



March 29, 2022

VIA ELECTRONIC MAIL:
rule-comments@sec.gov

Gary Gensler, Chair
U.S. Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Rule 10b5-1 and Insider Trading File Number S7-20-21

Dear Chair Gensler:

Pacific Legal Foundation files this comment to object to the Commission's proposed rule, *Rule 10b5-1 and Insider Trading*, 87 Fed. Reg. 8686 (Feb. 15, 2022). The Commission is not a legislative body. It cannot create new laws and certainly cannot create new criminal offenses. When Article III judges interpret the laws written by Congress in a manner with which the SEC disagrees, as a matter of policy or interpretation, then it must act like everyone else. It must obey the law, as settled by the judiciary, and is free to lobby Congress to make changes. The proposed rule is an exercise of simple disagreement with that basic function of our constitutional government. The rule digs in on a decades-long effort by the Commission to alter the scope of criminal liability for insider trading and regulate around judicial interpretation of the underlying statute. The rule is thus unlawful and should be withdrawn.

STATEMENT OF INTEREST

Pacific Legal Foundation is the nation's leading public interest organization advocating, in courts throughout the country, for the defense of individual liberty and economic opportunity and against government overreach. PLF is deeply concerned about agency action that exceeds constitutional limits, particularly when it intrudes into areas of economic choice. PLF is also disturbed by overcriminalization and the disturbing trend of administrative efforts to expand criminal liability for regulatory offenses beyond the limits set out by Congress. PLF's attorneys have long been at the forefront of challenging administrative overreach and have regularly defeated unlawful agency action in the courts. Rule 10b-5 is one of the most expansive administrative provisions in a Code of Federal Regulations laden with broad obligations for the regulated public. Indeed, the Commission correctly refers to it as "one of the securities laws' primary" enforcement tools, which regulates the conduct of tens of thousands of individuals every year. *See*

87 Fed. Reg. 8686, 8687, 8713. Unfortunately, the SEC has taken an expansive and unjustified view of its authority and purported to create criminal liability where Congress has not. If the agency is not concerned with structural limits on its power, then PLF will not hesitate to have the courts enforce those limits. The undersigned PLF attorney is therefore an “interested person[]” under Commission Rule 2.34(c) (16 C.F.R. § 2.34(c)).

RELEVANT FACTS

Section 10(b) of the Securities Exchange Act of 1934 broadly makes it “unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 78j(b). This rule is civilly enforceable by the Commission. But anyone “who willfully violates” Section 10(b) is also punishable by a federal prison sentence of up to 20 years. 15 U.S.C. § 78ff(a).

Rule 10b-5 is a mainstay of both the civil and criminal enforcement of the securities laws and broadly claims to prohibit any manner of fraudulent conduct by parties who have any tangential relationship to the offering, sale, or exchange of securities. *See* 17 CFR § 240.10b-5. This rule, promulgated by the Commission, nominally codifies Section 10(b) and sets out three specific means of violating the statute: “(a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.” *Id.*

Section 10(b) and Rule 10b-5 have been the subject of extensive, and sometimes expansive, judicial interpretation. *See Chiarella v. United States*, 445 U.S. 222, 226 (1980) (“Section 10(b) was designed as a catch-all clause to prevent fraudulent practices.”).

Because it is an administrative rule, however, “[l]iability under Rule 10b-5 . . . does not extend beyond conduct encompassed by § 10(b)’s prohibition.” *United States v. O’Hagan*, 521 U.S. 642, 651 (1997); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (scope of Rule 10b-5 cannot exceed power Congress granted Commission under § 10(b)). Indeed, while insider trading isn’t mentioned in either the statute or the rule, it can still be prosecuted under both. *See id.* at 230. But, in every case, courts prevented liability beyond

the statutory text, as the rule “cannot exceed the power granted the Commission by Congress under § 10(b).” *Ernst*, 425 U.S. at 214.

For example, one inexorable requirement to impose liability under Section 10(b) is that a defendant “use or employ, in connection with the purchase or sale of any security,” some prohibited means. Therefore, in insider trading prosecutions, courts often reference the fact that an insider must have traded securities “on the basis of material, nonpublic information,” *O’Hagan*, 521 U.S. at 651–52, but they still require proof that an insider actually *used* inside information to make a trade—and rejected the Commission’s assertion that a violation can occur if a trader merely acted “while *in possession* of material nonpublic information.” *SEC v. Adler*, 137 F.3d 1325, 1332, 1339 (11th Cir. 1998); *accord United States v. Smith*, 155 F.3d 1051, 1066 (9th Cir. 1998) (rejecting government’s claim that “it needed only to prove that [the defendant] knowingly *possessed* material nonpublic information, not that he actually *used* the information in deciding to buy or sell”). The “use” requirement “best comports with the language of § 10(b) and Rule 10b-5[.]” *Adler*, 137 F.3d at 1338. Moreover, “the SEC’s ‘knowing possession’ standard would not be—indeed, could not be—strictly limited to those situations actually involving intentional fraud.” *Smith*, 155 F.3d at 1068.

The *Adler* and *Smith* courts recognized an important truth about the market—insiders are still allowed to trade securities. A “trade by an insider with such information does not always and inevitably constitute a breach of the duty.” *Adler*, 137 F.3d at 1338. It is common, for instance, for insiders to tie compensation to prearranged stock acquisitions and sales. *See id.* What separates those transactions from illegal ones is the improper use of inside information. Indeed, if the Commission never had to prove the use of inside information, it wouldn’t even have to point to circumstances like suspicious timing or other indicia of bad motives. It would just be enough for an insider to participate in the market. And any such trading would be presumptively criminal.

This judicial threat to the SEC’s expansive view of its own authority did not sit well with the Commission. Shortly after the *Adler* and *Smith* decisions were issued, the Commission adopted Rule 10b5-1 in an effort to overrule them. 65 Fed. Reg. 51,716, 51,727. According to the Commission, “the goals of insider trading prohibitions—protecting investors and the integrity of securities markets—are best accomplished by a standard closer to the ‘knowing possession’ standard than to the ‘use’ standard.” *Id.* Thus, notwithstanding adverse interpretation, which flowed from *statutory language*, the Commission purported to codify its view that the interpretive phrase “on the basis of” meant that “a purchase or sale of a security of an issuer is ‘on the basis of’ material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale.” *Id.* at 51,737. At the same time, recognizing, as did the Ninth Circuit in *Smith*, that this would ensnare

innocent pre-arranged trades, the Commission also set up an elaborate affirmative defense mechanism. *See id.*

Now, the Commission has decided that even the cumbersome affirmative defense process, accomplished through “10b5-1 plans,” may be secretly protecting illegal trades. *See* 87 Fed. Reg. at 8689. Indeed, it seems concerned that “the use of trading arrangements under Rule 10b5-1(c)(1) has become widespread,” even though these arrangements were specifically authorized by the Commission as a means of effectuating lawful pre-arranged sales. *See id.* Therefore, The Commission now proposes to limit those plans, while insisting that its initial premise is true—a person can violate Section 10(b) without actually *using* any inside information. *Id.* at 8687. In fact, the SEC has claimed “that a purchase or sale of an issuer’s security is on the basis of material nonpublic information about that security or issuer for purposes of Section 10(b) if the person making the purchase or sale was aware of material nonpublic information when the person made the purchase or sale,” and that its “awareness standard is ‘entitled to deference’” under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843–44 (1984). *Id.* at 8687 n.9 (quoting *United States v. Royer*, 549 F.3d 886, 899 (2d Cir. 2008)). The Commission even goes so far as to say that courts, like the Eleventh Circuit, which continue to follow the *statutory* view that “a person must ‘use’ the inside information to purchase or sell securities,” have an “erroneous[.]” reading of the law that has been overruled by the Rule 10b5–1. *Id.* (citing *Fried v. Stiefel Labs., Inc.*, 814 F.3d 1288, 1295 (11th Cir. 2016)).

Thus, the Commission has now proposed to reinforce its knowing possession standard, and revise its regulation to say:

(b) Awareness of material nonpublic information. Subject to the affirmative defenses in paragraph (c) of this section, a purchase or sale of a security of an issuer is on the basis of material nonpublic information for purposes of Section 10(b) and Rule 10b-5 if the person making the purchase or sale *was aware of the material nonpublic information when the person made the purchase or sale*. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b-5 and this section does not modify the scope of insider trading law in any other respect.

Id. at 8729 (emphasis added).

PLF now submits this comment because the Commission’s original premise is simply wrong. Insider trading liability, which is, after all, premised on Section 10(b)’s statutory prohibition on the “use” of fraudulent means of trading, cannot arise without the knowing *use* of insider information. The SEC’s decades-long effort to override that basic statutory directive is unlawful.

DISCUSSION

The Commission's proposed rule is unlawful for four independent reasons. First, it cannot be reconciled with Section 10(b)'s statutory text. "Use" means what it says, and the Agency's attempt to regulate around that term cannot stand. Second, the SEC has no regulatory power to redefine unambiguous statutory terms. There is simply no room for the Commission's actions here. Third, the Commission's suggestion that courts must defer to its "interpretation" of the scope of Section 10(b) is dead wrong. On the contrary, if the statute's text is unclear, courts should apply the rule of lenity to prevent the administrative expansion of criminal liability. Fourth, if the SEC is correct in its view of its power under Section 10(b), then the statute has impermissibly delegated legislative authority to the Commission. Only Congress, not the Commission, can create brand new crimes at will.

I. The Proposed Rule Conflicts with the Text of Section 10(b)

"[N]o matter how important, conspicuous, and controversial the issue," "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Indeed, "[t]he United States Government has created many federal agencies to help implement important areas of the law. But whatever the agency, it will be a creature of statute and bound by both its authorizing statute and by its own regulations unless they are changed by procedures that are lawful. A federal agency does not have unlimited power to exercise its authority over persons whenever it pleases and without regard to what its enabling statute authorized it to do." *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 946 F.3d 1100, 1114 n.3 (9th Cir. 2020). Thus, Rule 10b-5 can never exceed the prohibitions already set out in Section 10(b). *O'Hagan*, 521 U.S. at 651.

Section 10(b) criminalizes the "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance[.]" 15 U.S.C. § 78j(b). And Congress delegated to the SEC only the power to "prescribe" rules defining what constitutes a "device or contrivance." *See id.* Rule 10b-5 does just that—it sets out three types of frauds but retains the requirement that each be employed "in connection with the purchase or sale of any security." 17 CFR § 240.10b-5.

Section 10(b) (and, for that matter, Rule 10b-5) says nothing about insider trading. *Chiarella*, 455 U.S. at 226. But there can be a variety of "frauds," which can include insider trading. *See id.*

But even while it recognized that insider trading could support liability under Section 10(b), the United States Supreme Court cautioned that it would not read liability for

conduct that was traditionally not viewed as fraudulent, “absent some explicit evidence of congressional intent.” *Chiarella*, 455 U.S. at 233. The “1934 Act cannot be read ‘more broadly than its language and the statutory scheme reasonably permit.’” *Id.* at 234 (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)). “Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud.” *Id.* at 234–35.

In *O’Hagan*, the Court went somewhat further. It first described the “classical theory” of insider trading, “when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information.” *O’Hagan*, 521 U.S. at 651–52. This type of trade is a “‘deceptive device’ under § 10(b) . . . because a relationship of trust and confidence exists between the shareholder of a corporation and those insiders who have obtained confidential information by reasons of their position with that corporation.” *Id.* at 652 (quotation omitted).

O’Hagan also accepted the “misappropriation theory” where “a person commits fraud ‘in connection with’ a securities transaction, and thereby violates § 10(b) and Rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information.” *Id.* “[M]isappropriators . . . deal in deception,” and thus the theory meets § 10(b)’s requirement that prohibited conduct “involv[e] manipulation or deception.” *Id.* at 653, 655.

But what about the “in connection” requirement? According to the Court, “This element is satisfied because the fiduciary’s fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities.” *Id.* at 656. The Court even explained what would not qualify: as the government had argued in *O’Hagan*, the misappropriation theory “would not . . . apply to a case in which a person defrauded a bank into giving him a loan or embezzled cash from another, and then used the proceeds of the misdeed to purchase securities,” because the fraud was “sufficiently detached from a subsequent securities transaction that §10(b)’s ‘in connection with’ requirement would not be met.” *Id.* at 656–57. Note, moreover, that the Court highlighted the *statutory* genesis of the “in connection” requirement. *See id.*

It’s no wonder then that several courts of appeals have rejected the Commission’s efforts to walk back that government concession and evade *O’Hagan*’s unmistakable language by claiming that it “needed only to prove that [the defendant] knowingly *possessed* material nonpublic information, not that he actually *used* the information in deciding to buy or sell” securities. *Smith*, 155 F.3d at 1066; *see also Adler*, 137 F.3d at 1338. It seems that the statutory “in connection” requirement should mean something. And when the statute requires the “*use*, in connection with a sale,” that means what it says—insiders must have “*used* inside information in consummating their trades.” *Smith*, 155 F.3d at 1069. Indeed,

“a ‘use’ requirement [is] more consistent with the language of § 10(b) and Rule 10b-5, which emphasizes ‘manipulat[ion],’ ‘decept[ion],’ and ‘fraud.’” *Id.* “By focusing exclusively upon the phrase ‘in connection with,’” the Commission has “lost sight of the law’s main thrust. After all, § 10(b) and Rule 10b-5 do not just prohibit certain unspecified acts ‘in connection with’ the purchase or sale of securities; rather, they prohibit the *employment* of ‘manipulative’ and ‘deceptive’ trading practices in connection with those transactions.” *Id.* at 1068 (emphasis added); *see also Fried*, 814 F.3d at 1295 (“This Circuit has stated that the mere possession of material nonpublic information is not sufficient to establish liability for insider trading; an insider must use that information, although a strong inference of use arises when an insider trades while in possession of material nonpublic information.”).

That should be the end of it, as the SEC cannot simply issue a new rule changing the meaning of the *statute*. As the Court has said, “Rule 10b-5 was adopted pursuant to authority granted the Commission under § 10(b). The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. Thus, despite the broad view of the Rule advanced by the Commission [here], its scope cannot exceed the power granted the Commission by Congress under s 10(b).” *Ernst*, 425 U.S. at 212–14 (cleaned up); accord *Chevron*, 467 U.S. at 843 n.9 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”) (cleaned up).

The Commission is simply wrong in its claim that it can overrule “erroneous” decisions by the courts of appeals. *See* 87 Fed. Reg. at 8687. But that’s plainly what the SEC hopes to accomplish. After all, in the proposed text it says that, aside from its frontal attack on adverse precedent, the “law of insider trading is *otherwise* defined by judicial opinions construing Rule 10b-5[.]” *Id.* at 8729 (emphasis added). The Commission’s proposed regulation asserting that “a purchase or sale of a security of an issuer is on the basis of material nonpublic information for purposes of Section 10(b) and Rule 10b-5 if the person making the purchase or sale *was aware of the material nonpublic information when the person made the purchase or sale*” is an invalid attempt to exercise legislative authority. *See id.* (emphasis added).

II. The Agency Has No Power To Fill in Unambiguous Statutory Terms

At perhaps an even more basic level, one must ask what authority the Commission is claiming to exercise. While Section 10(b) grants the Commission limited authority to

define the types of fraudulent devices that might violate the statute, that delegation “does not extend beyond conduct encompassed by § 10(b)’s prohibition.” *O’Hagan*, 521 U.S. at 651. In other words, the SEC cannot use its rulemaking authority to expand the statute’s reach, and it certainly cannot redefine the statutory terms that happen to be echoed by Rule 10b-5. *See id.*

But the Commission nevertheless suggests that its focused effort to overturn precedent with which it disagrees is a valid agency interpretation entitled to “deference.” 87 Fed. Reg. at 8687 n.9. But the only possible justification for the agency to act is an ambiguity in the meaning of the statutory text that needs resolution. *See Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”). But courts haven’t construed [found] an ambiguity in Section 10(b)—they have simply described Congress’ plain meaning. *See Smith*, 155 F.3d at 1066; *Adler*, 137 F.3d at 1338.

An agency’s gap-filling authority, and any attendant deference, applies only when there is an ambiguity left in a statute. *Chevron*, 467 U.S. at 844. Indeed, judicial deference to administrative interpretations is “rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019). Therefore, deference survives constitutional scrutiny only because Congress has implicitly directed an agency, not the judiciary, to “fill[] regulatory gaps” left by ambiguous regulatory text. *Id.* at 2413.

“If uncertainty does not exist, there is no plausible reason for deference. The [provision] then just means what it means—and the court must give it effect, as the court would any law.” *Id.* at 2415. Otherwise, deference would “permit the agency, under the guise of interpreting a [statute or regulation], to create *de facto* a new [law].” *Id.* (quotation omitted).

The Commission’s approach falters because the *statutory* terms it’s trying to redefine don’t present the kind of gaps in a statute that the agency could lawfully fill in. As discussed, the question facing a court is what *Congress* meant when it insisted that violations of Section 10(b) require the “use” of fraudulent means “in connection with the purchase or sale of any security.” *See* 15 U.S.C. § 78j(b). Interpreting the statute, in light of the substantial body of common law interpretation of those very terms, courts have concluded that “use” actually means “use” and that the SEC cannot forgo proof that a defendant traded securities *based on* insider information. *Smith*, 155 F.3d at 1066; *Adler*,

137 F.3d at 1338. Thus, there's no ambiguity in Section 10(b) the agency can fill in. *See Kisor*, 139 S. Ct. at 2415.¹

III. The Rule of Lenity Forecloses the SEC's Proposed Reading of Section 10(b) Liability

But even if one accepts that the Commission could issue a regulation here, no court should defer to the SEC's effort to expand criminal liability beyond the plain contours of the statute passed by Congress. If there's an ambiguity, the rule of lenity commands it be resolved the other way, to *avoid* the creation of criminal liability.

The canon of constitutional avoidance instructs that a court must “construe [a] statute to avoid [serious constitutional] problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This rule of construction prevails even concerning an ambiguous statute or regulation over which an agency ordinarily would be entitled to interpretive deference. *Id.* at 574–75.

“[W]hen liberty is at stake,” deference “has no role to play.” *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari). This is because the rule of lenity, which is required by other constitutional constraints, compels the opposite result. *See id.*

The rule is a tool of construction “perhaps not much less old than construction itself.” *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). In simple terms, “lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.). Indeed, “[h]istorically, 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 v. United States*, 142 S. Ct. 1063, 1086 (2022) (Gorsuch, J., concurring, joined by Sotomayor, J.) (citing cases).²

Three “core values of the Republic” underlie the rule of lenity: (1) due process; (2) the separation of governmental powers; and (3) “our nation’s strong preference for liberty.”

¹ For this reason, the Court’s decision in *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), is no help to the Commission. An agency can only provide an “authoritative” construction of a statute that is genuinely “ambiguous.” *Id.* at 983.

² To be sure, Section 10(b) is enforceable either civilly or criminally. But the rule of lenity still applies. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 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.”).

United States v. Nasir, 17 F.4th 459, 473 (3d Cir. 2021) (*en banc*) (Bibas, J., concurring, joined by Ambro, Jordan, Greenaway, Jr., Krause, and Restrepo, JJ.).

Due process requires that “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931). By construing ambiguities in the defendant’s favor, lenity prohibits criminal consequences when Congress did not provide a fair warning through clear statutory language. And “lenity’s emphasis on fair notice isn’t about indulging a fantasy. It is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance.” *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring).

Lenity also protects the separation of powers: the legislature criminalizes conduct and sets statutory penalties, the executive prosecutes crimes and can recommend a sentence, and the judiciary sentences defendants within the applicable statutory framework. *United States v. Bass*, 404 U.S. 336, 348 (1971). Lenity “strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.” *Liparota v. United States*, 471 U.S. 419, 427 (1985). “It ‘places the weight of inertia upon the party that can best induce Congress to speak more clearly,’ forcing the government to seek any clarifying changes to the law rather than impose the costs of ambiguity on presumptively free persons.” *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring) (quoting *Santos*, 553 U.S. at 514). “In this way, the rule helps keep the power of punishment firmly ‘in the legislative, not in the judicial department.’” *Id.* (quoting *Wiltberger*, 5 Wheat. at 95).

Finally, and “perhaps most importantly,” lenity “embodies ‘the instinctive distaste[] against men languishing in prison unless the lawmaker has clearly said they should.’” *Nasir*, 17 F.4th at 473 (Bibas, J., concurring) (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, Benchmarks 196, 209 (1967)). By promoting liberty, lenity “fits with one of the core purposes of our Constitution, to ‘secure the Blessings of Liberty’ for all[.]” *Id.* (quoting U.S. Const. pmb1.); *see also Wooden*, 142 S. Ct. at 1081 (Gorsuch, J., concurring) (“Under [the rule of lenity] any reasonable doubt about the application of a penal law must be resolved in favor of liberty.”).

Deferring to the Commission and erring on the side of criminal liability that was neither commanded, nor even foreseeable under the statutory prohibition in Section 10(b), would violate all of these principles. “The critical point is that criminal laws are for courts, not for the Government, to construe.” *Abramski v. United States*, 573 U.S. 169, 191 (2014); *see also United States v. Apel*, 571 U.S. 359, 369 (2014) (“[W]e have never held that the

Government’s reading of a criminal statute is entitled to any deference.”). The SEC has it completely backward.

Finally, we also know that when there is an ambiguity in a statute, we use the rule of lenity *first* to resolve the ambiguity, instead of leaning toward deference to the agency. The rule of lenity applies at *Chevron* [or *Kisor*] step one: it is a “canon of construction” applied to discern if a statute is truly ambiguous. *Hylton v. U.S. Att’y Gen.*, 992 F.3d 1154, 1158 (11th Cir. 2021); *see also Nasir*, 17 F.4th at 472 (Bibas, J., concurring) (“In *Kisor*, the Supreme Court awoke us from our slumber of reflexive deference: agency interpretations might merit deference, but only when the text of a regulation is truly ambiguous. Before deferring, we must first exhaust our traditional tools of statutory construction. Anything less is too narrow a view of the judicial role. . . . And one tool among many stands out as well suited to the task: the rule of lenity.”). This flows from the language of *Chevron* itself, because at step one a court “evaluate[s] whether Congress has written clearly,” but “[t]o determine whether a statute has a plain meaning, we ask whether its meaning may be settled by the ‘traditional tools of statutory construction.’” *Hylton*, 992 F.3d at 1157–58 (quoting *Chevron*, 467 U.S. at 843 n.9). “These tools encompass our ‘regular interpretive method,’ *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004), including the canons of construction.” *Id.* at 1158; *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”). “Where, as here, the canons supply an answer, *Chevron* leaves the stage.” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

In the end, “Whatever the virtues of giving experts flexibility to adapt rules to changing circumstances in civil cases, in criminal justice those virtues cannot outweigh life and liberty. Efficiency and expertise do not trump justice.” *Nasir*, 17 F.4th at 474.

IV. Congress Could Not Lawfully Vest the Commission with the Authority It Is Trying To Exercise

Finally, if everything PLF has submitted so far is simply dismissed by the Commission, it should pause to examine what it is *really* doing. The SEC is making a new crime because it doesn’t agree with the court-enforced limits found in the ones Congress wrote. If Congress somehow authorized the Commission’s actions here, then Section 10(b) would be an unconstitutional delegation of lawmaking power.

Article I of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. Const. art. I, § 1. Moreover, “[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.” *Liparota*, 471 U.S. at

424. Agencies, therefore, may not exercise Congress’s legislative power to declare “what circumstances . . . should be forbidden” by criminal laws. *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 418–19 (1935).

It’s no secret, however, that the Court has struggled with defining the limits on the legislature’s delegation of its authority. Traditionally the Court has allowed agencies to exercise authority so long as Congress set out an “intelligible principle to which the person or body authorized to [exercise the authority] is directed to conform.” *Mistretta v. United States*, 488 U.S. 361, 372 (1989). But that test lacks clear contours. Furthermore, five members of the Court have recently expressed interest in at least exploring a reconsideration of that standard. See *Gundy v. United States*, 139 S. Ct. 2116, 2131–42 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *id.* at 2130–31 (Alito, J., concurring in the judgment); *Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari) (stating that the issues raised in the *Gundy* dissent “may warrant further consideration in future cases”).

Of course, even under the “intelligible principle” standard, the Court has suggested that it would present “a nondelegation question” if a statute provides an agency with “unguided” or “unchecked” authority to define a crime. *Gundy*, 139 S. Ct. at 2123 (plurality op.). While “administrative” rules implementing a statute are one thing, rules creating a new crime are quite another. See *id.* at 2129.

Moreover, as Justice Gorsuch recently highlighted in his dissenting opinion in *Gundy*, a delegation that “purports to endow the nation’s chief prosecutor with the power to write his own criminal code” “scrambles th[e] design” of the Constitution, which “promises that only the people’s elected representatives may adopt new federal laws restricting liberty.” 139 S. Ct. at 2131.

If the SEC is correct that it can just *change* what constitutes an essential element of a criminal violation of Section 10(b) simply because it doesn’t *like* the definitive interpretation of the statute from Article III courts, then Congress has impermissibly allowed the Commission to write criminal laws. Congress did not criminalize the mere act of trading by an insider when he is in possession of insider information. See *Smith*, 155 F.3d at 1066; *Adler*, 137 F.3d at 1338. Instead, it criminalized *using* insider information to commit fraudulent insider trading. *Id.* If the Commission can simply toss that aside and create a different crime that is easier for it and the United States to prosecute, it “scrambles th[e] design” of the Constitution” See *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

CONCLUSION

The Commission's efforts to wrangle with the practical implications of Rule 10b-5 is a symptom of a more fundamental problem. When the SEC tried to change the scope of the criminal prohibition of insider trading in the year 2000 it acted well beyond its lawful authority. The Commission is now poised to expand upon that mistake, further threatening the liberty of innocent market participants. Had the Commission originally adhered to its limited authority, there would be no need to engage in the cumbersome process of trying to plan out lawful trades that the SEC faces today. Instead, the Commission's enforcement bureau, as well as federal prosecutors, would simply do what Congress told them to do and prosecute genuinely fraudulent behavior. This failed experiment in lawmaking has gone on long enough. The Commission should rescind the rule entirely and respect the limits of its authority.

Sincerely,



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