No. 24-777

IN THE

Supreme Court of the United States

DOUGLAS HUMBERTO URIAS-ORELLANA, ET AL.,
Petitioners,

v.

PAMELA BONDI, ATTORNEY GENERAL,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases (continued) **Page(s)**

Cases (continued) **Page(s)**

Cases (continued) **Page(s)**

Statutes

Statutes (continued) **Page(s)**

Other Authorities

Regulations **Page(s)**

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INTEREST OF AMICUS CURIAE*

The Center for Individual Rights (CIR) is a non-profit, public-interest law firm dedicated to defending individual rights essential to a free and flourishing society. Founded in 1989, CIR has a record of landmark victories in this Court and many others, setting prec-

* Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus or its counsel made a monetary contribution to this brief's preparation.

edents that restore and protect fundamental individual rights threatened by government actions.

CIR recognizes that protecting individual rights requires maintaining the constitutionally defined role of the federal government and each of its branches, as "the separation of powers is designed to preserve the liberty of all the people." *Collins* v. *Yellen*, 594 U.S. 220, 245 (2021). In particular, CIR has a vital interest in ensuring that the courts independently apply the laws Congress has enacted as written—and do not inappropriately cede that function to the Executive Branch. CIR has participated as an amicus in a number of cases involving structural limits and the separation of powers in the U.S. Constitution, including *Bond* v. *United States*, 572 U.S. 844 (2014), and *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), this Court reasserted the foundational principle that courts in all cases must exercise their independent judgment when interpreting statutes. That critical function had been surrendered for 40 years under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which required courts to defer to executive agencies' interpretations of statutes so long as they were "permissible." But *Loper Bright* overruled *Chevron* in favor of a return to the traditional understanding of the judicial role codified in the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*—under which courts, not agencies, have the final say on what the law is.

This case presents an opportunity to make clear that *Loper Bright* meant what it said: The task of authoritatively interpreting the laws belongs to the Judiciary, not the Executive. But in the decision below, the First Circuit reviewed only for substantial evidence a determination by the Board of Immigration Appeals (BIA) that a set of undisputed facts did not amount to "persecution" for purposes of asylum under 8 U.S.C. § 1101(a)(42), a provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq*. As a result, the court of appeals itself never decided independently what the statutory term "persecution" means. Instead, it asked only whether "any reasonable adjudicator" could have agreed with the BIA's view, and upheld the agency's decision under that deferential standard. The First Circuit did all this without any clear delegation in the statutory text—reviving the "implicit delegation" approach from *Chevron* that *Loper Bright* rejected.

The First Circuit's decision cannot stand. Under *Loper Bright*, the "presumption" is that "Congress expects courts to do their ordinary job of interpreting statutes." 603 U.S. at 403. Although the Court acknowledged that Congress can (within constitutional limits) delegate to agencies the power to define particular statutory terms, that delegation must be clear and express to overcome the default presumption, to respect constitutional boundaries, and to allow courts to police the outer edges of permissible delegations. Any other rule would reanimate *Chevron*'s discovery of implicit delegations in statutory silence. Here, the INA lacks any statement—much less a clear statement—delegating the power to define "persecution" in Section 1101(a)(42) to the BIA.

Deference was especially inappropriate in this case, where the BIA's decision lacked even the indicia that may give an Executive Branch interpretation the "power to persuade." *Loper Bright*, 603 U.S. at 388 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Deciding whether undisputed facts amount to "persecution" requires legal judgment, not technical or subject-matter expertise, and courts are best equipped to apply law to facts—especially given sustained criticism of the BIA's reasoning and decisionmaking process.

Even under *Chevron*, courts refused to defer to single-judge, unpublished, non-precedential BIA opinions like the one in this case. Such opinions do not necessarily embody even the considered view of the Executive Branch, and represent only the opinion of a single functionary. But under the First Circuit's approach, those decisions get a level of deference contrary to even *Chevron*'s most robust outer edges.

The rule of lenity provides yet another reason to reject the First Circuit's deferential standard. While Members of this Court have debated how much ambiguity is required for the rule of lenity to apply, the First Circuit's approach fails under *any* formulation. Because the First Circuit defers to the government if "any reasonable adjudicator" could agree, the government can win even in the face of grievous ambiguity so long as it offers some minimally rational basis for its position. That gets things backwards.

Loper Bright was clear: Without an express delegation of interpretive authority, reflexive deference to agencies is no more. The decision below failed to heed that instruction. The Court should reverse.

ARGUMENT

I. *LOPER BRIGHT* FORBIDS DEFERRING TO THE EXECUTIVE BRANCH'S INTERPRETATION HERE BECAUSE CONGRESS DID NOT CLEARLY DELEGATE AUTHORITY TO INTERPRET THE STATUTE

Under *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), courts must determine for themselves what the best meaning of a statute is, without deferring to an agency's views. Congress may delegate to an agency the authority to define particular statutory terms (subject to constitutional limits), but it must speak clearly to do so. There is no clear delegation here, so the First Circuit should not have deferred to the BIA's interpretation of the statute.

A. Congress Must Speak Clearly To Delegate Interpretive Power To An Agency

1. In *Loper Bright*, this Court returned to "the Framers' understanding of the judicial function" and reaffirmed that, in a case involving the Executive Branch "as in any other," "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Loper Bright*, 603 U.S. at 385, 400 (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Framers "envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts,'" "independent of influence from the political branches." *Id.* at 385 (quoting The Federalist No. 78, p. 525 (J. Cooke ed. 1961) (A. Hamilton)). That "elemental proposition," codified in the APA, reflects "judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment." *Id.* at 391-392. In overruling *Chevron*, this Court restored "the traditional un-

derstanding that questions of law [a]re for courts to decide, exercising independent judgment." *Id.* at 387.

As a result, whether or not "an administrative interpretation is in play," courts must "use every tool at their disposal" to determine the "single, best meaning" of the statutory text. *Loper Bright*, 603 U.S. at 400-401. A court's duty to apply its own judgment to interpret statutes does not disappear merely because "some judges might (or might not) consider the statute ambiguous"; after all, "[t]he very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities." *Ibid.* Those ambiguities do not license courts to "throw up their hands" and "declar[e] a particular party's reading" of the statute "permissible"—even when that party is a federal agency. *Ibid.*

To be sure, the Court in *Loper Bright* recognized that, in some cases, "the statute's meaning may well be that the agency is authorized to exercise a degree of discretion." 603 U.S. at 394-395. In those cases, a court must "independently interpret the statute" to determine "the boundaries of the delegated authority" and then assess whether the agency "engaged in 'reasoned decisionmaking' within those boundaries." *Ibid.* (brackets and citations omitted).

But the Court was careful to cabin this principle to statutes in which Congress *expresses* its "will" that the agency have "discretionary authority." *Loper Bright*, 603 U.S. at 394-395. The Court pointed to statutes that "'expressly delegat[e]' to an agency the authority to give meaning to a particular statutory term"; ones that "empower an agency to prescribe rules to 'fill up the details' of a statutory scheme"; and

those that allow an agency "to regulate subject to the limits imposed by a term or phrase that 'leaves [the] agenc[y] with flexibility.'" *Ibid.* The statutes the Court highlighted all contained language that explicitly delegated such authority to an agency. *Id.* at 395 nn. 5-6 (citing 29 U.S.C. § 213(a)(5), 33 U.S.C. § 1312(a), and 42 U.S.C. §§ 5846(a)(2) and 7412(n)(1)(A)). And in rejecting as "fiction" *Chevron*'s "presumption" that ambiguity or silence confers discretion, the Court was emphatic that an ambiguity "is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute." *Id.* at 399-400, 404.

"The better presumption" is that "Congress expects courts to do their ordinary job of interpreting statutes." *Loper Bright*, 603 U.S. at 403. Before a court surrenders that responsibility, it must carefully scrutinize statutory language to determine whether Congress "actually intended to delegate particular interpretive authority to an agency." *Id.* at 404 (citation omitted).

2. Congress must speak clearly if it wishes to oust courts from their "ordinary job of interpreting statutes" and delegate that power to an agency. *Loper Bright*, 603 U.S. at 403. Under *Chevron*, this Court construed "statutory ambiguities" as "implicit delegations to agencies." *Id.* at 399. *Loper Bright* rejected that untenable premise, explaining that "[a]n ambiguity is simply not a delegation of law-interpreting power." *Ibid.* (citation omitted). *Chevron* erroneously required clear language to overcome that default rule of deference, but under *Loper Bright* the default rule is the opposite: Courts—not agencies—definitively decide what a statute means. To overcome that de-

fault, Congress must make its intent to delegate clear. See *id.* at 394-395, 399-400, 403-404.

A clear-statement rule for delegations of law-interpreting authority makes good sense in light of the constitutional principles animating *Loper Bright*. Courts' authority to decide the meaning of statutes derives from "Article III of the Constitution" and reflects "the Framers' understanding of the judicial function." *Loper Bright*, 603 U.S. at 384-385. "[J]udicial practice dating back to *Marbury*" is that courts "decide legal questions by applying their own judgment." *Id.* at 391-392; see also *id.* at 390 n.3 (recognizing "the deep roots that this rule has in our Nation's judicial tradition"). Indeed, as several Justices have observed, delegating interpretive authority to executive agencies—giving them the power *both* to enforce the law against individuals *and* to say what the law means—can raise serious constitutional questions. See, *e.g.*, *id.* at 413-416 (Thomas, J., concurring); *id.* at 429-435 (Gorsuch, J., concurring); *Pereira* v. *Sessions*, 585 U.S. 198, 219-221 (2018) (Kennedy, J., concurring).

Those serious constitutional questions counsel against reading unclear language to effect a delegation of law-interpreting power to an executive agency. Where, as here, there is a need to "temper Congress' acknowledged powers" against "an essential component of our constitutional structure," this Court has not hesitated to adopt a clear-statement rule to avoid constitutional concerns. *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 55-56 (1996) (citation omitted); cf. *Kucana* v. *Holder*, 558 U.S. 233, 237 (2010) ("Separation-of-powers concerns, moreover, caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases

from the Judiciary's domain."). Clear-statement rules "help courts 'act as faithful agents of the Constitution'" and enable them "to ensure that acts of Congress are applied in accordance with the Constitution." *West Virginia* v. *EPA*, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring) (quoting A. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 169 (2010)). And, where a court "can avoid the constitutional question by answering the statutory one," that is the preferred route. *Perttu* v. *Richards*, 605 U.S. 460, 469 n.1 (2025). So when Congress has not clearly expressed any intent to shift interpretive authority away from the courts and into an executive agency, courts should not assume it has done so.

A clear-statement rule is also crucial to prevent courts from backsliding into *Chevron*. Under *Loper Bright*, courts must "police the outer statutory boundaries" of congressional "delegations of authority," and may not simply "pretend that ambiguities are necessarily delegations." 603 U.S. at 404. Courts searching for implicit delegations in ambiguous statutory text will find them everywhere, potentially short-circuiting judicial review after only "cursory analysis" of the statute. *Pereira*, 585 U.S. at 220 (Kennedy, J., concurring). That sort of "reflexive deference" was common under *Chevron*, *id.* at 221, and would return like a weed if courts could again find delegations of law-interpreting power in unclear statutory language.

To minimize that risk, "[t]he actual delegation of authority to the agency must be clear." *Moctezuma-Reyes* v. *Garland*, 124 F.4th 416, 421 (6th Cir. 2024). As the Sixth Circuit has explained, "expres[s] and explici[t]" language "conferring discretion on the agency" is "critical": "If broad language alone triggered deference,

we'd unwittingly return to construing less than precise words as implicit delegations to the agency that warrant deference." *Id.* at 420. But "[t]hat can't be right"; "[t]he case that declared '*Chevron* is overruled' didn't quietly reinstitute it." *Ibid.* (quoting *Loper Bright*, 603 U.S. at 412). Courts should therefore defer to an agency's implementation of a statute only "[w]hen 'Congress has *clearly* delegated discretionary authority to [the] agency.'" *Van Loon* v. *Department of the Treasury*, 122 F.4th 549, 563 (5th Cir. 2024) (emphasis added; citation omitted); see also, *e.g.*, *Mayfield* v. *U.S. Department of Labor*, 117 F.4th 611, 617 (5th Cir. 2024) (finding "an uncontroverted, explicit delegation of authority"); *Duffus* v. *MaineHealth*, 2025 WL 1928339, at *14 (D. Me. July 14, 2025) ("Without [a] clear delegation, though, courts cannot read congressional authorization for agency action into every statute that uses broad terms."); *Ventura Coastal, LLC* v. *United States*, 736 F. Supp. 3d 1342, 1356-1358 (Ct. Int'l Trade 2024) (similar). Any less vigilant approach would "give succor to *Chevron* resurrectionists." *China Unicom (Americas) Operations Ltd.* v. *FCC*, 124 F.4th 1128, 1165 n.11 (9th Cir. 2024) (Bea, J., dissenting).

* * *

Barely a year into the post-*Chevron* era, some courts are already getting the message: Courts and agencies cannot revive *Chevron* in a different form by finding congressional delegations in unclear language. The decision below, however, does exactly that. This Court should confirm that, under *Loper Bright*, deference to an agency is appropriate only in the limited instances where Congress has clearly conferred on the agency the power to say what the law means.

B. The First Circuit Erroneously Deferred To The BIA Without Clear Congressional Instruction To Do So

The First Circuit's approach here exemplifies the perils of courts "quietly reinstitut[ing]" *Chevron* by construing "broad," "less than precise" statutory language as "implicit delegations to the agency that warrant deference." *Moctezuma-Reyes*, 124 F.4th at 420. In asking only whether the BIA's decision was permissible under the forgiving substantial-evidence standard, the decision below improperly "place[d] a finger on the scales of justice in favor of the most powerful of litigants, the federal government," *Loper Bright*, 603 U.S. at 433 (Gorsuch, J., concurring)—even though Congress never clearly authorized such deference.

1. In analyzing petitioners' requests for asylum, the First Circuit had to determine whether the record evidence demonstrated "persecution or a well-founded fear of persecution." 8 U.S.C. § 1101(a)(42)(A) (defining "refugee"); see *id.* § 1158(b)(1)(A) (alien eligible for asylum if he is a "refugee"). Making that determination necessarily required the court first to ascertain what "persecution" means. But the court itself never did so and did not assess independently whether the undisputed evidence, as the agency had found it, constituted "persecution" under the statute.

Instead, the court of appeals "cabin[ed] [its] review" to whether the BIA's determination that petitioners had not made the necessary showing "was supported by substantial evidence." Pet. App. 10a. As the First Circuit has previously explained, "[t]his is not a petitioner-friendly standard of review." *Jinan Chen* v. *Lynch*, 814 F.3d 40, 45 (1st Cir. 2015) (citation omit-

ted). Under that standard, the court mistakenly believed that it was *bound* to accept the BIA's conclusions about what constitutes persecution, even if the court disagreed, "as long as" those conclusions "[we]re supported by reasonable, substantial and probative evidence on the record considered as a whole." Pet. App. 9a (quoting *Gomez-Abrego* v. *Garland*, 26 F.4th 39, 45 (1st Cir. 2022)). As a result, petitioners could not prevail simply by convincing the First Circuit that the BIA was *wrong* about the meaning of "persecution" as a matter of law; they had to establish that "any reasonable adjudicator would be compelled to conclude to the contrary." *Ibid.* (citations omitted).

Having stacked the deck against petitioners, the First Circuit unsurprisingly ruled for the BIA. The court determined, for example, that the BIA "reasonably concluded" that the threats at issue did "not meet th[e] threshold" for past persecution. Pet. App. 11a. It also cited circuit precedents where the court had similarly "upheld [BIA] decisions" on the same issue applying the same deferential standard. *Id.* at 12a-13a. In other words, it accepted the BIA's *legal* judgment about what constitutes "persecution." See *ibid.* And the court closed by concluding not that the BIA's decision was *correct*, but only that "the record here did not compel" a contrary conclusion. *Id.* at 13a.

That is *Chevron* in all but name. Indeed, prior First Circuit decisions made no secret that *Chevron* undergirds the court's deferential approach: The court has said that "[p]ersecution is a protean word, capable of many meanings," and that "[b]ecause the word 'persecution' is not defined by statute, it is in the first instance the prerogative of the Attorney General, acting through the BIA, to give content to it." *Bocova*

v. *Gonzales*, 412 F.3d 257, 263 (1st Cir. 2005) (citing *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)). That mode of analysis did not survive *Loper Bright*.

The First Circuit's deferential review thus rested on *Chevron*'s defunct method of interpretation and abdicated "the judicial role." *Loper Bright*, 603 U.S. at 385. The court never deployed "the traditional tools of statutory construction" to interpret the asylum statute. *Id.* at 401. Rather, it "declar[ed] a particular party's" approach to the statute "permissible," *id.* at 400, by concluding that the BIA's conclusions on past and future persecution were "reasonabl[e]," Pet. App. 11a; see *id.* at 9a. The decision below thus "adopt[ed] the construction given by" the Executive Branch, without deciding whether that construction was correct. *Loper Bright*, 603 U.S. at 386, 410 (quoting *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840)).

2. The First Circuit's decision cannot be justified on the theory that Congress delegated to the BIA the power to define the legal standard for persecution, because the INA says no such thing. Nothing in the statutory text amounts to the kind of delegation that *Loper Bright* acknowledged may be permissible.

The Solicitor General invokes the INA's provision stating that, on judicial review of a final order of removal, the agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); see Br. in Opp. 9-13. But that provision does not support deferring to the BIA here. See Pet. Br. 20-21, 29-32. *Loper Bright* itself distinguished between an agency's factual findings and its legal judgment about what the law means, holding that the APA mandated

deference to the former but not the latter. 603 U.S. at 387-392. The INA's command of deference to agency factfinding, like the APA's, comes nowhere close to a clear delegation of law-interpreting power.

Instead, the statutory structure points in the opposite direction. In addition to subjecting "findings of fact" to deferential review, 8 U.S.C. § 1252(b)(4)(B), the INA does the same for "a decision that an alien is not eligible for admission" and for the ultimate "discretionary judgment whether to grant" asylum, *id.* § 1252(b)(4)(C)-(D). But none of those provisions covers the asylum-eligibility question presented here, and the statute does *not* set a blanket deferential standard of review for all "questions of law"; instead, like the APA, the INA reserves such questions for courts. See *id.* § 1252(a)(2)(D). Nor does the INA authorize deference for "mixed questions of law and fact," which this Court has held "are always reviewable as questions of law under § 1252(a)(2)(D)." *Wilkinson* v. *Garland*, 601 U.S. 209, 218-219 (2024) (citing *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 225 (2020)). "The natural implication" of that silence "is that Congress did not intend for courts" to defer to the BIA's views on such questions. *Esteras* v. *United States*, 145 S. Ct. 2031, 2040 (2025); see also *Loper Bright*, 603 U.S. at 392 n.4.

Indeed, the question the First Circuit confronted here—whether the undisputed facts satisfy the definition of "persecution" under the INA—is precisely the kind of legal question to which the BIA is entitled no deference. See Pet. Br. 20-21, 29-32. This Court has twice held that a "questio[n] of law" under Section 1252 includes "the question whether a given set of facts meets a particular legal standard." *Guerrero-*

Lasprilla, 589 U.S. at 227; accord *Wilkinson*, 601 U.S. at 217. Far from delegating such questions to the BIA, the INA expressly reserves them for courts. 8 U.S.C. § 1252(a)(2)(D). And making that sort of legal judgment is a familiar task across a range of everyday judicial contexts, like motions to dismiss and summary judgment. See, *e.g.*, *Guerrero-Lasprilla*, 589 U.S. at 227-228 (collecting cases). The question in this case is of a piece: Deciding whether a given set of facts meets the legal standard for "persecution" is a quintessential "question of law under § 1252(a)(2)(D)," *Wilkinson*, 601 U.S. at 217—and "questions of law [a]re for courts to decide, exercising independent judgment," *Loper Bright*, 603 U.S. at 387.

At the very least, the INA lacks any clear statement delegating to the BIA the power to define "persecution." Particularly in light of *Guerrero-Lasprilla* and *Wilkinson*, the statute's mandate of deference for "findings of fact" does not unambiguously encompass that power. Without any such clear statement, *Loper Bright*'s presumption in favor of courts—not *Chevron*'s presumption in favor of agencies—controls.

II. Deference Is Particularly Inappropriate In BIA Cases Like This One

Loper Bright restored the primacy of the Judiciary in interpreting statutes. The Court also acknowledged that judges "exercising independent judgment" can nonetheless "accor[d] due respect to Executive Branch interpretations of federal statutes." 603 U.S. at 385. But not all agency interpretations pack the same punch. For example, courts historically gave more weight to agency interpretations crafted by those who were "masters of the subject" and those that were

"issued roughly contemporaneously with enactment of the statute and remained consistent over time." *Id.* at 386 (citation omitted). Even then, courts were not "at liberty" to "surrender" their "own judgment" or to let it be "supersede[d]" by an agency's view. *Id.* at 386-387 (quoting *United States* v. *Dickson*, 40 U.S. (15 Pet.) 141, 162 (1841) (Story, J.)).

The BIA's decision here carries none of the hallmarks of Executive Branch interpretations with the "power to persuade." *Loper Bright*, 603 U.S. at 388 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Its legal view of what "persecution" means is not "based upon * * * specialized experience"; does not reflect any "informed judgment" on policy issues; and does not demonstrate "thoroug[h]" or "consisten[t]" consideration of the issues at stake. *Ibid.* (quoting *Skidmore*, 323 U.S. at 139-140). The BIA's legal determination in this case therefore does not warrant any special respect—much less deference.

A. The BIA Lacks Relevant Special Expertise

When it comes to "resolving statutory ambiguities," "agencies have no special competence"; "[c]ourts do." *Loper Bright*, 603 U.S. at 400-401. Nor is the question at hand—whether a given set of facts amounts to "persecution" under the statute—the sort of "technical matter" where an agency's "body of experience and informed judgment" might prove persuasive. *Id.* at 402 (citation omitted).

The "expertise required to interpret the INA * * * does not require familiarity with technical or scientific information, nor with the workings of an industry, nor even, for the most part, with the mechanics of immigration enforcement." M. Sweeney, *Enforcing/Protec-*

tion: The Danger of Chevron *in Refugee Act Cases*, 71 Admin. L. Rev. 127, 174 (2019) (Sweeney). "[M]ost of the statutory ambiguities the BIA addresses in the INA" thus "do not implicate any technical or scientific expertise," either. S. Wadhia & C. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 Duke L.J. 1197, 1223 (2021) (Wadhia & Walker); see also *id.* at 1219 ("Job announcements for immigration judges * * * do not require any legal or policy expertise in immigration or foreign relations, or any other scientific or technical expertise."). Instead, interpreting the INA "demands expertise in legal analysis and the application of law to facts—precisely the sort of expertise that federal courts have" and the BIA often lacks. Sweeney 175.

Under *Chevron*, this Court deferred to the BIA where it "exercise[d] especially sensitive political functions that implicate questions of foreign relations." *Aguirre-Aguirre*, 526 U.S. at 425 (citation omitted). Such cases may still warrant a degree of judicial respect for the Executive Branch's judgment and expertise. *Aguirre-Aguirre* itself, for example, concerned a decision whether "to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States"—which "could affect our relations with that country or its neighbors," and for which "[t]he judiciary [wa]s not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *Id.* at 425. But not every immigration case implicates those concerns; indeed, "it is the very unusual case that affects anyone or anything other than the parties themselves." Sweeney 174-175. "The vast majority of im-

migration cases require expertise, not in foreign affairs, but rather in the legal interpretation of a complex statutory and regulatory scheme." *Ibid.*; see also, *e.g.*, M. Kagan, Chevron*'s Asylum: Judicial Deference in Refugee Cases*, 58 Hous. L. Rev. 1119, 1151-1152 (2021). In ordinary immigration cases like this one, the sole question concerns the meaning of text Congress enacted. Courts—not the BIA—are best suited to perform that task. And to the extent cases implicate foreign-policy concerns, Congress has accounted for those concerns by making the ultimate decision whether to grant asylum discretionary. See 8 U.S.C. § 1252(b)(4)(D). There is thus no need or basis to accord additional deference to the BIA's legal interpretations that Congress did not authorize.

B. The BIA's Decisions Are Often Thinly Reasoned And Inconsistent

On the whole, the BIA's decisions lack the thorough reasoning that could have the "power to persuade" a court. *Loper Bright*, 603 U.S. at 388 (quoting *Skidmore*, 323 U.S. at 140). The BIA has been subject for decades to stinging criticism for the quality of its analysis. Judicial "criticisms of the Board and of the immigration judges have frequently been severe," and courts have repeatedly faulted the agency for adjudications that "fal[l] below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005) (collecting cases); see also, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Blackmun, J., concurring) (chastising the agency for "years of seemingly purposeful blindness" in interpreting statutory provision "entrusted to its care"); M. Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 Drexel L.

Rev. 101, 153-154 (2012) (citing cases "reflect[ing] deeper systemic doubts" about the quality of immigration judges' decisionmaking). These critiques may be the consequence of an agency overwhelmed by a staggering caseload, which is "further exacerbated by the fact that immigration judges and BIA members face pressure to meet quotas and follow guidelines set by the attorney general." Wadhia & Walker 1229-1230.

The agency's rulings are also notoriously inconsistent, further undermining any persuasive value. One study of asylum cases, for example, found "amazing disparities in grant rates, even when different adjudicators in the same office each considered large numbers of applications from nationals of the same country." J. Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 296 (2007); see *id.* at 302. Similar inconsistencies plague the BIA: In one case, for instance, the BIA adopted *three different* definitions of the same statutory phrase, leaving the court to consider (and reject) the agency's "most recent definition." *Valenzuela Gallardo* v. *Barr*, 968 F.3d 1053, 1057-1059 (9th Cir. 2020). In another, the BIA "invoked *Chevron* to overrule a judicial precedent on which many immigrants had relied," and "then sought to apply its new interpretation retroactively to punish those immigrants." *Loper Bright*, 603 U.S. at 440 (Gorsuch, J., concurring) (citing *De Niz Robles* v. *Lynch*, 803 F.3d 1165 (10th Cir. 2015)). Consistency is simply not a feature of BIA adjudication, so courts cannot rely on the BIA to speak with one voice on questions of law. And "whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks

from both sides of its mouth, articulating no single position on which it might be held accountable." *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497, 520 (2018).

Exacerbating these problems is the BIA's heavy reliance on resolving cases through unpublished, non-precedential opinions. "[T]he vast majority of the final decisions issued by the BIA each year" are unpublished; they are "cited and relied upon by the BIA itself, by immigration judges, and by lawyers representing the government in immigration proceedings," but they "are not readily available to lawyers representing clients in immigration proceedings." *New York Legal Assistance Group* v. *BIA*, 987 F.3d 207, 208-209 (2d Cir. 2021). These decisions—including the one in this case—are often rendered by a single BIA member, rather than the full Board. See 8 C.F.R. § 1003.1(e). As the view of a single individual, they may not reflect the considered judgment of the Executive Branch. And even under *Chevron*, these single-member, unpublished, non-precedential decisions should not have garnered deference, see, *e.g.*, *Quinchia* v. *U.S. Attorney General*, 552 F.3d 1255, 1258 (11th Cir. 2008); Pet. Br. 28-29—but they do now, at least under the First Circuit's approach.

The BIA's regular issuance of such decisions leads to even more inconsistent adjudication of cases. Unpublished opinions "frequently conflict with each other or with published decisions," and the BIA "rarely, if ever, explains why two seemingly similar cases should have such disparate outcomes." F. Sayed, *The Immigration Shadow Docket*, 117 Nw. U. L. Rev. 895, 897 (2023). By disposing of so many cases in this way, the BIA has "all but abandoned" any serious attempt "to provide guidance as to the meaning of vague, often

complicated statutory language and to ensure uniformity in the application of immigration law across the nation." *Id.* at 898. In doing so, the BIA has "stunt[ed] the development and understanding of immigration law and likely contribute[d] to well-documented disparities in its application by immigration adjudicators." *Ibid.* That sort of adjudication should not be treated as persuasive.

* * *

The BIA's decision here does not carry any of the "factors which" could even "give it power to persuade." *Loper Bright*, 603 U.S. at 388 (citation omitted). The First Circuit erred by according it controlling weight.

III. THE RULE OF LENITY FURTHER PRECLUDES DEFERENCE IN THIS CONTEXT

Deference to the BIA's interpretation of what constitutes "persecution" is also inconsistent with the rule of lenity. If "persecution" is susceptible of multiple reasonable interpretations, then the rule of lenity required the First Circuit to resolve the ambiguity *against* the government—not in its favor.

1. "The 'rule of lenity' is a new name for an old idea—the notion that 'penal laws should be construed strictly.'" *Wooden* v. *United States*, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (quoting *The Adventure*, 1 F. Cas. 202, 204 (No. 93) (CC Va. 1812) (Marshall, C.J.)). The rule is a tool of construction "perhaps not much less old than construction itself." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Under the rule, "[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*

296 (2012) (*Reading Law*). So "if two rational readings are possible, the one with the less harsh treatment of the defendant prevails." *Ibid.*

The rule of lenity is not limited to criminal cases: "Historically, lenity applied to all 'penal' laws—that is, laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines." *Wooden*, 595 U.S. at 396 n.5 (Gorsuch, J., concurring). In particular, this Court has long applied the rule in removal proceedings, giving it force as "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001) (citation omitted). Deportation, after all, "is a drastic measure and at times the equivalent of banishment or exile"; it is "the forfeiture for misconduct of a residence in this country." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948) (citation omitted). Removal from the United States thus practically operates as a "penalty." *Ibid.* Courts must therefore "resolve * * * doubts in favor" of an alien facing removal, and may not "assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Ibid.*; see also, *e.g.*, *Barber* v. *Gonzales*, 347 U.S. 637, 642-643 (1954) (laws governing removal "should be strictly construed").

2. The First Circuit's approach was erroneous under any conception of the rule of lenity. The standard for invoking the rule has been articulated in different ways. This Court has often said that the rule applies when, after all the "traditional canons of statutory construction" have been exhausted, a "grievous ambiguity" remains, and the court "can make no more than a guess as to what Congress intended." *Shular* v.

United States, 589 U.S. 154, 166-167 (2020) (Kavanaugh, J., concurring) (citations omitted); see *id.* at nn. 1-2 (collecting cases). Some Members of this Court have argued that a "grievous" ambiguity is unnecessary and that the rule operates to resolve "*all reasonable doubts*" about a penal statute's meaning against the government. *Wooden*, 595 U.S. at 392-393 (Gorsuch, J., concurring in the judgment) (quoting *Harrison* v. *Vose*, 50 U.S. (9 How.) 372, 378 (1850)).

The distinction in formulations makes no difference here, however, because under either one the decision below is wrong. The First Circuit's substantial-evidence standard requires upholding the BIA's application of the statute unless "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); see Pet. App. 9a-10a. In other words, so long as the BIA could cobble together *some* plausible basis for its position, it would be entitled to deference. That is clearly incompatible with lenity: It is not enough that the government's interpretation "might find support in logic," *Fong Haw Tan*, 333 U.S. at 10, or that its reading is "rational," *Reading Law* 296. That outcome would allow even "grievous" statutory ambiguities to be resolved in the *agency's* favor, *Shular*, 589 U.S. at 167-168 (Kavanaugh, J., concurring), so long as the government offered some minimally rational argument. That cannot be right.

If the rule of lenity means anything, it must mean that courts cannot defer to the government's interpretation of a removal statute merely because *some* reason can be posited in support of that position. The First Circuit should have resolved any "lingering ambiguities" about what the statute meant "in favor of the alien," not the BIA. *St. Cyr*, 533 U.S. at 320.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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