No. 17-931

In the Supreme Court of the United States

YOSELIN LINET MARTINEZ CAZUN, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD 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-35a) is reported at 856 F.3d 249. The decision of the Board of Immigration Appeals (Pet. App. 36a-37a) is unreported. The oral decision and order of the immigration judge (Pet. App. 38a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2017. A petition for rehearing was denied on August 31, 2017 (Pet. App. 53a). On November 7, 2017, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including December 29, 2017, and the petition was filed on that date. 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 As originally enacted, the reinstatement authority was limited to particular categories of aliens who had illegally reentered the country, including aliens whose deportation was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 previous 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. II 2014). 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 she demonstrates, *inter alia*, that she is a "refugee," *i.e.*, she is "unable or unwilling to return to" her 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. *Ibid.* 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).

In adopting the regulations, the agency explained that "aliens subject to reinstatement of a previous removal order under [Section 1231(a)(5)]" are "ineligible

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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 the court below, Pet. App. 8a n.7, the government refers to the current regulations at 8 C.F.R. Parts 1208 and 1241.

for asylum" but may "be entitled to withholding of removal * * * or [protection] under the [CAT]." 64 Fed. Reg. at 8485.[3] 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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[3] 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).

[4] 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.

[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.

2. Petitioner, a native and citizen of Guatemala, entered the United States without inspection in March 2014. Pet. App. 2a. She was apprehended by the Department of Homeland Security (DHS), and ordered removed on an expedited basis under 8 U.S.C. 1225(b). Pet. App. 2a. Petitioner told DHS officers that she feared returning to Guatemala due to prior threats on her life. *Ibid.* After interviewing petitioner, an asylum officer determined that she lacked a credible fear of persecution or torture, and an immigration judge (IJ) affirmed that determination. *Ibid.* Petitioner was removed to Guatemala in May 2014. *Id.* at 39a.

In July 2014, petitioner reentered the United States without inspection, this time with her minor son, and was again apprehended. Pet. App. 3a, 39a. DHS reinstated the earlier removal order in accordance with 8 U.S.C. 1231(a)(5). Pet. App. 3a. Petitioner again stated that she feared harm in Guatemala, but following an interview, an asylum officer made a negative reasonable fear determination, which an IJ affirmed. *Ibid.* Petitioner later requested and was granted a new interview, at which she stated that the head of a drug trafficking gang had raped her and made threats against her life and the life of her son. *Id.* at 2a-3a, 39a-40a. The asylum officer found that petitioner's testimony was credible and established a reasonable fear of persecution, and referred her for a hearing before an IJ. *Id.* at 3a-4a.

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

The IJ granted asylum to petitioner's son, and granted petitioner withholding of removal and protection under the regulations implementing the United States' CAT obligations. Pet. App. 4a & n.4, 52a. The IJ explained, however, that petitioner's reinstated removal order made her ineligible to apply for asylum. *Id.* at 4a; see Administrative Record 68. Petitioner appealed, and the Board of Immigration Appeals (BIA) affirmed, concluding that petitioner's reinstated removal order rendered her ineligible to apply for asylum under 8 U.S.C. 1231(a)(5) and the relevant regulations. Pet. App. 4a-5a, 37a.

3. a. Petitioner sought review in the court of appeals. The court rejected petitioner's contention that she was entitled to apply for asylum under Section 1158(a)(1) despite Section 1231(a)(5)'s provision 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). The court began by noting that at the time of its decision, "four Courts of Appeals ha[d] addressed this question," and "[e]ach ha[d] concluded that individuals subject to reinstated removal orders may not apply for asylum." Pet. App. 9a; see *id.* at 9a n.10. "Three of these courts ha[d] found the reinstatement bar clear on its face," *id.* at 9a-10a & n.11 (citing *Jimenez-Morales* v. *U.S. Att'y Gen.*, 821 F.3d 1307, 1310 (11th Cir. 2016), cert. denied, 137 S. Ct. 685 (2017); *Ramirez-Mejia*, 794 F.3d at 491; and *Herrera-Molina* v. *Holder*, 597 F.3d 128, 138-139 (2d Cir. 2010)), while the Ninth Circuit applied *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "determined that the statutory scheme was ambiguous, and [held] that the Attorney General's inter-

pretation forbidding aliens subject to reinstated removal orders from applying for asylum [was] reasonable," Pet. App. 10a (citing *Perez-Guzman* v. *Lynch*, 835 F.3d 1066, 1082 (9th Cir. 2016), cert. denied, 138 S. Ct. 737 (2018).

The court of appeals agreed with the Ninth Circuit's *Chevron* analysis. Pet. App. 10a. Characterizing Sections 1158(a)(1) and 1231(a)(5) as "conflicting," *id.* at 9a, 14a, the court rejected each party's argument that the provisions were clear in its favor at *Chevron*'s first step, *id.* at 11a-18a. The court explained that while both sections contain broad language—Section 1158(a)(1) states that "any" alien may apply for asylum, while Section 1231(a)(5) bars aliens subject to reinstated removal orders from applying for "any relief"—each section contains limitations that makes it not "as broad as it first seems." *Id.* at 11a. Nor could the court "discern Congress's clear intent using 'traditional tools of statutory construction.'" *Id.* at 12a (citation omitted). In the court's view, the canon that the specific governs the general did "not * * * resolve the question definitively, because each subsection is more specific in certain respects and more general in others." *Ibid.* And IIRIRA's legislative history did not "clarify Congress's intent on the matter" because "'Congress intended to add more detail to the existing asylum scheme while simultaneously expanding the scope and consequences of the reinstatement of an earlier removal order.'" *Id.* at 13a (citation omitted).

The court also rejected petitioner's argument that the INA should be construed as unambiguous in her favor to avoid "running afoul of treaty obligations under the United Nations Protocol Relating to the Status of Refugees." Pet. App. 14a. The court explained that

"given the availability of withholding of removal and CAT protection, there is no treaty obligation in conflict with the Government's reading." *Ibid.* In a footnote, the court rejected petitioner's "brief[] argu[ment]" that the immigration corollary to the criminal rule of lenity should supplant the application of *Chevron*. *Id.* at 13a n.14. The court reasoned that while lenity is used "'as a canon of last resort,' * * * deference is especially applicable in the immigration context." *Ibid.* (citation omitted).

The court thus turned to *Chevron*'s second step, concluding that the agency's regulation "is a reasonable interpretation of the statutory scheme." Pet. App. 19a. "It was reasonable," the court explained, "to conclude that the statutory reinstatement bar foreclosing 'any relief under this chapter' means just what it says: no asylum relief is available to those subject to reinstated removal orders." *Id.* at 20a. Indeed, the court continued, the agency's interpretation "[c]ertainly" could not be considered "unreasonable," because other courts of appeals had "explicitly adopted the same interpretation without even finding the statutory scheme ambiguous." *Ibid.*

"Even independent of these courts' conclusions," the court of appeals upheld the agency's interpretation for four reasons. Pet. App. 20a. First, "[f]rom a purely textual standpoint," "the reinstatement bar is, at least in some respects, more specific than the asylum provision," because it "applies to a far narrower group of aliens." *Ibid.* Second, "[t]he agency's interpretation is faithful to [Congress's] intent" in IIRIRA "to strengthen the effect of the reinstatement bar" while continuing to "fulfill humanitarian commitments" by ensuring

the availability of withholding of removal and CAT protection. *Id.* at 20a-21a. Third, because a grant of asylum is discretionary, "[i]t would be strange" to conclude that an alien with a reinstated removal order must be allowed to apply for asylum. *Id.* at 21a. Fourth, deference is especially appropriate in light of the agency's "expertise making complex policy judgments" regarding asylum, withholding of removal, and CAT protection. *Ibid.* (citing *Aguirre-Aguirre*, 526 U.S. at 425).

b. Judge Hardiman concurred in the judgment. Pet. App. 24a-35a. While he agreed "that the Agency's interpretation * * * is reasonable," he "would [have] join[ed] the Eleventh, Fifth, and Second Circuits in finding that it is compelled by the statute." *Id.* at 25a. Judge Hardiman explained that "[b]ased on the text, history, and structure of the statute, * * * the reinstatement bar precludes [petitioner] from applying for asylum." *Id.* at 24a.

4. The court of appeals denied petitioner's request for panel rehearing. Pet. App. 53a.

ARGUMENT

Petitioner contends (Pet. 17-30) that she should have been permitted to apply for asylum, notwithstanding the text of Section 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." 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 the issue, and they all have reached the same conclusion: an alien whose prior order of removal has been reinstated may not seek asylum. See Pet. App. 9a-23a; *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); *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. Att'y 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, like the court below, have found the statutory scheme ambiguous and deferred to the agency's regulations—petitioner would be ineligible to apply for asylum in every circuit that has considered the issue. Moreover, while petitioner suggests (Pet. 11, 26) that this Court's review is warranted to "resolve confusion" in the courts of appeals regarding the application of deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the "immigration rule of lenity," the decision below does not conflict with any decision of this Court or of any court of appeals. This Court has previously denied review of three petitions raising the question whether an alien whose prior order of removal has been reinstated is eligible to apply for asylum, and the same result is appropriate here. [6]

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[6] 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 a writ of certiorari

1. a. As the government argued below, see Gov't C.A. Br. 23-41, 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 a form of "relief" from removal barred by Section 1231(a)(5). See, *e.g.*, *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; see also Pet. App. 33a-34a (Hardiman, J., concurring in the judgment); but see Pet. App. 11a-12a (concluding that the statute is ambiguous, but the agency interpretation is reasonable); *R-S-C*, 869 F.3d at 1185 (same); *Perez-Guzman*, 835 F.3d at 1082 (same).

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 reinstatement status. But while Section 1158(a)(1) states only that an alien "may apply" for asylum, Section 1231(a)(5) provides 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

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present the same question. See *Garcia* v. *Sessions*, No. 17-984 (filed Jan. 9, 2018); *Garcia* v. *Sessions*, No. 17-1212 (filed Feb. 21, 2018); *R-S-C* v. *Sessions*, No. 17-7912 (filed Feb. 23, 2018).

removal is ineligible for asylum (and other forms of relief) as a substantive matter, which necessarily excludes 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 Pet. App. 21a. Indeed, Section 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)." 8 U.S.C. 1158(b)(2)(C). And 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. 17-19, *infra*.

Thus, rather than provide an absolute eligibility for or right to be granted asylum, the asylum statute articulates a broad principle that is subject to exceptions, including Section 1231(a)(5)'s prohibition on eligibility and applications for asylum by aliens whose prior orders of removal have been reinstated. 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. Pet. App. 12a, 20a (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 (stating that the "general-specific canon" may give the "the government's position * * * a slight edge").[7]

b. Although the government thus believes that the reinstatement bar is clear, the court of appeals correctly held that the Board's decision should in any event be sustained under the second step of *Chevron*, *supra*. 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 such an alien to seek statutory withholding and protection from torture under the CAT 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.

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[7] In addition, reading Section 1231(a)(5) to bar applications for asylum by aliens in reinstatement status is consistent with the statute's legislative history. In IIRIRA, Congress sought "to strengthen the effect of the reinstatement bar." Pet. App. 20a; see also *R-S-C*, 869 F.3d at 1187; *Garcia*, 856 F.3d at 40; *Perez-Guzman*, 835 F.3d at 1076.

8 C.F.R. 1241.8(e). Section 1208.31(e), in turn, provides that if an asylum officer finds that an alien possesses 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 interpretation and implementation of Section 1231(a)(5) was, at a minimum, reasonable, and thus entitled to *Chevron* deference. As discussed above, see pp. 15-17, *supra*, the regulations reflect the reasonable view that Section 1231(a)(5) is a more specific provision than Section 1158, insofar as it "applies to a far narrower group of aliens—those subject to reinstated removal orders—than the asylum provision, which applies to all aliens." Pet. App. 20a. In addition, the regulations are consistent with Congress's intent "to strengthen the effect of the reinstatement bar." *Ibid.* (citing *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 33 (2006), and H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 155 (1996)). And given the distinctions between discretionary asylum on the one hand, and statutory withholding of removal and CAT protection on the other, it was at the very 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 to "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)).

2. Petitioner contends (Pet. 17-26) that the court of appeals should not have deferred to the agency's interpretation because it is "[u]ntethered" from the reinstatement statute, and she suggests (Pet. 11-16) that "confusion" exists in the courts of appeals regarding whether courts should defer to an agency's interpretation of an ambiguous statute that is not "a reasonable interpretation of the statutory text," Pet. 11 (capitalization altered). Petitioner's arguments lack merit.

a. Petitioner contends (Pet. 18-21) that no reasonable interpretation of the term "relief" could distinguish between asylum and withholding of removal. She therefore argues (Pet. 21-26) that because the government agrees that withholding of removal is not "relief," and so falls outside of the reinstatement bar, asylum also is not "relief," and must be available to aliens with reinstated removal orders.

Petitioner is correct (Pet. 18) that the INA does not expressly define the term "relief." But the terms and structure of the statute provide ample support for the agency's 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. 24. 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. 22)—the statute suggests that withholding of removal cannot be "relief." 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). Construing "relief" to include withholding of removal would create a conflict within the same provision. By contrast, Congress created no such dichotomy within the statute generally governing asylum, 8 U.S.C. 1158, and no similar conflict results from construing "relief" that is barred by 8 U.S.C. 1231(a)(5) to include asylum.

Moreover, as petitioner acknowledges (Pet. 18-19), extensive differences exist between asylum and withholding of removal. Withholding of removal is mandatory, whereas asylum is discretionary. Although petitioner contends (Pet. 19) that the term "relief" does not "suggest[] a definitional boundary based on discretionary versus mandatory action," she later acknowledges (Pet. 24) that the mandatory nature of withholding of removal is the reason it must be excluded from the reinstatement bar against all "relief." Because asylum does not share that characteristic, it is reasonable to conclude that asylum is "relief."

As compared to asylum, withholding of removal also is accompanied by a "higher burden of proof, the allowance of removal to a third country, the absence of a path to citizenship, the inability to petition for relatives abroad, the impossibility of international travel, and the need to seek work authorization via a separate application." Pet. 18. Thus, a discretionary grant of asylum provides more permanent and expansive redress than does withholding of removal. It is reasonable to construe the term "relief" not to include withholding of removal's more limited redress.

In fact, petitioner's argument is self-defeating. Petitioner contends that "relief" includes *any* "legal remedy or redress" from removal. Pet. 18 (quoting *Webster's Third New International Dictionary of the English Language* 1918 (1993). But if that were the case, then withholding of removal must be "relief," and petitioner should not have been able to seek and obtain it, either. But see Pet. App. 4a (noting that the IJ granted petitioner withholding of removal and protection from torture).[8]

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[8] To be clear, although the government does not accept elements of petitioner's interpretation of the withholding statute (Pet. 22-23) and the United States' international obligations (Pet. 23-24), 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, *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, *done* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1967 Protocol)). Because that obligation is mandatory, withholding of removal should not be considered "relief" under the reinstatement bar. See Pet. 21. In addition, while petitioner argued below that applying the reinstatement bar to asylum contravenes the United States' obligations under the 1967 Protocol, the court of appeals correctly rejected that

Rather than accept that result, petitioner advances (Pet. 21-26) an argument that strips the word "relief" of all meaning. Because withholding of removal cannot be relief, she contends, asylum also cannot be relief. Pet. 21. But if petitioner is correct that the agency cannot distinguish between withholding of removal and anything else that provides "legal remedy or redress," Pet. 18 (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); see *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931) ("[I]t is not within the judicial province to read out of the statute the requirement of its words.").

Petitioner's argument (Pet. 18-21) that the agency could not distinguish between withholding of removal and asylum also is impossible to reconcile with this Court's longstanding recognition that, at *Chevron*'s second step, deference to the agency's expertise is particularly warranted in immigration matters such as removal. See *Chevron*, 467 U.S. at 844-845; *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, every court that has addressed whether the reinstatement bar includes asylum has disagreed

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argument, Pet. App. 14a-15a & n.15, which petitioner has not renewed in this Court. But see Int'l & Immigration Law Scholars Amicus Br. 4-15.

with petitioner's view that "relief" cannot include asylum. While several of these courts have held that the reinstatement bar unambiguously applies to asylum, see *Garcia*, 873 F.3d at 557; *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, others, like the majority below, have perceived ambiguity when that clear provision is considered in relation to Section 1158(a), the asylum statute, and deferred to the agency's interpretation, Pet. App. 11a-12a; *R-S-C*, 869 F.3d at 1185; *Perez-Guzman*, 835 F.3d at 1074-1082.[9] No court has held that petitioner's interpretation of the statute should displace the agency's application of its expertise to ambiguous text.[10]

b. Although petitioner cannot allege a division in the courts of appeals on the question whether the agency's interpretation of the reinstatement bar is reasonable,

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[9] The First Circuit rejected an alien's argument that the reinstatement bar clearly does not include asylum, but took no position on the government's contention that the reinstatement bar clearly includes asylum, because the government prevailed regardless at *Chevron*'s second step. *Garcia*, 856 F.3d at 38-39.

[10] Petitioner also suggests (Pet. 32) that application of the reinstatement bar to asylum is unreasonable in her case, because she suffered additional harm between her removal and illegal reentry. But where an alien's removal order is reinstated, withholding of removal and protection from torture remain available and mandatory if the requirements for entitlement are satisfied (as they were in this case). Pet. App. 14a; see 8 C.F.R. 1208.31(e). Moreover, as the court of appeals observed, nothing forecloses an alien in petitioner's position from seeking asylum through a lawful entry. Pet. App. 22a n.20. And even when an alien reenters illegally, the agency's interpretation leaves DHS with "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 22a (citation omitted).

she nonetheless contends (Pet. 11-16) that the Court should grant review to provide guidance on whether courts should defer to an agency's interpretation of a statute that does not reflect a reasonable interpretation of the statutory text. That question is not implicated here because the agency's interpretation is clearly a reasonable construction of the statutory text. See Pet. App. 20a. Moreover, contrary to petitioner's contention (Pet. 11-15), the courts of appeals are not divided on the proper scope of *Chevron* deference.

The court below plainly considered whether the agency reasonably interpreted the statutory text. See Pet. App. 20a. The court explained that "[i]t was reasonable for the agency to conclude that the statutory reinstatement bar * * * means just what it says." *Ibid.* And the first of the court's four reasons for deferring to the agency's interpretation was that "the reinstatement bar is, at least in some respects, more specific than the asylum provision." *Ibid.* "From a purely textual standpoint," the court continued, "this in and of itself might compel us to agree with the Attorney General" at *Chevron*'s first step. *Ibid.* That the court also recognized the agency's policymaking expertise, see *id.* at 21a, is a feature, not a flaw, of its application of *Chevron* deference. See, *e.g.*, *Aguirre-Aguirre*, 526 U.S. at 425.

Nor is petitioner correct that other circuits would accept an agency interpretation that is inconsistent with statutory text. For example, petitioner relies (Pet. 13) on the Ninth Circuit's decision in *Perez-Guzman*, *supra*, but that decision was similarly tied to the statutory text: It, too, quoted and interpreted the statutory language, relied on the specific-general cannon, and noted that "[h]ad Congress intended to include a carve-out for

asylum relief, it could have done so explicitly." 835 F.3d at 1080.

Petitioner's other examples from this Court and the courts of appeals—which largely fall outside of the immigration context—fare no better. See Pet. 13-16. They simply reflect courts applying the same, well-established *Chevron* standard to different statutes and regulations, and reaching different conclusions.[11] Compare *Sierra Club* v. *Administrator*, 496 F.3d 1182, 1186 (11th Cir. 2007) (per curiam) (in case that petitioner contends "treated statutory ambiguity as inviting deference unconstrained by text," Pet. 14, the court stated that at *Chevron*'s second step, "we are obliged to assess whether the agency's answer is based on a permissible construction of the statute" (citation and internal quotation marks omitted)), with *Mt. Emmons Mining Co.* v. *Babbitt*, 117 F.3d 1167, 1171 (10th Cir. 1997) (in case that petitioner contends is on the other side of the alleged division, Pet. 15, the court acknowledged that "the Secretary is free to adopt a reasonable interpretation of an ambiguous statute"). Indeed, as petitioner concedes, the Third Circuit has held that statutory ambiguity "does 'not give [an agency] free rein to issue any eligibility regulations that [it] chooses.'" *Ibid.* (quoting *Zheng* v. *Gonzales*, 422 F.3d 98, 116 (3d Cir. 2005)) (brackets in original).

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[11] Petitioner contends (Pet. 13) that the Ninth Circuit misapplied *Chevron* in *Somers* v. *Digital Realty Trust Inc.*, 850 F.3d 1045, 1046-1047 (2017). Since the petition for a writ of certiorari was filed, however, this Court reversed the court of appeals' decision in *Digital Realty*, explaining that "[b]ecause 'Congress ha[d] directly spoken to the precise question at issue,' [this Court would] not accord deference to the contrary view advanced by the SEC." *Digital Realty Trust, Inc.* v. *Somers*, 138 S. Ct. 767, 782 (2018).

3. Petitioner further contends that the court of appeals should not have proceeded to *Chevron*'s second step because the immigration corollary to the criminal rule of lenity "preempts *Chevron* deference" for "'deportation statutes.'" Pet. 30 (citation omitted). Petitioner's argument lacks merit and does not warrant this Court's 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); see *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998); see also Pet. App. 13a n.14. 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. 15-17, *supra*.

Nor is petitioner correct (Pet. 26-27) that if the statute is ambiguous (as the court below held), then lenity supplants the agency's interpretation. In *Negusie*, *supra*, the Court rejected an alien's argument that lenity required the Court to interpret the "persecutor bar" of 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 Pet. App. 13a n.14 (noting that 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); *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. 26) 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 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 320 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. 26) *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 the proposition petitioner invokes could short-circuit

Chevron's second step. *Ibid.*; see *id.* at 446-448 (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. 28) that the courts of appeals are divided regarding the resolution of any ambiguity in interpreting the reinstatement bar. Instead, as petitioner concedes, "[t]hree other circuits interpreting § 1231(a)(5)" have agreed with the court below in rejecting the proposition that the agency's reasonable interpretation is prohibited because any ambiguity must be resolved in favor of the alien. *Ibid.* (citing *Mejia*, 866 F.3d at 587; *Garcia*, 856 F.3d at 41; and *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 rejected that proposition. See *R-S-C*, 869 F.3d at 1189.

Petitioner suggests more broadly (Pet. 28) that there is "widespread confusion" about how "the immigration rule of lenity and *Chevron* interact." Even if that were true, however, any such tension is not 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 Pet. 28-29 (citing *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); *Kim* v. *Meese*, 810 F.2d 1494, 1496, 1498-1499 (9th Cir. 1987) (upholding agency interpretation over dissent urging that ambiguity should be resolved in favor of the alien)).

d. Moreover, this case would present a poor vehicle for addressing the issues petitioner raises. Petitioner's appeal to lenity (Pet. 27-28) is based on the severity of deportation to a country in which she would face "death or persecution." Pet. 28 (citation omitted). Yet on either party's view of the law, petitioner cannot be removed to her native Guatemala, because she was able to apply for, and has been granted, withholding of removal to that country. See Pet. App. 3a-5a; Pet. 31.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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