No. 18-725

IN THE
Supreme Court of the United States

ANDRE MARTELLO BARTON,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

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

BRIEF FOR *AMICI CURIAE* THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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July 3, 2019

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INTEREST OF *AMICI CURIAE*[1]

The National Immigrant Justice Center (NIJC) is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the Nation's leading law firms, NIJC provides direct legal services to approximately 10,000 individuals annually. This experience informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage. NIJC has a substantial interest in the issue now before the Court, both as an advocate for the rights of immigrants generally and as the leader of a network of *pro bono* attorneys who regularly represent immigrants.

The American Immigration Lawyers Association (AILA) is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those

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[1] Petitioner has submitted a letter granting blanket consent to *amicus curiae* briefs. Respondent has granted consent for the filing of this brief. Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no persons other than *amici curiae* and their counsel made any monetary contribution intended to fund the preparation and submission of this brief.

appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security (DHS), immigration courts, and the Board of Immigration Appeals (BIA), as well as before the U.S. District Courts, U.S. Courts of Appeals, and this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question presented in this case is one of statutory interpretation: whether a lawfully admitted permanent resident who is not seeking admission to the United States can be "render[ed] * * * inadmissible" for purposes of the stop-time rule, 8 U.S.C. § 1229b(d)(1). Although both sides contend that the statute has a plain meaning, *amici* submit that petitioner has the better reading. Compare Pet'r Br. 20–22, with BIO 6–8. As petitioner correctly explains, an offense "renders the alien" "inadmissible" under Section 1229b(d)(1) only if it *actually* triggers an adjudication of inadmissibility during removal proceedings. Pet'r Br. 17–20. As petitioner alternatively explains, even if Section 1229b(d)(1) does not require an actual adjudication of inadmissibility, it at minimum requires that the predicate offense *could* trigger an adjudication of inadmissibility. *Id.* at 43–45. Either way, petitioner prevails here because—as a lawfully admitted permanent resident within the United States—an adjudication of inadmissibility was legally impossible.

Employing the traditional tools of statutory construction, petitioner carefully explains why the Eleventh Circuit's contrary decision was incorrect. See *id.* 20–39, 46–52. *Amici* do not repeat those arguments here, but instead address the issues of judicial deference to administrative agencies raised by the parties in this case. *Id.* at 39–43, 52–53. For example, in the

court of appeals, the government asserted that, if the court found Section 1229b(d)(1) ambiguous, the BIA's interpretation of the statute was entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Gov't C.A. Br. 19 n.9 (arguing that the court of appeals "should apply *Chevron* deference to the question"). As petitioner correctly explains, Section 1229b(d)(1) is not ambiguous. See Pet'r Br. 15–39. But even if this Court concludes that Section 1229b(d)(1) is ambiguous, *amici* submit that applying *Chevron* deference in this case would be unwarranted.

Part I begins with petitioner's alternative argument and explains why the BIA's rejection of that argument in its unpublished decision is not entitled to deference. See Pet. App. 20a–24a. Every circuit that has considered whether to give *Chevron* deference to non-precedential BIA decisions has declined to do so. That consensus makes perfect sense, given this Court's decision in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001). Administrative interpretations only merit deference when Congress has "delegated authority to the agency generally to make rules carrying the force of law," and the agency's statutory interpretation "was promulgated in the exercise of that authority." *Id.* at 226–27. The BIA's unpublished decisions do not fit the bill, and this Court's decision in *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999), is not to the contrary. Thus, with respect to petitioner's alternative interpretation of Section 1229b(d)(1), the BIA has never addressed the issue in a precedential decision and is therefore not entitled to *Chevron* deference.

Part II addresses why this Court should reconsider whether even the BIA's published decisions—like *Matter of Jurado-Delgado*, 24 I. & N. Dec. 29 (B.I.A. 2006),

the decision on which the BIA relied in this case to reject petitioner's primary argument—should be entitled to *Chevron* deference. There are several reasons to believe that Congress would not have envisioned delegating lawmaking power—the hallmark of *Chevron* deference—to the BIA. As numerous courts and commentators have acknowledged, the BIA lacks the requisite expertise, formalized adjudicatory procedures, and track record of thorough decisionmaking necessary to warrant a strong form of judicial deference. Moreover, the BIA's frequent attempts to aggrandize its power through *National Cable & Telecommunications Association* v. *Brand X Internet Services*, 545 U.S. 967 (2005), suggest that *Chevron* deference will only give rise to further mischief. If the Court reaches the question, it should therefore conclude that the BIA's published decisions are at most entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

For the following reasons, the judgment of the court of appeals should be reversed.

ARGUMENT

I. THE BIA'S UNPUBLISHED DECISION IN THIS CASE IS NOT ENTITLED TO *CHEVRON* DEFERENCE.

This case implicates the question of whether unpublished BIA decisions are entitled to *Chevron* deference. Pet'r Br. 52–53. In the court of appeals, the government argued that *Chevron* deference should apply to the BIA's non-precedential, single-member order. See Gov't C.A. Br. 19 n.9 ("[S]hould the Court find the statute ambiguous, it should apply *Chevron* deference to the question."); see also Pet. App. 17a n.5 ("[T]he government contends" that "the Board's decision here—which the parties agree is a non-precedential

single-member order—is entitled to *Chevron* deference."). The government has pressed a similar argument in another case. See Respondent's Br. at 17, *Calix* v. *Lynch*, 784 F.3d 1000 (5th Cir. 2015) (No. 13-60764), available at 2014 WL 10475139.

The Eleventh Circuit did not "definitively" resolve the question of whether unpublished BIA decisions warrant *Chevron* deference. Pet. App. 17a n.5. But the resounding answer is no. Every circuit that has considered the issue agrees, which is unsurprising in light of this Court's guidance in *Mead*. *Amici* therefore agree with petitioner that, with respect to his alternative interpretation of Section 1229b(d)(1), the "agency decision below is not entitled to *Chevron* deference because it is a non-precedential, single-judge order." Pet'r Br. 52.

A. Most Circuits Have Declined To Apply *Chevron* To Unpublished BIA Decisions.

1. *Chevron* provides a two-step framework for "review[ing] an agency's construction of the statute which it administers." 467 U.S. at 842. Step one: courts consider "whether Congress has directly spoken to the precise question at issue." *Id.* If so, then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43; see also *id.* at 843 n.9 (explaining that, at step one, courts must employ the "traditional tools of statutory construction"). Step two: if Congress has not "directly addressed the precise question at issue," courts cannot "impose [their] own construction on the statute." *Id.* at 843. Instead, if "the statute is silent or ambiguous," courts must determine "whether the agency's answer is based on a permissible construction of the statute." *Id.*

This Court offered two primary rationales for "the principle of deference to administrative interpretations" in *Chevron*. See *id.* First, an agency's power to "administer" a congressional program necessarily entails "fill[ing] any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). Courts therefore give "considerable weight" to an agency's "construction of a statutory scheme it is entrusted to administer." *Id.* at 844. Second, agencies often determine "the meaning or reach of a statute" by "reconciling conflicting policies." *Id.* (quoting *United States* v. *Shimer*, 367 U.S. 374, 382 (1961)). Such policy arguments are better addressed to administrators, who possess "more than ordinary knowledge respecting the matters subjected to agency regulations." *Id.* at 865. Thus, in *Chevron* itself, this Court held that the Environmental Protection Agency's interpretation of the term "stationary source" was "entitled to deference" because it "represent[ed] a reasonable accommodation of manifestly competing interests." *Id.* (deferring to "those with great expertise and charged with responsibility for administering the provision").

But there are also limits to *Chevron*. For example, as the Eleventh Circuit recognized here, "[o]ne of the principal justifications for granting deference to administrative agencies is that they operate pursuant to regular procedures that ensure thorough consideration and vetting of interpretive issues." Pet. App. 17a n.5; see also *Chevron*, 467 U.S. at 865 (noting that, among other things, "the agency considered the matter in a detailed and reasoned fashion"). When those procedures are "short-circuited," however, the justification for applying *Chevron* deference likewise "evaporates." Pet. App. 17a n.5.

Mead is illustrative. There, the question presented was "whether a tariff classification ruling by the United States Customs Service deserves judicial deference." 533 U.S. at 221. This Court explained that administrative interpretations qualify for *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," and the agency's statutory interpretation "was promulgated in the exercise of that authority." *Id.* at 226–27. Among other problems, the tariff classification rulings at issue were not subject to notice-and-comment procedures, were not binding on third parties, and were being "churned out at a rate of 10,000 a year at [the] agency's 46 scattered offices." *Id.* at 233. Under those circumstances, "[a]ny suggestion that [the] rulings [were] intended to have the force of law * * * is simply self-refuting." *Id.* This Court accordingly held that the rulings were "beyond the *Chevron* pale." *Id.* at 234.

2. Every circuit that has considered whether to give *Chevron* deference to unpublished BIA decisions has declined to do so. See, *e.g.*, *Tula-Rubio* v. *Lynch*, 787 F.3d 288, 291 (5th Cir. 2015); *Mahn* v. *Att'y Gen. of U.S.*, 767 F.3d 170, 173 (3d Cir. 2014); *Martinez* v. *Holder*, 740 F.3d 902, 909–10 (4th Cir. 2014); *Ruiz-Del-Cid* v. *Holder*, 765 F.3d 635, 639 (6th Cir. 2014); *Arobelidze* v. *Holder*, 653 F.3d 513, 520 (7th Cir. 2011); *Carpio* v. *Holder*, 592 F.3d 1091, 1097–98 (10th Cir. 2010); *Quinchia* v. *U.S. Att'y Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008); *Rotimi* v. *Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007) (per curiam); *Garcia-Quintero* v. *Gonzales*, 455 F.3d 1006, 1013 (9th Cir. 2006).[2] And for good reason, in light of this Court's decision in *Mead*.

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[2] The Eighth and D.C. Circuits would likely agree. *See Fogo De Chao (Holdings) Inc.* v. *U.S. Dep't of Homeland Sec.*, 769 F.3d

The BIA's non-precedential decisions do not carry the force of law. Only decisions rendered by a three-member panel (or the full Board) "may be designated to serve as precedents" in immigration proceedings—and even then, only upon a "majority vote of the permanent Board members." 8 C.F.R. § 1003.1(g). Those decisions are released in "published" form, and are considered binding on the BIA and Immigration Courts. See Exec. Office for Immigration Review, U.S. Dep't of Justice, *Board of Immigration Appeals Practice Manual*, ch. 1.4(d)(i), https://www.justice.gov/eoir/page/file/1101411/download (last updated Oct. 16, 2018) [hereinafter *BIA Practice Manual*]. The vast majority of remaining BIA decisions are "unpublished" and, while binding on the parties, are not considered precedent. See *id.* ch. 1.4(d)(i)–(ii).

This lack of precedential value has not been lost on the courts of appeals. For example, in *Mahn*, the Third Circuit found *Chevron* deference "inappropriate" when it was "asked to review an unpublished, non-precedential decision issued by a single BIA member." 767 F.3d at 173. The court explained that such decisions "do not bind the BIA, and therefore do not carry the force of law except as to those parties for whom the opinion is rendered." *Id.* (quoting *De Leon-Ochoa* v. *Att'y Gen. of U.S.*, 622 F.3d 341, 350 (3d Cir. 2010)). Operating under a lesser form of deference, see *Skidmore*, 323 U.S.

1127, 1137 & n.6 (D.C. Cir. 2014) (collecting cases for the proposition that "non-precedential opinions issued by one member of the [BIA] are not entitled to *Chevron* deference"); *Godinez-Arroyo* v. *Mukasey*, 540 F.3d 848, 850 (8th Cir. 2008) ("[B]ecause the underlying BIA decision in this case was unpublished, it may lack the force of law and *Chevron* deference may be inappropriate."). The First Circuit has yet to address the issue. *See Vasquez* v. *Holder*, 635 F.3d 563, 567 n.6 (1st Cir. 2011) ("[W]e have no need to address whether an opinion issued by a single member of the BIA * * * is entitled to *Chevron* deference * * * .").

at 140, the Third Circuit concluded that the petitioner's Pennsylvania conviction for reckless endangerment was not a "crime involving moral turpitude" and ultimately granted the petition for review and vacated the removal order. *Mahn*, 767 F.3d at 172–75.

Similarly, in *Martinez*, the Fourth Circuit found that, "[w]hen issuing a single-member, nonprecedential opinion, the BIA is not exercising its authority to make a rule carrying the force of law, and thus the opinion is not entitled to *Chevron* deference." 740 F.3d at 909–10. The court confirmed that such a decision "does not constitute a precedential opinion, as a precedential opinion may only be issued by a three-member panel." *Id.* at 909 (citing 8 C.F.R. § 1003.1(g), (e)(6)). Applying only the "modest deference" described in *Skidmore*, the Fourth Circuit concluded that the BIA incorrectly interpreted the statutory phrase "particular social group" under 8 U.S.C. § 1231(b)(3), partially granted the petition for review, and remanded for further proceedings. *Id.* at 910–13.

Moreover, unpublished BIA decisions are being "churned out" at a staggering rate. See *Mead*, 533 U.S. at 233 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year * * * is simply self-refuting."). For example, in Fiscal Year 2017, the BIA—comprised of a mere 21 Members—completed 31,820 appeals in total. See Exec. Office for Immigration Review, U.S. Dep't of Justice, *Statistics Yearbook: Fiscal Year 2017*, at 36–37, https://www.justice.gov/eoir/page/file/1107056/download [hereinafter *FY 2017 Statistics Yearbook*]. Nevertheless, during that same period of time, the BIA issued only 29 published decisions—roughly 0.091% percent of its completed appeals. See Exec. Office for Immigration Review, *Agency Decisions*, Vols. 26–27,

https://www.justice.gov/eoir/ag-bia-decisions (last visited July 2, 2019). As this baseline statistic implies, the BIA's unpublished decisions lack the degree of care and formality ordinarily associated with agency interpretations that merit deference. See *Mead*, 533 U.S. at 229–30 (explaining that *Chevron* deference should be given to "relatively formal administrative procedure[s]," which tend to promote "fairness and deliberation").

Finally, unpublished BIA decisions do not require a majority vote of the Board, 8 C.F.R. § 1003.1(g), and as such, do not necessarily represent the Board's "'authoritative' or 'official position.'" Cf. *Kisor* v. *Wilkie*, No. 18-15, 2019 WL 2605554, at *9 (U.S. June 26, 2019) (following *Mead*, 533 U.S. at 257–59 & n.6 (Scalia, J., dissenting)). Indeed, reflective of disagreements between Board Members, differences in briefing or briefing quality, or simply a change of heart, unpublished decisions can and do contradict each other. For instance, *amici* located an unpublished 2007 decision in which the BIA held—contrary to its decision in this case—that the stop-time rule would not be triggered for a permanent resident unless his predicate conviction rendered him deportable, even though that offense was one that would render a non-permanent resident inadmissible. See *Matter of Barrios-Castillo*, No. AXX-XX2-116, 2007 WL 1520882, at *2 (B.I.A. May 11, 2007) (holding that the permanent resident "was not precluded, by reason of the 1998 conviction for possession of [an indeterminate quantity of] marihuana, from establishing his continuous residence" notwithstanding that all drug offenses trigger inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(II)).

In sum, with respect to petitioner's alternative interpretation of Section 1229b(d)(1), the BIA's unpublished decision in this case is not entitled to *Chevron* deference.[3]

B. *Aguirre-Aguirre* Did Not Extend *Chevron* To Unpublished BIA Decisions.

Citing *Aguirre-Aguirre*, 526 U.S. at 424–25, the Eleventh Circuit stated below that "*Chevron* deference applies with full force when the [BIA] interprets ambiguous statutory terms in the course of ordinary case-by-case adjudication." See Pet. App. 7a. In *Aguirre-Aguirre*, the question presented concerned the proper interpretation of the phrase "committed a serious non-political crime" in former 8 U.S.C. § 1253(h)(2)(C). See 526 U.S. at 418. The BIA's decision was unpublished. See *Garcia-Quintero*, 455 F.3d at 1013 (recognizing that *Aguirre-Aguirre* concerned "an unpublished BIA decision"). And in reversing the Ninth Circuit's judgment, this Court explained that "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" *Aguirre-Aguirre*, 526 U.S.

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[3] In the court of appeals, the government argued that *Chevron* deference should apply because the BIA "followed its precedential decision" in *Jurado-Delgado*. Gov't C.A. Br. 19 n.9; *see also* Pet. App. 23a. But that contention was incorrect. As petitioner correctly observes, "*Jurado* did not decide between [his] alternative interpretation and the government's interpretation." Pet'r Br. 53. Indeed, the Eleventh Circuit explained that *Jurado-Delgado* did not "explicitly answer" the question of statutory interpretation presented here. Pet. App. 18a n.5 (quoting *Calix* v. *Lynch*, 784 F.3d 1000, 1009 (5th Cir. 2015)); *see also Nguyen* v. *Sessions*, 901 F.3d 1093, 1098 (9th Cir. 2018) (explaining that *Jurado-Delgado* "does not resolve the issue or require us to defer to the agency"). In any event, the government has since acknowledged that "the Board itself has yet to address the issue in a precedential opinion." BIO 12.

at 425 (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)).

But *Aguirre-Aguirre* does not stand for the proposition that unpublished BIA decisions are entitled to *Chevron* deference. For one thing, this Court subsequently made clear in *Mead* that "the *sine qua non* of *Chevron* deference is an agency statement carrying the force of law." See *Arobelidze*, 653 F.3d at 520 (citing *Mead*, 533 U.S. at 226–27). And here, there can be no dispute that unpublished BIA decisions do not carry the force of law. See pp. 8–10, *supra* (discussing 8 C.F.R. § 1003.1 and the *BIA Practice Manual*). For another thing, this Court had no reason to decide whether unpublished BIA decisions warrant *Chevron* deference in *Aguirre-Aguirre*. There, the precise issue of statutory interpretation had been addressed by the BIA "in one of its earlier decisions" that carried the force of law. See *Aguirre-Aguirre*, 526 U.S. at 418 (citing *Matter of McMullen*, 19 I. & N. Dec. 90 (B.I.A. 1984)). For that reason, perhaps, neither the parties nor the *amici* in *Aguirre-Aguirre* briefed substantive arguments concerning the application of *Chevron* deference to unpublished BIA decisions.[4]

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[4] *See, e.g.*, Pet'r Br., *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) (No. 97-1754), available at 1998 WL 858535; Respondent's Br., *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) (No. 97-1754), available at 1999 WL 26721; Pet'r Reply Br., *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) (No. 97-1754), available at 1999 WL 74195; *Amicus Curiae* Br. of Lawyers Comm. for Human Rights in Support of Resp., *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) (No. 97-1754), available at 1999 WL 23657; *Amicus Curiae* Br. of Office of U.N. High Comm'r for Refugees in Support of Resp., *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) (No. 97-1754), available at 1999 WL 33437; *Amicus Curiae* Br. in Support of Resp., *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) (No. 97-1754), available at 1999 WL 26718.

II. THIS COURT SHOULD RECONSIDER WHETHER EVEN PUBLISHED BIA DECISIONS ARE ENTITLED TO *CHEVRON* DEFERENCE.

Petitioner's primary challenge to the Eleventh Circuit's decision is that Section 1229b(d)(1) is "straightforward" and unambiguous: "an offense 'renders the alien' 'inadmissible' or 'removable' if it *actually* renders the alien inadmissible or removable at the alien's own removal hearing." Pet'r Br. 16. *Amici* agree with this interpretation. Here, petitioner's 1996 aggravated assault convictions did not trigger the stop-time rule because they "were never even *capable* of rendering Petitioner 'inadmissible' or 'removable' at his removal proceeding." *Id.*

As petitioner acknowledges, however, the BIA's published decision in *Jurado-Delgado*, 24 I. & N. Dec. at 31—the decision on which the BIA relied in its unpublished decision in this case—addressed and rejected that primary contention. Pet'r Br. 39. Thus, to the extent that this Court disagrees with petitioner's plain reading of Section 1229b(d)(1), finds the statute ambiguous, and looks beyond the unpublished BIA decision in this case to *Jurado-Delgado* as the reasoned interpretation of the BIA, petitioner is correct that *Jurado-Delgado* "is so weak that it is not entitled to *Chevron* deference." Pet'r Br. 40–43.[5]

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[5] *Jurado-Delgado* also considered whether the stop-time rule should apply retroactively to pre-1997 convictions and concluded that it should. 24 I. & N. Dec. at 32. The Seventh and Fourth Circuits have rejected the BIA's retroactivity analysis on the merits. *See Jeudy* v. *Holder*, 768 F.3d 595, 599–600 (7th Cir. 2014); *Jaghoori* v. *Holder*, 772 F.3d 764, 772 (4th Cir. 2014). While petitioner was convicted before the passage of the stop-time statute, he has not challenged the stop-time rule's retroactivity as applied

This case may therefore implicate the question of whether *any* published or unpublished BIA decision deserves *Chevron* deference. It was 20 years ago that this Court in *Aguirre-Aguirre* determined that deference should extend to BIA decisions where "'the statute is silent or ambiguous with respect to the specific issue' before it" and the BIA's "answer is based on a permissible construction of the statute." 526 U.S. at 424 (quoting *Chevron*, 467 U.S. at 843). In the intervening 20 years, however, the BIA has significantly transformed in ways that recommend reconsideration of such deference. See *Chevron*, 467 U.S. at 843–45; *Mead*, 533 U.S. at 228 (in determining "[t]he fair measure of deference to an agency administering its own statute * * * courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness" (footnotes omitted) (citing *Skidmore*, 323 U.S. at 139–40)). In the dozen-plus immigration cases that the Court has heard over those 20 years, it has granted *Chevron* deference to the BIA only once, and then not in a removal case. See *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41 (2014) (plurality opinion). *Amici* submit that only *Skidmore* deference should apply to even published BIA decisions like *Jurado-Delgado*. See *Mead*, 533 U.S. at 234.[6]

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to him. The Court should reserve this question for a case in which the issue has been preserved and fully briefed by the parties.

[6] Several Members of this Court have questioned the wisdom of *Chevron* deference altogether. *See, e.g., Pereira* v. *Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."); *Michigan* v. *EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions."); *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) ("The problem is bad enough, and perhaps insoluble if *Chevron* is not to

A. The BIA Lacks The Requisite Expertise, Formalized Procedures, And Track Record Of Thorough Decisionmaking Necessary To Warrant *Chevron* Deference.

1. The BIA is a non-statutory creature operating within a split-enforcement structure. The BIA adjudicates (within limits imposed on it), and DHS enforces, the immigration laws. See 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of * * * laws relating to the immigration and naturalization of aliens * * * .").[7] In a similar context where Congress "separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two different administrative authorities," this Court declined to defer to the *adjudicatory* agency's view of the law. See *Martin* v. *Occupational Safety*

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be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes."); *City of Arlington* v. *FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., joined by Kennedy and Alito, JJ., dissenting) ("*Chevron* is a powerful weapon in an agency's regulatory arsenal. * * * [T]he danger posed by the growing power of the administrative state cannot be dismissed."); *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (*Chevron* "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power."); *see also* Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907, 1911 (2017) (*Chevron* allows agencies, "[u]nder the guise of ambiguity, [to] stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes.").

[7] "On March 1, 2003 * * * the INS ceased to exist as an independent agency under the umbrella of the U.S. Department of Justice, and its functions were transferred to the new Department of Homeland Security." *Ahmed* v. *Dep't of Homeland Sec.*, 328 F.3d 383, 384 n.1 (7th Cir. 2003); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

& Health Review Comm'n, 499 U.S. 144, 151–52 (1991). *Martin* understood the adjudicative agency to have "the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context." *Id*. at 154. Just so here.

The BIA's quasi-judicial role is arguably inferior to the legislative rulemaking envisioned in *Chevron*. See, *e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. Rev. 1271, 1317 (2008) (arguing that "[a]dministrative law judges who lack policymaking authority [sh]ould not receive deference under *Chevron*"); Darren H. Weiss, Note, X *Misses the Spot:* Fernandez v. Keisler *and the (Mis)appropriation of* Brand X *by the Board of Immigration Appeals*, 17 Geo. Mason L. Rev. 889, 914 (2010) (arguing that legislative rulemaking is superior to adjudication because it "produces higher quality rules" and "allow[s] all potentially affected members of the public an opportunity to participate" (quoting 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.8, at 368–72 (4th ed. 2002))). The fact that the BIA cannot itself promulgate regulations further illustrates the point. Cf. *Martin*, 499 U.S. at 154 ("[W]hen a traditional, unitary agency uses adjudication to engage in lawmaking by regulatory interpretation, it necessarily interprets regulations that it has promulgated."); *Matter of Fede*, 20 I. & N. Dec. 35, 36 (B.I.A. 1989) (finding no ability to entertain challenges to regulations).

2. Nor does the BIA have the level of expertise envisioned by *Chevron*. See 467 U.S. at 865 (agency entitled to deference where "the regulatory scheme is technical and complex"). While the BIA certainly considers immigration law in many cases, as discussed below, weaknesses in its structure make it difficult to transform this activity into expertise. And it has no advantage in resolving questions of criminal law and

general statutory construction. See, *e.g.*, *Garcia-Lopez* v. *Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003) (no deference afforded to BIA's interpretation because criminal code at issue "is not a statute which the BIA administers or has any particular expertise in interpreting"); cf. *Kisor*, 2019 WL 2605554, at *9 ("When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.").

Federal courts are better equipped than the BIA to resolve questions of criminal statutory interpretation. Criminal law expertise is particularly necessary for interpreting ambiguities in removal statutes predicated on criminal offenses. See Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for a Crime*, 9 Drexel L. Rev. 323, 342 (2017). Commentators have explained that even interpreting "seemingly neutral" phrases—like "described in" or "relating to"—requires expertise that the BIA does not possess. *Id.* at 343. For example, federal courts more regularly interpret the term "aggravated felony" when presiding over illegal reentry prosecutions under 8 U.S.C. § 1326.[8]

Similarly, Asylum Officers from DHS's Citizenship and Immigration Services (CIS) are specially trained to adjudicate applications for asylum. In addition to reviewing more applications than the BIA,[9] the CIS

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[8] Illegal reentry is one of the most common convictions in the federal criminal system, accounting for thousands of convictions annually. *See* TRAC Immigration, *Illegal Reentry Becomes Top Criminal Charge* (June 10, 2011), http://trac.syr.edu/immigration/reports/251/.

[9] U.S. Citizenship & Immigration Servs., *Application for Adjustment of Status (Form I-485) Quarterly Report* (Dec. 7, 2017), available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Family-Based/I485_Performancedata_fy2017_qtr4.pdf.

Asylum Office is focused on those cases and how to handle them. See, *e.g.*, Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 311, 381 (2007). The CIS Asylum Office is a specialized group of adjudicators who interview asylum claimants and evaluate the merits of their claims. *Id.* All new asylum officers are required to complete "an intensive five-week basic training course with testing" that informs them about the legal issues, country conditions, and other asylum procedures that impact their decision-making. *Id.* at 311. As a result, Asylum Officers "receive much more initial and ongoing training than the immigration judges." *Id.* at 381.

3. The BIA does not have "formal administrative procedure[s]" that foster "fairness and deliberation" in its decisions. See *Mead*, 533 U.S. at 230. Formal administrative procedures are necessary because they "bespeak * * * congressional willingness to have the agency, rather than the courts, resolve statutory ambiguities." *Id.* at 241. No congressional delegation can be implied from the Immigration and Nationality Act, which specifies no rules—formal or other—for the BIA.

BIA procedures adopted by regulation and practice have been criticized for undermining fairness. Historically, the BIA operated like an appellate court in which three-member panels would hear cases and issue written opinions. Weiss, *supra*, at 916. But in 2002, former Attorney General Ashcroft implemented a rule allowing single Board Members to review appeals and issue summary orders. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878 (Aug. 26,

2002); see also 8 C.F.R. § 1003.1(e)(4).[10] A single Board Member now has the authority to affirm without opinion, and in doing so "shall not include further explanation or reasoning." See 8 C.F.R. § 1003.1(e)(4)(ii). The ABA Commission on Immigration attributed to the BIA's use of summary affirmances "a qualitative change in the decision making in the administrative process * * * that fosters the perception that the process is not fair." Comm'n on Immigration, Am. Bar Ass'n, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 4-4 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf.

While the number of summary decisions has declined since 2010, there are still a high number of short single-member opinions that often "dispos[e] of the matter based on only one of the issues presented." See Comm'n on Immigration, Am. Bar Ass'n, *2019 Update Report: Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, Vol. 1, ES-20 (2019), https://www.naij-usa.org/images/uploads/newsroom/ABA_2019_reforming_the_immigration_system_volume_1.pdf [hereinafter ABA 2019 Update Report]. As the Ninth Circuit explained in *Lezama-Garcia* v. *Holder*, 666 F.3d 518 (9th Cir. 2011), "[t]he nature of this one-member, non-preceden-

[10] Following the implementation of this procedural reform, 58% of all BIA cases filed in 2001 resulted in single-member summary decisions. *See* Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 Geo. Immigr. L.J. 35, 47–48 (2004).

tial, BIA order—one that does not explain its reasoning—'does not reflect the agency's fair and considered judgment on the matter in question.'" *Id.* at 532.

Additionally, the BIA's own practices and procedures have drawn criticism for undermining fairness and public participation. The BIA occupies an unusual role within the administrative state because it does not operate openly. It maintains no public docket. In fact, the Executive Office for Immigration Review (EOIR) currently lacks a fully-integrated, system-wide electronic filing and case management system. ABA 2019 Update Report, *supra*, at ES-20. Existing immigration court databases "are often *not* updated with new information," which can undermine an immigrant's ability to receive crucial updates about their court proceedings (like hearing information).[11]

The BIA rarely invites outside participation before issuing its very few precedential decisions. The ABA Commission on Immigration reported this year that the number of precedential BIA decisions "is still very low, as is the rate of oral argument." ABA 2019 Update Report, *supra*, at ES-20; *id.* at ES-50 (recognizing that oral arguments "are still extremely rare"). In 2017, the BIA completed 31,820 cases[12] but issued only 29 pub-

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[11] *See* Betsy Cavendish & Steven Schulman, Appleseed & Chi. Appleseed Fund for Justice, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System* 63, 65 (2012), https://www.appleseednetwork.org/uploads/1/2/4/6/124678621/reimagining-the-immigration-court-assembly-line.pdf (emphasis added).

[12] *See* EOIR, *FY 2017 Statistics Yearbook*, at 36 fig.27.

lished decisions—a mere 0.091% of all decisions rendered that year.[13] It appears that there was not a single oral argument before any of the decisions were published. See Exec. Office for Immigration Review, *Agency Decisions*, Vols. 26–27, https://www.justice.gov/eoir/ag-bia-decisions (last visited July 2, 2019). In fact, the BIA actually denied two requests for oral argument in 2017. See *Matter of Vella*, 27 I. & N. Dec. 138, 138 (B.I.A. 2017); *Matter of Falodun*, 27 I. & N. Dec. 52, 52 (B.I.A. 2017). This stands in stark contrast to the APA's notice-and-comment rulemaking to which *Chevron* deference is more traditionally applied, including CIS's and EOIR's own regulations appearing in the Federal Register.

Public participation is further limited by the fact that the BIA rarely accepts *amicus* briefs. In 2017, the BIA seemingly allowed *amici curiae* participation in only two of the 29 cases resulting in published decisions. See *Matter of L-E-A-*, 27 I. & N. Dec. 40, 42 & n.1 (B.I.A. 2017); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 826–27 & n.1 (B.I.A. 2016). Likewise, the BIA rarely grants *amicus* requests for argument. *BIA Practice Manual* ch. 2.10 ("The Board generally limits the appearance of amicus curiae to the filing of briefs."). Commentators have criticized these procedures for "limit[ing] the ability of immigration experts and practitioners to inform Board decisions." Weiss, *supra*, at 920.

The BIA's lack of transparency regarding certain procedures also undermines fairness. A Freedom of Information Act lawsuit was filed this year against EOIR because it had not publicly disclosed the standard used

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[13] Exec. Office for Immigration Review, U.S. Dep't of Justice, *Agency Decisions*, Vols. 26–27, https://www.justice.gov/eoir/ag-bia-decisions (last visited July 2, 2019).

by the BIA and immigration judges for adjudicating motions to stay removal. See Compl. ¶ 32, *Am. Immigration Council* v. *Exec. Office for Immigration Review*, No. 1:19-cv-01835-DLC (S.D.N.Y. Feb. 28, 2019), ECF No. 4. This information is crucial so that immigrants have a full and fair ability to litigate their stay requests. Once removed, it is extremely difficult for individuals—even those with meritorious claims—to secure legal representation and successfully litigate their immigration cases. *Id.* ¶¶ 22–24.[14]

4. Case backlog and resource constraints have undermined the BIA's thoroughness in deciding cases—yet another reason weighing against *Chevron* deference. See 467 U.S. at 865 (agency entitled to deference where "the agency considered the matter in a detailed and reasoned fashion"). In 2017, the BIA received a staggering 33,503 cases but only completed 31,820.[15] Cf. *Mead*, 533 U.S. at 233 (no deference where agency's rulings were "being churned out" at a rate of 10,000 to 15,000 a year). At times, the BIA has been deciding cases at the rate of 7–10 minutes per case, per Board Member.[16] Federal courts have repeatedly raised con-

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[14] *See also* Tiziana Rinaldi, *When the Government Wrongly Deports People, Coming Back to the US is Almost Impossible*, Pub. Radio Int'l (July 26, 2018), https://www.pri.org/stories/2018-07-26/when-government-wrongly-deports-people-coming-back-us-almost-impossible ("Most people don't have the support or resources to appeal their deportations to begin with, let alone fight their cases from abroad.").

[15] *See* EOIR, *FY 2017 Statistics Yearbook*, at 36 fig.27.

[16] *See* Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. Times (Jan. 5, 2003), https://www.latimes.com/archives/la-xpm-2003-jan-05-na-immig5-story.html (cited in *Kadia* v. *Gonzales*, 501 F.3d 817, 820 (7th Cir. 2007)).

cerns about the "sorely overworked Board of Immigration Appeals" and its "crushing workload that the executive and legislative branches * * * have refused to alleviate." See, *e.g.*, *Kadia* v. *Gonzales*, 501 F.3d 817, 820–21 (7th Cir. 2007).

As a result, it is unsurprising that the Federal Reporter is replete with examples of the BIA's failure to observe "elementary principles of adjudication." See *Niam* v. *Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004) (listing erroneous BIA decisions from the Second, Seventh, Eighth, and Ninth Circuits).[17] The Seventh Circuit has noted that the BIA's "[r]epeated egregious failures * * * to exercise care * * * can be understood, *but not excused*, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate." *Kadia*, 501 F.3d at 821 (emphasis added).

The BIA also frequently takes inconsistent positions, which further weighs against *Chevron* deference. See *Mead*, 533 U.S. at 228 (explaining that deference is partially determined by the agency's own "consistency with earlier and later pronouncements"). For example, this Court rejected the Immigration and Naturalization Services' request for heightened deference in *Cardoza-Fonseca* in part because of "the inconsistency of the positions the BIA has taken through the years."

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[17] *See, e.g.*, *Mohammed* v. *Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) ("Not only was the BIA's opinion an example of sloppy adjudication, it contravened considerable precedent."); *Benslimane* v. *Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (noting that in 2005 the Seventh Circuit "reversed the [BIA] in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits"); *Galina* v. *INS*, 213 F.3d 955, 958 (7th Cir. 2000) ("The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the [BIA] in this as in other cases.").

480 U.S. at 446 n.30. One study conducted in 2008 found that the "BIA reversed itself at an alarming rate of 12 percent." Weiss, *supra*, at 915 (citing Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 Admin. L. Rev. 647, 696 (2008)). And BIA inconsistencies are not always readily apparent because many unpublished BIA decisions are not publicly available on EOIR's website or Westlaw.

B. The BIA's Invocations Of *Brand X* To "Reclaim" *Chevron* Deference Further Counsel Hesitation.

As Members of this Court have previously recognized, the "reflexive deference" sometimes accorded to the BIA under *Chevron* has been "troubling." See *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). That "abdication of the Judiciary's proper role" in interpreting statutes, *id.*, has been compounded by this Court's decision in *Brand X*.

Assume, for instance, that this Court finds Section 1229b(d)(1)'s text ambiguous, but that the BIA's decision in *Jurado-Delgado* does not warrant *Chevron* deference because it makes "scant sense." See Pet'r Br. 40 (quoting *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1989 (2015)). In all likelihood, this Court would still provide its independent interpretation of "render[ed] * * * inadmissible." But if petitioner prevails under those circumstances and the matter thereafter returns to the agency (or the same issue subsequently arises in another case), the BIA could likely assert the power to reject this Court's reading of Section 1229b(d)(1). See *Sandoz Inc.* v. *Amgen Inc.*, 137 S. Ct. 1664, 1678 (2017) (Breyer, J., concurring) (explaining that, under

Brand X, administrative agencies "may well have authority to depart from, or to modify," this Court's interpretation of an ambiguous statute).[18]

Amici submit that the mischief associated with *Brand X* provides yet another reason for reconsidering whether the BIA should receive *Chevron* deference in the first instance. See *Kisor*, 2019 WL 2605554, at *21 (Gorsuch, J., concurring in the judgment) (explaining that, under *Brand X*, "an agency is always free to adopt a different view and insist on judicial deference to its new judgment").

1. *Brand X* requires federal courts to override their previous interpretations of ambiguous statutes in favor of those later announced by administrative agencies. In that case, the Federal Communications Commission (FCC) conducted a rulemaking to determine whether cable Internet companies provide "telecommunications service" as defined in Title II of the Communications Act, 47 U.S.C. § 151 *et seq.* See *Brand X*, 545 U.S. at 977–79. The FCC concluded that cable companies did not provide such service, and were therefore exempt from mandatory "common-carrier regulation." *Id.* at 979. The Ninth Circuit vacated the FCC's ruling in part. *Id.* Rather than defer to the FCC's new interpretation of "telecommunications service," the court adhered to "the *stare decisis* effect" of its previous decision in *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (9th Cir. 2000). See *Brand X*, 545 U.S. at 979–80. There, the Ninth Circuit concluded

[18] *See also, e.g.*, *MikLin Enters., Inc.* v. *NLRB*, 861 F.3d 812, 835 n.9 (8th Cir. 2017) (en banc) (Kelly, J., dissenting) ("Courts have held that *Brand X* applies to judicial precedent from the Supreme Court."); *Hernandez-Carrera* v. *Carlson*, 547 F.3d 1237, 1247–48 (10th Cir. 2008) ("[W]e see no reason why the holding in *Brand X* would not be equally applicable to agency constructions that displace tentative Supreme Court interpretations.").

that cable broadband was a "telecommunications service" based on a contrary interpretation of the statute. *Id.* at 979 (citing *Portland*, 216 F.3d at 877–80).

This Court reversed. As the majority explained it, the Ninth Circuit incorrectly "assum[ed]" that *Portland* overrode the FCC's construction of the statute. See *id.* "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill," the Court explained, "displaces a conflicting agency construction." *Id.* at 982–83. This approach "follows from *Chevron* itself," the Court elaborated, which "established a 'presumption that Congress * * * understood that [statutory] ambiguity would be resolved, first and foremost, by the agency.'" *Id.* at 982 (quoting *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996)). Thus, because *Portland* did not find that the "Communications Act unambiguously required treating cable Internet providers as telecommunications carriers," the Court held that the Ninth Circuit erred in failing to apply *Chevron* deference to the FCC's interpretation of "telecommunications service." *Id.* at 984–85.

2. Members of this Court have criticized *Brand X*. For example, dissenting in that case, Justice Scalia pointed out the "bizarre" and "probably unconstitutional" consequence of making "judicial decisions subject to reversal by executive officers." See *id.* at 1016 (Scalia, J., dissenting). An administrative agency would be empowered to "disregard" judicial construction of a given statute—even when the agency is party to the case—and "seek *Chevron* deference for its contrary construction the next time around." Compare *id.* at 1017, with *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (holding that

judgments of Article III courts "may not lawfully be revised, overturned or refused faith and credit by another Department of Government"). Justice Gorsuch has likewise observed that *Brand X* "risks trampling the constitutional design by affording executive agencies license to overrule a judicial declaration of the law's meaning prospectively." See *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

The BIA understands *Brand X* in precisely that manner. As EOIR has explained, this Court's decision in *Brand X* created "an important opportunity" for the BIA to "reclaim *Chevron* deference" and construe "ambiguous statutory provisions in the immigration laws, *notwithstanding contrary judicial interpretations*." See Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,661 (June 18, 2008) (emphasis added). The Attorney General has expressed similar views. *Matter of R-A-*, 24 I. & N. Dec. 629, 631 n.4 (Op. Att'y Gen. 2008) (explaining that "the Board itself appears to have recognized" that it is no longer "bound to apply existing circuit precedent" in "cases involving the interpretation of ambiguous statutory provisions"); see also *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring) (citation omitted) (explaining that, under *Brand X*, "a judicial declaration of the law's meaning in a case or controversy before it is not 'authoritative,' but is instead subject to revision by a politically accountable branch of government").

3. The BIA has aggressively employed *Brand X* to reject judicial precedent, resulting in excess litigation that wastes judicial resources.[19]

For instance, after the Ninth Circuit in *Lin* v. *Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007), rejected the BIA's view of the "departure bar" regulations in 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), the Fifth Circuit remanded a case to the BIA for it to reconsider its view. See *Matter of Armendarez-Mendez*, 24 I. & N. Dec. 646, 647, 650 (B.I.A. 2008). The BIA refused to do so; rather, citing *Brand X*, the BIA "respectfully decline[d]" to follow the Ninth Circuit's decision in *Lin* and declared that it would continue to apply its own "understanding of the regulation" and do so "even within the Ninth Circuit." *Id.* at 653.[20] The circuits have since

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[19] *See, e.g.*, *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 385–87 (B.I.A. 2018) (rejecting the Ninth Circuit's interpretation of 7 U.S.C. § 2156(a)(1) and concluding that sponsoring or exhibiting an animal in an animal-fighting venture is "a crime involving moral turpitude"); *Matter of D-R-,* 27 I. & N. Dec. 105, 112 (B.I.A. 2017) (rejecting the Ninth Circuit's interpretation of 8 U.S.C. § 1182(a)(6)(C)(i) and exercising "authority" under *Brand X* to "define the term 'material' * * * in cases arising in the Ninth Circuit"); *Matter of Fajardo Espinoza*, 26 I. & N. Dec. 603, 605–07 (B.I.A. 2015) (rejecting the Ninth Circuit's interpretation of 8 U.S.C. § 1229b(a)(2) and concluding that a grant of Family Unity Program benefits does not constitute an "admission" to the United States).

[20] True to its promise, the BIA issued unpublished decisions within the Ninth Circuit in which it disclaimed federal authority to reopen proceedings for previously departed aliens. *See Matter of Salgado-Valenzuela*, No. AXXX-XX2-297, 2009 WL 4030445 (B.I.A. Nov. 10, 2009); *Matter of Sanchez Esquivel*, No. AXXX-XX7-884, 2009 WL 3250485 (B.I.A. Sept. 18, 2009); *Matter of Haro-Perez*, No. AXXX-XX5-273, 2009 WL 2171613 (B.I.A. July 9, 2009); *Matter of Alvarez-Briseno*, No. A021-611-209, 2009 WL 773178 (B.I.A. Feb. 27, 2009); *Matter of Estrada*, No. AXXX-XX8-863, 2008 WL 5025206 (B.I.A. Oct. 27, 2008) (per curiam).

unanimously rejected the BIA's reading. See *Santana* v. *Holder*, 731 F.3d 50, 61 (1st Cir. 2013); *Prestol Espinal* v. *Att'y Gen.*, 653 F.3d 213, 218 (3d Cir. 2011); *William* v. *Gonzales*, 499 F.3d 329, 334 (4th Cir. 2007); *Garcia-Carias* v. *Holder*, 697 F.3d 257, 264 (5th Cir. 2012); *Contreras-Bocanegra* v. *Holder*, 678 F.3d 811, 819 (10th Cir. 2012) (en banc); *Lin* v. *Att'y Gen.*, 681 F.3d 1236, 1241 (11th Cir. 2012); cf. *Luna* v. *Holder*, 637 F.3d 85, 100 (2d Cir. 2011) (finding departure bar an impermissible contraction of the BIA's jurisdiction); *Pruidze* v. *Holder*, 632 F.3d 234, 240–41 (6th Cir. 2011) (same); *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 594–95 (7th Cir. 2010) (same).

A similar pattern occurred when the Attorney General outlined a new "administrative framework" for evaluating whether an immigrant has been convicted of a "crime involving moral turpitude." *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 688–89 (Op. Att'y Gen. 2008) (characterizing the case law as a "patchwork of different approaches"). Citing *Brand X*, the Attorney General rejected the case law of 10 circuits (and 50 years of agency precedent). *Id.* Within a few years, however, several circuits had rejected the Attorney General's framework. See *Olivas-Motta* v. *Holder*, 746 F.3d 907, 911–16 (9th Cir. 2013); *Prudencio* v. *Holder*, 669 F.3d 472, 480–84 (4th Cir. 2012); *Fajardo* v. *Att'y Gen.*, 659 F.3d 1303, 1307–11 (11th Cir. 2011); *Jean-Louis* v. *Att'y Gen.*, 582 F.3d 462, 472–82 (3d Cir. 2009). Eventually observing that *Silva-Trevino* had not fostered uniformity, the Attorney General receded from it. *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 552 (Op. Att'y Gen. 2015).

Experience with *Brand X* in the immigration context suggests that, rather than fostering the orderly administration of the law, it leads to an increase in litigation that wastes judicial resources. This seems a natural

consequence of allowing administrators to reject federal case law overturning their decisions. To the extent that this is required by *Brand X*, it gives further reason to hesitate before continuing to accord *Chevron* deference to the BIA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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July 3, 2019