No. 14-1096

IN THE
Supreme Court of the United States

JORGE LUNA TORRES,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND IMMIGRANT DEFENSE PROJECT, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

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INTEREST OF *AMICI CURIAE*[*]

The Court's decision in this case not only raises an important question of immigration law but will also have significant criminal law consequences. *Amici*—national criminal defense organizations and organizations with expertise in the interrelationship between the nation's criminal and immigration laws—have a fundamental interest in the fair and just administration of the criminal justice system through clear laws that are properly applied in accordance with the dictates of the Constitution, the will of Congress, and the decisions of this Court. *Amici* offer this brief to help the Court understand the criminal law implications of the definition of "aggravated felony," the effect those implications have on the interpretation of federal immigration law, and the significant difference in level of seriousness between arson crimes prosecuted under federal law and the often lower-level offenses prosecuted under state law.

More detailed information about individual *amici* is provided in the Appendix.

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[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

The statutory provision at issue in this case—the definition of "aggravated felony" in the Immigration and Nationality Act (the "INA"), 8 U.S.C. § 1101(a)(43) ("Section 1101(a)(43)")—has been before this Court many times. It creates severe criminal law consequences for many individuals, including non-citizens convicted of illegal reentry into the country after removal, the second-most prosecuted federal felony in the United States. As Petitioner has argued, the statute is clear on the point at issue here; a state offense is not "described in" the federal arson statute for purposes of § 1101(a)(43)(E) unless it shares each element of the federal offense. Pet. Br. at 14–29.

But should the Court find the statute ambiguous, it must clarify for the lower courts the role of an agency's interpretation in hybrid statutes—those that have *both* civil and criminal applications. In such cases, courts must apply the time-honored criminal rule of lenity to interpret any statutory ambiguity in favor of a criminal defendant or a civil petitioner, rather than grant *Chevron* deference to the agency's interpretation. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (under rule of lenity, courts must interpret "any statutory ambiguity" in a criminal statute in the accused's favor); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

This Court has routinely exercised plenary review over the proper construction of Section 1101(a)(43), a statute that identifies aggravated felonies by

specifying or cross-referencing (1) generic names of crimes, (2) crimes "defined in" certain criminal statutes, and (3) crimes "described in" other statutes. *See, e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Kawashima v. Holder*, 132 S. Ct. 1166 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The court below, however, did not engage in *de novo* review. Instead, the Second Circuit gave broad deference to the Board of Immigration Appeals' ("BIA") insupportable interpretation of "described in" to encompass a state offense that does not share each element of the referenced federal offense. As a result, the Second Circuit accepted the BIA's decision to designate New York's arson law as an offense described in the federal arson statute, even though the former lacks the interstate-commerce element needed to convict a person of the latter. *Luna-Torres v. Holder*, 764 F.3d 152, 153 (2d Cir. 2014); *In re Vasquez-Muniz*, 23 I. & N. Dec. 207, 213 (BIA 2002).

In reaching this result, the Second Circuit deferred to the BIA, reasoning that the aggravated-felony provision is "ambiguous" and that the BIA's construction is "permissible." *Torres*, 764 F.3d at 158 & n.4. In the course of granting agency deference, however, the Second Circuit did not even consider applying the criminal rule of lenity. *Id.* (instead addressing a so-called immigration rule of lenity, and only doing so after first deferring to the agency). Other circuits have similarly deferred to the BIA, either expressly or impliedly, without applying the criminal rule of lenity. *E.g.*, *Spacek v. Holder*, 688

F.3d 536, 538 (8th Cir. 2012) (according "substantial deference" to the BIA's statutory interpretation of "described in," and not addressing the criminal rule of lenity); *cf. Nieto Hernandez v. Holder*, 592 F.3d 681, 684–685 & n.5 (5th Cir. 2009) (withholding determination of "the precise degree of deference to be afforded the BIA's interpretation," but noting that the Circuit had "previously stated that it afford[s] considerable deference to the BIA's interpretation of the INA"; no mention of the criminal rule of lenity) (internal quotation marks omitted).

These courts misconceive the proper role of *Chevron* deference. A court should defer to the agency's interpretation only if ambiguity remains *after* deploying all relevant principles of statutory interpretation, including the rule of lenity. "All manner of presumptions, substantive canons and clear-statement rules take precedence over conflicting agency views." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) (citing numerous examples from this Court's rulings). Properly applied, the rule of lenity requires courts to construe Section 1101(a)(43)'s reach narrowly if ambiguity is present. The rule of lenity thus demands that the Court construe "described in" in Petitioner's favor, meaning that his New York conviction does not qualify as an "aggravated felony" because the state offense lacks an element essential to the definition of the federal offense. Lenity cures ambiguity. And it pretermits agency deference.

Even if the agency were accorded *Chevron* deference, though, the result would remain the same

because the BIA's interpretation of Section 1101(a)(43) is not reasonable. *Chevron* requires courts "to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment) (overruled by statute on other grounds). But there is nothing reasonable about the BIA's interpretation of § 1101(a)(43). Apart from giving no consideration to the criminal rule of lenity, the agency ignored the ordinary meaning of "described in," *see* Pet. Br. at 14–20, and it ignored empirical evidence showing Congress's intent that the federal arson statute's interstate-commerce element serves a substantive function. Congress was clear in reserving the severe criminal and immigration law consequences of an aggravated felony determination for those convicted of the serious offenses described in and prosecuted under federal law, and in declining to attach the aggravated felony label to the often less serious offenses prosecuted under state laws that do not require prosecutorial proof of substantive elements such as the link to interstate commerce. The BIA's interpretation is the essence of "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. It is certainly not worthy of deference.

ARGUMENT

I. THE BIA'S INTERPRETATION OF "AGGRAVATED FELONY" DESERVES NO DEFERENCE

The court below erroneously deferred to the BIA's conclusion that a state offense is "described in" a specified federal criminal statute under Section 1101(a)(43)(E), even where the state offense does not contain all of the essential elements of the federal statute. *Luna-Torres*, 764 F.3d at 152, 158 (deferring to the BIA's "permissible construction" of the statute); *see also Spacek*, 688 F.3d at 538. *Cf. Espinal-Andrades*, 777 F.3d 163, 169 (4th Cir. 2015); *Nieto Hernandez*, 592 F.3d at 684–85.

Even assuming statutory ambiguity—a prerequisite to allowing an agency's interpretation to trump that of the courts—deference is not appropriate here. Section 1101(a)(43) has both civil and criminal applications. To the extent a statute with criminal and civil applications is ambiguous, those ambiguities must be resolved in favor of the defendant or petitioner under the canonical criminal rule of lenity. *Leocal v. Ashcroft*, 543 U.S. at 11 n.8 (2004). The rule of lenity affords constitutionally required fair notice to criminal defendants, promotes consistency in statutory interpretation across criminal and civil applications, and strikes "the proper balance between Congress, prosecutors, and courts" in defining, administering, and interpreting laws that have criminal applications. *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Moreover, this Court has repeatedly implored courts to deploy

all of the "normal 'tools of statutory construction'" before deferring to an agency's interpretation of an ambiguous statute. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron*, 467 U.S. at 843 n.9). The rule of lenity is one such tool. *Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (plurality opinion) ("The rule of lenity . . . is a rule of statutory construction."). Thus, there is no irresolvable conflict between the rule of lenity and *Chevron*. They are applied sequentially—the criminal rule of lenity, as a tool of statutory construction, is deployed before deference is given. *See Chevron*, 467 U.S. at 843 n.9. Thus, "*Chevron* accommodates rather than trumps the lenity principle." *Carter*, 736 F.3d at 732 (Sutton, J., concurring).

Additionally, respect for the separation of powers, the absence of agency expertise, and the need for consistency over time in the interpretation of criminal statutes reinforce the conclusion that no deference is owed to the BIA's interpretation of Section 1101(a)(43). The BIA does not "administer" the statute in the criminal context—courts do. The BIA has no particular "expertise" interpreting or applying the statute in its criminal applications. And experience with this statute teaches that an agency interpretation can be anything but consistent; in fact, the BIA reached diametrically opposed conclusions within a mere 13 months on the same interpretative question presented to this Court. Deference is unwarranted.

A. Section 1101(a)(43) Has Extensive Criminal Applications, with Substantial Penal Consequences

The INA, like various other statutes, has both civil and criminal applications. *E.g.*, *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., respecting the denial of certiorari) (Section 10(b) of the Securities Exchange Act of 1934); *Maracich v. Spears*, 133 S. Ct. 2191, 2222 (2013) (Ginsburg, J., dissenting) (Driver's Privacy Protection Act); *Leocal*, 543 U.S. at 11 n.8 (Comprehensive Crime Control Act, as referenced in 8 U.S.C. § 1101(a)(43)); *Thompson/Center Arms Co.*, 504 U.S. at 518 n.10 (plurality opinion) (National Firearms Act). The INA criminalizes, among other things, (1) an immigrant's failure to leave the country after an order of removal, 8 U.S.C. § 1253; (2) the harboring of certain immigrants, *id.* § 1324; (3) an immigrant's improper entry, or reentry, into this country, *id.* §§ 1325, 1326; (4) providing assistance to immigrants who are improperly entering the country, *id.* § 1327; and (5) the importation of immigrants for immoral purposes, *id.* § 1328.

Section 1101(a)(43), the INA provision at issue here, itself has criminal applications. It defines "aggravated felony" not only for immigration proceedings, but also for purposes of defining crimes and setting forth criminal penalties. For example, it is illegal to aid or assist "any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an *aggravated felony*)." 8 U.S.C. § 1327 (emphasis added). Likewise, the federal failure-to-depart

statute makes it a crime for immigrants convicted of an "aggravated felony" to remain in the country. *See id.* § 1253(a).

Section 1101(a)(43) also substantially increases the sentencing exposure of those convicted of certain federal criminal offenses. For example, the maximum penalty authorized by statute for illegal reentry under 8 U.S.C. § 1326 is two years for a "simple" offense, meaning no enhancements based on predicate convictions, but 20 years if the defendant has been convicted of an aggravated felony. *See id.* § 1326(b)(2) (also identifying an intermediate penalty for those with prior non-aggravated-felony convictions). Likewise, a federal criminal defendant faces a maximum prison term of four years for "simple" failure to depart under 8 U.S.C. § 1253(a)(1), but he or she faces a maximum 10-year prison term if previously convicted of an aggravated felony. *See id.* § 1253(a)(1) (same). Along those same lines, helping an inadmissible immigrant who "has been convicted of an aggravated felony" enter the country is a federal crime punishable by a 10-year maximum prison sentence. *See id.* § 1327.

Severe consequences also result under the United States Sentencing Guidelines (the "Guidelines"). An immigrant convicted of improper entry under 8 U.S.C. § 1325(a) or illegal reentry under § 1326 incurs a substantially more severe sentencing range under the Guidelines if he or she has previously been convicted of an "aggravated felony," as defined by Section 1101(a)(43). *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.3 (2009). While illegal reentry itself carries a base offense level of 8,

id. § 2L1.2(a), that offense level increases to 12 if he or she was previously convicted of any felony, and it doubles to 16 if the defendant was previously convicted of an aggravated felony. *Id.* § 2L1.2(b)(1)(c)–(d); *see also Illegal Reentry Offenses*, UNITED STATES SENTENCING COMMISSION, 1, 7 (April 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

These criminal law consequences under Section 1101(a)(43) have widespread impact. The illegal reentry statute, which contains an "aggravated felony" enhancement, is the second-most prosecuted felony in our federal courts. Transactional Records Access Clearinghouse ("TRAC"), TRAC Reports, Prosecutions for 2014 (Dec. 5, 2014), *available at* http://tracfed.syr.edu/results/9x20548211252a.html. In 2013, illegal reentry cases accounted for 26 percent of all federal criminal sentencings and 83.3 percent of sentencings involving immigration offenses. *Illegal Reentry Offenses*, *supra*, at 9. And the raw number of illegal reentry cases has steadily climbed year after year, increasing nearly 10% in just four years—from 16,921 in 2009 to 18,498 in 2013. *Id.* What's more, of the 18,498 illegal reentry defendants sentenced in 2013, "slightly more than 40 percent faced a statutory maximum of 20 years under § 1326(b)(2)" because of an aggravated felony conviction. *Id.* (noting that approximately one quarter of illegal reentry defendants faced a two-year statutory maximum under § 1326(a) and about one-third faced a 10-year statutory maximum under § 1326(b)(1)).

Thus, there can be no doubt that an aggravated-felony conviction carries hefty criminal law consequences.

B. Because Section 1101(a)(43) Has Criminal Law Consequences, the Rule of Lenity Applies and the BIA Is Owed No Deference

Given that an "aggravated felony" conviction under Section 1101(a)(43) has both criminal and civil applications, that term must be interpreted consistently across both settings. *See Whitman*, 135 S. Ct. at 353. This remains true even when the case arises in a noncriminal context. *Leocal*, 543 U.S. at 11 n.8 ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *see also Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) (applying rule of lenity to civil statute); *Thompson/Center Arms Co.*, 504 U.S. at 517–18 (plurality opinion) (same). Thus, to the extent there are ambiguities in Section 1101(a)(43), they are governed by the rule of lenity and "should be construed in the noncitizen's favor." *Carachuri-Rosendo*, 560 U.S. at 581.

The rule of lenity requires construing an ambiguous statute in favor of the defendant to determine the statute's meaning. And because courts must apply this and other traditional rules of statutory construction to resolve ambiguity *before* deferring to an agency's interpretation, there is no place for deference to the BIA. *See Chevron*, 467

U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.") (emphasis added).

1) The Rule of Lenity Requires "Aggravated Felony" To Be Construed Narrowly and in Favor of Petitioner

The rule of lenity is one of the "most venerable and venerated" principles of statutory interpretation. *Carter*, 736 F.3d at 731 (Sutton, J., concurring); *see also Thompson/Center Arms Co.*, 504 U.S. at 518 n.10 (plurality opinion); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 Harv. L. Rev. 26, 104 (1994) (lenity is a "substantive canon"). "The rule . . . is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). It has been applied to all manner of statutes carrying criminal implications "for roughly two centuries." *See United States v. Ford*, 560 F.3d 420, 425 (6th Cir. 2009).

Lenity requires "ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). Under the rule, "when there are two rational readings of a criminal statute, one harsher than the other," courts may not choose the harsher reading unless "Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359–60 (1987) (superseded by statute on other

grounds); *see also Skilling v. United States*, 561 U.S. 358, 410–11 (2010) (applying the rule of lenity "absent Congress' clear instruction otherwise"); *Ladner v. United States*, 358 U.S. 169, 178 (1958) (rule of lenity applies to statutes that increase penalties).

To the extent that Section 1101(a)(43) is ambiguous, the rule of lenity requires the provision to be construed narrowly and in Petitioner's favor. *See, e.g.*, *United States v. Bass*, 404 U.S. 336, 347 (1971); *Whitman*, 135 S. Ct. at 353. Application of the rule to resolve ambiguity in Section 1101(a)(43) is not only required by this Court's precedent, but it also accords with three of the rule's purposes—"to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *Kozminski*, 487 U.S. at 952.

As for the first purpose, a narrow construction of Section 1101(a)(43) accords with the demand that the government provide fair notice of both the conduct it criminalizes, *see McBoyle v. United States*, 283 U.S. 25, 27 (1931), and the penalties it may impose for criminal offenses, *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). Section 1101(a)(43) does not give fair notice that a state offense can be an aggravated felony despite lacking an element of the federal criminal analogue. *See* Pet. Br. at 14–29. And "no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment

that is not clearly prescribed." *Santos*, 553 U.S. at 514.

The rule of lenity also fulfills the purpose of respecting our Constitution's separation of powers. This Court has held that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. And courts "presum[e] that Congress legislates with knowledge of our basic rules of statutory construction." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). Thus, by reading Section 1101(a)(43) to avoid harsh and unexpected criminal consequences that Congress did not clearly intend, this Court will leave the definition of criminal activity in the province of the legislature and respect legislative intent.

For these various reasons, it comes as no surprise that this Court frequently has interpreted Section 1101(a)(43) without deference to the BIA's interpretation and without any reference to *Chevron* at all. *See supra* at 3 (citing cases). The Government agreed in one of those cases that agencies do not have interpretive authority over statutes with criminal applications. Brief for Respondent, *Leocal v. Ashcroft*, No. 03-583, 2004 WL 1617398 (July 14, 2004), at *32–33.[1] No deference is warranted here

[1] Here, as in those earlier cases, the definition of aggravated felony depends on the interplay between an INA provision and statutes that define federal crimes. In *Leocal*, for example, the Court held that a drunk-driving conviction was not an aggravated felony because it did not fit the definition of "crime

because the rule of lenity requires any ambiguity in Section 1101(a)(43) to be resolved in favor of Petitioner.

2) Even Under the *Chevron* Framework, the Rule of Lenity Precludes Agency Deference

Even if the *Chevron* framework applies to a statute with significant criminal law consequences, the BIA's interpretation of Section 1101(a)(43) would not be entitled to deference. Courts must apply statutory rules of construction *before* deeming a statute ambiguous and deferring to an agency's interpretation. *Cf. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (deferring to the agency because the lower court, in refusing to give deference, did not say that the statute was unambiguous and "invoked no other rule of construction (such as the rule of lenity) requiring it to conclude that the statute was unambiguous to

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of violence" used in Section 1101(a)(43)(F). *See Leocal*, 543 U.S. at 10, 13. That subsection incorporates the definition of "crime of violence" found in 18 U.S.C. § 16. As noted earlier, Section 1101(a)(43)(E) similarly extends the definition of aggravated felony to offenses described in a number of Title 18 provisions, including 18 U.S.C. § 844(i). The *Leocal* decision applied the rule of lenity even though the Court was dealing with a criminal statute in the deportation context, because Section 16 "has both criminal and noncriminal applications." *Id.* at 11 n.8. Thus, the decision whether the rule of lenity applies to the interpretation of a provision does not turn on where the provision is codified; rather, it turns on whether the interpretation will have both criminal and non-criminal consequences.

reach its judgment"). Put another way, deference "comes into play only if a statutory ambiguity lingers after deployment of all pertinent interpretive principles," *Carter*, 736 F.3d at 731 (Sutton, J., concurring), and the rule of lenity is an interpretive principle that resolves possible ambiguities. *See also id.* at 732 ("*Chevron* accommodates rather than trumps" interpretive principles, like the rule of lenity).

Accepting, as one must, that rules of statutory construction are applied before *Chevron* deference comes into play, the rule of lenity effectively forecloses agency deference when a statute has criminal applications. *Carter*, 736 F.3d at 732 (Sutton, J., concurring). As applied here, the rule of lenity cures Section 1101(a)(43) of any and all ambiguity—requiring "described in" to be construed to capture only those offenses with all of the same elements as the cross-referenced federal crimes, including the interstate-commerce element. With lenity properly applied, no "gap" remains for the BIA's interpretation to fill. *Cf. Chevron*, 467 U.S. at 843. To hold otherwise—to allow an agency to construe ambiguity in the government's favor—would extend the reach of a criminal statute further than any court could accomplish on its own. That would "turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *See Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J. concurring). Under these circumstances, there is no room for deference.

C. Respect for Separation of Powers, an Absence of Agency Expertise, and the Need for Consistency All Independently Militate Against Deference

Apart from the rule of lenity's primacy as an interpretative principle, three other separate and independent interests militate against deference to the BIA's interpretation of Section 1101(a)(43). Chief among them is respect for the separation of powers—a careful balance that the Founders struck between the three co-equal branches of government. That balance is upset when the same branch of government is allowed to decide what is a crime or its penalty and then choose when to prosecute under that interpretation. Relatedly, a key rationale for deference—agency expertise—is not present here. Courts, not agencies, have the expertise to interpret and apply criminal laws. Finally, criminal laws—even more so than civil laws—must be interpreted consistently over time to ensure the citizenry is given fair notice of the conduct that Congress has criminalized and the breadth of the applicable criminal penalties.

1) Deference Would Disrupt the Separation of Powers

As noted above, the rule of lenity prevents courts from exercising Congress's power to define criminal conduct. Judicial deference to an executive branch agency's interpretation of a criminal statute would upset the separation of powers in yet another way: by placing in one branch the power to define criminal

conduct and then prosecute those accused of engaging in it. Deference to an agency's interpretation of a statute with criminal applications is tantamount to allowing the agency to "define criminal activity," a power that rests exclusively with Congress. *See Bass*, 404 U.S. at 348. "[T]he most democratic and accountable branch of government"—the legislature—should define criminal conduct. *See Carter*, 736 F.3d at 731 (Sutton, J., concurring). Indeed, it is axiomatic that "'the King cannot create any offence by his prohibition or proclamation, which was not an offence before.'" *Whitman*, 135 S. Ct. at 353 (quoting *Case of Proclamations*, 12 Co. Rep. 74, 75 (K.B. 1611)).[2]

In short, deference would have the perverse effect of subtly shielding from independent judicial scrutiny the executive branch's interpretation of the very criminal laws that it sets out to prosecute. This Court "ha[s] never thought that the interpretation of those charged with prosecuting criminal statutes is

[2] It may be the case that Congress is allowed to assign its authority to create or define a crime, but the prerequisites for delegation of that power are not present here. *See Carter*, 736 F.3d at 733 (Sutton, J., concurring). When Congress departs from traditional notions of separation of powers in that manner, it must do so "deliberately," "explicitly," and "distinctly." *Id.*; *see also Whitman*, 135 S. Ct. at 353 ("[I]t is quite a different matter for Congress to give"—"let alone for [courts] to *presume* that Congress gave"—an agency the "power to resolve ambiguities in criminal legislation") (emphasis in original). *Cf. Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) ("Courts defer to an agency's reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency"). Congress did not expressly delegate to the BIA the power to construe a criminal statute.

entitled to deference." *Crandon*, 494 U.S. at 177 (Scalia, J., concurring); *see also Whitman*, 135 S. Ct. at 353 ("[T]he Government's pretensions to deference . . . collide with the norm that legislatures, not executive officers, define crimes"). By deferring to the BIA's interpretations, the lower courts have effectively allowed the BIA to enhance or decrease criminal penalties under the INA "at will," so long as it stays within the "ambiguities that the laws contain." *Whitman*, 135 S. Ct. at 353.

2) The BIA Lacks Criminal-Law Expertise

Chevron deference rests, in part, on respect for an agency's expertise in the subject matter of the statute that it administers. Considerations of agency expertise in this case, however, point the opposite way.

Chevron gives deference to an agency's interpretation of a "statute which it administers." *Chevron*, 467 U.S. at 842. But agencies do not "administer" criminal laws. Courts alone are charged with that responsibility. *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014) ("[C]riminal laws are for courts, not for the Government, to construe"). Indeed, this Court has "*never* held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) (emphasis added). The same is true of hybrid statutes with civil and criminal applications. *See, e.g.*, *Crandon*, 494 U.S. at 177 (Scalia, J., concurring) ("The law in question, a criminal statute, is not administered by any agency

but by the courts."). To be sure, the BIA administers the civil provisions of the INA, but it does not (and cannot) administer those laws in their criminal settings. *See, e.g.*, *id.* (Scalia, J., concurring) (that administrative necessity is "not the sort of specific responsibility for administering the law that triggers *Chevron*").

Chevron itself shows why courts should not defer to the BIA's interpretation of Section 1101(a)(43). This Court explained there that, in administering the Clean Air Act, the Environmental Protection Agency is charged with "implementing policy decisions in a technical and complex arena." 467 U.S. at 863. The Court specifically noted that the Clean Air Act's "regulatory scheme is technical and complex" and observed that "[p]erhaps" Congress left to the agency the ability to "strike the balance" between competing interests in this area because "those with great expertise and charged with responsibility for administering [the law] would be in a better position to do so." *Id.* at 865. This case is different because the BIA, like other agencies, simply lacks the relevant expertise. *See Crandon*, 494 U.S. at 177 (Scalia, J., concurring).

Several courts of appeals have recognized that "[t]he BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes. . . ." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir.), *cert. denied*, 130 S. Ct. 1011 (2009)*; see also*, *e.g.*, *Santana v. Holder*, 714 F.3d 140, 143 (2d Cir. 2013); *Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001). That is especially so for the provision at issue here. The phrase

"described in [a particular statutory provision]" is not an immigration term of art. Congress has used that phrasing repeatedly in a large number of statutes having nothing to do with immigration, including several criminal statutes. *See, e.g.*, 18 U.S.C. § 32(b)(4) (criminal penalties for persons who willfully attempt or conspire to commit "an offense described in paragraphs (1) through (3) of this subsection"); 18 U.S.C. § 38(b)(5)(A)–(B) (different fines depending on which paragraph the offense is "described in"); 18 U.S.C. § 209(f) (creating exemption from criminal liability for officers or employees injured "during the commission of an offense described in section 351 or 1751 if this title"); 18 U.S.C. § 485 (extending liability to anyone who "attempts the commission of any offense described in this paragraph"). Nothing about the interpretation of "offense described in" would be informed by an agency's expertise in immigration matters.

3) Deference Would Lead to Intolerable Inconsistencies Because Agencies Are Not Bound by *Stare Decisis*

One final reason for not deferring to the BIA's interpretation of Section 1101(a)(43)—separate and apart from lenity, separation of powers, and lack of agency expertise—is to ensure that the provision is interpreted consistently over time, especially in its criminal applications.

This Court requires consistent interpretation of statutory provisions that carry both criminal and non-criminal consequences; a statutory term does not

expand or contract based on the type of proceeding that the government chooses. *See, e.g.*, *Santos*, 553 U.S. at 522; *Leocal*, 543 U.S. at 11 n.8. In *Leocal*, for example, the Court recognized that the term "crime of violence," as used in Section 1101(a)(43), has been "incorporated into a variety of statutory provisions, both criminal and noncriminal" and held that it "must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal*, 543 U.S. at 4, 7, 11 n.8. To allow otherwise "'would render every statute a chameleon'" and allow judges or, worse, agencies to "'give the same statutory text different meanings in different cases.'" *Santos*, 553 U.S. at 522–23 (quoting *Clark v. Martinez*, 543 U.S. 371, 378 (2005)). But a "statute is not a chameleon. Its meaning does not change from case to case." *Carter*, 736 F.3d at 730 (Sutton, J., concurring). And allowing the "same words" in the same statute to mean different things depending on the type of proceeding "would be to invent a statute rather than interpret one." *Clark*, 543 U.S. at 378.

Equally important, unless a statute with criminal applications is interpreted consistently over time, the citizenry will be deprived of fair notice of which conduct is criminal and the penalty for engaging in it. *See McBoyle*, 283 U.S. at 27. Deference to an agency's interpretation of a criminal statute would leave the door open for the statute's meaning to change back and forth over time, at the whims of each newly installed administration and with no

requirement of advance notice.[3] Deference, in effect, would "allow one administration to criminalize conduct within the scope of the ambiguity, the next administration to decriminalize it, and the third to recriminalize it, all without any direction from Congress." *See Carter*, 736 F.3d at 729 (Sutton, J., concurring).

In fact, that is precisely what has happened with Section 1101(a)(43). In 2000, the BIA held that a state offense is not "described in" Section 1101(a)(43)(E) if the state offense lacks the interstate-commerce element of the referenced federal statute, because characterizing an element as "'jurisdictional' . . . does not change the fact that it is an element of the offense." *In re Vasquez-Muniz*, 22 I. & N. Dec. 1415, 1420, 1424 (BIA 2000). A mere 13 months later, however, after a new administration took office, the BIA changed its mind, finding a state offense to be "described in" a federal statute even if the state offense lacks the "jurisdictional" interstate-commerce element. *See In re Vasquez-Muniz*, 23 I. & N. Dec. 207, 213 (BIA 2002).

No one should be surprised by this bureaucratic flip-flop. Nor would it be unusual if future administrations continued to oscillate. Indeed, the

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[3] This Court deferred in *Chevron* despite the EPA's change in interpretations over time. *Chevron*, 467 U.S. at 863 ("The fact that the [EPA] has from time to time changed its interpretation of the term . . . does not . . . lead us to conclude that no deference should be accorded the [EPA's] interpretation of the statute."). But unlike Section 1101(a)(43), the Clean Air Act provision at issue in *Chevron*, "stationary source," had no criminal applications. *See id* at 840.

one consistent thing about the BIA's interpretation of the INA is its disregard for consistency. *See, e.g.*, *Judulang v. Holder*, 132 S. Ct. 476, 488 (2011) (unanimously rejecting the BIA's interpretation while noting that the "BIA repeatedly vacillated" in determining whether § 212(c) of the INA permits the Attorney General to grant discretionary relief to a deportable non-citizen).

If past is prologue, deference to the BIA would undermine fair notice and consistency.[4] "Whether a person spends twenty years in prison cannot depend on the unpredictably changing views of agency officials." Pet. Br. at 41.

II. EVEN IF *CHEVRON* DEFERENCE APPLIED HERE, THE OUTCOME WOULD BE THE SAME

With the rule of lenity requiring ambiguities in Section 1101(a)(43) to be construed in Petitioner's favor, that—in *Chevron's* words—"is the end of the

[4] The Court's decision in *Babbitt v. Sweet Home Chapter, Cmtys. for a Great Or.*, 515 U.S. 687 (1995), is of no moment. In *Babbitt*, the Court, with "scarcely any explanation . . . brushed the rule of lenity aside in a footnote, stating that '[w]e have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations." *Whitman*, 135 S. Ct. at 353 (Scalia, J., respecting the denial of certiorari) (quoting *Babbitt*, 515 U.S. at 704, n.18)). But this comment in *Babbitt* "deserves little weight," as it both "vindicates the principle that only the legislature may define crimes and fix punishments" and "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Id.* at 353–54.

matter." *Chevron*, 467 U.S. at 842–43. But even if the Court were to apply *Chevron* deference by reviewing the BIA's interpretation for reasonableness, the result would be the same. The BIA failed to apply, or even mention, the interpretive principle most salient here—the rule of lenity. Moreover, empirical evidence, which shows that the interstate-commerce element is a valid proxy for more serious offenses, bears out the conclusion that Congress meant what it said when it enacted Section 1101(a)(43). Put simply, the BIA's interpretation is unreasonable and entitled to no deference—even under *Chevron*.

A. The Manner in Which the BIA Interpreted the Provision Was Unreasonable

Chevron requires courts to accept only those agency interpretations "that are reasonable in light of the principles of construction courts normally employ."[5] *Arabian Am. Oil Co.*, 499 U.S. at 260 (Scalia, J., concurring in part and concurring in the judgment). Courts properly refuse to defer to agency interpretations that are not reasonable. *See Francis*, 269 F.3d at 168 n.8 (noting that the BIA's decision would be reversed "even if *Chevron* applied because the BIA's analysis is not a reasonable interpretation

[5] Thus, "[i]f you believe that *Chevron* has only one step, you would say that *Chevron* requires courts 'to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.'" *Carter*, 736 F.3d at 731 (Sutton, J., concurring) (citing *Arabian Am. Oil Co.*, 499 U.S. at 260) (Scalia J., concurring in part and concurring in judgment).

of 8 U.S.C. § 1101(a)(43)(F)"). After all, "deference is not abdication." *Arabian Am. Oil Co.*, 499 U.S. at 260.

The BIA's interpretation of Section 1101(a)(43) is unreasonable for the many reasons articulated by Petitioner. Pet. Br. at 47–49. It is also unreasonable because the BIA failed to apply—or even mention—the criminal rule of lenity. As explained above, the rule dictates that "[w]hen ambiguity clouds the meaning of a criminal statute, the tie must go to the defendant." *United States v. Ford*, 560 F.3d 420, 425 (6th Cir. 2009) (internal quotations omitted). "Rules of interpretation bind all interpreters, administrative agencies included." *Carter*, 736 F.3d at 731 (Sutton, J., concurring). "That means an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Id.* "[A] court should not defer to an agency's anti-defendant interpretation of a law backed by criminal penalties." *Id.* Although the BIA may have engaged in *some* statutory analysis (ultimately reaching the wrong conclusion), its failure to apply or even mention the criminal rule of lenity renders its interpretation of Section 1101(a)(43) unreasonable and worthy of no deference.

B. Empirical Evidence Confirms that Congress Intended the Interstate-Commerce Element To Function Substantively

The BIA's capacious construction of Section 1101(a)(43) does not comport with the words Congress used. Nor could other canons of

construction justify reading "offense described in" to mean "one element short of an offense described in." This is especially the case because experience shows that the element being excised, the interstate-commerce element, plays an important role in narrowing "aggravated felony" to more serious offenses. Thus, contrary to the BIA's declaration that "the omission of the Federal jurisdictional element" is "not dispositive," *Matter of Bautista*, 25 I. & N. Dec. 616, 620 (BIA 2011), *vacated by Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014), Congress sensibly required a nexus to interstate commerce for the offenses at issue here.

Serious crimes of the types that might qualify as aggravated felonies are significantly more likely to be prosecuted federally. Susan R. Klein et al., *Why Federal Prosecutors Charge: A Comparison of Federal and New York State Arson and Robbery Filings, 2006-2010*, 51 HOUS. L. REV. 1381, 1401 (2014). For example, although the federal and New York statutes at issue here contain similar elements (apart from the notable difference when it comes to interstate commerce), the more serious arson crimes are generally prosecuted by the federal government, with minor arson offenses left to the state courts. *Id.* at 1395. A comparison of filings between 2006 and 2010 reveals that where an arson crime contains indicia of seriousness, including, for example, the use of a weapon, the presence of a minor victim, or prior violent or drug-related arrests, the crime is considerably more likely to be prosecuted federally. *Id.* at 1426. In particular, where a weapon is used, an arson case is 369% more likely to be charged in federal court than in state court. *Id.* at 1416, Tbl. 27.

Where a minor victim is involved, an arson case is 711% more likely to be charged federally. *Id*. Where the suspect has between one and five prior violent arrests, an arson case is 433% more likely to be charged federally. *Id.* And where the suspect has between six and ten prior violent arrests, that number rises to 4,028%. *Id.*

Although there will, of course, be exceptions to this general rule, the question is not whether federal prosecutions *always* involve more culpable conduct than the offenses that give rise to prosecutions under similar state statutes. After all, Congress chose a categorical approach rather than looking to the manner in which each defendant committed each predicate offense. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1684; *cf. Johnson*, 135 S. Ct. at 2557 (Armed Career Criminal Act).

One explanation for this phenomenon when it comes to arson cases is that numerous state arson statutes are only misdemeanors.[6] *See, e.g.*, Code of Ala. § 13A-7-43(d) ("Arson in the third degree is a Class A misdemeanor"); Colo. Rev. Stat. § 18-4-103 (3) ("Second degree arson is a class 2 misdemeanor, if the damage is less than one hundred dollars."); Iowa Code § 712.4 ("Arson in the third degree is an aggravated misdemeanor."); Md. Criminal Law Code

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[6] Some offenses count as an aggravated felony only if they are punishable by a term of imprisonment of at least one year, *e.g.*, § 1101(a)(43)(F), two years, *see* § 1101(a)(43)(T), or five years, *see* § 1101(a)(43)(Q). But for offenses "described in" a specified federal statute, there is no language preventing offenses with low maximum penalties from being labeled aggravated felonies.

Ann. § 6-105(c) ("A person who violates this section is guilty of the misdemeanor of malicious burning in the second degree."); Mich. Comp. Laws § 750.77(3) ("Fifth degree arson is a misdemeanor."); R.S. Mo. § 569.053 (2) ("Arson in the third degree is a class A misdemeanor."); N.Y. Penal Law § 150.01 ("Arson in the fifth degree is a class A misdemeanor."); Wyo. Stat. § 6-3-104(b) ("Fourth-degree arson is a misdemeanor."); Or. Rev. Stat. § 164.335(2) ("Reckless burning is a Class A misdemeanor."); Tenn. Code Ann. § 39-14-304 ("Reckless burning is a Class A misdemeanor."); Utah Code Ann. § 76-6-104(2) (Reckless burning is a misdemeanor); Rev. Code Wash. (ARCW) § 9A.48.050(2) ("Reckless burning in the second degree is a gross misdemeanor."); Cal. Pen. Code § 452(d) ("Unlawfully causing a fire of property is a misdemeanor."); Haw. Rev. Stat. § 708-8254 ("Arson in the fourth degree is a misdemeanor.").

Federal arson prosecutions, which carry a statutory minimum of five years and a maximum of 20 years under 18 U.S.C. § 844(i), often involve death or a risk of substantial property damage and harm to others. *See, e.g.*, *Russell v. United States*, 471 U.S. 858, 859 n.1, 859–60 (1985) (affirming defendant's conviction and 10-year sentence under the § 844(i), where defendant hired a convicted felon to start a fire in the apartment building owned by defendant by using a natural gas line in the basement); *United States v. Aman*, 480 F. App'x 221, 222 (4th Cir. 2012) (affirming defendant's conviction for the burning of a restaurant, bar, and pool hall facility in a commercial office building that housed more than 70 other businesses using lighter fluid and gasoline under

§ 844(i)); *Belflower v. United States*, 129 F.3d 1459, 1460 (11th Cir. 1997) (affirming defendant's conviction and 121-month sentence for bombing a car owned by the Sheriff's department, in violation of § 844(i)); *United States v. Brown*, 74 F. Supp. 2d 637, 638, 644 (N.D.W. Va. 1998) (affirming magistrate judge's denial of motion to dismiss indictment for arson under § 844(i) where defendants' residence was destroyed by fire and five children who lived in the home died).

Consistent with this difference in offense severity, federal defendants also serve longer sentences than their state counterparts. Susan R. Klein et al., at 1388. Between 2006 and 2010, the mean sentence for arson charged in federal court was 84.2 months, while the mean sentence for arson charged in New York state court was only 41.1 months. *Id.* at 1425. And that understates the difference, because while a federal defendant actually serves the great bulk of the sentence imposed (with a small "good time" credit), a state criminal defendant serves a much smaller percentage of jail time before being released on parole. *Id.* Thus, while federal arson defendants served nearly all of their 84.2-month average sentences, state arson defendants actually served, on average, only 24.6 months. *Id.*

Congress therefore took a sensible approach in light of the severe criminal and immigration law consequences attached to conviction of an aggravated felony when it declined to create a "jurisdictional element" exception for offenses described in federal law, such as the federal arson statute at issue here,

that would encompass the lower-level offenses often prosecuted under state law.

CONCLUSION

For all of these reasons, the Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX – INTEREST OF AMICI

The National Immigration Project of the National Lawyers Guild ("NIP") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For 30 years, the NIP has provided legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises. The NIP has participated as *amicus curiae* in several significant immigration-related cases before this Court. *See, e.g.*, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010).

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges. IDP has submitted *amicus curiae* briefs in many of this Court's key cases involving the interplay between criminal and immigration law. *See, e.g.*, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012);

Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (citing IDP brief).

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. NAFD has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals. NAFD has filed in this case to offer the knowledge and experience of the indigent defense bar regarding both the operation of the Rule of Lenity and the nature of arson offenses prosecuted in state and federal courts. In addition, NAFD understands that the resolution of this case will have broader implications for federal criminal defendants and supports Petitioner's arguments that the Court should hew to a strict categorical approach or apply the Rule of Lenity in construing the aggravated felony statute.

The National Association of Criminal Defense Lawyers ("NACDL") files numerous *amicus curiae* briefs each year in this Court and other courts. This Court has often cited NACDL *amicus curiae* briefs that address the everyday workings of the criminal justice system and the implications of the Court's decisions in criminal justice and immigration cases. *See, e.g.*, *Navarette v. California*, 134 S. Ct. 1683 (2014) (Scalia, J., dissenting); *Fernandez v. California*, 134 S. Ct. 1126 (2014) (Ginsburg, J., dissenting); *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (Sotomayor, J., concurring); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *INS v. St. Cyr*, 533 U.S. 289 (2001).

The National Association for Public Defense ("NAPD") is an association of nearly 8,000 attorneys and other professionals critical to delivering the constitutional right to effective assistance of counsel for individuals charged with criminal offenses in the United States. NAPD members are the advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of services. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models. The NAPD has a deep interest in the correct interpretation of laws involving the potential direct and enmeshed consequences of criminal convictions.