No. 22-23

In the Supreme Court of the United States

JEAN FRANCOIS PUGIN,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 8 OTHER STATES IN SUPPORT OF PETITIONER

PATRICK MORRISEY
Attorney General
OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

MICHAEL R. WILLIAMS
Senior Deputy Solicitor General

MAX A. SCHREIBER*
Fellow

Counsel for Amicus Curiae *State of West Virginia*
[additional counsel listed after signature page]

QUESTIONS PRESENTED

Under the Immigration and Nationality Act (INA), a noncitizen who is convicted of an "aggravated felony" is subject to mandatory removal and faces enhanced criminal liability in certain circumstances. One aggravated felony is "an offense relating to obstruction of justice." 8 U.S.C. § 1101(a)(43)(S). The questions presented are:

1. Whether a state offense—like petitioner's accessory-after-the-fact offense here—that does not involve interference with an existing official proceeding or investigation may constitute an "offense relating to obstruction of justice."

2. Whether, assuming that the phrase "offense relating to obstruction of justice" is deemed ambiguous, courts should afford *Chevron* deference to the Board of Immigration Appeals' interpretation of that phrase.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

When criminal defendants stand in the dock to hear their fate, their freedom should not hinge on unelected bureaucrats. Congress holds "the power to define criminal offenses and … prescribe the punishments to be imposed upon those found guilty of them." *Whalen* v. *United States*, 445 U.S. 684, 689 (1980). So Congress's will is what matters, not an executive agency's. And "[w]hen Congress has the will" to make something a crime, "it has no difficulty in expressing it." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). Thus, statutes with criminal implications should leave little room for agency judgment calls.

Yet Petitioner Jean Francois Pugin faces substantial criminal liability because a federal administrative agency—not Congress—said he should. Confronted with the question of how to define "an offense relating to obstruction of justice" in the Immigration and Nationality Act, the Fourth Circuit deferred to the judgment of the Board of Immigration Appeals instead of using the words that Congress wrote to construe the statute. As a result, Pugin could spend many more years in prison than he otherwise would, particularly should he return to the United States. See Pet.35-36. And although the court couched its choice as an ordinary use of administrative deference, see *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), it was anything but. "[C]riminal laws are for courts," not the executive, "to construe." *Abramski* v. *United States*, 573 U.S. 169, 191 (2014). Administrative deference therefore should not

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[1] Under Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

come into play when a statute has criminal implications, as the INA does.

The amici States of West Virginia, Alabama, Arizona, Idaho, Indiana, Mississippi, Montana, Nebraska, and Texas agree with Pugin that agencies should not be empowered to abrogate Americans' liberty interests through broad administrative deference and statutory reinterpretation. Applying *Chevron* deference when a statute has criminal implications offends the separation of powers. It also ignores well-established canons of construction, like lenity. States have a particular concern with shunting canons aside while elevating an agency's preferences—for if the rule of lenity might succumb to *Chevron*, then the federalism canon might, too. See *U.S. Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020). The Court should thus grant certiorari to reiterate that canons of construction play a central role in statutory interpretation, not a secondary one—even in an agency case.

Applying *Chevron* to civil-criminal statutes like the INA also extends the reach of the federal government into an area of the law meant to be "primarily a responsibility of the States." *Shinn* v. *Ramirez*, 142 S. Ct. 1718, 1730 (2022). At least at one time, "the administration of criminal justice rest[ed] with the States except as Congress, acting within the scope of those delegated powers, ha[d] created offenses against the United States." *Screws* v. *United States*, 325 U.S. 91, 109 (1945) (plurality op.). But agencies have now inserted themselves into the equation, too. And to what end? "[T]he federal criminal code" is no longer "thin, modest, and restrained." *Gamble* v. *United States*, 139 S. Ct. 1960, 2008 (2019) (Gorsuch, J., dissenting). It hardly needs another boost from Article I functionaries crafting still more extensions.

And this problem is not confined to the immigration context. "It is extraordinarily common … for a statute to carry both civil and criminal penalties." *Van Harken* v. *City of Chi.*, 103 F.3d 1346, 1350 (7th Cir. 1997). Dual civil-criminal statutes run the gamut from tax laws, 26 U.S.C. §§ 7201, 7231, 7402, to the Endangered Species Act, 16 U.S.C. § 1540, to emergency-price-control laws, see, *e.g.*, 56 Stat. 23 (1942), medical-privacy laws, 42 U.S.C. §§ 1320d–5(a)(1), 1320d–6, and more. Statutes like these—doing double civil-and-criminal duty—constitute "a category that covers a great many (most?) federal statutes today." *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorscuh, J., concurring). And many of the States here have already noted how employing deference when construing those kinds of laws can wreak havoc. See, *e.g.*, Br. Amicus Curiae of Mont., W. Va., and 20 Other States, *Gun Owners of Am.* v. *Garland* (S. Ct. Apr. 7, 2022) (No. 21-1215), 2022 WL 1093232 (arguing that *Chevron* deference should not apply to the Bureau of Alcohol, Tobacco, and Firearms interpretation of "machine gun" in the National Firearms Act). Yet if the Fourth Circuit is content to recast the INA as nothing but a civil statute with a few criminal consequences (and accordingly apply *Chevron*), then it and other courts that follow its lead will probably do the same with these other double-duty statutes, too.

In short, this case offers a chance to address a critical question for criminal defendants, States, and courts alike: whether courts should defer to an administrative agency's reading of a statute with clear criminal consequences. See, *e.g.*, *Aposhian* v. *Barr*, 958 F.3d 969, 999 (10th Cir. 2020) (Carson, J., dissenting) ("[M]y hope is that the Supreme Court will one day take up this issue and give us clear guidance."). Whether because *Chevron* deference does not apply to civil-criminal statutes at all or because

lenity resolves any ambiguity at *Chevron* Step One, deference to the agency should play no role either way. The Court should grant certiorari, address the pronounced circuit split on this issue, see Pet.17, and hold that deference has no place here.

SUMMARY OF ARGUMENT

The Court should take this case and reject applying *Chevron* here for two reasons.

I. Courts have struggled to understand whether crime-related statutes stumble at *Chevron*'s "Step Zero." The Court should confirm that agencies do not deserve deference when interpreting these statutes. Criminal or civil-criminal statutes are not the sort of statutes that courts can presume Congress tacitly empowered agencies to construe. Applying the doctrine in the criminal realm advances none of *Chevron*'s purposes. The Fourth Circuit rejected these concerns out-of-hand by declaring the INA a civil statute and nothing more. But that label ignores reality: The BIA's interpretation will directly expose Pugin and others like him to more potential criminal liability.

II. Even if a court could move past *Chevron* Step Zero when construing a criminal statute, a court should still never reach *Chevron* Step Two and defer to the agency's opinion; lenity would end the inquiry at *Chevron* Step One. A court must apply all the traditional tools of construction at Step One. The rule of lenity is one of these tools—and it requires a court to read a criminal-law-related statute narrower when some ambiguity exists. History, precedent, and plain logic confirm that lenity prevails over *Chevron* Step Two deference to any "reasonable" agency construction. In fact, the Court granted a petition for certiorari arguing exactly that just a few years ago,

Esquivel-Quintana v. *Lynch*, 137 S. Ct. 368, 369 (2016), but ultimately found it unnecessary to decide the issue, *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017). With a prime case in which to resolve that lingering question, the Court should reach it now.

REASONS FOR GRANTING THE PETITION

I. Courts Should Not Apply *Chevron* To Agency Interpretations Of Statutes With Criminal Consequences.

1. The Fourth Circuit got one thing right: it started with the "Step Zero" question of "whether *Chevron* applies at all." Pet.App.8a. Some courts decline to take even that step when dealing with any formal agency rulemaking or adjudication; the First Circuit, for instance, thought that "[t]he BIA's administration of the INA falls within [a] safe harbor for formal adjudications … and thus falls within *Chevron*'s domain." See, *e.g.*, *Silva* v. *Garland*, 27 F.4th 95, 112 (1st Cir. 2022). Those courts are wrong, as "the existence of a formal rulemaking [or adjudicatory] proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring). Even formal administrative interpretations might fail at Step Zero, for instance, when they address major questions without clear congressional authorization. See *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2610 (2022). They might fail when the agency purports to construe a statute that Congress never charged it with administering. See *Metro. Stevedore Co.* v. *Rambo*, 521 U.S. 121, 137 n.9 (1997). Or they might fail when they concern statutory issues that fall within the courts' traditional domain. See *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990).

So the Fourth Circuit started down the right road—but the wheels came off when it went on to apply Step Zero. This case could have fallen into that last category of cases—those that are traditionally for the courts alone. After all, this Court has "never held that the Government's reading of a criminal statute is entitled to any deference." *United States* v. *Apel*, 571 U.S. 359, 369 (2014). "Whether the Government interprets a criminal statute too broadly ... or too narrowly ..., a court has an obligation to correct its error." *Abramski*, 573 U.S. at 191. And because "[t]he lowest common denominator"—that is, the least restrictive form of the statute—"must govern" when a statute has both criminal and civil applications, *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005), the principles from *Apel* and *Abramski* should apply to dual civil-criminal statutes, too. See also, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

Even so, the Fourth Circuit thought that whether to pair deference with purely criminal statutes was still an open issue—one reflecting an "ongoing debate" implicating "serious questions." Pet.App.8a. It then avoided that question by recharacterizing the INA as a purely "civil statute" that "might impact the scope of criminal liability" only in an "attenuated" way. Pet.App.8a-9a. Having redefined the problem, the court then saw no problem in applying *Chevron*.

2. One need only return to *Chevron* itself to see the very real problem in applying it to a provision like the INA's "aggravated felony" definition. Step Zero should have stopped the Fourth Circuit from applying *Chevron* deference at the start.

First, "practical agency expertise" may have been a "principal justification[]" behind *Chevron*, but it does not support deference here. *Pension Benefit Guar. Corp.* v.

LTV Corp., 496 U.S. 633, 651-52 (1990). The idea behind *Chevron*, it seemed, was that "those with great expertise ... would be in a better position" than the courts to resolve statutory ambiguities. *Chevron*, 467 U.S. at 865. *Chevron* itself provided the first archetypal example: The Environmental Protection Agency was there construing a technical provision of the Clean Air Act that defined a "stationary source" for pollutants. *Id.* at 840-41. And since *Chevron*, this Court has continued to stress that factors like "the related expertise of the Agency," "the complexity of [the statute's] administration," and "the careful consideration the Agency [gave] the question" drive the analysis. *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002).

Whatever the merits of this "expertise rationale" generally, the BIA has no relevant expertise to bring to bear here. To be sure, the BIA might have expertise in construing the immigration statutes generally. That expertise may or may not warrant deference sometimes. See *Negusie* v. *Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) (explaining that "central legal issues" and "pure questions of statutory interpretation" should still be decided by courts, not agencies). But the BIA "has no particular expertise in construing federal and state criminal statutes." *Cupete* v. *Garland*, 29 F.4th 53, 57 (2d Cir. 2022). And "[u]nlike environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts." *Dolfi* v. *Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998). Determining what acts call for greater sanction—including imprisonment downstream—is not a judgment requiring technical analysis or skill in the usual sense. See also Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV.

1537, 1599 (2006) (noting that immigration law generally "do[es] not require scientific or other technical training"). Rather, "criminal punishment usually represents the moral condemnation of the community." *United States* v. *Bass*, 404 U.S. 336, 348 (1971).

Life experience, personal morality, and a deep understanding of the community at large do not necessarily lie in bureaucratic backrooms. Thus, "legislatures" have been specially tasked with "respond[ing] to the will and consequently the moral values of the people" when enacting criminal laws. *Gregg* v. *Georgia*, 428 U.S. 153, 175 (1976). "[S]aid a bit differently," writing and construing criminal laws "involves balancing and rebalancing over time complex and oft-competing ideas about social policy and moral culpability—about the criminal law's practical effectiveness and its ethical foundations." *Kahler* v. *Kansas*, 140 S. Ct. 1021, 1028 (2020) (cleaned up). Experience with immigration law does not give twenty-three public servants in Falls Church special insight into that careful balancing.

The Fourth Circuit also incorrectly thought that this case implicated the BIA's understanding of foreign relations. Pet.App.7a (citing *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)). But though immigration laws might occasionally touch on foreign relations, the particular provisions here—and the additional prison term in the United States that Pugin might face given the BIA's approach to construing them—have next to nothing to do with international affairs. And while the Court gave the BIA leeway in *Aguirre-Aguirre* because the Board was deciding whether to "deem certain violent offenses committed in another country as political in nature," 526 U.S. at 424-25, nothing so sensitive is at stake here. At

bottom, "[t]he members of the Board do not ... play any role in the formulation of foreign policy" in a case like this one. Michael G. Heyman, *Immigration Law in the Supreme Court: The Flagging Spirit of the Law*, 28 J. LEGIS. 113, 142 (2002).

Second, *Chevron* justified deference to agencies by suggesting that they are more politically accountable to Congress and the broader electorate by virtue of their accountability to the President, *Chevron*, 467 U.S. at 865-66, but this rationale fails here, too. Admittedly, courts lack "electoral legitimacy" in interpreting laws. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 196-97 (2006). But given the vastness of the administrative state and the distance from which agencies now sit from the President, it seems unlikely that the BIA (or most other agencies, for that matter) feel constrained or otherwise accountable to the President. See Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263, 1301-02 (1962) (noting the real difficulties in asking the President to meaningfully direct agencies). "Direct presidential policymaking in agency statutory administration is exceptional," and "the degree to which any single agency statutory interpretation impacts the President's approval rating may be negligible." Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1289–90 (2008). And it seems odd to say in one breath that we trust agencies in part for their detached expertise, but then confess in the next that we reward them for their pliability in response to presidential will. Political accountability, then, is a challenging justification for *Chevron* even in the usual case.

It is an especially weak reason to defer to the BIA's construction of a civil-criminal statute. The members of

the BIA are required to "exercise their independent judgment and discretion in considering and determining cases coming before the Board." 8 C.F.R. § 1003.1(d)(1)(ii). So by regulation, Board members must exercise that discretion independent of the lone official accountable to the President, the Attorney General. See *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 267 (1954) ("[A]s long as the regulations remain operative, the Attorney General denies himself the right to ... dictate [the Board's] decision in any manner."). And the Board's members are career appointees subject to Attorney General oversight only through a rarely used direct-review provision. See Michael Kagan, *Chevron's Liberty Exception*, 104 IOWA L. REV. 491, 516 (2019). These structural differences alone could justify a different approach to agency deference. Cf. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2377 (2001) (noting that less deference may be appropriate for independent agencies).

Still other reasons explain why political accountability does not justify deference to the BIA here. For one, crime is different. "Political accountability" seems a feeble benefit when liberty is at risk; trading the latter for the former could lead to mob or "minister[ial]" rule over a criminalized minority. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting THE FEDERALIST NO. 11, at 85 (A. Hamilton) (C. Rossiter ed. 1961)). And crimes should not be subject to the ever-shifting political prerogatives of one administration versus another, as the Court has recognized "the importance of a consistent interpretation of criminal statutes." *Jean* v. *Nelson*, 472 U.S. 846, 856 n.3 (1985). For another, "[t]he most visible agency actors and agency actions are the most accountable to the electorate and to Congress." Jeremy D. Rozansky, *Waiving Chevron*, 85 U. CHI. L. REV. 1927,

1963 (2018). The BIA's decisions are unlikely to garner much attention; they concern only individual people—who often finds themselves removed shortly after the case is done—and issue from a Board few Americans know exists. Far from the bright lights of Congress, "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." *Whitman* v. *United States*, 574 U.S. 1003, 135 S. Ct. 352, 353 (2014) (statement of Scalia, J., respecting the denial of certiorari).

Third, *Chevron* has been said to rest on separation-of-powers principles, but those don't work here. See *City of Arlington* v. *FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) ("*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive."); but see *Michigan* v. *EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions."). Some believe that ambiguous statutes must be resolved with value judgments. See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931). Working from that belief, *Chevron*'s champions reason that the executive branch should make those judgments. Deference thus works to advance that aim, helping to guard against "judicial displacement of political judgments." Sunstein, *supra*, at 197; see also Rachel Scholz-Bright, *A Hail Mary for the Administrative State: An Originalist Defense of Chevron Deference*, 19 GEO. J.L. & PUB. POL'Y 573, 589 (2021).

Even assuming this separation-of-powers idea justifies using *Chevron* in the mine-run civil case, it falls away when an agency deals with criminal and civil-criminal statutes. Courts are especially sensitive to separation-of-

powers concerns when it comes to laws with criminal implications. "Only the people's elected representatives in Congress have the power to write new federal criminal laws." *United States* v. *Davis*, 139 S. Ct. 2319, 2323 (2019). For that reason, Congress can delegate the power to define crimes to the executive branch only when it speaks "distinctly." *United States* v. *Grimaud*, 220 U.S. 506, 519 (1911). "This clear-statement rule reinforces horizontal separation of powers," as Congress must "legislate deliberately and explicitly before departing from the Constitution's traditional distribution of authority." *Carter* v. *Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring). Allowing an agency to take an ambiguous statute and run with it is the very opposite of a "distinct" agency delegation—and *Chevron*, by definition, involves only "implicit" delegations. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1629 (2018).

And that only describes the conflict that arises between the agency's asserted power and Congress's. A tension also arises here between the agency's power and the courts', as courts are meant to construe criminal laws. *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803); see also *United States* v. *Am. Trucking Ass'n*, 310 U.S. 534, 544 (1940) ("The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function."). All this is to say—"the BIA's construction of a statute with criminal applications raises serious constitutional concerns." *Valenzuela Gallardo* v. *Barr*, 968 F.3d 1053, 1059 (9th Cir. 2020).

Let's be clear about the practical effect of the Fourth Circuit's approach: The prosecutor now seizes the power to define crime. In most criminal cases, the roles are carefully cast—Congress passes the law, the executive

decides when to prosecute, and a court decides the case. But using *Chevron* deference in a case like this one merges the three roles into one. The BIA, after all, is part of the Department of Justice. See 8 C.F.R. § 1003.1. So one arm of the BIA can now extend the "aggravated felony" provision's reach (so long as that extension is in any way "reasonable" under *Chevron*). See 8 U.S.C. § 1101(a)(43). Should Pugin reenter the country, another arm of the Department of Justice will then be empowered to wield that extension to obtain potentially decades of additional imprisonment based on the Department's own prior determination. See *id.* §§ 1326(b)(2), 1327. Yet the Constitution ensures that defendants are at the mercy of the law, not the day's political winds—especially for those with little political capital like Pugin. Thus, "[b]efore courts may send people to prison, we owe them an independent determination that the law actually forbids their conduct. A 'reasonable' prosecutor's say-so is cold comfort in comparison." *Guedes* v. *ATF*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J.). *Chevron* deprives them of that.

3. Faced with these concerns, those pushing for *Chevron* in the civil-criminal context often look to a few words from a twenty-five-year-old case—*Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 690 (1995). See, *e.g.*, *Guedes* v. *ATF*, 920 F.3d 1, 24 (D.C. Cir. 2019). There, the Court considered an Endangered Species Act provision that made it a crime to "take" an endangered species; the Department of the Interior had construed "taking" to include certain effects on the species' habitat. *Babbit, 515 U.S.* at 692. Although it did not conduct a full *Chevron*-style, two-step analysis, the Court did cite *Chevron* and say that it owed "some degree of deference" to Interior's "reasonable interpretation." *Id.* at 703-04. The Court never directly considered

whether *Chevron* applies to civil-criminal statutes. It merely "deferred, with scarcely any explanation, to an agency's interpretation of a law that carried criminal penalties." *Whitman*, 135 S. Ct. at 353 (statement of Scalia, J.).

Seeing as how it never touched on any of the issues above, "*Babbitt*'s drive-by ruling ... deserves little weight." *Whitman*, 135 S. Ct. at 354 (statement of Scalia, J.). This Court did not think that *Babbitt* resolved the question of how *Chevron* applies to civil-criminal statutes, as it later declined to say whether *Chevron* applies when "violations of the [interpreted law] carry criminal penalties." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 n.8 (2001). And *Babbitt* seems to run smack into the Court's later decisions in *Apel* and *Abramski*, too. At a minimum, though, the confusion that attends *Babbitt* confirms that this question warrants this Court's further attention.

* * * *

Whatever one thinks about *Chevron*'s original logic, it finds even less footing in a case like this. "The key point is that on close examination the standard rationales for *Chevron* deference do not apply with equally persuasive force to all agencies and to all decisions." M. Kagan, *supra*, at 517. And indeed, "[t]he standard rationales" do not apply much at all in this case. The Fourth Circuit should have left *Chevron* deference aside. Cf. Tr. of Oral Argument at 12, *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017) (No. 16-54), 2017 WL 749022 (Kagan, J., describing a "middle ground" in which the Court does not apply lenity but also does not apply *Chevron* given the "criminal application of this statute). The Fourth Circuit erred in not recognizing as much.

II. Lenity Should Resolve Any Ambiguity In A Civil-Criminal Statute Before Reaching *Chevron* Step Two.

Even if *Chevron* did have some space to operate in the criminal sphere, it still would not greenlight a court to defer to an agency's interpretation of an ambiguous civil-criminal statute. The rule of lenity says that "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333. And that rule should decide the meaning of an ambiguous civil-criminal statute at Step One, so a court would never proceed to embrace an agency's "reasonable" construction in Step Two. The Court very nearly held as much when it heard *Esquivel-Quintana*, 137 S. Ct. at 1562. Now this case presents a clean shot to decide that question for real.

1. Lenity should close the door on *Chevron* Step Two. "[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the traditional tools of construction." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019) (cleaned up). Canons of statutory constructions are "traditional tools." *Epic Sys.*, 138 S. Ct. at 1630; see also, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001) (applying a substantive canon of construction at Step One); accord *Arangure* v. *Whitaker*, 911 F.3d 333, 340 (6th Cir. 2018) (Thapar, J.) ("[C]anons are traditional tools of statutory interpretation that take precedence over *Chevron* deference." (cleaned up)); *OfficeMax, Inc.* v. *United States*, 428 F.3d 583, 592 (6th Cir. 2005) (Sutton, J.) ("[T]he question whether a statute is ambiguous arises after, not before, a court applies traditional canons of interpretation."). And lenity is a canon of construction. See *United States* v. *Lanier*, 520 U.S. 259, 266 (1997); *Dixson* v. *United States*, 465 U.S. 482, 500 n.19 (1984); *United States* v. *Campos-Serrano*, 404 U.S. 293, 298

(1971). So when lenity applies, a court never reaches *Chevron* Step Two. In other words, when "the canons supply an answer, *Chevron* leaves the stage." *Epic Sys.*, 138 S. Ct. at 1630 (cleaned up).

This Court should thus make plain that lenity applies to a statute like the one here—that is, "a statute whose provisions have both civil and criminal application." *WEC Carolina Energy Sols. LLC* v. *Miller*, 687 F.3d 199, 204 (4th Cir. 2012) (citing *Leocal*, 543 U.S. 11 n.8); see also *Crandon* v. *United States*, 494 U.S. 152, 158 (1990) (applying lenity in civil case in which "governing standard" came from criminal statute, even though a Department of Justice memorandum decided otherwise); *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003) (applying rule of lenity in civil case under Hobbs Act). In fact, in *Leocal*, the Court never once mentioned *Chevron* even while reviewing a BIA decision that construed the term "crime of violence." 543 U.S. at 8-13. But the Court did go out of its way to stress that the "rule of lenity applie[d]." *Id.* at 11 n.8.

Were a court to apply lenity only in "pure" criminal cases, then many statutes would find themselves with two meanings: a criminal meaning colored by lenity and a civil meaning shaped without it. But again, statutes are not "chameleon[s]." *Clark*, 543 U.S. at 382. A dual-application statute cannot be "subject to change" depending on the context in which it is applied. *Id.*; see also, *e.g.*, *FCC* v. *ABC*, 347 U.S. 284, 296 (1954) ("There cannot be one construction for the Federal Communications Commission and another for the Department of Justice."). So a statute that has "criminal consequences," even when construed in a "civil setting," must trigger the rule of lenity. *United States* v. *Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 (1992) (Breyer, J., plurality op.).

In short, even if the Court were to conclude that *Chevron* can apply to dual civil-criminal statutes at all (like the INA provisions here), lenity would knock out *Chevron* Step Two. Either way, the effect is the same: Courts should never defer to an agency's interpretation of a dual civil-criminal statute.

2. That outcome matches lenity's substantial history. Lenity is the modern label for one of the common law's oldest ideas—that "penal laws should be construed strictly." *The Adventure*, 1 F. Cas. 202, 204 (CC Va. 1812) (No. 93) (Marshall, C.J.). Our country's courts have long felt an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should." HENRY FRIENDLY, BENCHMARKS 209 (1967). In fact, Chief Justice Marshall once observed that this distaste is "perhaps not much less old than construction itself." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820). Likewise, Justice Scalia lauded lenity as a "venerable" and "ancient canon." *Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting); *Taylor* v. *United States*, 495 U.S. 575, 603 (1990) (Scalia, J., concurring in part and concurring in the judgment). Lenity, then, holds an established place in American jurisprudence.

Chevron deference had a far more "recent provenance." *Aposhian* v. *Wilkinson*, 989 F.3d 890, 899 (10th Cir. 2021) (Tymkovich, J., dissenting). Less than a century ago, the Court was still wrestling over whether agencies could decide questions of fact, never mind law. *Crowell* v. *Benson*, 285 U.S. 22 (1938). *Chevron* itself is only about forty years old; before it, the best deference agencies received was only proportional to the persuasiveness of their argument. *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). And unlike lenity—which has

remained largely stable over the years—*Chevron* deference continues to shift and change. The Court would thus be ill-advised to weaken a doctrine tracing its roots to Blackstone for the sake of a doctrine drawing from a "dramatic shift in power over the last 50 years." *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting).

3. But this is not merely a case of "oldest doctrine wins." Putting lenity at the forefront advances some of our nation's most important values. Two come immediately to mind.

First, lenity is "not merely a convenient maxim of statutory construction"; "it is rooted in fundamental principles of due process." *Dunn* v. *United States*, 442 U.S. 100, 112 (1979). Lenity ensures that we know what specific conduct is criminal. See U.S. CONST. AMENDS. V, XIV. Citizens deserve "fair warning" of what might be criminal in "language that the common world will understand." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). Clear laws promote a stable society. They also target criminalized conduct narrowly—and for good reasons. For example, people may avoid a reporting requirement for many "innocent" reasons, so this Court concluded—after using lenity—that a double scienter mens rea requirement applied to a financial-reporting crime. See *Ratzlaf* v. *United States*, 510 U.S. 135, 144-46 (1994). Ditching lenity and applying *Chevron* could produce a chilling effect on other everyday "innocent" transactions, too. *Id.*

Second, lenity promotes the rule of law. Lenity helps "minimize the risk of selective or arbitrary enforcement." *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). Allowing *Chevron* to supersede lenity commands the opposite result, with agencies able "to create (and uncreate) new crimes at will" based on statutory

ambiguities. *Whitman*, 135 S. Ct. at 353 (statement of Scalia, J.). Laws could vacillate over time. Regulated persons will have to guess what statutes might be ambiguous and which way the agency will go, and then keep themselves informed through review of the Code of Federal Regulations. Congress, too, might be motivated to enact hybrid statutes that "duck under lenity's imperatives." *Esquivel-Quintana* v. *Lynch*, 810 F.3d 1019, 1030 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev'd*, 137 S. Ct. 1562 (2017). Or Congress could delegate the power to define criminal offenses to agencies wholesale—an undesirable result to say the least. See *United States* v. *McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987); cf. *Liparota* v. *United States*, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ... strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.").

4. Courts have sometimes tried to use *Babbitt* again to prop up *Chevron* deference in the face of lenity, see, *e.g.*, *Gun Owners of Am.* v. *Garland*, 19 F.4th 890, 901 (6th Cir. 2021)—but *Babbitt* is an ill fit here, too. Unlike this case, *Babbitt* involved a declaratory-judgment suit claiming that a longstanding regulation implementing a civil statute was facially invalid. 515 U.S. at 704 n.18. The Court explained that this quiet and long-lasting regulation at least gave enough notice to wrongdoers to satisfy lenity. *Id.* Congress had further laid down the nature and extent of criminal liability in the statute, 16 U.S.C. § 1540(b)(1), so the regulation itself didn't purport to extend liability—obviating separation-of-powers concerns. And if *Babbitt* really was meant to reject lenity wholesale in a case with dual civil and criminal implications, then that dismissive attitude would "contradict[] the many cases before and since holding" just the opposite: "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 353-54 (statement of Scalia, J.).

The mangled treatment that courts have given *Babbitt*'s lenity analysis reiterates the need for this Court's involvement. Some judges think *Babbitt* demands deference, even when everything else says deference is a poor fit. See, *e.g.*, *Esquivel-Quintana*, 810 F.3d at 1024. Others think *Babbitt* is effectively a dead letter, and lenity prevails. See, *e.g.*, *United States* v. *Scully*, 108 F. Supp. 3d 59, 109 (E.D.N.Y. 2015). Still others think some middle ground exists, in which *Babbitt* permits—but does not require—*Chevron* deference for ambiguous criminal statutes. See, *e.g.*, *Wilkinson*, 989 F.3d at 904 (Eid, J., dissenting). The Court needs to resolve the *Babbitt* footnote's cryptic meaning once and for all.

* * * *

Whether *Chevron* applies to civil-criminal statutes or not, canons of construction must be given their due. Lenity included. When a civil-criminal statute is ambiguous, courts should at least apply that doctrine to construe the statute at *Chevron* Step One—and no further. But truth be told, courts should just dispense with the *Chevron* framework altogether when confronted with dual-application statutes like these. They should construe those statutes de novo—end of story. The Fourth Circuit was wrong to lean on agency deference instead. The Court should thus grant certiorari to stop mistakes like these from continuing to repeat themselves.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

MICHAEL R. WILLIAMS
Senior Deputy Solicitor General

MAX A. SCHREIBER*
Fellow

*admitted in Indiana, practicing under the supervision of West Virginia attorneys

Counsel for Amicus Curiae *State of West Virginia*

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

MARK BRNOVICH
Attorney General
State of Arizona

LAWRENCE WASDEN
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

LYNN FITCH
Attorney General
State of Mississippi

AUSTIN KNUDSEN
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

KEN PAXTON
Attorney General
State of Texas