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The Eleventh Circuit Creates Uncertainty by Applying the Rule of Lenity in *United States v. Izurieta*

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THE ELEVENTH CIRCUIT CREATES UNCERTAINTY BY APPLYING THE RULE OF LENITY IN *UNITED STATES v. IZURIETA*

Abstract: On February 22, 2013, in *United States v. Izurieta*, the U.S. Court of Appeals for the Eleventh Circuit found 18 U.S.C. § 545—a federal statute criminalizing the importation of goods "contrary to law"—ambiguous as to whether it criminalizes violations of a regulation and, as a result, applied the rule of lenity. In reaching this conclusion, the court rejected approaches espoused by two split circuits, instead examining whether the regulation appears civil or criminal in nature. To avoid this type of uncertainty, this Comment argues that courts should instead apply the rule of lenity consistently based on § 545's ambiguous text and history, rather than examine the nature of each regulation.

INTRODUCTION

The federal smuggling statute, 18 U.S.C. § 545, imposes criminal penalties on anyone who knowingly imports goods into the United States "contrary to law."[1] Through this "contrary to law" phrase, the statute criminalizes conduct that may be *illegal* under other sources of law, but is not necessarily *criminal* according to those sources.[2] Courts disagree on how broadly "law" should be construed under the statute and whether it criminalizes violations of regulations or only of statutes.[3] The U.S. Court of Appeals for the Ninth Circuit defines "law" narrowly, including regulations only when a statute specifies that violation of the regulation is a crime.[4] The U.S. Court of Appeals for the Fourth Circuit, however, defines "law" broadly, so that regulations having the "force and effect of law" fall under the statute.[5]

In 2013, the U.S. Court of Appeals for the Eleventh Circuit, in *United States v. Izurieta*, rejected both approaches by examining whether the regula-

[1] 18 U.S.C. § 545 (2006) ("Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law . . . shall be fined under this title or imprisoned not more than 20 years, or both.").

[2] United States v. Place, 693 F.3d 219, 227 (1st Cir. 2012).

[3] *Compare* United States v. Izurieta, 710 F.3d 1176, 1179–81 (11th Cir. 2013) (concluding that "law" is ambiguous as to whether it criminalizes violations of a regulation appearing civil and contractual in nature), *with* Unites States v. Alghazouli, 517 F.3d 1179, 1187 (9th Cir. 2008) (concluding that "law" includes regulations only when a statute specifically states that a violation of the regulation constitutes a crime), *and* United States v. Mitchell, 39 F.3d 465, 470 (4th Cir. 1994) (concluding that "law" encompasses regulations having the "force and effect of law").

[4] *Alghazouli*, 517 F.3d at 1187.

[5] *Mitchell*, 39 F.3d at 470.

tion at issue appears civil or criminal in nature.[6] The defendants were convicted under § 545 for violating a Customs and Border Protection ("Customs") regulation governing the conditional release of imported goods.[7] Finding the regulation primarily civil in nature, the court applied the rule of lenity, concluding that § 545 is ambiguous as to whether it criminalizes violations of the Customs regulation, and accordingly vacated the convictions.[8]

This Comment argues that courts should apply the rule of lenity consistently in all cases involving regulations because of the ambiguous text and history of § 545, as evidenced by the Ninth and Fourth Circuits' drastically different interpretations.[9] Part I of this Comment describes the crime allegedly committed by the *Izurieta* defendants and outlines the procedural history of the case.[10] Part II discusses the divergent circuit court interpretations of "law" under § 545.[11] Finally, Part III argues that courts should apply the rule of lenity to all § 545 cases involving regulations because examining regulations on a case-by-case basis creates needless uncertainty in determining whether a regulatory violation qualifies as a § 545 violation.[12]

I. The Alleged Crime: Importing Goods in Violation of a Customs Regulation

On May 11, 2011, the U.S. District Court for the Southern District of Florida found Yuri Izurieta and his wife, Anneri, as well as their company, Naver Trading, Corp. ("Naver"), guilty of violating § 545 by importing dairy products "contrary to law."[13] The Izurietas founded and operate Naver, a company that imports cheese, butter, and bread from Central America into the United States.[14] The Izurietas were convicted under § 545 for violating 19 C.F.R. § 141.113(c), a Customs regulation governing the conditional release of imported goods pending Food and Drug Administration (FDA) approval.[15] The defendants failed to redeliver to Customs five shipments of dairy products and

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[6] *See* 710 F.3d at 1183–84.

[7] *Id.* at 1178.

[8] *Id.* at 1183–84.

[9] *See infra* notes 63–79 and accompanying text.

[10] *See infra* notes 13–29 and accompanying text.

[11] *See infra* notes 30–62 and accompanying text.

[12] *See infra* notes 63–79 and accompanying text.

[13] Brief of Appellant at 1, *Izurieta*, 710 F.3d 1176 (No. 11-13585), 2012 WL690501.

[14] *Izurieta*, 710 F.3d at 1178.

[15] Recall of Merchandise Released from Customs and Border Protection Custody, 19 C.F.R. § 141.113(c) (2010) ("For the purposes of determining the admissibility of any food, drug, device, cosmetic, or tobacco product . . . the release from [Customs] of any such product will be deemed conditional."); *Izurieta*, 710 F.3d at 1178.

failed to make one shipment available for FDA examination, thereby violating the conditional release provisions of § 141.113(c).[16]

To facilitate the inspection of food products seeking entry into the United States, § 141.113(c) allows importers to temporarily take possession of their imported goods pending FDA inspection.[17] These goods are on hold and cannot be distributed until the FDA provides formal authorization for entry.[18] If the goods are found to be contaminated or otherwise unfit for distribution, the FDA may demand that they be redelivered to Customs for exportation or destruction.[19] Failure to comply with § 141.113(c) gives rise to a civil remedy of liquidated damages in the amount of three times the value of the goods.[20]

Given the nature of the regulation, the Eleventh Circuit, on appeal, sua sponte raised the question of whether the indictment in *Izurieta* sufficiently alleged a crime.[21] Because the indictment only alleged a violation of a regulation, the court considered whether § 545 criminalizes violations of regulations or only of statutes.[22] Rejecting both the Ninth and Fourth Circuit approaches to interpreting "law" under § 545, the *Izurieta* court instead examined § 141.113(c) to determine whether the regulation appears civil or criminal in nature.[23] Concluding that § 141.113(c) prescribes civil remedies and merely governs the conditions under which Customs may release imported goods pending approval by the FDA, the court found the regulation civil and contractual in nature.[24]

Even with this determination, however, the Court ultimately concluded that § 545 is ambiguous as to whether it criminalizes violations of the Customs regulation and, as a result, applied the rule of lenity to the Izurietas.[25] The rule

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[16] *Izurieta*, 710 F.3d at 1178.

[17] *See* 21 U.S.C. § 374 (2006). Before food products are approved for entry into the United States, they are subject to inspection by the FDA under the Federal Food, Drug and Cosmetic Act ("FDCA"). *See id.* Importers taking possession of their goods pending FDA approval must store them pursuant to security measures prescribed by the Secretary of the Treasury. 19 U.S.C. § 1499(a)(1) (2006) ("Imported merchandise . . . shall not be delivered from customs custody except under such bond or other security as may be prescribed by the Secretary [of the Treasury] to assure compliance with all applicable laws . . . .").

[18] *See* 21 U.S.C. § 381(j) (2006 & Supp. V 2012).

[19] *See id.* § 381(a); 19 C.F.R. § 141.113(c), (e), (i).

[20] 19 C.F.R. § 141.113(c)(3) ("[F]ailure to comply . . . will result in the assessment of liquidated damages equal to three times the value of the merchandise involved . . . .").

[21] *Izurieta*, 710 F.3d at 1178–79.

[22] *See id.* at 1179.

[23] *See id.* at 1181–82.

[24] *Id.* at 1183–84.

[25] *See id.* at 1184. The Court disagreed with the Ninth Circuit's strict requirement that a statute must specify that violating a regulation is a crime for it to qualify as a "law." *See id.* at 1181; *cf. Alghazouli*, 517 F.3d at 1187. At the same time, Court expressed concern with the Fourth Circuit's broad definition of "law," which encompasses all regulations having the "force and effect of law," including those derived in a non-criminal context. *See Izurieta*, 710 F.3d at 1181–82; *cf. Mitchell*, 39 F.3d at 476.

of lenity indicates that when there is grievous ambiguity in a criminal statute, the issue should be resolved in favor of defendants.[26] Applying the rule of lenity ensures that potential wrongdoers receive fair warning of the legal consequences of their actions.[27] Moreover, the rule prevents courts from defining criminal conduct, a power properly reserved for the legislature.[28] Accordingly, the Eleventh Circuit vacated the convictions under § 545.[29]

II. Divergent Interpretations of "Law" Under § 545

In *Izurieta*, the Eleventh Circuit analyzed 18 U.S.C. § 545 in light of a circuit split defining "law" in different ways under the statute.[30] Both the Ninth and Fourth Circuits examined the text and history of § 545 to discern the meaning of the word "law," but came to drastically different conclusions.[31] Section A describes the Ninth Circuit's narrow interpretation of "law" under § 545.[32] Section B then describes the Fourth Circuit's broad interpretation of "law" under the statute.[33]

A. *The Ninth Circuit's Narrow Approach: Defining "Law" as Including a Regulation Only When a Statute Specifies That Violation of the Regulation Is a Crime*

In 2008, in *United States v. Alghazouli*, the Ninth Circuit narrowly concluded that § 545 criminalizes a violation of a regulation only when a statute specifies that the violation is a crime.[34] In coming to this conclusion, the court

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[26] *See* Huddleston v. United States, 415 U.S. 814, 831 (1974) (concluding that a statute making it unlawful to knowingly make a false statement in connection with the acquisition of a firearm is unambiguous as to whether it covers redemption of a firearm from a pawn shop); Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv. C.R.-C.L. L. Rev. 197, 198 (1994). The rule of lenity stands for the principle that individuals should have fair warning of what constitutes criminal conduct and prevents courts from extending the reach of a statute beyond what the legislature clearly stated. Newland, *supra*, at 197. Courts applying the rule must balance the competing interests of the judiciary, legislature and individuals. *Id.* at 203.

[27] *See Huddleston*, 415 U.S. at 831.

[28] United States v. Bass, 404 U.S. 336, 348 (1971) (applying the rule of lenity by adopting the narrower reading of a statute and requiring the government to show a nexus between a defendant's firearms possession and interstate commerce, which it failed to do); *see also* Newland, *supra* note 26, at 197 (observing that the rule of lenity constrains the power of the courts).

[29] *See Izurieta*, 710 F.3d at 1184.

[30] 710 F.3d 1176, 1179 (11th Cir. 2013); *see also* 18 U.S.C. § 545 (2006) (imposing criminal penalties on anyone who knowingly imports goods into the United States "contrary to law").

[31] *Compare* United States v. Alghazouli, 517 F.3d 1179, 1187 (9th Cir. 2008) (concluding that "law" includes regulations only when a statute specifically states that a violation of the regulation constitutes a crime), *with* United States v. Mitchell, 39 F.3d 465, 470 (4th Cir. 1994) (concluding that "law" encompasses regulations having the "force and effect of law").

[32] *See infra* notes 34–51 and accompanying text.

[33] *See infra* notes 52–62 and accompanying text.

[34] *See Alghazouli*, 517 F.3d at 1187.

examined the plain language and legislative history of § 545.[35] First, the court concluded that the plain meaning of "law" does not always or even usually include regulations.[36] Thus, statutes that do not specifically refer to laws *and* regulations only refer to statutes.[37]

Second, the Ninth Circuit held that the legislative history of § 545 reveals Congress's intent for "law" to include regulations only when a statute specifies that violating the regulation is a crime.[38] In both 1922 and 1930, Congress reenacted Section 4 of the Tariff Act of 1866, the predecessor to § 545, without any change.[39] Notably, these reenactments occurred after the U.S. Supreme Court had determined that violating a regulation becomes criminal only when a statute specifies that doing so is a crime.[40] For example, in 1892, in *United States v. Eaton*, the Court reversed a criminal conviction for violation of a bookkeeping regulation under a statute that imposed criminal penalties for omitting to do anything "required by law."[41] The Court held that the conviction could not stand because no statute specified that violation of the regulation was a crime.[42] Conversely, in 1911 in *United States v. Grimaud*, the Court allowed a conviction under the predecessor to § 545 for violating a regulation because a statute specified that violations of such regulations "shall be punished."[43] Tak-

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[35] *See id.* at 1183–87.

[36] *See id.* at 1183–84. The Ninth Circuit cited the 2004 edition of *Black's Law Dictionary*, which defines "law" as "a statute," but also more broadly as "[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply[.]" *Id.* (quoting BLACK'S LAW DICTIONARY 900 (8th ed. 2004)). The most recent edition defines the term identically. BLACK'S LAW DICTIONARY 952 (9th ed. 2009).

[37] *See Alghazouli*, 517 F.3d at 1183–84.

[38] *See id.*

[39] *See* Tariff Act of 1922, ch. 356, § 593, 42 Stat. 858, 982; Tariff Act of 1930, ch. 497, § 593, 46 Stat. 590, 751. The Tariff Act of 1866 prohibited the fraudulent or knowing importation of merchandise "contrary to law." An Act Further to Prevent Smuggling and for Other Purposes (Tariff Act), 14 Stat. 178, 179 (1866).

[40] *See* United States v. Grimaud, 220 U.S. 506, 518–19, 522–23 (1911); United States v. Eaton, 144 U.S. 677, 688 (1892). After *Eaton* and *Grimaud*, Congress reenacted the Tariff Act in 1922 and 1930 without changing the "contrary to law" language. *See* Tariff Act of 1922, ch. 356, § 593; Tariff Act of 1930, ch. 497, § 593.

[41] *See* 144 U.S. at 686–88. The defendant was convicted under the Oleomargarine Act of 1886, which provided criminal penalties if the omission was knowing or willful. *See* Oleomargarine Act of 1886, ch. 840, § 18, 24 Stat. 209, 212.

[42] *See Eaton*, 144 U.S. at 688 (indicating that the Oleomargarine Act criminalized the failure to perform actions "required by law"). In contrast to *Eaton*, the federal smuggling act in *Izurieta* criminalizes actions "contrary to law." *See* 18 U.S.C. § 545 (2006); 710 F.3d at 1178. Courts apply the same reasoning to these opposing frameworks, however, because criminal convictions result whether the defendant violated the law or failed to act in accordance with the law. *See Alghazouli*, 517 F.3d at 1184–86 (discussing the Supreme Court's interpretation of "law" in *Eaton*).

[43] *See* 220 U.S. at 518–19, 522–23; *see also* Estes v. United States, 227 F. 818, 821–22 (8th Cir. 1915) (comparing *Eaton* and *Grimaud* and affirming a conviction under Section 4 of the Tariff Act of 1866 because a statute criminalized violations of the regulation). The Secretary of Agriculture promulgated the regulation under the Forest Reserve Act. *Grimaud*, 220 U.S. at 509. The Forest Reserve

en together, *Eaton* and *Grimaud* indicate that the Court interpreted "law" to mean regulations only when an accompanying statute specifies that violating the regulation is a crime.[44] Thus, the *Alghazouli* court concluded that Congress endorsed the Court's interpretation of "law" when it reenacted the statute without change.[45]

Moreover, the Ninth Circuit observed that Congress's 2006 amendment of § 545 as well as the simultaneous enactment of a parallel provision criminalizing the illegal exportation of goods indicated legislative intent to interpret § 545 narrowly.[46] In 2006, Congress enacted the Patriot Improvement and Reauthorization Act, which amended § 545 by increasing the maximum sentence, but otherwise left the statute unchanged.[47] At the same time, Congress added an entirely new provision to the Act, now codified at 18 U.S.C. § 554, which mirrors the language of § 545 but criminalizes the exportation of goods—rather than importation—"contrary to any law or regulation."[48] Congress introduced § 554 and amended § 545 simultaneously, but did not add the word "regulation" to § 545.[49] Because courts cannot interpret statutes in a way that renders other language superfluous, the *Alghazouli* court explained that "law" in § 554 cannot include regulations without rendering the "or regulations" language superfluous.[50] Thus, the Ninth Circuit reasoned that the word "law" under § 545 cannot necessarily include regulations.[51]

Act indicated that violations of this regulation should be criminalized. Forest Reserve Act, ch. 2, § 1, 30 Stat. 34, 35 (1897) ("The Secretary of Agriculture shall make provisions for the protection [of public national forests] . . . and any violation of [the rules and regulations promulgated] shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both.").

[44] *See Eaton*, 144 U.S. at 688 ("It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offen[s]e."); *Grimaud*, 220 U.S. at 519 ("The very thing which was omitted in [*Eaton*] has been distinctly done . . . .").

[45] *See Alghazouli*, 517 F.3d at 1186. As a canon of statutory construction, Congress is presumed to be aware of judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *See* Lorillard v. Pons, 434 U.S. 575, 580 (1978).

[46] *See Alghazouli*, 517 F.3d at 1186–87.

[47] *See* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, § 310, 120 Stat. 192, 242 (2006).

[48] 18 U.S.C. § 554 (2006) (emphasis added).

[49] *See id.* § 545 (2006); *id.* § 554; *Alghazouli*, 517 F.3d at 1187.

[50] *See Alghazouli*, 517 F.3d at 1187 (referencing a rule of statutory construction which provides that courts must give effect to every word in a statute and avoid constructions that render other words superfluous).

[51] *See id.*; *see also* Ariz. Elec. Power Coop. v. United States, 816 F.2d 1366, 1375 (9th Cir. 1987) ("When Congress includes a specific term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded."). Courts presume that every word in a statute has a purpose and that Congress purposely excluded the words not used. 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2008). The same words used twice are presumed to have the same meaning and different words are not construed to have the same meaning. *Id.* The Ninth Circuit in *Alghazouli* noted that the close relationship between § 545 and § 554 suggests that "law" has the same meaning in each provision. *See* 517 F.3d at 1187.

B. *The Fourth Circuit's Broad Approach: Defining "Law" as Including Regulations That Have the "Force and Effect of Law"*

Unlike the Ninth Circuit's narrow analysis of "law," in 1994, in *United States v. Mitchell*, the Fourth Circuit broadly concluded that § 545 criminalizes a violation of a regulation so long as it has the "force and effect of law."[52] The court examined the plain meaning of "law" and concluded that it is commonly defined to include administrative regulations.[53] Indeed, in 1979 in *Chrysler Corp. v. Brown*, the Supreme Court declared that the word "law" in the "authorized by law" provision of 18 U.S.C. § 1905 includes regulations.[54] Because properly promulgated, substantive regulations have the "force and effect of law," the Court held that it would take a clear showing of contrary legislative intent for a definition of "law" to not include such regulations.[55] Given this *Chrysler* precedent, the Fourth Circuit in *Mitchell* held that "law" under § 545 includes regulations, as there is no showing of contrary legislative intent.[56]

The Fourth Circuit's reasoning in *Mitchell* is in direct conflict with the Ninth Circuit's analysis of legislative history and use of the rule of lenity in *Izurieta*.[57] The Fourth Circuit reasoned that, because Congress re-enacted the

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[52] *See* 39 F.3d at 470. To discern *which* regulations have the "force and effect of law," the Fourth Circuit adopted the three-prong test found in the 1979 U.S. Supreme Court case *Chrysler Corp. v. Brown*. *See* 441 U.S. 281, 301–02 (1979) (establishing the test); *Mitchell*, 39 F.3d at 470–71 (applying the test). First, the regulation must be substantive, rather than interpretive, general or organizational, and it must affect individual rights. *Chrysler*, 441 U.S. at 301–02. Second, the regulation must have been promulgated pursuant to a congressional grant of quasi-legislative authority. *Id.* at 302. Third, its promulgation must have conformed with congressionally imposed procedural requirements. *Id.* at 303. The Fourth Circuit in *Mitchell* found that regulations promulgated by Customs, the Fish and Wildlife Service, and the Department of Agriculture satisfy the test and therefore have the "force and effect of law." *See* 39 F.3d at 471.

[53] *Mitchell*, 39 F.3d at 468. The Fourth Circuit cited the 1979 edition of *Black's Law Dictionary*, which defines law as "a body of rules of action or conduct prescribed by controlling authority, and having binding legal force." BLACK'S LAW DICTIONARY 795 (5th ed. 1979).

[54] *See Chrysler*, 441 U.S. at 295–96, 298; *Mitchell*, 39 F.3d at 468. Similarly, in 1920 in *Maryland Casualty Co. v. United States*, the Supreme Court indicated that properly promulgated, substantive regulations have the "force and effect of law." 251 U.S. 342, 349 (1920). Under 18 U.S.C. § 1905, federal officers who disclose confidential information "not authorized by law" will be discharged from employment and may be fined or imprisoned for not more than one year. 18 U.S.C. § 1905 (2006).

[55] *Chrysler*, 441 U.S. at 295–96.

[56] *Mitchell*, 39 F.3d at 468–69. The court explained that the legislative history of 18 U.S.C. § 545 (2006) gives no indication that Congress intended to exclude regulations from the definition of "law." *See id.* at 469. In doing so, the court rejected the defendant's argument that regulations were uncommon when Congress enacted the prior version of § 545 in 1866 and thus Congress could not have intended "law" to include regulations. *See id.*

[57] *Compare Mitchell*, 39 F.3d at 470 (holding that § 545 criminalizes regulations having the "force and effect of law" because the Supreme Court had interpreted "law" in another context to include such regulations), *with Alghazouli*, 517 F.3d at 1187 (holding that § 545 only criminalizes violations of regulations when a statute specifies that violating the regulation is a crime because Congress reenacted the predecessor to § 545 after the Supreme Court adopted this definition and Congress sim-

predecessor to § 545 with knowledge that the Supreme Court had interpreted the "contrary to law" provision in other contexts to include regulations, Congress could not have intended to exclude regulations from the definition of "law" under § 545.[58] In contrast, the Ninth Circuit held that "law" cannot include regulations because Congress reenacted § 545 after the Supreme Court declared that § 545 only criminalizes regulations when a statute specifies that violating the regulation is a crime *and* simultaneously enacted a similar provision using the word "regulation."[59] Despite *Eaton* and *Grimaud*, the *Mitchell* court relied on *Chrysler* precedent to conclude that "law" includes regulations having the "force and effect of law."[60] Moreover, relying on *Chrysler* in this way allowed the Fourth Circuit to reject the defendant's contention that § 545 is ambiguous.[61] Thus, the court concluded that it was unnecessary to apply the rule of lenity, as Congress reenacted the predecessor to § 545 with knowledge that it had been interpreted to include regulations having the "force and effect of law."[62]

III. The Uncertainty of the Eleventh Circuit's Rationale for Applying the Rule of Lenity

To avoid creating unnecessary uncertainty, courts should consistently apply the rule of lenity, regardless of the nature of the regulation, due to 18 U.S.C. § 545's ambiguous text and history.[63] As evidenced by the drastically different approaches articulated by the U.S. Courts of Appeals for the Eleventh, Ninth, and Fourth Circuits, § 545 is ambiguous as to whether it criminal-

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ultaneously enacted a similar provision but added "regulation"), *and Izurieta*, 710 F.3d at 1183–84 (finding § 545 ambiguous as to whether it criminalizes a violation of a Customs regulation and applying the rule of lenity).

[58] *See Mitchell*, 39 F.3d at 470.

[59] *See Alghazouli*, 517 F.3d at 1187.

[60] *See Mitchell*, 39 F.3d at 469. Interestingly, the Fourth Circuit found the Supreme Court's interpretations of "law" in other contexts persuasive, while the Ninth Circuit found the legislative history of § 545 more persuasive. *Compare Mitchell*, 39 F.3d at 469 (noting the Supreme Court's interpretation of "law" under 18 U.S.C. § 1905 (2006) and applying that definition to § 545), *with Alghazouli*, 517 F.3d at 1187 (noting Congress's 1922 and 1930 reenactments of § 545—without change—in light of the Supreme Court's interpretation of "law" under § 545 and Congress's 2006 reenactment of § 545—without change—alongside a parallel provision adding the word "regulations").

[61] *See Mitchell*, 39 F.3d at 470.

[62] *See id.* at 469.

[63] *See* Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1, 40–41 (1997) (arguing that where a statute and regulation combine to create criminal liability, strict construction is necessary to provide fair notice to regulated parties); Newland, *supra* note 26, at 198 (discussing two approaches to applying the rule of lenity: (1) examining the text of the statute only and (2) examining the legislative history if text is ambiguous; and noting that Justice Scalia has even argued that resorting to legislative history creates impermissible uncertainty).

izes violations of regulations *in general*.[64] A case-by-case approach that analyzes whether a regulation appears civil or criminal in nature, as the Eleventh Circuit does in *Izurieta*, creates uncertainty by failing to set a clear standard regarding which regulations § 545 criminalizes.[65] Applying the rule of lenity consistently based on the ambiguousness of § 545 will give fair notice to defendants and avoid a case-by-case judicial determination as to whether a regulation "seems" civil or criminal in nature.[66]

Analyzing the scope of § 545 by assessing the nature of a particular regulation creates uncertainty by confusing two central questions: (1) whether a regulation has the "force and effect of law," and (2) whether "law" under § 545 is ambiguous.[67] When addressing questions of ambiguity, courts should look only to the text and history of a criminal statute,[68] and in some cases end the inquiry at the text of the statute.[69] Contrary to the *Izurieta* court's analysis, determining whether a regulation is civil or that it has the "force and effect of law" is irrelevant in discerning the meaning of "law" under § 545 and whether the statute is ambiguous.[70] Moreover, when looking to the text and history of § 545, the Ninth and Fourth Circuits' drastically different conclusions demonstrate that the word "law" as used in § 545 is patently ambiguous.[71] The federal

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[64] *See* United States v. Alghazouli, 517 F.3d 1179, 1187 (9th Cir. 2008) (holding that 18 U.S.C. § 545 (2006) only criminalizes violations of regulations when a statute specifies that violating the regulation is a crime because definitions of "law" typically do not include regulations, Congress reenacted the predecessor to § 545 after the U.S. Supreme Court espoused this definition, and Congress simultaneously enacted a similar provision but added "regulation"); United States v. Mitchell, 39 F.3d 465, 470 (4th Cir. 1994) (holding that § 545 criminalizes all regulations having the "force and effect of law" because the definition of "law" commonly includes regulations and the Supreme Court has established that properly promulgated regulations have the "force and effect of law"); Newland, *supra* note 26, at 198 (describing how courts apply the rule of lenity).

[65] *See* Greenberg, *supra* note 63, at 40–41; Newland, *supra* note 26, at 198; *cf.* United States v. Izurieta, 710 F.3d 1176, 1184 (11th Cir. 2013) (analyzing whether § 545 appears civil or criminal in nature).

[66] *See* Newland, *supra* note 26, at 198 (discussing two approaches to applying the rule of lenity); *cf. Izurieta*, 710 F.3d at 1184 (concluding that § 545 is ambiguous and applying a case-by-case analysis).

[67] *See Mitchell*, 39 F.3d at 477 (Murnaghan, C.J., dissenting). Judge Murnaghan noted that there are two distinct questions to be addressed: whether the regulations have the force of law and the meaning of "law" under § 545. *Id.* He argued that the majority spent considerable time establishing that the regulations have the force of law, which is irrelevant to the meaning of "law" under § 545. *Id.*

[68] *See* Newland, *supra* note 26, at 198 (outlining the traditional rule of lenity analysis).

[69] *See* United States v. Hughey, 495 U.S. 411, 422 (1990) (holding that if the text of a statute is ambiguous, legislative history will not resolve ambiguity against a criminal defendant).

[70] *See Mitchell*, 39 F.3d at 477 (Murnaghan, C.J., dissenting); Newland, *supra* note 26, at 198 (discussing the two traditional approaches to applying the rule of lenity: analyzing the statute's text and analyzing the statute's text and its legislative history); *cf. Izurieta*, 710 F.3d at 1184 (applying the rule of lenity after concluding that the regulation is civil and contractual in nature).

[71] *See* United States v. Bass, 404 U.S. 336, 347 (1971) (finding a federal statute ambiguous after examining its text and legislative history); Newland, *supra* note 26, at 198 (explaining that analyzing the text and legislative history of a statute is one of the traditional approaches to applying the rule of lenity). The courts drew these conflicting conclusions after examining the text and history of 18

appeals courts could not even agree about whether the dictionary definition of "law" included regulations.[72] Thus, this disagreement regarding the scope of § 545 demonstrates the statute's ambiguity in and of itself without need to examine any particular regulation.[73]

Applying the rule of lenity consistently will not only remove the uncertainty in examining this ambiguous statute, but will also better ensure that importers are on notice of the activities criminalized by § 545.[74] Punishment is illegitimate unless individuals are given reasonable notice that their activities are criminally culpable.[75] Because criminal penalties represent the ultimate governmental intrusion on individual freedom, courts consistently require enhanced clarity in criminal statutes.[76] If courts consistently apply the rule of lenity in light of § 545's ambiguity, rather than examine the nature of each regulation, importers will not need to guess whether they could face criminal penalties for failing to comply with the numerous, complex regulations governing the importation of goods.[77] Moreover, applying the rule of lenity consistently will address the *Izurieta* court's concern with notice and punishing "innocent" conduct.[78] Accordingly, courts should rationalize the application of the rule of

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U.S.C. § 545 (2006). *Compare Alghazouli*, 517 F.3d at 1187 (concluding that "law" includes regulations only when a statute specifically states that a violation of the regulation constitutes a crime), *with Mitchell*, 39 F.3d at 470 (concluding that "law" encompasses regulations having the "force and effect of law").

[72] *Compare Alghazouli*, 517 F.3d at 1183–84 (finding that the definition of "law" does not always, or perhaps even usually, include regulations), *with Mitchell*, 39 F.3d at 468 (finding that "law" is commonly defined to include regulations).

[73] *See* Newland, *supra* note 26, at 198 (discussing two approaches to applying the rule of lenity: examining the text and legislative history or examining the text only).

[74] *See* Greenberg, *supra* note 63, at 17–18 (arguing that the rule of lenity shows little tolerance for statutory ambiguity).

[75] *Id.*

[76] *Id.* at 16; *see also* Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1348 (2008) (acknowledging the historical trend of criminal law from common law to statutes, which is refined by applying the rule of lenity).

[77] *See* Walter Sinnott-Armstrong, *Word Meaning in Legal Interpretation*, 42 SAN DIEGO L. REV. 465, 488–89 (2005) (noting that citizens often interpret law on the basis of what its words normally mean, rather than speculating on legislative intent or asking a lawyer). Citizens often have difficulty interpreting the law because asking lawyers is expensive and researching legislative intent can require lots of time and training. *Id.* Moreover, the evidence is often unavailable, skimpy, or conflicting. *Id.* Citizens can guess what legislators intended, but that can be risky. *Id.*

[78] *See* Sinnott-Armstrong, *supra* note 77, at 488–89; Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421 (2006) (arguing that courts often construe statutes narrowly when they would otherwise punish innocent conduct). Indeed, asking whether the regulation, rather than the statute, *seems* criminal, as the Eleventh Circuit did in *Izurieta*, will create more notice problems than a consistent application of the rule of lenity. *Cf. Izurieta*, 710 F.3d at 1184.

lenity by simply stating that "law" is ambiguous due to the text and history of § 545.[79]

Conclusion

The Eleventh Circuit in *United States v. Izurieta* relied on the civil, contractual nature of 19 C.F.R. § 141.113(c), a Customs regulation, in holding that 18 U.S.C. § 545 is ambiguous as to whether it criminalizes violations of the regulation. In doing so, it failed to clarify the meaning of "law" under § 545 and created uncertainty as to which regulations § 545 criminalizes in the future. To avoid unnecessary uncertainty, courts should instead apply the rule of lenity consistently in § 545 cases involving regulations. As evidenced by the Ninth and Fourth Circuit's drastically different approaches, the text and history of § 545 is ambiguous as to whether § 545 criminalizes regulations in general, which calls for lenity notwithstanding the nature of the regulation.

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[79] *See Mitchell*, 39 F.3d at 477 (Murnaghan, C.J., dissenting); Greenberg, *supra* note 63, at 40–41; Newland, *supra* note 26, at 198.