No. 20-315

IN THE

Supreme Court of the United States

JOSE SANTOS SANCHEZ AND SONIA GONZALEZ,

Petitioners,

v.

ALEJANDRO N. MAYORKAS, SECRETARY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Respondents.

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

BRIEF OF PROFESSORS ALAN MORRISON AND BRIAN WOLFMAN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are law professors who have taught, written about, and litigated issues of administrative law. **Alan B. Morrison** is the Lerner Family Associate Dean for Public Interest & Public Service at The George Washington University Law School. **Brian Wolfman** is Professor from Practice and Director of the Appellate Courts Immersion Clinic at Georgetown University Law Center. Amici have an interest in ensuring that this Court reserves *Chevron* deference only for agency determinations reached after appropriately formal, thorough, and transparent administrative processes.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should resolve this case based on the unambiguous statutory text, which renders petitioners eligible to adjust to lawful-permanent-resident status. But even were the statutes ambiguous, the Court should not defer to two agency adjudications—decided while this issue was being litigated in this case and others—concluding that a recipient of Temporary Protected Status (TPS) has not been inspected and admitted for purposes of adjustment of status. Neither agency decision-maker exercised any congressionally delegated authority to make rules carry-

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

ing the force of law, and so neither warrants *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

I. In the first case, the Administrative Appeals Office (AAO), a program office within the United States Citizenship and Immigration Services (USCIS), reached a decision in an agency adjudication lacking formality, procedural safeguards, transparency, and opportunity for public participation. That decision was subsequently rubber-stamped as precedential, without any analysis, by the Attorney General. *See Matter of H-G-G-*, 27 I. & N. Dec. 617 (AAO 2019).

Mead instructs that it is appropriate to apply deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to agency interpretations that are the product of "relatively formal administrative procedure[s] tending to foster … fairness and deliberation." *Mead*, 533 U.S. at 230. AAO's informal adjudications, including in *H-G-G-*, fail what has been termed "*Chevron* step zero," because they lack any of the features that bespeak congressional intent to have the agency resolve any statutory ambiguities.

AAO has received considerable criticism over the years—including by the Citizenship and Immigration Services (CIS) Ombudsman—for its lack of transparency, formality, independence, and procedural safeguards. AAO's informal agency process begins with the adjudication of an application by a USCIS officer, without any right to a hearing, and ends with an AAO "appeal" featuring limited procedural safeguards, optional briefing, exceedingly unlikely oral argument,

and no opportunity for public participation. Opinions issued by AAO warrant no *Chevron* deference.

The Attorney General's designation of an AAO opinion as precedential only compounds the lack of formality and transparency. The opaque process for designating an AAO opinion as precedential affords no opportunity for participation by either the applicant or interested stakeholders, and provides no assurance that the Attorney General has "focuse[d] fully and directly upon the issue" in question. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165, 173 (2007). Indeed, the opinion rubber-stamped by the Attorney General in *H-G-G-* is substantively identical to AAO's earlier opinion.

Congress would not have wanted this important question of statutory interpretation to be determined by an idiosyncratic and obscure agency proceeding whereby one agency reaches an informal decision that is subsequently transformed into binding precedent by the rubber-stamping of an entirely different agency. *H-G-G-* is "beyond the *Chevron* pale." *Mead*, 533 U.S. at 234.

II. In the second case, the Board of Immigration Appeals (BIA) purported to adopt the reasoning of *H-G-G-* in a precedential BIA opinion that did not present the same question as *H-G-G-*. *See Matter of Padilla Rodriguez*, 28 I. & N. Dec. 164 (BIA 2020). The BIA's dicta in *Padilla Rodriguez* does not warrant *Chevron* deference because it was not an exercise of the BIA's delegated authority to render decisions in the cases before it, much less the authority to make binding law.

ARGUMENT

I. AAO's Decision In *H-G-G-* Warrants No *Chevron* Deference.

The Court's inquiry into the deference due to the agency's interpretation in *H-G-G-* begins and ends with *Chevron* step zero: the Court's initial inquiry into whether *Chevron*'s framework applies at all. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187 (2006).

Chevron applies only where (1) "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law;" and (2) "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27. *Mead* instructs that *Chevron* deference applies to agency interpretations that are the product of "relatively formal administrative procedure[s]" tending to promote "fairness and deliberation." 533 U.S. at 230. *Chevron* deference typically applies to notice-and-comment rulemaking or formal adjudications. *Id.* When an agency goes through a formal and prescribed administrative process, it gives some assurance that the agency has "focused fully []on the matter in question." *Long Island Care*, 551 U.S. at 165.

"[T]he ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority."

Id. at 173; *see also Mead*, 533 U.S. at 230 n.11 ("*Chevron* should apply only where Congress would want *Chevron* to apply." (quoting Merrill & Hickman, *supra,* at 872)).

The formality of administrative procedures matters because relatively formal procedures promote "'fairness and deliberation'[] by, for example, giving people an opportunity to be heard and offering reasoned responses to what people have to say," whereas "informal processes … are unlikely to promote values of participation and deliberation." Sunstein, *supra*, at 225. Thus, "deference is generally permissible only when the agency reaches its interpretation in a more or less formal proceeding, in which input from outside the agency is sought—a rarity in informal adjudications." Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 Admin. L. Rev. 79, 118 (2007). Requiring formal procedures also ensures that "procedural protections" are followed—both the "APA and due process [of] law demand compliance with these procedures before agencies can take action that binds the public with the force of law." Merrill & Hickman, *supra*, at 887. *See also* Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 Duke L.J. 931, 964 (2021) (arguing that *Chevron* categorically should not apply to "interpretations announced in adjudications that lack congressionally imposed formal adjudication procedures").

When, as here, the agency decides a critical legal question in an informal process shielded from public view and public participation, and without sufficient procedural protections or careful consideration of the

issue by those with the relevant expertise, *Chevron* deference is inappropriate.[2]

A. AAO adjudications lack sufficient formality and transparency.

Every stage of the process for issuing an AAO decision lacks the type of reasoned, formal, transparent decision-making warranting *Chevron* deference.

1. USCIS's initial review does not develop a full evidentiary record.

When an individual applies for immigration benefits, his or her application first goes through the agency review process at USCIS. Critically, there is no right to a hearing at this stage. *See* 8 C.F.R. § 103.2(b)(7); 8 C.F.R. § 245.6. Instead, eligibility is often decided on the papers, by a USCIS immigration services officer who is not necessarily a lawyer. *See* Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. Nat'l Ass'n Admin. L. Judiciary 45, 66 (2011).

This means that USCIS benefit determinations "do not necessarily include a full development of the issues and evidence." Letter from Am. Immigr. Council et al. to USCIS 10 (Feb. 4, 2020), https://tinyurl.com/yb8edyru. The record is often underdeveloped because USCIS officers reach a deci-

[2] Instead, at most, *Skidmore* deference applies. The weight afforded to the agency's decision should depend only on "those factors which give [the agency's interpretation] power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

sion "after adjudication of a paper application and supporting documents, such that the applicant and [any] advocate may not know how the adjudicator is construing the evidence until a final decision is made." *Id.* at 10-11. The officer, for example, may misinterpret critical evidence, without the applicant having the opportunity to correct this misinterpretation. "[G]iven the nature of the USCIS application adjudication process, a full record cannot be developed in a way that compares to the development of the evidentiary record in the adversarial hearing context present in immigration court." *Id.* at 11.

While USCIS has made recent efforts to "phase-in interviews" of certain benefit applicants, *see* USCIS, *USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants* (Aug. 28, 2017), https://tinyurl.com/u4f9g5ab, officers can still decline to interview an applicant for adjustment of status if the officer believes an interview is "unnecessary." USCIS, 7 USCIS Policy Manual, *Chapter 5—Interview Guidelines* https://tinyurl.com/3y3gxl68 (current as of Mar. 1, 2021).

And even when USCIS conducts an in-person interview, "the setting is informal." Beth K. Zilberman, *The Non-Adversarial Fiction of Immigration Adjudication*, 2020 Wis. L. Rev. 707, 739. Interviews are generally conducted in the adjudicator's office, and while an applicant has a right to have an attorney present, the majority of attorneys report that they are "restricted in their representation before USCIS," with limitations imposed on their ability to "properly explain or clarify questions and legal issues." *Id.* at

739-40, 756-57. The applicant also lacks access to the full record—adjudicators can consider material outside of the record, including material that is classified or confidential and is not disclosed to the applicant and counsel. *Id.* at 742-43, 758-59.

2. AAO's review of USCIS benefit determinations lacks formality and transparency.

AAO is a program office within USCIS. USCIS Organizational Chart (Dec. 1, 2020), https://tinyurl.com/oj7ollr7. The Secretary of the Department of Homeland Security (DHS) has delegated authority to AAO to hear administrative appeals of certain benefits determinations, such as employment-based visa petitions, and applications relating to citizenship. *See* AAO Practice Manual § 1.4, https://tinyurl.com/4hew4m8w (last updated Apr. 18, 2018); *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 728 F. Supp. 2d 1077, 1083-84 (N.D. Cal. 2010); DHS Delegation Number 0150.1(U) (effective March 1, 2003).[3]

Some benefit determinations—including those involving adjustment of status—may not be appealed. 8 C.F.R. § 245.2(a)(5)(ii). In that circumstance, USCIS can choose to certify a non-appealable determination to AAO. 8 C.F.R. § 103.4(a)(4)-(5). While the regulations do not explain when certification is appropriate,

[3] When an appeal is filed, the benefits officer treats the appeal as a motion to reopen and must decide the motion within 45 days. If the officer declines reopening, the appeal and record are forwarded to AAO. 8 C.F.R. § 103.3(a)(2)(iii)-(iv).

AAO's practice manual indicates that the "initial decision should articulate an unusually complex or novel issue of law or fact to be reviewed by the AAO." AAO Practice Manual, *supra*, § 5.3. This means that the certification process can work as a one-way ratchet, where a USCIS official may selectively certify only those decisions that he thinks AAO is likely to affirm. Since decisions on adjustment of status are not otherwise appealable, *H-G-G-* was the result of USCIS certification. 27 I. & N. Dec. 617 (AAO 2019).

AAO's internal structure and the qualifications and experience of its staff remain exceedingly opaque. As of 2010, AAO had 88 employees, 59 of whom were adjudication officers and 66 of whom were attorneys. USCIS, *Listening Session with the Administrative Appeals Office* (Feb. 4, 2011), https://tinyurl.com/4qvwonle. The number of individuals currently working for AAO, their experience, and their status as officers versus employees is not public.

AAO has been the subject of substantial criticism over the years, including by the CIS Ombudsman. It "may be the most mysterious appellate body in the American legal system," one whose "internal workings … are a mystery, even to seasoned immigration law practitioners." Family, *Murky Immigration Law*, *supra*, at 75, 95.

The CIS Ombudsman has been raising red flags about AAO's lack of transparency since at least 2005, decrying the agency's failure to publish its standard of review (which was eventually set forth in its first practice manual), and the agency's refusal to provide any details about its process for issuing precedential

opinions. *See* Letter from Prakash Khatri, CIS Ombudsman, to Robert Divine, Acting Deputy Dir., USCIS 3-4 (Dec. 6, 2005), https://tinyurl.com/3tm7j99a, *see also infra* Part I.B.1.

Since 2005, "stakeholders [have] continue[d] to express concern and confusion regarding the AAO's authority, independence, and procedures." CIS Ombudsman, Annual Report 2013 at 43 (June 27, 2013), https://tinyurl.com/m2tewk24. In particular, many have "question[ed] whether the AAO is an independent appellate body." *Id.* at 45. "Stakeholders have expressed concern regarding the AAO's autonomy, explaining that it is often thought of as an extension of USCIS service centers and field offices, and not an independent review panel." CIS Ombudsman, Annual Report 2014 at 56 (June 27, 2014), https://tinyurl.com/ccdf9nt8. These concerns are exacerbated by the "absence of any up-to-date statutory or regulatory standard for AAO operations," which "creates an impression among the public that the AAO merely 'rubber-stamps' USCIS decisions." *Id.*

The quality of AAO's decisions, which are drafted by individual adjudicators, *see* Khatri, *supra*, at 2, has also been critiqued. In 2017, CIS's Ombudsman reported that while efforts had been made to "improve the writing quality of AAO decisions," many prior AAO decisions dismissing appeals "did not include a detailed analysis of the facts and law, preventing appellants from understanding why a decision was made." CIS Ombudsman, Annual Report 2017 at 28 (June 29, 2017), https://tinyurl.com/3v4zbuzh.

More specifically, AAO proceedings lack formality and transparency in multiple ways:

First, no regulations govern AAO's processes and procedures. While the agency began making efforts in 2005 to publish its standards of review and other details about its processes via rule—in response to "stakeholders['] continue[d] [requests for] clarifying information as to AAO policies and procedures," CIS Ombudsman, Annual Report 2013, *supra*, at 45-46, it has never actually done so. Instead, the agency's practice manual, first published in 2015, is the only publicly available source detailing how AAO operates. The manual provides scant detail about AAO's internal workings and decision-making processes, and also provides insufficient procedural protections because it can be changed at any time.

Second, while an applicant *may* submit a brief on appeal, a brief is not mandatory, and the applicant can instead pursue an appeal by identifying errors on an appeal form. AAO Practice Manual, *supra*, §§ 3.7(f), 3.8. Similarly, after certification of a decision to AAO, the submission of a brief by the applicant is voluntary. *Id.* at § 5.3. Thus, in many instances, AAO may be adjudicating applications based solely on the paper record filed with USCIS, without any legal briefing. That is likely given that there is no right to appointed counsel in immigration proceedings, and many applicants proceed without any legal representation. For example, in fiscal year 2011, less than half of applicants to adjust status were represented by an attorney or nonprofit representative. Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 Admin. L. Rev. 565, 568 n.4 (2012).

Third, while oral argument before AAO *may* occur, "the Service has [the] sole authority to grant or deny a request for oral argument." 8 C.F.R. § 103.3(b)(2). The regulations do not provide any guidance for when oral argument is appropriate, and the practice manual indicates that "[t]he AAO generally adjudicates decisions based on the record of proceedings without oral argument." AAO Practice Manual, *supra*, § 6.5. The manual goes on to state that "AAO may grant a written request for oral argument where a case involves an issue of particular significance and the AAO determines that it would benefit from supplemental argument." *Id.* Amici, however, are aware of only a single oral argument ever held by AAO.[4]

Fourth, there is limited opportunity for public participation. While AAO decisions are eventually posted online, AAO's docket is not publicly available. And the public has no right to participate in AAO proceedings. The regulations say nothing about amicus participation. While AAO's website indicates that it "may occasionally request the submission of *amicus curiae* briefs to help us review complex or unusual issues of law or policy," AAO has complete discretion in whether to invite such briefing. USCIS, Administrative Appeals Office, Amicus Curiae (Aug. 18, 2016), https://tinyurl.com/4edv7phe; *see also* AAO Practice Manual, *supra*, § 3.8(e). AAO states that it will post any solicitations for amicus briefing on its webpage,

[4] None of AAO's precedential or adopted decisions mention oral argument. A review of all 373 non-precedential AAO opinions mentioning "oral argument" since 2010 indicates that oral argument occurred just once: Unpublished AAO Opinion at 3 (May 3, 2011), https://tinyurl.com/4pj6ffnb.

but the page lists just two solicitations for amicus briefs, one in 2015 and one in 2011. USCIS, Administrative Appeals Office, Amicus Curiae, *supra*. AAO did not solicit any amicus briefs in *H-G-G-*. *Id.*

AAO indicates that an organization may file an unsolicited amicus brief by coordinating with the applicant (who must actually submit the amicus brief), *id.*; AAO Practice Manual, *supra*, § 3.8(e), but it is unclear how an interested organization would become aware of an AAO proceeding. As noted, there is no public docket of AAO's proceedings, nor is the public notified when a decision has been certified to AAO. And even if an interested amicus were to become aware of the proceedings, the group cannot participate unless the applicant agrees to submit the organization's brief.[5]

3. *Chevron* deference does not apply to AAO's non-precedential decisions.

AAO issues three types of opinions: non-precedential, adopted, and precedential. AAO Practice Manual, *supra*, § 3.15.

As described below, AAO on rare occasions issues precedential decisions, "upon approval of the Attorney General as to the lawfulness of such decision." 8 C.F.R. § 103.3(c). AAO also infrequently issues "adopted" decisions, which "provide policy guidance to USCIS employees," but which "do not establish policy

[5] In *H-G-G-*, one organization (American Immigration Council) filed an unsolicited amicus brief in support of the applicant. 27 I. & N. Dec. at 617 n.2.

that must be followed by personnel outside of USCIS." AAO Practice Manual, *supra*, § 3.15(b).[6]

The vast majority of AAO decisions are non-precedential decisions, which are not binding on other parties. AAO Practice Manual, *supra*, § 3.15(a). AAO's non-precedential (and adopted) decisions are not entitled to *Chevron* deference. The lack of formality and transparency in AAO's proceedings prevents them from "foster[ing] the fairness and deliberation that should underlie a pronouncement [carrying the force of law]." *Mead*, 533 U.S. at 230. As discussed above, the informal agency process begins with the adjudication of a paper application, without any hearing right, and ends with an AAO "appeal" featuring limited procedural safeguards, optional briefing, exceedingly unlikely oral argument, and nonexistent opportunity for public participation. When the "ultimate question" is whether Congress would have wanted this type of informal proceeding to receive *Chevron* deference, *Long Island Care*, 551 U.S. at 173, the answer here is clear: no.

Multiple courts have reached exactly that conclusion. In *Fogo de Chao (Holdings) Inc. v. United States Dep't of Homeland Sec.*, 769 F.3d 1127, 1136-37 (D.C. Cir. 2014), the D.C. Circuit held that *Chevron* deference did not apply to a non-precedential AAO decision, reasoning that the "decision, and any legal interpretations contained within it, were the product of informal adjudication within the Service." The lack

[6] Since 2010, AAO has issued 18 such decisions. USCIS, AAO Decisions, Adopted AAO Decisions, https://tinyurl.com/3may9puk (last updated Jan. 27, 2021).

of any "'formal administrative procedures' that 'tend to foster the fairness and deliberation that should underlie a pronouncement' of legal interpretation weigh[ed] against the application of *Chevron* deference." *Id.* (alterations omitted) (quoting *Mead*, 533 U.S. at 230-31). While the D.C. Circuit also relied on the non-precedential nature of the AAO opinion, AAO's lack of sufficient formality was a separate and independent rationale for declining to apply *Chevron*. *Id. See Perez v. Cuccinelli*, 949 F.3d 865, 877 (4th Cir. 2020) (en banc) (*Chevron* does not apply to non-precedential AAO decision because "USCIS did not arrive at its understanding … through either notice-and-comment rule-making, a formal adjudication, or some other means evincing an application of congressionally delegated authority to make rules carrying the force of law"); *Moreno-Gutierrez v. Napolitano*, 794 F. Supp. 2d 1207, 1212 (D. Colo. 2011) (*Chevron* deference does not apply to non-precedential AAO decision); *see also Herrera v. U.S. Citizenship and Immigr. Servs.*, 571 F.3d 881, 888 n.7 (9th Cir. 2009) (suggesting *Skidmore* deference would apply to an AAO adopted decision).[7]

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[7] Every Circuit that has considered whether unpublished BIA opinions issued by a single member are entitled to *Chevron* deference has held they are not. *See Rotimi v. Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007) (per curiam); *Mahn v. Att'y Gen. of U.S.*, 767 F.3d 170, 173 (3d Cir. 2014); *Martinez v. Holder*, 740 F.3d 902, 909-10 (4th Cir. 2014); *Tula-Rubio v. Lynch*, 787 F.3d 288, 291 (5th Cir. 2015); *Ruiz-Del-Cid v. Holder*, 765 F.3d 635, 639 (6th Cir. 2014); *Arobelidze v. Holder*, 653 F.3d 513, 519-20 (7th Cir. 2011); *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1013 (9th Cir. 2006), *overruled on other grounds by Medina-Nunez v.*

B. The Attorney General's rubber-stamping of AAO's *H-G-G-* decision does not transform it into a decision warranting *Chevron* deference.

An obscure procedural mechanism allows an AAO decision to be deemed "precedential" via the actions of the Attorney General. In the last 22 years, there have been only eight AAO decisions that have become precedential by the action of the Attorney General. U.S. Dep't of Justice, DHS/AAO/INS Decisions, https://tinyurl.com/9py28xb4 (last updated Oct. 1, 2019). AAO's precedential decisions, including the decision in *H-G-G-*, also warrant no *Chevron* deference.

1. Precedential AAO opinions are just as informal and shrouded in secrecy as non-precedential AAO opinions.

The sole difference between an AAO non-precedential decision and an AAO precedential decision is the Attorney General's rubber-stamping of the decision, via his "approval … as to the lawfulness of such decision." 8 C.F.R. §§ 103.3(c); 1003.1(*i*).

First, the involvement of the Attorney General in designating AAO decisions as precedential itself weighs against *Chevron* deference because "justifications for deference begin to fall" when multiple agencies are charged with administering a statute.

Lynch, 788 F.3d 1103, 1105 (9th Cir. 2015); *Carpio v. Holder*, 592 F.3d 1091, 1097-98 (10th Cir. 2010); *Quinchia v. U.S. Att'y Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008). For the reasons described above, non-precedential AAO decisions are entitled to even less deference than unpublished BIA decisions.

Kaufman v. Nielsen, 896 F.3d 475, 485 (D.C. Cir. 2018) (internal quotation marks omitted); *see Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (where multiple agencies are tasked with promulgating regulations, there is "not the same basis for deference"); *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996) (similar). AAO is part of DHS; the Attorney General is the head of a different cabinet agency altogether, the Department of Justice (DOJ).

Moreover, the Attorney General's conduct in this process is just as informal and lacking in transparency as AAO's other procedures. In 2005, the CIS Ombudsman raised exactly these concerns. While the regulations require a precedential decision to be reviewed and approved by DHS and the Attorney General, further details are "not codified in statute or promulgated in regulation or published on the AAO website." Khatri, *supra*, at 2. "Providing the basic legal administrative appellate rules … is critical to the … integrity of the process. Employers and individuals should not have to speculate as to … how a case becomes a precedent decision." *Id.* at 4. In response, AAO refused to divulge any details, maintaining that this type of information is protected by the "deliberative process privilege." Letter from Robert C. Divine, Acting Deputy Dir., USCIS to Prakash Khatri, CIS Ombudsman 3 (Dec. 19, 2005), https://tinyurl.com/3jy76b67. The agency specifically contrasted the issuance of AAO precedential opinions with the transparency of more formal agency processes: "[F]ull notice to the public is more appropriate in the formal 'notice and comment' rulemaking process through the Federal Register." *Id.*

While AAO refuses to release any information about the process for designating an AAO opinion as precedential, it is undisputed that this process lacks any opportunity for public comment or participation. Indeed, AAO does not notify the public that a decision is being considered for a precedential designation. And neither the parties nor potentially interested amici are given the opportunity to submit briefing to either AAO or the Attorney General on whether a decision should be deemed precedential—that is, lawful.[8] In contrast, under the APA, when an agency reviews a decision of a subordinate person or entity, the parties must be provided with a reasonable opportunity to submit briefing. 5 U.S.C. § 557(c).

Indeed, the CIS Ombudsman has raised specific concerns about the public's inability to participate, as amici or otherwise, in the designation of precedential AAO opinions. The Ombudsman lamented that a 2015 precedential AAO opinion was issued "without first providing the affected stakeholder community an opportunity to provide its input." CIS Ombudsman, Annual Report 2015 at 43 (June 29, 2015), https://tinyurl.com/t9u7tcjs.

The "precedential" opinion issued by AAO in *H-G-G-* contains no indication that the Attorney General engaged in any reasoned, thorough analysis of the is-

[8] While AAO's practice manual indicates that it will "consider written requests from the public to reissue a non-precedent decision as an adopted or precedent decision," AAO Practice Manual, *supra*, § 3.15(e), AAO does not provide interested parties with the opportunity to advocate *against* the designation of a decision as precedential.

sues. Indeed, in *H-G-G-*, the precedential AAO decision is substantively identical to AAO's adopted opinion. *Compare Matter of H-G-G-*, Adopted Decision 2019-01 (AAO July 31, 2019), https://tinyurl.com/zyunv6ht, *with Matter of H-G-G-*, 27 I. & N. Dec. 617 (AAO 2019).

The Attorney General's rubber-stamping of AAO's decision gives no assurance that the Attorney General has "focuse[d] fully and directly upon the issue." *Long Island Care*, 551 U.S. at 173. And as this Court recognized in *Mead*, "precedential value alone does not add up to *Chevron* entitlement." *Mead*, 533 U.S. at 232. *See, e.g.*, *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1352-54 (Fed. Cir. 2020) (Prost, C.J., Plager, J., O'Malley, J., additional views) (*Chevron* deference should not apply to decisions issued by even the precedential opinions panel of the Patent and Trademark Office given lack of formality and opportunity for public participation). The Attorney General's unexplained signing off on the lawfulness of an AAO decision does nothing to assure that the decision was a reasoned one, and for that reason is not one to which Congress would have wanted to afford deference.

2. The Attorney General's rubber-stamping of AAO's decision does not otherwise warrant *Chevron* deference.

This Court has indicated that, in limited circumstances, Congress may intend to extend *Chevron* deference to informal agency proceedings, depending on "the interpretive method used and the nature of the

question at issue." *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). *Barnhart*'s discussion of *Chevron*'s applicability to informal agency proceedings is dicta because that case concerned regulations issued after notice-and-comment. *See id.* at 227 (Scalia, J., concurring in part). Nonetheless, this Court identified several factors that a court might consider in evaluating whether informal proceedings warrant deference: "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency ha[d] given the question over a long period of time." *Id.* at 222. These factors arguably provide "other indications of a comparable congressional intent to give a particular type of agency pronouncement the force of law." *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002) (alteration and internal quotation marks omitted).

As described below, these factors militate against deference here. *See, e.g.*, *Fogo de Chao*, 769 F.3d at 1137 (invoking the *Barnhart* factors and concluding that the AAO's decision was not otherwise "marked by the qualities that might justify *Chevron* deference in the absence of a formal adjudication or notice-and-comment rulemaking").

a. Whether TPS recipients can adjust their status is not an "interstitial" legal question that Congress would have wanted either DOJ or DHS to determine. As Justice Breyer, the author of *Barnhart*, has articulated, "[t]he less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute

and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) 'wished' or 'expected' the courts to remain indifferent to the agency's views." *Mayburg v. Sec'y of Health & Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984) (Breyer, J.). On the other hand, when the question is "larger" and "is likely to clarify or stabilize a broad area of law," it is "more likely Congress intended the courts to decide the question themselves." *Id.*; *see also King v. Burwell*, 576 U.S. 473, 486 (2015) (declining to defer to agency interpretation on "question of deep economic and political significance that is central to [the] statutory scheme" (internal quotation marks omitted)); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

Here, given the INA's explicit statutory command that individuals with TPS "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" "for [the] purposes of adjustment of status under section 1255," 8 U.S.C. § 1254a(f)(4), this is not an "interstitial" legal question related to everyday administration of the statute. Rather, this case presents an important question of law that will determine whether TPS recipients are eligible to adjust their immigration status. *Cf. MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994); *Hall v. U.S. Dep't of Agric.*, 984 F.3d 825, 836 (9th Cir. 2020). Even if there were statutory ambiguity about whether TPS recipients can adjust status (there is not), resolving any ambiguity between two statutes is a job for courts, not agencies. There is no reason to believe that Congress wanted TPS recipients' ability to adjust status to be determined by an agency, and certainly not through

wholly informal and opaque processes featuring an idiosyncratic combination of two different agencies.

b. While the question presented in this case certainly has very significant consequences for many individuals, adopting Petitioner's construction will not wreak havoc on the agency's broader ability to "administ[er] … the statute." *Barnhart*, 535 U.S. at 222.

Whether certain TPS recipients can adjust their status will not "impact[] myriad aspects of the regulatory scheme." *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 331-32 (D.C. Cir. 2011). Courts have concluded that this factor weighs in favor of deference in circumstances unlike those here, where the question impacts an agency's ability to administer a larger program. *See, e.g.*, *Atrium Med. Ctr. v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 560, 572 (6th Cir. 2014) (whether to treat short-term disability payments as wages or wage-related costs is "undoubtedly necessary" to agency's ability to administer Medicare); *Fournier v. Sebelius*, 718 F.3d 1110, 1121 (9th Cir. 2013) (rule limiting Medicare dental "coverage is important to the … administration of Medicare given the scarce resources available and the 'vast number of claims'" (quoting *Barnhart*, 535 U.S. at 225)).

The outcome here will resolve whether qualifying TPS recipients are able to adjust their status, without larger implications for the agency's ability to administer the INA. There is no reason to believe that Congress would have wanted an agency to answer this kind of legal question, much less by employing the one-off procedures implicated here.

c. The Attorney General also lacks relevant expertise. *See Barnhart*, 535 U.S. at 222. The Attorney General's approval of an AAO decision, given his lack of experience with the relevant statutory provisions at issue in this case, does not transmogrify the decision into one warranting *Chevron* deference.

"[T]he basis for deference ebbs when the subject matter of the dispute is distant from the agency's ordinary duties or falls within the scope of another agency's authority." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (internal quotation marks and alterations omitted). Here, the Attorney General lacks sufficient experience regarding adjustment of status applications, which USCIS officers ordinarily adjudicate. DOJ's Immigration Judges and the BIA handle a small number of these applications each year, when an individual seeks to adjust status in his or her removal proceeding. *See* 8 C.F.R. § 1245.2(a)(1). For instance, in fiscal year 2017, Immigration Judges across the country granted adjustment of status for just 1,860 individuals. U.S. Dep't of Justice, Executive Office for Immigration Review, Statistics Yearbook, Fiscal Year 2017 at 32, https://tinyurl.com/y8c8ted8 (last visited Mar. 1, 2021). In contrast, in the same year, USCIS officers approved over 550,000 applications for adjustment of status.[9] And of course, just a small fraction of individuals seeking adjustment of status in any given year are TPS recipients. Deference should

[9] USCIS, Number of I-485 Applications to Register Permanent Residence or Adjust Status by Category of Admission, FY 17 (Dec. 2016), https://tinyurl.com/3jhh8jy7; https://tinyurl.com/jmwa4974; https://tinyurl.com/vvkpynbk; https://tinyurl.com/pmym34hs.

not be granted to the Attorney General's rubber-stamping where the statute at issue is so "distant from the agency's ordinary duties." *Kisor*, 139 S. Ct. at 2417 (internal quotation marks and alterations omitted).

d. Even AAO arguably lacks sufficient expertise on these issues. While USCIS officers process hundreds of thousands of adjustment of status applications each year, as discussed *supra* 8-9, decisions rejecting these applications are not ordinarily appealable to AAO. That means that AAO only adjudicates adjustment of status applications in the rare circumstances where decisions on these applications are certified for its review. Because AAO sees only a small and narrow subset of these cases—those that are certified to it by USCIS officers—it has no legitimate claim to expertise of the kind that Congress implies when it grants an entity authority to make rules carrying the force of law.

e. There are several further reasons why *Chevron* deference is particularly inappropriate regarding the decision in *H-G-G-*.[10]

As an initial matter, the designation of *H-G-G-* as precedential was plagued with confusion. At the time that DOJ listed *H-G-G-* as a precedential decision on its website, USCIS continued to state that it was only

[10] *H-G-G-* itself has been vacated by a federal district court as being arbitrary and capricious given its inconsistency with the statutory language. *Hernandez de Gutierrez v. Barr*, No. 19-2495, 2020 WL 5764281 (D. Minn. Sept. 28, 2020), *as amended* (Oct. 23, 2020), *appeal docketed*, No. 20-3683 (8th Cir. Dec. 28, 2020).

an adopted decision. *See Velasquez v. Barr*, 979 F.3d 572, 579 n.4 (8th Cir. 2020) (detailing this confusion and stating that "it is not clear whether *Matter of H-G-G-* is in fact precedential and binding"). While this has been clarified now, insofar as USCIS's website currently lists *H-G-G-* as a precedential opinion, *see* USCIS, AAO Decisions, *supra*, https://tinyurl.com/3may9puk (listing adopted *H-G-G-* decision as being superseded by precedential decision), the USCIS website still, in some places, indicates that the opinion remains only an "adopted" one, *see* USCIS, Adopted AAO Decisions, https://tinyurl.com/8eaf9mrv (last updated Aug. 31, 2020).

The timing of the issuance of the precedential decision here is also unusual as compared to the typical case where *Chevron* is held to apply. AAO previously indicated that it issues so few precedential decisions because obtaining the "review and approval of the U.S. Attorney General via the U.S. Department of Justice" is a "lengthy process that prevents the AAO from issuing precedent decisions in a timely manner." CIS Ombudsman, Annual Report 2017, *supra*, at 27 n.132.

For example, other than *H-G-G-*, an AAO adopted decision has been reissued as a precedential opinion on only two occasions, and it took nearly five and six years respectively for the precedential opinions to issue in those cases. *See Matter of Chawathe*, Adopted Decision 06-0003 (AAO Jan. 11, 2006), *superseded by Matter of Chawathe*, 25 I. & N. Dec. 369 (AAO Oct. 20, 2010); *Matter of Al Wazzan*, Adopted Decision 06-0002 (AAO Jan. 12, 2005), *superseded by Matter of Al Wazzan*, 25 I. & N. Dec. 359 (AAO Oct. 20, 2010).

Yet, here, the Attorney General was able to rubber-stamp this decision almost immediately. While the precise date of the Attorney General's approval is unknown—given the fact that *H-G-G-* does not contain any information regarding the Attorney General's approval, and the fact that the precedential *H-G-G-* decision lists the exact same date of issuance as the adopted opinion—the DOJ website first listed *H-G-G-* as a precedential opinion sometime between July 31, 2019 (the date AAO issued *H-G-G-* as an adopted decision) and October 13, 2019 (the first date after July 31, 2019 when the DOJ webpage was captured for archiving). *See* Internet Archive Wayback Machine, U.S. Dep't of Justice, DHS/AAO/INS Decisions (Oct. 13, 2019), https://tinyurl.com/25cn286r.

The confusion surrounding *H-G-G-*'s precedential status, combined with its designation as precedential at unusual speed, provides additional ground to question whether the agency "focused fully" on these issues, *Long Island Care*, 551 U.S. at 165, and to ask whether instead the Attorney General's approval was obtained to secure an advantage in litigation.

The latter concern is particularly salient here, where the timing of *H-G-G-* coincided with the government's litigation of this precise issue across multiple circuits. The Attorney General stamped *H-G-G-* as precedential in between the filing of the opening and reply briefs in this case below, *see* Gov't C.A.3 Reply Br. 15 (noting that *H-G-G-* had "bolstered" its position), and while this issue was being litigated in *Velasquez v. Barr*, 979 F.3d 572, 579 n.4 (8th Cir. 2020); *Solorzano v. Mayorkas,* No. 19-50220, 2021 WL 365830 (5th Cir. Feb. 3, 2021); *Bhujel v. Wolf*, 444 F.

Supp. 3d 268 (D. Mass. 2020), *appeal docketed*, No. 20-1510 (1st Cir. May 12, 2020); and *Melgar v. Barr*, 379 F. Supp. 3d 783 (D. Minn. 2019), *consolidated and aff'd by Velasquez,* 979 F.3d 572. Deference is not warranted when it appears that the agency's interpretation might be "a convenient litigating position" or a "post hoc rationalization." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (internal quotation marks and alteration omitted).[11]

II. BIA's Adoption Of *H-G-G-* As Dicta Warrants No *Chevron* Deference.

The BIA's adoption of *H-G-G-* as dicta in *Padilla Rodriguez* also merits no *Chevron* deference. Despite acknowledging that *H-G-G-* dealt with a "clearly separate and distinct" issue than the one before it, the BIA nonetheless opined that AAO's interpretation of section 1254a(f)(4) is the "proper" one. *Padilla Rodriguez*, 28 I & N. Dec. at 167-68.[12] Because the BIA's dicta is not a proper exercise of any delegated author-

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[11] Nor do USCIS's prior informal interpretations regarding the ability of TPS recipients to adjust status warrant *Chevron* deference. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). Indeed, before the Third Circuit, the government only asked for *Skidmore* deference for these informal agency interpretations. Gov't C.A.3 Br. 36-38.

[12] The BIA disagreed with AAO's primary holding that the statute is unambiguous. *Id.* at 167. Agency decisions holding that the language of a statute is unambiguous are not entitled to *Chevron* deference. *See, e.g.*, *Chevron*, 467 U.S. at 842-43; *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 57 (2014) (plurality) ("Under *Chevron*, the statute's plain meaning controls, whatever the [BIA] might have to say.").

ity to make decisions carrying the force of law, it, too, does not qualify for *Chevron* deference.

A. The BIA's discussion of *H-G-G-* in *Padilla Rodriguez* is dicta.

Dicta are nonbinding statements in judicial opinions that are "unnecessary" to the resolution of the case: comments made "by the way—that is, incidentally or collaterally, and not directly upon the question before the court." *Dictum*, Black's Law Dictionary 1102 (11th ed. 2019); *see also Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006). Propositions not contained in a holding are dicta. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953, 1065 (2005) ("A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment."). "Dictum settles nothing, even in the court that utters it." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 351 n.12 (2005).

The BIA's discussion of *H-G-G-* in *Padilla Rodriguez* was pure dicta.

First, the two cases concerned fundamentally different issues of statutory interpretation. *H-G-G-* addressed a current TPS recipient's eligibility to adjust status under section 1255. 27 I. & N. Dec. at 618. *Padilla Rodriguez*, on the other hand, looked at whether a former TPS recipient is inadmissible under section 1182(a)(6)(A)(i), and thereby removable. 28 I. & N. Dec. at 164-65. The BIA itself acknowledged that "[e]ligibility for discretionary relief"—for instance,

whether a current TPS recipient can adjust status under section 1255—"is clearly separate and distinct from the issue of removability" at issue in *Padilla Rodriguez*. *Id.* at 168.

Second, *H-G-G-* arose in a different and thoroughly distinguishable factual context. Not only did the respondent in *Padilla Rodriguez* seek to avoid removal—rather than adjust status—he also no longer had TPS status, unlike the petitioner in *H-G-G-*. The BIA acknowledged that the prior termination of the individual's TPS status was an independent reason rendering the respondent ineligible for adjustment (if that were the relief he had sought). *Id.*

Third, as the BIA also acknowledged, its endorsement of *H-G-G-* was unnecessary to its holding. Recognizing that the question whether a current TPS recipient can adjust status is fundamentally different from the question at issue in *Padilla Rodriguez*, the BIA declared, correctly, that cases addressing the adjustment of status issue were "inapplicable" to the respondent's situation. *Id.*

In these circumstances, the BIA's incidental endorsement of AAO's holding in *H-G-G-* was thus classic dicta.

B. Dicta in a BIA decision warrants no *Chevron* deference.

This Court affords *Chevron* deference to precedential BIA decisions to the extent that the BIA has exercised its delegated authority to interpret ambiguous statutory terms through case-by-case adjudica-

tion. *See, e.g.*, *Immigr. & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). This principle does not extend to dicta (especially in a case where, as here, the immigrant proceeded pro se). *Padilla Rodriguez*, 28 I. & N. Dec. at 164.

First, dicta is nonbinding and therefore cannot qualify for *Chevron* as it does not "carry[] the force of law." *Mead*, 533 U.S. at 226-27. The BIA's discussion of *H-G-G-* has no precedential value—it did not bind even the parties before it, let alone the BIA itself in future proceedings.

Second, this Court's pronouncements on when published BIA opinions merit *Chevron* deference limit that deference to decisions made "in the course of considering and determining cases before it." *Aguirre-Aguirre*, 526 U.S. at 425 (internal quotation marks omitted). This means deference does not extend to *Padilla Rodriguez*'s dicta because, as described above, the BIA's gratuitous comments about *H-G-G-* were not made "in the course" of deciding the (very different) case "before it." *Id.*

Third, while even well-reasoned dicta in BIA opinions should not receive *Chevron* deference, deference is particularly inappropriate here given the BIA's superficial discussion of *H-G-G-*. Because this issue was not actually presented in *Padilla Rodriguez*, the BIA did not thoroughly examine it. Instead, the BIA simply noted the split in authority, declared with little if any explanation that it found AAO's conclusion in *H-G-G-* persuasive, and clarified how it would navigate the split going forward. 28 I. & N. Dec. at 167-68. This cursory treatment, which featured no

independent analysis by the BIA, provides insufficient assurance that the agency "focused fully" on the question. *Long Island Care*, 551 U.S. at 165. Allowing the BIA to garner *Chevron* deference in this fashion would make a mockery of the principles underlying *Chevron,* and would create an illicit backdoor mechanism for agencies to obtain *Chevron* deference for informal decisions that do not otherwise merit such deference.[13]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[13] This is all the more true here where the BIA opinion actually *disagrees* with the primary holding of the AAO opinion it purports to be embracing. *See supra,* n.12.