No. 17-984

In the Supreme Court of the United States

CIRILO 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 SEVENTH 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-8a) is reported at 873 F.3d 553. A prior opinion of the court of appeals is reported at 859 F.3d 406. The decision of the Board of Immigration Appeals (Pet. App. 9a-11a) and the oral decision and order of the immigration judge (Pet. App. 12a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 2017. The petition for a writ of certiorari was filed on January 9, 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 As originally enacted, the reinstatement authority was limited to particular categories of aliens who had illegally reentered the country, including aliens whose deportation was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 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

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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).

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]

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 explained that "[f]or

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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*. Like petitioner (Pet. 2), 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, which does not require a separate application, and CAT withholding are collectively known as CAT protection.

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]

2. Petitioner, a native and citizen of Honduras, first came to the United States in 2003. Pet. App. 2a. He was ordered removed *in absentia*, and departed in 2005. *Ibid.*; see *id.* at 15a.

Petitioner returned to the United States in 2014, and was apprehended by authorities. Pet. App. 2a. The De-

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

partment of Homeland Security (DHS) reinstated petitioner's prior order of removal in accordance with 8 U.S.C. 1231(a)(5). Pet. App. 15a. Petitioner told DHS officers that he feared return to Honduras because petitioner recently had been kidnapped and beaten on account of his political opposition to deforestation. *Id.* at 2a; see Pet. 8. Petitioner was interviewed by an asylum officer, who determined that his testimony established a reasonable fear of torture. Pet. App. 2a. The asylum officer referred petitioner for a hearing before an immigration judge (IJ). *Id.* at 2a-3a.

The IJ granted petitioner withholding of removal. Pet. App. 3a, 14a-16a. The IJ explained, however, that she lacked authority to consider petitioner's arguments that he should be permitted to seek asylum notwithstanding his reinstated order of removal. *Id.* at 15a.[6] Petitioner appealed, and the Board of Immigration Appeals (BIA or Board) dismissed the appeal because neither an IJ nor the Board has "authority to declare the regulations to be in violation of the Act, or to be unconstitutional for limiting the scope of protection where an applicant has a prior order of deportation and the DHS has reinstated that order under section 241(a)(5) of the Act." *Id.* at 11a. The Board noted, however, that "several federal courts [of appeals] have held that a person in reinstatement proceedings is not eligible for and cannot seek asylum." *Id.* at 11a n.3 (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 485-490;

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[6] In light of the grant of withholding of removal, the IJ did not issue a decision on petitioner's application for CAT protection. Pet. App. 16a.

Herrera-Molina v. *Holder*, 597 F.3d 128, 139 (2d Cir. 2010)).

3. Petitioner sought review in the court of appeals.[7] Pet. App. 1a-8a. The court rejected petitioner's contention that he should have been permitted to apply for asylum under Section 1158(a)(1) despite Section 1231(a)(5)'s directive that an alien who is subject to a reinstated order of removal "is not eligible and may not apply for any relief under this chapter." 8 U.S.C. 1231(a)(5); see Pet. App. 7a. The court began by noting that every circuit to have considered "whether an alien subject to a reinstated order of removal may apply for asylum * * * ha[s] answered in the negative." Pet. App. 5a. In particular, "[t]he Second, Fourth, Fifth, and Eleventh Circuits each found the text of 8 U.S.C. § 1231(a)(5) dispositive, while the First, Third, and Ninth Circuits deferred to the government's position under *Chevron U.S.A.*[] *Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 [(1984)]." Pet. App. 5a-6a & nn.2-3 (citing *Garcia* v. *Sessions*, 856 F.3d 27, 41 (1st Cir. 2017), petition for cert. pending, No. 17-1212 (filed Feb. 21, 2018); *Herrera-Molina*, 597 F.3d at 139; *Cazun* v. *Attorney Gen. U.S.*, 856 F.3d 249, 260 (3d Cir. 2017), petition for cert. pending, No. 17-9311 (filed Dec. 29, 2017); *Mejia* v. *Sessions*, 866 F.3d 573, 584 (4th Cir. 2017); *Ramirez-Mejia*, 794 F.3d at 490; *Perez-Guzman*

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[7] The court initially dismissed the petition because then-binding circuit precedent dictated that "petitioner had not suffered an Article III injury-in-fact when he was denied the opportunity to apply" for asylum, "'a form of discretionary relief in which there is no liberty interest at stake.'" Pet. App. 4a (citations and internal quotation marks omitted); see 859 F.3d at 408. The court subsequently granted rehearing and, after circulating the new opinion to all active judges pursuant to Seventh Circuit Rule 40(e), overruled its precedent on the standing issue. Pet. App. 4a-5a & n.1.

v. *Lynch*, 835 F.3d 1066, 1082 (9th Cir. 2016), cert. denied, 138 S. Ct. 737 (2018); *Jimenez-Morales*, 821 F.3d at 1310).

The court of appeals "agree[d] with the result in all these cases," and concurred in the reasoning of the "first group of courts." Pet. App. 6a. In particular, the court determined that Section 1231(a)(5) "unambiguously declare[s] that aliens in [petitioner's] position are ineligible to apply for asylum." *Id.* at 7a. The court explained that the statute bars "'any relief'"; asylum "'is a form of relief'"; and the word "any" "typically 'has an expansive meaning.'" *Ibid.* (citations omitted).[8]

The court of appeals further determined that "[t]he general asylum statute, 8 U.S.C. § 1158, doesn't change that result." Pet. App. 7a. While Section 1158(a) permits "[a]ny alien" to apply for asylum, "that general statement is followed by numerous exceptions," and "Section 1231(a)(5) should be read as another limitation on the right to apply for asylum." *Ibid.* (brackets in original). Indeed, the court reasoned, petitioner's "proffered interpretation of Section 1158(a) attempts to use that subsection to trump the specific prohibition in Section 1231(a)(5)," contrary to the canon of statutory construction "that a 'specific' statute" generally "prevail[s] over a 'general' one." *Ibid.* (citation omitted).

ARGUMENT

Petitioner contends (Pet. 11-32) that he should have been permitted to apply for asylum, notwithstanding the text of Section 1231(a)(5) stating that an alien whose

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[8] The court of appeals declined (Pet. App. 7a n.4) to determine whether withholding of removal is also "relief," because "[n]either party takes issue with the grant of withholding of removal in this case."

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). 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. 7a-8a; *Garcia* v. *Sessions*, 856 F.3d 27, 30 (1st Cir. 2017), petition for cert. pending, No. 17-1212 (filed Feb. 21, 2018); *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. 17-931 (filed Dec. 29, 2017); *Mejia* v. *Sessions*, 866 F.3d 573, 587 (4th Cir. 2017); *Ramirez-Mejia* v. *Lynch*, 794 F.3d 485, 489-490 (5th Cir. 2015); *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, like the court below, 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 would be ineligible to apply for asylum in all nine circuits that have considered the issue. This Court has previously denied review of three petitions 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]

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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.

1. a. The court of appeals correctly held, in agreement with four other circuits, that 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 Pet. App. 7a-8a; *Mejia*, 866 F.3d at 587; *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 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

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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. 17-1212 (filed Feb. 21, 2018); *R-S-C* v. *Sessions*, No. 17-7912 (filed Feb. 23, 2018).

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*, and pp. 15-17, *infra*.

Thus, rather than provide an absolute right to or eligibility for asylum, the asylum statute articulates a broad principle that is subject to exceptions, including the prohibition in Section 1231(a)(5) and the governing regulations, 8 C.F.R. 1208.16, 1208.31(e), on applications for asylum by aliens whose prior orders of removal have been reinstated. See Pet. App. 7a; *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. Pet. App. 7a; see, *e.g.*, *Bloate* v. *United States*, 559 U.S. 196, 207-208 (2010);

Mejia, 866 F.3d at 587; 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 court below thus correctly held that the reinstatement bar clearly precludes an alien subject to a reinstated order of removal from applying for or obtaining asylum, three courts of appeals have reached the same result under the second step of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *R-S-C*, 869 F.3d at 1185; *Cazun*, 856 F.3d at 260; *Perez-Guzman*, 835 F.3d at 1082 (same); see also *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

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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 effect of the reinstatement bar." *Cazun*, 856 F.3d at 260; see also *R-S-C*, 869 F.3d at 1187; *Garcia*, 856 F.3d at 40; *Perez-Guzman*, 835 F.3d at 1076.

to seek statutory withholding of removal and CAT protection where circumstances warrant. Under these regulations:

> 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 of removal 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.*, *Perez-Guzman*, 835 F.3d at 1081. As discussed above, see pp. 14-15, *supra*, the regulations reflect 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; Pet. App. 7a-8a. 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. 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 8 U.S.C. 1252(a)(2)(B) (barring judicial review of denial of "relief" under specified INA provisions providing for discretionary relief, and not listing withholding of removal under 8 U.S.C. 1231(b)(3)(A)). And the regulations reasonably further IIRIRA's clear purpose in strengthening the reinstatement provision. See, *e.g.*, *Cazun*, 856 F.3d at 260 (citing *Fernandez-Vargas*, 548 U.S. at 30, and H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 155 (1996)).

2. Although every court of appeals to consider the question has held that an alien subject to a reinstated order of removal cannot apply for asylum, petitioner contends (Pet. 14-24) that they all have erred because the statutory provisions are clear in his favor. Petitioner's arguments lack merit and do not warrant this Court's review.

a. Petitioner first contends (Pet. 14-20) that "Section 1231(a)(5) unambiguously permits noncitizens subject to reinstated orders of removal to receive asylum." Pet. 14 (capitalization and emphasis omitted). In particular, he argues (Pet. 15-22) that the term "relief" cannot be interpreted to distinguish between asylum and

withholding of removal. Because the government agrees that withholding of removal is not "relief" and so falls outside of the reinstatement bar, petitioner contends (*ibid.*) that asylum also is not "relief" and therefore must be available to aliens with reinstated removal orders.

Petitioner is correct (Pet. 17) that the INA does not expressly define the term "relief." But the terms and structure of the statute provide ample support for the determination that asylum is "relief" prohibited by the reinstatement bar, while withholding of removal (like protection from torture) is "protection" that remains available to an alien with a reinstated removal order. The INA distinguishes between "relief" and "protection" from removal: Section 1229a(c)(4)(A) states that the alien bears the burden of proof in applying for either "relief *or* protection from removal." 8 U.S.C. 1229a(c)(4)(A) (emphasis added); see Pet. 20. And Congress clearly considers asylum to be a form of relief. See 8 U.S.C. 1232(d)(8)) ("[a]pplications for *asylum and other forms of relief* from removal") (emphasis added); 8 U.S.C. 1252(a)(2)(B)(ii) ("other than the granting of *relief under section 1158(a)*") (emphasis added).

At the same time—and as petitioner concedes (Pet. 17)—the statute suggests that withholding of removal cannot be "relief" under Section 1231(a)(5). Congress used the term "relief" in the same section, 8 U.S.C. 1231(a)(5), that *requires* withholding of removal, 8 U.S.C. 1231(b)(3)(A), if the alien satisfies the statutory criteria. Construing "relief" barred by Subsection (a)(5) of Section 1231 to include withholding of removal required by Subsection (b)(3)(A) of Section 1231 would create a conflict within the same section. By contrast,

Congress created no such dichotomy within the separate section generally governing asylum, 8 U.S.C. 1158, and no similar conflict results from construing "relief" in 8 U.S.C. 1231(a)(5) to include asylum.

Moreover, as petitioner acknowledges (Pet. 18), extensive differences exist between asylum and withholding of removal. Withholding of removal is mandatory, whereas asylum is discretionary. See pp. 5-6, *supra*. Although petitioner contends (Pet. 19) that the term "relief" does not "suggest[] a definitional boundary based on discretionary vs. mandatory action," he acknowledges (Pet. 17) that the mandatory nature of withholding of removal is the reason it must be excluded from the reinstatement bar against all "relief." Because asylum is not mandatory, it is reasonable to conclude that asylum is "relief." That understanding of relief is reflected in 8 U.S.C. 1252(a)(2)(B), which bars judicial review of decisions denying specified forms of "relief," all of which are discretionary, as well as other actions that are in the "discretion" of the Attorney General, except "relief" under 8 U.S.C. 1158(a), the asylum statute.

In addition, as compared to asylum, withholding of removal is accompanied by a higher "standard of proof," the chance of removal to a third country, the absence of a path to citizenship, the inability to petition for relatives abroad, the absence "of documents authorizing international travel," and the need to seek work authorization via a separate application. Pet. 18; see *Cazun*, 856 F.3d at 252 n.3. Thus, asylum provides more permanent and expansive benefits than does withholding of removal. Contrary to petitioner's argument (Pet. 15-22), Section 1231(a)(5) does not unambiguously require treating them in the same manner, and it is reasonable

to construe the term "relief" not to include withholding of removal's more limited protection.

In fact, petitioner's argument is self-defeating. Petitioner contends (Pet. 17) that "relief" includes any "legal remedy or redress" from removal. *Ibid.* (quoting *Webster's Third New International Dictionary* 1918 (1993) (*relief*)). But if that were the case, then withholding of removal also would be considered "relief," and petitioner would not have been able to seek and obtain withholding, either. But he did. See Pet. App. 3a, 7a n.4.[11]

Rather than accept that result, petitioner advances (Pet. 15-22) an argument that strips the word "relief" of all meaning. Because withholding of removal cannot be relief, he contends (Pet. 20), asylum also cannot be relief. But if petitioner is correct that no reasonable definition of "relief" can distinguish between withholding of

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[11] To be clear, although the government does not accept elements of petitioner's interpretation of the withholding statute (Pet. 15-16) and the United States' international obligations (Pet. 16-17), the government agrees that withholding of removal as enacted in 8 U.S.C. 1231(b)(3) implements Article 33(1) of the United Nations Convention Relating to the Status of Refugees (Refugee Convention), *done* July 28, 1951, 189 U.N.T.S. 150, 176, reprinted in 19 U.S.T. 6259, 6276 (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). Because that obligation is mandatory, withholding of removal should not be considered "relief" under the reinstatement bar. See Pet. 14-15, 17. Moreover, while petitioner argued below (Pet. C.A. Br. 25-30) that applying the reinstatement bar to asylum contravenes the United States' obligations under the Refugee Protocol, petitioner has not renewed that argument—which several courts of appeals have rejected—in this Court. See *R-S-C*, 869 F.3d at 1188-1189; *Mejia*, 866 F.3d at 587-588; *Cazun*, 856 F.3d at 257 n.16; *Garcia*, 856 F.3d at 41-43. But see Int'l & Immigration Law Scholars Amici Br. 4-17.

removal and anything else (like cancellation of removal or voluntary departure) that provides "legal remedy or redress," Pet. 17 (citation omitted), then the reinstatement bar cannot prohibit an alien with a reinstated order of removal from seeking *any* of those benefits. Petitioner's argument thus would leave the reinstatement bar with no work to do, violating "one of the most basic interpretive canons"—that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," *Kawashima* v. *Holder*, 565 U.S. 478, 492 (2012) (citation omitted).[12]

b. Petitioner further argues (Pet. 22) that his reading of Section 1231(a)(5) "gains * * * support from the structure and content of the asylum statute," Section 1158(a)(1). But as the court below explained (Pet. App. 6a-8a), the generally worded asylum statute cannot overcome the more narrowly focused reinstatement bar. *Id.* at 7a-8a (petitioner's "proffered interpretation of Section 1158(a) attempts to use that subsection to

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[12] Although petitioner appears to contend (Pet. 15-22) that the statute is clear in his favor, to the extent his argument is that the agency could not resolve any ambiguity by distinguishing between withholding of removal and asylum, it fails to heed this Court's longstanding recognition that, at *Chevron*'s second step, deference to the agency's expertise is particularly warranted in immigration matters. See *Aguirre-Aguirre*, 526 U.S. at 424; *Negusie* v. *Holder*, 555 U.S. 511, 517 (2009) (citing *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)). Indeed, while three courts of appeals have found ambiguity when the reinstatement bar is considered in relation to Section 1158(a), the asylum statute, no court has held that petitioner's interpretation of the statute should displace the agency's application of its expertise to ambiguous text. See *R-S-C*, 869 F.3d at 1185; *Cazun*, 856 F.3d at 260; *Perez-Guzman*, 835 F.3d at 1082; see also *Garcia*, 856 F.3d at 38-39 (assuming without deciding that statute is ambiguous, but deferring to agency's regulations).

trump the specific prohibition in Section 1231(a)(5)," in contravention of the canon of construction that "a 'specific' statute [usually] prevail[s] over a 'general' one") (citation omitted). And while petitioner suggests (Pet. 22) that where Congress "wished to exclude particular classes of aliens from receiving asylum, it did so explicitly," the court of appeals correctly explained that given Section 1231(a)(5)'s broad language, Congress did not need to also include a specific exception or cross-reference in every other provision of Chapter 12 making aliens eligible for "relief" from removal. Pet. App. 7a ("Section 1231(a)(5) should be read as another limitation on the right to apply for asylum."). In fact, petitioner's argument would nullify the reinstatement bar, because the other statutes within the chapter providing for discretionary relief from removal *also* contain no exception for aliens with reinstated orders. See, *e.g.*, 8 U.S.C. 1182 (2012 & Supp. IV 2016) (waivers of inadmissibility); 8 U.S.C. 1255 (adjustment of status); 8 U.S.C. 1229b(a) and (b) (cancellation of removal); 8 U.S.C. 1229c (voluntary departure).

Petitioner also contends (Pet. 23-24 & n.3) that his reading is necessary to ensure a significant role for Section 1158(a)(2)(D), which permits an individual to seek asylum a second time based on changed circumstances. See 8 U.S.C. 1158(a)(2)(D). But as petitioner must concede (Pet. 24 n.3), the government's reading does not render Section 1158(a)(2)(D) a "nullity." To the contrary, the government has discretion not to reinstate the prior order of removal, at which point Section 1158(a)(2)(D) could apply. In addition, some applicants are not subject to removal at the time asylum is first denied because, for example, CAT protection is granted, or the applicant is lawfully present in the United

States. See 8 C.F.R. 1208.14(c)(2). And many applicants who are denied asylum and are removable are not immediately removed: judicial review of such a denial can sometimes take a long time, or DHS may be unable to obtain travel documents, see *Zadvydas* v. *Davis*, 533 U.S. 678, 685-686 (2001). For these categories of aliens, Section 1158(a)(2)(D) continues to apply despite the reinstatement bar. See, *e.g.*, *Lara-Aguilar* v. *Sessions*, No. 16-1836, 2018 WL 2026971, at *7-*8 (4th Cir. May 2, 2018) (rejecting this argument).[13]

3. Because the court of appeals determined that Section 1231(a)(5) clearly prohibits petitioner from applying for asylum, it did not address petitioner's argument that "the immigration rule of lenity applied to require construal of any ambiguity in the statute in his favor." Pet. 29; see Pet. App. 5a-8a. Petitioner nonetheless renews that argument in this Court, contending (Pet. 25-29) that the Court should grant review to provide guidance on whether "[t]he immigration rule of lenity resolves ambiguity in deportation statutes, preempting

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[13] Petitioner also suggests (Pet. 23-24, 31-32) that application of the reinstatement bar to asylum is unreasonable in his case, because he suffered harm between his removal and illegal reentry. But as noted above, where an alien's removal order is reinstated, withholding of removal and protection from torture remain available and mandatory if the statutory requirements are satisfied (as they were in this case). Pet. App. 3a; see, *e.g.*, *Cazun*, 856 F.3d at 260. Moreover, nothing forecloses an alien in petitioner's position from seeking asylum through a lawful entry. 856 F.3d at 261 n.20. And even when an alien reenters illegally, DHS has "discretion to forgo reinstatement and instead place an individual in ordinary removal proceedings," in which the reinstatement bar would not apply and the individual would be able to seek asylum. *Id.* at 261 (citation omitted); see generally *Lara-Aguilar*, 2018 WL 2026971, at *7-*8.

Chevron deference." Pet. 25 (capitalization and emphasis omitted). Petitioner's argument lacks merit and does not warrant review.

a. 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 the court of appeals correctly held, the statute is unambiguous in the government's favor. See pp. 13-15, *supra*.

Nor is petitioner correct (Pet. 25) that if the statute were ambiguous, as some courts of appeals have held, then lenity would supplant the agency's interpretation. In *Negusie* v. *Holder*, 555 U.S. 511 (2009), the Court rejected an alien's argument that 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 in the first instance. *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 *Cazun*, 856 F.3d at 256 n.14 (lenity is "'a canon of last resort'") (citation omitted); *Garcia*,

856 F.3d at 41 ("[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); see also *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).

b. Petitioner does not discuss *Negusie*, *supra*, but contends (Pet. 25) that this Court "has twice determined that the rule of lenity resolves ambiguity in deportation statutes, preempting *Chevron* deference." Neither citation supports petitioner's argument.

Petitioner first relies (Pet. 25) on a footnote in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), in which the 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. 25) *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").

c. Nor does petitioner suggest (Pet. 25-29) that the courts of appeals are divided regarding the resolution of any ambiguity in interpreting the reinstatement bar. Instead, as petitioner concedes (Pet. 27-28), four "Circuits interpreting § 1231(a)(5)" have rejected the proposition that the agency's reasonable interpretation is prohibited because any ambiguity must be resolved in favor of the alien. Pet. 27-28 (citing *Mejia*, 866 F.3d at 587; *Cazun*, 856 F.3d at 256 n.14; *Garcia*, 856 F.3d at 41; *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. 27) that there is "widespread confusion" about how "the immigration rule of lenity and *Chevron* interact." Even if that were true, however, any such tension would not be implicated here, because the court of appeals found the statute to be clear in the government's favor. Pet. App. 5a-8a. And as just noted, even those courts of appeals that have perceived the reinstatement bar to be ambiguous in light of the asylum statute agree that lenity does not supplant *Chevron* deference to the agency's interpretation.

In any event, petitioner's citations do not support his claim (Pet. 27-28) of "widespread confusion" among the courts of appeals. Petitioner acknowledges (Pet. 28) that "[t]he Third, Fourth, and Second Circuits have applied lenity" not to supplant *Chevron* deference, but "as

part of their *Chevron* step two reasonableness analysis." And petitioner provides no case in which a court of appeals has expressly considered the question and determined that petitioner's lenity principle renders *Chevron* deference inapplicable. See Pet. 27 (citing *Amador-Palomares* v. *Ashcroft*, 382 F.3d 864, 868 (8th Cir. 2004) (stating that lenity applies "'where there still exists an ambiguity after the reviewing court applies traditional methods of statutory construction,'" and "does not supplant *Chevron* merely because a seemingly harsh outcome may result from the Board's interpretation") (citation omitted); *Padash* v. *INS,* 358 F.3d 1161, 1173-1174 (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)).

d. Finally, this case would present a poor vehicle for addressing the issues petitioner raises. Petitioner's appeal to lenity (Pet. 25-29) is based on the severity of deportation to a country in which he would face "death or persecution." Pet. 26 (citation omitted). Yet on either party's view of the law, petitioner cannot be removed to

his native Honduras, because he was able to apply for, and has been granted, withholding of removal to that country. See Pet. App. 3a, 7a n.4; Pet. 9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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