No. 25-1241

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KOFFI DUFFI,
Petitioner,
v.
PAMELA BONDI,
UNITED STATES ATTORNEY GENERAL,
Respondent

On Petition for Review of an Order of the Board of Immigration Appeals
Agency Case No. A 064-016-427

BRIEF OF *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER AND REVERSAL

Jonathan Weinberg*
Wayne State University Law School
471 West Palmer Street
Detroit, MI 48202
Tel: (313) 577-3933
weinberg@wayne.edu

Attorney for amicus curiae

*Not admitted to the Eighth Circuit Bar

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ADMINISTRATIVE DECISIONS

INTEREST OF AMICUS CURIAE

The American Immigration Lawyers Association ("AILA") is a national, nonpartisan, and nonprofit association with nearly 17,000 members throughout the United States and abroad, including lawyers and law professors who practice and teach in the field of immigration and nationality law. AILA's member attorneys regularly represent noncitizens in legal proceedings, and are experienced in the day-to-day functioning of the immigration and criminal legal systems.

AILA has a strong interest in the Board of Immigration Appeals (BIA)'s correctly interpreting the immigration law. To that end, it is crucial that courts independently review BIA statutory interpretation in accordance with the Supreme Court's recent ruling in *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024). AILA proffers this brief to underline the effect of *Loper Bright* on judicial review of BIA statutory interpretations upheld under the now-superseded *Chevron* regime.[1]

[1] All parties have consented to the filing of this *amicus* brief. No party's counsel authored this brief in whole or in part, nor contributed money intended to fund preparing or submitting this brief. No person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Under the rule of *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024), when a court reviews an agency's interpretation of a statute, the court must independently identify the statute's single best meaning. It cannot defer to the agency or to any other entity.

That rule applies to the Board of Immigration Appeals (BIA)'s interpretation of the Immigration and Nationality Act in this case. This is not a case in which Congress assigned the interpretive task to the BIA. Nor was the BIA's position adopted contemporaneously with the statute's enactment and consistently maintained since then; quite the contrary is true. The only question before this Court is whether the BIA's interpretation is the best understanding of what the statute means.

Previously, when its hands were tied by *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984), this Court deferred to the BIA's understanding of the phrase "particularly serious crime." But this Court does not follow earlier panel decisions whose reasoning has been cast into doubt by a later Supreme Court opinion. The reasoning of the earlier decisions deferring to the BIA was definitively rejected in *Loper Bright*. Accordingly, those earlier decisions should play no role here. The Court's only job is to determine whether the BIA's determination is the best understanding of the statute.

ARGUMENT

I. THE BIA's VIEWS ARE ENTITLED TO NO WEIGHT.

Until last year, courts were required to uphold agencies' statutory interpretations so long as they were "reasonable," without regard to whether they were correct. That was the rule of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984). But that rule is no more. The Supreme Court, in *Loper Bright Enterprises v. Raimondo,* was explicit: "*Chevron* is overruled." 603 U.S. 369, 412 (2024).

Under *Loper Bright*, agency interpretations of statutes . . . are *not* entitled to deference." *Id.* at 392 (emphasis in original). When a court reviews an agency action in which the agency expressed a view as to the statute's meaning, the court must independently decide the statute's meaning.

All statutes, "no matter how impenetrable, do – in fact, must – have a single, best meaning." *Id.* at 400. It is the court's job to determine what that meaning is, without regard to the agency's views. If the agency's reading of the statute "is not the one the court, after applying all relevant interpretive tools, concludes is best," then it is simply not a permissible interpretation. "In the business of statutory interpretation, if it is not the best, it is not permissible." *Id.*

This Court has put said the same thing: "Our review is de novo, and we no longer treat the government's views as controlling or even 'especially

informative.' Deference to the Board [of Immigration Appeals], in other words, is now a relic of the past." *Quito-Guachichulca v. Garland*, 122 F.4th 732, 735 (8th Cir. 2024) (citations omitted); *see also id.* at 735 n.1.

In announcing this rule, the Supreme Court noted one exception and one qualification. The exception relates to cases in which Congress expressly delegated interpretative authority to an agency; in those cases, the reviewing court should recognize that delegation. *Id.* at 394-95. The qualification is that a court, in making its own independent judgment, may give appropriate weight to the way an agency's "experience and informed judgment" influenced the agency's reading of the statute. *Id.* at 394 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *Union Pac. Railroad v. Surface Transp. Bd.*, 113 F.4th 823, 833 (8th Cir. 2024).

In this case, however, Congress has delegated no authority to the Board of Immigration Appeals to interpret the statutory language at issue. And the Board's reading of the statute is entitled to no weight under *Skidmore* and related cases.

A. Congress Did Not Delegate Authority to Interpret the Phrase "Particularly Serious Crime" to the Board of Immigration Appeals.

In *Loper Bright*, the Court noted that sometimes Congress expressly delegates interpretive authority to an agency. The Court gave four examples of statutory language establishing that sort of agency interpretive leeway: [1] a statute

expressly noting that certain statutory terms are to be "defined and delimited by regulations of the Secretary"; [2] a statute imposing consequences in connection with "a substantial safety hazard, as defined by regulations which the Commission shall promulgate"; [3] a statute imposing consequences "whenever, in the judgment of the Administrator," pollutant discharges would interfere with water quality goals; and [4] a statute directing EPA to regulate power plans "if the Administrator finds such regulation appropriate and necessary." *Loper Bright*, 603 U.S. at 395 nn. 5 & 6.

All these examples involve express statutory language conferring unmistakable discretion on the agency. And that makes sense: The Court in *Loper Bright* made plain that independent judicial determination is the norm, and thus that the cases in which agencies rather than courts have interpretive authority are exceptional. They must be signposted by unambiguous language.

The Sixth Circuit recently addressed this issue in a case requiring interpretation of the statutory phrase "exceptional and extremely unusual hardship"; the Immigration and Nationality Act requires a showing of such hardship when persons in the United States without status, who satisfy certain other criteria, seek cancellation of removal. 8 U.S.C. § 1229b(b)(1)(D). The government argued that because the phrase "exceptional and extremely unusual hardship" was broad and somewhat vague, Congress should be deemed to have

delegated the authority to interpret that language to the BIA. *Moctezuma-Reyes v. Garland*, 124 F.4th 416 (6th Cir. 2024).

The Sixth Circuit had little difficulty disposing of that contention. *Loper Bright* forbids courts to base a finding that Congress delegated interpretive authority to the agency on the mere fact that a statute includes broad language. As the court explained, that approach would effectively bring back *Chevron.* "That can't be right. The case that declared '*Chevron* is overruled' didn't quietly reinstitute it." *Id.* at 420.

Rather, the Sixth Circuit explained, "there are rare circumstances where a court may have to defer to an agency. But . . . imprecise wording alone won't cut it." *Id.* at 421. Rather, "[t]he actual delegation of authority to the agency must be clear." Congress can be deemed to have delegated interpretive authority to the agency only when the statute pairs its broad language with "words that expressly empower the agency to exercise judgment." *Id.* at 420, 421.

There are no such words in this case. The statute does not state that asylum is unavailable if "in the judgment of the Administrator" the noncitizen has been convicted of a particularly serious crime and constitutes a danger to the community. It does not state that asylum is unavailable if the Secretary deems the noncitizen to have been convicted of a particularly serious crime and to constitute a danger to the community, "as defined and delimited by regulations of the

Secretary." Rather, it states simply that asylum is unavailable to a noncitizen who, "having been convicted . . . of a particularly serious crime, constitutes a danger to the community." 8 U.S.C. § 1158(b)(2)(A)(ii). Those words may not be self-explanatory. But under *Loper Bright*, it is the Court's job, and nobody else's, to decide what they mean.

B. The BIA's Views Are Not Entitled to Any Weight Under *Skidmore*.

The Court in *Loper Bright* noted that a reviewing court, in the course of its independent analysis, may attend to the way the agency's "experience and informed judgment" influenced the agency's reading of the statute. 603 U.S. at 374. Chief Justice Roberts referenced the Court's eighty-year-old opinion in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), which stated that an agency's influence should depend on such factors as "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements," and any other consideration that lent its views the "power to persuade." *Loper Bright*, 603 U.S. at 388 (quoting *Skidmore*, 323 U.S. at 140).

Skidmore, however, does not change the nature of the analysis in this case. First, the Supreme Court and this Court have emphasized that *Skidmore* does not direct courts to give weight to an agency interpretation except to the extent the agency's position is actually persuasive. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) ("under *Skidmore*, we follow an agency's rule only to the extent it

is persuasive"); *Kai v. Ross*, 336 F.3d 650, 655 (8th Cir. 2003) (under *Skidmore*, an agency interpretation "is worth no more than its inherent persuasive value").

Second, the Supreme Court explained in *Loper Bright* that a key driver of *Skidmore* respect is that an agency interpretation "was issued roughly contemporaneously with enactment of the statute and remained consistent over time." 603 U.S. at 386; *see also id.* at 388, 394. In some instances, the Court noted, the agency employees responsible for an interpretation may have helped draft the statutory language in question. In those circumstances, their views should get weight. *See id.* at 386.

But this is not such a case. The term "particularly serious crime" entered statutory U.S. immigration law in the Refugee Act of 1980, § 203(e), 94 Stat. 102, 107 (1980). The Board of Immigration Appeals issued a roughly contemporaneous interpretation in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). But far from consistently adhering to that contemporaneous interpretation, the BIA repudiated it in *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). While *Matter of Frentescu* explained that "the applicant's danger to the community" was the paramount consideration, 18 I&N Dec. at 247, the Board in *Matter of N-A-M-* reversed course. Whether an applicant was likely to endanger the community going forward, under the Board's about-face in *Matter of N-A-M-*, was not properly a matter for the Immigration Judge to consider at all. 24 I&N Dec. at 342-43. So while *Matter of*

Frentescu would have had some basis for *Skidmore* deference had the Board adhered to it, *Matter of N-A-M-* does not.

II. OLD PANEL DECISIONS DEFERRING TO *MATTER OF N-A-M-* ARE NOT CONTROLLING

This Court has deferred to the BIA interpretation embodied in *Matter of N-A-M* on several occasions. *See, e.g., Gutierrez-Vargas v. Garland*, 42 F.4th 877, 881 (8th Cir. 2022); *Shazi v. Wilkinson*, 988 F.3d 441, 448 (8th Cir. 2021).

On no occasion, though, did this Court taken the view that the Board's position in *Matter of N-A-M-* was the best interpretation of the statute. Rather, it deferred to the BIA's approach under *Chevron*. Thus, in *Shazi v. Wilkinson*, this Court explained that the statute was "silent as to the definition of 'particularly serious crime," and provided no guidance as to that category's content; it thus was "ambiguous." 988 F.3d at 448-49. With that starting point, the panel upheld the approach embodied in *Matter of N-A-M-* . It explained: "[W]e have recognized that the BIA's construction determining that the 'proper focus ... is on the nature of the crime and not the likelihood of future serious misconduct' is reasonable, and we have afforded such construction deference." *Id.* at 448.

Similarly, in *Gutierrez-Vargas*, this Court wrote: "We defer to the BIA's determination . . . and therefore reject Gutierrez-Vargas's argument that the BIA

erred by failing to consider whether he is a danger to the community." 42 F.4th at 881.

This Court's deference is perhaps most apparent in *Mumad v. Garland*, 11 F.4th 834 (8th Cir. 2021). The Court in *Mumad* had emphasized that because "the phrase 'danger to the community of the United States' modifies what comes before it," the particularly serious crime definition cannot be satisfied unless the crime "makes the [noncitizen] a 'danger to the community.'" *Id.* at 840. The Court reconciled that holding with the Board's contradictory approach in *Matter of N-A-M-*, which gives the question of danger to the community no explicit consideration, by means of these six words: "We defer to the Board's determination." *Id.*[2]

A. Under The Prior Panel Rule, Decisions Deferring to *Matter of N-A-M-* Have No Binding Force.

In the wake of *Loper Bright*, this Court's precedents deferring to *Matter of N-A-M-* have no binding force. In this Court, where earlier panel decisions have been "cast into doubt by intervening … Supreme Court decision[s]," a later panel

[2] *Tian v. Holder*, 576 F.3d 890 (8th Cir. 2009), was the earliest case in which this Court addressed the merits of a challenge to a BIA decision citing *Matter of N-A-M*. In *Tian*, though, the validity of the *Matter of N-A-M* standard was not before the Court: While the BIA had cited *Matter of N-A-M* in its opinion, it had also explicitly considered and rejected the noncitizen's claim that he posed no danger to the community. That rejection was central to the panel's affirmance. *Id.* at 897. This Court has nonetheless authoritatively characterized *Tian* as deferring to *Matter of N-A-M-* on the ground that it presented a reasonable interpretation of the statute. *See Shazi v. Wilkinson*, 988 F3d at 448.

is not bound by them. *Brown v. United States*, 929 F.3d 554, 559 (8th Cir. 2019) (ellipsis and brackets in original) (quoting *United States v. Anderson*, 771 F.3d 1064, 1067 (8th Cir. 2014), *cert. denied,* 575 U.S. 924 (2015)). *See also, e.g., Faltermeier v. FCA SU*, 899 F.3d 617, 621 (8th Cir. 2018) (where a Supreme Court decision "raises serious questions about the continued validity of [an earlier decision,] we may revisit the decision of the prior panel"); *Hernandez v. Bridgestone Americas Tire Operations*, 831 F.3d 940, 949 n.6 (8th Cir. 2016) (earlier panel decision not binding because an intervening Supreme Court decision called "its reasoning . . . into doubt"); *United States v. Taylor*, 803 F.3d 931, 933 (8th Cir. 2015) (same; prior panel decision is no longer binding because Supreme Court decision rendered its reasoning "doubtful"); *United States v. Anderson*, 771 F.3d 1064, 1066–67 (8th Cir. 2014) (decision "cast into doubt"), *cert. denied,* 575 U.S. 924 (2015); *United States v. Jiminez-Perez*, 659 F.3d 704, 720 (8th Cir. 2011) (prior panel decision not binding because it "has been undermined by the Supreme Court's intervening decision").

This Court does not require that the Supreme Court have explicitly overruled its prior decision, or that it be impossible to retrofit a justification for the earlier panel decision in light of the new Supreme Court ruling. All that is necessary, rather, is that the recent Supreme Court pronouncement has "undermined" the

earlier one, or called "its reasoning . . . into doubt." *Jiminez-Perez*, *supra*; *Hernandez, supra.*

Those holdings are more than sufficient to describe this case. Earlier Eighth Circuit panels never decided whether *Matter of N-A-M-* was the "single, best" interpretation of the statute, *Loper Bright*, 603 U.S. at 400. Rather, judges understood that, under *Chevron*, they need only decide whether the BIA's interpretation was a reasonable one. Yet *Loper Bright* has now made clear that that approach to statutory interpretation was illegitimate and incorrect. *Loper Bright* has done much more than cast the earlier precedents' reasoning "into doubt" – it has obliterated that reasoning utterly.

Indeed, this Court has already recognized that point. In *Quito-Guachichulca, supra,* after noting that "the deference we used to generally accord to the Board's interpretation of deportation-authorizing statutes did not survive *Loper Bright*," 122 F.4th at 735 n.1 (8th Cir. 2024) (citation omitted and cleaned up), this Court pointedly added, "*see also T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 960 (8th Cir. 2006) ('[A] panel may depart from circuit precedent based on an intervening opinion of the Supreme Court that undermines the prior precedent.')." *Id.*

B. *Loper Bright* Does Not Undercut the Prior Panel Rule

The Supreme Court's discussion of *stare decisis* in *Loper Bright* does not undermine this Circuit's prior panel rule. At one point in that opinion, the Court spoke to the significance of its holding for the doctrine of *stare decisis*. Even where *Loper Bright* renders earlier case law "wrongly decided," the Court noted, the simple fact that a case was wrongly decided is not enough, by itself, to overcome *stare decisis* in cases where that doctrine applies; some additional "special justification" must support overruling. *Loper Bright*, 603 U.S. at 412. The quoted language was from *Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258, 266 (2000)), in which the Court had discussed the requisites for its overruling its own precedent.

That observation, though, is not relevant to the question now before this Court, for two reasons.

First, the law of *stare decisis* that the Supreme Court was referencing – one that requires a "special justification" for overruling earlier holdings, 603 U.S. at 412 – was the law that governs the Court's treatment of its *own* past precedent. That body of *stare decisis* law is "a principle of policy and not a mechanical formula," *Helvering v. Haddock*, 309 U.S. 106, 119 (1940). It calls on the Court to balance such factors as the quality of the precedent's reasoning, the workability of the established rule, and the reliance interests it has engendered. *See Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 268-69 (2022).

But that body of Supreme Court law is different from this Court's prior panel rule. Absent an intervening Supreme Court decision, the prior panel rule is absolute: "It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." *United States v. Donath*, 107 F.4th 830, 836 (8th Cir. 2024) (quoting *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011)), *cert. denied*, -- U.S. -- (2025).The prior panel rule involves no balancing, and has no room for the "special justifications" that *Loper Bright* saw as weighing in the balance.

The question of the current status of earlier Eighth Circuit decisions is not a matter of the Supreme Court's approach to the *stare decisi*s effect of its own decisions– it is a matter of this Circuit's prior panel rule. The body of *stare decisis* law that the Supreme Court applies to its own precedents does not displace this Circuit's prior panel case law. And *Loper Bright* nowhere says that it does -- that would make no sense. *Loper Bright* should not be read as a dictate from the Supreme Court forcing the Courts of Appeals, in contravention of their own case law, to keep in place panel decisions using reasoning that they now recognize as wrong.

Second, even if that dictum in *Loper Bright* were read to modify this Circuit's prior panel rule, it still would not require the Court to follow *Matter of N-A-M-* in this case. At most, it would preserve holdings "that *specific* agency actions were lawful," 603 U.S. at 412 (emphasis added). Thus, for example, it would

freeze in place, absent action by the *en banc* Court, the ruling in *Shazi* that while a conviction for making terroristic threats in violation of Minn. Stat. § 609.713 is prima facie a particularly serious crime, the agency was required to consider evidence in mitigation relating to the noncitizen's mental health. 988 F.3d at 446-450.

But even so, that language would not require this Court to "use [earlier *Chevron*-dependent holdings] as analytical building blocks" in later cases presenting the question whether a noncitizen convicted of a *different* crime, on different facts, was barred from asylum. *See Murillo-Chavez v. Bondi,* 128 F.4th 1076, 1087 (9th Cir. 2025) (earlier *Chevron*-dependent panel decisions deciding that specific offenses are crimes involving moral turpitude may still be good law, but the court must apply independent judgment, going forward, when it comes to criminal offenses other than the specific ones the earlier panels had considered); *see also In re MCP No. 185*, 124 F.4th 993, 1002-03 (6th Cir. 2025).

Indeed, if *Loper Bright* were read any other way, the consequences would be far-reaching. Noncitizens would have to contend with the effects of an array of BIA decisions that incorrectly interpreted the law, but that this Circuit, pre-2024, had been forced to uphold under *Chevron*. That would be a serious error: Noncitizens seeking asylum should not be relegated to possible torture and death as a result of incorrect BIA statutory interpretation, just because this Court was

required to defer to that bad interpretation in the past. Citizens and noncitizens alike "are entitled to make their arguments about the law's demands . . . on equal footing with the government." *Loper Bright*, 603 U.S. at 441 (Gorsuch, J., concurring). And this Court should not have to go *en banc* to correct every prior instance in which *Chevron* had tied a panel's hands, forcing it to acquiesce to an incorrect BIA interpretation.

CONCLUSION

This Court's job in this case is to determine the "single, best" meaning of the Immigration and Nationality Act. For the reasons set out in Petitioner's brief, the BIA's position is not the best reading of the statute. This Court should therefore vacate its decision.

Dated: April 28, 2025

Respectfully submitted,

/s/ Jonathan Weinberg
Wayne State University Law School
471 West Palmer Street
Detroit, MI 48202
Tel: (313) 577-3933
weinberg@wayne.edu

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Jonathan Weinberg
Attorney for Amicus
American Immigration Lawyers Association

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5). This document contains 3660 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using MS Word for Mac Version 16.78 in **Times New Roman Size 14**.

3. Pursuant to 8th Cir. R. 25, I certify that the brief has been scanned for viruses and is virus free.

DATE: April 28, 2025

s/ Jonathan Weinberg
Attorney for Amicus
American Immigration Lawyers Association

CERTIFICATE OF CONSENT

Pursuant to Fed. R. App. P. 29(a)(2), I certify that counsel for Appellants and counsel for Appellees consented to the filing of this brief.

DATE: April 28, 2025

s/ Jonathan T. Weinberg
Attorney for Amicus
American Immigration Lawyers Association