No. 14-1217

IN THE

Supreme Court of the United States

BP EXPLORATION & PRODUCTION INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fifth Circuit erred by giving mere lip service to the rule of lenity and penal canon when imposing Clean Water Act civil fine liability under 33 U.S.C. § 1321(b)(7) on the owners of an offshore well, where oil discharged to federal waters not from the well itself but from a vessel and its associated equipment connected to the well.

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INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this and other federal courts in cases addressing the proper interpretation of the Clean Water Act (CWA). *See, e.g., Mingo Logan Coal Co. v. EPA,* 134 S. Ct. 1540 (2014); *Rapanos v. United States,* 547 U.S. 715 (2006); *Am. Farm Bureau Fed'n v. EPA*, No. 13-4079 (3d Cir., dec. pending). WLF also routinely litigates in cases addressing the proper scope of civil and criminal prosecutions against members of the business community. *See, e.g., Stolt-Nielsen S.A. v. United States*, *cert. denied*, 549 U.S. 1015 (2006); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *Friedman v. Sebelius*, 686 F. 3d 813 (D.C. Cir. 2012).

WLF agrees with Petitioner that the Fifth Circuit's holding in this case presents issues of exceptional importance. WLF is deeply concerned that the panel's novel and erroneous interpretation

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for Respondent with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

of the CWA's "from-which-oil-is-discharged" test under § 1321(b)(7) represents a fundamental misunderstanding of the rule of lenity. Correctly applied, that interpretative rule requires that courts resolve the meaning of ambiguous penal statutes by strictly construing them in the defendant's favor. Here, the courts below effectively ignored the rule of lenity to find BPXP liable for up to the more than $13 billion in penalties sought by the government. Especially given that the government elected to proceed under a strict-liability statute, the appeals court should have taken greater pains to ensure that the rule of lenity was scrupulously observed. Accordingly, the Court should use this case as a vehicle to resolve the ambiguity inherent in § 1321(b)(7) in Petitioner's favor and instruct the lower courts on the proper application of the rule of lenity.

STATEMENT OF THE CASE

This case arises from the April 2010 explosion on the watercraft drilling vessel *Deepwater Horizon* and the resulting oil spill in the Gulf of Mexico. BP Exploration & Production Inc. (BPXP) and Anadarko Petroleum Company (Anadarko) jointly owned the Macondo well, which was located entirely beneath the seabed. Transocean, one of the world's largest offshore drilling contractors, owned and operated the *Deepwater Horizon* and all its appurtenances, including a blowout preventer and related safety mechanisms that were attached (underwater) to the Macondo well.

Following the explosion on the *Deepwater Horizon*, the United States brought a CWA

enforcement action against BPXP, Anadarko, and Transocean (among others), seeking civil and criminal penalties. In relevant part, § 311 of the CWA prohibits the "discharge of oil and hazardous substances," including "any spilling, leaking, pumping, pouring, emitting, emptying, or dumping." 33 U.S.C. § 1321(a)(2), (b)(3). Rather than proceed under § 1319, which establishes civil and criminal penalties that apply to "*any* person" violating § 311 of the CWA, the United States elected to proceed under § 1321(b)(7), which provides for civil penalties on a strict-liability basis against only "the owner, operator, or person in charge of any vessel, onshore facility or offshore facility *from which oil or a hazardous substance is discharged* in violation of [§ 311 of the CWA]." 33 U.S.C. § 1321(b)(7)(A) (emphasis added).

The United States moved for summary judgment, contending that BPXP, Anadarko, Transocean, and others were all independently liable for civil penalties under § 1321(b)(7) of the CWA. As for the statutory requirement that, to be held liable, a defendant must own or control the vessel or facility "from which oil . . . is discharged," the United States acknowledged that Transocean was the owner and operator of the *Deepwater Horizon* but argued that all three entities were liable because the same oil was discharged from both the Macondo well and the *Deepwater Horizon*. Pet. App. 49a. In response, BPXP and Anadarko emphasized that the *Deepwater Horizon* and it appurtenances were separate and distinct from the Macondo well for CWA purposes, and that oil was discharged into the Gulf only "from" the *Deepwater Horizon* and it appurtenances. Pet. App. 50a. To the extent that § 1321(b)(7) is

ambiguous as to assigning liability, BPXP and Anadarko urged application of the rule of lenity requiring strict construction of penal statutes, which would resolve any statutory ambiguity in favor of defendants. Pet. 8.

The U.S. District Court for the Eastern District of Louisiana granted summary judgment for the United States. The district court acknowledged the lack of any relevant precedent on point and conceded that the CWA does not define "from" and that "its definition of 'discharge' is of little help." Pet. App. 50a. Nonetheless, the district court concluded that the oil was discharged only "from" the Macondo well, not "from" the *Deepwater Horizon* and its appurtenances, finding BPXP and Anadarko liable as owners of the well. *Id.* at 52a-57a. The district court supported its decision with public policy considerations by noting that BPXP and Anadarko should pay all CWA penalties because they stood to "profit directly" from the oil and thus were better positioned to absorb liability. *Id.* at 54a. The district court denied summary judgment as to Transocean's liability. *Id.* at 58a-59a. The district court did not address the rule of lenity in its opinion.

BPXP and Anadarko appealed. After BPXP and Anadarko filed their notices of appeal but before appellate proceedings began, Transocean settled its civil penalty claims with the United States for $1 billion—even though the district court had determined that only BPXP and Anadarko were liable. Then, less than five months after the district court's ruling, Congress passed the "RESTORE" Act, which requires that 80 percent of all civil penalties collected from the *Deepwater Horizon* incident (*i.e.*,

from this still-pending litigation) be deposited into the "Gulf Coast Restoration Trust Fund" for distribution to the five Gulf Coast States and their citizens. Pub. L. No. 112-141, Title I, Subtitle F, §§ 1601-08, 126 Stat. 405, 588-607 (July 6, 2012).

On appeal, the Fifth Circuit affirmed. While acknowledging that the CWA is "not a model of clarity," the panel relied on little more than the "regulatory structure" of the CWA and the EPA's prior enforcement practice to conclude that a "discharge" occurs "from" the "point at which controlled confinement is lost." Pet. App. 5a-7a. Characterizing BPXP and Anadarko as seeking "exceptions" to the CWA's strict-liability scheme, the panel declared that it was "aware of no case in which a court or administrative agency exempted a defendant from liability on account of the path traversed by discharged oil." *Id.* at 9a-11a. The panel thus rejected as "immaterial" Appellants' argument that no violative "discharge" occurred until oil escaped into the water from the *Deepwater Horizon* and its appurtenances, concluding instead that the Macondo well was the definitive point where "controlled confinement" was "lost." *Id.* at 12a. Citing § 1321(b)(7), the panel concluded that "by the express terms of the statute, Anadarko and BP 'shall be subject to a civil penalty' calculated in accordance with statutory and regulatory guidelines." *Id.* at 12a. The panel failed entirely to address the rule of lenity.

BPXP and Anadarko petitioned for rehearing *en banc*. While those petitions were still pending, the Fifth Circuit issued a "supplemental opinion" that reaffirmed its original holding but emphasized

that "no prior reported cases have presented facts that are directly analogous to those in the present case." *Id.* at 13a-26a. Although the panel initially found a "loss of controlled confinement," the panel now insisted that the Macondo well "never confined the hydrocarbons at all." *Id.* at 16a. Again relying on the EPA's enforcement practice to interpret the statute, the panel concluded that because the meaning of the CWA was "clear," application of the rule of lenity was foreclosed. *Id.* at 26a.

By a vote of 7 to 6, the Fifth Circuit declined rehearing *en banc*. *Id.* at 62a. Judge Clement, joined by the five other judges who voted in favor of rehearing, strongly dissented. Noting that the panel's "controlled confinement" test lacked any support in the text of the CWA, the dissent pointed out that the panel's "supplementary opinion to clarify its first CWA interpretation suggests that the panel perceived an ambiguity in the CWA." *Id.* at 63a-64a. The dissent found the panel's implicit acknowledgement of ambiguity to be "concerning because a clear line of precedent exists holding that ambiguities in civil-penalty statutes should be resolved in favor of the defendant." *Id.* The dissent also stressed that the panel's initial and supplemental opinions contradicted each other, effectively changing the applicable test from a "loss of controlled confinement" to an "absence of controlled confinement," while nonetheless disclaiming any ambiguity.

SUMMARY OF ARGUMENT

This case presents issues of exceptional importance to the business community. The Fifth

Circuit's unsupported and inconsistent view of when an entity can be held strictly liable for a "discharge of oil or hazardous substances" under the CWA has significant implications for the rule of law that go well beyond the more than $13 billion in civil penalties at stake in this case. Because only this Court can provide the clarity, guidance, and regulatory certainty that are so desperately needed for faithful implementation of the CWA, the Court should grant the Petition and reverse the decision below.

The panel's implicit acknowledgement of ambiguity, as revealed by the panel's two inconsistent opinions, clearly invites application of the venerable rule of lenity. That rule is deeply rooted in our legal system, ensuring that fair notice is given to defendants, that laws are not enforced arbitrarily, and that the executive, legislative, and judicial branches maintain their proper roles. To comply with the rule of lenity, the appeals court should have rejected the government's argument for imposing strict liability on Petitioner. As the six-judge dissent from denial of rehearing *en banc* noted, the panel decision stands athwart a "clear line of precedent" which holds that "ambiguities in civil-penalty statutes should be resolved in favor of the defendant." It now falls on this Court to vindicate the rule of lenity and the important values it promotes.

Further, the Fifth Circuit's approach in this case impermissibly rests in part on intimations of general legislative policy rather than on the specific question of statutory construction. In the absence of any applicable precedent, to the extent that the

panel deferred to the government's litigating position in this case, such deference was wholly improper, especially since the government has issued no formal interpretation of § 1321(b)(7) to defer to. In any event, because the rule of lenity requires that any ambiguity be resolved against the government and in favor of the defendant, "there is, for *Chevron* purposes, no ambiguity in such a statute." *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001).

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO ENSURE THAT LOWER COURTS CONSISTENTLY APPLY THE RULE OF LENITY TO RESOLVE STATUTORY AMBIGUITIES IN FAVOR OF DEFENDANTS

A. The Rule of Lenity Is a Vital Tool of Statutory Construction for Resolving Ambiguities in Penal Statutes

Originating in England during the late seventeenth and early eighteenth centuries to protect individuals from the expansive imposition of the death penalty, *see* Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv. C.R.-C.L. L. Rev. 197, 199-200 (1994), the rule of lenity remains a substantive canon of statutory interpretation essential to safeguarding individual rights. The rule, which is "not much less old than the constitution itself," *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820), requires that courts faced with more than

one plausible reading of a penal statute take the narrowest view. *McNally v. United States*, 483 U.S. 350, 359-60 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.").

The rule stems not "out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct." *Bell v. United States*, 349 U.S. 81, 83 (1955). Rather, it is "founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. at 95. Indeed, "because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).

This Court has also elaborated on the rule's role in ensuring that the public is provided with constitutionally adequate notice of what conduct is subject to criminal punishment. Recognizing that the "vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited," *United States v. Cardiff*, 344 U.S. 174, 176 (1952), the Court has insisted that "a fair warning should be given to the world in language that the common world will understand." *Bass*, 404 U.S. at 348. Thus, the rule of lenity is among the sound principles of

statutory construction this Court has used to cabin amorphous statutes that create room for arbitrary and unfair decisions by allowing judges to develop standards of liability and punishment on a case-by-case basis.

Following *Wiltberger*'s teaching, strict construction of criminal statutes became the governing canon within United States courts. For example, in *United States v. Lacher*, 134 U.S. 624, 628 (1890), the Court held that "before a man can be punished, his case must be plainly and unmistakably within the statute." Likewise, in *Ladner v. United States*, 358 U.S. 169, 178 (1958), this Court refused to "interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." As Justice Frankfurter emphasized in *Bell v. United States*, 349 U.S. at 83, it is "a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a higher punishment."

This Court's jurisprudence continues to make the rule of lenity the dispositive principle when the text, structure, and legislative history of a penal statute are ambiguous about its meaning and application. Most recently, in *Yates v. United States*, the Court vacated a commercial fisherman's conviction under the Sarbanes-Oxley Act, confirming that "if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of 'tangible object,' as that term is used in § 1519, we would invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" 135 S. Ct. 1074, 1088 (2015)

(quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)); *see also Skilling v. United States*, 561 U.S. 358, 365 (2010) (reiterating the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."); *Moskal v. United States*, 498 U.S. 103, 107 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.").

B. Because the CWA Contains Both Criminal and Civil Sanctions, It Is Subject to the Rule of Lenity

The rule of lenity is not limited to criminal sanctions but applies to any statute in which civil remedies can fairly be described as "penal." The CWA, which includes a scheme of harsh civil and criminal penalties, is such a statute. Criminally, a "knowing" violation of the CWA carries fines up to $100,000 per day and six years' imprisonment. 33 U.S.C. § 1319(c)(2). Criminal prosecutions for CWA violations are not uncommon. *See, e.g., United States v. Ortiz*, 427 F.3d 1278, 1281 (10th Cir. 2005) (one year in prison); *United States v. Ming Hong*, 242 F.3d 528, 529 (4th Cir. 2001) (three years in prison, $100,000 maximum fine for each of 12 CWA convictions); *United States v. Wilson*, 133 F.3d 251, 253 (4th Cir. 1997) (21 months in prison, $1 million

fine).

Likewise, civil and administrative penalties under the CWA can equal $37,500 per day. 33 U.S.C. § 1319(d), (g); 40 C.F.R. § 19.4 (2010). Even *negligence* can result in fines of $50,000 per day and two years' jail time. *Id.* § 1319(c)(1). Although this case arises in the context of civil penalties under § 1321, that same provision also triggers criminal penalties under § 1319 where scienter and other factors are present. *See id.* § 1319(c). Thus, even though § 1321(b)(7) is civil in nature, it has a criminal counterpart in § 1319(c). The penal nature of the statute's administrative penalties is especially underscored in this case, where BPXP faces the staggering prospect of *billions* of dollars in unprecedented CWA liability.

Ambiguities in a statute like the CWA, which imposes strict liability in the form of harsh monetary penalties against a defendant without regard to the actual injuries sustained, are thus resolved by applying the rule of lenity.[2] Such statutes are penal because they "compel obedience beyond mere redress to an individual for injuries received." 3 Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 59.1, at 116 (6th ed. 2001); *Wood, Walker & Co. v. Evans*, 461 F.2d 852, 855 (10th Cir. 1972) (holding that statutes in which "the amount of the damages is fixed on a somewhat liquidated

[2] When applied in a civil setting, the rule of lenity is sometimes referred to as the "penal canon." *See, e.g., Commissioner v. Acker*, 361 U.S. 87, 91 & n.4 (1959) (collecting cases).

measure without regard to injury suffered" are to be "strictly construed"). Indeed, this Court has recognized that a single law should have but one meaning, and the "lowest common denominator, as it were, must govern" all of its applications. *Clark v. Martinez*, 543 U.S. 371, 380 (2005). Accordingly, 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." *Id.*

United States v. Thompson/Center Arms Co. illustrates the point well. There, the Court was called upon to interpret a law that included both a civil and criminal penalty. Even though *Thompson/Center Arms* was a civil case, a majority of the Court applied the rule of lenity. 504 U.S. 505, 518 n. (1992) (plurality opinion). "The rule of lenity," the Court's plurality explained, "is a rule of statutory construction[,] . . . 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." *Id.* at 518 n.10. Relying solely on the rule of lenity, Justices Scalia and Thomas concurred in the judgment, bringing to five the number of justices who agreed that the rule of lenity applied. *Id.* at 523.

Recent cases further underscore this point. *See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) (confirming that "the rule of lenity can apply when a statute with criminal sanctions is applied in a noncriminal context"); *Leocal v. Ashcroft*, 543 U.S. 1, 13 n.8 (2004) ("Because we must interpret the

statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *Scheindler v. Nat'l Org. for Women*, 537 U.S. 393, 408-09 (2003) (applying the rule of lenity in a civil RICO class action).

C. Review is Warranted to Ensure that § 1321(b)(7) of the CWA Is Construed with the Same Lenity that Would Be Required in a Criminal Prosecution

The Fifth Circuit's approach to statutory interpretation is particularly inappropriate in the context of a strict-liability penal statute such as the CWA. As demonstrated above, the rule of lenity clearly applies to the CWA and should have guided the Fifth Circuit to a strict construction of § 1321(b)(7). Instead, the panel's interpretation of the CWA essentially ignored the rule of lenity, leading the court to interpret § 1321(b)(7)'s "from-which-oil-is-discharged" provision expansively rather than narrowly. As the six-judge dissent noted, that approach contravenes "a clear line of precedent" requiring that "ambiguities in civil-penalty statutes should be resolved in favor of the defendant." Pet. App. 63a-64a.

The CWA does not define the word "from" as used in § 1321(b)(7), and even the district court admitted that the CWA's definition of the word "discharge" is "of little help." *Id.* at 50a. In its initial opinion, the Fifth Circuit panel conceded that the CWA is ambiguous and "not a model of clarity." *Id.* at 5a. Indeed, at oral argument, one member of the panel likened the CWA's use of "from" in § 1321(b)(7)

to a "Rorschach inkblot," explaining that "you can put any definition of several on top of that, and you can make it go right back down under the ground to the good Lord himself who forced this kick." Pet. 11. The statute's inherent ambiguity is further demonstrated by the panel's supplemental opinion, which effectively changed the applicable test from a "loss of controlled confinement" to an "absence of controlled confinement," while simultaneously disclaiming any ambiguity. And despite the lack of any applicable precedent interpreting § 1321(b)(7), the appeals court read that provision broadly to determine that oil was discharged only "from" the Macondo well, but not "from" the *Deepwater Horizon*.

Section 1321(b)(7) thus embodies precisely the sort of ambiguity the rule of lenity was created to resolve. The rule ensures that only Congress, the most democratic and accountable branch of the federal government, gets to decide what conduct triggers harsh, punitive consequences. When a court applies the rule of lenity, it does not snatch away a policy decision from the political branches. Instead, it insists that the choice to punish certain conduct be made by the first political branch rather than the third. *See Bass*, 404 U.S. at 348 ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."). The rule also forces the government to give its citizens fair warning, ideally on the face of the statute, as to what conduct is proscribed. But if, in the face of glaring ambiguity, courts are free simply to turn a blind eye to the rule of lenity (as happened below), each of these important interests will be seriously

eroded.

The Court recently reaffirmed the constitutionally grounded importance of the rule of lenity, holding that when a penal statute is ambiguous, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Yates*, 135 S. Ct. at 1088. Only this Court can safeguard the continued vitality of that venerable rule in light of the holding below. Given the unprecedented billions of dollars that are at stake in this case, the Court should grant review to clarify for the Fifth Circuit (and all federal courts) that the rule of lenity remains an indispensable canon of statutory interpretation for all punitive statutes.

II. THE GOVERNMENT'S OWN LITIGATING VIEW OF § 1321(b)(7) IS NOT ENTITLED TO DEFERENCE

The Fifth Circuit's confusing approach to statutory interpretation is deeply flawed and departs sharply from the traditional tools of construction employed by this Court. Relying on little more than Congress's broad remedial purpose and the "regulatory framework" of the CWA, Pet. App. 5a, the panel concluded that because the CWA's overriding goal is to eliminate all pollutants from federal waters, Congress must have intended to maximize all penalties in order to prevent illegal discharges.[3] But if the general punitive purpose of a

[3] The panel apparently viewed § 1321 as attaching liability to any party who ever owned oil that was eventually discharged, absent some express "exception." The appeals court

statute were grounds for its broad construction, then the rule of lenity would be turned on its head.

Indeed, the Fifth Circuit's approach falls far short of the sort of rigorous statutory analysis that this Court has traditionally required. Indeed, the initial panel opinion actually misstated the law when it concluded that "by the express terms of the statute, Anadarko and BP 'shall be subject to a civil penalty' calculated in accordance with statutory and regulatory guidelines," Pet. App. 12a, even though § 1321(b)(7) contains no reference to "regulatory guidelines" whatsoever. But this Court has insisted that "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Tellingly, the United States did not direct the courts below to any relevant § 1321(b)(7) authorities on point. In its effort to validate the largest environmental penalty ever sought by the United States, the panel referenced various EPA regulations, guidelines, and the like, implying that they somehow should govern resolution of this case or are at least helpful in clarifying the meaning of § 1321(b)(7). *See, e.g.,* Pet. App. 6a (citing 33 C.F.R.

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cited to *United States v. W. of Eng. Ship Owner's Mut. Prot. & Indem.*, 872 F.2d 1192, 1196 (5th Cir. 1989), for the proposition that § 1321(b)(7) establishes "an absolute liability system *with limited exceptions*, which are to be narrowly construed." Pet. App. 11a (emphasis added). But the panel identified no such "exceptions" in § 1321(b)(7), and none exist.

§ 27.3 (2006)); *id.* at 18a (citing 30 C.F.R. § 250.401, 250.420(a)). But none of those regulations cited by the panel purport to interpret § 1321(b)(7), leaving nothing to which the court could properly defer. Perhaps that is why the panel opinion vaguely alludes to regulations but never actually quotes any. And while EPA did define "may be harmful" as used in § 1321(b)(3) by creating the "sheen test," 40 C.F.R. § 110.3, EPA has never deigned to interpret § 1321(b)(7) in *any* regulation to WLF's knowledge.

In any event, deference to EPA is wholly inappropriate where, as here, the particular statutory provision at issue is administered by the courts, not the agency. Unlike § 1321(b)(6), under which the agencies may assess a civil penalty, the assessment of penalties under § 1321(b)(7) is reserved exclusively to the federal courts. 33 U.S.C. § 1321(b)(7)(E). Although an agency's determination within the scope of its delegated authority to establish *standards* implementing a statutory scheme is entitled to deference, that delegation does not extend to the agency's interpretation of the statute's *enforcement* provisions. To hold otherwise would be to allow an agency to "bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (finding it "inappropriate" to "consult executive interpretations" of a statute to resolve ambiguities surrounding the scope of the statute's judicially enforceable remedy).

Even if EPA had some reasoned view of § 1321(b)(7), the appeals court could not defer to that view in this case because BPXP lacked fair notice of that interpretation. The "fair notice doctrine," which began as a principle of due process in the criminal

context "has now been thoroughly 'incorporated into administrative law.'" *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (quoting *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987). This doctrine "prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986); *see United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) ("Thus, to the extent that the [administrative] regulations [stating a contrary interpretation of the law] deprived [defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."). As these cases make clear, an administrative agency may not seek to eliminate statutory ambiguities for the first time in an enforcement action. Rather, the agency must first eliminate any ambiguity by way of regulatory action, and only later may it seek penalties after having clarified the law.

Finally, even if the United States could point to some formal agency interpretation of § 1321(b)(7) to which the court should defer—and it has not, because it cannot—the rule of lenity would still operate to resolve any ambiguity *in favor* of the defendant. Even under *Chevron*, an agency's interpretation of a statute does not automatically prevail any time the statute contains an ambiguity. Rather, courts may "accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ."

EEOC v. Arabian Am. Oil. Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment). Deference comes into play if, and only if, a statutory ambiguity persists after applying all the "traditional tools of statutory construction." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 & n.9 (1984). The rule of lenity is one such tool, and it must be applied first.

Indeed, substantive canons of construction like the rule of lenity "forbid administrative agencies from making decisions on their own" by curtailing their "ordinary discretion" to construe an "ambiguous statutory provision." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 316 (2000). Such canons serve "to trigger democratic (in the sense of legislative) processes and to ensure the forms of deliberation, and bargaining, that are likely to occur in the proper arenas" by requiring Congress to "sp[eak] clearly" before the court will recognize a certain statutory meaning. *Id.* at 335. And because canons help to ensure "that judgments are made by the democratically preferable institution," they "trump[] *Chevron* for that very reason. Executive interpretation of a vague statute is not enough when the purpose of the canon is to require Congress to make its instructions clear." *Id.* at 331. "If an interpretative principle resolves a statutory doubt in one direction, an agency may not reasonably resolve it in the opposite direction." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring).

Although the lower courts are divided on how the rule of lenity interacts with *Chevron*, this Court has repeatedly confirmed that traditional canons of

construction take precedence over conflicting agency interpretations. *See*, *e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (applying the presumption against preemption); *St. Cyr*, 533 U.S. at 289 (applying the presumption against retroactivity and the canon that ambiguous deportation statutes should be interpreted in favor of immigrants); *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (applying the federalism canon); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (applying the constitutional avoidance canon). By displacing an agency's prerogative to resolve an ambiguity, such canons ensure an independent judicial interpretation of an unclear statute.[4]

The Court underscored this important limit on agency deference in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, which ultimately reversed the Ninth Circuit for failing to defer to the FCC under *Chevron*, but only after noting that the appeals court had "invoked no other rule of construction (such as the rule of lenity) requiring it to conclude that the statute was unambiguous to

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[4] A number of legal scholars have, in the context of various interpretative canons, argued for a canon-trumps-*Chevron* rule. *See, e.g.,* Eliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 Baylor L. Rev. 1, 61 (2006) (arguing that the rule of lenity "must trump the rule of deference"); Scott C. Hall, *The Indian Law Canons of Construction v. The* Chevron *Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 Conn. L. Rev. 495, 497 (2004) (arguing that the "Indian law canons should trump *Chevron*"); Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 742 (2004) (arguing that the presumption against preemption displaces the *Chevron* framework).

reach its judgment." 545 U.S. 967, 985 (2005). *Brand X* thus confirms that a court may well find that Congress has not delegated interpretative authority to an agency either on the basis of plain statutory text *or* on the basis of some "other rule of construction (such as the rule of lenity)." *Id.*; *see also Welles-Bowen Realty*, 736 F.3d at 731 (Sutton, J., concurring) ("Rules of interpretation bind *all* interpreters, administrative agencies included."); *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) (recognizing that "time-honored canons of construction . . . constrain the possible number of reasonable ways to read an ambiguity in a statute.").

Here, the rule of lenity requires that any ambiguity be resolved against the government and in favor of the defendant. Accordingly, "there is, for *Chevron* purposes, no ambiguity in such a statute." *St. Cyr*, 533 U.S. at 320 n.45. Because such statutory analysis ends with the first step of *Chevron*, "that is the end of the matter." *Chevron*, 467 U.S. at 842-43.

* * *

Earlier this term, Justice Scalia, joined by Justice Thomas, issued a statement with respect to the denial of certiorari in *Whitman v. United States*, 135 S. Ct. 352 (2014). Critical of the Second Circuit's deferral to the SEC's interpretation of a "law that contemplates both criminal and administrative enforcement," Justice Scalia noted that deferring in such cases "collide[s] with the norm that legislatures, not executive officers, define crimes." *Id.* at 353. When courts defer to agency interpretations of statutory provisions to which criminal sanctions are attached, Justice Scalia

cautioned, "federal administrators can in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Id.* Because *Whitman* did not seek review on the issue of deference, Justice Scalia agreed with the Court's denial of discretionary review. "But when a petition properly presenting the question comes before us," he concluded, "I will be receptive to granting it." *Id.* at 354. The petition in this case offers just such a vehicle.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the Petition for writ of certiorari.

Respectfully submitted,

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