No. 23-1095

In the Supreme Court of the United States

PATRICK D. THOMPSON, PETITIONER

v.

UNITED STATES

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

BRIEF OF PROFESSOR JOEL S. JOHNSON
AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE

Joel S. Johnson is an Associate Professor of Law at the Pepperdine Caruso School of Law. His interest as amicus curiae is the sound construction of federal penal statutes. This brief draws from his articles, *Ad Hoc Constructions of Penal Statutes*, 100 Notre Dame L. Rev. 73 (2024) (*Ad Hoc Constructions*), and *Major-Questions Lenity* (Nov. 11, 2024 draft) <tinyurl.com/MQlenity>.[1]

[1] No counsel for a party authored any part of this brief. Nor did anyone, other than amicus and his academic institution, financially contribute to preparing or submitting this brief. The brief reflects only amicus's views, not those of his academic institution.

SUMMARY OF ARGUMENT

Amicus agrees with petitioner that the court of appeals adopted an overly expansive construction of 18 U.S.C. 1014. Amicus submits this brief to urge the Court to explicate a generic rule of major-questions lenity that frames its reading of penal statutes when significant interpretive questions arise. When triggered, a rule of major-questions lenity would require the government to show clear congressional authorization for its asserted prosecutorial power. In this case, major-questions lenity provides a straightforward rationale for narrowly construing Section 1014 to exclude merely misleading statements.

ARGUMENT

SECTION 1014 SHOULD BE NARROWLY CONSTRUED ON THE BASIS OF A RULE OF MAJOR-QUESTIONS LENITY

Under 18 U.S.C. 1014, a person can be imprisoned up to thirty years or fined up to a million dollars for "knowingly mak[ing] any false statement * * * for the purpose of influencing in any way" the Federal Deposit Insurance Corporation or a bank that it insures. The court of appeals broadly construed the phrase "any false statement" in that statute to cover representations that are merely misleading, noting that "literal truth is not a defense." Pet. App. 12a.

While amicus generally agrees with petitioner that the court of appeals erred and that this Court should narrowly construe the statute to exclude merely misleading statements, amicus submits this brief to highlight the importance of *how* the Court goes about reaching that result. The Court should explicate a ge-

neric rule of narrow construction that frames its reading of penal statutes, and expressly rely on that rule to adopt a narrow reading of Section 1014.

In particular, the Court should articulate a rule of major-questions lenity rooted in the same separation-of-powers principles that motivate the administrative-law major questions doctrine, under which Congress is not presumed to have delegated policymaking authority to agencies on "major" questions of "vast economic and political significance," absent clear statutory authorization. *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2609 (2022) (internal quotation marks omitted); see *Major-Questions Lenity* 51-68. In the context of administrative law, the major questions doctrine prevents courts from construing broad and indeterminate statutory language as a delegation of lawmaking authority on important issues. The same basic logic should extend to the context of penal statutes; in fact, it did as an historical matter—when this Court applied a separation-of-powers doctrine of "strict construction" to penal statutes that was far more robust than the modern version of the rule of lenity (which virtually never plays a meaningful role in this Court's construction of penal statutes). See pp. 5-8, *infra*.

When triggered, a rule of major-questions lenity would require the government to show "clear congressional authorization for the [prosecutorial] power it claims." *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted). And it would instruct courts to be "reluctant" to read into less-than-clear statutory language the delegated prosecutorial authority "claimed to be lurking there." *Ibid.* (internal quotation marks omitted); see *Major-Questions Lenity* 52-53. As Chief Justice Marshall put it more than two centuries ago, "[t]o determine that a case is within the

intention of a [penal] statute, its language must authorise [courts] to say so." *Wiltberger* v. *United States*, 18 Wheat. 76, 96 (1820).

Major-questions lenity comports with a rationale that has emerged in a series of this Court's recent decisions narrowly construing penal statutes. In these cases, the Court has invoked a lenity-like tradition of "interpretive restraint" for penal statutes that is rooted in separation-of-powers concerns. See, *e.g.*, *Fischer* v. *United States*, 144 S. Ct. 2176, 2189 (2024); *Dubin* v. *United States*, 143 S. Ct. 1557, 1572 (2023); *Van Buren* v. *United States*, 141 S. Ct. 1648, 1661 (2021); *Marinello* v. *United States*, 138 S. Ct. 1101, 1108 (2018); *Yates* v. *United States*, 574 U.S. 528, 536, 540 (2014) (plurality opinion). When invoking that tradition, the Court has often highlighted the significant practical consequences that would result from adopting the government's proposed broad readings, and has sometimes noted that clear direction from Congress would be needed before adopting those readings. See pp. 24-28, *infra*.

In that way, the emerging interpretive-restraint rationale for penal statutes is strikingly similar to the administrative-law major questions doctrine. Yet, when invoking interpretive restraint, the Court has not yet made clear that it is a generic rule of narrow interpretation that lower courts should apply when construing federal penal statutes with sufficiently high stakes. This case presents an opportunity to do so: the Court should explicate a rule of major-questions lenity that frames the analysis of important interpretive questions arising from penal statutes.

A. The Historic Rule Of Strict Construction Has Been Replaced By An Ad Hoc Approach To Construing Penal Statutes

1. The historic rule of strict construction was a more robust predecessor to the modern rule of lenity.

When the Court first applied strict construction to federal penal statutes, Chief Justice Marshall justified it on a separation-of-powers basis, explaining that the "legislature, not the Court," is "to define a crime" and "ordain its punishment" because "the power of punishment is vested in the legislative, not the judicial department." *Wiltberger*, 18 Wheat. at 96. This principle of legislative primacy in crime definition "meant not just that Congress was entitled to take the lead in defining criminal law, but also that Congress was obliged to do so however inconvenient the consequences might be." Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 361 (1994).

That understanding of strict construction as a separation-of-powers constraint on the judiciary aligned the doctrine with another early tenet of federal criminal law rooted in separation-of-powers and federalism concerns—that federal courts did not have the power to create common law crimes. See *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction for the offence."). Strict construction ensured that the judiciary did not accept prosecutors' efforts to expand federal criminal law by engaging in common law crime definition under the guise of statutory interpretation. *Major-Questions Lenity* 13-17. It required that, in order for courts "[t]o determine that a case is within" the scope of a federal

penal statute, "its language must authorise [courts] to say so." *Wiltberger*, 5 Wheat. at 96.

Throughout the nineteenth century, this Court led the judiciary in applying the rule of strict construction to federal penal statutes. See, *e.g.*, *Ballew* v. *United States*, 160 U.S. 187, 197 (1895); *Sarlls* v. *United States*, 152 U.S. 570, 576-577 (1894); *United States* v. *Reese*, 92 U.S. 214, 219 (1875); *United States* v. *Hartwell*, 73 U.S. 385, 396-397 (1867); *Harrison* v. *Vose*, 50 U.S. 372, 378 (1850). During that period, this Court understood it to be "well settled * * * that all reasonable doubts concerning" a penal statute's "meaning ought to operate in favor of the [accused]," *Harrison*, 50 U.S. at 378, and that the Court was "not at liberty to extend [a penal statute's] meaning beyond its exact literal sense," *Sarlls*, 152 U.S. at 675.

2. But in the twentieth century, the Court deliberately weakened the rule of strict construction to the point of near irrelevance. That effort was part of a larger methodological shift towards purposivism, an approach to interpretation aimed at implementing the spirit of a legislative enactment by looking to a wide range of materials to determine legislative intent. *Major-Questions Lenity* 18-19. Viewing strict construction as an impediment to the implementation of legislative intent, the purposivist Court "sapped it of its strength, renaming it 'the rule of lenity'" and "relegating it to the to 'the end of the interpretive process,' as something to be considered only if ambiguity remained after considering all other indicia of legislative intent that could be gathered from all legal materials that purposivism made available." *Id.* at 4 (quoting Shon Hopwood, *Clarity in Criminal Law*, 54 Am. Crim. L. Rev. 695, 717 (2017)); see, *e.g.*, *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221

(1952); *United States* v. *Brown*, 333 U.S. 18, 25 (1948); *United States* v. *Gaskin*, 320 U.S. 527, 529-530 (1944). That demotion ensured that federal courts would rely on lenity only very rarely, as a "tool of last resort." Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 Wash. U. L. Rev. 351, 379 (2019).

Since that time, this Court has retained a weakened version of lenity, even after the Court's methodology has shifted from purposivism towards textualism. If anything, the Court's more recent decisions have further weakened lenity, often restricting its application to when "grievous ambiguity" remains following the use of all other interpretive tools. See, *e.g.*, *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (quoting *Staples* v. *United States*, 511 U.S. 610, 619 n.17 (1994)); but see *Wooden* v. *United States*, 142 S. Ct. 1063, 1082-1083 (2022) (Gorsuch, J., concurring in the judgment) (arguing for more robust lenity); *United States* v. *R.L.C.*, 503 U.S. 291, 307-310 (1992) (Scalia, J., concurring in the judgment) (similar).

3. Unsurprisingly, this Court now rarely, if ever, firmly relies on lenity. Indeed, in a study of the Court's 43 cases concerning the construction of penal statutes decided from the October 2013 Term through the October 2022 Term, amicus found that the Court *never* firmly relied on the rule of lenity in the 27 cases in which it adopted a narrow construction. See *Ad Hoc Constructions* 109. That was not for lack of opportunity: in 21 of the 27 narrow-construction cases studied, lenity was raised in party briefs, amicus

briefs, or at oral argument (often by a Justice[2]). *Ibid.* Lenity's prominence in the litigation materials of these cases may indicate that it did some persuasive work. Cf. *Snyder* v. *United States*, 144 S. Ct. 1947, 1960 (2024) (Gorsuch, J, concurring) (suggesting that "lenity is what's at work behind" many of the Court's narrow readings of penal statutes).

On the face of the Court's opinions, however, the apparent preference when narrowly construing penal statutes is to rely on statute-specific rationales that are "ad hoc," in the sense that they do not provide a generic principle of construction that can be widely applied by lower courts in future cases involving other penal statutes. *Ad Hoc Constructions* 79. Indeed, the Court relied on ad hoc rationales in 19 of the 27 narrow-construction cases studied. *Id.* at 104.[3]

That is not to say that the Court's interpretive analysis in these cases was simplistic; to the contrary, it often involved sophisticated and resource-intensive analysis of dictionaries, statutory context, linguistic canons, and other tools for determining ordinary meaning. See *Ad Hoc Constructions* 79 n.21 (collecting examples). But in these cases, the Court's heavy reliance on statute-specific ordinary-meaning analysis came at the expense of any distinct generic rule of narrow interpretation for penal statutes.

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[2] See, *e.g.*, Tr. 36, *Dubin*, 143 S. Ct. 1557 (No. 22-10) (Justice Alito raising lenity); *id.* at 43 (Justice Sotomayor raising lenity); *id.* at 59 (Justice Jackson raising lenity); Tr. 40, *Van Buren*, 141 S. Ct. 1648 (2021) (No. 19-783) (Justice Thomas raising lenity).

[3] In the remaining eight cases, the Court firmly relied on a different substantive canon, such as the federalism presumption, the scienter presumption, or the avoidance of constitutional vagueness concerns. See *Ad Hoc Constructions* 110-113.

B. The Absence Of A Generic Rule Of Narrow Construction For Penal Statutes Enables Implicit Delegation Of Criminal Lawmaking

The Court's ad hoc approach in narrow-construction cases has significant downstream consequences. See *Ad Hoc Constructions* 128-143 (identifying the downstream effects on legislatures, lower courts, prosecutors, defense counsel, and police). In the absence of a generic rule of narrow construction, open-ended language in federal penal statutes has the effect of implicitly delegating the legislative task of specific crime definition to courts and to prosecutors.

1. a. The ad hoc approach may have been a good fit for the purposivist paradigm of the mid-twentieth century, in which this Court abandoned the long tradition of more robust generic strict construction. In that era, the Court might have understood broad and indeterminate language in penal statutes to evince a Congressional "preference for lawmaking collaboration rather than a lawmaking monopoly." Kahan 369. In effect, the Court engaged in delegated judicial crime-definition while trying to remain faithful agents of Congress's purpose. See *Major-Questions Lenity* 39.

But the notion of implicit delegation has an uneasy relationship with the current textualist paradigm, which promises to "constrain the federal judiciary," Tara L. Grove, *Which Textualism?*, 134 Harv. L. Rev. 265, 271 (2020), through "fidelity to the text as written," Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 Case W. Res. L. Rev. 855, 856 (2020). Textualism does not entertain notions of inter-branch collaboration aimed at giving effect to the spirit of statutes; limiting interpretation to the ordinary meaning of the text is thought to suppress courts' potential to act according to their own

unfair predilections in an unfair or arbitrary manner. See, *e.g.*, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 25 (1997) (arguing that the formalism of textualism "is what makes a government of laws and not men"). For textualists, then, the presence of open-ended language in penal statutes (many of which may have been drafted in a purposivist era) is not generally viewed as an invitation to engage in collaborative crime definition, but rather as a mandate to apply the text as written. See *Major-Questions Lenity* 39-40.

b. As a result, in the textualist age, overly broad and sometimes literalistic constructions of penal statutes are to be expected in the lower courts.

Congress often enacts penal statutes with broad or indeterminate language. The combination of that statutory language and the absence of a robust generic rule of narrow construction for penal statutes has the effect of granting significant interpretive discretion to lower courts. When seeking to adhere to textualism while exercising that discretion, a lack of resources often pushes lower courts towards sweeping constructions of open-ended language in penal statutes. *Major-Questions Lenity* 40-41.

Indeed, as commentators have observed, "[s]tatutory interpretation is different at the top and bottom of the legal system." Joshua Kleinfeld, *Textual Rules in Criminal Statutes*, 88 U. Chi. L. Rev. 1791, 1816 (2021). While this Court resolves statutory-interpretation questions in a "resource-rich environment," Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 Duke L.J. 1, 13 (2018), resources in the lower courts are more meager. Significantly higher caseloads translate into

each issue getting less time and attention. *Ibid*; see *Ad Hoc Constructions* 132-133.

Fewer resources in the lower courts "lead[s] to simpler and quicker interpretive approaches," Bruhl 14, that are *cheaper* in terms of the resources they require. Both a generic rule of narrow construction (e.g., a substantive canon) and simple forms of ordinary-meaning analysis (e.g., mere reliance on dictionary definitions) are cheap relative to more complex arguments, such as those based on statutory context or analogies to other statutory schemes. All else equal, resource-strapped lower courts are likely to employ substantive canons or simple forms of ordinary-meaning analysis. *Ad Hoc Constructions* 133-134. But lower courts seeking fidelity to this Court's ad hoc approach will often rely exclusively on ordinary-meaning analysis when construing penal statutes. *Id.* at 134. And that ordinary-meaning analysis is likely to be superficial much of the time. See Kleinfeld at 1818 (observing that "the version of the rule-oriented textualism that prevails in the ordinary criminal courthouses * * * is not the stuff of visionary jurists," but is instead "a kind of 'them's the rules' approach one might get from the TSA at the airport").

When coupled with the open-ended language found in many penal statutes, superficial ordinary-meaning analysis that looks to dictionaries and little else is likely to result in more broad and literalistic constructions in lower courts. Examples pervade the Federal Reporter, see *Ad Hoc Constructions* 82 n.42 (collecting broad lower-court constructions based on simple ordinary-meaning analysis), with the result that this Court's correction of a portion of them "has become nearly an annual event," *United States* v. *Dubin*, 27 F.4th 1021, 1041 (5th Cir. 2022) (en banc) (Costa, J.,

dissenting), *vacated*, 143 S. Ct. 1557 (2023); see *Ad Hoc Constructions* 76 (observing that, in recent years, cases involving interpretation of penal statutes have accounted for 7% of this Court's merits cases).

Yates is illustrative. In that case, the lower courts breezed past the statutory-interpretation question that ultimately produced several lengthy opinions from this Court. In a single-page order, the district court applied the phrase "any * * * tangible object" in a provision of the Sarbanes-Oxley Act to the undersized fish that the defendant had caught and discarded, declining to limit that "broad" catch-all term to objects similar to the more specific terms "record" and "document" that preceded it in a statutory list. *United States* v. *Yates*, Crim. No. 2:10-66 (M.D. Fla. Aug. 8, 2011). In just one paragraph, the Eleventh Circuit affirmed by relying upon a dictionary to conclude that the "plain" and "ordinary" meaning of the catch-all term "unambiguously applies to fish." *United States* v. *Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013) (citing *Black's Law Dictionary* 1592 (9th ed. 2009)). This Court reversed, adopting a narrower reading of "any * * * tangible object" that excluded fish. *Yates*, 574 U.S. at 536 (plurality opinion). In doing so—in stark contrast to the lower courts—a four-Justice plurality produced eighteen pages of statutory analysis that employed multiple linguistic canons, considered the statute's structure and title, and looked to legislative history. See *id.* at 531-549. Justice Alito's opinion concurring in the judgment provided several additional pages of analysis that employed linguistic canons and considered the statute's title. See *id.* at 549-552. And Justice Kagan produced eighteen more pages of sophisticated textual analysis

in a dissenting opinion that favored the opposite result. See *id.* at 552-570.

Similarly, in *Dubin*, the Fifth Circuit insisted upon a sweeping reading of the federal aggravated identity theft statute on the basis of simple ordinary-meaning analysis based on little more than dictionary definitions. See *United States* v. *Dubin*, 982 F.3d 318, 325-326 (5th Cir. 2020) (citing *Oxford Dictionary of English* (3d ed. 2010) and *Black's Law Dictionary* (10th ed. 2014)); see Dubin, 27 F.4th at 1021 (en banc) (per curiam) (affirming "for the reasons set forth in the panel's majority opinion"). This Court ultimately adopted a narrow construction of the statute, relying on more sophisticated ordinary-meaning analysis that looked beyond dictionaries to the statute's text and title, statutory context, and a linguistic canon. See *Dubin*, 143 S. Ct. at 1564-1572.

This Court's preference for ad hoc narrow constructions of penal statutes—rather than a generically applicable rule—thus seems to encourage lower courts to rely on simple ordinary-meaning analysis, which more often yields broad, literalistic constructions of penal statutes as compared to the more sophisticated ordinary-meaning analysis the Court is able to do. Only a small fraction of these broad and literalistic constructions can be corrected by this Court, with the benefit of more resource-intensive analysis.

c. In a related vein, the ad hoc approach burdens defense counsel by making *cheaper* narrow-construction arguments based on substantive canons, such as the rule of lenity, less likely to succeed—often leaving costlier sophisticated ordinary-meaning arguments as the only viable option.

When a statute's text is open-ended, it is not too difficult to make a prima facie case for a broad construction. A prosecutor need not do much beyond superficial interpretive analysis that relies on a few dictionary definitions of the open-ended statutory terms. The onus is then on defense counsel to look for ways to argue (often counterintuitively) that the statute should be read more narrowly.

Defense lawyers arguing before this Court—typically specialists associated with elite institutions, such as big law firms or top law schools—tend to have the resources needed to build sophisticated ordinary-meaning arguments. Experienced Supreme Court defense lawyers (*e.g.*, petitioner's counsel in this case) thus routinely devote the bulk of their merits briefs to sophisticated, ordinary-meaning arguments (*e.g.*, Pet Br. 12-33); they tend to tack on substantive canons, such as lenity, only as fail-safe arguments at the end of their briefs (*e.g.*, Pet. Br. 35-36).[4] See *Ad Hoc Constructions* 140; see also Daniel Epps & William Ortman, *The Defender General*, 168 U. Pa. L. Rev. 1469, 1471-1472 (2020) (noting how Supreme Court defense lawyers focus on short-term victories for particular defendants rather than the long-term interests of criminal defendants as a class).

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[4] For additional examples, see Pet. Br. at 42-44, *Dubin*, 143 S. Ct. 1557 (No. 22-10) (authored by Jeffrey Fisher) (making lenity argument at end of brief); Pet. Br. at 48-49, *Ciminelli* v. *United States*, 143 S. Ct. 1121 (2023) (No. 21-1170) (authored by Michael Dreeben) (same); Pet. Br. at 33-34, *Bittner* v. *United States*, 143 S. Ct. 713 (2023) (No. 21-1195) (authored by Daniel Geyser) (same); Pet. Br. at 45-46, *Wooden*, 142 S. Ct. 1063 (No. 20-5279) (authored by Allon Kedem) (same); Pet. Br. at 42-44, *Borden* v. *United States*, 141 S. Ct. 1817 (2021) (No. 19-5410) (authored by Kannon Shanmugam) (same).

But criminal defendants in most courthouses "cannot access textualism at its best." Kleinfeld 1818. Defense lawyers in the lower courts usually have limited resources. Most are public defenders or other appointed counsel. Many are excellent advocates. But the combination of budgetary constraints and heavy caseloads makes it practically impossible for them to perform all the work needed to provide zealous advocacy on every aspect of every case. *Ad Hoc Constructions* 140; see also Paul T. Crane, *Charging the Margin*, 57 Wm. & Mary L. Rev. 775, 825-27 (2016) (describing how misdemeanor defense counsel have even fewer resources).

The task of building from scratch a sophisticated ordinary-meaning argument specific to a particular statute is much costlier than simply invoking a prepackaged generic rule of interpretation. Yet because lower courts are likely to follow the Court's ad hoc approach, see pp. 10-13, *supra*, substantive canons such as lenity are less likely to be effective. Defense counsel thus must weigh the benefits of spending a significant chunk of their limited resources on a sophisticated statutory-interpretation argument against the costs of not devoting those same resources to some other aspect of representation. Often, defense counsel will conclude that time is better spent on other arguments or in plea negotiations. Even when defense counsel elects to pursue a costly interpretive argument, that hardly guarantees that it will be effective. See *Ad Hoc Constructions* 140-141.

If this Court consistently and explicitly relied on a generic rule of narrow construction for penal statutes, the costs of arguing for narrow readings in the lower courts would substantially decrease.

2. In the absence of a generic rule of narrow construction, open-ended language in federal penal statutes also implicitly delegates the legislative task of crime definition to prosecutors.

Prosecutors use charging discretion to pursue conduct on the outer peripheries of open-ended statutory language. See Erik Luna, *Prosecutors as Judges*, 67 Wash & Lee. L. Rev. 1413, 1495 (2010) (noting that prosecutors "have every incentive to extend criminal liability"); see *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what to charge before a grand jury, generally rests entirely in his discretion.").[5] When doing so, prosecutors are using the criminal lawmaking authority implicitly delegated to them by open-ended statutory text. As a functional matter, they are not merely engaged in the executive task of enforcing criminal law, but also the legislative task of crime definition. See *Major-Questions Lenity* 43.

Because most criminal cases are resolved through plea bargaining, prosecutors also often functionally perform an adjudicative function. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L.

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[5] Before this Court, the government nearly always advocates for expansive readings of penal statutes. See, *e.g.*, Gov't Br. 9-37, *Dubin*, 143 S. Ct. 1557 (No. 22-10); Gov't Br. 14-46, *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019) (No. 17-9560); Gov't Br. 13-46, *Marinello*, 138 S. Ct. 1101 (No. 16-1144); Gov't Br. 20-39, *McDonnell* v. *United States*, 579 U.S. 550 (2016) (No. 15-474); Gov't Br. 14-55, *Yates*, 574 U.S. 528 (No. 13-7451); Gov't Br. 17-34, *Elonis* v. *United States*, 875 U.S. 723 (2015) (13-983).

Rev. 869, 876-878 (2009). That consolidation of enforcement, legislative, and adjudicative functions grants prosecutors vast power and discretion.

Prosecutors often use that discretion to threaten particular defendants with more serious charges as a tactic for securing a guilty plea to a lesser charge. See *Bordenkircher*, 434 U.S. at 358. When using that tactic, prosecutors have a strong incentive to push the boundaries of open-ended statutory language. Barkow 879. If an expansive theory of prosecution yields a guilty plea to a lesser charge, then it has done its job. And because the more serious charge is ultimately dropped, the expansive reading of the statute on which it was based evades judicial review. *Major-Question Lenity* 43.

Of course, some expansive theories of prosecution under open-ended statutes are ultimately tested in court. But for reasons already explained, lower courts often adopt the broad readings as within the ordinary meaning of the open-ended statute, even when this Court later rejects them. See pp. 10-13, *supra*. That bifurcation in outcomes allows federal prosecutors to advance sweeping readings of penal statutes in the lower courts in many cases over many years, unless and until this Court intervenes. See, *e.g.*, *Ad Hoc Constructions* 139 (identifying a decades' worth of expansive prosecutions under the Computer Fraud and Abuse Act that predated this Court's narrow reading in *Van Buren*). When courts accept prosecutions premised on expansive readings of open-ended federal penal statutes, they functionally adopt a definition of prohibited criminal conduct set by prosecutors, not by Congress, and ultimately engage in criminal lawmaking at odds with the ban on federal common law crime definition. See *Major-Questions Lenity* 44.

Consistent and explicit rejection of overly expansive theories of prosecution on the basis of a robust generic rule of narrow construction would help to rein in the excesses of the implicit delegation created by open-ended statutory language.

C. Separation-Of-Powers Principles Support A Generic Rule Of Major-Questions Lenity

The logic of the new major questions doctrine in the administrative-law context provides a fresh approach for a more robust generic rule of narrow construction for penal statutes. See *Major-Questions Lenity* 45-68. This Court should embrace a rule of major-questions lenity rooted in separation-of-powers concerns and clearly articulate it as a generic rule that frames the analysis of important interpretive questions arising from penal statutes.

1. a. In context of administrative law, the major questions doctrine functions as an implied-limitation rule that requires clear statutory authorization before concluding that Congress has delegated an agency policymaking authority concerning "major" questions of "vast economic and political significance." *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted); see Caleb Nelson, *Statutory Interpretation* 923 (2d ed. 2023) (characterizing the major questions doctrine as "an implied-limitation rule"); *id.* at 230-232 (describing implied-limitation rules in more detail). The Court has recently applied the major questions doctrine to invalidate several significant agency actions. See, *e.g.*, *Biden* v. *Nebraska* 143 S. Ct. 2355, 2374-2376 (2023); *West Virginia*, 142 S. Ct. at 2609-2613; *National Federation of Independent Business* v. *OSHA*, 142 S. Ct. 661, 665 (2022).

In effect, the major questions doctrine prevents Congress from implicitly delegating major policy questions and reduces the discretion of agencies that previously understood broad or indeterminate statutory language as an invitation to issue regulations on those major questions.

b. The major questions doctrine has both normative and descriptive justifications. See *West Virginia*, 142 S. Ct. at 2609 (rooting the doctrine in "both separation of powers principles and a practical understanding of legislative intent").

The major questions doctrine can be understood as a normative commitment to the separation of powers. On this understanding, it prevents courts from construing statutory language as a delegation of lawmaking authority to agencies on "major" questions absent an explicit statement to that effect. See *West Virginia*, 142 S. Ct. at 2616-2617 (Gorsuch, J., concurring) (describing the major questions doctrine as "protect[ing] the Constitutions' separation of powers"). That may sometimes require departure from the most natural reading of statutory text to ensure that "important subjects * * * must be entirely regulated by the legislature itself," *Wayman* v. *Southard*, 10 Wheat. 1, 42-43 (1825) (Marshall, C.J.), because Article I's Vesting Clause locates "[a]ll federal 'legislative powers * * * in Congress," *West Virginia*, 142 at 2617 (Gorsuch, J., concurring) (quoting U. S. Const. Art. I, § 1).

The major questions doctrine can also be understood as a more modest descriptive "tool for discerning—not departing from—the text's most natural interpretation" by "situat[ing] text in context" of "common sense" that avoids "literalism." *Biden*, 143 S. Ct. at 2379 (Barrett, J., concurring). The idea is that Congress is "expect[ed] * * * to speak clearly if it

wishes to assign an agency decisions of vast economic and political significance." *Id.* at 2380 (internal quotation marks omitted). This "expectation of clarity" follows from "the basic premise that Congress normally 'intends to make major policy questions itself, not leave those decisions to agencies.'" *Ibid.* (quoting *United States Telecom Assn.* v. *FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc)). That premise reflects "our constitutional structure, which is itself part of the [relevant] legal context." *Ibid.* Given Article I's Vesting Clause, "a reasonable interpreter would expect [Congress] to make the big-time policy calls itself[.]" *Ibid.*

The major questions doctrine can separately be justified on a descriptive ground by appealing to philosophical and legal-philosophical literature concerning the relationship between textual indeterminacy, epistemology, and the stakes of a particular situation. See Ilan Wurman, *Importance and Interpretive Questions*, 110 Va. L. Rev. 909, 916, 949-964 (2024) (arguing that the major questions doctrine rests on norms of linguistic usage concerning how uncertainty is dealt with in "high-stakes" contexts and that "interpreters tend to expect clarity when * * * lawmakers or parties authorize others to make important decisions on their behalf") (citing Ryan D. Doerfler, *High-Stakes Interpretation*, 116 Mich. L. Rev. 523, 527 (2018)).

c. Whether understood in normative or descriptive terms (or both), the major questions doctrine plainly reduces the degree to which statutory text is understood to delegate questions of significance to administrative agencies. It constrains executive discretion to implement expansive readings of statutes that implicate major questions and, in turn, constrains judicial discretion to adopt those readings.

2. The logic of the major questions doctrine extends to the context of construing penal statutes.

a. The major questions doctrine purports to advance the same basic separation-of-powers-value of legislative primacy in the context of administrative law that historic strict construction did in the context of penal statutes, see pp. 5-6, *supra*, where limits on the delegation of criminal lawmaking are stronger, see *Hudson*, 11 U.S. (7 Cranch) at 32, and the prospect of punishment raises the stakes of interpretation, see *Wiltberger*, 18 Wheat. at 95.

The major questions doctrine comports with Chief Justice Marshall's general instruction that "important subjects * * * must be entirely regulated by the legislature itself." *Wayman*, 10 Wheat. at 42. And historic strict construction was essentially an application of that general principle to the specific context of penal statutes. See *Wiltberger*, 18 Wheat. at 95 (Marshall, C.J.) (rooting strict construction in the "plain principle" that "the legislature, not the Court" is "to define a crime [ ] and ordain its punishment" because "the power of punishment is vested in the legislative, not the judicial department"). That principle of legislative primacy in crime definition "meant not just that Congress was *entitled* to take the lead in defining criminal law, but also that Congress was obliged to do so however inconvenient the consequences might be." Kahan 361; see *Major-Questions Lenity* 51-52.

But with historic strict construction now abandoned and lenity weakened to the point of near irrelevance, no generic rule of interpretation ensures that Congress does not implicitly delegate criminal lawmaking authority to prosecutors and courts. See pp. 6-8, *supra*. The logic of the major questions doctrine

provides a path for restoring a robust generic rule of narrow construction of penal statutes.

When triggered, a rule of major-questions lenity would require the government to show "clear congressional authorization for the [prosecutorial] power it claims," instructing courts to be "reluctant" to read into less-than-clear statutory language the delegated prosecutorial authority "claimed to be lurking there." *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted). Or, in the words of Chief Justice Marshall, "[t]o determine that a case is within the intention of a [penal] statute, its language must authorise [courts] to say so." *Wiltberger*, 5 Wheat. at 96; see *Major-Questions Lenity* 52.

b. In addition, the "majorness" trigger would distinguish major-questions lenity as a tool for constraining extremely broad penal statutes—a common type of penal statute typically thought to be beyond the reach of lenity-like tools of interpretation that are triggered only by linguistic indeterminacy. *Major-Questions Lenity* 64; see Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 Ariz. L. Rev. 641, 642-643 (2019) (observing that interpretive tools triggered by linguistic indeterminacy, such as modern lenity, do not properly address the problem of breadth in penal statutes). Insofar as major-questions lenity functions as an implied-limitation rule, its application would extend to statutes with broad but seemingly clear language. See Nelson 230 (explaining that implied-limitation rules "encourage courts to read implied limitations into seemingly general language—language that is broad enough as a matter of ordinary usage to en-

compass the issue in question, but that does not specifically address that issue or show that members of the enacting legislature thought about it").[6]

c. Major-questions lenity could be understood as an interpretive rule rooted in a normative commitment to the separation of powers. Cf. *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in the judgment) (justifying a robust rule of lenity on separation-of-powers grounds); see also *West Virginia*, 142 S. Ct. at 2116-2117 (Gorsuch, J., concurring) (describing the major questions doctrine as "protect[ing] the * * * separation of powers"). It could also be viewed as a descriptive canon based on "commonsense principles of communication" that situate the text of penal statutes within the context of our constitutional structure, *Biden*, 143 S. Ct. at 2380 (Barrett, J., concurring), and the high stakes of punishment, see Wurman 949-64; *Major-Questions Lenity* 64-67.

Under either conception, major-questions lenity would work to limit the practice of implicit delegation of crime definition. Because major-questions lenity would not be relegated to the end of the interpretive process—as is modern lenity—it would meaningfully help curb lower courts' adoption of overly broad and literalistic constructions of penal statutes based on expansive theories of prosecution.

D. A Rule Of Major-Questions Lenity Comports With This Court's Recent Decisions

A generic rule of major-question lenity is consistent with a rationale that has emerged in some of

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[6] A "majorness" trigger requires determining which interpretive questions are sufficiently important. *Major-Questions Lenity* 61-64. But by any measure, the interpretive question in this case is a major one. See p. 29, *infra*.

this Court's recent decisions narrowly construing penal statutes.

In this line of cases, the Court has invoked a tradition of "interpretive restraint" for federal penal statutes that is rooted in separation-of-powers concerns. See, *e.g.*, *Fischer*, 144 S. Ct. at 2189; *Dubin*, 143 S. Ct. at 1572; *Van Buren*, 141 S. Ct. at 1661; *Marinello*, 138 S. Ct. at 1108; *Yates*, 574 U.S. at 536, 540 (plurality opinion). When invoking interpretive restraint, the Court has often highlighted the significant and severe consequences of the government's proposed broad readings, see *Fischer*, 144 S. Ct. at 2189-2190; *Dubin*, 143 S. Ct. at 1572; *Van Buren*, 141 S. Ct. at 1661, and sometimes noted that clear direction from Congress would be needed before adopting those readings, see *Marinello*, 138 S. Ct. at 1108; *Yates*, 574 U.S. at 536, 540 (plurality opinion).

1. This Court's recent decision in *Fischer* illustrates how the interpretive-restraint rationale functions as a form of major-questions lenity.

Fischer concerned the scope of Section 1512(c) of the Sarbanes-Oxley Act in the context of a prosecution related to the events at the U.S. Capitol on January 6, 2021. 144 S. Ct. at 2182. Subsection (1) of that statute applies to any person who corruptly "alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding"; subsection (2) sets forth a residual clause that extends criminal liability to anyone who "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so." 18 U.S.C. 1512(c). The prosecution of Fischer under Section 1512(c) was based on the theory that his conduct at the Capitol violated the residual clause. *Id.* at 2182.

This Court held that the residual clause did not apply to Fischer's alleged conduct, narrowly construing it to cover only acts that affect "the availability or integrity" of "records, documents, objects, or * * * other things" used in an official proceeding. *Fischer*, 144 S. Ct. at 2190. The Court justified that narrow reading with the statute's text, linguistic canons, and statutory history and context. *Id.* at 2183-2189. But the Court also pointed to the avoidance of "peculiar" consequences that would result from the government's "unbounded" reading, which would have "criminaliz[ed] a broad swath of prosaic conduct." *Id.* at 2187-2189. Those consequences, the Court explained, "underscore[d] the implausibility of the Government's interpretation," *id.* at 2189 (quoting *Van Buren*, 141 S. Ct. at 1661), noting that, if Congress had meant to impose criminal punishment on "*any* conduct that delays or influences a proceeding in *any* way, it would have said so." *Ibid.* The Court also drew attention to the severity of the potential penalty under the statute. *Ibid.*

The Court then cited *Wiltberger* for the proposition that the Court has "long recognized 'the power of punishment is vested in the legislative, not in the judicial department.'" *Fischer*, 144 S. Ct. at 2189 (quoting *Wiltberger*, 5 Wheat. at 95). For that reason, the Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute." *Ibid.* (quoting *Marinello*, 138 S. Ct. at 1109). By "cabin[ing]" the residual clause, the Court was "afford[ing] proper respect to 'the prerogatives of Congress' in carrying out the quintessentially legislative act of defining crimes and setting the penalties for them." *Ibid.* (quoting *United States* v. *Aguilar*, 515

U.S. 593, 600 (1995)). The government's broad reading, the Court noted, "would intrude on that deliberate arrangement of constitutional authority over federal crimes, giving prosecutors broad discretion to seek" significant criminal penalties. *Ibid.*

2. This Court's decision in *Dubin* further illustrates how the emerging interpretive-restraint rationale functions as a form of major-questions lenity.

Dubin concerned the scope of the federal aggravated identity theft statute, which increases the penalty for anyone who, "during and in relation to" to the commission of an enumerated predicate felony, "knowingly * * * uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). The Fifth Circuit had broadly construed the term "uses" to cover any person who recites another's name while committing a predicate crime, regardless whether the person had the authority to do so or whether doing so was instrumental to committing the predicate crime. *Dubin*, 27 F.4th at 1022 (en banc) (per curiam); *Dubin*, 982 F.3d at 325-326. This Court disagreed, narrowly construing the terms "uses" and "in relation to" as applying only when "the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal." *Dubin*, 143 S. Ct. at 1563.

This Court justified that "targeted reading" with an ad hoc approach that relied on the statute's text and title, statutory context, and a linguistic canon. *Dubin*, 143 S. Ct. at 1563-1572. But the Court also highlighted the "far-reaching consequences" that would have resulted from "the staggering breadth" and "implausib[ility]" of the government's reading, which would have "swe[pt] in the hour-inflating law-

yer, the steak-switching waiter, the building contractor who tacks an extra $10 onto the price of paint he purchased[,] [s]o long as they used various common billing methods." *Id.* at 1572. And "[b]ecause everyday overbilling cases would account for the majority of violations in practice," the Court explained, the government's reading "places at the core of the statute its most improbable applications." *Id.* at 1573.

In highlighting these implausible applications of the government's reading, the Court situated its analysis with a "tradition[]" of "'exercis[ing] restraint in assessing the reach of a federal criminal statute." 143 S. Ct. at 1572 (quoting *Marinello*, 138 S. Ct. at 1109). That tradition, the Court explained, "arises 'both out of deference to the prerogatives of Congress and out of a concern that a fair warning should be given to the [common] world,'" adding that "[c]rimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language." *Id.* (quoting *Marinello*, 138 S. Ct. at 1109).

The Court then pointed to three recent narrow-construction cases—*Van Buren*, *Marinello*, and *Yates*—to illustrate how, "[t]ime and again, th[e] Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes." *Ibid.*; see *Van Buren*, 141 S. Ct. at 1661 (noting that the "far-reaching consequences" of the government's reading "underscore[d] [its] implausibility"); *Marinello*, 138 S. Ct. at 1108 (noting that, if "Congress [had] intended" to sweep as far as the government suggested, "it would have spoken with more clarity than it did"); *Yates*, 574 U.S. at 536, 540 (noting that the government's "unrestrained" reading would have turned a "records" and "documents" statute into "an all-encompassing ban on the spoliation of evidence"

that would "sweep within its reach physical objects of every kind" and that "one would have expected a clearer indication" if that were Congress's intent).

* * * * *

This series of interpretive-restraint cases can be understood as invoking a modest form of major-questions lenity. See *Major-Questions Lenity* 51-60.

In each case, this Court demonstrated the high stakes of the interpretive question by drawing attention to the far-reaching and severe consequences of the government's broad reading of the statute. It then declined to adopt that broad reading, sometimes adding that it would require clear authorization from Congress before adopting such a sweeping construction of the penal statute.

Yet, when invoking the interpretive-restraint rationale in these cases, the Court never made clear that it is a generic rule of narrow construction that lower courts should apply when construing federal penal statutes with sufficiently high stakes.

That should change. In this case, the Court should explicate a rule of major-questions lenity that generically applies to federal penal statutes and is more robust than the all-but-defunct modern version of lenity, which applies only at the back-end of the interpretive process. The rule of major-questions lenity should be articulated as a front-end implied-limitation rule that frames the resolution of important interpretative questions arising from penal statutes.

E. Major-Questions Lenity Requires a Narrow Construction of Section 1014

Application of a generic rule of major-questions lenity makes this an easy case.

Section 1014 criminally prohibits a person from "knowingly mak[ing] any false statement * * * for the purpose of influencing in any way" the Federal Deposit Insurance Corporation or a bank that it insures. 18 U.S.C. 1014. In this case, the question is whether the phrase "any false statement" is broad enough to cover representations that are merely misleading.

That is an important interpretive question. For one thing, adoption of the government's broad reading of Section 1014—which encompasses merely misleading but literally true statements, Pet. App. 12a—would have "far-reaching consequences," *Dubin*, 143 S. Ct. at 1572, that would "criminalize a broad swath of prosaic conduct," *Fischer*, 144 S. Ct. at 2189, including numerous merely misleading commonplace statements made in the context of prospective borrowers seeking loans, see Pet. Br. 33-35 (providing multiple examples). And because cases involving merely misleading statements would likely "account for the majority of violations in practice," the government's broad reading "places at the core of the statute its most improbable applications." *Dubin*, 143 S. Ct. at 1573. In addition, the penalty that attaches to Section 1014 is severe: a violator can be imprisoned up to thirty years or fined up to a million dollars. 18 U.S.C. 1014; cf. *Fischer*, 144 S. Ct. at 2189. By any measure, the interpretive question whether the statutory term "any false statement" encompasses merely misleading statements is one of major importance.

As a major interpretive question, it is one on which Congress would be "expect[ed] * * * to speak clearly" if it wished to authorize prosecutorial authority. *Biden*, 143 S. Ct. at 2379 (Barrett, J., concurring); cf. *Yates*, 574 U.S. at 536, 540 (noting that "one would have expected a clearer indication" if Congress had

meant for a records-and-documents statute to function as "an all-encompassing ban on the spoliation of evidence" that "sweep[s] within its reach physical objects of every kind"). A rule of major-questions lenity thus requires the government to show "clear congressional authorization for the power" to prosecute merely misleading statements under Section 1014. *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted). The government cannot make that showing.

To be sure, there can be reasonable disagreement over whether the phrase "any false statement" in Section 1014 is best read to cover merely misleading statements. As the deep circuit conflict on the question presented reflects, Pet. 6-13, different interpreters using various interpretive tools can reasonably reach different conclusions. Accordingly, petitioner has devoted over 20 pages of his brief to sophisticated ordinary-meaning analysis that is statute-specific. See Pet. Br. 12-33. The government will no doubt do the same.

But major-questions lenity makes the interpretive task easy precisely because it does not require ascertaining the best reading of the statute using other interpretive tools. Cf. *West Virginia*, 142 S. Ct. at 2615 (noting that the Court had "no occasion to decide" the best reading of the statute in light of the major questions doctrine's application); see also Gary Lawson, *"The Game" (or How I Learned to Stop Worrying and Love the Major Questions Doctrine)*, 2024 Harv. J.L. & Pub. Pol'y Per Curiam 14 (observing that both the major questions doctrine and "classical lenity" function "as a way to decide a case *without offering a specific interpretation of the underlying statute*").

Instead, major-questions lenity requires the government to show that the statute *clearly* authorizes a prosecution for a merely misleading statement. And on that front, there can be no doubt that the text of Section 1014 does not clearly do so. Indeed, the fact that Congress has repeatedly drawn a distinction between "false" and "misleading" statements in numerous other statutes shows that Congress knows how to clearly authorize prosecutions for merely misleading statements when it wishes. See Pet. Br. 19-20 (collecting examples of statutes that expressly distinguish between "false" and "misleading" statements).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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