Lenity, to forego

supposition and pretense, once a court determines there are two or more interpretations of the law, and there remains reasonable doubt as to which of those interpretations correctly applies. In those cases, a court should invoke the Rule of Lenity in favor of the defendant, find the least penal option, and await the correction and clarification of the law by the legislature.

ARGUMENT

I. The Rule of Lenity compels affirmance of the Fifth Circuit.

A. The Rule of Lenity is foundational to the Anglo-American common law.

The Rule of Lenity is a bedrock principle inextricably intertwined in the criminal jurisprudence of our common law heritage. No less than the presumption of innocence, the Rule of Lenity serves as a check on the powers of government directed toward the individual.

Before the Founding, renowned common law jurist and widely accepted authority William Blackstone defined the Rule of Lenity as a rule of statutory construction: "Penal statutes must be construed strictly." 1 WM. BLACKSTONE, COMMENTARIES *88 (1765) (showing examples where, "general words . . . being looked upon as much too loose to create a capital offence, . . . it was found necessary to make another statute."); *see also* 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE

CROWN 335 (1736); L. Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749-51 (1935). "[I]f judgments were to be the private opinions of the judge, men would then be slaves to their magistrates." 4 BLACKSTONE *371.

Other contemporary political philosophers shared the same view. *E.g.*, 1 M. DE SECONDAT, BARON MONTESQUIEU, THE SPIRIT OF LAWS 93 (Dublin 1751) ("In republics the very nature of the constitution requires the judges to follow the letter of the law. Here there is no possibility of interpreting a law against a subject, in cases where either his property, honor, or life is concerned."); *id*. at 102 ("Lenity reigns in moderate governments.").

The Framers of the Constitution understood and applied the Rule of Lenity in their creation of our federal government. U.S. CONST. art. I, § 9 (no "ex post facto Law shall be passed."); *id*. art. I, § 10 ("No State shall . . . pass any . . . ex post facto Law"); THE FEDERALIST No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("subjecting . . . men to punishment for things which, when they were done, were breaches of no law . . . ha[s] been, in all ages, the favorite and most formidable instrument[t] of tyranny."). *See also* U.S. CONST. amend. V (no deprivation "of life, liberty, or property without due process of law"); *id*. amend. VI ("the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation"); THE FEDERALIST No. 78, at 464-65 (Alexander Hamilton) ("The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated. The

judiciary, on the contrary, ... may be said to have neither FORCE nor WILL but merely judgment. . . . [T]he general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive.") (citing "the celebrated Montesquieu," *supra*).

The earliest leaders of the federal judiciary applied the Rule of Lenity and affirmed its continuing strength and relevance. Chief Justice John Marshall maintained that "penal laws are to be construed strictly; where the mind balances and hesitates between the two constructions, the more restricted construction ought to prevail." *The Adventure*, 1 F. Cas. 202, 204 (C.C.D. Va. 1812) (No. 93). This rule safeguards the right of every person to suffer only those punishments dictated by "the plain meaning of words." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Congress's use of words "high seas" could not extend criminal jurisdiction to a river in China).

Justice Joseph Story also declared it was "a principle grown hoary in age and wisdom, that penal statutes are to be construed strictly, and criminal statutes to be examined with a favorable regard to the accused." *United States v. Mann*, 26 F. Cas. 1153, 1157 (C.C.D.N.H. 1812) (No. 15,718). *See also United States v. Wilson*, 28 F. Cas. 699, 709 (C.C.E.D. Pa. 1830) (No. 16,730) ("This is a rule of construction of statutes as old and well established as law itself.").

The Court has brought to the fore the Rule of Lenity in many of its core precedents, leading up to the present case. *See*, *e.g.*, *Bittner v. United States*, 598 U.S. 85 (2023); *United States v. Santos*, 553 U.S. 507 (2008); *Liporata v. United States*, 471 U.S. 419, 427 (1985); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Comm'r v. Acker*, 361 U.S. 87, 90 (1959); *Ladner v. United States*, 358 U.S. 169, 177-78 (1958). "Time and again this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes." *Dubin v. United States*, 599 U.S. 110, 130 (2023).

Today the Rule of Lenity means that "any reasonable doubt about the application of a penal law must be resolved in favor of liberty." *Wooden v. United States*, 595 U.S. 380, 388 (2022) (Gorsuch, J., concurring); *Santos*, 553 U.S. at 515 ("When interpreting a criminal statute, we do not play the part of a mindreader."); *Wiltberger*, 18 U.S. (5 Wheat.) at 105 ("[P]robability is not a guide which a court, in construing a penal statute, can safely take."). *See also* JABEZ GRIDLEY SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 353 at 444 (1891) ("[I]f there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of a court not to inflict the penalty."); ANTONIN SCALIA & BRYAN A. GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 439 (2012) (Defining the rule of lenity as "The doctrine that ambiguity in a statute defining a crime or imposing a penalty should be resolved in a defendant's favor.").

B. The Rule of Lenity furthers dual Constitutional values.

"Since the founding, lenity has sought to ensure that the government may not inflict punishment on individuals without fair notice and the assent of the people's representatives." *Wooden*, 595 U.S. at 392 (Gorsuch, J., concurring).

1. Due Process and fair notice

Due Process principles in the Fifth and Fourteenth Amendments to the Constitution call for clear and fair notice to all persons of what actions or behaviors will constitute crimes. U.S. CONST. amend. V; *id*. amend. XIV, § 1. Individuals "can suffer penalties only for violating standing rules announced in advance." *Wooden*, 595 U.S. at 390-91 (Gorsuch, J., concurring); *see* THE FEDERALIST No. 84 (Alexander Hamilton); *see also Bittner*, 598 U.S. at 102 (2023); *Dubin*, 599 U.S. at 135-36 ("due process means that criminal statutes must provide rules 'knowable in advance'") (citing *Percoco v. United States*, 598 U.S. 319, 337 (2023) (Gorsuch, J., concurring)); *Johnson v. United States*, 576 U.S. 591, 595 (2015) ("the constitutional minimum of due process . . . provide[s] ordinary people with fair notice of the conduct [the laws] punish") (cleaned up).

Accordingly, when a law is not clear as to what it prohibits, the defendant always merits the benefit of the doubt and Lenity excuses the conduct. *See McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) ("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. Gradwell*, 243 U.S. 476, 485 (1917) ("before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute"); *Harrison v. Vose*, 50 U.S. (9 How.) 372, 378 (1850) ("In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent."). *See also Huddleston v. United States*, 415 U.S. 814, 834 n.* (1974) (Douglas, J., dissenting) (failure to apply the rule of lenity "is only another device as lacking in due process as Caligula's practice of printing the laws in small print and placing them so high on a wall that the ordinary man did not receive fair warning."); *United States v. Cardiff*, 344 U.S. 174, 176 (1952) ("The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited.").

2. Separation of Powers

The Rule of Lenity upholds separation of powers principles in the Constitution. By keeping all legislative power with the Congress, and not permitting the courts or executive agencies to enact criminal law or rules with criminal sanctions, the Rule safeguards the law-making monopoly granted to Congress in Article I. U.S. CONST. art. I, § 1; THE FEDERALIST No. 51, at 321 (J. Madison) (new national laws restricting liberty require assent of the nation's "many parts, interests and

classes"); *Wiltberger*, 18 U.S. at 95 (the Rule of Lenity keeps the power of punishment fairly "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."); *Wilson*, 28 F. Cas. at 709 (noting "the plain and universal principle that the power of punishment is vested in the legislature and not in the judicial department").

Only the legislative body explicitly granted power as the elected representatives of the people may make laws. U.S. CONST. art. I, § 1; *United States v. Bass*, 404 U.S. 336, 348 (1971) ("because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"). *See also United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (federal courts have no criminal jurisdiction, except what is given by statute); *cf*. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 41 (1881) ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community.").

"[I]t is Congress's responsibility to unambiguously define the scope of criminal conduct." *Cargill v. Garland*, 54 F.4th 447, 472 n.13 (5th Cir. 2023) (per curiam) ("Congress having failed to do so, we deploy lenity to retain the proper allocation of legislative power, not unsettle it."). And no person should be held at risk in liberty or property unless such a law clearly and specifically sets out the elements of the crime. *Wooden*, 595 U.S. at 392 (Gorsuch, J., concurring) (the

Rule of Lenity "seeks to ensure people are never punished for violating just-so rules concocted after the fact, or rules with no more claim to democratic provenance than a judge's surmise about legislative intentions."); *Bass*, 404 U.S. at 347 ("it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."); *Wiltberger*, 18 U.S. (5 Wheat.) at 96 (to "determine that a case is within the intentions of a statute, its language must authorize us to say so.").

In like manner, the clear distinction between legislative and judicial conduct prevents blurring of the boundaries between the Congress and the courts and permits the judiciary to retain its singular focus on interpreting the laws as they are written. The "Constitution prohibits the Judiciary from resolving reasonable doubts about a criminal statute's meaning by rounding up to the most punitive interpretation its text and context can tolerate." *Dubin*, 599 U.S. at 134 (Gorsuch, J., concurring); *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some Members of Congress, is the preferred result."); *Moskal v. United States*, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting) ("The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted."); *Huddleston*, 415 U.S. at 831 ("The rule is also the product of an awareness that legislators and not the courts should define criminal activity."); *United States v. Open Boat*, 27 F. Cas. 364, 357 (C.C.D.

Me. 1829) (No. 15,968) (Story, J.) ("Even where cases lie within the same mischief, if they are not provided for in the text of the act, courts of justice do not adventure on the usurpation of legislative authority to meet them."). *See also* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES §297 *180 (1840) ("No remark is better founded in human experience than that of Montesquieu, that 'there is no liberty, if the judiciary be not separated from the legislative and executive powers.'").

A further argument against judicial overreach to fill a legislative gap with the Court's own supposition, is that such drafting error can easily be corrected by Congress, while Congress cannot correct a case-specific court ruling. "A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases." THE FEDERALIST No. 81, *supra*, at 483 (Alexander Hamilton).

The Court has also made it clear, it "cannot construe a criminal statute on the assumption that the Government will use it responsibly." *Dubin*, 599 U.S. at 131 (cleaned up); *Marinello v. United States*, 584 U.S. ___, ___, 138 S. Ct. 1101, 1109 (2018); *McDonnell v. United States*, 579 U.S. 550, 576 (2016); *United States v. Stevens*, 559 U.S. 460, 480 (2010).

II. The Court can clarify the operation of the Rule of Lenity in this case.

This is not the first case to consider ambiguity in the National Firearms Act (NFA) prohibition of machine guns and machine gun parts. *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505 (1992). Finding that "[n]either the statute's language nor its structure provides any definite guidance," the Court applied the Rule of Lenity in favor of the non-governmental party. *Id*. at 513, 518. *See also id*. at 527 ("The key to resolving the ambiguity lies in recognizing that although it is a tax statute . . . the NFA has criminal applications that carry no additional requirement of willfulness.").

Different courts in recent years have diverged in their definitions and applications of the Rule of Lenity. With respect to 26 U.S.C. § 5845, the circuit courts have split as to the clarity or ambiguity of the law's text when called to decide challenges to the ATF Final Rule. *Gun Owners of Am. v. Garland*, 19 F.4th 890 (6th Cir. 2021) (en banc), *cert. denied*, ___ U.S. ___, 143 S. Ct. 83 (2022); *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) (en banc), *cert. denied sub nom. Aposhian v. Garland*, ___ U.S. ___, 143 S. Ct. 84 (2022); *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019). *See also United States v. Alkazahg*, 81 M.J. 764 (N-M. Ct. Crim. App. 2021).

A. The statute at issue bespeaks of ambiguity.

Multiple judges of the en banc Fifth Circuit considered 26 U.S.C. §5845(b) to be ambiguous as applied to bump stocks. The per curiam opinion of the Fifth Circuit discusses the issues of ambiguity, 57 F.4th at 469, and while the plurality found no ambiguity, *id*. at 473, the opinion nonetheless continued, "assuming arguendo that the relevant statute is ambiguous, . . . We conclude that the rule of lenity applies if the statute is ambiguous." *Id*. at 469.

Both concurring opinions found the statute on appeal to be ambiguous. Judge Haynes wrote, "I reluctantly conclude that the relevant statute is ambiguous such that the rule of lenity" applies. *Id*. at 473. Judge Ho also found that "the relevant language is at best ambiguous. That makes this an easy case for invoking the rule of lenity." *Id*. at 474.

Finally, the dissent spoke of the Rule of Lenity as well. Judge Higginson declared that the statute, if not clear, does not reach such a level of "grievous ambiguity" that he believed to be necessary before invoking the Rule of Lenity "as a last resort." *Id*. at 480.

B. The state of ambiguity cannot be qualified.

Ambiguity is an "uncertainty of meaning or intention, as in a contractual term or statutory provision." BLACK'S LAW DICTIONARY 93 (9th ed. 2009). *See also*

United States v. E.T.H., 833 F.3d 931, 937 (8th Cir. 2016) ("A statute is ambiguous if it is 'capable of being understood in two or more ways.'") (citing *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 77 (1985))); *Med. Transp. Mgt. Corp. v. Comm'r*, 506 F.3d 1364, 1367 (11th Cir. 2007) ("Statutory language is ambiguous if it is susceptible to more than one reasonable interpretation.").

The concept of ambiguity does not speak of a spectrum or gradation which can be metrically quantified. Ambiguity, by definition, is uncertain, amorphous and without defined boundaries or limits. A statutory term that is definite can be clearly and definitely applied – the instance would fit, or it would not fit, the defined term in the law. The contrary uncertainty ends the inquiry – if not only one interpretation is reasonable, the term or phrase cannot be further parsed, graded or compared in any precision; one cannot say that *this* ambiguous term is more or less ambiguous than *another* ambiguous term.

Just as the broader contract law principle of *contra preferentem* holds that, in interpreting documents, ambiguities are to be construed unfavorably to the drafter, BLACK'S LAW DICTIONARY, *supra*, at 377, the Rule of Lenity construes any criminal law unfavorably to the Government, as that law's drafter. *See* SCALIA & GARDNER, *supra*, § 49 at 279 ("When the government means to punish, its commands must be reasonably clear. When they are not clear, the consequences should be visited on the party more able to avoid and correct

the effects of shoddy legislative drafting – namely, the federal Department of Justice or its state equivalent."); *Santos*, 553 U.S. at 514 (Rule of Lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.").

Yet at some point in years past, courts began to parse the concept of "ambiguity," distinguishing between a common or ordinary ambiguity as opposed to "*grievous* ambiguity." *E.g.*, *Shaw v. United States*, 580 U.S. 63, 71 (2016); *cf. Wooden*, 595 U.S. at 377 (Kavanaugh, J., concurring); *Shular v. United States*, 589 U.S. ___, 140 S. Ct. 779, 788-89 (2020) (Kavanaugh, J., concurring); *United States v. Castleman*, 572 U.S. 157, 173 (2016).

A split arose between these two views of ambiguity, which triggers the Rule of Lenity: In the traditional view, the Rule of Lenity governs once "all reasonable doubts concerning [the statute's] meaning . . . operate in favor of" the defendant. *Harrison v. Vose*, 50 U.S. (9 How.) at 378; *accord Wooden*, 595 U.S. at 393 (Gorsuch, J., concurring); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Moskal v. United States*, 498 U.S. at 108 ("we have always reserved lenity for those situations in which a reasonable doubt persists"). And in opposition to that tradition, the other view restricts the Rule of Lenity to cases when the ambiguity can be deemed "grievous." *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) ("most statutes are ambiguous to some degree. . . . To invoke the rule, we must conclude that there is a 'grievous ambiguity or uncertainty' in the

statute."); *Huddleston*, 415 U.S. at 831 ("we perceive no grievous ambiguity"); *see Ocasio v. United States*, 578 U.S. 282, 295 (2016).[2]

The Government asserts the "grievous" standard in this case. Pet. Br. 44. The Court has yet to decide which of these standards should control the Rule of Lenity. 57 F.4th at 469.

The divergent methods of applying the Rule of Lenity today "provide little more than atmospherics, since it leaves open the crucial question – almost invariably present – of how much ambiguousness constitutes an ambiguity." *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, Cir. J.).

C. The Court should take this opportunity to set the reasonable doubt standard of ambiguity for the Rule of Lenity.

The Court should take this occasion to dispel the confusion and make clear that ambiguity is an indivisible concept: The inability to state what a statute means, but instead finding two or more interpretations reasonably supported, is enough to call the law ambiguous, and therefore invoke the Rule of Lenity without further ado. *Harrison v. Vose*, 50 U.S. (9 How.) at 378; *Wooden*, 595 U.S. at 395 ("the right path is the more

[2] *Muscarello* in fact found the subject statute clear enough according to the "generally accepted contemporary meaning," 524 U.S. at 39, hence there was no ambiguity, and the discussion of Lenity was *obiter dicta*. *See Wooden*, 595 U.S. at 394 & n.4.

straightforward one"). *See also* Br. of *amicus curiae* FAMM (advocating against the "grievous" standard).

One proposal, born of judicial experience and expertise, lies waiting for the Court to adopt: The Rule of Lenity's

> operation would be relatively clear if the rule were automatically applied at the outset of the textual inquiry, before any other rules of interpretation were invoked to resolve ambiguity. Treating it as a clear-statement rule would comport with the original basis for the command and would provide considerable certainty.

SCALIA & GARDNER, *supra*, § 49 at 298. *See Wooden*, 595 U.S. at 384 (Barrett, J., concurring) ("I would impute to Congress only what can fairly be imputed to it: the words of the statute."); *Santos*, 553 U.S. at 519 (divining Congress's presumptive intent "turns the rule of lenity upside-down. We interpret ambiguous criminal statutes in favor of defendants, not prosecutors."); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) ("we simply must interpret statutes verbatim").

A clear-statement rule, applying a law to a defendant only when the law's terms can be said to encompass the subject or his conduct beyond a reasonable doubt, without ambiguity supporting more than one interpretation, can resolve this area of criminal law. "Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step isn't to legislative history or the law's unexpressed purposes. The

next step is to lenity." *Wooden*, 595 U.S. at 395 (Gorsuch, J., concurring); *Yates v. United States*, 574 U.S. 528, 547-48 (2015) (if statutory analysis "leaves any doubt about the meaning," the Court would invoke the Rule of Lenity).

The Court "has always reserved lenity for those situations in which reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *United States v. R.L.C.*, 503 U.S. 291, 306 (1992) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)) (emphasis in original). This is preferable to the "grievous ambiguity" standard, because the "grievous" standard effectively nullifies the Rule of Lenity. *Wooden*, 595 U.S. at 377 (Kavanaugh, J., concurring) ("Properly applied, the rule of lenity therefore rarely if ever plays a role.").

Proponents of the "grievous" prerequisite argue that the Rule of Lenity, unconstrained, would loosen and undermine the criminal law. *Wooden*, 595 U.S. at 378 (Kavanaugh, J., concurring) ("ambiguity is in the eye of the beholder and cannot be readily determined on an objective basis. Applying a looser front-end ambiguity trigger would just exacerbate that problem."); *Johnson v. United States*, 529 U.S. 694, 713 n.13 (2000) ("in any event the rule of lenity would be Delphic").[3]

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[3] *But see* SCALIA & GARDNER, *supra*, § 61 at 352-53 ("Questions like these are appropriately asked by those who write the laws, but not by those who apply them."); *accord Harrison v. Vose*, 50 U.S. (9 How.) at 385 ("in respect to this conclusion if it be

But this is not so, as the ancient practice and meaning of the Rule of Lenity prevented the occurrence of that danger. Unsurprisingly, Chief Justice Marshall anticipated this complaint from the start, and he set forth clearly the reasons it can be dispelled.

> It is said, that notwithstanding this rule [of lenity], the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.

Wiltberger, 18 U.S. (5 Wheat.) at 95-96; *see Wilson*, 28 F. Cas. at 709 ("though the penal laws are to be

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different from the design of Congress in this act, another [act] can at once be passed").

construed strictly, they are not to be construed so strictly as to defeat the obvious intent of the legislature."); SCALIA & GARDNER, *supra*, § 49 at 301 ("Naturally, the rule of lenity has no application when the statute is clear.").

CONCLUSION

"[P]unishments should never be products of judicial conjecture about this factor or that one. They should come only with the assent of the people's elected representatives and in laws clear enough to supply fair warning to the world." *Wooden*, 595 U.S. at 396 (Gorsuch, J., concurring) (quotation marks omitted).

The Court should affirm the decision of the Fifth Circuit and rule for Respondent.

Respectfully submitted,

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