No. 24-777

IN THE
Supreme Court of the United States

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

v.

PAMELA BONDI, UNITED STATES ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PROFESSOR NANCY MORAWETZ AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Nancy Morawetz is a Professor of Law at New York University Law School, where she teaches and writes about immigration law. She has written extensively on the scope of judicial review, including the history of judicial deference

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amicus* and her counsel made such a monetary contribution.

to Executive Branch interpretations of the Immigration and Nationality Act—the question at the heart of this case.[2]

SUMMARY OF ARGUMENT

The government has not disputed in this case that courts owe no special deference to an agency's interpretation of the immigration laws. As petitioners explain, that concession disposes of this case. Whether a given set of facts constitutes "persecution" under the Immigration and Nationality Act (INA) is a question of law. Pet. Br. 18-29, 32-41. With *Chevron*'s demise, an agency's answer to that question is entitled to no deference in court. See *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 436 (2024).

In the lead-up to this Court's decision in *Loper Bright*, however, the government occasionally invoked 8 U.S.C. § 1103(a)(1)—a provision that gives "controlling" force to the Attorney General's views on "questions of law" in immigration matters—as a *statutory* basis for judicial deference.[3] The government has since dropped that argument, and for good reason. Section 1103(a)(1)'s text, context and history make clear that the Attorney General's views are controlling only *within* the Executive Branch. See *Ruiz* v. *U.S. Att'y Gen.*, 73 F.4th 852, 864 (11th Cir. 2023) (Newsom, J., concurring). It does not and was

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[2] This brief reflects Professor Morawetz's views only; it does not reflect those of New York University Law School.

[3] Among other things, the Solicitor General twice invoked § 1103(a)(1) as a reason not to hold petitions for certiorari in immigration cases in abeyance pending the outcome of *Loper Bright*. See Br. in Opp. at 13 n.3, *Diaz-Rodriguez* v. *Garland*, 55 F.4th 697 (9th Cir. 2022) (No. 13-73719), petition for cert. filed, No. 22-863 (U.S. Mar. 8, 2023), cert. granted, vacated, and remanded, 2024 WL 3259656 (July 2, 2024); Br. in Opp. at 25, *Debique* v. *Garland*, 58 F.4th 676 (2d Cir. 2023) (No. 21-6208), petition for cert. filed, No. 23-189 (U.S. Aug. 25, 2023), cert. denied, 2024 WL 3259698 (July 2, 2024).

never intended to displace Article III courts' obligation to independently "say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803).

First enacted in 1952, §1103(a)(1) allocates authority among the various Executive Branch agencies responsible for administering the immigration laws, with the proviso that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." Immigration and Nationality Act of 1952, Pub. L. No. 82-414 §103(a), 66 Stat. 163, 173. That proviso put an end to decades of independent and occasionally conflicting interpretations of the immigration laws by the Departments of Justice, State, and Labor, among others. See Nancy Morawetz, *Immigration Law after* Loper Bright*: The Meaning of 8 U.S.C. §1103(a)(1)*, 99 N.Y.U. L. Rev. 282, 291-296 (2024). But it had no effect on courts. Indeed, the INA's express provision for judicial review of legal questions would make little sense if Congress thought §1103(a)(1) made the Attorney General's views binding on the judiciary.

This Court's immigration decisions confirm that §1103(a)(1) has never been understood as a limitation on the scope of judicial review. The Court's pre-*Chevron* cases routinely disagreed with the Executive without so much as *citing* the provision. And while some later decisions invoked §1103(a)(1) as evidence that the Attorney General's interpretations of the INA were entitled to *Chevron* deference, this Court never suggested that the provision offered any basis for *statutory* deference.

A contrary reading would raise serious constitutional concerns. Because §1103(a)(1) purports to make the Attorney General's legal determinations "controlling" without caveat, applying it to Article III courts would transform their decisions into advisory opinions subject to

Executive veto. And it would vest a political appointee with the final say on the meaning of myriad statutory provisions authorizing deportation, imprisonment, and even the death penalty.

ARGUMENT

I. Section 1103(a)(1) Evinces No Intent To Limit Judicial Review of Legal Questions

For over a century, multiple Executive Branch agencies have shared responsibility for administering the country's immigration laws. The provision at the heart of this case is a prime example. Asylum officers in the Department of Homeland Security and immigration judges in the Department of Justice are asked every day to decide whether a given set of facts constitutes persecutionunder the INA. See 8 U.S.C. §§1158(a), 1229a; Gov't Br. in Resp. at 1-2. Section 1103(a)(1) ensures that these shared responsibilities do not create *intra*-branch conflict by providing that the Attorney General's "determination" on such "questions of law" is "controlling." 8 U.S.C. § 1103(a)(1). But § 1103(a)(1) never mentions courts, and the provision's history and context demonstrate that Congress never intended it to limit the scope of judicial review.

A. Section 1103's Text Makes Clear That the Attorney General's Determinations Are "Controlling" Only on Executive Branch Actors, Not Courts

Section 1103 addresses the "[p]owers and duties" of the various Executive Branch officials who administer and enforce the immigration laws. 8 U.S.C. § 1103. Subsection (a)(1) provides that:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as

> this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

8 U.S.C. § 1103(a)(1).

While the first part of the paragraph allocates "authority to administer and enforce immigration laws" to the Secretary of Homeland Security and other Executive actors, the last clause "limits that authority." *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 591 U.S. 1, 25 (2020). It does so by "specifying that, with respect to 'all questions of law,' the determinations of the Attorney General 'shall be controlling.'" *Ibid* (quoting 8 U.S.C. § 1103(a)(1)); see Bryan A. Garner & Antonin Scalia, *Reading Law* ch.21 (2012) ("the word *provided* * * * introduces a condition" that "modifies the immediately preceding language").

By vesting that authority in a proviso, however, Congress limited its reach. "The grammatical and logical scope of a proviso is confined to the subject-matter of the principal clause to which it is attached." *Abbott* v. *United States*, 562 U.S. 8, 30 (2010) (internal quotation marks and ellipses omitted). Where, as here, a proviso "appears in the same subsection (and the same sentence) as" text accomplishing some other purpose, "an ordinary reader would naturally presume that the proviso modifies *only*" that other text. *Martin* v. *United States*, 145 S. Ct. 1689, 1698 (2025) (emphasis added).

"Nothing about [§1103(a)(1)]'s proviso gives [any] reason to think it works differently." *Martin*, 145 S. Ct. at

1698. "It appears in the same subsection (and the same sentence) as" the assignment of enforcement and administration responsibility *among* Executive actors, *id.* at 1697, in a section addressed exclusively to Executive authority, see 8 U.S.C. §1103(a)(2)–(7) (describing additional responsibilities of the Secretary of Homeland Security); *id.* §1103(a)(10)–(11) (same for the Attorney General); *id.* §1103(a)(8)–(9) (describing responsibilities that the Attorney General may delegate to foreign officials). Whatever force Congress meant to give to the Attorney General's legal determinations with respect to those other Executive Branch officers, there is no reason to think it meant for them to bind the courts.

B. The INA's History and Structure Confirm That Section 1103(a)(1) Has No Bearing on Judicial Review

Section 1103(a)(1)'s text reflects its historical and statutory context. Congress enacted §1103(a)(1)'s predecessor provision against a backdrop of bureaucratic infighting among the many Executive Branch actors responsible for administering the immigration laws. Section 1103(a)(1) ensured, for the first time, that the Executive would be able to speak with one voice. But the proviso was just a small part of a much larger overhaul. In the same Act, Congress also explicitly addressed judicial review of agency action, including the Attorney General's legal determinations, in provisions that would have made no sense if those determinations were "controlling" on courts. The INA's system of judicial review has only grown more intricate and detailed since. Yet Congress has left the proviso untouched even as it has amended other language in §1103(a)(1)—further confirming that Congress never intended to extend the Attorney General's authority over "questions of law" to the Judicial Branch.

1. Until 1952, no agency could claim the last word on immigration matters. The Departments of State, Labor, and Justice promulgated their own regulations, implementing those portions of the immigration laws they administered. See Morawetz, *supra*, at 291-293; Laurel Leff, *'Death by Bureacracy': How the U.S. State Department Used Administrative Discretion to Bar Refugees from Nazi Europe*, 34 Yale J. L. & Human. 389, 393 (2023) ("Responsibility for immigration was divided among [separate] Cabinet departments, with State issuing visas abroad, Labor deciding admittance at U.S. ports of entry through its Immigration and Nationalization Service unit, and Justice spelling out rules of enforcement."). That was at least partly by design. When Congress first delegated substantial immigration responsibility to the State Department in 1924, then-Secretary of State Charles Evans Hughes successfully lobbied against requiring State Department officials to follow regulations promulgated by other departments. Morawetz, *supra*, at 291-292 & n.57; see Letter from Charles Evans Hughes, Sec'y of State, to Rep. Johnson (Feb. 8, 1924), reprinted in H.R. Rep. No. 68-350, pt. 2, at 29 (1924), https://perma.cc/4SHN-NWEY.

This balkanized approach occasionally led to awkward intra-branch conflicts. In 1924, for example, the Solicitor General filed a brief in this Court articulating the views of the Department of Labor, alongside an appendix setting forth the conflicting views of the Secretary of State—"in order that this Court may have the benefit of comparing them." See Brief on Behalf of the Appellee at 6-7, *Cheung*

Sum Shee v. *Nagle*, 268 U.S. 336 (1925) (No. 769), https://perma.cc/LKK5-XVFK.[4]

Congress solved that problem when it overhauled the country's immigration laws in 1952. See Immigration and Nationality Act of 1952 § 103(a), 66 Stat. at 173. Among the provisions in the 1952 Act was the predecessor of today's 8 U.S.C. § 1103(a)(1). Tracking the structure of the present-day statute, § 103(a) of the Act reflected that the Attorney General had primary responsibility for administering the immigration laws, "except insofar" as those laws "relate[d] to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling." § 103(a), 66 Stat. at 173.[5]

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[4] Such disputes between the Departments of Labor and State were not uncommon. In the 1930s, then-Secretary of Labor Frances Perkins unsuccessfully "argued to State [Department] officials and to [President] Roosevelt that Labor, not State," should be responsible for interpreting and applying a provision of immigration law restricting entry to those "likely to become a public charge." Leff, *supra*, at 398, 406; see Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874. Indeed, "'[t]he two departments argued not only over jurisdiction but also over almost every immigration issue.'" Leff, *supra*, at 393 n.15 (quoting Barbara McDonald Stewart, *United States Government Policy on Refugees from Nazism, 1933-1940* 196 (1982)).

[5] Several decades later, President Carter accomplished something similar outside the immigration context, ordering "Executive agencies whose heads serve at the pleasure of the President" and which "are unable to resolve * * * a legal dispute" to "submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere." Exec. Order No. 12,146 § 1-402, 44 Fed. Reg. 42657 (Jul. 18, 1979). The Attorney General had long played an important *advisory*

2. At the same time as it passed § 1103(a)(1)'s predecessor, Congress addressed judicial review of immigration-related Executive action in ways that would make little sense if the 1952 Act already made the Attorney General's legal determinations "controlling" on courts. Among other things, the Act explicitly addressed judicial review of certain of the Attorney General's legal "determination[s] and ruling[s]." 8 U.S.C. § 1103(a)(1). These included determinations that a person claiming to be a United States national was "not entitled to admission to the United States," § 360(c), 66 Stat. at 273-274, and decisions to detain a noncitizen during deportation proceedings, § 242(a), 66 Stat. at 208-209.

Congress would continue to refine the scope of judicial review over the coming decades. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 295-298 (2001) (discussing this history); Immigration and Nationality Act of 1961 § 5(a), Pub. L. 87-301, 75 Stat. 650, 651-653 (setting up the current system for judicial review of deportation orders in the courts of appeals); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 306, Pub. L. 104-208, 110 Stat. 3009-546, 3009-607-612 (amending venue, timing, and other requirements for obtaining judicial review of orders of removal and limiting review of certain discretionary decisions by the Attorney General); Act of May 11, 2005, Pub. L. 109-13 § 106, 119 Stat. 231, 310 (providing for judicial review in the courts of appeals of all "questions of law"). And although Congress has also amended what is

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role in resolving inter-departmental legal disputes; since 1789, Congress required him to "give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93; see also 28 U.S.C. §§ 511–512.

now § 1103(a)(1), it left the proviso, making the Attorney General's legal determinations "controlling," unchanged.[6]

Today, 8 U.S.C. § 1252 comprehensively governs judicial review of orders of removal through a scheme that would border on incoherent if § 1103(a)(1)'s proviso could be read to make the Attorney General's legal determinations controlling on courts. Section 1252 provides that, with very limited exceptions, "[n]othing" in "*any*" INA provision "which limits" or even "eliminates judicial review" of agency decisions "shall be construed as precluding review of constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D) (emphasis added). That rule of construction would make little sense if a single clause tucked in a provision that does not mention judicial review gave the Attorney General the final, "controlling" word on "*all* questions of law" in court. 8 U.S.C. § 1103(a)(1) (emphasis added).

3. Reading § 1103(a)(1) to reach courts is even more absurd in the context presented by this case. Section 1252 imposes a litany of conditions on judicial review of orders of removal like the one at issue here. It specifies every detail of the process—down to requiring the courts of appeals to review any proceeding "on a typewritten record and on typewritten briefs." 8 U.S.C. § 1252(b)(2). And it cabins the substantive scope of review, confining the

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[6] Although § 1103(a)(1) was most recently amended in 2003, the amendment merely transferred enforcement and administration responsibilities from the Department of Justice to the newly created Department of Homeland Security. Act of Feb. 20, 2003, Publ. L. 108-7 § 105, 117 Stat. 11, 531. The proviso, making the Attorney General's *legal* interpretations "controlling," remained unchanged. *Ibid.* Earlier amendments also left the proviso unchanged. See Act of Nov. 25, 2002, Pub. L. 107-296 § 1102, 116 Stat. 2135, 2273-2274; Illegal Immigration Reform and Immigrant Responsibility Act § 372, 110 Stat. at 3009-646.

reviewing court to "the administrative record on which the order of removal is based," *id.* § 1252(b)(4)(A), and giving "conclusive" force to "administrative findings of fact" unless no reasonable factfinder could have made them, *id.* § 1252(b)(4)(B).

Nothing in that highly reticulated scheme requires courts to accept as "controlling" the Attorney General's view of the *law*. To the contrary, even on the ultimate question of "whether to grant" asylum to an eligible applicant, the Attorney General's "discretionary judgment" is "conclusive *unless* manifestly contrary to the law and an abuse of discretion." *Id.* § 1252(b)(4)(D) (emphasis added). The Attorney General's judgment could never be "contrary to the law"—and § 1252(b)(4)(D) would have no force—if her view of the law were "controlling" on courts.

Congress ordinarily "'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'" *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 515 (2018) (quoting *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). There is no reason to think it did so here.

II. Precedent Confirms That Courts Have An Obligation To Independently Review the Attorney General's Legal Determinations

The Court's pre-*Chevron* cases refute any suggestion that § 1103(a)(1)'s proviso offers a free-standing basis for judicial deference. And although this Court's later decisions occasionally cited § 1103(a)(1) as one reason among others to defer to the Board of Immigration Appeals' interpretations of the INA under *Chevron*, those cases do not suggest that § 1103(a)(1) does anything more than allocate authority among Executive Branch officers.

A. Before *Chevron*, this Court interpreted provisions of the immigration laws without any special deference. That was true both before *and* after Congress passed § 1103(a)(1)'s predecessor provision in 1952—confirming that the amendment did not alter the scope of judicial review.

Before 1952, this Court routinely exercised independent legal judgment when interpreting the immigration laws. In *Bridges* v. *Wixon*, 326 U.S. 135 (1945), for example, it held that a noncitizen had "been ordered deported on a misconstruction of the term 'affiliation' as used in [a] statute" authorizing deportation based on affiliation with the Communist party. *Id.* at 156. The Court started with its own analysis of the ambiguous provision, based on statutory language, precedent, legislative history, and attention to practical consequences. *Id.* at 142-144. Only *then* did the Court consider the "construc[tion] * * * by the Attorney General," and only to decide whether he had correctly applied the statute to the facts at hand. *Id.* at 144. Similarly, in *Cheung Sum Shee*, this Court did not even acknowledge that the views of the Departments of Labor and State were different, much less suggest that deference to either agency would be appropriate. 268 U.S. at 345-346. See also *Hansen* v. *Haff*, 291 U.S. 559, 562 (1934) (rejecting the government's determination that a given set of facts demonstrated that a noncitizen had entered the country "for an immoral purpose as defined by the statute").

The Court's approach did not change after Congress made the Attorney General's legal opinions "controlling" in 1952. In *Bonetti* v. *Rogers*, 356 U.S. 691 (1958), this Court considered a "narrow and vexing problem of statutory construction" relating to which of several entries counted as "the time of entering the United States" for the

purpose of a statute authorizing deportation of any noncitizen who was a communist or became one after entering. *Id.* at 692. This Court found that the relevant statutes were, "to say the least, ambiguous upon the question we must now decide." *Id.* at 696. Despite that ambiguity, it *disagreed* with the Attorney General's interpretation—concluding that the "time of entering" "refers to the time the alien was lawfully permitted to make the entry and re-entry under which he acquired the status and right of lawful presence that is sought to be annulled by his deportation," and not to any earlier entry. *Id.* at 700.

Nor was *Bonetti* an outlier. In case after case following the 1952 Act, this Court analyzed statutory interpretation questions under the immigration laws without affording the Attorney General's legal views any special deference or even citing the 1952 Act's proviso. *E.g.*, *Rowoldt* v. *Perfetto*, 355 U.S. 115, 119-121 (1957) (disagreeing with the government's view of what was required to establish a noncitizen had been "a member" of the Communist party); *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462-463 (1963) (again disagreeing with the government's view that the return from few-hours trip to Mexico sufficed to constitute an "entry" to the United States); *Costello* v. *INS*, 376 U.S. 120, 125-132 (1964) (further disagreeing with the government's view about whether a provision allowing deportation following conviction for various crimes applied to crimes committed while a citizen).

Even this Court's decisions applying something like *Skidmore* deference confirm that § 1103(a)(1) does not vest the Attorney General's views with "controlling" weight. In *Saxbe* v. *Bustos*, 419 U.S. 65 (1974), this Court considered whether noncitizens who commuted from Canada or Mexico for daily or seasonal work qualified for a form of special "entry without the usual documentation

requirements." *Id.* at 66. In resolving that question, this Court gave "great weight" to longstanding "administrative practice"—especially since Congress had "revisited the Act and left the [administrative] practice untouched." *Id.* at 73-74; see *Loper Bright*, 603 U.S. at 385-386. But the *Saxbe* Court did not so much as cite § 1103(a)(1)'s predecessor provision, much less suggest that any longstanding administrative practice was "controlling."

B. Later decisions of this Court occasionally cited § 1103(a)(1) as evidence that "'principles of *Chevron* deference'" apply to the INA or to determine *which* agency was entitled to *Chevron* deference. *Negusie* v. *Holder*, 555 U.S. 511, 516 (2009) (quoting *INS* v. *Aguirre-Aguire*, 526 U.S. 415, 424 (1999)). But that is as far as those decisions go. None analyzed or discussed § 1103(a)(1) in any detail—let alone suggested that it supplied an independent basis for judicial deference. That made sense. *Chevron* required courts to defer to "an agency's construction of the statute which it administers." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). And, even then, deference was appropriate only insofar as Congress intended to allow the agency to "speak with the force of law." *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). Thus, *Aguirre-Aguirre* cited a pre-Department-of-Homeland-Security version of the statute, which "charged" the Attorney General with primary responsibility for "the administration and enforcement" of the INA, as a basis to afford *the Attorney General* (rather than some other Executive-Branch actor) the deference required under *Chevron*. *Aguirre-Aguirre*, 526 U.S. at 424. With *Chevron*'s overruling, those decisions offer no basis for reading § 1103(a)(1) to affect judicial review.

III. According "Controlling" Weight to the Attorney General's Legal Determinations Would Raise Serious Constitutional Concerns

Text and precedent aside, reading § 1103(a)(1) to make the Attorney General's legal determinations "controlling" on the courts "would almost certainly render it unconstitutional." *Ruiz*, 73 F.4th at 864 (Newsom, J., concurring); see *Kennedy* v. *Braidwood Mgmt., Inc.*, 145 S. Ct. 2427, 2451 (2025) (canon of "constitutional avoidance" counsels against adopting an interpretation that might violate the Constitution).

A. By its terms, § 1103(a)(1) is categorical. It makes the "determination and ruling by the Attorney General with respect to all questions of law * * * *controlling*"—"controlling" without qualification. Cf. *Regents of Univ. of Calif.*, 591 U.S. at 25 (the Secretary of Homeland Security "was *bound* by the Attorney General's legal determination" under § 1103(a)(1)). Applied to the courts, that categorical language is a problem. Our constitutional order is predicated on the understanding that courts will seek the "best meaning" of legislative enactments through "independent legal judgment." *Loper Bright*, 603 U.S. at 400-401.

Giving "controlling" force to the Attorney General's construction of the INA would not only require judges to abdicate their constitutional role, it would make judicial interpretations subject to Executive Branch override. See *Loper Bright*, 603 U.S. at 428 (Gorsuch, J., concurring); *Ruiz*, 73 F.4th at 864 (Newsom, J., concurring). For example, nothing would stop the Attorney General from overruling a judicial decision in a particular case simply by recharacterizing the issue as "legal" and issuing a contrary, "controlling" decision on remand. That would violate the centuries-old principle that "Congress cannot vest

review of the decisions of Article III courts in officials of the Executive Branch." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (discussing *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792)).

B. Allowing the Attorney General to control this and other courts' interpretations of the immigration laws is also incompatible with the Due Process Clause's guarantee of fair and impartial adjudication. It "would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch * * * the very opposite of the separation of powers that the Constitution demands." *SEC* v. *Jarkesy*, 603 U.S. 109, 140 (2024); *cf. id.* at 149 (Gorsuch, J., concurring) ("The Fifth Amendment's Due Process Clause" requires review by "independent judges" before the government may "deprive anyone of 'life, liberty, or property.'"); *id.* at 174 n.4 (Sotomayor, J., dissenting) (independent "[j]udicial review of * * * agency decisions allows Congress to avoid any due process concerns that might arise from having executive officials deprive someone of their property without review in an Article III court").

The due process implications are particularly staggering when one considers that the INA includes *criminal* as well as civil prohibitions. *E.g.*, 8 U.S.C. §1325(a) (first "offense" of unlawful entry punishable by up to six months imprisonment, and subsequent "offense[s]" punishable by up to two years); *id.* §1325(c) ("enter[ing] into a marriage for the purpose of evading any provision of the immigration laws" punishable by up to 5 years' imprisonment); see also 8 U.S.C. §1101(a)(43) (defining the term "aggravated felony"); *id.* §1227(a)(2)(A)(iii) (making a conviction for an aggravated felony a deportability ground); *id.* §1326(b)(2) (authorizing imprisonment of up to 20 years for illegal reentry after

removal for an aggravated felony conviction). Even in *Chevron*'s heyday, this Court "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). But § 1103(a)(1) draws no distinction between civil and criminal provisions. 8 U.S.C. § 1103(a)(1) (defining the scope of the provision as all laws in chapter 12 of Title 8 "and all other laws relating to the immigration and naturalization of aliens"). That includes provisions that define death-eligible felonies that could be charged against American citizens. *E.g.*, *id.* § 1324(a)(1)(B)(iv) (authorizing death or life-imprisonment for smuggling noncitizens if the violation "result[s] in the death of any person"). Giving the Executive the last word on the scope of such provisions would be fundamentally at odds with the judiciary's role.

CONCLUSION

Section 1103(a)(1) cannot save the judgment below. That provision makes the Attorney General's legal determinations controlling *within* the Executive Branch. It cannot be read to take back what *Loper Bright* returned

to the courts—the independent obligation to "say what the law is." *Marbury*, 5 U.S. at 177. Vacatur is warranted.

Respectfully Submitted.

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