No. 21-1195

In The Supreme Court of the United States

ALEXANDRU BITTNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief of *Amici Curiae* National Federation of Independent Business Small Business Legal Center, National Association of Home Builders of the United States, American Farm Bureau Federation, Restaurant Law Center, and Corn Refiners Association, In Support of Petitioner

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Interests of the *Amici Curiae*[1]

The National Federation of Independent Business ("NFIB") Small Business Legal Center is the nation's leading small business association, representing members in Washington, D.C., and all fifty states. Its membership spans the spectrum of business

[1] All parties have consented to the filing of this brief by filing blanket consents with this Court or providing written consent. Pursuant to Supreme Court Rule 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from the *amici curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files amicus briefs in cases that will impact small businesses.

The Restaurant Law Center ("Law Center") is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other food-service outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other food-service providers are the second largest private sector employers in the United States. Through amicus participation, the Law Center provides courts with perspectives on legal issues that have the potential to adversely affect its members and their industry.

The National Association of Home Builders of the United States ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. About one-third of NAHB's approximately 120,000 members are home builders or remodelers, and are

responsible for the construction of 80% of all new homes in the United States. The remaining members work in closely related fields within the housing industry, such as environmental consulting, mortgage finance and building products and services.

The American Farm Bureau Federation ("AFBF"), headquartered in Washington, D.C., was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts.

The Corn Refiners Association ("CRA") is the national trade association representing the corn refining industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, starch, advanced bioproducts, corn oil and feed products from corn components such as starch, oil, protein and fiber.

* * *

The members of the *Amici* are every day subject to thousands of federal regulations for which civil penalties can be imposed for their violation. These civil penalties can be so severe, and civil monetary

penalties can be so many, as to destroy businesses, ruin careers, and cripple industries.

Civil monetary penalties can be even more oppressive when agencies seek to multiply them by urging narrow units of violation on courts. Moreover, at least one federal agency is now artificially manipulating the wording of its regulations solely to increase the number of violations.

The determination of a unit of violation needs to be constrained by the rule of lenity (or, equivalently, the rule of narrow or strict construction). It also needs to be restrained by a holding that courts may not rely on the wording of such regulations except where, as here, the citizenry can be misled by them.

Summary of Argument

1. *Lenity should apply to civil penalty prosecutions*. A rule of lenity should apply to civil penalty prosecutions because the same reasons for applying lenity in criminal cases—fair notice, separation of powers, and "the tenderness of the law for the rights of individuals"—also apply to civil penalty prosecutions. Civil penalties can destroy careers and businesses and even determine the fate of an industry. It is often difficult to distinguish the magnitude of criminal and civil monetary sanctions. For example, the Clean Water Act now imposes a maximum daily civil penalty of $59,973 but a maximum daily criminal penalty of $25,000 for negligent violations.

Justice Gorsuch recently observed that, "Historically, lenity applied to all 'penal' laws—that is, laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines." And several federal circuit and a number of state courts have, without apparent difficulty, applied a lenity rule in civil penalty cases. A rule of lenity applicable to civil cases could reflect the lesser weight of that sanction.

2. *This case can be decided on a narrower ground for applying a rule of lenity*: It should be enough to decide this case to hold that lenity applies when construing the *particular* statutory provision that imposes the civil penalty or is argued to state or imply the unit of violation—regardless of whether lenity applies when construing the statutory provision or regulation that was allegedly violated.

That lenity should be applied to provisions that impose civil penalties was the actual holding of *Comm'r v. Acker*, 361 U.S. 87 (1959). A number of lower federal courts, and a large number of state courts, have applied lenity when construing the particular provisions that impose civil penalties.

3. *Courts should not rely on the wording of a regulation or form to determine a unit of violation, except to avoid misleading the public*. The Fifth Circuit here correctly recognized that reliance on the wording of a regulation to resolve a unit-of-violation issue would ascribe to its wording a power that the agency lacks. Regulations could be used to define units of violation—and justify the imposition of multiple penalties—even if the agency has neither a

delegation of statutory authority nor guiding statutory criteria to decide the matter.

Unfortunately, the specter raised by the Fifth Circuit has already come to pass: One agency (OSHA) openly manipulated the wording of its regulations expressly to increase the number of penalties. Its actions were not constrained or disciplined by anything in its organic statute, and it identified no statute that made the choice of unit of violation a "factor[] which Congress . . . intended it to consider," under this Court's precedent. Although the D.C. Circuit upheld the changes, its reasoning—that a rule maker "stands in the shoes of the legislature"—was flawed for, unlike Congress, agencies do not exercise plenary authority. Agencies require delegations of authority, especially with regard to sanctions. 5 U.S.C. § 558(b) ("A sanction may not be imposed … except within jurisdiction delegated to the agency and as authorized by law."). A delegation of authority to regulate conduct does not carry with it the authority to decide the unit of violation. The Court should thus make clear that the wording of regulations should not be relied upon to determine units of violation.

There is, however, an instance, important to this case, in which the wording of a regulation or form can be relevant to the unit of violation—where it can mislead regulated persons into believing that the number of penalties that could be imposed would be fewer than an agency now claims. According to the District Court and Ninth Circuit, that is this case. Such regulations and administrative

pronouncements can deprive citizens of fair notice—a core principle served by the rule of lenity.

Argument

I. A rule of lenity should be applied if a civil penalty can be imposed.

A rule of lenity should apply here because the reasons for applying lenity in criminal cases also apply to civil penalty prosecutions. First, the rule applied in criminal cases ("sometimes cast as the idea that '[p]enal statutes must be construed strictly'" (SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 296 (2012)) reflects the constitutional due process requirement that laws provide fair notice of punitive consequences. *E.g., Dunn v. United States,* 442 U.S. 100, 112 (1979). Second, the criminal rule vindicates the constitutional principle of separation of powers, for it keeps the power of punishment firmly "in the legislative, not in the judicial department." *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820). Third, lenity also rests "on the tenderness of the law for the rights of individuals." *Id.*

These principles also apply to civil penalty prosecutions. Fair notice is required before a civil penalty can be imposed. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (regulatory monetary penalty). *See also Wooden v. United States*, 142 S.Ct. 1063, 1082 (2022) (Gorsuch, J., concurring in the judgment) (lenity "enforce[s] the fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws"). The principle of separation of powers applies

to civil penalty cases. *West Virginia v. EPA*, 142 S.Ct. 2587, 2609 (2022). And a lenity rule for civil penalty cases would also reflect "the tenderness of the law for the rights of individuals," for civil penalties can destroy careers and businesses (*e.g., Lucia v. SEC*, 138 S.Ct. 2044, 2050 (2018) ("lifetime bar" from profession)), and even determine the fate of an industry (*e.g., Seaworld of Fla., LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014) (OSHA regulation of animal shows)). Indeed, it is often difficult to distinguish the magnitude of criminal and civil monetary sanctions. For example, the Clean Water Act now imposes a maximum civil penalty of $59,973 "per day for each violation" (33 U.S.C. § 1319(d) (originally, $25,000[2])) and a maximum criminal penalty of "$25,000 per day of violation" for negligent violations. 33 U.S.C. § 1319(c)(1). *See* Jonathan Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974) (discussing Congress's "mere change of label, from criminal to civil" of certain federal regulatory sanctions).

There is no apparent reason why a civil version of the rule of lenity should not be applied when determining units of violation in civil penalty prosecutions. "Historically, lenity applied to all 'penal' laws—that is, laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines." *Wooden*, 142 S.Ct. at 1086

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[2] 87 Fed. Reg. 1676, 1678 (Jan. 12, 2022), adjusting for inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, 104 Stat. 890, as amended.

n. 5 (Gorsuch, J.), citing cases. *See also* SCALIA & GARNER at 297 (lenity "applies not only to crimes but also to civil penalties."). And several circuits have, without apparent difficulty, applied a lenity rule in civil penalty cases. *First Nat'l Bank of Gordon v. Dep't of the Treasury,* 911 F.2d 57, 65 (8th Cir. 1990) (banking statute; "[p]enal provisions, even those involving civil penalties, should be strictly construed"); *Kropp Forge Co. v. Sec'y of Labor,* 657 F.2d 119, 122 (7th Cir. 1981) (OSHA case; "traditional rule that the applicability of penal sanctions in regulations is to be narrowly construed"); *Dravo Corp. v. OSHRC,* 613 F.2d 1227, 1232 (3d Cir. 1980) ("penal sanction" sought; "coverage of an agency regulation should be no broader than what is encompassed within its terms"); *Diamond Roofing Co. v. OSHRC,* 528 F.2d 645, 649 (5th Cir. 1976) (despite OSH Act's remedial purpose, ambiguous standard that "subjects private parties to criminal or civil sanctions" is not broadly construed). *See also* the cases cited on page 12 below. A number of state appellate courts have also applied the rule to civil penalties.[3]

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[3] *RBG Bush Planes, LLC v. Alaska Pub. Offices Comm'n*, 361 P.3d 886, 892 (Alaska 2015) ("ambiguous statutory or regulatory requirements must be strictly construed . . . [if] breach may give rise to a civil penalty"); *Whitfield v. United States*, 99 A.3d 650, 656 n.14 (D.C. 2014) ("that [the law in question] is a civil traffic regulation, rather than an actual criminal statute, is of no moment. The rule of lenity is not so unduly restrictive"); *Ellis v. La. Bd. of Ethics*, 168 So.3d 714, 724 (La. Ct. App. 2014) (discipline for ethical violation; "principle applies to . . . civil statutes of a penal nature" and "has been applied in the area of administrative law"), cited and

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A rule of lenity applicable to civil penalty prosecutions need not apply with the same force as in criminal cases. Its force in a civil penalty case could reflect the lesser weight of that sanction. But such a rule should apply.

II. Regardless of whether lenity applies when a civil penalty can be imposed, lenity should apply when construing the particular statutory provision that imposes a civil penalty or provides a unit of violation.

This case can be decided on a narrower ground for applying a rule of lenity: Lenity should apply when construing the *particular* statutory provision that imposes the civil penalty or is argued to state or imply the unit of violation, regardless of whether lenity should be applied when construing the statutory provision or regulation that was allegedly violated. *Cf. Bifulco v. United States*, 447 U.S. 381, 387 (1980) (criminal case; lenity "applies not only to

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partially quoted with approval by *State v. Hurley*, 2015 Vt. 46 (2015); *City of New York v. Verizon N.Y. Inc.*, 4 N.Y.3d 255, 258-59 (2005); *State Dep't of Revenue v. Collins Entm't,* 340 S.C. 77, 79 (2000); *Young Oil Co. v. Racetrac Petrol., Inc.*, 757 So.2d 380, 383 (Ala. 1999) (predatory pricing statute); *Ports Petrol. Co., Inc. v. Tucker*, 323 Ark. 680, 684, 916 S.W.2d 749, 753 (1996) (same); *In re Woodrow Wilson Constr. Co.,* 563 So.2d 385, 389-91 (La.Ct.App. 1990) (air quality regulation enforced by civil penalties is "a penal regulation and must be strictly construed"); *First Fed. Sav. & Loan Ass'n v. Dep't of Bus. Reg.,* 472 So.2d 494, 495 (Fla. Dist. Ct. App. 1985) ("statutes imposing a penalty, even a civil penalty, must be strictly construed"). *See also* the cases cited in n. 6.

interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose").

That lenity should be applied to the provision that imposes a civil penalty was the actual holding of *Comm'r v. Acker*, 361 U.S. 87 (1959). There, lenity was applied to construe the *particular* provision that allegedly imposed the civil penalty sought, namely I.R.C. § 294(d)(2) (1952).[4] Such a focus was also at work in *Werckmeister v. Amer. Tobacco Co.*, 207 U.S. 375, 381 (1907), a civil forfeiture and penalty case, where the Court stated: "*This* section of the statute is penal, and there should be especial care to work no extension of *its* provisions by construction." (Emphases added.)[5] Inasmuch as provisions that impose penalties (here, 31 U.S.C. § 5314(a)) or from which the unit of violation might be implied (here, 31 U.S.C. § 5321(a)(5)) define "what the extent of the punishment will be" (SCALIA & GARNER at 296), they should be subject to a rule of lenity.

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[4] And contrary to the District Court (*United States v. Bittner*, 469 F. Supp.3d 709, 724 (E.D. Tex. 2020)), *Acker* was not limited to tax cases. *Acker* principally rested on *Keppel v. Tiffin Sav. Bank*, 197 U.S. 356, 362 (1905), a bankruptcy case, on *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409 (1873), a bank interest case, and *Elliott v. R.R.*, 99 U.S. 573, 576 (1878), a tax penalty case.

[5] *Cf. Commonwealth v. Monumental Props., Inc.,* 459 Pa. 450, 460-61, 329 A.2d 812, 817 (1974) (statute requiring that "[p]enal provisions" be "strictly construed" applies only to penalty-imposing provisions; that "a statute 'contains' a penal provision [does not mean that] the entire statute must be strictly construed").

A number of lower federal court decisions have applied lenity when construing the particular provisions that impose civil penalties. *E.g., Haberern v. Kaupp Vascular Surgeons Pens. Plan,* 24 F.3d 1491, 1505 (3d Cir. 1994) (29 U.S.C. § 1132(c); civil ERISA "penalty provisions are construed strictly"), *cert. denied*, 513 U.S. 1149 (1995); *Fisher v. Metro. Life Ins. Co.,* 895 F.2d 1073, 1077 (5th Cir. 1990) (29 U.S.C. § 1132(c); "[a]s a penalty provision, must be strictly construed"); *Gold Kist, Inc. v. Dep't of Agric.,* 741 F.2d 344, 348 (11th Cir. 1984) (no express civil penalty provision, penalty sought to be implied; *Acker* applied); *United States v. Hill,* 368 F.2d 617, 621 (5th Cir. 1966) (penalty-imposition portion of I.R.C. § 6672 (1954) "strictly construed"). *See also* tax cases such as *Stephan v. Commissioner,* 197 F.2d 712, 714 (5th Cir. 1952) (civil tax penalty provision construed "strictly"); and *Rand v. Comm'r*, 141 T.C. 376, 393 (T.C. 2013) (civil tax penalty provision). Many state courts have applied lenity to penalty-imposing provisions.[6] At

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[6] *Karlen v. Jones Lang LaSalle Americas, Inc.,* 766 F.3d 863, 867 (8th Cir. 2014) (applying state law) (Minn. Stat. § 181.13 "creates a civil penalty"; "strictly construed"); *King v. State*, 447 S.W.3d 126, 128 (Ark. App. 2014) (forfeiture statute "construed narrowly"); *Home Const. Mgmt., LLC v. Comet, Inc.,* 125 So.3d 221, 222 (Fla. App. 2013) (treble damage provision, Fla. Stats. § 768.0425(2) (2007), imposes penalty; "narrowly construe[d]"); *City of Houston v. Jackson*, 192 S.W.3d 764, 770 (Tex. 2006) (Tex. Loc. Gov't Code § 143.134(h) imposing civil penalty; "strictly construed"); *Washington v. Dep't of Pub. Works,* 954 A.2d 945, 948-49 (D.C. 2008) ("lateness penalty" imposed by D.C. Code § 8-804(f) (2001); lenity applied; detailed discussion); *Spradlin v. City of Fulton*, 982 S.W.2d 255, 261 (Mo. 1998) (attorney fee provision "penal in nature," "strictly

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least one independent federal adjudicative agency (the Occupational Safety and Health Review Commission) applies a lenity rule when determining the unit of violation.[7]

In sum, lenity should be applied when construing provisions under which a penalty might be imposed (here, 31 U.S.C. § 5314(a)) or from which the unit of violation might be implied (here, 31 U.S.C. § 5321(a)(5)).

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construed"); *State ex rel. Grams v. Beach,* 498 N.W.2d 83, 85 (Neb. 1993) (civil penalty imposed by Neb. Rev. Stat. § 81-1508(1)(c); "penal statute"; "strictly construed"); *Gibbs Constr. Co. v. State Dep't of Labor,* 540 So.2d 268, 269 (La. 1989) (civil penalty imposed by former La.R.S. 38:2301(F); "strictly construed"); *Att'y Gen. v. John A. Biewer Co.,* 363 N.W.2d 712, 716-17 (Mich. App. 1985) (civil penalty imposed by MCL 323.10(1); MSA 3.529(1)(1); "strictly construed"); *Saskill v. 4-B Accept.,* 487 N.E.2d 97, 98 (Ill. App. 1985) (penal fee shifting statute, Ill. Rev. Stat. 1983, ch. 17, par. 6413; "construed strictly").

[7] *Erik K. Ho*, 20 BNA OSHC 1361, 1370 (OSHRC 2003) ("per-instance violations and penalties are appropriate when the cited regulation or standard *clearly* prohibits individual acts rather than a single course of action") (emphasis added), *aff'd sub nom. Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005), followed in *Dayton Tire*, 23 BNA OSHC 1247, 1257 (OSHRC 2010), *rev'd on other grounds*, 671 F.3d 1249 (D.C. Cir. 2012); *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1578 (OSHRC 2009); and *Gen. Motors Corp.,* 22 BNA OSHC 1019, 1046 (OSHRC 2007).

III. Regulations may not be considered in determining the unit of violation except to avoid misleading the public.

If a statute is ambiguous with respect to the unit of violation, courts should not, with the exception noted below, determine the unit of violation by relying on the wording of an implementing regulation or form,[8] but should rely solely on the language of the statute.

The Fifth Circuit here correctly recognized that reliance on the wording of a regulation to resolve a unit-of-violation issue would ascribe to its wording a power that the agency lacks. Such reliance would "give the Secretary discretion not only to define the reporting mechanism, but also to define the number of violations subject to penalty." *United States v. Bittner*, 19 F.4th 734, 746 (5th Cir. 2021). Units of violation could thus be defined—and multiple penalties imposed—even if the agency has neither a delegation of statutory authority nor guiding statutory criteria to decide the matter. Nothing in the statute here suggests that the Secretary was authorized to decide what the unit of violation should

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[8] Federal courts have held that the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA") and specifically § 553(b)(3), requires forms to undergo notice-and-comment rulemaking if they contain substantive requirements beyond their implementing regulation. *See United States v. Reinis*, 794 F.2d 506, 508 (9th Cir. 1986), citing *United States v. $200,000 in United States Currency*, 590 F. Supp. 866 (S.D.Fla. 1984). The instructions on the FBAR form apparently underwent such rulemaking. *See* 75 Fed. Reg. 8844, 8851-54 (Feb. 26, 2010).

be or contains criteria by which he could so decide. (Whether Congress could constitutionally delegate such authority thus need not be considered here.)

Unfortunately, the specter raised by the Fifth Circuit has already come to pass: An agency has artificially manipulated the wording of its regulations expressly to increase the number of penalties. In 2008, the Occupational Safety and Health Administration ("OSHA") noted that when determining the unit of violation, adjudicators had looked to the wording of OSHA's occupational safety and health standards. Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee, 73 Fed. Reg. 75,568, 75569 col. 3, 75570-72 (Dec. 12, 2008).[9] To make clear that per-employee penalties were to be imposed for violations of training and personal protective equipment standards (*id*. at 75,568 cols. 2-3), OSHA amended over a hundred such provisions. *Id.* at 75583-89. For example, one provision previously required "a training *program* for *all* employees" over-exposed to noise. 29 C.F.R. § 1910.95(k)(1) (2007) (emphasis added).[10] OSHA moved "program" to a

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[9] One cited case was *Erik K. Ho*, 20 BNA OSHC 1361, *9-17 (OSHRC 2003), *aff'd sub nom. Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005), cited in 73 Fed. Reg. 75,568, 75569 col. 3 (Dec. 12, 2008). It concerned 29 C.F.R. § 1926.1101(k)(9)(i) (2007) (asbestos), which then required "a training program" for "all employees" in certain categories.

[10] The previous provision read as follows: "The employer shall institute a training program for all employees who are exposed to noise at or above an 8-hour time-weighted average of 85

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new sentence and changed "all" to "each."[11] Thus, before 2008 an employer who erroneously believed that a requirement for a training "program" did not apply to its one-hundred employee workforce would have been penalized once; after 2008, a hundred penalties could be assessed.

These changes were not constrained or disciplined by anything in OSHA's organic statute, the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("OSH Act"). OSHA identified no OSH Act provision that made the choice of unit of violation a "factor[] which Congress . . . intended it to consider." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). OSHA reasoned that, because the amendments "add no additional requirements," it could make the changes without making findings that otherwise would be statutorily required. 73 Fed. Reg. at 75570 cols. 2-3.

The D.C. Circuit upheld the changes, reasoning that OSHA "stands in the shoes of the legislature." *National Ass'n of Home Builders v. OSHA*, 602 F.3d 464, 467 (D.C. Cir. 2010), *disagreeing with Reich v. Arcadian Corp.*, 110 F.3d 1192, 1198-1199 (5th Cir.

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decibels, and shall ensure employee participation in such program." 29 C.F.R. § 1910.95(k)(1) (2007).

[11] The amended provision reads as follows: "The employer shall train each employee who is exposed to noise at or above an 8-hour time weighted average of 85 decibels in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program." 29 C.F.R. § 1910.95(k)(1) (2009).

1997).[12] The analogy was inapt. Congress exercises plenary authority over (in that case) interstate commerce (U.S. Const., Art. I, § 8, cl. 3)) but agencies do not. Agencies require delegations of authority, especially with regard to sanctions. 5 U.S.C. § 558(b) ("A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."); *Stark v. Wickard*, 321 U.S. 288, 309 & n. 22 (1944) ("the power of agencies is circumscribed by the authority granted"); *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J., concurring) ("ancient and venerable principle"). A delegation of authority to regulate conduct does not carry the authority to decide the unit of violation—whether a citizen is to be penalized multiple times for what may be, for example, a single course of

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[12] The Fifth Circuit held that per-employee penalties may not be imposed under the OSH Act's "General Duty Clause" (29 U.S.C. § 654(a)(1), OSH Act § 5(a)(1)), a gap filler applicable when no standard applies (29 C.F.R. § 1910.5(f)) and requiring protection from "recognized hazards . . . likely to cause . . . serious physical harm." The Fifth Circuit reasoned that imposing per-employee penalties under that gap filler would be "anomalous" because a core rulemaking provision (the definition of "standard" in 29 U.S.C. § 652(8), OSH Act § 3(8) (*see Indus. Union Dep't. v. Amer. Petrol. Inst.*, 448 U.S. 607, 639 (1980))) permits OSHA only "to promulgate standards governing 'conditions' and 'practices' of employment," not to "set a unit of prosecution." 110 F.3d at 1198. The D.C. Circuit characterized this statement as "dictum." 602 F.3d at 467. That was error, for the statement was part of the Fifth Circuit's *ratio decidendi*. *Ramos v. Louisiana*, 140 S.Ct. 1390, 1404 & n.54 (2020); *Duncan v. Louisiana*, 391 U.S. 145, 184 n. 24 (1968) (Harlan, J., dissenting) (not dictum if "critical to the chain of reasoning by which a result is . . . reached").

conduct. *Cf. United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224-26 (1952) (unit of wage-hour criminal violation is course of conduct).

The Court should thus make clear that the wording of regulations or forms should not be relied upon to determine units of violation. If a statute does not clearly state the unit of violation and all interpretive avenues have been exhausted (*Wooden v. United States*, 142 S.Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring)), but "a reasonable doubt persists" (SCALIA & GARNER at 299), then lenity would be required.

There is, however, an instance, also important to this case, in which the wording of a regulation or form can be relevant to the unit of violation—where that wording can mislead regulated persons into believing that the number of penalties that could be imposed would be fewer than an agency now claims. According to the District Court and Ninth Circuit, that is this case. The District Court emphasized the single-FBAR approach of the regulations. 469 F. Supp.3d at 720 ("the number of . . . accounts . . . maintain[ed] has no bearing whatsoever on [the] obligation to file an FBAR" under the regulations"). The Ninth Circuit concluded that the unit of violation was the form rather than the account based on "[t]he statute, read with the regulations . . . ." (*United States v. Boyd*, 991 F.3d 1077, 1079 (9th Cir. 2021)) and laid heavy emphasis on the regulations' wording. *Id.* at 1081-83. See also the administrative materials, including the FBAR instructions, set out on pages 6-10 in the certiorari-stage *amicus curiae* brief of the American College of Tax Counsel. Such

regulations and administrative pronouncements can deprive citizens of fair notice (*Gen. Elec. Co. v. EPA,* 53 F.3d 1324, 1330-34 (D.C. Cir. 1995))—a core principle served by the rule of lenity.

Conclusion

The decision below should be reversed.

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