No. 19-1220

In the
Supreme Court of the United States

ISTVAN SZONYI,

Petitioner,

v.

WILLIAM P. BARR, in his official capacity as Attorney General of the United States,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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Motion for Leave

Amicus curiae Pacific Legal Foundation (PLF) respectfully moves for leave to file the accompanying brief, under Supreme Court Rules 21, 33.1, and 37.2. PLF timely served notice of its intent to file the brief. Petitioner consented, but Respondent's counsel did not respond.

PLF frequently participates as lead counsel and as counsel for amici in cases addressing the separation of powers and administrative law. It writes in support of Petitioner here because the questions presented raise significant issues concerning the proper scope of agency power and the right of due process for those subject to agency regulation.

Below, PLF draws on its nearly 50 years of experience and provides a discussion of first principles that will inform the Court's consideration of the Petition.

Accordingly, PLF respectfully asks the Court to grant it leave to file this amicus brief.

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, PACIFIC LEGAL FOUNDATION is a nonprofit, tax-exempt, California corporation established to litigate matters affecting the public interest. PLF provides a voice for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases involving the role of the judiciary as an independent check on the executive and legislative branches under the Constitution's Separation of Powers. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (*Auer* deference); *Gundy v. United States*, 139 S. Ct. 2116 (2019) (non-delegation); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

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[1] Pursuant to this Court's Rule 37.2(a), Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Petitioner consented, but Respondent's counsel did not respond. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Introduction and Summary of Argument

This should have been an easy case for the Ninth Circuit, and the Court should grant the Petition to clarify the proper roles of the executive and judicial branches.

Petitioner Istvan Szonyi fled the Soviet invasion of Hungary in 1957, when he was four years old, and he has since remained a lawful permanent resident in the United States. Nearly 40 years ago, Mr. Szonyi invited three women to his place of work and over a period of five or six hours forced them to engage in sexual acts. He pled guilty to four crimes of sexual violence, for which he was sentenced to 12 years in prison. He was released early on parole in 1988 for good behavior.

Under the Immigration and Nationality Act (INA), an alien is removable if he has been convicted of "two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct." 8 U.S.C. § 1227(a)(2)(A)(ii). There is no dispute that Mr. Szonyi's crimes involved moral turpitude. The only question is whether they arose "out of a single scheme of criminal misconduct."

The Ninth Circuit addressed the meaning of that phrase over six decades ago. In *Wood v. Hoy*, the court ruled that two counts of first-degree robbery—because they were committed by the same four persons (including Charles Wood, an alien), through means of force and fear, and carried out within three days of each other—arose out of a single scheme of criminal misconduct and, therefore, that Mr. Wood was not removable under §1227. 266 F.2d 825, 831 (9th Cir. 1959). According to the court, §1227 says "'not arising out of a single scheme of criminal misconduct'; it does not say 'not arising out of a single criminal act.' If such latter reading had been the intent of Congress

they could have so declared." *Id.* at 830. Rejecting the argument that the statutory exception should be limited to "crimes arising out of a single act of criminal misconduct," the Ninth Circuit was unequivocal: "this is not what the statute says." *Id.*

According to the Board of Immigration Appeals (BIA), however, multiple convictions arise out of a "single scheme" only when they are based on "essentially one act." *Matter of B—*, 8 I.&N. Dec. 236, 238 (BIA 1958). During the pendency of Mr. Szonyi's administrative appeal, the BIA issued *Matter of Islam*, 25 I.&N. Dec. 637 (BIA 2011), which reaffirmed its interpretation. The BIA also declared that its "analysis . . . is controlling and should now be uniformly applied in all circuits throughout the country," including circuits, like the Ninth Circuit, that had previously rejected the BIA's interpretation. *Id.* at 641.

When this case reached the Ninth Circuit, therefore, the court was faced with an agency interpretation that admittedly contradicted the court's own long-standing and uniform interpretation of §1227. A ruling for the Petitioner should have followed as a matter of course. After all, it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

But this Court's approval of agencies' gradual accumulation of all of the government's powers "has deranged our three-branch legal theories." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

As a result, a court must now defer to an agency's interpretation of ambiguous statutes, so long as the agency's reading is not unreasonable. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Worse, a court must withdraw its own settled interpretation in favor of an agency's, unless the court previously held that the statute unambiguously forecloses the agency's interpretation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). In this case, the Ninth Circuit relied on *Chevron* and *Brand X* to abandon its precedent and adopt the BIA's view of §1227. Pet. App. 62a.

Petitioner ably explains the Ninth Circuit's misapplication of *Chevron* and *Brand X*. *See* Pet. 14–21. Clarification on this point is sorely needed. But even more necessary is that the Court put an end to the potential for mischief—realized here—inherent in the Court's "deranged" administrative-deference doctrines. The Court should take this opportunity to reconsider these doctrines.

Reasons to Grant the Petition

I. The Court Should Grant Certiorari to Reject the Ninth Circuit's Unwarranted Extension of *Brand X*

This Court's precedents do not support the notion that an agency may sidestep a judicial conclusion that its preferred reading "is not what the statute says" and insist on deference to that same reading in a later case. Nor is *Brand X* a license for a circuit court panel to accede to such agency insistence, jettisoning precedent without en banc review or review by this Court. Yet the Ninth Circuit panel in this case adopted the BIA's preferred interpretation despite circuit precedent rejecting that interpretation as contrary to the statute. *See Wood*, 266 F.2d at 830. This Court should grant certiorari to disapprove of the Ninth Circuit's unwarranted extension of *Brand X*.

A. The Panel Misconstrued the Scope of *Brand X*

Brand X held that a court must discard its earlier contrary decision and defer to an agency's "reasonable" interpretation of a statute unless "the prior court decision holds that its construction follows from the unambiguous terms of the statute." 545 U.S. at 982.

Here, the Ninth Circuit panel took that requirement far too literally and abandoned decades-old precedent in favor of the BIA's position because its earlier cases "did not say . . . that [their] interpretation 'follow[ed] from the unambiguous terms of the statute.'" Pet. App. 68a (quoting *Brand X*, 545 U.S. at 982). Contrary to the panel's approach, proper application of *Brand X* is not a matter of scouring prior decisions for "magic words," such as an explicit statement that the statutory text "unambiguously" required the interpretation adopted in the earlier case. *See, e.g.*, *Bastardo-Vale v. Att'y Gen.*, 934 F.3d 255, 259 n.1 (3d Cir. 2019) (en banc) (declining to abandon precedent despite the prior case's "lack of magic words" and noting that "the absence of *Chevron*-type language [in the prior decision] . . . is understandable because the BIA had not interpreted the clause at issue"); *Fernandez v. Keisler*, 502 F.3d 337, 347 (4th Cir. 2007) (rejecting the idea that "a court must say in so many magic words that its holding is the only permissible interpretation of the statute in order for that holding to be binding on an agency"). Insisting on those "magic words" in a prior decision stretches *Brand X* well beyond its intended bounds.

Such an approach is particularly flawed where the earlier decision pre-dated *Brand X* and *Chevron*, as did the Ninth Circuit precedent here. As Justice Scalia aptly put it, a court in that era would have been "unaware of

even the utility (much less the necessity) of making the ambiguous/nonambiguous determination." *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493–94 (2012) (Scalia, J., concurring in part and in the judgment).[2] Obviously, *Wood*'s rejection of the BIA's interpretation in 1959 could not be expected to use language from a test that this Court would not announce for another 25 years. *See Chevron*, 467 U.S. 837. Yet not only did the panel below fault *Wood* for failing to refer to the "unambiguous terms of the statute," it also chided that decision for "not directly address[ing] the reasonableness of the BIA's approach under *Chevron* step two." Pet. App. 68a. That the panel required a decision issued two decades before *Chevron* not only to closely adhere to *Chevron*'s language, but to follow its steps, shows just how extreme the Ninth Circuit's position is.

B. Under a Proper Application of *Chevron* and *Brand X*, the Panel Should Not Have Deferred

Rather than applying a "magic words" test, a reviewing court applying *Brand X* should look to the substance of the earlier decision and determine whether it "ascertain[ed] that Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9; *see also Home Concrete & Supply*, 566 U.S. at 489 (plurality op.) (adhering to precedent despite the statute's "linguistic ambiguity" because "there is every reason to believe that the Court [in a pre-*Chevron* case] thought

[2] The four-member plurality in *Home Concrete & Supply* went further, concluding that even the pre-*Chevron* statement, "'it cannot be said that the [statutory] language is unambiguous,'" did not necessarily mean "that Congress had delegated gap-filling power to the agency." 566 U.S. at 486, 488–89 (plurality op.) (quoting *Colony, Inc. v. Comm'r*, 357 U.S. 28, 33 (1958)).

that Congress had directly spoken to the question at hand") (quotation omitted). If the prior decision identified a congressional intention, that intention trumps a contrary agency view.

Here, although *Wood* didn't use *Chevron* terms like "unambiguous" or "permissible construction," it was clear on this point: Congress's chosen language foreclosed the BIA's reading. *See Wood*, 266 F.2d at 830 (rejecting the BIA's interpretation because "[i]f [that] reading had been the intent of Congress they could have so declared"); *see also id.* at 831 ("The government treated the matter as if the words 'not arising out of a single scheme of criminal misconduct' had not been added to the statute."); *id.* ("This is an erroneous view of the law."); *Gonzalez-Sandoval v. INS*, 910 F.2d 614, 617 (9th Cir. 1990) (calling the BIA's test "legally erroneous"). In light of *Wood*'s clear rejection of the BIA standard, it should not matter for purposes of *Brand X* deference whether the court *also* concluded that its own reading was the only permissible interpretation of the statute. The Ninth Circuit panel should not have allowed agency intransigence to wear down and reverse *Wood*'s conclusion that the BIA failed to "stay[ ] within the bounds of its statutory authority." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 297 (2013) (emphasis omitted).

To put it in *Chevron* terms, even if *Wood* did not make a step-one determination that the statutory language is unambiguous, it conclusively held that the agency's reading of that language was unreasonable under step two. Pet. App. 21a, 27a (Collins, J., dissenting from denial of rehearing en banc). In light of that determination, the panel's decision to now defer to the BIA's approach goes well beyond *Brand X* and elevates the agency into "some sort of super court of appeals." *Gutierrez-Brizuela v.*

Lynch, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring). This Court should grant certiorari to confirm that the Ninth Circuit's extension of *Brand X* goes too far.

II. Alternatively, the Court Should Grant Certiorari to Reconsider *Brand X*

As just explained, this Court can reverse the panel's decision as an impermissible extension of *Brand X*. *See also* Pet. 31 (stating that Petitioner "seeks only to 'tame'" *Brand X*). But if the Court were to conclude that the panel correctly applied *Brand X*, it should revisit that decision for three reasons: judges continue to question its constitutionality, it requires courts to unnecessarily and repeatedly address thorny deference questions, and, as shown here, its application fosters only additional problems.

A. *Brand X*'s Constitutionality Has Been Called Into Question

Members of this Court have questioned *Brand X*'s constitutionality. *See Baldwin v. United States*, 140 S. Ct. 690, 690–95 (2020) (Thomas, J., dissenting from the denial of certiorari) ("*Brand X* appears to be inconsistent with the Constitution, the Administrative Procedure Act, and traditional tools of statutory interpretation."); *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting) (calling the majority decision "not only bizarre" but "probably unconstitutional"); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., concurring in the judgment) ("[I]f an agency can not only control the court's initial decision but also revoke that decision at any time, how can anyone honestly say the court, rather than the agency, ever really determines what the regulation means?"); *Gutierrez-Brizuela*, 834 F.3d at 1149–51 (Gorsuch, J., concurring) ("*Brand X* permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal

power in a way that seems more than a little difficult to square with the Constitution of the framers' design.").

Various lower court judges have also raised constitutional concerns with *Brand X*. *See, e.g.*, *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting) (criticizing *Brand X*; "In too many cases, courts [defer to agencies' interpretive views] almost reflexively, as if doing so were somehow a virtue . . . —as if our duty were to facilitate violations of the separation of powers rather than prevent them."); *S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 554–55 (3d Cir. 2018) (noting that *Brand X*'s "doctrine of deference to federal agencies is open to question," although "it is the law"); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 280–81 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (noting that in light of *Brand X*, "[c]itizens are . . . left to the mercy of government functionaries," and "[a]gencies can make the ground rules and change them in the middle of the game"). *Compare MikLin Enters., Inc. v. NLRB*, 861 F.3d 812, 823 (8th Cir. 2017) (en banc) (declining to defer because *Brand X*, "if applied literally here, would leave the Board free to disregard any prior Supreme Court or court of appeals interpretation"), *with id.* at 836 (Kelly, J., dissenting) ("That is in fact what *Brand X* allows . . . .").[3]

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[3] *See also Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (arguing that the rule of lenity should trump *Brand X* to avoid "a complete undermining of the Constitution's separation of powers" and to "preclude[ ] the same agency from altering criminal laws back and forth over time (even over conflicting judicial interpretations, and even without input from Congress)") (citation omitted); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2015) (stating that "one might question . . . whether the combination of *Chevron* and *Brand X* further muddles the muddle by intruding on the judicial function"); *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 531 (9th Cir. 2012) (en banc) (Kozinski, J., "disagreeing with everyone") (asserting that *Brand X*

Given the growing recognition that *Brand X* stands on shaky constitutional ground, there is good reason for this Court to revisit that decision.

B. *Brand X* Requires Courts to Unnecessarily Revisit Thorny Deference Questions

The proper sphere of the federal courts includes interpreting laws and establishing precedent. *Brand X* cuts the legs out from both of those functions, transferring to agencies both the authority to announce a conclusive (until the agency changes its mind) interpretation of statutes *and* the power to overrule precedent. Thus, even when a court has seemingly answered a statutory interpretation question, it may nonetheless repeatedly confront the argument that it must defer to a contrary agency interpretation.[4] And because executive agencies are naturally incentivized to try to expand their authority, courts will continue to face agency attempts to bypass judicial decisions. When that happens, rather than applying traditional interpretive tools to statutory language, courts are instead left trying to tease out whether their prior case(s) "unambiguously foreclosed" the agency's interpretation or merely offered a competing interpretation—such as the "best reading" of the statute. *See, e.g.*, *Acosta*, 909 F.3d at 740. There are often reasonable arguments to be made on both sides of the debate. *See, e.g.*, *Rush Univ. Med. Ctr. v. Burwell*, 763 F.3d 754,

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makes court rulings "necessarily provisional" because it holds that "[a]gencies alone can speak . . . as to what the law means").

[4] *See, e.g.*, *Bastardo-Vale*, 934 F.3d at 259 n.1; *Texas v. Alabama-Coushatta Tribe of Tex.*, 918 F.3d 440, 447–48 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020); *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 731 (5th Cir. 2018); *Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 139 (2d Cir. 2017); *MikLin Enters.*, 861 F.3d at 823.

759 (7th Cir. 2014) ("Both parties have been able to cull isolated language from [the prior case] to support their positions on whether that holding was based on the 'unambiguous terms of the statute' . . . ."). And such an inquiry is particularly perilous where the prior decision came before *Brand X* and *Chevron*. *See supra,* Part I.A.

As a matter of judicial economy and expertise, federal courts should not be required to continually address these questions. But unless and until this Court confronts the ramifications of *Brand X*, courts will continue to face conflicts between seemingly settled judicial interpretations and executive agencies' alternating policy positions.

C. The Panel's Application of *Brand X* in This Case Illustrates Its Infirmities

The application of *Brand X* deference here highlights fundamental problems with the decision. First, *Brand X* provides a significant and perverse incentive for courts to ignore the often difficult task of statutory interpretation and, instead, defer to agency positions. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (noting the "cursory analysis" many courts applied to a BIA interpretation of an immigration statute and expressing concern about the "reflexive deference" courts often give to agency interpretations). Such abandonment of the judicial role can be seen in the panel's willingness to discard precedent because, rather than relying on statutory definitions or legislative history, the Ninth Circuit in *Wood* had "interpreted the [statutory] phrase for ourselves." Pet. App. 67a; *see also id.* at 68a (stating that *Wood* relied on its "own interpretation of the text"). But interpreting legal texts is a role that courts are *supposed* to play in our governmental structure. *See United States v. Dickson*, 40 U.S. (15 Pet.) 141, 162 (1841) (Story, J.) ("[T]he judicial department has imposed upon it

by the constitution, the solemn duty to interpret the laws . . . .").

For that reason, *Chevron/Brand X* deference is *never* appropriate unless the court has first run the text through standard judicial interpretive tools. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (explaining that deference is not due unless the court's use of traditional tools of construction, such as interpretive canons, cannot resolve the ambiguity); *Kisor*, 139 S. Ct. at 2415 (stating that before deferring, courts "must exhaust all the traditional tools of construction," including by "carefully considering the text, structure, history, and purpose"). Interpreting texts is a fundamental role of courts, and the fact that *Wood* interpreted a phrase that had no statutory definition, and that it did so unaided by legislative history, did not justify scrapping its conclusion in favor of the agency's view. Courts must "retain a firm grip on the interpretive function," *Kisor*, 139 S. Ct. at 2421, yet *Brand X* encourages—sometimes, requires—them to abandon that duty.

Second, *Brand X* allows agencies to get away with what otherwise would be significant due process violations. *See* Part III, *infra*; *see also Gutierrez-Brizuela*, 834 F.3d at 1152 ("Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions."). By permitting agencies to reverse judicial opinions in favor of executive preference, *Brand X* lets them undercut such due process values as fair notice, predictability, stability, and reasonable reliance. This poses an immense threat to liberty. It is especially perverse when, as here, agency deference "has the effect of placing the ability to construe authoritatively the limits on an agency's power in that

agency's own self-interested hands." Pet. App. 3a (Collins, J., dissenting from denial of rehearing en banc); *see also Baldwin*, 140 S. Ct. at 695 (Thomas, J., dissenting from the denial of certiorari) ("*Brand X* gives the Executive the ability to neutralize a previously exercised check by the Judiciary."). *Brand X* merits reconsideration because it encourages both courts and agencies to circumvent due process protections.

Third, application of *Brand X* frequently turns cautious respect for "practical agency expertise," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651 (1990), into uncritical acceptance that hollows out judicial oversight. As this Court recently noted, one of the primary justifications given for agency deference is the agency's "unique expertise." *Kisor*, 139 S. Ct. at 2413 (quotation omitted). And although the BIA has expertise in certain immigration issues, what possible expertise can it have to determine whether multiple convictions (possibly decades old) were part of a "single scheme of criminal misconduct?" The BIA is not an expert in criminal schemes, and this is not the sort of question that "implicate[s the BIA's] substantive expertise," *id.* at 2417, yet the Ninth Circuit did not even address that issue, instead relying on "reflexive deference" to the agency. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring). All too often, application of *Brand X* involves bypassing the foundational prerequisite of agency expertise.

Finally, *Brand X* enables agencies (assisted by receptive courts) to undermine and circumvent the doctrine of *stare decisis*. In stark contrast to an agency's discretion to shift positions and overrule cases it dislikes, "*[s]tare decisis* is the preferred course because it promotes the even-handed, predictable, and consistent development of legal

principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Agency views, including as to the proper interpretation of statutes, ebb and flow in response to electoral results and leadership changes. Allowing those fluctuating views to trump settled judicial interpretations breeds chaos. *See Gutierrez-Brizuela*, 834 F.3d at 1150 ("[A]fter this court declared the statutes' meaning and issued a final decision, an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals. If that doesn't qualify as an unconstitutional revision of a judicial declaration of the law by a political branch, I confess I begin to wonder whether we've forgotten what might.").

In contrast, appropriate respect for *stare decisis* requires adherence to precedent absent "special justification—something more than an argument that precedent was wrongly decided." *Kisor*, 139 S. Ct. at 2422 (quotation omitted). Not only does *Brand X* supply federal agencies with a powerful mechanism for subverting the "special justification" requirement, it also allows a circuit court panel—possibly sympathetic to the agency's policy aims—to bypass the normal requirements of en banc or Supreme Court review. And although *stare decisis* is never an "inexorable command," it "carries enhanced force when a decision . . . interprets a statute." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015) (quotation omitted). Yet under *Brand X*, judicial constructions of statutes can be swept away based not on "special justification," but on a cursory showing of reasonableness. Judicial respect for the *stare decisis* values that are undermined by *Brand X* should lead this Court to revisit that decision.

III. The Court Should Decide Whether Administrative Agencies are Immune From Due Process Strictures

The panel's opinion reveals yet another problem created by this Court's administrative-deference doctrines—the power of executive agencies to adopt new policies and apply them retroactively, a power that upsets centuries of settled jurisprudence. The Court should grant the Petition and re-restrict the branches to their delegated powers.

A. Rule of Law 101

All "persons"—including aliens on U.S. soil—are afforded protection under the Fifth Amendment's Due Process Clause. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). *Cf. Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (noting that the Fourteenth Amendment's due process protections extend to all "persons").

And "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly[.]" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). "[S]ettled expectations should not be lightly disrupted." *Id.* (footnote omitted). Due process therefore requires agencies to "provide regulated parties fair warning of the conduct a regulation prohibits or requires." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012) (internal quotation marks and alteration omitted).

The "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*,

511 U.S. at 265 (footnote omitted). It is a "sacred" principle. *Reynolds v. McArthur*, 27 U.S. (2 Pet.) 417, 434 (1829) (Marshall, C.J.).[5]

Therefore, "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (citations omitted). And by "the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* (citation omitted).

These "fundamental anti-retroactivity principles are Rule of Law 101." *PHH Corp. v. CFPB*, 839 F.3d 1, 48 (D.C. Cir. 2016) (Kavanaugh, J.), *vacated in part*, 881 F.3d 75 (D.C. Cir. 2018).

B. The Fourth Branch of Government

There is no dispute that the BIA applied its interpretation retroactively. *See* Pet. App. 62a (Ninth Circuit's holding the application of BIA's reading "not impermissibly retroactive."). The question is whether an executive

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[5] One reason it is sacred is the risk that a legislature's "responsivity to political pressures" may "tempt[] [it] to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266. This concern exists here, as the BIA believes that the "single scheme" language "should be interpreted to include the greatest number of twice-convicted aliens." *Matter of Z—*, 8 I.&N. Dec. 170, 175 (BIA 1958).

It's worth adding that the BIA changed its theory of this case. Initially, the BIA charged—nearly 20 years after Mr. Szonyi was paroled—that he was removable as an aggravated felon pursuant 8 U.S.C. § 1227(a)(2)(A)(iii). But while his case was pending, the Ninth Circuit issued an opinion that effectively precluded Mr. Szonyi's removal under §1227(a)(2)(A)(iii). *See* Pet. App. 113a. The BIA then proceeded against Mr. Szonyi under its current theory. *Id.*

agency may impose its interpretation retroactively even though a court of law has already settled the legal issue. *See De Niz Robles*, 803 F.3d at 1169 (The question here "isn't whether the BIA's decision seeks to impose new legal consequences on Mr. [Szonyi's] past conduct, but whether lawfully it may.") (Gorsuch, J.) (citations omitted).

The resolution of this question is muddled by the Court's permitting executive agencies to exercise *de facto* all three powers of government. Here, the BIA acted in all three capacities—executive (enforcing the INA), legislative (adopting a new (in the Ninth Circuit) policy), and judicial (applying its interpretation to Mr. Szonyi). If the BIA's decision below is considered (solely) as an adjudication—*i.e.*, the interpretation of law and retroactive application to resolve past disputes—there would be no question that the BIA's decision satisfied due process. *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

But, here, consistent with *Chevron* and *Brand X*, the Ninth Circuit treated the BIA's action as (primarily) legislative. *See* Pet. App. 70a–71a (applying a balancing test to determine whether the BIA's "new rule" could lawfully be applied retroactively). The BIA itself implicitly confirmed that it was engaged in rulemaking by announcing—in an unrelated case where the issue was not presented—that its interpretation would henceforth apply across the Nation. *Matter of Islam*, 25 I.&N. Dec. at 641.

This power of executive agencies to adopt new policies and apply them retroactively—even if inconsistent with previous agency policy—was confirmed in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*). Dismissing concerns about the retroactive applications of new agency rules, this Court stated that "[e]very *case* of first impression has a retroactive effect, whether the new principle is

announced by a court or by an administrative agency." *Id.* at 203 (emphasis added). But the Court later approved the SEC's decision because it was "a judgment based upon public *policy* . . . ." *Id.* at 209 (emphasis added). And we now know that an "agency may act through adjudication to clarify an uncertain area of the law, so long as the retroactive impact of the clarification"—*i.e.*, of the new rule—"is not excessive or unwarranted." *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1328 (9th Cir. 1982) (relying on *Chenery II*).

In effect, *Chenery II* allows executive agencies to exercise legislative power (adopting new policies or rules) and judicial power (deciding "cases" and issuing "judgments") while relieving agencies of constitutional restrictions placed on the legislative and judicial branches—*e.g.*, the requirement that generally applicable rules binding private conduct, *i.e.*, laws, may be adopted only through bicameralism and presentment. *INS v. Chadha*, 462 U.S. 919 (1983). *See also Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (Congress "cannot delegate legislative power to the president.").

Under *Chenery II*, agencies now adopt generally applicable rules binding private conduct, through adjudication if they wish, and apply them, if they wish, retroactively. And agencies enjoy deference every step of the way. *See, e.g.*, *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 180 (3d Cir. 2002) ("We must defer to agency retroactivity rulings unless the ruling creates 'manifest injustice.'") (citations omitted).

As a result, the BIA was emboldened to decide that "it was time for [the judicial branch] to fall in line" with the executive branch's interpretation. Pet. App. 5a (Collins, J., dissenting from denial of rehearing en banc). And the Ninth Circuit eagerly abdicated its judicial duty.

C. The Constitution Created Only Three Powers and Divided Them Among Separate Branches

While Amicus agrees with Petitioner that the opinion below may be reversed under *Chevron* step two and *Brand X*, the Court should take this opportunity to reconsider its overly deferential review of the executive branch's exercise of legislative and judicial powers.[6]

The problems created by the Court's administrative-deference doctrines in general, and by *Chenery II* in particular, can be resolved by limiting branches to their delegated powers. This division of powers alone would solve the due-process concerns raised by this case. As professors Chapman and McConnell explain, the "'idea that the legislature can only make laws, or legislative enactments, as contradistinguished from judicial sentences and decrees,' was an American constitutional innovation." Nathan S. Chapman & Michael W. McConnell, *Separation of Powers as Due Process*, 121 Yale L.J. 1672, 1731 (2012) (citation omitted). "But in determining the nature of the law-making power, courts relied on two common law principles. First, a law was prospective. . . . Second, in contrast to a judicial judgment, a law is 'general and public.'" *Id.* at 1731, 1733 (citation omitted).

The legislative-prospectivity principle "could not have had real constitutional force [in the common law] against retrospective legislation as long as Parliament continued

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[6] While *de jure*, Congress may not delegate legislative or judicial power to the executive, the executive branch *de facto* exercises all three of the government's powers. *Cf.* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 446 (1987) ("[T]he New Deal agency combines executive, judicial, and legislative functions.").

to engage in legislative adjudication" and "where Parliament could enact bills of attainder or render rulings in specific cases." Chapman & McConnell, 121 Yale L.J. at 1732. This "prospectivity principle and the due process principle became mutually reinforcing: if law must be prospective and rights can be deprived only pursuant to law, then retroactive deprivations, *even pursuant to legislative action, are a violation of due process*." *Id.* (emphasis added).

The U.S. Constitution, therefore, separates these powers and places them in different branches. As Chief Justice Marshall explained, "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

Professors Chapman and McConnell sum up:

> The basic idea of due process, both at the Founding and at the time of adoption of the Fourteenth Amendment, was that the law of the land required each branch of government to operate in a distinctive manner, at least when the effect was to deprive a person of liberty or property. The executive had power only to enforce law in accordance with its terms, and not to make law. The judiciary was required to adjudicate cases in accordance with longstanding procedures, unless the legislature substituted alternative procedures of equivalent fairness. The legislative branch could enact general laws for the future, including the rules for acquisition and use of property, but could not assume the "judicial" power of deciding individual cases.

Chapman & McConnell, 121 Yale L.J. at 1781–82.

The Ninth Circuit's opinion shows how far we've strayed from these principles. *See, e.g.*, *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments, within the powers vested in courts by the . . . Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.").

The executive's "accretion of [this] dangerous power" has come from "the generative force of unchecked disregard of the restrictions" imposed by the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring). The Court should check the executive branch's overreach.

CONCLUSION

The Petition should be granted.

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Respectfully submitted,

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