No. 17-302

In the
Supreme Court of the United States

RONY ESTUARDO PEREZ-GUZMAN
AKA RONNIE PEREZ-GUZMAN,

PETITIONER,

v.

JEFFERSON B. SESSIONS III,
UNITED STATES ATTORNEY GENERAL,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a court must defer to an agency's position under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when the only textual "ambiguity" is a direct conflict between two statutory sections, which the agency has not addressed.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. In 1989, Cato established the Center for Constitutional Studies to help restore the principles of limited constitutional government that are the foundation of liberty. To that end, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because it raises vital questions about the ability of courts to address abuses by administrative agencies and afford individuals the full protection of the law.

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[1] All parties' counsel received timely notice of the intent to file this brief. Petitioner has given blanket consent to the filing of *amicus* briefs, and respondent's specific letter of consent has been submitted to the Clerk. No counsel for a party authored this brief in whole or in part, and nobody other than *amicus*, its members, and its counsel made a monetary contribution to fund the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Can a refugee present in the United States but subject to a reinstated removal order apply for asylum? In answering that question, Congress spoke out of both sides of its mouth. It said both that an alien in reinstatement status cannot "apply for any relief" under the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5), and that "[a]ny alien" present in the United States can apply for asylum "irrespective of such alien's status," *id.* § 1158(a)(1).

The Ninth Circuit acknowledged that these two congressional directives are "in conflict" and that there is no "indication of how Congress intended to resolve" the contradiction. Pet. App. 15, 17. Yet it held that the attorney general's choice between these conflicting directives was entitled to *Chevron* deference. In an opinion issued after Mr. Perez-Guzman filed his petition for certiorari, the Tenth Circuit reached the same flawed conclusion. *See R-S-C v. Sessions*, No. 15-9572, 2017 WL 3881938 (10th Cir. Sept. 6, 2017).

These decisions break faith with *Chevron*'s essential premise and limiting principle: that courts defer to agencies because, and only when, Congress has (implicitly) told them to. For more than 30 years, the Court has justified *Chevron* on the theory that when Congress leaves gaps in a statute administered by an agency, it means to delegate authority to the agency to fill in those gaps. That theory, however, cannot justify deferring to an agency's choice between conflicting statutory commands. "Direct conflict is not ambiguity, and the resolution of such a conflict is

not statutory construction but legislative choice." *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) (Roberts, J., concurring in the judgment).

As several members of this Court have recognized, the account of implicit congressional delegation on which *Chevron* rests is itself suspect, and there are serious questions about whether that account provides a sufficient justification for courts to abdicate their traditional role in interpreting the law. But at least the delegation theory has led to important limits on *Chevron*'s reach, such as the "major questions" doctrine and the *Mead* rule. By reflexively deferring to the attorney general without pausing to consider whether the theory underlying *Chevron* provides any basis for doing so, the decision below undermines those important limiting principles.

Not only is the decision below unmoored from any plausible account of congressional intent; it also displaces the judiciary from its role as a guardian of individual liberty. Unlike agencies, courts have tools for resolving statutory conflict in ways that serve enduring constitutional and democratic values. One such tool is the rule of lenity, which protects individual freedom by providing that certain harsh deprivations of liberty—such as imprisonment and deportation—can be imposed only when *Congress*, working through the deliberately difficult process of bicameralism and presentment, has *clearly said* that they should be.

That the judicial toolkit includes such liberty-protecting default rules confirms that courts are far better suited than executive agencies to resolve intra-statutory conflicts like the one presented here. Yet

the Ninth Circuit held, despite the absence of any evidence of a congressional delegation, that the venerable rule of lenity was trumped by the need to defer to the attorney general under *Chevron*. That decision warrants review and reversal.

REASONS FOR GRANTING THE PETITION

I. Deferring To An Agency's Choice Between Conflicting Statutory Commands Violates One Of *Chevron*'s Key Limiting Principles.

All administrative-agency powers, including the power to interpret laws, must come from Congress. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). *Chevron* deference is thus "rooted in a background presumption of congressional intent," *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013)—namely, the "theory that a statute's ambiguity constitutes an implicit delegation from Congress" to the agency of the authority "to fill in the statutory gaps." *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015); *see, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Dunn v. CFTC*, 519 U.S. 465, 479 n.14 (1997); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

Accordingly, despite divisions on the Court about other aspects of *Chevron*, it is uncontroversial that "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington*, 569 U.S. at 306; *accord id.* at 310 (Breyer, J., concurring in part and in the judgment) (when Congress has not spoken unambiguously, courts must "ask whether Congress

would have intended the agency to resolve the resulting ambiguity"); *id.* at 318–19 (Roberts, J., dissenting) ("[W]hether a particular agency interpretation warrants *Chevron* deference turns on the court's determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue."). As commentators have noted, this Court has been "consistent in recent years in maintaining that congressional delegation is the basis for according deference to agency interpretations of ambiguous statutes." Nathan A. Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1525–29.

To be sure, this presumption about congressional intent may be little more than a fiction. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516–17 (the "theoretical justification for *Chevron*" is "a fictional, presumed [congressional] intent . . . to confer discretion" on the agency); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron*'s claim about legislative intentions is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that.").

But if the implied-delegation theory is a fiction, it is at least a useful one. That theory has given rise to a number of important limits on *Chevron*'s reach. For example, *Chevron* deference is not available for agency interpretations that address matters of "deep economic and political significance," because it is not reasonable to assume that Congress "intended . . . an implicit delegation" with respect to such important

questions. *King*, 135 S. Ct. at 2488–89 (quotation marks omitted); *see Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Likewise, *Chevron* deference is generally unavailable when an agency forgoes the procedural safeguards of formal adjudication or notice-and-comment rulemaking, because it is unlikely that Congress "meant to delegate authority" to the agency to issue interpretations carrying "the force of law" in such a breezy fashion. *Mead*, 533 U.S. at 231–32; *see Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 643 (2013); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). And an agency receives no *Chevron* deference when interpreting a statute it is not specially charged with administering, because in those circumstances the claim of an "implicit delegation . . . is not sustainable." *Gonzales v. Oregon*, 546 U.S. 243, 265–67 (2006); *see Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997); *Prof'l Reactor Operator Soc'y v. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (R. Ginsburg, J.). In all these cases, the Court has held that *Chevron* cannot apply in circumstances where it is not reasonable to infer that Congress intended to delegate binding interpretive authority to the agency. *Cf.* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 872 (2001) ("[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply.").

Extending *Chevron* deference to an agency's choice between conflicting congressional commands is irreconcilable with that vital limiting principle. If the

notion that Congress delegates interpretive power to agencies by using ambiguous language requires a "hefty suspension of disbelief," *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring), the suggestion that it does so by directly contradicting itself is downright absurd. A principal does not confer discretion on an agent by telling the agent to do both X and not X. *See Cuellar de Osorio*, 134 S. Ct. at 2214 (Roberts, J., concurring in the judgment); *id.* at 2216 (Alito, J., dissenting).

Recognizing that a conflict between two statutory provisions is not an implicit delegation, and therefore does not trigger *Chevron* deference, is also consistent with *City of Arlington*. Far from abandoning *Chevron*'s traditional limits, the Court there resoundingly reaffirmed them. *See* pp. 4–5, *supra*; Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753, 776 (2014) ("*City of Arlington* has done more than any decision since *Mead*" to establish the congressional-delegation theory "as a basic limitation on the scope of the *Chevron* doctrine"). The Court there held that *Chevron*'s applicability cannot depend on the whether an agency's interpretation enlarged its "jurisdiction," because judges lack the tools to answer that question in a principled way. *City of Arlington*, 569 U.S. at 297, 307. By contrast, judges can readily distinguish between statutes that can be harmonized and those in conflict. (In this regard, it bears emphasis that Justice Scalia, the author of the majority opinion in *City of Arlington*, also joined the Chief Justice's opinion in *Cuellar de Osorio*.)

II. The Court Should Be Wary Of Decisions, Like The One Below, That Expand *Chevron* Beyond Its Traditional Bounds.

The Court should not tolerate lower courts' expansion of *Chevron* beyond its traditional bounds. As several members of this Court have recognized, *Chevron*'s statutory and constitutional foundations are questionable to begin with. *Chevron* deference appears to flout the clear directive in the Administrative Procedure Act that when agency action is challenged, "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706; *see 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, 1211 (2015) (Scalia, J., concurring in the judgment) (*Chevron* is a "judge-made doctrine" that the Court developed "[h]eedless of the original design of the APA"); *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.").

Nor have doubts about *Chevron* been limited to this Court. One respected jurist has called *Chevron* an "atextual invention by courts" and a "judicially orchestrated shift of power from Congress to the Executive Branch." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)). Consistent with the delegation theory of

Chevron, Judge Kavanaugh suggests that it should apply only where Congress has legislated in "broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.'" *Id.* at 2153–54. *See also* Philip Hamburger, *Is Administrative Law Unlawful?* at 316 (2014) (*Chevron* amounts to an "abandonment of judicial office" by which courts "deny the benefit of judicial power to private parties and abandon the central feature of their office as judges"); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 1000 (2017) (concluding that *Chevron* has "no true historical antecedent" and is inconsistent with traditional approaches to judicial review); Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 788–809 (2010).

Any further expansion of *Chevron* will only further erode "[t]he rule of law, which is a foundation of freedom." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring in the judgment). *Chevron*'s corrosive effect on the rule of law has been well described by two judges on the D.C. Circuit, the court on the front lines of the struggle between the judiciary and administrative agencies. As Judge Kavanaugh recently observed:

> From my more than five years of experience at the White House, I can confidently say that *Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints. . . . After all, an

> executive branch decisionmaker might theorize, "If we can just convince a court that the statutory provision is ambiguous, then our interpretation of the statute should pass muster as reasonable. And we can achieve an important policy goal if our interpretation of the statute is accepted. And isn't just about every statute ambiguous in some fashion or another? Let's go for it."

Kavanaugh, *supra*, at 2150–51. Judge Tatel has made similar comments:

> From my D.C. Circuit vantage, I sometimes wonder whether administrative agencies . . . really care about the fundamentals in the way that courts do. . . . [I]n both Republican and Democratic administrations, I have too often seen agencies failing to display the kind of careful and lawyerly attention one would expect from those required to obey federal statutes and to follow principles of administrative law. In such cases, it looks for all the world like agencies choose their policy first and then later seek to defend its legality.

David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 1–2 (2010).

Indeed, a recent survey of rule drafters at seven executive agencies found that *Chevron* was the "interpretive tool" the agencies used most often. Ninety percent reported that *Chevron* played a role in their drafting decisions, beating out every semantic or

substantive canon of construction the survey tested. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1062 (2015). That is all the more remarkable when one considers that unlike the canons, *Chevron* does not actually tell the agency anything about *how* it should interpret a given statute; all it tells the agency is that courts will not be checking its work carefully.

It should therefore come as no surprise that 80 percent of the agency rule drafters surveyed reported at least some agreement with the proposition that an agency is "more aggressive" in its interpretation when it believes *Chevron* will apply. *Id.* at 1063. As one scholar has remarked, a willingness to "adopt adventurous interpretations, far from any good faith reading of Congress's intent" has become "part of the culture" in many agencies post-*Chevron*. Beerman, *supra*, at 837–38; *see, e.g.*, *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (criticizing EPA for attempting to "seiz[e] expansive power that it admits the statute is not designed to grant"); *Michigan*, 135 S. Ct. at 2713 & n.2 (Thomas, J., concurring) (agencies are often "emboldened" by *Chevron* to pursue their policy goals "without any particular fidelity to the text"); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (agency had "repeatedly been rebuked in its attempts to expand the statute beyond its text, and ha[d] repeatedly sought new means to the same ends").

Just as *Chevron* emboldens agencies to aggrandize themselves, it encourages Congress and the judiciary to relinquish power. Although "a federal court's obligation to hear and decide cases within its

jurisdiction is virtually unflagging," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quotation marks omitted), courts often invoke *Chevron* to avoid deciding difficult or sensitive questions. And Congress "dis-empower[s] itself" by passing statutes that are vague or incoherent. Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 George Mason L. Rev. 501, 502–03 (2015). This gives agencies a further excuse for improvisation and adventurism, feeding a vicious circle. Such "[a]bdication of responsibility" on the part of two of the three branches "is not part of the constitutional design." *Clinton v. City of N.Y.*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

One way to mitigate these problems is to reaffirm *Chevron*'s traditional limiting principle: that where, as here, Congress cannot be said to have delegated interpretive authority to an agency, courts should "say what the law is" by using traditional rules of construction—including substantive canons that establish default rules for situations where Congress has not spoken clearly. Not only do those principles provide a stable set of ground rules that let Congress and the public predict how a court will interpret the law; as explained below, they also serve important constitutional and democratic values, the protection of which is better entrusted to courts than to administrative agencies.

III. Courts Should Resolve Statutory Conflicts By Applying Longstanding Rules Of Construction That Protect Individual Liberty.

Petitioner is correct that ordinary principles of statutory construction, including semantic canons like the specific-general canon, weigh heavily against allowing the reinstatement bar to trump the asylum provision. Pet. 24–28. More fundamentally, the asylum provision should prevail under the rule of lenity. Substantive canons like the rule of lenity are an important means by which courts protect fundamental constitutional values, including due process of law, democratic governance, and individual liberty. The judiciary's time-honored practice of adhering to those canons is an important reason why courts are better situated than executive agencies to resolve statutory conflicts like the one at issue here.

A "longstanding" canon of construction requires courts to resolve any ambiguities in deportation statutes "in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)); *see Dada v. Mukasey*, 554 U.S. 1, 19 (2008); Pet. 28 n.6. Because this canon embodies the same principle of forbearance that requires construing ambiguous criminal statutes in favor of the defendant, it is often called the "immigration rule of lenity." *E.g.*, Brian Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 Geo. Immigr. L.J. 515, 520 (2003); *see Bonetti v. Rogers*, 356 U.S. 691, 699 (1958) (describing the canon as an application of the more general rule of lenity); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (explaining that the canon reflects the harshness of deportation,

which is akin to exile or banishment); *Francis v. Reno*, 269 F.3d 162, 170 (3d Cir. 2001).

Whether in the criminal context or the immigration context, the rule of lenity reflects a fundamental principle: Congress must speak clearly if it wants to impose an especially severe deprivation of liberty. Just as the criminal rule of lenity expresses society's "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should," *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting Henry Friendly, *Benchmarks* 209 (1967)), the immigration rule of lenity expresses the law's distaste for individuals being forcibly removed from the country unless the lawmaker has clearly said they should be. *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 296 (2012) (explaining that the rule of lenity is rooted in the belief that "a just legislature will not decree punishment without making clear what conduct incurs the punishment and what the extent of the punishment will be"); *Carter v. Wells-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) ("The rule of lenity carries into effect the principle that only the legislature, the most democratic and accountable branch of government, should decide what conduct triggers these consequences.").

Chevron deference, which presumes that Congress has *delegated* the relevant decision to an agency, cannot trump the rule of lenity, which protects vital liberty interests by providing that only Congress *itself* can decide to infringe those interests. *E.g.*, *Whitman v. United States*, 135 S. Ct. 352, 353–54

(2014) (statement of Scalia, J., respecting denial of certiorari); *Carter*, 736 F.3d at 730–36 (Sutton, J., concurring); *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (identifying the rule of lenity as a tool of construction that a court might invoke to justify withholding *Chevron* deference). As Professor Sunstein has explained, the rule of lenity provides that "important rights and interests" can be infringed "only with respect for the institutional safeguards introduced through the design of Congress." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 338–39 (2000). It necessarily follows that the rule of lenity must take precedence over *Chevron*: "Executive interpretation of a vague statute is not enough when the purpose of the canon is to require Congress to make its instructions clear." *Id.* at 331; *see also* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L.J. 64, 79–80 (2008); Elliott Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 Baylor L. Rev. 1, 59–60 (2006); Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2115–16 (1990).

By limiting Congress's ability to delegate particularly important decisions, the rule of lenity helps ensure that "the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution." *United States v. Nichols*, 784 F.3d 666, 671 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc). That is a vital safeguard, as we have "not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully

crafted restraints spelled out in the Constitution"—including the "inefficient" but "deliberate and deliberative" process of bicameralism and presentment. *INS v. Chadha*, 462 U.S. 919, 959 (1983); *see Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1252 (2015) (Thomas, J., concurring in the judgment) (agreeing with Alexander Hamilton that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones" (quoting *The Federalist* No. 73, at 444)); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2610 (2014) (Scalia, J., concurring in the judgment).

Because the political branches often prioritize the achievement of their policy goals over respect for the constitution, however, lenity is a safeguard "that may not be fully vindicated without the intervention of the courts." *Nichols*¸ 784 F.3d at 671 (Gorsuch, J., dissenting from denial of rehearing en banc). "Agencies simply do not have the competency, the motivation, the impartiality, or the insulation from political forces to perform this task adequately." Greenfield, *supra*, at 59.

Other substantive canons likewise promote values that take precedence over *Chevron* deference. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–74 (2001) (avoidance of doubtful constitutional questions); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in the judgment) (presumption against extraterritoriality), *superseded by statute as stated in Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 n.8 (2006); *Massachusetts v. U.S. Dep't of*

Transp., 93 F.3d 890, 893–94 (D.C. Cir. 1996) (presumption against preemption). It makes little difference whether one views lenity and other substantive canons as barring application of the *Chevron* framework, as clarifying an otherwise ambiguous statute at *Chevron* "step one," or as making contrary interpretations unreasonable at *Chevron* "step two." The important point is that when criminal punishment or deportation is at stake, courts should not defer to an agency interpretation that infringes liberty more than the statute requires.

* * *

The combination of intra-statutory conflict and the rule of lenity should have made this an easy case. Congress has provided that Mr. Perez-Guzman, a refugee who faces the prospect of torture in his home country, both is and is not eligible for asylum. It is not plausible to interpret Congress's self-contradiction as an intentional delegation to unelected bureaucrats. Moreover, to recognize such an implicit delegation would undermine the values lenity is supposed to protect. In these circumstances a court should choose "the least liberty-infringing" of Congress's conflicting commands, *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1028 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev'd*, 137 S. Ct. 1562 (2017), rather than deferring to the attorney general's preference for a harsher rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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