No. 17-1212

In the Supreme Court of the United States

VICTOR GARCIA GARCIA, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, and regulations interpreting it, bar an alien whose prior removal order has been reinstated from applying for asylum in the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 856 F.3d 27. The decision of the Board of Immigration Appeals (Pet. App. 71a-74a) and the decision and order of the immigration judge (Pet. App. 75a-86a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2017. A petition for rehearing was denied on September 25, 2017 (Pet. App. 87a-89a). On December 14, 2017, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including February 22, 2018, and the petition was filed on February 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Since 1950, the immigration laws have provided for reinstatement of a previous order of removal against an alien who illegally reentered the country after having been removed. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 33 (2006) (discussing the Internal Security Act of 1950 (ISA), ch. 1024, § 23(d), 64 Stat. 1012 (8 U.S.C. 156(d) (Supp. IV 1950))). Congress adopted the reinstatement provision as part of broader legislation aimed at "provid[ing] more effective control over, and * * * facilitat[ing] the deportation of, deportable aliens." H.R. Conf. Rep. No. 3112, 81st Cong., 2d Sess. 59 (1950). As originally enacted, the reinstatement authority was limited to particular categories of aliens who had illegally reentered the country, including aliens whose deportation was based on their involvement in narcotics trafficking, crimes of moral turpitude, or subversive activity. See ISA § 23(c), 64 Stat. 1012 (adding 8 U.S.C. 156(c) (Supp. IV 1950)). Deportation of other illegal reentrants was conducted pursuant to the provisions governing deportation of aliens more generally. See 8 U.S.C. 155 (1946 & Supp. IV 1950).

When Congress comprehensively revised the immigration laws in the Immigration and Nationality Act (INA or Act), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), it reenacted the reinstatement provision in revised form. See § 242(f), 66 Stat. 212 (8 U.S.C. 1252(f) (1952)). The reinstatement authority was again confined to certain categories of illegal reentrants, including aliens who had committed specified crimes, had falsified documents, or had endangered national security. See *ibid.*; § 242(e), 66 Stat. 211 (8 U.S.C. 1252(e) (1952)).

The reinstatement provision remained unchanged until 1996, when Congress again enacted comprehensive revisions to the immigration laws in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. IIRIRA repealed the former reinstatement provision and replaced it "with one that toed a harder line." *Fernandez-Vargas*, 548 U.S. at 34. The resulting provision, 8 U.S.C. 1231(a)(5), remains unchanged today. It states:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

Ibid.[1]

Section 1231(a)(5) differs from the earlier reinstatement statute in three principal respects. First, the reinstatement authority now extends to all individuals previously removed or who departed voluntarily under an order of removal. Second, the reinstatement provision now makes explicit that such an illegal reentrant's

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[1] Pursuant to the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*, responsibility for the removal of aliens was transferred from the Attorney General to the Secretary of Homeland Security, see 6 U.S.C. 251(2) (Supp. II 2002), 8 U.S.C. 1103(a), although the Attorney General retains responsibility for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals, see 8 U.S.C. 1103(g). See generally 68 Fed. Reg. 9824 (Feb. 28, 2003).

previous order of removal is not subject to reopening or review. Finally—and of principal relevance here—the reinstatement provision now provides that an illegal reentrant whose prior order of removal is reinstated is "not eligible and may not apply for any relief under this chapter," 8 U.S.C. 1231(a)(5), *i.e.*, Chapter 12 of Title 8 of the United States Code, which includes 8 U.S.C. 1101-1537 (2012 & Supp. IV 2016). See *Fernandez-Vargas*, 548 U.S. at 35.

b. Asylum is a form of discretionary relief governed by Chapter 12 of Title 8 of the United States Code. See 8 U.S.C. 1158. An alien is eligible for asylum if he demonstrates, *inter alia*, that he is a "refugee," *i.e.*, he is "unable or unwilling to return to" his country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A); see 8 U.S.C. 1158(a)(1) and (b)(1)(B)(i).

Since the Refugee Act of 1980 (Refugee Act), Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. 1158 has governed asylum procedures in the United States. As originally enacted, Section 1158(a) directed the Attorney General to establish "a procedure for an alien [who is] physically present in the United States * * * , irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee." Refugee Act § 201(b), 94 Stat. 105 (8 U.S.C. 1158(a) (Supp. IV 1980)). Congress later amended the statute, adding a provision at 8 U.S.C. 1158(d) (Supp. II 1990) to prevent aliens convicted of aggravated felonies from applying for or being granted

asylum, notwithstanding Subsection (a). See Immigration Act of 1990, Pub. L. No. 101-649, § 515(a)(1), 104 Stat. 5053.

In IIRIRA, Congress rewrote the asylum provision, with the new Section 1158(a)(1) providing that "[a]ny alien who is physically present in the United States * * * , irrespective of such alien's status, may apply for asylum in accordance with this section." § 604(a), 110 Stat. 3009-690. The ability to apply for asylum was limited by a list of exceptions, 8 U.S.C. 1158(a)(2) (Supp. II 1996), and the authority to grant asylum was limited by a different list of exceptions, rules, and limitations, 8 U.S.C. 1158(b)(2) (Supp. II 1996). Section 1158(b)(2)(C) further provides that "[t]he Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)." 8 U.S.C. 1158(b)(2)(C).

c. In addition to asylum, two types of protection from removal are relevant here. See *Ramirez-Mejia* v. *Lynch*, 794 F.3d 485, 489 (5th Cir. 2015) (distinguishing between these forms of "protection" and asylum "relief"). First, statutory withholding of removal is governed by 8 U.S.C. 1231(b)(3)(A), which provides, with certain exceptions, that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion"—the same five enumerated grounds as in the asylum statute. Withholding of removal differs from asylum because, *inter alia*, withholding of removal is mandatory if certain conditions are met; it prevents removal only to the particular country where the alien

would be threatened with persecution and does not afford the alien a general right to remain in the United States; the alien must meet a higher standard of proof; and the one-year time limit applicable to asylum applications, 8 U.S.C. 1158(a)(2)(B), does not apply. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419-420 (1999) (distinguishing between asylum and withholding of removal); cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

Second, federal regulations implementing obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 20 (1988), 1465 U.N.T.S. 85, 114, also protect an alien from removal to a country if the alien demonstrates that "it is more likely than not that he * * * would be tortured." 8 C.F.R. 1208.16(c)(2). Like withholding of removal under Section 1231(b)(3)(A), CAT protection is mandatory if certain requirements are met, but it does not relieve the alien from removal altogether; rather, it prohibits removal only to the specific country where the alien would more likely than not be tortured. And CAT protection differs from both asylum and statutory withholding of removal because, *inter alia*, the alien must demonstrate a risk of torture, but need not show that the risk is because of one of the five enumerated grounds.

d. Following IIRIRA's enactment, separate legislation was enacted requiring promulgation of regulations to implement the United States' obligations under the CAT. See Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 (FARR), Pub. L. No. 105-277, Div. G, 112 Stat. 2681-822 (8 U.S.C. 1231 note).

To implement IIRIRA and FARR, the former Immigration and Naturalization Service (INS) (with the Executive Office for Immigration Review) promulgated regulations addressing, among other things, the potential protection available to aliens whose prior removal orders had been reinstated. In adopting the regulations, the agency identified a number of statutory provisions giving it authority to promulgate regulations to govern asylum and withholding procedures, including 8 U.S.C. 1158. See 64 Fed. Reg. 8478, 8487 (Feb. 19, 1999) (listing the authorities for 8 C.F.R. Part 208 (2000) generally). The regulations provide that if an alien whose prior order of removal has been reinstated expresses a fear of returning to her country, the alien shall be referred to an asylum officer for an interview; if the officer determines that the alien has a reasonable fear of persecution or torture, the officer shall refer the case to an immigration judge "for full consideration of the request for withholding of removal only * * * in accordance with the provisions of § 1208.16." 8 C.F.R. 1208.31(e); see 8 C.F.R. 1208.31; see also 8 C.F.R. 1241.8(e).[2] Such "full consideration" includes any claim for withholding of removal under 8 C.F.R. 1208.16(b) or for CAT protection under 8 C.F.R. 1208.16(c).[3]

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[2] The regulations were originally promulgated at 8 C.F.R. Parts 208 and 241 (2000), but were recodified in 2003 to reflect the transfer of the INS's functions to the Department of Homeland Security. See 68 Fed. Reg. at 9824; p.3 n.1, *supra*. The government refers to the current regulations at 8 C.F.R. Parts 1208 and 1241.

[3] Where an alien establishes a likelihood of torture but is barred from withholding under the regulations implementing the United States' obligations under the CAT, 8 C.F.R. 1208.16(d)(2) and (3), Section 1208.17 provides that a less durable form of protection, known as deferral of removal, must be granted. CAT deferral,

In adopting the regulations, the agency explained that "aliens subject to reinstatement of a previous removal order under [Section 1231(a)(5)]" are "ineligible for asylum" but may "be entitled to withholding of removal * * * or [protection] under the [CAT]." 64 Fed. Reg. at 8485. The agency further stated that "[f]or persons subject to reinstatement, * * * the rule establishes a screening mechanism" similar to the one used in expedited removal proceedings. *Id.* at 8478.[4] And the agency explained that the new process was intended "to rapidly identify and assess" claims for withholding of removal and protection from torture made by individuals subject to reinstated removal orders to "allow for the fair and expeditious resolution of such claims without unduly disrupting the streamlined removal processes applicable to these aliens." *Id.* at 8479; see also *id.* at 8485 (discussing 8 C.F.R. 1208.31).[5]

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which does not require a separate application, and CAT withholding are collectively known as CAT protection.

[4] A similar regulatory scheme was established to implement IIRIRA provisions restricting eligibility for discretionary relief for aliens who are subject to expedited, "administrative removal" procedures under 8 U.S.C. 1228(b). See 8 U.S.C. 1228(b)(5) ("No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion."); see also 8 C.F.R. 1238.1(f)(3).

[5] In *Fernandez-Vargas*, this Court parenthetically described the regulations now codified at 8 C.F.R. 1208.31 and 1241.8(e) as "raising the possibility of asylum." 548 U.S. at 35 n.4. As the Ninth Circuit has noted, however, "[t]his appears to have been an oversight; although both regulations refer to 'asylum officers,' they clearly permit only withholding from removal," and the "main text of the Court's footnote correctly refers" to only that form of protection. *Perez-Guzman* v. *Lynch*, 835 F.3d 1066, 1081 n.9 (2016), cert. denied, 138 S. Ct. 737 (2018); see *Jimenez-Morales* v. *U.S. Attorney*

2. Petitioner, a Guatemalan Mayan, initially entered the United States without inspection in 2004. Pet. 7; Pet. App. 10a. He did not apply for asylum at that time. Pet. App. 78a. Immigration authorities apprehended and detained him in 2007, and an immigration judge (IJ) ordered him removed. *Id.* at 10a. The Board of Immigration Appeals (Board) dismissed his appeal of the removal order and denied a motion to reconsider. *Id.* at 77a. Petitioner was removed to Guatemala in October 2007. See *id.* at 10a, 78a.[6]

In 2015, petitioner illegally reentered the United States without inspection, this time with his 16-year-old son. Pet. App. 79a. Petitioner was again apprehended, and the Department of Homeland Security (DHS) reinstated the 2007 removal order in accordance with 8 U.S.C. 1231(a)(5). Pet. App. 10a. With the aid of counsel, petitioner informed DHS officers that he feared

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Gen., 821 F.3d 1307, 1310 (11th Cir. 2016), cert. denied, 137 S. Ct. 685 (2017).

[6] Petitioner notes (Pet. 11) that he was unrepresented when he conceded his removability and waived appeal in March 2007, but that "[s]hortly thereafter," he was able to meet with attorneys "with the assistance of a K'iche-speaking interpreter." See Administrative Record (A.R.) 15-16; see also Pet. App. 35a-36a, 84a. Petitioner then appealed through counsel, but the Board dismissed the appeal based on petitioner's waiver. See A.R. 147; Pet. App. 35a. Petitioner (again acting through counsel) moved for reconsideration, and the Board determined that the transcript of proceedings before the IJ indicated that petitioner had waived his right to counsel and had "said he did not fear returning to his native Guatemala." A.R. 148. Because petitioner "d[id] not dispute that he [wa]s subject to removal, as charged, and identifie[d] no relief from removal to which he might be entitled," the Board denied the motion to reconsider. A.R. 148-149; see also Pet. App. 84a. Petitioner did not seek judicial review of the Board's decision. See A.R. 15-16; see also Pet. App. 10a, 35a-36a, 78a, 84a.

persecution if returned to Guatemala. *Ibid.* An asylum officer interviewed petitioner and determined that he had a reasonable fear of persecution. *Id.* at 10a-11a. Petitioner was therefore referred for a hearing before an IJ. *Id.* at 11a; see *id.* at 76a.

Following an evidentiary hearing, the IJ granted petitioner withholding of removal. Pet. App. 84a-85a; see *id.* at 77a. The IJ rejected petitioner's arguments that he was entitled to apply for asylum. *Id.* at 80a-84a. Specifically, the IJ explained that because he was subject to a reinstated order of removal, the governing statutes and regulations precluded petitioner from seeking asylum. *Id.* at 81a-82a. The IJ also determined that he lacked jurisdiction over petitioner's argument that the reinstatement statute did not apply to him because he did not reenter the United States illegally. *Id.* at 82a-83a. And the IJ rejected petitioner's contention that "he was not afforded a meaningful opportunity to express his 'well-founded fear of returning to Guatemala following his apprehension and prior to his removal by DHS in 2007.'" *Id.* at 83a (citation omitted). Citing the Board's 2007 order, the IJ determined that petitioner had "a full and fair opportunity to apply for asylum," but—even when represented by counsel—he had "identified no relief from removal to which he might be entitled." *Id.* at 84a (citation omitted). Petitioner appealed, and the Board affirmed, concluding that the IJ and Board did not have authority to review the 2007 proceedings, and that petitioner's reinstated removal order rendered him ineligible to apply for asylum under 8 U.S.C. 1231(a)(5) and the relevant regulations. Pet. App. 71a-74a; see *id.* at 12a.

3. Petitioner sought review in the court of appeals. He "argu[ed] * * * that aliens who are subject to reinstated orders of removal may seek asylum," Pet. App. 13a n.6, despite Section 1231(a)(5)'s prohibition on aliens in reinstatement status "apply[ing] for any relief under this chapter." 8 U.S.C. 1231(a)(5). The court rejected that argument. Pet. App. 14a-29a. [7]

i. Applying the framework set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals rejected (Pet. App. 13a-19a) petitioner's argument that the "complex statutory scheme" "unambiguously grants [him] the right to seek asylum." *Id.* at 19a.

In support of his textual argument, petitioner pointed out that IIRIRA changed the language of Section 1158(a)(1) from providing "'an' alien" the right to seek asylum irrespective of the alien's status, to providing "'*any*' alien" that right. Pet. App. 15a-16a (citation omitted). But the court declined to conclude that "Congress used the subtle stratagem of replacing one indefinite article with a different one to signal its unambiguous intent to make an exception to [the] otherwise categorical" reinstatement bar in Section 1231(a)(5) "that Congress set forth the very same day in a different provision of the very same statute." *Id.* at 16a.

The court of appeals also rejected (Pet. App. 17a) petitioner's argument that Section 1158(a)(1) "should be read to override all exceptions" to the right to seek asylum except those set out in Section 1158 itself. As the

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[7] The Board had remanded to the IJ for completion of security checks. Pet. App. 73a-74a. The court of appeals agreed with petitioner and the government that, upon completion of those checks, the IJ's order became final and appealable. *Id.* at 12a-13a.

court explained, "Congress has 'many options in revising statutory schemes,'" and could create an additional "'statutory limit'" in Section 1231(a)(5). *Id.* at 17a-18a (citations omitted).

The court of appeals further disagreed with petitioner's invocation of the canon that the specific controls the general, opining that both Sections 1158(a)(1) and 1231(a)(5) "are 'specific in certain respects and general in others.'" Pet. App. 18a (quoting *Perez-Guzman* v. *Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016), cert. denied, 138 S. Ct. 737 (2018)). And the court explained (*id.* at 18a-19a) that, contrary to petitioner's argument, reading Section 1231(a)(5) to bar aliens subject to reinstated removal orders from applying for asylum would not nullify Section 1158(a)(2)(D), which permits aliens who have been denied asylum to reapply in certain circumstances. *Id.* at 19a (citing *Perez-Guzman*, 835 F.3d at 1082).

ii. The court of appeals acknowledged that "[a] number of circuits have agreed with the government" and held, at *Chevron*'s first step, that Section 1231(a)(5) "clearly bar[s] aliens subject to reinstated orders of removal from seeking asylum, notwithstanding § 1158(a)(1)." Pet. App. 20a (citing *Jimenez-Morales* v. *U.S. Attorney Gen.*, 821 F.3d 1307, 1310 (11th Cir. 2016), cert. denied, 137 S. Ct. 685 (2017); *Ramirez-Mejia*, 794 F.3d at 489-490). But the court declined to decide that issue. *Id.* at 21a.

Instead, the court of appeals proceeded to *Chevron*'s second step, concluding that "the agency's regulations reasonably balance the various statutory provisions."

Pet. App. 21a.[8] In the court's view, it was not unreasonable for the agency to distinguish between withholding of removal and asylum "for purposes of applying" Section 1231(a)(5)'s bar on any "relief," *id.* at 23a, for several reasons.

First, the court of appeals observed that the government's asserted distinction—that asylum is a form of "relief," while withholding of removal is a form of "protection"—"reasonably tracks the distinct ways in which [this] Court has described asylum and withholding of removal." Pet. App. 23a (citing *Cardoza-Fonseca*, 480 US. at 444). While "withholding of removal has long been understood to be a mandatory protection that must be given to certain qualifying aliens, * * * asylum has never been so understood." *Id.* at 23a-24a.

Second, the text of the relevant provisions "provides further support for distinguishing between asylum and withholding of removal." Pet. App. 24a. The court of appeals explained that, unlike Section 1158(a)(1), the withholding provision, Section 1231(b)(3)(A), "does not by its terms expressly purport to permit an alien to do what § 1231(a)(5) appears expressly to forbid: 'apply for . . . relief' under chapter 12." *Ibid.* Instead, Section 1231(b)(3)(A) "is styled as a limitation on the Attorney General's removal authority," and thus "simply * * * guarantee[s] that an alien facing persecution or torture

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[8] In a footnote, the court of appeals rejected petitioner's contention that "the agency cannot benefit from deference at *Chevron*'s second step because the agency did not interpret the statutory scheme, but instead 'believe[d] that [its] interpretation is compelled by Congress.'" Pet. App. 21a n.10 (brackets in original). The court explained that petitioner offered "no support for this proposition," and it found "none in the agency's own statements." *Ibid.* (citing *Perez-Guzman*, 835 F.3d at 1079 n.8).

will receive protection from being returned to the alien's home country." *Ibid.*

Third, the court of appeals concluded that the agency's interpretation "comports with the relevant legislative history," Pet. App. 24a, reasoning that the regulations "give effect to Congress's clear intention * * * to 'strengthen the reinstatement provision and to make it operate more efficiently.'" *Id.* at 24a-25a (quoting *Lattab* v. *Ashcroft*, 384 F.3d 8, 19 (1st Cir. 2004)).

iii. The court of appeals rejected (Pet. App. 25a-29a) petitioner's additional arguments based on two canons of construction. The court declined (*id.* at 26a) to hold, as petitioner urged, that lenity required construing the statute in his favor. The court explained (*ibid.*) that "[i]t is not at all clear" that lenity applies here, because petitioner, who has obtained withholding of removal to Guatemala, is not faced with the risk of deportation to that country. In addition, the court stated that lenity "'cannot apply to contravene the BIA's reasonable interpretation' of an immigration statute where the agency makes use of 'ordinary principles of statutory interpretation.'" *Ibid.* (quoting *Soto-Hernandez* v. *Holder*, 729 F.3d 1, 6 (1st Cir. 2013)).

The court of appeals also rejected (Pet. App. 27a-29a) petitioner's contention that the agency's interpretation violates the United States' obligations regarding certain Articles of the United Nations Convention Relating to the Status of Refugees (Refugee Convention), *done* July 28, 1951, 189 U.N.T.S. 150, reprinted in 19 U.S.T. 6259 (via the United Nations Protocol Relating to the Status of Refugees (Refugee Protocol), *done* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267). The court determined (Pet. App. 27a) that petitioner failed

to show that precatory language in Article 34 of the Refugee Convention, 19 U.S.T. 6276, 189 U.N.T.S. 176, regarding assimilation of refugees requires the exclusion of asylum from the reinstatement bar. Similarly, the court observed (Pet. App. 28a-29a) that Article 28, 19 U.S.T. 6274, 189 U.N.T.S. 172, addressing freedom to travel, specifically authorizes exceptions for "compelling reasons of national security or public order." Pet. App. 29a.

b. Judge Stahl dissented. Pet. App. 31a-70a. Although the majority had found that petitioner failed to raise a due process challenge to the 2007 removal order, *id.* at 13a n.6, Judge Stahl construed petitioner's briefing to "raise[] the lack of due process afforded to him in his initial removal proceedings." *Id.* at 47a. And even if petitioner did "not develop these facts into an express argument," Judge Stahl believed that "the 'substantial public interests' at stake in this dispute counsel against applying the usual waiver rule." *Id.* at 47a n.11 (citation omitted). In addition, Judge Stahl would have found (*id.* at 51a-69a) that the agency's interpretation is unreasonable because it would violate several of the United States' obligations under international law—including some treaty provisions that petitioner had not invoked, see *id.* at 67a; see also *id.* at 29a n.13 (majority opinion).

4. The court of appeals denied petitioner's request for rehearing and rehearing en banc. Pet. App. 87a. Judge Stahl dissented from the denial of panel rehearing, and Judge Torruella dissented from the denial of rehearing en banc. *Id.* at 87a-88a.

ARGUMENT

Petitioner contends (Pet. 15-35) that he should have been permitted to apply for asylum, notwithstanding

the text of 8 U.S.C. 1231(a)(5) stating that an alien whose prior order of removal is reinstated is "not eligible and may not apply for any relief under this chapter." Review of the court of appeals' rejection of that contention is not warranted.

Nine courts of appeals have addressed this issue, and they all have reached the same conclusion: an alien whose prior order of removal has been reinstated may not seek asylum. Pet. App. 21a-22a, 25a; *Herrera-Molina* v. *Holder*, 597 F.3d 128, 139 (2d Cir. 2010); *Cazun* v. *Attorney Gen. U.S.*, 856 F.3d 249, 260 (3d Cir. 2017), petition for cert. pending, No. 17-981 (filed Dec. 29, 2017) (No. 17-931); *Mejia* v. *Sessions*, 866 F.3d 573, 587 (4th Cir. 2017); *Ramirez-Mejia* v. *Lynch*, 794 F.3d 485, 489-490 (5th Cir. 2015); *Garcia* v. *Sessions*, 873 F.3d 553, 555 (7th Cir. 2017), petition for cert. pending, No. 17-984 (filed Jan. 9, 2018); *Perez-Guzman* v. *Lynch*, 835 F.3d 1066, 1082 (9th Cir. 2016), cert. denied, 138 S. Ct. 737 (2018); *R-S-C* v. *Sessions*, 869 F.3d 1176, 1189 (10th Cir. 2017), petition for cert. pending, No. 17-7912 (filed Feb. 23, 2018); *Jimenez-Morales* v. *U.S. Attorney Gen.*, 821 F.3d 1307, 1310 (11th Cir. 2016), cert. denied, 137 S. Ct. 685 (2017). Although the courts have not arrived at that result in precisely the same way—some have held that Section 1231(a)(5) clearly bars asylum, while others have found the statutory scheme ambiguous and deferred to the agency's regulations—petitioner cannot show that he would be permitted to seek asylum in any circuit that has considered the issue. This Court previously denied review of three petitions for writs of certiorari arguing that an alien whose prior order of removal has been

reinstated is eligible to apply for asylum, and the same result is appropriate here.[9]

1. a. As the government argued below, see Pet. App. 19a-20a, and as several courts of appeals have held, 8 U.S.C. 1231(a)(5) clearly bars an alien whose prior removal order has been reinstated from seeking asylum. In relevant part, the provision states that an alien whose order of removal is reinstated "is not eligible and may not apply for any relief under this chapter." *Ibid.* "[T]his chapter" includes 8 U.S.C. 1158, the provision governing asylum. Asylum is thus clearly a form of "relief" from removal barred by Section 1231(a)(5). See *Garcia*, 873 F.3d at 557; *Jimenez-Morales*, 821 F.3d at 1310; *Ramirez-Mejia*, 794 F.3d at 489-491; *Herrera-Molina*, 597 F.3d at 138-139.

Some courts have perceived ambiguity because 8 U.S.C. 1158(a)(1) provides that "[a]ny alien who is physically present in the United States * * * irrespective of such alien's status, may apply for asylum in accordance with this section," and none of Section 1158(a)(2)'s express exceptions addresses the context of reinstated orders of removal. See, *e.g.*, *Cazun*, 856 F.3d at 255-259; *Perez-Guzman*, 835 F.3d at 1074-1077. But while Section 1158(a)(1) states only that an alien "may apply" for asylum, 8 U.S.C. 1158(a)(1), Section 1231(a)(5) directs that an alien subject to a reinstated order of removal both "is not eligible and may not apply

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[9] See *Jimenez-Morales* v. *Lynch*, 137 S. Ct. 685 (2017) (No. 16-662); *Perez-Guzman* v. *Sessions*, 138 S. Ct. 737 (2018) (No. 17-302); *Vasquez-Ramirez* v. *Sessions*, 138 S. Ct. 1005 (2018) (No. 17-873). Three other pending petitions for writs of certiorari present the same question. See *Cazun* v. *Sessions*, No. 17-931 (filed Dec. 29, 2017); *Garcia* v. *Sessions*, No. 17-984 (filed Jan. 9, 2018); *R-S-C* v. *Sessions*, No. 17-7912 (filed Feb. 23, 2018).

for any relief," 8 U.S.C. 1231(a)(5). Section 1231(a)(5) thus mandates that an alien subject to a reinstated order of removal is "not eligible" for asylum (and other forms of relief) as a substantive matter, which necessarily precludes the alien from obtaining asylum relief under Section 1158(a)(1).

Moreover, asylum is discretionary, and Section 1158 itself "show[s] that it was intended to be amenable to limitation by regulation and by the exercise of discretion." *Ramirez-Mejia*, 794 F.3d at 490 (citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 441, 444-445 (2006)); see 8 U.S.C. 1158(d)(5)(B) and (7); see also *Cazun*, 856 F.3d at 260. Indeed, 8 U.S.C. 1158(b)(2)(C) expressly provides that "[t]he Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)." And the applicable regulations provide that an alien subject to a reinstated order of removal is eligible for withholding of removal or CAT protection, but not asylum. See pp. 6-8, *supra*; pp. 19-21, *infra*.

Thus, rather than provide an absolute right to asylum, the asylum statute articulates a broad principle that is subject to exceptions, including Section 1231(a)(5)'s prohibition on applications for asylum by aliens whose prior orders of removal have been reinstated. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 35 (2006) (the reinstatement statute "generally forecloses discretionary relief from the terms of the reinstated order"). For these reasons, there is no conflict between the provisions, and in any event, the well-established principle of statutory construction that the specific controls the general supports the government's interpretation. See, *e.g.*, *Bloate* v. *United States*,

559 U.S. 196, 207-208 (2010); cf. *Cazun*, 856 F.3d at 260 (acknowledging that "[f]rom a purely textual standpoint," the fact that "the reinstatement bar is, at least in some respects, more specific than the asylum provision" might "in and of itself * * * compel us to agree with the Attorney General were we forced to decide the issue without resorting to *Chevron*"); *Perez-Guzman*, 835 F.3d at 1076 (similar).[10]

b. Although the government thus believes that the reinstatement bar is clear, the court of appeals declined to decide whether it plainly prohibits aliens with reinstated orders of removal from seeking asylum. See Pet. App. 21a. The court did not reach that issue (*ibid.*) because it correctly determined that the Board's decision should in any event be sustained under the second step of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (deferring to agency's interpretation of provision barring certain individuals from eligibility for withholding of removal).

The Attorney General promulgated regulations that reasonably interpret the complex web of immigration statutes to prohibit an illegal reentrant whose prior removal order has been reinstated from seeking asylum, while continuing to provide an avenue for those aliens to seek statutory withholding of removal and CAT protection where circumstances warrant. Under these regulations:

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[10] Reading Section 1231(a)(5) to bar applications for asylum by an alien whose order of removal has been reinstated also is consistent with the intent of Congress in IIRIRA "to strengthen the reinstatement provision." Pet. App. 24a (citation omitted); see *Cazun*, 856 F.3d at 260; *Garcia*, 856 F.3d at 40; *Perez-Guzman*, 835 F.3d at 1076.

> If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture pursuant to § 1208.31 of this chapter.

8 C.F.R. 1241.8(e). Section 1208.31(e), in turn, provides that if an asylum officer finds that an alien demonstrates a reasonable fear of returning, the request shall be referred to an immigration judge for "full consideration of the request for withholding of removal only," 8 C.F.R. 1208.31(e), which includes any claim for withholding under 8 C.F.R. 1208.16(b) or for CAT protection under 8 C.F.R. 1208.16(c). As the agency explained in adopting Section 1208.31, the regulations are so limited because "aliens subject to reinstatement of a previous removal order" are "ineligible for asylum," but "may * * * be entitled to withholding" of removal or CAT protection. 64 Fed. Reg. at 8485.

The agency's reconciliation of any tension between Sections 1158(a)(1) and 1231(a)(5) was, at a minimum, reasonable, and thus entitled to *Chevron* deference. See, *e.g.*, Pet. App. 23a; *Perez-Guzman*, 835 F.3d at 1081. As discussed above, see pp. 18-19, *supra*, the regulation reflects the reasonable view that Section 1231(a)(5) is a more specific provision than Section 1158, insofar as it "[i]t applies to a far narrower group of aliens—those subject to reinstated removal orders—than the asylum provision, which applies to all aliens." *Cazun*, 856 F.3d at 260; see also *R-S-C*, 869 F.3d at 1186; *Garcia*, 873 F.3d at 557. In addition, given the distinctions between discretionary asylum, on the one hand,

and statutory withholding of removal and CAT protection, on the other, it was at least reasonable for the agency to conclude that aliens whose prior orders of removal have been reinstated should be eligible for the latter, but not the former. See Pet. App. 23a-24a. That is particularly so because, as the Fifth Circuit has recognized, "withholding of removal and application of the CAT are often referred to as forms of protection, not relief," and thus are not plainly subject to Section 1231(a)(5)'s bar on "relief." *Ramirez-Mejia*, 794 F.3d at 489; see also Pet. App. 23a-25a. And the regulation reasonably furthers IIRIRA's clear purpose of strengthening the reinstatement provision. Pet. App. 24a-25a; see *Cazun*, 856 F.3d at 260 (similar, citing *Fernandez-Vargas* and H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 155 (1996)).

2. Petitioner does not dispute any of the foregoing analysis or renew the textual arguments he made in the courts of appeals. Compare Pet. 15-31, with Pet. C.A. Br. 39-49, 52-55; but see Immigrant Legal Service Organizations Amici Br. 8-12. Instead, petitioner offers (Pet. 15-35) three reasons why the court of appeals should not have deferred to the agency's interpretation that Section 1231(a)(5) bars aliens subject to reinstated orders of removal from receiving asylum. Each of petitioner's arguments lacks merit, and none warrants this Court's review.

a. Petitioner first contends (Pet. 15-20) that in order to "avoid [a] constitutional issue, * * * this Court should grant certiorari and find that 8 U.S.C. § 1231(a)(5) does not bar noncitizens [with reinstated orders of removal] from applying for asylum." Pet. 20. Like the dissenting judge in the court of appeals (Pet. App. 43a-51a), petitioner asserts (Pet. 17-18) that the circumstances of his

2007 removal hearing prohibited him from applying for asylum at that time, and that, as a result, it raises constitutional concerns for the reinstated order of removal to serve as the basis for petitioner's inability to seek asylum now.

As the court of appeals observed (Pet. App. 13a n.6), however, petitioner did not make this argument below, and the court did not address it. Indeed, even the dissent noted only that petitioner, at one point in his appellate brief, stated that he "was never provided a real opportunity to apply for asylum" in 2007. *Id.* at 47a (Stahl, J., dissenting); see also *id.* at 47a n.11 (Judge Stahl would exercise "discretion" to consider issue not raised in briefs) (citation omitted). Judge Stahl appears to have been referencing a single sentence in the statement of facts of petitioner's submission in the court of appeals. See Pet. C.A. Br. 16. Indeed, because petitioner did not "front" the argument, Pet. App. 46a (Stahl, J., dissenting), even the dissent advanced the due process issue without conclusively deciding it. See *id.* at 51a ("I would hold that the court is permitted to review the underlying removal order for serious due process defects when properly called upon to do so."). Having been neither pressed nor passed upon below, petitioner's constitutional-avoidance argument is not properly presented for the Court's review. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is one "of review, not of first view").

Even if it had been raised in the court of appeals, petitioner's argument would not warrant this Court's review. As petitioner concedes (Pet. 16-17), no court has held that the reinstatement bar in Section 1231(a)(5) and the governing regulations must be read to permit

an alien subject to a reinstated order of removal to apply for asylum if he can demonstrate that he was unable to do so at the time of the original removal proceeding. And although petitioner was represented by counsel before the Board in 2007, he did not seek judicial review of the Board's denial of his appeal or his motion to reconsider. See p. 9 n.6, *supra*; A.R. 15-16; Pet. App. 10a, 35a-36a, 78a, 84a. Cf. *Daniels* v. *United States*, 532 U.S. 374, 381 (2001) ("Procedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim.").

b. Second, petitioner contends (Pet. 20-27) that international law requires reading Section 1158's asylum provision to overcome Section 1231(a)(5)'s reinstatement bar. Petitioner is incorrect. As this Court has noted, Congress adopted the original version of the asylum provision as part of the broader Refugee Act, § 201(b), 94 Stat. 105, which was aimed at "implement-[ing] the principles agreed to in the [Refugee Protocol]," which "incorporates by reference Articles 2 through 34 of the [Refugee Convention]." *Aguirre-Aguirre*, 526 U.S. at 427 (citing *Cardoza-Fonseca*, 480 U.S. at 436-437); see Pet. 20-22. Petitioner asserts that precluding an alien with a reinstated order of removal from seeking asylum conflicts with the United States' treaty obligations—and thus, that reading must be avoided under the *Charming Betsy* canon that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Pet. 20 (quoting *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). Specifically, petitioner contends (Pet. 22-27) that excluding aliens subject to reinstated orders of removal from the

opportunity to apply for and obtain asylum contravenes "the right to engage in wage-earning employment" under Refugee Convention Article 17, 19 U.S.T. 6269, 189 U.N.T.S. 164 (Pet. 24-25); the right to "travel documents" under Article 28, 19 U.S.T. 6274, 189 U.N.T.S. 172 (Pet. 23-24); the guarantee against "penalties" based on refugees' illegal entry into the country under Article 31(1), 19 U.S.T. 6275, 189 U.N.T.S. 174 (Pet. 25-27); and the principle of assimilation under Article 34, 19 U.S.T. 6276, 189 U.N.T.S. 176 (Pet. 24-25).

Petitioner's argument fails. As an initial matter, he largely failed to preserve it. Although petitioner now contends (Pet. 25) that the decision below "[p]erhaps most clearly" violates Article 31(1), both the majority and dissent recognized that petitioner did not cite that provision—or Article 17—in the court of appeals. Pet. App. 29a (majority); *id.* at 57a-58a n.21 (Stahl, J., dissenting). The majority therefore did not address those provisions. See *id.* at 27a-29a. Moreover, while petitioner briefly raised Articles 28 and 34 below, see Pet. C.A. Br. 50-51, he did not fully develop arguments regarding them. See Pet. App. 29a (noting that Article 28, which concerns the right to travel, "recognizes that exceptions may be made from its requirements for 'compelling reasons of national security or public order,'" but that petitioner made "no argument" that "deterring repeated unlawful entry into this country" would not qualify) (citation omitted). And in any event, petitioner's reliance on the *Charming Betsy* canon fails because —as the dissent below acknowledged—that interpretive principle applies only to "ambiguous federal statutes." *Id.* at 52a (Stahl, J., dissenting); see 6 U.S.

(2 Cranch) at 118. Here, Section 1231(a)(5) clearly prohibits an alien whose prior order of removal has been reinstated from seeking asylum. See pp. 17-19, *supra*.

Even if *Charming Betsy* applied, Congress's decision to bar an alien whose removal order is reinstated from applying for the discretionary relief of asylum would not violate international law. As this Court has explained, asylum implements Article 34 of the Refugee Convention, 19 U.S.T. 6276, 189 U.N.T.S. 176, which calls on nations to facilitate the admission of refugees "as far as possible." *Cardoza-Fonseca*, 480 U.S. at 441 (citation omitted). Section 1158 thus implements a *discretionary* regime. *Ibid.*; see *INS* v. *Stevic*, 467 U.S. 407, 428 n.22 (1984). By contrast, withholding of removal under 8 U.S.C. 1231(b)(3) implements Article 33(1), 19 U.S.T. 6276, 189 U.N.T.S. 176, *Stevic*, 467 U.S. at 426 n.20, 428 n.22, an obligation that is mandatory, *Cardoza-Fonseca*, 480 U.S. at 440-441; see Pet. App. 28a; see also *R-S-C*, 869 F.3d at 1188 n.11. Statutory limitations on the discretionary relief of asylum, including the bar in the INA's reinstatement provision, 8 U.S.C. 1231(a)(5), thus do not conflict with the United States' obligations under the Refugee Protocol. Moreover, petitioner's brief contention that aliens with reinstated orders of removal do not come within Article 28's exception for "compelling reasons of national security or public order" does not demonstrate that the United States is required to make asylum available for all such aliens. Pet. 23 (citation omitted). For these reasons, among others, every court of appeals that has addressed the issue has held that "barring illegal reentrants from applying for asylum doesn't conflict with our international treaty obligations." *Mejia*, 866 F.3d at 587-588 (rejecting argument under Article 31(1)); see

Pet. App. 28a-29a (rejecting arguments under Articles 28 and 34); *R-S-C*, 869 F.3d at 1188 (same); *Cazun*, 856 F.3d at 257 n.16 (rejecting arguments under Articles 28, 31(1), and 34); see also *Ramirez-Mejia* v. *Lynch*, 813 F.3d 240, 241 (5th Cir. 2016) (opinion on rehearing en banc) ("We find no treaty obligation in conflict with our holding.").

Indeed, petitioner's suggestion that asylum is mandatory would upend United States immigration law. Under petitioner's logic, *any* determination by an agency to deny an asylum application as a matter of discretion, or as untimely under the one-year filing deadline in 8 U.S.C. 1158(a)(2), would contravene the United States' treaty obligations.

c. Third, petitioner contends (Pet. 27-31) that the immigration corollary to the criminal rule of lenity "preempts [*Chevron*] deference" to the agency's reasonable interpretation of the statutory text of "deportation statutes." Pet. 29. That argument is incorrect.

i. Even in the criminal context, this Court has made clear that lenity is the last resort, following the application of all other interpretive tools, to resolve "grievous ambiguity." *United States* v. *Castleman*, 134 S. Ct. 1405, 1416 (2014) (citation omitted); *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998); see also *Cazun*, 856 F.3d at 256 n.14; *Perez-Guzman*, 835 F.3d at 1076 n.5. Lenity thus has no application here, because there is no "grievous ambiguity"—to the contrary, as several courts of appeals have held, the statute is unambiguous in the government's favor. See pp. 17-19, *supra*.

Nor is petitioner correct that if a statute is ambiguous —which the court of appeals assumed, but did not hold, in this case, see Pet. App. 21a—lenity must "preempt"

deference (Pet. 30), or "override" the agency's interpretation (Pet. 31). In *Negusie* v. *Holder*, 555 U.S. 511 (2009), the Court rejected an alien's argument that the rule of lenity required the Court to interpret the "persecutor bar" to withholding of removal under the INA, 8 U.S.C. 1101(a)(42), in his favor. 555 U.S. at 518. As the Court explained, "the rule of lenity"—like "principles of criminal culpability [and] concepts of international law"—"may be persuasive in determining whether a particular agency interpretation is reasonable," but it does not foreclose the agency from interpreting an ambiguous statute. *Ibid.* That makes particular sense in the "immigration context," where "deference to the Executive Branch is especially appropriate." *Aguirre-Aguirre*, 526 U.S. at 425; see Pet. App. 26a ("[E]ven if the rule of lenity might be relevant * * * it 'cannot apply to contravene the BIA's reasonable interpretation' of an immigration statute where the agency makes use of 'ordinary principles of statutory interpretation.'") (citation omitted); *Cazun*, 856 F.3d at 256 n.14 (lenity is "a canon of last resort'"); *Mejia*, 866 F.3d at 587 n.9 ("[T]he rule of lenity is a last resort, not a primary tool of construction.") (citation omitted).[11]

ii. Petitioner does not discuss *Negusie*, *supra*, but contends (Pet. 29) that this Court has twice "resolved statutory ambiguity in deportation statutes by invoking

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[11] For this reason, petitioner is wrong to contend (Pet. 29) that lenity should preempt *Chevron* deference in the immigration context "[j]ust as" it does "in criminal cases." While deference "is especially appropriate" in immigration cases, *Aguirre-Aguirre*, 526 U.S. at 425, "this Court has 'never held that the Government's reading of a criminal statute is entitled to any deference,'" Pet. 29 (quoting *United States* v. *Apel*, 134 S. Ct. 1144, 1151 (2014)).

the rule of lenity without resort to *Chevron* deference." Neither citation supports petitioner's argument.

Petitioner first relies (Pet. 29-30) on a footnote in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), in which this Court stated that deference was inappropriate because the "normal 'tools of statutory construction,'" *id.* at 321 n.45 (citation omitted)—specifically, the rule that "a statute that is ambiguous with respect to retroactive application is construed * * * to be unambiguously prospective," *ibid.* (citing *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 264 (1994))—resolved any ambiguity. Although the Court stated that "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien'" "buttressed" its conclusion, *id.* at 320 (quoting *Cardoza-Fonseca*, 480 U.S. at 449), it did not rely solely, or even primarily, on that proposition. *Ibid.*

Petitioner also cites (Pet. 30) *Cardoza-Fonseca*, *supra*. There, the Court concluded that "the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history" all "lead inexorably" to a single conclusion. 480 U.S. at 449. Thus, the Court in *Cardoza-Fonseca* had no need to determine whether lenity could short-circuit *Chevron*'s second step. *Ibid.*; see *id.* at 446 (acknowledging the applicability of *Chevron* deference in immigration matters, but noting that the question before the Court was "a pure question of statutory construction for the courts to decide").

iii. Nor does petitioner suggest (Pet. 31) that the courts of appeals are divided regarding the role of lenity in interpreting the bar to relief under 8 U.S.C. 1231(a)(5). Instead, petitioner concedes that "[t]hree other circuits have applied an analysis similar to the

First Circuit, finding that lenity could not be used to override the agency's interpretation of the statute." *Ibid.* (citing *Mejia*, 866 F.3d at 587; *Cazun*, 856 F.3d at 256 n.14; *Perez-Guzman*, 835 F.3d at 1076 n.5). In fact, the agreement is more widespread: the Tenth Circuit's decision in *R-S-C* also rejects that proposition. See 869 F.3d at 1189.

Petitioner suggests more broadly (Pet. 31) that there exists "confusion" about "the interplay between lenity and *Chevron* deference." Even if that were true, however, any such tension would not be implicated here, because the courts of appeals agree that lenity does not supplant *Chevron* deference to the agency's interpretation of the reinstatement bar. And in any event, petitioner cites no case in which a court of appeals has expressly considered the question and determined that *Chevron* deference is rendered inapplicable. See *ibid.* (citing *Padash* v. *INS,* 358 F.3d 1161, 1170, 1173 (9th Cir. 2004) (finding that the "statute's language, structure, subject matter, context, and history" all supported the court's interpretation, which "also adheres to the general canon of construction that a rule intended to extend benefits should be 'interpreted and applied in an ameliorative fashion'") (citations omitted); *Francis* v. *Reno*, 269 F.3d 162, 168, 170-171 (3d Cir. 2001) (applying lenity rather than *Chevron* deference not because the former generally preempts the latter, but because "the BIA did not rely upon any expertise in interpreting the meaning of 'felony' within 18 U.S.C. 16[,] a general criminal statute" that the BIA does not administer); *Naderpour* v. *INS*, 52 F.3d 731, 732-733 (8th Cir. 1995) (invoking proposition that ambiguity should be resolved in favor of the alien without discussing whether agency sought *Chevron* deference).

iv. Finally, this case would present a poor vehicle for addressing the issues petitioner raises. Petitioner's appeal to lenity (Pet. 27-31) is based on the "drastic consequences of deportation." Pet. 28 (citation omitted). Yet on either party's view of the law, petitioner cannot be deported to his native Guatemala, because he was able to apply for, and has been granted, withholding of removal to that country. See Pet. App. 11a, 85a-86a; Pet. 12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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