Nos. 22-23 and 22-331

In the Supreme Court of the United States

JEAN FRANCOIS PUGIN, *Petitioner*,
v.
MERRICK GARLAND, ATTORNEY GENERAL,
Respondent

MERRICK GARLAND, ATTORNEY GENERAL, *Petitioner*,
v.
FERNANDO CORDERO-GARCIA, *Respondent*

On Writs of Certiorari
to the United States Court of Appeals
for the Fourth and Ninth Circuits

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF JEAN FRANCOIS PUGIN AND FERNANDO CORDERO-GARCIA

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I. INTEREST OF AMICUS CURIAE

The National Association of Federal Defenders ("NAFD"), formed in 1995, is a nationwide, nonprofit, volunteer organization made up of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act, 18 U.S.C. § 3006A. Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court, among them thousands of individuals charged with criminal offenses contained in the Immigration and Nationality Act ("INA"). As explained herein, the aggravated felony statute, 8 U.S.C. § 1101(a)(43), plays a crucial role in a large swath of those cases. The members of NAFD have a strong incentive to ensure that courts construe immigration offenses, like all other criminal offenses, fairly and without pro-government deference.[1]

II. INTRODUCTION

Seeking a capacious reading of the term "obstruction of justice" in the aggravated felony statute, 8 U.S.C. § 1101(a)(43)(S), the government sounds a familiar refrain: it argues this Court should

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[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

grant deference under *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984), to the interpretation reached by the Board of Immigration Appeals ("Board"). This is not the first such request. In five previous cases, the government has asked this Court to defer to the Board's pro-government interpretation of various prongs of the aggravated felony statute: 8 U.S.C. §§ 1101(a)(43)(A)[2]; 1101(a)(43)(B)[3]; 1101(a)(43)(E)[4]; and—twice—1101(a)(43)(M)(i).[5]

But each time, this Court has declined that request, instead construing these provisions without

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[2] Brief for the Respondent at 36, *Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017) (No. 16-54), 2017 WL 345128 (arguing that the Board's interpretation "merits deference under *Chevron*").

[3] Brief for the Respondents at 32 n.26, *Lopez v. Gonzales*, 549 U.S. 47 (2006) (No. 05-547), 2006 WL 2474082 (arguing that "the Board's construction… merit[s] deference").

[4] Brief for the Respondent at 45, *Torres v. Lynch*, 578 U.S. 452 (2016) (No. 14-1096), 2015 WL 5626637 (arguing that the interpretation "should be resolved based on deference under *Chevron*").

[5] Brief for the Respondent at 16, *Kawashima v. Holder*, 565 U.S. 478 (2012) (No. 10-577), 2011 WL 4590846 (arguing that "the proper course would be to remand to the agency to exercise its *Chevron* discretion to interpret [the statute] in the first instance") (quotations and alterations omitted); Brief for the Respondent at 45, *Nijhawan v. Holder*, 557 U.S. 29 (2009) (No. 08-495), 2009 WL 815242 (arguing that "it is well established that the Attorney General's reasonable interpretation … is entitled to substantial deference" under *Chevron*).

Chevron deference. *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 397-98 (2017); *Torres v. Lynch*, 578 U.S. 452, 473 (2016); *Kawashima v. Holder*, 565 U.S. 478, 484 (2012); *Nijhawan v. Holder*, 557 U.S. 29, 38 (2009); *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006). Indeed, this Court has *never* deferred to the Board's interpretation of the aggravated felony statute. And in the most recent case, this Court suggested that the applicability of *Chevron* to this statute was an open question. *Esquivel-Quintana*, 581 U.S. at 397-398 (holding that there was "no need to resolve" whether *Chevron* applied because "sexual abuse of a minor" was unambiguous).

Despite this Court's consistent refusal to defer to the Board's interpretations of the aggravated felony statute, the lower courts have not followed suit. Much like the Fourth Circuit below, the courts of appeals routinely cede interpretative power to the Board, allowing that bureaucratic body to define the statute's criminal-law terms such as "perjury," "theft," and "murder." *Yim v. Barr*, 972 F.3d 1069, 1080 (9th Cir. 2020); *Santana v. Barr*, 975 F.3d 195, 199-200 (2th Cir. 2020); *Hernandez v. U.S. Att'y Gen.*, No. 21-12951, 2022 WL 1667020, at *2 (11th Cir. May 25, 2022). As Justice Kennedy has noted, such "reflexive deference" under *Chevron* is "an abdication of the Judiciary's proper role in interpreting federal statutes." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

Mr. Pugin and Mr. Cordero-Garcia have persuasively demonstrated that 8 U.S.C.

§ 1101(a)(43)(S) unambiguously refutes the government's interpretation, leaving no room for *Chevron* deference. Pugin Br. 13; Cordero-Garcia Br. 13. But there is another reason why *Chevron* has no role to play here: the aggravated felony statute is as much a criminal provision as a civil one. The statute is frequently implicated in criminal prosecutions, and *Chevron* has no place in the construction of the terms of a criminal offense.

III. SUMMARY OF ARGUMENT

The aggravated felony statute is written into several different criminal offenses, and its interpretation is at issue in one out of every twenty federal prosecutions. These criminal-law applications make *Chevron* deference inappropriate because "[c]riminal laws are for the courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169 (2014). *Chevron* deference is at cross-purposes with the age-old doctrine of lenity, which holds that ambiguous terms in criminal statutes should be construed in the defendant's favor. Granting the Board—a tribunal of the Attorney General's delegates—the power to say what criminal statutes mean would subvert the fair-notice and separation-of-powers principles that lenity protects. Further, contrary to the government's apparent contention, lenity is no less appropriate for criminal-law terms codified in Title 8 than those codified in Title 18. As the government has conceded elsewhere, a general grant of administrative authority—like the one contained in the Immigration and Nationality Act—does not

empower the Attorney General to dictate the meaning of criminal-law statutes.

IV. ARGUMENT

A. The aggravated felony statute is written into federal criminal law

Although it appears in the Immigration and Nationality Act, the aggravated felony definition is also a criminal provision. 8 U.S.C. § 1101(a)(43). Congress wrote the term into the illegal reentry statute at 8 U.S.C. § 1326(b)(2), one of the most commonly prosecuted federal offenses. Indeed, in the last fiscal year, one out of every five criminal defendants in federal courts faced a charge of illegal reentry. United States Courts, Criminal Federal Judicial Caseload Statistics 2022, Tbl. D2 at 3 (September 30, 2022) (listing 13,821 illegal reentry charges among a total of 68,315 federal criminal defendants).[6]

Whether an illegal reentry defendant's prior offense qualifies as an aggravated felony determines the sentence he faces. The default maximum punishment for illegal reentry is two years' imprisonment. 8 U.S.C. § 1326(a). However, § 1326(b)(2) "increases the maximum sentence to twenty years if the alien's removal 'was subsequent to a conviction for commission of an aggravated felony.'" *United States v. Guerrero-Jasso*, 752 F.3d 1186, 1189 (9th Cir. 2014) (quoting § 1326(b)(2)). In

[6] https://www.uscourts.gov/sites/default/files/data_tables/jb_d2_0930.2022.pdf (last visited March 19, 2023).

2021, 30 percent of all illegal reentry defendants were subject to the heightened aggravated-felony statutory maximum. United States Sentencing Commission ("U.S.S.C."), *Federal Sentencing of Illegal Reentry: The Impact of the 2016 Guideline Amendment* (July 2022) at 24 & fig. A-3 (hereinafter "U.S.S.C. Illegal Reentry 2022").[7] This data indicates that the aggravated felony statute is at issue in one out of every twenty federal prosecutions nationwide. In other words, the average federal district judge must construe the aggravated felony defintion when taking guilty pleas and imposing sentences for some five percent of all defendants that appear before her. *See* Fed. R. Crim. Pro. 11(b)(1)(H); 18 U.S.C. § 3553(a)(3). This increased statutory maximum has a real impact on actual sentences: defendants subject to § 1326(b)(2)'s heightened aggravated felony maximum receive an average sentence nearly four times higher than defendants sentenced under § 1326(a). U.S.S.C. Illegal Reentry 2022 at 24 & fig. A-4; *see also*, *e.g.*, *United States v. Payano*, 930 F.3d 186, 196-198 (3d Cir. 2019) (holding that district court's wrongful application of § 1326(b)(2) was sufficiently prejudicial to establish plain error, even though sentence was below the correct maximum). By any measure, § 1326(b)(2)—

[7] https://www.ussc.gov/sites/default/files/pdf/ research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf (last visited March 19, 2023).

and the aggravated felony definition that it incorporates—is a significant criminal law.[8]

Illegal reentry is not the only federal criminal offense to incorporate the aggravated felony definition. It is a felony to "aid or assist" a noncitizen convicted of an aggravated felony to enter the United States. 8 U.S.C. § 1327. This offense requires the government to prove that the smuggled individual had a conviction for an aggravated felony. *See, e.g.*, *United States v. Flores-Garcia*, 198 F.3d 1119, 1122 (9th Cir. 2000). It is also a crime for a person convicted of an aggravated felony to remain in the United States after being ordered removed. 8 U.S.C. § 1253; 8 U.S.C. § 1227(a)(2)(A)(iii). Like § 1326(b)(2), these offenses bring the aggravated felony definition into the criminal courtroom.

In *Pugin*, the Fourth Circuit thought the aggravated felony statute's criminal applications were "too attenuated" to militate against *Chevron* deference to the government's preferred interpretation. *Pugin v. Garland*, 19 F.4th 437, 442

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[8] By way of comparison, consider the oft-litigated Armed Career Criminal Act, a penal law that "has occupied so much of this Court's attention over so many years." *Wooden v. United States*, 142 S. Ct. 1063, 1079 (2022) (Gorsuch, J., concurring in the judgment). In 2019, that Act was applied in only 312 sentencings nationwide—just 0.4% of all federal criminal cases. U.S.S.C., *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways* (March 2021) at 18 & fig.1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf (last visited March 19, 2023).

(4th Cir. 2021). But the statistics just described show the prominence of the aggravated felony definition on the federal criminal docket, contradicting the lower court's assessment. Moreover, the Fourth Circuit misunderstood the operation of the aggravated felony statute in criminal prosecutions: the court assumed that the aggravated felony enhancement would only apply against defendants for whom a "civil aggravated-felony determination was previously made." *Id.* at 444. Assuming that premise, the court saw no reason to concern itself with the downstream criminal effects of a civil deportation statute. *Id.*

But as the government ultimately conceded below, neither § 1326(b)(2) nor § 1327 require a prior civil aggravated felony determination. Attorney General's Brief in Opposition to En Banc Rehearing at 14-15, *Pugin v. Garland*, 19 F.4th 437 (4th Cir. 2021) (No. 20-11363). Section 1326(b)(2) applies whenever a reentered noncitizen was deported "subsequent to" an aggravated felony conviction. *Id.* There is no requirement that the noncitizen was deported *because of* that conviction, and courts commonly apply the § 1326(b)(2) enhancement in the absence of prior civil aggravated felony determination. *See, e.g.*, *United States v. Zelaya*, 293 F.3d 1294, 1298 (11th Cir. 2002) (affirming § 1326(b)(2) conviction where aggravated felony was sustained after imposition of removal order, but before physical removal); *United States v. Nava-Perez*, 242 F.3d 277, 279 (5th Cir. 2001) (applying § 1326(b)(2) where conviction was sustained after removal order, but before subsequent reinstatement

of that order); *United States v. Maria-Gonzalez*, 268 F.3d 664, 670 (9th Cir. 2001) (holding that § 1326(b)(2) applied for offense that became an aggravated felony under the Illegal Immigration Reform and Immigrant Responsibility Act, even though the defendant's conviction and deportation preceded that Act).

The same is true for the aggravated smuggling offense under § 1327. Unlike illegal reentry, the smuggling statute does not even require a proof previous deportation—it requires only that the smuggled individual "has been convicted of an aggravated felony." *Id.* As such, a court presiding over a § 1327 case must determine in the first instance that the smuggled individual's prior conviction qualifies as an aggravated felony. *See United States v. Quinones-Chavez*, 641 F. App'x 722, 726 (9th Cir. 2016) (affirming § 1327 conviction and district court's conclusion, made in the first instance, that the smuggled individual's conviction qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(R)).

Thus, unlike other immigration statutes that might "only indirectly impact future criminal liability," *Pugin*, 19 F4th at 437, the aggravated felony statute has a direct role in a significant portion of the federal criminal docket. Its effects are not merely downstream of civil processes. It is nothing less than a criminal law.

B. Because of its criminal applications, the aggravated felony statute lies beyond *Chevron*'s domain

A growing chorus of judges has recognized that the aggravated felony statute's criminal-law applications make *Chevron* deference unwise. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027-32 (6th Cir. 2016) (Sutton, J., concurring and dissenting); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155-56 (10th Cir. 2016) (Gorsuch, J., concurring); *see also Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1059 (9th Cir. 2020) ("[D]eferring to the BIA's construction of a statute with criminal applications raises serious constitutional concerns."); *Pugin v. Garland*, 19 F.4th 437, 457 (4th Cir. 2021) (Gregory, J., dissenting) (expressing "reservations" with prior precedent applying *Chevron* to this statute).

The same is true beyond the immigration context, with jurists increasingly concluding that *Chevron* deference is inappropriate for statutes that have both criminal and civil applications. *Cargill v. Garland*, 57 F.4th 447, 465-468 (5th Cir. 2023) (en banc); *Gun Owners of Am. v. Garland*, 19 F.4th 890, 915-925 (6th Cir. 2021) (Murphy, J., dissenting from affirmance by equally divided court); *Aposhian v. Wilkinson*, 989 F.3d 890, 899 (10th Cir. 2021) (Tymkovitch, J., dissenting from denial of en banc rehearing); *Guedes v. ATF*, 920 F.3d 1, 39-42 (D.C. Cir. 2019) (Henderson, J., dissenting).

These jurists are correct. As a matter of both precedent and constitutional principles, the ancient

rule of lenity—not *Chevron* deference—governs the interpretation of ambiguous criminal statutes. And as these judges have recognized, that same rule necessarily must control the construction of statutes, like the aggravated felony definition, that have both civil and criminal applications.

1. *Chevron* deference has no role to play in the interpretation of criminal law

This Court "ha[s] never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) ("The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."). Indeed, this Court has held that an agency's interpretation of a criminal statute is "not relevant at all," because "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). *Apel* and *Abramski*'s categorical language leaves no room for application of *Chevron*—or any other doctrine of agency deference—to a criminal statute. *See Gutierrez-Brizuela*, 834 F.3d at 1155-56 ("The Supreme Court has expressly instructed us not to apply *Chevron* deference when an agency seeks to interpret a criminal statute.").

Rather than *Chevron* deference, the much older rule of lenity controls the interpretation of ambiguous criminal statutes. Lenity's role in Anglo-American jurisprudence predates the founding; Chief Justice Marshall explained that lenity is "perhaps not much less old than construction itself." *United States v. Wiltberger,* 18 U.S. 76, 95 (1820) (Marshall, J.). And this Court has long held that lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

Lenity and *Chevron* cannot coexist with respect to criminal statutes: under the rule of lenity, ambiguities in the statute are interpreted in the defendant's favor, but under *Chevron*, ambiguities are resolved in accordance with the government's preferred interpretation. *See Valenzuela-Gallardo*, 968 F.3d at 1060 & n.3 (explaining that *Chevron* and lenity are "mutually exclusive"); *see also Esquivel-Quintana*, 810 F.3d at 1027 ("[T]he application of *Chevron* to criminal laws also would leave no room for the rule of lenity."); *Aposhian*, 989 F.3d at 899 ("[I]t is not clear to me that the level of ambiguity required to invoke the rule of lenity is any different from that necessary to invoke *Chevron*."). In the words of Justice Scalia, applying *Chevron* deference to criminal statutes "would turn their normal construction upside-down, replacing the doctrine of lenity with a doctrine of severity." *Whitman v. United States*, 574 U.S. 1003, 1005 (2014) (Scalia, J., joined by Thomas, J., respecting the denial of

certiorari) (internal quotation marks and alterations omitted).

Supplanting lenity with *Chevron* deference in the interpretation of criminal statutes threatens constitutional norms. For one, it offends a defendant's due process right to fair notice, a right with an ancient pedigree. *See Whitman*, 574 U.S. at 1004 ("When King James I tried to create new crimes by royal command, the judges responded that the King cannot create any offence by his prohibition or proclamation, which was not an offence before.") (citation omitted). A criminal statute must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," *United States v. Harriss*, 347 U.S. 612, 617 (1954), a rule that applies equally "to statutes fixing sentences." *Johnson v. United States*, 576 U.S. 591, 596 (2015). *Chevron* dwells in ambiguity, but an ambiguous statute does not afford fair notice of what conduct is subject to imprisonment—even if the executive branch's interpretation may be a reasonable one.

Worse, *Chevron* allows an agency to oscillate between opposing constructions of a statute: a court must defer to an agency's reasonable statutory interpretation even if it contradicts the agency's previous interpretation—and even if a court has previously deferred to that prior interpretation. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-85 (2005). The extension of *Chevron* to criminal statutes thus would allow agencies to "in effect create (and uncreate) new crimes at will"—depriving the governed of fair notice

of what actions will be criminal. *Whitman*, 574 U.S. at 1004.

In addition to the due process concerns, deference to an executive agency's interpretation of a crime "could offend the doctrine of separation of powers." *Valenzuela-Gallardo,* 968 F.3d at 1059. "Since the founding, it has been the job of Article III courts, not Article II executive-branch agencies, to have the final say over what criminal laws mean." *Esquivel-Quintana*, 810 F.3d at 1032. Further, "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (*quoting United States v. Hudson*, 7 Cranch 32, 34 (1812)). Granting an Article II agency *Chevron* authority encroaches on the coequal branches' roles, concentrating executive, judicial, and legislative power in a single branch. Yet "division matters most" when imprisonment is at stake. *Esquivel-Quintana*, 810 F.3d at 1027; *see Whalen v. United States*, 445 U.S. 684, 689 (1980) (explaining that violation of "the constitutional principle of separation of powers" in the criminal sphere "trenches particularly harshly on individual liberty"). Indeed, "whatever else one thinks about *Chevron*, it has no role to play when liberty is at stake…. Before courts may send people to prison, we owe them an independent determination that the law actually forbids their conduct." *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., respecting the denial of certiorari).

2. *Chevron* deference likewise does not extend to statutes with both criminal and civil applications

The same rule governs statutes that, like the aggravated felony definition, have both civil and criminal applications: lenity—and not *Chevron*—controls. A statute, after all, is not a "chameleon," changing its meaning in different applications. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). To the contrary:

> When deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.

Id. The constitutional norms that undergird the rule of lenity and foreclose *Chevron* deference have equal force in the construction of dual-application statutes, and they must be honored regardless of whether a given application arises in a criminal or civil case. *See id.*

In *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), this Court considered a civil appeal involving an ambiguous tax provision of the National Firearms Act. Noting that the tax statute had "criminal applications," this Court found it "proper" to "apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor." *Id.* at 518

(plurality opinion); *see id.* at 519 (Scalia, J., and Thomas, J., concurring in the judgment) (agreeing with the plurality's application of lenity).

Following *Thompson*, this Court applied that same principle—that lenity, and not *Chevron*, controls—to the aggravated felony statute. *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004). *Leocal* concerned the crime-of-violence prong of the aggravated felony definition, which in turn incorporates 18 U.S.C. § 16. *Leocal v. Ashcroft*, 543 U.S at 12. Noting that the statute has "both criminal and noncriminal applications," the Court held that the rule of lenity applied even in that civil case, "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Id.* at n.8 (citing *Thompson/Center*, 504 U.S at 517-18). Meanwhile, *Leocal*—like every other case in which this Court has construed the aggravated felony definition—made no mention of *Chevron*. *Id.*; *see Valenzuela-Gallardo*, 968 F.3d at 1060 (stating that *Leocal*'s invocation of lenity "suggests that the Court looked unfavorably upon giving deference to the BIA's construction of the statute"). As a doctrinal matter, *Leocal* confirms that even in a civil case, the rule of lenity—and not *Chevron*—applies to statutes that have both civil and criminal applications. *See also Bittner v. United States*, 143 S. Ct. 713, 725 (2023) (opinion of Gorsuch, J., joined by Jackson, J.) (explaining that "the rule of lenity, not to mention a dose of common sense, favors a strict construction" when a statute has "criminal as well as civil ramifications").

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995), is not to the contrary. In that case, this Court cited *Chevron* and granted "some degree of deference" in rejecting a facial challenge to a regulation interpreting the Endangered Species Act. *Id.* at 703-04. And it did so despite noting that the Act imposed misdemeanor liability for anyone who "knowingly violate[d] any regulation issued in order to implement" the relevant statute. 16 U.S.C. § 1540(b)(1). In a footnote, *Babbitt* rejected the argument that lenity should instead apply, distinguishing *Thompson/Center* on the ground that "we have never suggested that the rule of lenity should provide the standard for reviewing facial challenges." *Babbitt*, 515 U.S. at 704 & n.14.

Babbitt does not sanction the application of *Chevron* in this case. For one, this case involves neither a facial challenge nor a regulation, but a construction of a discrete statutory provision. "[U]ndoubtedly Congress may make it a crime to violate a regulation, but it is quite a different matter for Congress to give agencies—let alone for us to *presume* that Congress gave agencies—power to resolve ambiguities in criminal legislation." *Whitman*, 574 U.S. at 1004 (citations omitted). Unlike the Endangered Species Act, the INA contains no provision criminalizing the violation of one of the Board's decisions. By the *Babbitt* footnote's own terms, *Thompson/Center*—and lenity—controls.

And to the extent that *Babbitt* could be understood to articulate a broader rule that *Chevron* trumps lenity, any such reading would be untenable after *Leocal*. Jurists on this Court and lower courts have recognized as much. *See Whitman*, 574 U.S. at 1005 (explaining that "*Babbitt*'s drive-by ruling…deserves little weight" because *Leocal* "contradicts" it); *Valenzuela Gallardo*, 968 F.3d at 1060 (explaining that *Leocal* "leaned decidedly against" *Babbitt*'s footnote); *Cargill*, 57 F.4th at 468 (holding that "subsequent Supreme Court precedent" undercuts *Babbitt*). As these Courts have concluded, this Court's precedents—*Babbitt* notwithstanding—suggest that lenity, rather than *Chevron* deference, governs the interpretation of dual-application statutes like the aggravated felony definition.

Rejecting *Chevron* deference in favor of lenity here is not just dictated by precedent, it is also firmly supported by constitutional principles. The separation-of-powers and fair-notice concerns underlying the rule of lenity—and pushing against *Chevron*—are no less present in considering the Board's interpretations of the aggravated felony statute. The Board is wholly subordinate to the Attorney General. It is housed within the Department of Justice and made up of attorneys "appointed by the Attorney General to act as the Attorney General's delegates." 8 C.F.R. § 1003.1(a)(1). Board members are "subject to removal by the Attorney General, and may be transferred from or to assignments as necessary." Board of Immigration Appeals: Procedural Reforms

to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002). The Attorney General may review and reverse any of the Board's decisions at his pleasure. 8 C.F.R. § 1003.1(h)(1)(i). For example, in *Matter of Reyes*, 28 I. & N. Dec. 52, 52 (A.G. 2020), the Attorney General issued a decision holding that the noncitizen's offense qualified as an aggravated felony, vacating the Board's contrary ruling. The decision in *Reyes*, like all of the Attorney General's opinions, is binding precedent on the Board and Immigration Judges.

If this Court accepted the government's request for *Chevron* deference here, the Attorney General could designate offenses as aggravated felonies in order to bolster his prosecutions under § 1326(b)(2), "all without any direction from Congress." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring). This executive-branch legislation would deprive defendants of fair notice of their potential punishments of their conduct. And it would mean that the Department of Justice could dictate the meaning of the statute governing an illegal reentry defendant's fate.

For all these reasons, "any distinction between 'pure' criminal laws and 'hybrid' criminal-civil laws is a mirage." *Gun Owners of Am.*, 19 F.4th at 924-25. The aggravated felony statute cannot mean one thing in civil cases and another in criminal prosecutions. Both this Court's precedents and the constitutional principles underlying the rule of lenity prevent *Chevron*'s application to hybrid statutes like the aggravated felony definition.

C. *Chevron* deference is as ill-suited for criminal offenses described in Title 8 as for those described in Title 18

The government recognizes that "the federal criminal code" is outside of *Chevron*'s ambit, but it argues that *Chevron* applies to the whole of the INA. *See* Gov't Br. at 52. The government's argument fails scrutiny. *Chevron* has no role to play in defining the criminal offenses found in the INA, which contains nothing like the express delegations this Court has required for Congress to delegate the authority to define federal crimes.

As an initial matter, this dichotomy—"federal criminal code" vs. "INA"—is false; many criminal offenses, such as smuggling and illegal entry and reentry, are contained in the INA. 8 U.S.C. §§ 1324, 1325, 1326. Indeed, if "federal criminal code" refers to criminal offenses charged in federal courts, the previous discussion demonstrates that some of the most common provisions of the "federal criminal code" are found in the INA.

To the extent that the government is contending that only offenses contained in Title 18 are off-limits for *Chevron* deference, that is inconsistent with this Court's pronouncements. "[A] *criminal statute*" is not entitled to "any deference," *Apel*, 571 U.S. at 369 (emphasis added), because "*criminal laws* are for courts, not for the Government, to construe." *Abramski*, 573 U.S. 169 (emphasis added). The constitutional reasoning underlying that principle—that fair notice and separation of powers are most critical when imprisonment is at stake—does not

depend on where an offense might be codified. Admittedly, this Court has granted *Chevron* deference to the Attorney General's interpretation of the civil portions of the INA, particularly provisions concerning foreign governments. *See, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999) (applying *Chevron* to the Board's interpretation of the "serious nonpolitical crime" bar to withholding of removal, because pronouncements about the nature of an offense committed abroad "may affect our relations with the alien's native country or its neighbors"); *Negusie v. Holder*, 555 U.S. 511, 517-18 (2009) (reaching same conclusion for the "persecutor bar," which applies when an asylum seeker has previously engaged in persecution). But this Court has never granted *Chevron* deference to the agency's interpretation of any of INA's criminal offenses—or to the civil-criminal hybrid aggravated felony definition.

Indeed, the government's reasoning would extend *Chevron* not just to the aggravated felony statute, but also to the elements of the INA's criminal offenses like §§ 1324, 1325, and 1326. In the course of reviewing removal orders, the Board sometimes has occasion to interpret the elements of those crimes. *See, e.g.*, *In re Farias-Mendoza*, 21 I&N Dec. 269, 274 (BIA 1996) ("8 U.S.C. § 1324 (1994)… do[es] not require proof of 'gain.'"); *In re Morgado-Hernandez*, 2017 WL 1230028, *2 (BIA Feb. 17, 2017) ("The respondent's statute of conviction, 8 U.S.C. § 1324(a)(1)(A)(ii), has a minimum mens rea of 'reckless disregard,' meaning that mere recklessness is sufficient to support a conviction.").

Under the government's logic, a court presiding over a prosecution would be required to defer to the Board's interpretation of those offenses' elements. But this Court has never granted the Department of Justice the authority to decide what its prosecutors must prove in order to win a criminal conviction.

The government cites 8 U.S.C. § 1103(a)(1), Gov't Br. at 51-52, but that statute does not give the Attorney General authority to dictate the meaning of the INA's criminal offenses. As an initial matter, the plain terms of that provision are directed at allocating responsibility *within* the executive; it does not purport to transfer the authority to say what the law means from the judicial to the executive branch. *See* § 1103(a)(1) (dividing duties between the Secretary of Homeland Security, the President, the Attorney General, the Secretary of State, and lower officers). Moreover, as then-Judge Gorsuch noted, the INA also contains a provision enshrining courts' authority to decide all questions of law, a reservation also echoed in the Administrative Procedure Act. *Gutierrez-Brizuela*, 834 F.3d at 1151 (*citing* 8 U.S.C. § 1252(a)(2)(D) and 5 U.S.C. § 706).

But even allowing that § 1103(a)(1) grants the Attorney General general interpretive authority, it does not vest in him the power to define criminal offenses or their punishments. Beginning decades before *Chevron*, this Court has imposed a clear-statement rule on purported delegations of crime-defining power: Congress must speak "distinctly" to grant agencies the authority to define criminal offenses. *United States v. Grimaud*, 220 U.S. 506,

519 (1911); *United States v. Eaton*, 144 U.S. 677, 688 (1892); *see also Carter*, 736 F.3d at 734-35 ("[I]f Congress wants to assign responsibility for crime definition to the executive, it must speak clearly."). For example, 15 U.S.C. § 78n(e) permits the Securities and Exchange Commission to define by regulation what "acts" make conduct "fraudulent" under the Securities and Exchange Act. Because the statute makes clear that a violation of those rules is a crime, it does not pose a separation of powers problem. *See United States v. O'Hagan*. 521 U.S. 642, 667 (1997). In light of the heightened fair-notice and separation-of-powers concerns in the criminal sphere, this clear-statement rule applies whenever Congress seeks "to establish regulatory crimes with the force of law." *Gun Owners of Am.,* 19 F.4th at 916.

Grimaud's clear-statement rule is a fundamental mismatch for *Chevron* deference. *Chevron* deals in *implicit* delegations: the idea is that a statutory ambiguity indicates a congressional intent for an agency to fill the gap. *Chevron*, 467 U.S. at 844. "But an implicit delegation is not a distinct one." *Gun Owners of Am*, 19 F.4th at 918. A statutory ambiguity falls far short of the "distinct[]" delegation to make criminal rules that this Court has long required. *Grimaud*, 220 U.S. at 519; *see also Gonzalez v. Oregon*, 546 U.S. 243, 262 (2006) ("The idea that Congress gave the Attorney General such broad and unusual authority [to declare otherwise lawful activity a crime] through an implicit delegation…is not sustainable.").

Moreover, "grants of general rulemaking power" that do not specifically instruct that the agency's regulations will have criminal weight "are not express delegations of power to adopt substantive criminal rules." *Gun Owners of Am.*, 19 F.4th at 918. And § 1103(a)(1) is not even a grant of *rulemaking* power—it merely designates the Attorney General as the interpretative authority within the executive branch. It certainly says nothing about the Attorney General being able to decree the element of or penalties for immigration crimes. As such, it fails the clear-statement rule.

Indeed, § 1103(a)(1) is no more express than grants of rulemaking authority contained in Title 18 that indisputably do not give the Department of Justice crime-defining power. Title 18 contains several provisions that grant broad rulemaking authority to the Attorney General. *See* 18 U.S.C. § 926(a)(1) (directing the Attorney General to "prescribe" any "rules and regulations that are necessary to carry out the provisions" of the chapter containing federal firearms offenses); 18 U.S.C. § 847 (declaring that the "administration" of the chapter on explosive devices "shall be vested in the Attorney General" and authorizing him to "prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter"); 18 U.S.C. § 2346(a) (authorizing Attorney General to "prescribe such rules and regulations as he deems reasonably necessary to carry out" cigarette-trafficking offenses). Like 8 U.S.C. § 1103(a)(1), each of these provisions grant general administrative authority to the Attorney General,

but none of them say anything about making a violation of ensuing regulations a crime. And despite these rulemaking delegations within Title 18, the government's instant brief concedes that "the Attorney General has no delegated authority to speak with the force of law when interpreting … the federal criminal code." Gov't Br. 52. (internal quotation marks omitted). In other words, the government apparently agrees that Title 18's general grants of rulemaking authority do not trigger *Chevron* deference. There is no reason, therefore, why 8 U.S.C. § 1103(a)(1) should do so.

The government's apparent concession here—that Title 18's general rulemaking provisions do not grant the Attorney General crime-defining authority—is consistent with its position in recent litigation. In another case, the government expressly conceded that the general grant of rulemaking authority at 18 U.S.C. § 926(a)(1) did not give the Attorney General authority to interpret criminal-law terms with the force of law. *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019), concerned the Attorney General's interpretation of the word "machinegun," which is an element of the offense under 18 U.S.C. § 922(o)(1). In its briefing to the D.C. Circuit, the government unequivocally disclaimed any *Chevron* authority: "The government did not contend in district court—nor does it contend on appeal—that the agency is entitled to *Chevron* deference for its interpretation of the terms 'single function of the trigger' and 'automatically' in a criminal statute." Brief for Appellees at 36-37, *Guedes*, 920 F.3d 1 (No. 19-5042), 2019 WL 1200603. After the D.C. Circuit

nonetheless applied *Chevron* deference, *Guedes*, 920 F.3d 20-28, the government repeated its concession to this Court:

> "The court of appeals' invocation of *Chevron* also rests on a misunderstanding of the Attorney General's rulemaking power under … the Gun Control Act, 18 U.S.C. § 926(a).…The statutory scheme at issue here does not suggest that Congress intended to grant the Attorney General the authority to engage in such 'gap-filling' with respect to the classification of the firearms at issue here."

Brief of Respondents in Opposition at 25, *Guedes v. ATF*, No. 12-296 (U.S. Dec. 4, 2019), 2019 WL 6650579.

The government is certainly correct that 18 U.S.C. § 926(a)(1) does not grant it power to define criminal statutes under *Chevron*.[9] But that position is inconsistent with its apparent position in this case that 8 U.S.C. § 1103(a)(1) brings even the criminal

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[9] Indeed, a contrary reading would conflict with *Abramski*. The offense at issue in that case, making a false statement to a firearms dealer under 18 U.S.C. § 922(a)(6), is also covered by 18 U.S.C. § 926(a)(1)'s delegation. *Abramski*, 573 U.S. at 171. The fact that this Court found the government's interpretation "not relevant at all" necessarily means that 18 U.S.C. § 926(a)(1) does not give the Attorney General to define the terms of the offense. *See id.* at 191.

provisions of the INA under *Chevron*'s domain. If, as the government told this Court in *Guedes*, § 926(a)(1) does not give the Attorney General the power to define the terms of a criminal statute, the same must be true for the no-more-express § 1103(a)(1).

In short, there is no basis to treat Title 18 crimes differently under *Chevron* than those in Title 8—including those that incorporate the aggravated felony definition. The constitutional norms of fair notice and separation of powers demand that lenity, and not *Chevron*, control.

V. CONCLUSION

Amicus agrees with Mr. Pugin and Mr. Cordero-Garcia that 8 U.S.C. § 1101(a)(43)(S) unambiguously forecloses the government's interpretation. But if this Court finds the statute ambiguous, this Court should apply lenity, because the statute's criminal applications place it outside *Chevron*'s domain. On that analysis, the judgment of the Court of Appeals for the Fourth Circuit should be reversed and the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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