No. 22-23

In The
# Supreme Court of the United States

JEAN FRANCOIS PUGIN,
*Petitioner,*

v.

MERRICK B. GARLAND,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER


OLIVER J. DUNFORD
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
916.503.9060
ODunford@pacificlegal.org

CALEB J. KRUCKENBERG
*Counsel of Record*
Pacific Legal Foundation
3100 Clarendon Blvd., Ste. 610
Arlington, VA 22201
202.888.6881
CKruckenberg@pacificlegal.org

*Counsel for Amicus Curiae Pacific Legal Foundation*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

**Constitution**



**Statutes**

**Other Authorities**

## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases involving the role of the Judicial Branch as an independent check on the Executive and Legislative branches under the Constitution's Separation of Powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (SEC administrative-law judge is "officer of the United States" under the Appointments Clause); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United*

[1] Counsel for all parties were provided timely notice and have consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

*States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

This case implicates significant questions about administrative overreach and judicial abdication: whether an administrative agency may claim the judicial power to say what the law is; whether, and to what extent, the quasi-judicial rulings of an administrative agency warrant deference; and, finally, whether courts are obligated to reject deference when an administrative interpretation trumps the rule of lenity, thereby authorizing the permanent removal of noncitizens. PLF offers a discussion of the relevant constitutional principles and the dire consequences of ignoring them, and urges this Court to grant review.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In the Immigration and Nationality Act (INA), Congress established harsh consequences for noncitizens convicted of certain criminal offenses. Those who have committed an offense "relating to . . . the obstruction of justice" face permanent banishment from this country. *See* 8 U.S.C. § 1101(a)(43)(S). That's true even if they have become lawful permanent residents, had children who are citizens of the United States, and worked and lived as every other American for years. How Courts go about resolving the statutory question of which crimes qualify for these harsh consequences, therefore, matters greatly for noncitizens, their families, and indeed every person in this country who values fair and predictable outcomes in our immigration system.

In ordering the Petitioner, Jean Francois Pugin, removed from the United States, the Fourth Circuit applied a methodology that is at odds with the separate roles occupied by the judiciary, Congress, and the Executive Branch. Instead of interpreting the statutory language for itself, the Fourth Circuit granted binding deference to a statutory gloss devised by the Board of Immigration Appeals (BIA), a quasi-judicial body employed by the very prosecutor seeking to remove Mr. Pugin. But deference to the BIA is improper.

First, deference is improper here because none of the central premises of *Chevron* deference apply to the inherently legal decisions made by the BIA. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The BIA lacks appropriate expertise, does not engage in accountable or predictable policymaking, and, rather than promoting uniformity, sows unpredictability into our immigration laws.

Second, deference to the enforcement agency's punitive reading of the INA runs afoul of the baseline presumption of lenity. To respect the constitutional imperatives of fair notice, the separation of powers, and our fundamental preference for liberty, the rule of lenity compels that the "drastic measure" of removal will arise only when the will of Congress is clear, based on "the narrowest of several possible meanings of the words used." *See Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). Accordingly, when a court finds ambiguity in cases like this, it must apply the rule of lenity—not deference—to an administrative interpretation.

Review is necessary because the Fourth Circuit is just the latest court of appeals to adopt this unconstitutional analysis. As it stands now, no matter the countervailing constitutional principles, most noncitizens facing removal are subject to the binding views of the BIA, even when courts *disagree* with the BIA's analysis. This Court must not sit idly by as lowers courts continue to systematically abdicate their core judicial function in favor of the BIA's whims. It should therefore grant Mr. Pugin's petition.

## ARGUMENT

### I. Because *Chevron*'s Premises Are Absent, Routine Deference to the BIA Is Precluded

In *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999), this Court concluded "that principles of *Chevron* deference are applicable to th[e] statutory scheme" set out in the INA. In the Court's view, the Executive Branch may "exercise especially sensitive political functions that implicate questions of foreign relations," and, therefore, the "judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions" that might arise from interpretation of the INA. *Id.* at 424–25 (citation omitted). Thus, in that case, the Court concluded that deference even to the BIA's interpretation of law was warranted. *See id.*

But there are good reasons to question whether deference to the BIA *ever* remains appropriate, and this Court should grant Mr. Pugin's petition to address this question. Deference to the BIA's statutory interpretation serves none of the core

premises of *Chevron* itself, and this Court's most recent decisions cast doubt on the continued viability of *Aguirre-Aguirre*'s holding.

When an agency demands deference, a court should first determine whether "*Chevron*'s essential premises" are present. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018). If one or more of these premises is missing, no deference may be afforded. Here, when deference to the BIA is sought, all of *Chevron*'s premises are "simply missing." *Id*. Indeed, the "case against *Chevron* deference in administrative adjudication has perhaps its greatest force when it comes to immigration adjudication," because "the theoretical foundations for *Chevron* deference crumble in this context." Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 Duke L.J. 1197, 1201 (2021).

### A. The BIA lacks the expertise relevant here—legal interpretation

First, while agency expertise is considered one of the bedrock rationales for *Chevron* deference, the BIA has a demonstrable *lack* of expertise in interpreting Congressionally enacted laws. As the *Chevron* Court said, when Congress has left a statutory ambiguity, it makes sense to infer that it "consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so." 467 U.S. at 865.

But the BIA is ultimately a quasi-judicial body, and the "expertise required to interpret the INA . . .

does not require familiarity with technical or scientific information, nor with the workings of an industry, nor even, for the most part, with the mechanics of immigration enforcement." Maureen A. Sweeney, *Enforcing/Protection: The Danger of* Chevron *in Refugee Act Cases*, 71 Admin. L. Rev. 127, 174 (2019). Legal interpretation "demands expertise in legal analysis and the application of law to facts—precisely the sort of expertise that federal courts have." *Id.* at 175. Indeed, as in this case, the interpretive questions decided by the BIA often involve the scope of local criminal law, which is certainly far *outside* the BIA's competence.

In contrast, when this Court did defer to the BIA's interpretation, it did so because of the Executive Branch's expertise concerning "especially sensitive political functions that implicate questions of foreign relations." *Aguirre-Aguirre*, 526 U.S. at 425 (citation omitted). There, the Court considered whether to "deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, [which] may affect our relations with that country or its neighbors." *Id.* And while foreign-relations expertise might have been dispositive in the narrow question before this Court in *Aguirre-Aguirre*, these interests rarely arise. The "vast majority of immigration cases require expertise, not in foreign affairs, but rather in the legal interpretation of a complex statutory and regulatory scheme." Sweeney, 71 Admin. L. Rev. at 175. In ordinary cases like the one before this Court now, which implicate only whether a noncitizen has committed a domestic offense triggering removal, the

sole question involves a statutory inquiry about *Congressional* intent.

Moreover, even if the BIA had relevant expertise here, its legal interpretation is not automatically entitled to judicial deference. Rather, to decide whether deference is appropriate, courts must consider how an agency goes about making its decision. The "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Rels. Auth.*, 464 U.S. 89, 97 (1983) (citation omitted). And lower courts have often recognized that *Chevron* deference to the BIA depends, in large part, on how thorough the Board's reasoning was. *See Arteaga-De Alvarez v. Holder*, 704 F.3d 730, 739 (9th Cir. 2012). When the BIA's decision "is not thoroughly reasoned" it is not entitled to *any* weight. *Id.* at 740.

And the BIA's process reveals only cursory and superficial legal reasoning. Indeed, the BIA has, to put it lightly, been subject to stinging criticism for the shoddy quality of its analysis. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Blackmun, J., concurring) (bemoaning the BIA's "years of seemingly purposeful blindness" in interpreting statutory provision that had been "entrusted to its care"); *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005) (collecting cases where the "adjudication . . . at the administrative level has fallen below the minimum standards of legal justice" and noting that the "criticisms of the Board and of the immigration judges have frequently been

severe"). The BIA's inadequate analysis is the predictable result of an organization overwhelmed by a staggering caseload, which is "further exacerbated by the fact that immigration judges and BIA members face pressure to meet quotas and follow guidelines set by the attorney general." Wadhia & Walker, 70 Duke L.J. at 1229–30.

### B. The BIA has no responsibility for making policy decisions

"Another justification the *Chevron* Court offered for deference is that 'policy choices' should be left to Executive Branch officials 'directly accountable to the people.'" *Epic Sys. Corp.*, 138 S. Ct. at 1630 (quoting *Chevron*, 467 U.S. at 865). But the BIA is not a policy arm of the Executive. "Rulemaking and adjudication are different, with perhaps the most important distinction being public notice and opportunity for comment." Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 Duke L.J. 931, 965 (2021). "A process that requires an agency to interact with broad segments of society and explain why it has acted in view of concerns raised by the general public, all else being equal, typically should yield more legitimate outcomes." *Id.* at 967. But the BIA's decisions don't solicit public comments. Instead, the BIA has jealously guarded most of them from public view. *See New York Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 210–12 (2d Cir. 2021) ("the balance of the BIA's [more than 30,000 yearly] unpublished decisions are not publicly available," and the agency contends that it need not release those decisions to the public).

### C. The BIA's interpretations lack consistency and cause confusion

Finally, deference is sometimes justified as a means of ensuring uniformity in application of the law. *See City of Arlington v. FCC*, 569 U.S. 290, 306–07 (2013) ("ad hoc judgment[s] regarding congressional intent" from courts "would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*"). But BIA decisions are often destabilizing, as this case illustrates. *See also Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1058 (9th Cir. 2020) (recounting BIA's failed attempts to define "obstruction of justice"). The BIA even overrules circuit precedent concerning ambiguous statutes, which creates turmoil in the law. *See, e.g.*, *Szonyi v. Barr*, 942 F.3d 874, 892 (9th Cir. 2019) (deferring to BIA ruling, even though it contradicted Ninth Circuit precedent). Other times the BIA reverses itself, or takes sides in a circuit split, which is obviously "not a sustainable way to administer uniform justice in the area of immigration." *Lugo v. Holder*, 783 F.3d 119, 121 (2d Cir. 2015) (citation omitted). Uniformity is simply not a feature of BIA adjudication.

## II. This Court Should Clarify When BIA Decisions, Like the One Here, Are Not Entitled to Deference

Even when deference may otherwise be permissible as a general matter, that hardly means a court *should* defer in a given case. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 448–49 (refusing to defer to the BIA). But the lower courts continue to reflexively defer to the BIA, even when it is demonstrably

improper. This Court should at least clarify why deference in situations like this are improper.

First, as discussed above, the BIA has not exercised any special expertise in this case. At its root, the BIA has tried to interpret a statutory question concerning the scope of local criminal law. Indeed, the Third Circuit rejected deference to the BIA's understanding of the phrase "obstruction of justice" because interpretation of that phrase was not "an obscure ambiguity or a matter committed to agency discretion," and was instead a question "very much a part of t[he] Court's competence." *Denis v. Att'y Gen. of the U.S.*, 633 F.3d 201, 209 (3d Cir. 2011) (citation omitted). The agency thus lacks *relevant* experience to warrant deference.

"An additional reason for rejecting the [BIA's] request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years." *Cardoza-Fonseca*, 480 U.S. at 446 n.30 & 447. Not only does inconsistency conflict with the presumption that the agency applies expertise, it also undermines any pretense to political accountability. When "the Executive seems of two minds, . . . whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely [] becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable." *Epic Sys. Corp.*, 138 S. Ct. at 1630.

The BIA's reasoning here is anything but consistent. According to the INA, a noncitizen is removable after conviction of an "aggravated felony" offense "relating to . . . obstruction of justice." 8 U.S.C.

§ 1101(a)(43)(S). But over the years the BIA has seesawed between interpretations that would either (1) treat Mr. Pugin's single misdemeanor offense (accessory after the fact to another person's felony, Va. Code § 18.2-19(ii)), as an aggravated felony under the INA, or (2) exempt from the harsh consequences of that determination. Originally, the BIA concluded that aggravated felony offenses obstructed *ongoing* proceedings, an interpretation that would exempt Mr. Pugin's conviction from the INA's reach. *See In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 893 (BIA 1999). The Ninth Circuit accepted that interpretation as binding law. *See Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1164 (9th Cir. 2011).

Yet the BIA changed course and spent nearly 10 years trying to undo its previous interpretation. In 2012, the BIA attempted to overrule itself—and the Ninth Circuit—by interpreting the offense to require interference only with an abstract "process of justice." *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 841 (BIA 2012). The Ninth Circuit subsequently *rejected* that interpretation as being so vague as to be likely unconstitutional. *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 819 (9th Cir. 2016). So the BIA tried again, saying the interference need only affect a "reasonably foreseeable" proceeding. *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 460 (BIA 2018). The Ninth Circuit *again* rejected the interpretation, this time as a matter of plain statutory interpretation. *See Valenzuela Gallardo*, 968 F.3d at 1069. Yet it is the BIA's latter interpretation—which the Ninth Circuit found unreasonable, even under a *Chevron* analysis—that the Fourth Circuit adopted here. *See Pugin v. Garland*, 19 F.4th 437, 450 (4th Cir. 2021). The only

consistent line here seems to be the BIA's own waffling.

To round things out, no uniformity interests can justify deference. The BIA's effort in *Valenzuela Gallardo* has created profound confusion and inconsistency across the country. While the BIA failed *twice* to apply its definition in the Ninth Circuit against Mr. Valenzuela Gallardo himself, its decision nevertheless binds Mr. Pugin in the Fourth Circuit. Thus, similarly situated noncitizens face drastically different outcomes depending on where removal proceedings are initiated. This Court should not allow reflexive deference to the BIA to cause such confusion and uncertainty.

## III. This Court Must Restore the Primacy of the Rule of Lenity in Agency Adjudication

Even if the law at issue is ambiguous, this Court must apply the constitutionally derived rule of lenity and not reflexive deference to the BIA's interpretation. Yet the Fourth Circuit breezed past the rule of lenity without hesitation. This is part of a disturbing and unconstitutional trend across the country, where courts of appeals have discarded the constitutional principles enshrined in the rule of lenity for the sake of expediency. This Court must grant review to finally restore the primacy of the rule of lenity in such contexts.

### A. The Rule of Lenity Requires Any Doubts Be Resolved Against Removal

"The 'rule of lenity' is a new name for an old idea—the notion that 'penal laws should be construed strictly.'" *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring, joined by Sotomayor, J.) (quoting *The Adventure*, 1 F.Cas. 202, 204 (No. 93) (CC Va. 1812) (Marshall, C. J.)). The rule is a tool of construction "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (1 Wheat.) 76, 95 (1820). In simple terms, "lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.). But it also applies in non-criminal settings. Indeed, "[h]istorically, lenity applied to all 'penal' laws—that is, laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines." *Wooden*, 142 S. Ct. at 1086 n.6 (Gorsuch, J., concurring) (citing cases). "In fact, if the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes?" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring).

It is no wonder then that this Court has long applied the rule of lenity in removal proceedings. *See Fong Haw Tan*, 333 U.S. at 10. Accordingly, a court must "resolve [] doubts in favor" of an alien facing removal, and "will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the

words used." *Id.* This is "because deportation is a drastic measure and at times the equivalent of banishment of exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." *Id.* (citation omitted); *accord Barber v. Gonzales*, 347 U.S. 637, 642–43 (1954) ("Although not penal in character, deportation statutes as a practical matter may inflict the equivalent of banishment or exile, and should be strictly construed.") (citation omitted).

Of course, the rule of lenity applies most obviously when a statute has criminal consequences. *See Santos*, 553 U.S. at 514. And, as this Court unanimously recognized in *Leocal v. Ashcroft*, 543 U.S. 1, 12 n. 8 (2004), when a statute "has both criminal and noncriminal applications," "the rule of lenity applies." This is "[b]ecause [a court] must interpret the statute consistently," regardless of "whether [it] encounter[s] its application in a criminal or noncriminal context." *Id.* "In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005).

Three "core values of the Republic" underlie the rule of lenity: (1) due process; (2) the separation of governmental powers; and (3) "our nation's strong preference for liberty." *United States v. Nasir*, 17 F.4th 459, 473 (3d Cir. 2021) (en banc) (Bibas, J.,

concurring). Due process requires that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). And "lenity's emphasis on fair notice isn't about indulging a fantasy. It is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance." *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring).

Lenity also protects the separation of powers: the legislature sets penalties for certain conduct, the executive prosecutes alleged violations, and, ultimately, the judiciary imposes applicable punishment. *See United States v. Bass*, 404 U.S. 336, 348 (1971). Lenity "strikes the appropriate balance between the legislature, the prosecutor, and the court" in defining liability. *Liparota v. United States*, 471 U.S. 419, 427 (1985). "It 'places the weight of inertia upon the party that can best induce Congress to speak more clearly,' forcing the government to seek any clarifying changes to the law rather than impose the costs of ambiguity on presumptively free persons." *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring) (quoting *Santos*, 553 U.S. at 514). "In this way, the rule helps keep the power of punishment firmly 'in the legislative, not in the judicial department.'" *Id.* (quoting *Wiltberger*, 5 Wheat. at 95.). Thus, as this Court has said in the removal context, "We will not attribute to Congress a purpose to make [a noncitizen's] right to remain here dependent on

circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

Finally, and "perhaps most importantly," lenity embodies "the instinctive distaste[] against" laws imposing punishment "unless the lawmaker has clearly said they should.'" *Nasir*, 17 F.4th at 474 (Bibas, J., concurring) (quoting *Bass*, 404 U.S. at 347 (citation omitted)). By promoting liberty, lenity "fits with one of the core purposes of our Constitution, to 'secure the Blessings of Liberty' for all[.]" *Id.* (quoting U.S. Const. pmbl.); *see also Wooden*, 142 S. Ct. at 1081 (Gorsuch, J., concurring) ("Under [the rule of lenity] any reasonable doubt about the application of a penal law must be resolved in favor of liberty.").

### B. When the Rule of Lenity Applies To Resolve Statutory Ambiguity, *Chevron* Deference Is Precluded

"[W]hen liberty is at stake," deference "has no role to play." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari). After this Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), "awoke [courts] from [their] slumber of reflexive deference," the rule of lenity has "thus been thrust to the fore." *Nasir*, 17 F.4th at 472 (Bibas, J., concurring). "Before deferring, [a court] must first exhaust [] traditional tools of statutory construction. . . . And one tool among many stands out as well suited to the task: the rule of lenity." *Id.*

Any other conclusion "raises serious constitutional concerns" about the proper role of courts. *Valenzuela*

*Gallardo*, 968 F.3d at 1059. "The rule of lenity and *Chevron* deference are typically mutually exclusive[.]" *Id.* at 1060. Lenity, of course, reflects the primacy of the legislature in imposing punishment. *Id.* n.3. *Chevron* just reflects judicial policy "to permit agencies to fill in the details of a statute." *Id.* When the policy of *Chevron* deference collides with the constitutional imperative reflected by the rule of lenity—lenity prevails. *Nasir*, 17 F.4th at 474; *see also Hylton v. U.S. Att'y Gen.*, 992 F.3d 1154, 1158 (11th Cir. 2021) (applying lenity instead of deference).

And all of this flows from the language of *Chevron* itself, because at the outset, a court "evaluate[s] whether Congress has written clearly," and "[t]o determine whether a statute has a plain meaning," a court asks "whether its meaning may be settled by the 'traditional tools of statutory construction.'" *Hylton*, 992 F.3d at 1157–58 (quoting *Chevron*, 467 U.S. at 843 n.9). "These tools encompass our 'regular interpretive method,' *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004), including the canons of construction." *Id.* at 1158. "Where, as here, the canons supply an answer, *Chevron* leaves the stage." *Epic Sys. Corp.*, 138 S. Ct. at 1630; *see also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (refusing to apply *Chevron*, in part, because of canon of constitutional avoidance concerning the agency interpretation).

In fact, this Court has followed this analysis before, applying the immigration rule of lenity to resolve a potential statutory ambiguity and *then* concluding that *Chevron* deference was no longer warranted. *See INS v. St. Cyr*, 533 U.S. 289, 320

(2001). In *St. Cyr* this Court then applied "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," to "foreclose[]" a punitive reading of a deportation statute. 533 U.S. at 320. *Then*, in a footnote, it cast aside a call to "extend deference under *Chevron*," because, after "applying the normal 'tools of statutory construction'" there was, "for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." *Id*. at n.45 (citation omitted).

In the end, if there is uncertainty in the meaning of the statutory provision, then the rule of lenity provides a clear answer. Any lingering ambiguity must be resolved in favor of Mr. Pugin. And with that ambiguity resolved, there is no remaining role for *Chevron* deference.

### C. The Courts of Appeals Continue To Discard the Rule of Lenity in Favor of Reflexive Deference to the BIA

While the primacy of the rule of lenity is clear as a constitutional matter, the lower courts have simply discarded it in favor of the BIA's punitive interpretation. This Court needs desperately to remedy this situation by granting Mr. Pugin's petition.

As Mr. Pugin notes, the circuits are hopelessly divided on the precise statutory question presented by his petition. *See* Pet. at 14–16. But this arises from a larger confusion about the proper role of *Chevron* deference in this context. *See, e.g.*, *Flores v. Att'y Gen. U.S.*, 856 F.3d 280, 287 n.23 (3d Cir. 2017) ("In contrast to other circuits, we do not defer to the BIA's

interpretation of the Obstruction Provision in making this determination."); *Higgins v. Holder*, 677 F.3d 97, 103 (2d Cir. 2012) ("There is a circuit split on the question of whether deference is owed to the BIA's reasoning" concerning the phrase "offense relating to obstruction of justice."). Moreover, as the Ninth Circuit recognized while addressing the statutory question at issue here, deferring to the BIA's understanding of the phrase "offense relating to obstruction of justice" "raises serious constitutional concerns" concerning the proper role of the rule of lenity. *Valenzuela Gallardo*, 968 F.3d at 1059. Nevertheless, like the Fourth Circuit below, courts have clung to the view that the rule of lenity can *never* apply when an administrative body like the BIA interprets a statute. *See, e.g.*, *Silva v. Garland*, 27 F.4th 95, 112–13 (1st Cir. 2022) (court must "defer to the BIA's interpretation of a statute with criminal implications"); *Pugin*, 19 F.4th at 444 ("This is a civil proceeding interpreting a civil statute. Any ancillary criminal consequences are too attenuated. As a result, lenity cannot displace *Chevron* here."); *Valenzuela Gallardo*, 968 F.3d at 1059, 1062 (despite "serious constitutional concerns," court concluded it was "not free to take a fresh look at the *Chevron* Step Zero question"). Even when an agency's reading of an ambiguous statute results in unforeseeable consequences like expulsion from the United States or even incarceration, some courts claim to not be able to adopt a contrary reading. *See Silva*, 27 F.4th at 112–13.

The culprit, it seems, is this Court's opinion in *Babbitt v. Sweet Home Chapter, Communities for a Great Ore.*, 515 U.S. 687, 704 n.18 (1995), where the

majority deferred to an agency's interpretation of a law that carried criminal penalties. *See, e.g.*, *Silva*, 27 F.4th at 112 (concluding that applying the rule of lenity to BIA interpretation is "flatly inconsistent" with *Babbitt*). Justice Scalia later referred to that part of the opinion as a "drive-by ruling" that "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Whitman v. United States*, 574 U.S. 1003, 1003 (2014) (Scalia, J., joined by Thomas, J., statement regarding denial of certiorari). "With deference to agency interpretations of statutory provisions to which criminal prohibitions are attached, federal administrators can in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Id.* And since *Babbitt*, this Court has affirmed that it has "never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014); *see also Abramski v. United States*, 573 U.S. 169, 191 (2014) ("The critical point is that criminal laws are for courts, not for the Government, to construe."). Yet the lower courts remain insistent that their hands are tied. *See, e.g.*, *Silva*, 27 F.4th at 112.

At least twice this Court has granted certiorari to finally redirect the lower courts, but each time it resolved the cases on other grounds. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation."); *Barber v.*

*Thomas*, 560 U.S. 474, 488 (2010) (declining to apply the rule of lenity to sentencing provision but also declining to consider *Chevron* deference to agency). Meanwhile, a growing chorus of judges on the courts of appeals has expressed concern for *Chevron* deference's victory over the rule of lenity. *See, e.g.*, *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 921 (6th Cir. 2021) (Murphy, J., dissenting, joined by Sutton, C.J., Batchelder, Kethledge, Thapar, Bush, Larsen, and Nalbandian, JJ.) (It is "preposterous to say that when criminal statutes are ambiguous, the Department of Justice is permitted to construe them as it sees fit. Two of our foundational principles—the separation of powers and due process—should lead us to adopt the opposite presumption.") (citation omitted); *Aposhian v. Wilkinson*, 989 F.3d 890, 898 (10th Cir. 2021) (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, and Carson, JJ.) ("*Chevron* only kicks in once the traditional tools of interpretation have been exhausted. . . . We still have one left in our toolbox: the rule of lenity."); *Valenzuela Gallardo*, 968 F.3d at 1059 (deference to BIA "raises serious constitutional concerns" otherwise protected by the rule of lenity).

This Court is thus faced with two options. It can continue to allow the lower courts to defy the constitutional directives embodied by the rule of lenity in favor of reflexive deference to the BIA or it can grant the petition and right this wrong. As Mr. Pugin's case demonstrates, this problem will not go away on its own. Without this Court's intervention, noncitizens like Mr. Pugin will continue to face the harsh consequences of permanent banishment, and the BIA's rulings will affect criminal prosecutions,

without Congressional approval, without fair notice, and without reasoned decisionmaking from the judiciary.

## CONCLUSION

"As [this Court has] explained on many prior occasions, the separation of powers is designed to preserve the liberty of all the people." *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021). When power is improperly consolidated, violations of other rights have no remedy. But Mr. Pugin, and countless others, face the most severe consequences available to the government through the BIA's improper exercise of power. The lower courts that have refused to correct this injustice threaten all of our liberty and have undermined their own legitimacy. This Court should grant Mr. Pugin's petition for a writ of certiorari to correct these injustices.

DATED: August 5, 2022.

Respectfully submitted,

OLIVER J. DUNFORD
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
916.503.9060
ODunford@pacificlegal.org

CALEB J. KRUCKENBERG
*Counsel of Record*
Pacific Legal Foundation
3100 Clarendon Blvd., Ste. 610
Arlington, VA 22201
202.888.6881
CKruckenberg@pacificlegal.org

*Counsel for Amicus Curiae Pacific Legal Foundation*