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

BRIEF OF FAMM AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE* [1]

FAMM, previously known as Families Against Mandatory Minimums, is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and to challenge mandatory sentencing laws and the inflexible and excessive penalties they require. Founded in 1991, FAMM currently has more than 75,000 members around the country. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the public and through selected *amicus* filings in important cases.

FAMM has a strong interest in the correct application of the rule of lenity when interpreting federal statutes that set forth the scope of criminal conduct or the penalties that may or must be imposed for federal crimes. FAMM writes here to reiterate the importance of rejecting the argument that lenity applies only upon a finding of "grievous ambiguity" in a statute. That unduly cramped view is contrary to this Court's precedent and would lead to interpretations that conflict with the doctrine's constitutional underpinnings.

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[1] Pursuant to this Court's Rule 37.6, *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 made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The en banc Fifth Circuit held below that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) rule interpreting the definition of "machinegun" in 26 U.S.C. § 5845(b) as encompassing bump stocks was unlawful. FAMM takes no position on whether the statute's definition of "machinegun" unambiguously supports or forecloses that interpretive rule. But if this Court concludes that the statute is ambiguous, it should reject the Solicitor General's argument that the rule of lenity applies only when a statute is "grievously ambiguous." Pet. Br. 44–45. That ill-defined but evidently heightened standard conflicts with more than two centuries of this Court's teachings and undermines the principles animating the rule of lenity.

Lenity is "not much less old than" the task of statutory "construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.). The doctrine originated from English common law as a way to protect criminal defendants against harsh punishments inflicted by ambiguous statutes. Following that ancient practice, this Court has long applied lenity whenever it has "reasonable doubt[]" about the application of a penal statute. *See, e.g.*, *Harrison v. Vose*, 50 U.S. (9 How.) 372, 378 (1850). As the Court has recognized, lenity safeguards the due process rights of the accused by ensuring that no defendant is required to guess how a court will choose between two reasonable readings of a statute. It also protects the separation of powers by requiring Congress to speak clearly when it wishes to create criminal offenses and prescribe their punishments.

The refusal to apply lenity unless a statute is "grievously ambiguous" runs headlong into the

history of the doctrine and strips lenity from its constitutional foundations. The suggestion that lenity might require "grievous ambiguity" only appeared in this Court's precedent after more than two centuries of applying that rule. If this Court were to adopt the government's view that lenity plays no part in the interpretation of statutes absent "grievous ambiguity," it would lead to interpretations that raise reasonable doubt about the scope and proper application of those statutes—a result that fails to provide defendants with a "fair warning . . . in language that the common world will understand." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). A "grievous ambiguity" requirement would also grant judges excessive discretion and power and undermine the separation of powers twice over: First by allowing judges to exploit ambiguous statutes and thereby usurp the power of Congress, and second by granting agencies the authority to interpret ambiguous penal statutes to their liking. If the Court concludes that § 5845(b)'s definition of "machinegun" is ambiguous, it should reject the "grievously ambiguous" standard and make clear that lenity applies upon a finding of reasonable ambiguity.

ARGUMENT

Under the rule of lenity, ambiguities in criminal statutes must be resolved against the government. Lenity has historically been applied when, after applying other rules of construction, reasonable doubt persists about a penal statute's meaning. Some courts, however, have added to the rule a threshold requirement of "grievous" ambiguity, an undefined term that is itself deeply ambiguous. That heightened standard departs from this Court's precedents, finds no support in the historical underpinnings of lenity,

and fails to safeguard due process and the separation of powers.

FAMM takes no position on whether § 5845(b)'s definition of "machinegun" unambiguously supports or forecloses ATF's interpretive rule concluding that bump stocks fall within the statutory definition of machineguns. But if this Court concludes that it cannot resolve this case based on the statutory language alone, it should reject the Solicitor General's argument that lenity applies only when a statute is "grievously ambiguous." *See* Pet. Br. 44–45.

I. THE RULE OF LENITY REQUIRES RESOLVING AMBIGUITIES IN CRIMINAL LAWS IN THE DEFENDANT'S FAVOR.

"[T]he rule of lenity[] teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). Historically, this Court has applied lenity to a criminal statute when, after applying other rules of construction, "reasonable doubt" persists about a penal statute's meaning. This straight-forward application of lenity is consistent with the history of the canon and upholds the Constitution's commitments to due process and the separation of powers.

The rule of lenity applies here even though this case does not arise from a criminal prosecution. A statutory term that is integral to a penal provision must be given a consistent interpretation even when construed in the context of a "noncriminal" "application." *Leocal v. Ashcroft*, 543 U.S. 1, 11–12 n.8 (2004). As pertinent here, 26 U.S.C. § 5871 makes it a felony to violate any provision of Chapter 53 (the National Firearms Act). One such provision is § 5861(d), which

makes it unlawful to possess an unregistered "firearm"—a term defined in the National Firearms Act as including any "machinegun." 26 U.S.C. § 5845(a). Accordingly, the rule of lenity applies to the statutory construction question presented in this case. *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992) (plurality, applying this principle to the same statute at issue in this case); *Crandon v. United States*, 494 U.S. 152, 158 (1990); *see also Bittner v. United States*, 598 U.S. 85, 103 (2023) (opinion of Gorsuch, J.) (when there are "criminal as well as civil ramifications," "the rule of lenity, not to mention a dose of common sense, favors a strict construction").

A. Lenity Has Historically Been Applied When There Is Reasonable Doubt About a Statute's Meaning.

For centuries, this Court has applied the rule of lenity whenever "the traditional tools of statutory interpretation yield[ed] no clear answer." *Wooden v. United States*, 595 U.S. 360, 395 (2022) (Gorsuch, J., concurring in the judgment) (relying on *United States v. Open Boat*, 27 F. Cas. 354, 357 (No. 15,968) (CC Me. 1829); *United States v. Wiltberger* 18 U.S. (5 Wheat.) 76, 96 (1820); *Hughey v. United States*, 495 U.S. 411, 422 (1990)); *see also, e.g.*, *Abramski v. United States*, 573 U.S. 169, 204 (2014) (Scalia, J., dissenting) (observing that the rule of lenity applies when "all legitimate tools of interpretation . . . do not decisively dispel the statute's ambiguity").

Lenity was first recognized in English courts, "justified in part on the assumption that when Parliament intended to inflict severe punishments it would do so clearly." *Wooden*, 595 U.S. at 388 (Gorsuch, J.,

concurring in the judgment). To avoid imposing harsh sentences without clear authority, English judges "strictly construed" criminal statutes against the government. 1 William Blackstone, *Commentaries on the Laws of England* *88 (1765); *see also* 2 Matthew Hale, *History of the Pleas of the Crown* 335 (1736) (felonies "are construed literally and strictly"); *see generally* David S. Romantz, *Reconstructing the Rule of Lenity*, 40 Cardozo L. Rev. 523, 526–27 (2018).

One of the earliest applications of lenity before the Founding illustrates the level of clarity required of criminal statutes. A 1547 English law criminalized the "stealing of hors[]es, geldings, or mares." An Acte for the Repeale of Certaine Statutes Concerninge Treasons, Felonyes, &c, 1 Edw. 6, ch. 12, § 9 (1547). English judges were soon confronted with the question of whether the statute encompassed a defendant's stealing of a single horse. And they concluded it did not because "the statute, being in the plural, did not cover the situation." Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 Ind. L.J. 335, 340 n.30 (1994). That ruling led Parliament to amend the law the next year: Acknowledging that there "ha[d] b[een] amb[iguity] and doubt[]" about whether the law criminalized "stealing[] one horse, geld[ing], or mare," lawmakers clarified that anyone charged with "taking[] or stealing[] any horse, geld[ing], or mare" should be charged as if he had stolen "two horses[,] two geld[ings], or two mares." An Acte that no Man Stealinge Horse or Horses Shall Enjoye the Benefit of His Clergie, 2 & 3 Edw. 6, ch. 33 (1548).

Following that ancient practice, this Court has long applied lenity whenever it has "reasonable

doubt[]" about the application of a penal statute. *See, e.g.*, *Harrison v. Vose*, 50 U.S. (9 How.) 372, 378 (1850). In *United States v. Wiltberger*, for example, a sailor was charged with killing an individual on a river in China under a statute that criminalized manslaughter on the "high seas." 18 U.S. (5 Wheat.) 76, 93 (1820) (quoting Act of Apr. 30, 1790, § 12, 1 Stat. 115). Chief Justice Marshall acknowledged that other parts of the statute could be construed as conveying Congress's intent to criminalize the sailor's conduct—in fact, it was "almost impossible to believe" that Congress sought "to distinguish between the same offence . . . on the high seas, and on the waters of a foreign State." *Id.* at 99. But because "probability is not a guide which a court . . . can safely take," *id.* at 105, the Court declined to interpret the statute as encompassing the sailor's conduct. Criminal statutes "are to be construed strictly" because of "the tenderness of the law for the rights of individuals" and "the plain principle that the power of punishment is vested in the legislative" department. *Id.* at 95.

This Court has repeatedly observed that lenity applies to "situations in which a reasonable doubt persists about a statute's intended scope even after resort to" ordinary tools of construction. *Moskal v. United States*, 498 U.S. 103, 108 (1990) (emphasis omitted); *see also, e.g.*, *United States v. Santos*, 553 U.S. 507 (2008) (plurality op.); *United States v. R.L.C.*, 503 U.S. 291, 305, 308 (1992) (plurality and concurring ops.); *McBoyle v. United States*, 283 U.S. 25, 27 (1931). So long as a statute "is not entirely free of doubt, the doubt must be resolved in favor of lenity." *Whalen v. United States*, 445 U.S. 684, 694 (1980); *see also Adamo Wrecking Co. v. United States*, 434 U.S. 275,

284–85 (1978) (per Rehnquist, J.; requiring only "some doubt").

B. Applying the Rule of Lenity to Ambiguous Statutes Protects Due Process and Preserves the Separation of Powers.

Requiring clarity from criminal statutes "uphold[s] the Constitution's commitments to due process and the separation of powers." *Wooden*, 595 U.S. at 389 (Gorsuch, J., concurring in the judgment). Before interpreting an ambiguous criminal statute to impose a "harsher alternative," courts must find that Congress has spoken in "clear and definite" language. *United States v. Bass*, 404 U.S. 336, 347–48 (1971) (quotation marks omitted). This rule "vindicates the fundamental principle that no citizen should be . . . subjected to punishment that is not clearly prescribed." *Santos*, 553 U.S. at 514 (Scalia, J.) (plurality op.). It thereby ensures that, "whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance." *Wooden*, 595 U.S. at 390-91 (Gorsuch, J., concurring in the judgment). Entitlement to notice is no small thing—it comprises a core aspect of due process and the rule of law. *See* Lon Fuller, *The Morality of Law* 51–62 (1964).

Lenity also protects a second basic tenet of American government: Only Congress may create criminal offenses and prescribe punishments. *Wiltberger*, 18 U.S. (5 Wheat.) at 95; *see United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32 (1812). The separation of powers ensures that "[a]ny new national laws restricting liberty require the assent of the people's representatives and thus input from the country's 'many parts, interests and classes.'" *Wooden*, 595 U.S. at 391

(Gorsuch, J., concurring in the judgment) (quoting *The Federalist No. 51*, at 324 (James Madison) (Clinton Rossiter ed., 1961)); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 132–34 (2010). Lenity thereby "embodies 'the instinctive distastes against [people] languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348 (citation omitted). In this way, the rule of lenity is essential to "maintain[ing] the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Allowing "judges to send people to prison based on intuitions about 'merely' ambiguous laws would hardly serve" the ideal of democratic accountability. *Wooden*, 595 U.S. at 392 (Gorsuch, J., concurring in the judgment).

II. REQUIRING "GRIEVOUS AMBIGUITY" WOULD IMPROPERLY CONSTRAIN THE RULE OF LENITY.

Rather than apply lenity upon a finding that there is reasonable doubt about the meaning of a criminal statute, some courts—including the court below—have suggested that a statute must be "grievously ambiguous" for lenity to apply. Pet. App. 41a (noting differing standards without resolving the issue); *see also* Pet. App. 61a n.3 (Ho, J., concurring in part and concurring in judgment) (picking up on "'grievous ambiguity'" but stating that "the [Supreme] Court has never indicated any intention to abrogate its longstanding commitment to lenity in cases of 'reasonable doubt'"). That standard would flout more than two centuries of this Court's teachings and conflict with the origins of lenity. It also would unmoor the doctrine from its constitutional underpinnings. If this Court concludes that it cannot resolve this case based

on the language of § 5845(b) alone, it should disavow the grievous-ambiguity standard.

A. A "Grievous Ambiguity" Requirement Would Be Contrary to Lenity's Historical Application.

The notion of requiring a criminal statute to be "grievously" ambiguous before applying the rule of lenity stems from a passing reference to "grievous ambiguity" in *Huddleston v. United States*, 415 U.S. 814, 831 (1974). That decision did not, however, purport to establish a new legal standard—the Court merely observed, without citation to precedent for a governing standard, that it "perceive[d] no grievous ambiguity or uncertainty in the language" of the statute because the law "clearly proscribe[d] [the] petitioner's conduct and accorded him fair warning of the sanctions the law placed on that conduct." *Id.*; *see Wooden*, 595 U.S. at 394 (Gorsuch, J., concurring in the judgment) ("[E]ven in *Huddleston* itself, the discussion of 'grievous' ambiguities was dicta"). The Court nevertheless repeated that phrase in *Chapman v. United States*, 500 U.S. 453, 463 (1991), this time erroneously stating that lenity "is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of [a statute].'"

Since then, this Court has sometimes "suggested that courts should consult the rule of lenity only when . . . a court confronts a 'grievous' statutory ambiguity." *Wooden*, 595 U.S. at 392 (Gorsuch, J., concurring in the judgment) (quoting *Shaw v. United States*, 580 U.S. 63, 71 (2016)). But that heightened standard "does not derive from any well-considered theory about lenity or the mainstream of this Court's opinions," which have never defined the term "grievous

ambiguity." *Wooden*, 595 U.S. at 392 (Gorsuch, J., concurring in the judgment); *see also* Pet. App. 43a ("[T]he precise meaning of 'grievously ambiguous' is not entirely clear." (citing *Shular v. United States*, 140 S. Ct. 779, 788 (2020) (Kavanaugh, J., concurring))). As the decision below illustrates, that novel characterization of the canon has caused confusion among courts and judges, who have adopted sharply different understandings of when lenity applies and when it doesn't. *Compare* Pet. App. 42a (it "is sufficient to require application of the rule of lenity" under either view of the standard when a court has "availed [itself] of all traditional tools of statutory construction") with Pet. App. 64a-65a (Higginson, J., dissenting) ("[T]he majority opinion and the lead concurrence apply the rule of lenity to garden-variety ambiguity.").

B. "Grievous Ambiguity" Fails to Protect Due Process and Violates the Separation of Powers.

Requiring a statute to be "grievously" ambiguous before lenity may apply would depart from the doctrine's constitutional underpinnings. "[W]hen the government means to punish, its commands must be reasonably clear" to satisfy due process. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 299 (2012). If lenity were to play no part absent "grievous ambiguity," it would lead to interpretations of statutes that raise reasonable doubt about the scope of those statutes and their proper application. In that circumstance, the rule would no longer sufficiently protect defendants' rights to "fair notice of [the law's] demands." *Wooden*, 595 U.S. at 389 (Gorsuch, J., concurring in the judgment). Put otherwise, when a defendant is required to guess

how a court will choose between competing canons of construction, "fair warning" simply has not "be[en] given . . . in language that the common world will understand." *McBoyle*, 283 U.S. at 27.

A "grievous ambiguity" requirement, moreover, would give judges far too much open-ended discretion and power. No one has defined what makes an ambiguity "grievous," so this amorphous standard fails to constrain judges, instead allowing them to reach a favored result by attaching, or not attaching, the term "grievous" to ambiguous statutes. Reasonable doubt, by contrast, is as administrable and familiar as any standard known in the law. Indeed, trial courts routinely entrust its interpretation and application to the wisdom of lay juries in making decisions affecting the life and liberty of their fellows.

The degree of discretion granted to courts by the "grievous ambiguity" standard of lenity also would fail to safeguard the separation of powers. For starters, it would blur the distinct roles of the judiciary and Congress. If judges could side with the government whenever they devise a colorable textual argument or ferret out a friendly bit of legislative history—thereby saving the ambiguity from rising to the "grievous" standard—lenity would place no limit at all on judges' ability to impose "their own sensibilities" on Congress's enactments. *Wooden*, 595 U.S. at 391 (Gorsuch, J., concurring in the judgment).

Requiring a statute to be "grievously" ambiguous before applying lenity also would disrupt the balance of power between Congress and the executive branch. As the Founders recognized, "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." *The*

Federalist No. 47, at 302 (James Madison). Yet by deferring to agency interpretations of statutes so long as the statutes themselves are not "grievously" ambiguous, courts grant agencies an extraordinary degree of power to rewrite legislation to their liking. Allowing the executive branch to fill in the gaps of ambiguous criminal laws "offends the rule of lenity" by transforming it into a canon of deference. *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring) ("No judge would think of deferring to the Department of Justice."). That type of deference "threatens a complete undermining of the Constitution's separation of powers" and undermines the fundamental notion that "the legislature [i]s the creator of crimes." *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030 (6th Cir. 2016) (quotation marks omitted) (Sutton, J., concurring), *rev'd sub nom. Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017); *see Abramski v. United States*, 573 U.S. 169, 191 (2014) ("[C]riminal laws are for courts, not for the Government, to construe").

CONCLUSION

If this Court concludes that § 5845(b)'s definition of "machinegun" is ambiguous, it should reject any argument that the rule of lenity applies only if a statute is found to be "grievously" ambiguous.

Respectfully submitted.

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