No. 25-488

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IDALIA GUERRERO AVRCA,
Petitioner,
v.
PAMELA BONDI,
UNITED STATES ATTORNEY GENERAL,
Respondent

On Petition for Review of a Decision of the Board of Immigration Appeals

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

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

INTRODUCTION 2

ARGUMENT 7

I. THIS COURT HAS ALREADY REPUDIATED *AHMETOVIC* 8

II. *AHMETOVIC* IS IN ANY EVENT NO LONGER BINDING AFTER *LOPER BRIGHT* 11

III. CONGRESS DID NOT DELEGATE AUTHORITY TO INTERPRET 8 U.S.C. §§ 1158(B)(2)(A)(II) & 1231(B)(3)(B)(II) TO THE BOARD OF IMMIGRATION APPEALS. 17

CONCLUSION 22

AILA Doc. No. 26042009. (Posted 4/20/26)

TABLE OF AUTHORITIES

CASES

Ahmetovic v. INS, 62 F.3d 48 (2d Cir. 1995) .... passim

Art and Antique Dealers League of America v. Seggos, 121 F.4th 423 (2d Cir. 2024) 6

Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979)... 11, 12

Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984) .. passim

Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) 14

Doscher v. Sea Port Group Securities, 832 F.3d 372 (2d Cir. 2016)..................... 12

Farhane v. United States, 121 F.4th 353 (2d Cir. 2024) (*en banc*)............ 6, 8, 9, 10

Flores v. Holder, 779 F.3d 159 (2d Cir. 2015)... 5

Florida Central R. Co. v. Schutte, 103 U.S. 118 (1880) 10

Gelman v. Ashcroft, 372 F.3d 495 (2d Cir. 2004) 11

Gillespie v. U.S. Steel Corp., 321 F.2d 518 (6th Cir. 1963), *aff'd*, 379 U.S. 148 (1964) 10

Halliburton C. v. Erica P. John Fund, 573 U.S. 258 (2000) 13, 15

Helvering v. Haddock, 309 U.S. 106 (1940) 13

In re Zarnel, 619 F.3d 156 (2d Cir. 2010).. 11

INS v. Elias-Zacharias, 502 U.S. 478 (1992).. 20

Issaq v. Holder, 617 F.2d 962 (7th Cir. 2010)... 3

Jimenez v. Bondi, No. 23-6005, 2025 WL 1077492 (2d Cir. Apr. 10, 2025) 16

Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024)......................... passim

Marambo v. Barr, 932 F.2d 650 (8th Cir. 2019).. 3

Matthews v. Barr, 927 F.3d 606 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 158 (2020) 5, 14

Murillo-Chavez v. Bondi, 128 F.4th 1076 (9th Cir. 2025) 15

Nderere v. Holder, 467 Fed. Appx. 56 (2d Cir. 2012) 5

Nehma v. Garland, No. 20-3546, 2023 WL 2910631 (2d Cir. April 12, 2023)....... 5

AILA Doc. No. 26042009. (Posted 4/20/26)

Nethagani v. Mukasey, 532 F.3d 150 (2d Cir. 2008) 3, 5

Padilla v. Kentucky, 559 U.S. 356 (2010).. 8

Penaranda Arevalo v. Bondi, 130 F.4th 325 (2d Cir. 2025) 16

Sullivan v. American Airlines, 424 F.3d 267 (2d Cir. 2005)........................... 11, 12

United States v. Gill, 748 F.3d 491 (2d Cir. 2014).. 14

United States v. Oshatz, 912 F.2d 534 (2d Cir. 1990)... 10

Urias-Orellana v. Bondi, No. 24-777 (U.S. June 30, 2025)................................. 20

Vaskovska v. Lynch, 655 Fed. Appx. 880 (2d Cir. 2016)... 5

Wojchowski v. Daines, 498 F.3d 99 (2d Cir. 2007)... 11, 12

Wright v. Spaulding, 939 F.3d 695 (6th Cir. 2019).. 10

STATUTES

8 U.S.C. § 1158(b)(2)(A) 19

8 U.S.C. § 1158(b)(2)(A)(ii)... passim

8 U.S.C. § 1158(b)(2)(A)(v)... 21

8 U.S.C. § 1158(b)(2)(B)(ii)... 20

8 U.S.C. § 1231(b)(3)(B)... 19

8 U.S.C. § 1231(b)(3)(B)(ii)... passim

8 U.S.C. § 1252(b)(4)(B)... 20

ADMINISTRATIVE DECISIONS

Matter of Carballe, 19 I&N Dec. 357 (1986) .... passim

Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (Oct. 21, 2020) 21

OTHER AUTHORITIES

Christopher J. Walker, *Making Sense of Statutory Interpretation and Delegation After* Loper Bright, YALE. J. ON REG. NOTICE & COMMENT, https://www.yalejreg.com/nc/making-sense-of-statutory-interpretation-and-delegation-after-loper-bright/ (July 2, 2025) 18

Michael Dorf, *Dicta and Article III*, 142 U. PENN. L. REV. 1997 (1994)............... 10

AILA Doc. No. 26042009. (Posted 4/20/26)

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 correct interpretation of the immigration law, and thus in courts' correcting flawed Board of Immigration Appeals (BIA) statutory interpretation. AILA proffers this brief to explain the effect of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), when a Court of Appeals had previously been constrained by *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to uphold an incorrect BIA statutory interpretation.[1]

SUMMARY OF ARGUMENT

This Court's tasks in this case include determining the single, best meaning of 8 U.S.C. §§ 1158(b)(2)(A)(ii) *&* 1231(b)(3)(B)(ii), which provide that a

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[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.

AILA Doc. No. 26042009. (Posted 4/20/26)

noncitizen is barred from humanitarian relief if that noncitizen, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."

Under the defunct *Chevron* regime, the job of interpreting that language fell in the first instance to the Board of Immigration Appeals, and this Court was then required to defer to that reading. No more. Under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), this Court must independently determine the best meaning of the statute. Indeed, this Court has already done so, *en banc,* in a post-*Loper Bright* decision.

Prior to *Loper Bright*, this Court deferred to the BIA's interpretation of the §§ 1158(b)(2)(A)(ii) *&* 1231(b)(3)(B)(ii) language. Under this Court's prior-panel-rule case law, those earlier decisions are no longer good law. Nothing in the Supreme Court's opinion in *Loper Bright*, and nothing in the Immigration and Nationality Act, requires this Court to continue to defer to BIA interpretations without regard to whether those interpretations are correct.

INTRODUCTION

The Immigration and Nationality Act (INA) authorizes asylum and withholding of removal for noncitizens who will face persecution if returned to their home countries. That humanitarian relief is precluded, however, if the noncitizen, "having been convicted by a final judgment of a particularly serious

AILA Doc. No. 26042009. (Posted 4/20/26)

crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(A)(ii); *see id.* § 1231(b)(3)(B)(ii).

Whether this bar has been triggered is a matter of life or death. Under Board of Immigration Appeals (BIA) case law, the crimes triggering the bar need not be ones an ordinary person would consider unusually heinous. *See, e.g., Nethagani v. Mukasey*, 532 F.3d 150, 156-57 (2d Cir. 2008) (reckless endangerment conviction for shooting a gun into the air); *Issaq v. Holde*r, 617 F.2d 962 (7th Cir. 2010) (misdemeanor burglary followed by probation violation); *Marambo v. Barr*, 932 F.2d 650 (8th Cir. 2019) (unlawful possession of a firearm).

Yet once an Immigration Judge makes a finding that a noncitizen, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States," the judge has no power to grant asylum or withholding of removal. The noncitizen may be returned to her home country even if she is sure to be maimed or murdered there.

In *Matter of Carballe*, 19 I&N Dec. 357 (1986), the BIA effectively rewrote the statute, removing part of the language quoted above. The BIA ruled that "[o]nce a finding is made that an alien has been finally convicted of a particularly serious crime, it necessarily follows that the alien is a danger to the community of the United States." *Id.* at 357 (case syllabus). Accordingly, when faced with an applicant for asylum or withholding, it would focus only on whether he had ever

AILA Doc. No. 26042009. (Posted 4/20/26)

committed a crime (however minor) that it deemed "particularly serious." It would make *no* separate inquiry into whether the person in fact posed a danger to the community. According to the BIA, the idea that a person could once have been convicted of a crime it deemed "particularly serious," and yet not pose a danger to the larger community, was simply a logical impossibility. *Id.* at 360.

This Court addressed that statutory interpretation in *Ahmetovic v. INS*, 62 F.3d 48 (2d Cir. 1995). The Court was troubled by the BIA's interpretation, which seemed to run counter to the statute's plain text. Judge Winter, writing for the Court, explained: "Arguably, the language 'having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community' suggests that a separate finding as to the alien's 'dangerousness' is required. Otherwise, the clause concerning 'danger to the community' might seem superfluous." *Id.* at 52. The Supreme Court and this Court had made it plain that a statute should not be read so as to render its language meaningless. *Id.* at 53.

Judge Winter noted, though, that the language and legislative history left "room for differing interpretations." *Id.* Given that fact, he continued, "we believe that we may not 'simply impose [our] own construction on the statute, as would be necessary in the absence of an administrative interpretation.'" *Id.* (quoting *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984)). Rather, he explained, "*Chevron* instructs that 'if the statute is ... ambiguous with respect to the

AILA Doc. No. 26042009. (Posted 4/20/26)

specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *Id.* (again quoting *Chevron*, 467 U.S. at 843). On that basis, he "accept[ed] the BIA's interpretation." *Id.*

After *Ahmetovic* was decided, noncitizens continued to challenge the BIA's interpretation of §§ 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii) before this Court. Until last year, this Court's consistent answer was that "[w]e have previously afforded *Chevron* deference to the BIA's interpretation," and that that decision was binding on future panels until there should be "an intervening Supreme Court decision that casts doubt on our controlling precedent." *Nehma v. Garland*, No. 20-3546, 2023 WL 2910631 (2d Cir. April 12, 2023), at *1 (quoting *Matthews v. Barr,* 927 F.3d 606, 614 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 158 (2020)); *see also Vaskovska v. Lynch*, 655 Fed. Appx. 880, 883-84 (2d Cir. 2016); *Flores v. Holder*, 779 F.3d 159, 167 (2d Cir. 2015); *Nderere v. Holder*, 467 Fed. Appx. 56, 58 (2d Cir. 2012); *Nethagani v. Mukasey*, 532 F.3d 150, 156-57 (2d Cir. 2008).

Last year, however, the Supreme Court decided *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). It swept away the *Chevron* rule of deference that had dictated the outcome in *Ahmetovic*. The Court was explicit: "*Chevron* is overruled." *Id.* at 412. Under *Loper Bright*, "agency interpretations of statutes . . . are *not* entitled to deference." *Id.* at 392 (emphasis in original).

AILA Doc. No. 26042009. (Posted 4/20/26)

The *Loper Bright* Court explained that "[a]ll statutes, "no matter how impenetrable, do – in fact, must – have a single, best meaning." *Id.* at 400. It is the reviewing 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 not a permissible interpretation. "In the business of statutory interpretation, if it is not the best, it is not permissible." *Id.; see also Art and Antique Dealers League of America v. Seggos*, 121 F.4th 423, 435 (2d Cir. 2024) (after *Loper Bright*, "[t]he court makes its own determination of the meaning of ambiguous provisions"), *cert. denied*, 2025 WL 1496487 (U.S. May 27, 2025).

Freed from the strictures of *Chevron,* this Court returned to the meaning of §§ 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii) in *Farhane v. United States*, 121 F.4th 353, 370 & n.14 (2d Cir. 2024) (*en banc*), a case about denaturalization proceedings. Relying on the parallel nature of proceedings to undo naturalization and terminate asylum, the *en banc* Court explained that – contrary to the BIA's position following *Carballe* – §§ 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii) require the government to "prove more than the fact of a conviction of a qualifying crime." Rather, as the statute demands, the government must also show separately that the noncitizen is "a danger to the community of the United States." *Id.*

AILA Doc. No. 26042009. (Posted 4/20/26)

In the case before this panel, the BIA found that Ms. Guerrero Avrca's misdemeanor conviction barred her from asylum and withholding of removal. It followed the line of agency precedent begun in *Carballe*, and made no finding that she posed a present danger to the community. In Ms. Guerrero Avrca's petition for review, she argued that the interpretation of §§ 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii) embodied in the BIA's decisions following *Carballe* – and reflected in its decision in her case -- is a misreading of the statute.

Amicus believes that Ms. Guerrero Avrca's arguments to this Court are correct across the board. We limit our argument in this brief, though, to a single foundational point: The meaning of §§ 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii) is a question of statutory interpretation, which *Loper Bright* reserves to the independent judgment of Article III judges. *Ahmetovic* and its progeny are no longer binding. And the BIA can get no deference.

ARGUMENT

The Government is likely to argue that this Court is not free to entertain Ms. Guerrero Avrca's challenge to the BIA's statutory interpretation because [1] an earlier panel deferred to that interpretation in *Ahmetovic,* and [2] *Ahmetovic* binds this Court under the prior panel rule (under which, in general, this Court's judges are bound by earlier panel decisions). That argument fails for multiple reasons.

AILA Doc. No. 26042009. (Posted 4/20/26)

I. THIS COURT HAS ALREADY REPUDIATED *AHMETOVIC*

Most immediately, the Government's argument fails because this Court, sitting *en banc*, has *already* repudiated the BIA's statutory interpretation. The *en banc* Court in *Farhane* explicitly and intentionally addressed itself to the relevant statute, and rejected the BIA's position. In so doing, it made Circuit law.

The Government will no doubt seek to shrug off this Court's interpretation of § 1158(b)(2)(A)(ii) in *Farhane* as stray dictum. But the *Farhane* analysis was not dictum.

In *Farhane*, the Court considered whether the rule of *Padilla v. Kentucky*, 559 U.S. 356 (2010), applies to a naturalized citizen considering whether to plead guilty to a charge that would put him at risk of denaturalization. The Government argued that it did not, in part because denaturalization will sometimes require the government to make an additional factual showing beyond the conviction itself. Yet the Court recognized an inconsistency dooming that argument: The government had conceded that the rule of *Padilla* did sweep in an asylee's pleading guilty to a charge that put him at risk for termination of asylum. Yet § 1158(b)(2)(A)(ii), the Court explained, makes plain that termination of asylum *also* requires an additional factual showing: It requires a separate showing that the individual poses a danger to the community. Since *Padilla* applied to the case of

AILA Doc. No. 26042009. (Posted 4/20/26)

the asylee, it had equal applicability to the case of the citizen facing denaturalization.

The *Farhane* analysis, in other words, was part of the chain of reasoning that led the *en banc* Court to its ultimate conclusion. It was explicitly put in issue at oral argument.[2] It was not "necessary for the decision," in the sense that the Court might have reached its result relying only on other analysis. But the Supreme Court has recognized that the question is more complicated: If "necessary for the decision" were the only standard, then *everything* in an opinion articulating alternate holdings would be dictum, because neither of the holdings would be necessary to the result standing alone. *See Florida Central R. Co. v. Schutte*, 103

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[2] *See* Transcript of Oral Argument, *Farhane v. United States*, No. 20-1666 (Feb. 25, 2025), at 53:

> THE COURT: So terminating asylee status, if the government has to prove that you were convicted of a particularly serious crime and constitute a danger to the community of the United States, so in other words there is an evidentiary showing above and beyond the mere fact of conviction, conviction is necessary but not sufficient reason for terminating asylum status, why isn't that on all fours with the denaturalization as a first step to removal for a citizen?
>
> MR. METZNER: Your Honor, because the discretion in the government to bring a denaturalization petition is substantial and has been for more than a hundred years.
>
> THE COURT: Does the government not have discretion as to whether or not to seek to terminate someone's asylum status?

The discussion of terminating asylee status occupies five pages of the transcript. *See id.* at 51-55.

AILA Doc. No. 26042009. (Posted 4/20/26)

U.S. 118, 143 (1880); Michael Dorf, *Dicta and Article III*, 142 U. PENN. L. REV. 1997, 2040-48 (1994).

Instead, courts have applied more nuanced analysis to the question of which legal propositions articulated along the way to a judgment constitute holdings. The careful approach of Judge Thapar in *Wright v. Spaulding*, 939 F.3d 695 (6th Cir. 2019), is exemplary. Using that approach, we can see that [1] the *Farhane* analysis "contribute[d] to the judgment"; [2] the Court "actively *applied* the [analysis in question] to the case before it"; and [3] the Court "considered the issue and consciously reached a conclusion about it." Accordingly, the analysis was "part of [the Court's] holding." *Id.* at 701-02 (emphasis in original); *see also, e.g., Gillespie v. U.S. Steel Corp.*, 321 F.2d 518, 530 (6th Cir. 1963), *aff'd*, 379 U.S. 148 (1964).

It should not be forgotten that the source of the analysis in *Farhane* was the Court sitting *en banc*. Even if the *Farhane* analysis does not bind future Second Circuit panels in their consideration of §§ 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii), at the very least it establishes that future panels are no longer required to apply *Ahmetovic*'s deference – an approach by now rejected by *both* the Supreme Court and this Court sitting *en banc*. *Accord United States v. Oshatz*, 912 F.2d 534, 540 (2d Cir. 1990) (even dicta should be treated as the law of the Circuit where to do otherwise would subvert the orderly administration of justice), *cert. denied*, 500 U.S. 910 (1991).

AILA Doc. No. 26042009. (Posted 4/20/26)

II. *AHMETOVIC* IS IN ANY EVENT NO LONGER BINDING AFTER *LOPER BRIGHT*

In this Court, where an intervening Supreme Court decision "casts doubt" on a prior panel ruling, the earlier ruling is no longer binding. *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010) (quoting *Gelman v. Ashcroft*, 372 F.3d 495, 499 (2d Cir. 2004)). "The intervening decision need not address the precise issue decided by the [prior] panel for this exception to apply." *Id.* Rather, it is sufficient that the Supreme Court's decision "undermines" an important assumption underlying the prior panel decision, *Sullivan v. American Airlines*, 424 F.3d 267, 274 (2d Cir. 2005); that it "disturbs" the prior panel decision in a subtle but fundamental way, *Wojchowski v. Daines*, 498 F.3d 99, 108-09 (2d Cir. 2007); or that it rejects the prior panel decision's rationale, see *Boothe v. Hammock*, 605 F.2d 661, 663 (2d Cir. 1979).

Those holdings are more than sufficient to describe this case. Under the rule of *Loper Bright*, 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. 603 U.S. at 400. But this Court never decided that the BIA's interpretation of §§ 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii) was the "single, best" one – quite the contrary. Rather, this Court found the BIA's approach problematic from the start. It affirmed only because *Chevron* disabled it from "impos[ing its] own construction on the statute." *Ahmetovic,* 62 F.3d at 53

AILA Doc. No. 26042009. (Posted 4/20/26)

(quoting *Chevron*, 467 U.S. at 843). *Chevron* constrained this Court to accept an agency interpretation it did not approve.

L*oper Bright* rejected that approach to statutory interpretation as illegitimate and incorrect. *Loper Bright,* in other words, has done much more than "cast[] doubt" on *Ahmetovic* and progeny -- it has obliterated those decisions' rationales entirely. The Supreme Court's decision has certainly "undermine[d]" an important assumption underlying those decisions, as this Court found in *Sullivan v. American Airlines*. It has "disturb[ed]" those decisions' reasoning in a fundamental way, as this Court found in *Wojchowski*. It has without question rejected the decisions' rationales, as this Court found in *Boothe v. Hammock*.

This Court has cautioned that panels should not "revisit precedent without cause" though a "less-than-stringent" application of this rule. *Doscher v. Sea Port Group Securities*, 832 F.3d 372, 378 (2d Cir. 2016). But if an intervening Supreme Court decision has in fact "cast doubt" on a prior panel decision, the Court may not shrink from that finding. *See id.* at 378-81. In this case, that finding is unavoidable. Under any straightforward application of this Court's prior panel rule, *Ahmetovic* and its progeny are no longer good law.

The Government has objected in similar litigation that the Courts of Appeals should not, in this situation, apply their own case law establishing when prior panel decisions are and are not binding. Rather, it says, *stare decisis* language in *Loper*

AILA Doc. No. 26042009. (Posted 4/20/26)

Bright overrides all of that, constraining the Courts of Appeals to continue to treat prior panel opinions as binding even when their own case law says that they should not. But that's not correct.

At one point in the *Loper Bright* 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 "special justification" 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 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

AILA Doc. No. 26042009. (Posted 4/20/26)

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 entirely different from this Court's prior panel rule case law. Absent an intervening decision by superior authority, this Court's prior panel rule is absolute: "In our Circuit, panels are 'bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.' " *Matthews v. Barr*, 927 F.3d 606, 614 (2d Cir. 2019) (quoting *United States v. Gill*, 748 F.3d 491, 502 n.8 (2d Cir. 2014)), *cert. denied*, 141 S. Ct. 158 (2020). That rule permits no balancing. It does not allow a later court to consider the poor quality of the prior panel's reasoning, or the unworkability of the rule it established, or its failure to engender reliance interests, or any other of the "special justifications" that the *Loper Bright* Court referenced. Because this Court's prior panel case law does not *permit* attention to "special justifications," the Supreme Court's discussion would make no sense wrenched into that context.

The question of the current status of earlier Second Circuit decisions depends on this Circuit's prior panel rule, not on the Supreme Court's approach to the *stare decisis* effect of its own decisions. *Loper Bright* should not be read as the Government wishes: 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

AILA Doc. No. 26042009. (Posted 4/20/26)

using reasoning that they now recognize as wrong. It cannot coherently be read as a command that this Court of Appeals, in this one context only, replace its case law on the binding nature of prior panel decisions with a new body of law that (like the Supreme Court's) turns on *Halliburton*-style "special considerations." Indeed, the Supreme Court has no power to tell this Court that it must regard its prior panel decisions as binding, if this Court's own case law says otherwise. That is a matter of the internal functioning of this Court.

Second, even if the *Loper Bright* dictum were read to modify this Circuit's prior panel rule, it still would not require the Court to defer to the BIA in this case. At most, it would preserve prior panel 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 *Ahmetovic* that the noncitizen in that case and other similarly situated persons are barred from asylum and withholding.

But that language would still 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

AILA Doc. No. 26042009. (Posted 4/20/26)

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) (law set out in a pre-*Loper Bright* decision approving one "specific agency action" does not bind a post-*Loper Bright* court addressing a different "specific agency action").

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*. But noncitizens facing persecution should not be wrongly denied asylum by virtue of incorrect BIA statutory interpretation, and thus relegated to imprisonment or death, just because the now-repudiated *Chevron* regime previously required this Court to defer. 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* tied a panel's hands, forcing it to acquiesce to an incorrect BIA interpretation at odds with the statutory text.[3]

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[3] This issue is one of first impression in this Court. In *Jimenez v. Bondi*, No. 23-6005, 2025 WL 1077492 (2d Cir. Apr. 10, 2025), the Court held that the *pro se* petitioner had waived the relevant issue. *Id.* at *2 n.3. In *Penaranda Arevalo v. Bondi*, 130 F.4th 325 (2d Cir. 2025), the Court emphasized that its prior panel decision had not relied on *Chevron* in the first place, and that it was in any event

AILA Doc. No. 26042009. (Posted 4/20/26)

III. CONGRESS DID NOT DELEGATE AUTHORITY TO INTERPRET 8 U.S.C. §§ 1158(B)(2)(A)(II) & 1231(B)(3)(B)(II) TO THE BOARD OF IMMIGRATION APPEALS.

The Supreme Court in *Loper Bright* noted one exception to its general rule: If Congress has expressly delegated interpretative authority to an agency, then the reviewing court should recognize that delegation. 603 U.S. at 394-95. That exception does not apply in this case.

The Court in *Loper Bright* gave four examples of statutory language establishing the sort of delegation that gives an agency interpretive leeway. They were: [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. They define two – and only two –

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reaffirming that decision as an exercise of independent judgment rather than treating it as binding.

AILA Doc. No. 26042009. (Posted 4/20/26)

"categories of . . . delegations of authority." The first is "when Congress specifically and expressly instructs the agency to define or give meaning to a statutory term." The second is "when Congress grants the agency general rulemaking authority, and the agency 'fills up the details' of a statutory scheme or regulates subject to the limits imposed by a statutory term that leaves the agency with flexibility, such as 'appropriate' or 'reasonable.'" Christopher J. Walker, *Making Sense of Statutory Interpretation and Delegation After* Loper Bright, YALE. J. ON REG. NOTICE & COMMENT, https://www.yalejreg.com/nc/making-sense-of-statutory-interpretation-and-delegation-after-loper-bright/ (July 2, 2025).

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. In the words of the Sixth Circuit, "there are *rare* circumstances where a court may have to defer to an agency. But we must be sure. The actual delegation of authority to the agency must be clear . . . ." *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 421 (6th Cir. 2024) (emphasis added). After all, finding implicit delegation of interpretative authority to the agency in less-than-clear cases 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.

AILA Doc. No. 26042009. (Posted 4/20/26)

There is no language effecting a congressional delegation of interpretive authority in this case. The statute does not state that asylum is unavailable if "*in the judgment of the Administrato*r" 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*." It does not state that asylum is unavailable "*whenever appropriate* to avoid danger to the community" given the noncitizen's conviction of a particularly serious crime.

The Government has argued in other pending litigation that the INA does incorporate an explicit delegation. In its brief in that litigation, it noted the INA's provision that asylum and withholding of removal are unavailable if the Attorney General "determines" that any of six statutory bars are present, including the criminal bar at issue in this case. 8 U.S.C. § 1158(b)(2)(A).[4] (Other statutory bars listed in this provision include the noncitizen's having engaged in persecution of others, the noncitizen's fitting within the statute's terrorist inadmissibility bar, the noncitizen's having been firmly resettled in another country before entering the

[4] The quoted language can be found in 8 U.S.C. § 1158(b)(2)(A). Section 1231(b)(3)(B), otherwise almost entirely parallel, substitutes "decides" for "determines." It does not appear that this difference was intended to reflect a difference in meaning.

AILA Doc. No. 26042009. (Posted 4/20/26)

United States, and more. *See id.* § 1158(b)(2)(A)(i), (v), (vi)). But that language is inadequate to establish the delegation the Government claims.

The language the Government has cited reflects that all of the bars described in § 1158(b)(2)(A) require factual determinations – before any of the bars applies, the agency must "determine" that its factual predicates have been satisfied. In such a situation, we can expect deference to the agency's fact-finding. *See* 8 U.S.C. § 1252(b)(4)(B); *INS v. Elias-Zacharias*, 502 U.S. 478, 481 (1992). The Supreme Court has recently granted *certiorari* on the question whether a reviewing court should also extend deference to the BIA's decision of a "primarily factual" mixed question of fact and law. *Urias-Orellana v. Bondi*, No. 24-777 (U.S. June 30, 2025).

But this case is not that. The statutory interpretation embodied in *Matter of Carballe* answered a pure question of law. It has controlled later BIA decision-making under that statutory provision. It is at the core of *Loper Bright*.

Other provisions located in the same statutory section the government cites demonstrate that Congress knew how to write express delegations when it intended to create them. In 8 U.S.C. § 1158(b)(2)(B)(ii), Congress wrote that the agency "*may designate by regulation* offenses that will be considered to be" particularly serious crimes. *Id.* (emphasis added). That is an express delegation of interpretive authority. It is not one that applies in this case -- the Government has never

AILA Doc. No. 26042009. (Posted 4/20/26)

promulgated any such regulations. It has eschewed notice-and-comment and the other procedural protections of the rulemaking process. *See Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202, 67253 (Oct. 21, 2020) ("The Attorney General and the Secretary have not issued regulations identifying additional categories of convictions that qualify as particularly serious crimes . . . .").[5] But it demonstrates how Congress phrased an express delegation of interpretive authority in this context.

Elsewhere in the same section, in 8 U.S.C. § 1158(b)(2)(A)(v), Congress wrote that certain noncitizens falling within the terrorist bar may nonetheless be considered for asylum "if the Attorney General determines, *in the Attorney General's discretion*, that there are not reasonable grounds for regarding the [noncitizen] as a danger to the security of the United States." *Id.* (emphasis added). That too is an express delegation of authority, akin to those described in *Loper Bright*.

But neither of those express delegations transfers to the BIA the authority to decide, as a matter of pure statutory interpretation, that § 1158(b)(2)(A)(ii)'s "danger to the community" language requires no finding of present dangerousness.

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[5] Indeed, even if the agency had issued such regulations, and then claimed deference when it came to the definition of "particularly serious crimes," judicial deference would not extend to the separate question whether, in addition to such a crime, the statutory bar requires a showing of danger to the community.

AILA Doc. No. 26042009. (Posted 4/20/26)

And the presence of those express delegations strongly disfavors any argument that Congress somehow intended the word “determine” to effect a broad implicit delegation that would have swamped and rendered redundant its more specific ones.

In sum: The words “having been convicted . . . of a particularly serious crime, constitutes a danger to the community,” 8 U.S.C. § 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii), may or may not be self-explanatory. But “[a]gencies have no special competence in resolving statutory ambiguities. Courts do.” *Loper Bright,* 603 U.S. at 400-01. Under *Loper Bright*, it is the Court’s job, and nobody else’s, to decide what they mean.

CONCLUSION

Under *Loper Bright*, the Court’s job is to determine the “single, best” meaning of 8 U.S.C. § 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii). As Petitioner’s brief demonstrates, and as this Court already ruled in *Ahmetovic*, the BIA’s reading is far from that. This Court should vacate the agency decision.

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Respectfully submitted,

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AILA Doc. No. 26042009. (Posted 4/20/26)

CERTIFICATE OF SERVICE -- CORRECTED BRIEF

I hereby certify that on July 26, 2025, I electronically filed the foregoing corrected brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the ACMS system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the ACMS system.

s/ *Jonathan Weinberg*
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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Second Circuit Rules 29.1 and 32.1(a)(4)(A). It contains 5,210 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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Dated: July 22, 2025

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AILA Doc. No. 26042009. (Posted 4/20/26)