United States Court of Appeals

for the

First Circuit

Case No. 16-2120

UNITED STATES,

Appellee,

– v–

RICHARD WEED,

Appellant.

ON APPEAL FROM AN ORDER ENTERED FROM THE
UNITED STATES DISTRICT COURT OF MASSACHUSETTS, BOSTON

BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF APPELLANT RICHARD WEED

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AMICUS CURIAE BRIEF OF CAUSE OF ACTION INSTITUTE IN SUPPORT OF APPELLANT RICHARD WEED

Pursuant to Fed. R. of App. P. 29, Cause of Action Institute ("CoA Institute" or "CoA") respectfully files this *Amicus Curiae* brief in support of the position argued by Appellant Richard Weed. CoA Institute submits this brief with the consent of all parties.[1]

STATEMENT OF INTEREST

CoA is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law work together to protect liberty and economic opportunity. As part of this mission, CoA works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as *Amicus Curiae* before this and other federal courts. *E.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA has a particular interest in opposing governmental overreach and working to combat the criminalization of conduct that can be addressed through existing civil law—*i.e.*, the process of "overcriminalization." In order to fulfill this mission, CoA has represented criminal defendants in federal court, *e.g.*, *United*

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than CoA Institute contributed money intended to fund the brief's preparation or submission.

States v. Black, No. CR 12-0002 (N.D. Cal.) (involving a Marine Mammal Protection Act regulation criminalizing "feeding" certain marine mammals without a permit), and appeared as *Amicus Curiae* in *Yates v. United States*, 135 S. Ct. 1074 (2015), at both the merits stage and in support of the petition for a writ of certiorari. CoA Institute also represents clients to challenge agency action that violates the United States Constitution, the separation of powers doctrine, federal laws, and existing judicial precedent. To this effect, CoA Institute works to curb the expansion of the administrative state. CoA is well-suited to provide the instant *Amicus Curiae* brief, as this case deals with the intersection of overcriminalization and administrative law.

BACKGROUND

The United States obtained an indictment against Richard Weed on December 4, 2014, for eleven counts arising out of alleged securities fraud. After a two-week trial, a jury found Mr. Weed guilty on Count 1 (Conspiracy to Commit Securities Fraud and Wire Fraud under 18 U.S.C. § 371), Count 2 (Securities Fraud under 15 U.S.C. §§ 78j, 78ff), and Counts 5 through 11 (Wire Fraud under 18 U.S.C. § 1343). Appellant's Addendum ("Add.") A003-A011. On May 31, 2016, Mr. Weed filed a Motion for Judgment of Acquittal and, in the alternative, a Motion for a New Trial. Joint Appendix ("JA") 1317-18; JA 1320-21. He asked the District Court to acquit him as a matter of law or order a new trial because his conviction rested on (or was

tainted by) the Government's incorrect assumption that the securities at issue in the case had to be registered in contravention of the plain language of 15 U.S.C. § 77c(a)(9).

The lower court denied Mr. Weed's motions, Add. A001-002, and sentenced him to forty-eight months on each of the counts to run concurrently. Add. 003-011. The District Court stated in its denial of Mr. Weed's Motion for Judgment of Acquittal and Motion for New Trial that section "3(a)(9) for 80 years has been viewed as transactional," that Congress's designation of section 3(a)(9) securities as exempt securities was a "legislative accident in drafting," and it rejected Mr. Weed's "wooden approach" to interpreting the statute in light of Congress's purported legislative intent that "3(a)(9) was for the purpose of transactions." Add. A012–A016 (Hearing Tr. 23:13-25:25, J. Woodlock). The Court further stated that "one can look through the case law and find no 3(a)(9) cases . . . there are a variety of reasons, but perhaps the best reason is that nobody ever thought it was otherwise." Add. A013 (Hearing Tr. 24:1-4, J. Woodlock). This appeal followed.

SUMMARY OF ARGUMENT

Justice Scalia aptly warned in an earlier securities case that "[a] court owes no deference to the prosecution's interpretation of a criminal law." Statement of J. Scalia on Denial of Cert. at 1, *Whitman v. United States*, 574 U.S. ___, No. 14-29 (decided Nov. 10, 2014) (J. Thomas, joining) (citing *Abramski v. United States*, 134

S. Ct. 2259, 2274 (2014)). But does a court owe deference to an executive agency's *civil* interpretation of a statute in a *criminal* case when that interpretation directly contradicts the unambiguous text of the statute? This is precisely the question facing the Court here—and the answer is a resounding "no."

In this case, an agency—the United States Securities and Exchange Commission ("SEC" or "Commission")—has interpreted an unambiguous statute in civil law for eighty years in a manner that is directly inconsistent with the actual text of the statute. *See* Securities Act of 1933 ("1933 Act" or "Securities Act"), Pub. L. 73-22, 48 Stat. 74 (1933), *as amended by* 48 Stat. 906, § 202(c) (1934) (currently § 3(a)(9) and codified at 15 U.S.C. § 77c(a)(9)). Specifically, 15 U.S.C. § 77c(a)(9) lists "any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange" as an *exempted security* to which the provisions of subchapter 77a, *et seq.*, of the 1933 Act—including its registration requirements—*shall not apply*. 15 U.S.C. § 77c(a) Nevertheless, for years, the SEC has interpreted section 3(a)(9) securities not as exempted securities—*i.e.*, securities to which the Securities Act's registration requirement does not apply—but as exempted *transactions* of the type set forth under section 4 of the Securities Act. *See* 15 U.S.C. § 77d. In this case, the Government's interpretation has the practical effect of requiring parties to register section 3(a)(9) securities prior to any transfer of the

security. Such a registration mandate can be found in neither the 1933 Act, 15 U.S.C. § 77a *et seq*., nor the Securities Exchange Act of 1934 ("Securities Exchange Act" or "1934 Act"), 15 U.S.C. § 78a *et seq*. Now, the Government seeks to apply this erroneous interpretation, created in civil law, to impose criminal liability against Mr. Weed under 15 U.S.C. § 78j(b). This prosecution cannot stand.

First, the language of 15 U.S.C. § 77c(a)(9) (section 3(a)(9) of the Securities Act) is unambiguous. The securities about which Mr. Weed issued opinion letters were exempt securities that did not need to be registered with the SEC. Accordingly, the prosecution is invalid insofar as it was based on an erroneous assumption by the Government under section 3(a)(9).

Second, even if the Court finds that the text of the Securities Act at 15 U.S.C. § 77c(a)(9) is somehow ambiguous, lenity must resolve any ambiguity in favor of Mr. Weed. The Government is not entitled to the interpretative deference it apparently received below. In two recent cases, the Supreme Court ruled that the Government is entitled to no deference for its interpretation of a criminal statute. *United States v. Apel*, 134 S. Ct. 1144 (2014); *Abramski v. United States*, 134 S. Ct. 2259 (2014). Even eighty years of improper construction cannot save the Government's case. Accordingly, this Court should reverse the lower court's denial of the Motion for Judgment of Acquittal and Motion for a New Trial.

ARGUMENT

This is a statutory construction case. Accordingly, this Court's review of the District Court's interpretation is *de novo*. *Lattab v. Ashcroft*, 384 F.3d 8, 21 (1st Cir. 2004). We urge the Court to reverse the District Court's Order denying Mr. Weed's Motion for Judgment of Acquittal and Motion for a New Trial.

I. The Securities at Issue in the Case Are Exempt from Registration Under the Unambiguous Language of 15 U.S.C. § 77c.

A. The SEC's Interpretation of 15 U.S.C. § 77c Conflicts with the Unambiguous Language of the Statute.

The SEC has erroneously interpreted an unambiguous statute in civil law in a manner that is directly inconsistent with the actual text of the statute. Specifically, 15 U.S.C. § 77c(a)(9) lists "any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange" as an *exempted security* to which the provisions of subchapter 77 of the Securities Act *shall not apply*. 15 U.S.C. § 77c(a).

There is no dispute that the securities at issue in this case, at the time of their creation, were the class of securities described under section 3(a)(9). The Government conceded as much. *See* Gov't Opp. to Motion for Judgment of Acquittal and New Trial at 7. These securities, like the other securities set forth within section 3, do not require registration. *Gustafson v. Alloyd Co.*, 513 U.S. 561,

569 (1995) (stating that "§ 3, see 15 U.S.C. § 77c (exempting certain classes of securities from the coverage of the Act" set forth "explicit and well-defined exemptions"); *see United States v. Naftalin*, 441 U.S. 768, 771, 773–78 (1979) (unambiguous reading of the Securities Act defeated defendant's argument that "upon the purchaser," found only in subsection (3) of § 17 (a), should be read into all three subsections, because "[t]he short answer is that Congress did not write the statute that way").

Nevertheless, the SEC has, for eighty years, interpreted section 3(a)(9) securities not as exempted securities—*i.e.*, securities to which the Securities Act's registration requirement does not apply—but as exempted *transactions* of the type set forth under section 4 of the Securities Act. *See* 15 U.S.C. § 77d. In 1940, the Commission found that 3(a)(9) securities were different from the securities delineated at 3(a)(1) through (a)(8) and did require registration. *See In re Thomson Ross Secs. Co.*, 6 S.E.C. 1111, Securities Exchange Act Release No. 2455, 1940 WL 36371 (Mar. 25, 1940). Below, the Government never cited *Thomson Ross* and the District Court never discussed or referred to *Thomson Ross.* *See* Add. A013 (Hearing Tr. 24:1-4 ("One can look through the case law and find no 3(a)(9) cases[.]")). The District Court instead made reference to an "enunciation" of the

SEC General Counsel[2] and accorded the equivalent of "ex officio deference under *Chevron*" to an "expansive administrative interpretation" of section 3(a)(9) that is "not even deserving of any persuasive effect." *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring).

B. An Agency is Not Free to Impose an Interpretation that Is Contrary to the Plain Language of the Statute.

Apparently relying on such "ex officio deference," the United States seeks to apply its irreconcilable civil interpretation of section 77c(a)(9) in this criminal case. Indeed, the purported registration requirement of the stock sales supported by Mr. Weed and his assistance in purportedly evading such requirements was the crux of the Government's conspiracy theory presented at trial. However, the plain meaning of 15 U.S.C. § 77c(a)(9) forecloses the Government's case.

The prosecutor cannot rely on flawed civil law standards to support a criminal prosecution. As Chief Justice Marshall wrote:

> 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. To determine that a case is within the intention of a statute, its language must authorize us to say so.

[2] The Government also cited to a 2008 SEC administrative "interpretation." *See* U.S. Secs. & Exch. Comm'n, Div'n of Corp. Fin., Compliance Disclosure Interpretations: Securities Act Sections (Question 125.08) (Nov. 26, 2008), *available at* http://bit.ly/2hmImb4.

United States v. Wiltberger, 18 U.S. 76, 96 (1820).[3]

In *Crandon v. United States*, the Supreme Court refused to apply the government's longstanding civil interpretation of a statute in a criminal case where the interpretation contradicted the text of the statute. 494 U.S. at 159 (holding that the statutory language of 18 U.S.C. § 209 required, as an element, status as a government employee at the time of the gift). Moreover, the Court concluded its analysis by noting that, since it was construing a criminal statute, it was bound to apply the rule of lenity and resolve any ambiguity in favor of the defendant. *Id*. at 168.

In a concurrence joined by Justices O'Connor and Kennedy, Justice Scalia flatly rejected "what seems to me the strongest argument against interpreting § 209(a) to mean what it says: the fact that it has long been interpreted differently." *Id*. at 176. Similarly here, applying administrative precedent to generally vindicate the prosecutor's understanding of the purpose of the Securities Exchange Act would be "an unprecedented way of interpreting the criminal law." *Id*. at 180; *id*. at 176

[3] The court must always look first to the plain meaning of the statute, *Robinson v. Shell Oil Co*., 519 U.S. 337, 340-41 (1997), and its inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent. *United States v. Ron Pair Enters., Inc*., 489 U.S. 235, 240-41 (1989). The court must "presume that the legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (brackets and citation omitted).

(stating that "the long and unsatisfactory experience with a countertextual interpretation is one of the prime reasons for adhering to what Congress enacted").

C. Mr. Weed Is Entitled to Have the Statute Applied As Written in this Criminal Case.

The Government may well be hesitant to confront the proper judicial interpretation of a hybrid civil/criminal statute which has been misinterpreted for a very long time by a very public agency. However, as the Supreme Court made clear in *Abramski*, no matter how long a statute with criminal ramifications has been misinterpreted, it is the Court's duty to correct it. 134 S. Ct. at 2274.[4]

[4] Additionally, the principle of lenity, discussed *infra*, requires courts to resolve any statutory ambiguity in a criminal law in favor of the defendant. "This principle rests on concerns about notice (the state ought to provide fair warning of what violates the criminal laws) and separation of powers (Congress, not agencies or courts, defines crimes)." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring) (citing *United States v. Bass*, 404 U.S. 336, 348 (1971)). Even if Mr. Weed was "on notice" of the SEC's eighty-year-old "interpretation," the separation of powers doctrine must still be vindicated for a statutory interpretation to stand. The Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), to defer to an agency's interpretation of a law that carried criminal penalties while only referencing the fair notice concerns of the rule of lenity, was subsequently referred to as a "drive-by ruling" that "deserves little weight." Statement of J. Scalia on Denial of Cert. at 3, *Whitman v. United States*, *supra* p. 7 (citing *United States v. Wiltberger*, 18 U.S. 76, 95 (1820)). *Babbitt* also pre-dates the recent holdings clarifying that the Government's reading of a criminal statute is not entitled to deference because criminal statutes are for the courts, not the government, to construe. *See Apel*, 134 S. Ct. at 1146; *Abramski*, 134 S. Ct. at 2274; *see also Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030–32 (2016) (Sutton, J., concurring in part and dissenting in part) (reconciling *Babbitt* footnote 18 with more recent Supreme Court decisions).

Moreover, Mr. Weed is entitled to a literal application, or "wooden" reading, of section 3(a)(9) under the simple premise that, in a criminal prosecution, the government has the burden to prove he committed each statutory element of a crime beyond a reasonable doubt. *See, e.g.*, *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) ("It is the Government that bears the burden of proving its case beyond a reasonable doubt."). There can be no crime for violating the spirit or public's general understanding of a law. *See Crandon*, 494 U.S. at 179 (Scalia, J., concurring). Mr. Weed is simply asking that in this criminal case, the Court apply the statute as written.[5]

II. Any Ambiguity in the Language of 15 U.S.C. § 77c Must Be Resolved in Favor of Mr. Weed.

The lower court's failure to apply the rule of lenity in this case resulted in a four-year prison sentence for Mr. Weed. Even assuming, *arguendo*, that section 3(a)(9) is in some way ambiguous (which it is not), the District Court's failure to apply the rule of lenity in this criminal case was error. Below, the District Court delved into the legislative history of the securities laws—a construction analysis

[5] Only new constitutional rules with substantive effect, *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016), and new "watershed rules of criminal procedure" (which are procedural rules implicating the fundamental fairness and accuracy of the criminal proceeding), *Saffle v. Parks*, 494 U.S. 484, 495 (1990), have retroactive effect. *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016).

only proper if 15 U.S.C. § 77c was found to be ambiguous. The rule of lenity requires any ambiguity in a criminal law be resolved in favor of the defendant.

A. Criminal Statutes are for the Courts, not the Government, to Construe.

American jurisprudence is founded on the seemingly straightforward principle that the Legislative, Executive, and Judicial Branches are three separate entities that must remain equal. *Mistretta v. United States*, 488 U.S. 361, 381–83 (1989) ("[T]he greatest security against tyranny—the accumulation of excessive authority in a single branch—lies . . . in a carefully crafted system of checked and balanced power within each Branch."). Courts must strike down provisions of law that either "accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." *Id*. at 382 (citing The Federalist No. 51, at 349 (James Madison) (J. Cooke ed., 1961)).

The doctrine of the separation of powers is violated by undue deference to an agency's erroneous interpretation of a hybrid civil/criminal statute. *See Crandon*, 494 U.S. at 177 (Scalia, J., concurring). The dangers and instability of such a regime are readily apparent. If the Executive is allowed to promulgate criminal regulations and enforce those regulations, and the Judiciary must defer to the Executive's interpretation of a criminal statute so long as it is reasonable under *Chevron*, the result is a confusing tangle of ambiguous laws passed by Congress, administered,

interpreted, and prosecuted entirely by the Executive, and completely unchecked by the Judiciary. *See* Hon. Jed S. Rakoff, U.S. Dist. Judge, S.D.N.Y., Speech at Conference on Corporate Crime and Financial Misdealing at New York University Law School: Hybrid Statutes: A Study in Uncertainty, Speech at Conference on Corporate Crime and Financial Misdealing (Apr. 17, 2015), *available at* http://bit.ly/2hefGhr (stating that "hybrid statutes create more problems than they solve").

The SEC's historical interpretation of 15 U.S.C. § 77c, a quasi-civil and criminal statute, is entitled to no deference. The "[Supreme] Court has never held that the Government's reading of a criminal statute is entitled to any deference." *Apel*, 134 S. Ct. at 1146. Criminal statutes like the one in this case are for courts, not the government to construe. *Abramski*, 134 S. Ct. at 2274. An agency's historical position on a statute is "no more relevant than its current one—which is to say, not relevant at all." *Id.* (rejecting the Defendant's claim that the agency had formerly interpreted the statute in accordance with his position and stating "[w]hether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly (as the ATF used to in construing § 922(a)(6)), a court has an obligation to correct its error"); *see also* Statement of J. Scalia on Denial of Cert. at 1, *Whitman v. United States*, *supra* p. 7 ("A court owes no deference to the

prosecution's interpretation of criminal law. Criminal statutes are for the courts, not for the Government, to construe.").

B. The Rule of Lenity Resolves All Ambiguity in Hybrid Civil/Criminal Statutes in Favor of Mr. Weed.

The rule of lenity directs courts to "interpret ambiguous criminal laws in favor of criminal defendants." *Wiltberger*, 18 U.S. at 76. It requires that all interpreters resolve uncertainties in the law with criminal applications in favor of the defendant. *Carter v. Welles-Bowen Realty, Inc.*, 736 F. 3d 722, 736 (6th Cir. 2013) (Sutton, J., concurring); *see United States v. Santos*, 553 U.S. 507, 514 (2008); *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

Where a statute has both criminal and civil applications, like the 1933 Securities Act, *see* 15 U.S.C. § 77x, the Supreme Court has held that "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *cf. United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992) (plurality) (applying the rule of lenity to a tax statute in a civil setting where the statute had criminal applications and therefore had to be interpreted consistently with its criminal applications); *Crandon*, 494 U.S. at 168 (Stevens, J.) (applying rule of lenity to a hybrid criminal/civil statute in the civil context); *Fed. Commc'ns Comm'n v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954) ("There cannot be

one construction for the Federal Communications Commission and another for the Department of Justice.").[6]

This Court cannot rely on the prosecution to simply interpret and apply the law fairly, but rather should check the Executive's role by construing this criminal statute narrowly. *See McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (declining to rely on "the Government's discretion" to protect against overzealous prosecutions under § 201, concluding instead that "'a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter'" (citing *United States v. Sun Diamond*, 526 U.S. 398, 408 (1999).

C. The Rule of Lenity, as a Canon of Construction, Precludes *Chevron* Deference.

"The rule of lenity . . . is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation." *Thompson/Center Arms Co.*, 504 U.S. at 518 n.10 (plurality opinion).

[6] *See also Scottrade, Inc. v. BroCo Investments, Inc.*, 774 F. Supp. 2d 573, 584 (S.D.N.Y. 2011) ("[W]hen a statute has both civil and criminal application, th[e] rule of lenity must be applied consistently to both.").

The *Chevron* doctrine tells courts to defer to an administrative agency's reasonable interpretation of an ambiguous statute—but only where that statute is ambiguous even after the ordinary statutory canons of construction, like lenity, apply. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984). In other words, lenity must trump *Chevron* deference in a court's interpretation of a hybrid statute.[7] *Cf. Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) ("The rule of lenity requires a stricter construction of 'ambiguity in a criminal statute,' not deference." (citation omitted)). Supreme Court precedent calls into question an agency's power even to interpret any criminal statute. *See Apel*, 134 S. Ct. at 1146; *Abramski*, 134 S. Ct. at 2274. It follows, then, that when an agency does interpret a hybrid criminal statute, it is bound by the same canons of construction that the court is—and lenity must govern. *See Crandon*, 494 U.S. at 176–78 (Scalia, J., concurring) ("[A] vast body of *administrative* interpretation that exists . . . is not an administrative interpretation that is entitled to deference under *Chevron* . . . . The law in question, a criminal statute, is not administered by any agency but by the courts." (citation omitted)).

[7] *See* Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 Baylor L. Rev. 1, 61 (2006) ("Where the rule of lenity would shield an individual from being subjected to harsh criminal penalties under an ambiguous statute, that rule should take precedence [over *Chevron*].").

This distinction is even more important to apply across the judiciary as Congress continues to promulgate hybrid statutes, like the one at issue here.[8] Specifically, in the Securities Exchange Act, Congress gave the SEC the authority to prescribe regulations, *see* 15 U.S.C. § 78w(a)(1), and to define some of those regulations as crimes, *see* 15 U.S.C. § 78ff, such as the use of deceptive devices in the violation of such regulations. *See* 15 U.S.C. § 78e; 17 C.F.R. § 240.10b5;[9] *see also United States v. Royer*, 549 F.3d 886, 899 (2d Cir. 2008) (affirming criminal conviction after deferring to the SEC's interpretation of 15 U.S.C. § 78j(b) as it relates to criminal regulatory prohibitions set forth at Rule 10b-5).[10]

When a statute has criminal implications, lenity must apply first as a cannon of statutory construction to resolve the ambiguity in favor of a criminal defendant.[11]

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[8] This case highlights the problems that can arise when an agency construes a hybrid statute in the civil context with no regard to the ramifications both on the criminal system as a whole as well as negative penal consequences for criminal defendants. The prosecutor's understanding of section 3(a)(9), as misinterpreted in the civil context, tainted the trial below and the Government's entire theory of the case.

[9] *See also* Steve Thel, *Taking Section 10(b) Seriously: Criminal Enforcement of SEC Rules*, 2014 Colum. Bus. L. Rev. 1 (2014).

[10] Rule 10b-5 was promulgated under § 10(b), and therefore it "does not extend beyond conduct encompassed by § 10(b)'s prohibition." *United States v. O'Hagan*, 521 U.S. 642, 651 (1997).

[11] *See* Kristen Hickman, *Of Lenity, Chevron, and KPMG*, 26 Va. Tax. Rev. 905 (2007) (In discussing the circumstances in which all of the *Chevron* and *Skidmore* deference doctrines will apply, "the Court has called for employing traditional canons of statutory construction in evaluating whether a statute's meaning is clear. In other words, as a canon of construction, the rule of lenity may operate as a tie-breaker between competing statutory interpretations to establish a statute's supposed plain meaning. A court applying the rule of lenity thus never gets past that first-

There should be no *Chevron* deference afforded to agency interpretation of hybrid criminal/civil statutes. *See Clark v. Suarez Martinez*, 543 U.S. 371, 380–81 (2005) ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. *The lowest common denominator, as it were, must govern*.") (emphasis added).

This is true whether the statute is being interpreted in a civil or criminal proceeding. *See United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (holding in a civil case that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil). Since 15 U.S.C. § 77(a)(9) has both criminal and civil applications, the rule of lenity governs its interpretation in both settings. *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. at 11–12 n.8; *Thompson/Center Arms Co.*, 504 U.S. at 517 (plurality).

Indeed, "[t]ime, time, and time again, the [Supreme] Court has confirmed that the one-interpretation rule means that the criminal-law construction of the statute

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level inquiry and, consequently, does not have the opportunity to defer to the government."). Specifically, the Supreme Court has stated that, within the *Chevron* framework, a court need "accept only those agency interpretations that are reasonable *in light of the principles of construction courts normally employ*." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 272 (2010) (emphasis added) (quoting *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in judgment)).

(with the rule of lenity) prevails over the civil-law construction of it (without the rule of lenity). When a single statute has twin applications, the search for the least common denominator leads to the least liberty-infringing interpretation." *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1028 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part). The courts of appeals have also consistently recognized that the rule of lenity applies to hybrid statutes in both civil and criminal cases. *See, e.g., WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 203–04 (4th Cir. 2012) ("Where . . . our analysis involves a statute whose provisions have both civil and criminal application, our task merits special attention because our interpretation applies uniformly in both contexts. Thus, we follow 'the canon of strict construction of criminal statutes, or rule of lenity.'" (citations omitted)); *In re Woolsey*, 696 F.3d 1266, 1277 (10th Cir. 2012) (for hybrid statutes, "the rule of lenity must apply equally to civil litigants to whom lenity would not ordinarily extend"); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924–25 (11th Cir. 1984) (the rule of lenity applies "even though we construe the OCCA in a declaratory judgment action, a civil context").

Toward this end, a recent case from the United States District Court for the District of Columbia is instructive. In *United States Association of Reptile Keepers, Inc. v. Jewell*, 103 F. Supp. 3d 133 (D.D.C. 2015), plaintiffs sought a preliminary injunction to prevent an Interior Department rule from taking effect which sought to

ban the interstate transfer of any reticulated python and green anaconda already in the United States (*e.g.*, banning the transfer of the snake between Maryland and Virginia). However, the Lacey Act statute, as written, prohibited only the shipment of these two snakes "between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States." *Id.* at 139 (citing 18 U.S.C. § 42(a)(1)). The agency sought *Chevron* deference for the rule, and presented evidence that, notwithstanding the text of the statute (which, on its face, appeared to ban only transfer of injurious species between the continental United States and other territories), the agency and even Congress had interpreted the Lacey Act for more than thirty years to prohibit all interstate transfer of such enumerated species. *Id.* The agency argued that its longstanding interpretation of the Lacey Act, a criminal statute, was compelled by the plain meaning of the statute or, in the alternative, entitled to *Chevron* deference. *Id*. at 144. The Court rejected the Government's argument that the plain meaning of the statute supported the agency's decision and granted the plaintiff's preliminary injunction, finding that the plaintiff was likely to prevail on the merits because it was unlikely that the agency could ever receive *Chevron* deference for its interpretation of the Lacey Act, a statute with both criminal and civil implications:

> There is significant reason to doubt, however, whether *Chevron* applies in this context. The Lacey Act is a criminal statute . . . and the Supreme Court recently observed that it "ha[s] never held that the Government's reading of a criminal statute is entitled to any

> deference[.]" Instead, "whether the Government interprets a criminal statute too broadly . . . or too narrowly . . . a court has an obligation to correct its error." [. . .]
>
> Deferring to [the Government's] view would "upend ordinary principles of interpretation," including the "rule of lenity [which] requires interpreters to resolve ambiguity in criminal laws in favor of defendants." In sum, recent Supreme Court authority suggests that "criminal laws are for courts, not for the Government, to construe."

Id. at 144–45 (citations and original brackets omitted). This approach preserves the legislature's ability to delegate rulemaking authority to agencies while avoiding the dangers implicit in an agency's performance of all three constitutional functions.[12]

While the SEC has criminal rulemaking authority, the SEC's interpretation of the Securities Exchange Act, and the regulations it promulgates thereunder, cannot exceed the bounds of the statute. *United States v. Larionoff*, 431 U.S. 864, 873 (1977) (invalidating regulation as inconsistent with statute under which it was

[12] *But see Oppedisano v. Holder*, 769 F.3d 147, 153 (2d Cir. 2014) (stating that the rule of lenity "does not trump *Chevron's* requirement of deference to *reasonable interpretations* by administrative agencies of statutes for which they are responsible," but not discussing *Apel* or *Abramski*) (emphasis added); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005) ("Rather than apply a presumption of lenity to resolve the ambiguity, *Chevron* requires that we defer to the agency's reasonable construction of the statute."); *see also Amador-Palomares v. Ashcroft*, 382 F.3d 864, 868 (8th Cir. 2004) (stating that the rule of lenity "does not supplant *Chevron* deference merely because a seemingly harsh outcome may result from the [Board of Immigration Appeals'] interpretation"). However, case law that either pre-dates or is inconsistent with the rules in *Apel* and *Abronski* is irrelevant. *See Apel*, 134 S. Ct. at 1144; *Abramski*, 134 S. Ct. at 2259.

promulgated); *Schism v. United States*, 316 F.3d 1259, 1287 (Fed. Cir. 2002) (regulations must be consistent with the statute under which they are promulgated).

If the Government seeks deference for its position, unsupported by statute, that the sale of securities created under 15 U.S.C. § 77c (classes of securities exempted from registration) required registration under 15 U.S.C. § 78a, *et. seq.*, the Court should apply lenity to resolve any ambiguity in favor of Mr. Weed.

D. "Hybrid" Statutes with Civil and Criminal Penalties for the Same Conduct Should Always Be Construed Narrowly.

Without careful attention by courts, hybrid statutes can broaden criminal sanctions unintentionally, if those criminal statutes are most often applied in civil and administrative cases where the broader remedial purpose of the statute is invoked.[13] In the securities context, "[a]lthough criminal violations of § 10(b) require a showing that the act was done willfully, the elements of a civil and criminal violations [*sic*] of the statute are otherwise the same, and courts in criminal cases frequently cite civil interpretations of the statute to determine whether there has been

[13] *See* Jonathan Marx, *How to Construe a Hybrid Statute*, 93 Va. L. Rev. 235 (2007), (discussing the "path-dependence" problem that can arise depending on whether a statute is construed in a civil or criminal proceeding); Hon. Jed S. Rakoff, U.S. Dist. Judge, S.D.N.Y., Speech at Conference on Corporate Crime and Financial Misdealing at New York University Law School: Hybrid Statutes: A Study in Uncertainty, Speech at Conference on Corporate Crime and Financial Misdealing (Apr. 17, 2015), *available at* http://bit.ly/2hefGhr (stating that "hybrid statutes create more problems than they solve").

a violation." *In re Enron Corp. Secs*., 235 F. Supp. 2d 549, 579 n. 18 (S.D. Tex. 2002).

To prevent this problem, the courts and agencies alike must interpret a hybrid civil/criminal statute to the lowest common denominator—in other words, the rule of lenity should govern all agency and judicial interpretations of a hybrid statute, whether in a civil, administrative, or criminal proceeding.[14] *See Clark*, 543 U.S. at 381 ("The lowest common denominator . . . must govern."); *Esquivel-Quintana*, 810 F.3d at 1028 (Sutton, J., concurring in part and dissenting in part) ("The courts must give dual-application statutes just one interpretation, and the criminal application controls. . . . Because a single law should have a single meaning, the 'lowest common denominator'—including all rules applicable to the interpretation of criminal laws—governs all of its applications." (quoting *Clark*, 543 U.S. at 380)); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012) ("Is the language defining the violation to be given one meaning (a narrow one) for the penal sanction and a different one (a more expansive one) for the private compensatory action? That seems inconceivable."). This is particularly important given the "danger posed by the growing power of the administrative state." *City of*

[14] *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155–58 (10th Cir. 2016) (Gorsuch, J., concurring) (citing tension between deference and lenity to buttress argument that *Chevron* doctrine should be abandoned wholesale).

Arlington v. Fed. Commc'ns Comm'n, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

This is "no small matter given the reality that Congress continues to 'put[] forth an ever-increasing volume . . . of criminal laws." *Carter*, 736 F. 3d at 736 (Sutton, J., concurring) (citing *Sykes v. United States*, 131 S. Ct. 2267 (2011) (Scalia, J., dissenting)). In sum, agencies, no less than courts, must honor the rule of lenity. *See Carter*, 736 F. 3d at 736 (Sutton, J., concurring). For this reason, the SEC's interpretation of 15 U.S.C. § 77c(a)(9), even for the past eighty years, cannot stand. Mr. Weed's prosecution, based on that faulty interpretation, must meet a similar fate.

CONCLUSION

For these reasons, the Court should reverse the lower court's Order denying Mr. Weed's Motion for Judgment of Acquittal. Alternatively, the Court should grant Mr. Weed a new trial.

Respectfully submitted,

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I hereby certify that a true copy of the above document was served upon counsel of record for the United States by electronic mail on December 9, 2016.

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