No. 17-302

In the Supreme Court of the United States

RONY ESTUARDO PEREZ-GUZMAN, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, and regulations interpreting it bar an alien whose prior removal order has been reinstated from applying for asylum in the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 835 F.3d 1066. The decision of the Board of Immigration Appeals (Pet. App. 33-39) is unreported. The oral decision and order of the immigration judge (Pet. App. 40-55) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2016. A petition for rehearing was denied on April 26, 2017 (Pet. App. 56). On July 7, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 24, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Since 1950, the immigration laws have provided for reinstatement of a previous order of removal

against an alien who illegally reenters the country after having been removed. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 33 (2006) (discussing the Internal Security Act of 1950 (ISA), ch. 1024, § 23(d), 64 Stat. 1012 (8 U.S.C. 156(d) (Supp. IV 1950))). Congress adopted the reinstatement provision as part of broader legislation aimed at "provid[ing] more effective control over, and * * * facilitat[ing] the deportation of, deportable aliens." H.R. Conf. Rep. No. 3112, 81st Cong., 2d Sess. 59 (1950). As originally enacted, the reinstatement authority was limited to particular categories of aliens who had illegally reentered the country, including aliens whose deportation was based on their involvement in narcotics trafficking, crimes of moral turpitude, or subversive activity. See ISA § 23(c), 64 Stat. 1012 (adding 8 U.S.C. 156(c) (Supp. IV 1950)). Deportation of other illegal reentrants was conducted pursuant to the provisions governing deportation of aliens more generally. See 8 U.S.C. 155 (1946 & Supp. IV 1950).

When Congress comprehensively revised the immigration laws in the Immigration and Nationality Act (INA or Act), ch. 677, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), it reenacted the reinstatement provision in revised form. See § 242(f), 66 Stat. 212 (8 U.S.C. 1252(f) (1952)). The reinstatement authority was again confined to certain categories of illegal reentrants, including aliens who had committed specified crimes, had falsified documents, or had endangered national security. See *ibid.*; § 242(e), 66 Stat. 211 (8 U.S.C. 1252(e) (1952)).

The reinstatement provision remained unchanged until 1996, when Congress again enacted comprehensive revisions to the immigration laws in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat.

3009-546. IIRIRA repealed the former reinstatement provision and replaced it "with one that toed a harder line." *Fernandez-Vargas*, 548 U.S. at 34. The resulting provision, 8 U.S.C. 1231(a)(5), remains unchanged today. It states:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

Ibid.[1]

Section 1231(a)(5) differs from the previous reinstatement statute in three principal respects. First, the reinstatement authority now extends to all individuals previously removed or who departed voluntarily under an order of removal. Second, the reinstatement provision now makes explicit that such an illegal reentrant's previous order of removal is not subject to reopening or review. Finally—and of principal relevance here—the reinstatement provision now provides that an illegal reentrant whose prior order of removal is reinstated is "not eligible and may not apply for any relief under this chapter," 8 U.S.C. 1231(a)(5), *i.e.*, Chapter 12

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[1] Pursuant to the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*, responsibility for the removal of aliens was transferred from the Attorney General to the Secretary of Homeland Security, see 6 U.S.C. 251(2) (Supp. II 2002), although the Attorney General retains responsibility for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See 68 Fed. Reg. 9824 (Feb. 28, 2003).

of Title 8 of the United States Code, which includes 8 U.S.C. 1101-1537 (2012 & Supp. IV 2016). See *Fernandez-Vargas*, 548 U.S. at 35 ("Unlike its predecessor, § 241(a)(5) applies to all illegal reentrants, explicitly insulates the removal orders from review, and generally forecloses discretionary relief from the terms of the reinstated order").

b. Asylum is a form of discretionary relief governed by Chapter 12 of Title 8 of the United States Code. See 8 U.S.C. 1158. An alien is eligible for asylum if he demonstrates, *inter alia*, that he is a "refugee," *i.e.*, he is "unable or unwilling to return to" his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A); see 8 U.S.C. 1158(a)(1) and (b)(1)(B)(i).

Since the Refugee Act of 1980 (Refugee Act), Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. 1158 has governed asylum procedures in the United States. As originally enacted, 8 U.S.C. 1158(a) (Supp. IV 1980) directed the Attorney General to establish "a procedure for an alien who is physically present in the United States * * * , irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee." Refugee Act § 201, 94 Stat. 105 (8 U.S.C. 1158(a)(1)). Congress later amended the statute, adding a provision at 8 U.S.C. 1158(d) to prevent aliens convicted of aggravated felonies from applying for or being granted asylum, notwithstanding subsection (a). See Immigration Act of 1990, Pub. L. No. 101–649, § 515, 104 Stat. 5053.

In IIRIRA, Congress rewrote the asylum statute, with the new 8 U.S.C. 1158(a)(1) providing that "[a]ny alien who is physically present in the United States * * * , irrespective of such alien's status, may apply for asylum in accordance with this section." IIRIRA § 604, 110 Stat. 3009-690. The ability to apply for asylum was limited by a list of exceptions, 8 U.S.C. 1158(a)(2), and the authority to grant asylum was limited by a different list of exceptions, rules, and limitations, 8 U.S.C. 1158(b)(2).

c. In addition to asylum, two types of "protection" from removal are relevant here. See *Ramirez-Mejia* v. *Lynch*, 794 F.3d 485, 489 (5th Cir. 2015) (distinguishing between these forms of "protection" and asylum "relief"). First, withholding of removal is governed by Section 1231(b)(3)(A) of Title 8 of the United States Code, which provides, with certain exceptions, that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion"—the same five enumerated grounds as in the asylum statute. *Ibid.* Withholding of removal differs from asylum because, *inter alia*, withholding of removal is mandatory if certain conditions are met; it prevents removal only to the particular country where the alien would be threatened with persecution and does not afford the alien a general right to remain in the United States; the alien must meet a higher standard of proof; and the one-year time limit applicable to asylum applications, 8 U.S.C. 1158(a)(2)(B), does not apply. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419-420 (1999) (distinguishing

between asylum and withholding of removal); cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

Second, federal regulations implementing obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, also protect an alien from removal to a country if the alien demonstrates that "it is more likely than not that he * * * would be tortured." 8 C.F.R. 1208.16(c)(2). Like withholding of removal under Section 1231(b)(3)(A), CAT protection is mandatory if certain requirements are met, but it does not relieve the alien from removal altogether; rather, it prohibits removal only to the specific country where there is a likelihood of torture. And CAT protection differs from both asylum and withholding of removal because, *inter alia*, the alien must demonstrate a risk of torture specifically, but need not show that the risk is *because of* one of the five enumerated grounds.

d. Following IIRIRA's enactment, separate legislation was enacted requiring promulgation of regulations to implement the United States' obligations under the CAT. See Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, 112 Stat. 2681-822. To administer both of these legislative directives, the former Immigration and Naturalization Service (INS) (with the Executive Office for Immigration Review) promulgated regulations addressing, among other things, the potential protection available to aliens whose prior removal orders had been reinstated. In adopting the regulations, the agency identified a number of statutory provisions giving it authority to promulgate regulations to govern asylum and

withholding procedures, including 8 U.S.C. 1158. See 64 Fed. Reg. 8478, 8487 (Feb. 19, 1999) (listing the authorities for 8 C.F.R. Part 208 (2000) generally). The regulations provide that if an alien whose prior order of removal has been reinstated expresses a fear of returning to his or her country, the alien shall be referred to an asylum officer for an interview; if the officer determines that the alien has a reasonable fear of persecution or torture, the officer shall refer the case to an immigration judge "for full consideration of the request for withholding of removal only * * * in accordance with the provisions of § 1208.16." 8 C.F.R. 1208.31; see 8 C.F.R. 1241.8(e).[2] Such "full consideration" includes any claim for withholding of removal under 8 C.F.R. 1208.16(b) or for CAT protection under 8 C.F.R. 1208.16(c).

In adopting the regulations, the agency explained that "aliens subject to reinstatement of a previous removal order under [Section 1231(a)(5)]" are "ineligible for asylum" but may "be entitled to withholding of removal * * * or [protection] under the [CAT]." 64 Fed. Reg. at 8485.[3] The agency further stated that "[f]or per-

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[2] The regulations were originally promulgated at 8 C.F.R. Parts 208 and 241 (2000), but were recodified in 2003 to reflect the transfer of the INS's functions to the Department of Homeland Security. See 68 Fed. Reg. at 9824; p.3 n.1, *supra*. Like the court below (Pet. App. 8 n.2), the government refers to the current regulations at 8 C.F.R. Parts 1208 and 1241.

[3] A similar regulatory scheme was established to implement IIRIRA provisions restricting eligibility for discretionary relief for aliens who are subject to expedited, "administrative removal" procedures under 8 U.S.C. 1228(b). See 8 U.S.C. 1228(b)(5) ("No alien described in this section shall be eligible for any relief from removal

sons subject to reinstatement, * * * the rule establishes a screening mechanism" similar to the one used in expedited removal proceedings. *Id.* at 8478.[4] And the agency went on to explain that the new process was intended "to rapidly identify and assess" claims for withholding of removal and protection from torture made by individuals subject to reinstated removal orders to "allow for the fair and expeditious resolution of such claims without unduly disrupting the streamlined removal processes applicable to these aliens." *Id.* at 8479; see also *id.* at 8485 (discussing 8 C.F.R. 1208.31 specifically).[5]

2. Petitioner, a native and citizen of Guatemala, entered the United States without inspection in 2011 and was apprehended by the Department of Homeland Security (DHS) the next day. Pet. App. 2, 4; Administrative Record (A.R.) 132. According to contemporaneous agency records, petitioner told DHS officers that he was seeking work and that he did not fear persecution or torture in Guatemala. Pet. App. 4, 42-43; A.R. 128,

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that the Attorney General may grant in the Attorney General's discretion."); see also 8 C.F.R. 1238.1(f)(3).

[4] Where an alien establishes a likelihood of torture but is barred from withholding under the regulations implementing the United States' obligations under the CAT, 8 C.F.R. 1208.16(d)(2) and (d)(3), Section 1208.17 provides that a less durable form of protection, known as deferral of removal, must be granted. CAT deferral, which does not require a separate application, and CAT withholding are collectively known as CAT protection.

[5] In *Fernandez-Vargas*, this Court parenthetically described the regulations now codified at 8 C.F.R. 1208.31 and 1241.8(e) as "raising the possibility of asylum." 548 U.S. at 35 n.4. As the court of appeals noted, however, "[t]his appears to have been an oversight; although both regulations refer to 'asylum officers,' they clearly permit only withholding from removal," and the "main text of the Court's footnote correctly refers" to only that form of protection. Pet. App. 27 n.9.

134, 138. Petitioner was removed to Guatemala in July 2011. A.R. 128.

Petitioner reentered the United States without inspection and was apprehended in January 2012. Pet. App. 5. At that time, petitioner again stated that he did not fear persecution or torture in Guatemala. *Id.* at 43; A.R. 124. DHS reinstated the earlier removal order in accordance with 8 U.S.C. 1231(a)(5). Pet. App. 5. "[A]fter being in detention for a certain period of time," however, petitioner asserted a fear of persecution or torture if returned to Guatemala. *Id.* at 43. A DHS asylum officer found that petitioner established a reasonable fear of torture if removed to Guatemala and referred petitioner to an immigration judge (IJ) for further proceedings. *Id.* at 43-44.

The IJ held that petitioner was not eligible to apply for asylum due to his reinstated removal order, Pet. App. 40-41, and denied on the merits his requests for withholding of removal and CAT protection, *id.* at 46-55. The Board of Immigration Appeals (the Board or BIA) similarly held that petitioner was ineligible for asylum, *id.* at 33, and that he had failed to make the showings necessary for withholding of removal or CAT protection, *id.* at 33-39.

3. Petitioner sought review in the court of appeals. The parties agreed that in light of intervening circuit precedent, the court should remand petitioner's claims for withholding of removal and CAT protection to the Board, and the court did so. Pet. App. 31-32 (citing *Madrigal* v. *Holder*, 716 F.3d 499 (9th Cir. 2013) (CAT protection); *Henriquez-Rivas* v. *Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc) (withholding of removal)).

The court of appeals rejected petitioner's contention that he should have been permitted to apply for asylum

under Section 1158(a)(1) despite Section 1231(a)(5)'s prohibition on aliens who are subject to a reinstated order of removal "apply[ing] for any relief under this chapter." 8 U.S.C. 1231(a)(5); see Pet. App. 10-11. The court began by noting that "[t]hree other circuits have already considered the interplay between § 1158 and § 1231," with each "conclud[ing] that individuals subject to reinstated removal orders may not apply for asylum relief." Pet. App. 12 (citing *Jimenez-Morales* v. *United States Att'y Gen.*, 821 F.3d 1307, 1310 (11th Cir. 2016), cert. denied, 137 S. Ct. 685 (2017); *Ramirez-Mejia*, 794 F.3d at 491; *Herrera-Molina* v. *Holder*, 597 F.3d 128, 138-139 (2d Cir. 2010)). Rather than rest on those decisions, however, the court analyzed for itself the interaction between Sections 1158(a)(1) and 1231(a)(5). *Ibid.*

Applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals first concluded that Congress had not "directly spoken to the interplay" between Sections 1158(a)(1) and 1231(a)(5). Pet. App. 12. While Section 1231(a)(5) is clear that an alien whose order of removal has been reinstated may not apply "for any relief under this chapter," 8 U.S.C. 1231(a)(5), which would include asylum under Section 1158, the court found that Section 1158 also is clear that any alien may apply for asylum, with certain exceptions that do not expressly include an alien subject to a reinstated order of removal. Pet. App. 12-13. Moreover, the court reasoned, although both provisions were qualified to some extent, those qualifications did not "give[] an indication of how Congress intended to resolve a conflict between the two" provisions. *Id.* at 15; see *id.* at 13-15. Nor, in the court's view, did "the other 'traditional tools of statutory construction'" provide "an answer." *Id.* at 15 (citing *Chevron*, 467 U.S.

at 843 n.9). The principle that the specific governs the general might give "the government's position * * * a slight edge," but, in the court's view, it did "not help to *clearly* discern Congress's intent as to which section should take precedence here." *Id.* at 16. And the court found that the provisions' legislative history also did not resolve the issue. *Id.* at 16-18.

The court therefore turned to the second step of the *Chevron* analysis. It concluded that 8 C.F.R. 1208.31(e), which states that an alien subject to a reinstated removal order may seek "withholding of removal only," is a reasonable interpretation of the statute. Pet. App. 23-31. The court noted that deference "is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Id.* at 23 (quoting *Aguirre-Aguirre*, 526 U.S. at 425).[6]

The court cited two primary reasons for its conclusion that the regulation reasonably harmonized Sections 1158(a)(1) and 1231(a)(5). "First, the regulation is consistent with a reasonable judgment that § 1231(a)(5) is a more specific provision than § 1158," and thus that it is "'more deserving of credence'" when the two provisions conflict. Pet. App. 24 (quoting Antonin Scalia &

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[6] Although petitioner contended that the regulation should not be afforded deference because the agency failed to adequately explain its reasoning, the court of appeals declined to reach that argument, concluding that it was an untimely procedural challenge to the regulation. Pet. App. 18-23; see *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016) (labeling the requirement that an agency give adequate reasons for its decisions a "procedural requirement," and citing *JEM Broadcasting Co.* v. *FCC*, 22 F.3d 320, 324-326 (D.C. Cir. 1994), which held that procedural challenges must be brought within a limited time after the rule's promulgation, as provided by statute).

Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012) (Scalia & Garner). Second, the court concluded that the regulation "is consistent with Congress's intent in IIRIRA that the reinstatement of a previous removal order would cut off certain avenues of relief from removal." *Id.* at 25.

The court acknowledged that the agency's approach permitted aliens subject to a reinstated removal order to seek withholding of removal and CAT protection, but it found those distinctions were not unreasonable. Pet. App. 26-27. In particular, the court explained that asylum is discretionary, and "it is not unreasonable to conclude Congress intended to bar [asylum for] persons in reinstated removal proceedings while preserving" the ability of individuals who "meet * * * higher standards" to obtain withholding and CAT protection. *Id.* at 27. Moreover, the bar against applying for asylum "makes sense" where an alien had the opportunity to apply for that relief before his prior removal. *Id.* at 28. Although the bar also applies to an alien whose grounds for asylum arose after the prior removal, withholding of removal and CAT protection remain available for such an alien, and in addition "the government has discretion to forgo reinstatement and instead place the individual in ordinary removal proceedings," where he may apply for asylum. *Ibid.*

The court rejected petitioner's remaining arguments that the agency's interpretation is unreasonable. Pet. App. 29-30. Contrary to petitioner's view, the court explained that barring asylum for an alien whose prior removal order has been reinstated does not render superfluous the statutory provision permitting a second asylum application (8 U.S.C. 1158(a)(2)(D)) because the government has discretion to place the alien in regular

removal proceedings, where asylum is available and the alien could potentially apply a second time. Pet. App. 29-30. The court also concluded that the agency's view that Section 1158's exceptions to the availability of asylum are not "exhaustive" was reasonable: because Section 1231(a)(5) refers to "'any relief under this chapter,'" Section 1158 need not cross-reference that provision. *Id.* at 30 (citation omitted).

4. The court of appeals denied petitioner's request for panel rehearing and rehearing en banc, with no judge requesting a vote on whether to grant rehearing en banc. Pet. App. 56.

ARGUMENT

Petitioner contends (Pet. 13-23) that he should have been entitled to apply for asylum, notwithstanding the text of 8 U.S.C. 1231(a)(5) stating that an alien whose prior order of removal is reinstated is "not eligible and may not apply for any relief under this chapter." Review of the court of appeals' rejection of that contention is not warranted.

Nine courts of appeals have addressed that issue, and they all have reached the same conclusion: an alien whose prior order of removal has been reinstated may not seek asylum. Although the courts have not arrived at that result in precisely the same way—some have held that Section 1231(a)(5) clearly bars asylum, while others, like the court below, have found the statutory scheme ambiguous and deferred to the agency's regulations—petitioner cannot show that he would be permitted to seek asylum under any circuit's approach. Moreover, even if the question presented warranted this court's review, this case, which is in an interlocutory posture, would present a poor vehicle for considering it. This Court previously denied review of a petition for a

writ of certiorari raising the question whether an alien whose prior order of removal has been reinstated is eligible to apply for asylum, see *Jimenez-Morales* v. *Lynch*, 137 S. Ct. 685 (2017) (No. 16-662), and the same result is appropriate here.

1. a. As the government argued below, and as several courts of appeals have held, 8 U.S.C. 1231(a)(5) clearly bars an alien whose prior removal order has been reinstated from seeking asylum. In relevant part, the provision states that an alien whose order of removal is reinstated "is not eligible and may not apply for any relief under this chapter." *Ibid.* "[T]his chapter" includes 8 U.S.C. 1158, the provision governing asylum. Asylum is thus a form of "relief" from removal barred by Section 1231(a)(5). See, *e.g.*, *Jimenez-Morales* v. *United States Att'y Gen.*, 821 F.3d 1307, 1310 (11th Cir. 2016), cert. denied, 137 S. Ct. 685 (2017); *Ramirez-Mejia* v. *Lynch*, 794 F.3d 485, 489-491 (5th Cir. 2015).

The issue in this case arises because 8 U.S.C. 1158(a)(1) provides that "[a]ny alien who is physically present in the United States * * * irrespective of such alien's status, may apply for asylum in accordance with this section," and none of Section 1158(a)(2)'s express exceptions addresses reinstatement status. But asylum is discretionary, and Section 1158 itself "show[s] that it was intended to be amenable to limitation by regulation and by the exercise of discretion." *Ramirez-Mejia*, 794 F.3d at 490 (citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 441, 444-445 (2006)); see 8 U.S.C. 1158(d)(5)(B) and (d)(7)). Indeed, 8 U.S.C. 1158(b)(2)(C) expressly provides that "[t]he Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be

ineligible for asylum under paragraph (1)." Thus, rather than provide an absolute right to asylum, the asylum statute articulates a broad principle that is subject to exceptions, including Section 1231(a)(5)'s prohibition on applications for asylum by aliens whose prior orders of removal have been reinstated. For this reason, the well-established principle of statutory construction that the specific controls the general supports the government's interpretation. See, *e.g.*, *Bloate* v. *United States*, 559 U.S. 196, 207-208 (2010); cf. Pet. App. 16 (declining to find this principle conclusive, but acknowledging that "the government's position may have a slight edge"). Moreover, reading Section 1231(a)(5) to bar applications for asylum by aliens in reinstatement status is consistent with "Congress's intent in IIRIRA that the reinstatement of a previous removal order would cut off certain avenues of relief from removal." Pet. App. 25.

b. Petitioner contends (Pet. 24-32) that in the absence of deference, the "normal tools of statutory construction" demonstrate that the reinstatement bar does not apply to asylum. Pet. 24. Each of petitioner's arguments fails.

i. First, petitioner contends (Pet. 24-27) that while both the asylum provision and the reinstatement bar are "qualified in certain respects," Pet. 25 (quoting Pet. App. 18), the asylum statute's exceptions are explicit. As the court of appeals explained, however, given Section 1231(a)(5)'s broad language, Congress did not need to include a specific exception or cross-reference in every other provision of Chapter 12 making aliens eligible for "relief" from removal. In fact, petitioner's argument would nullify the reinstatement bar, because the other statutes within the chapter providing for discretionary relief from removal *also* contain no exception

for aliens with reinstated orders. See, *e.g.*, 8 U.S.C. 1182 (2012 & Supp. I 2013) (waivers of inadmissibility); 8 U.S.C. 1229b(a) and (b) (cancellation of removal); 8 U.S.C. 1255 (adjustment of status); 8 U.S.C. 1229c (voluntary departure). Petitioner's view thus would violate "one of the most basic interpretive canons"—that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Kawashima* v. *Holder*, 565 U.S. 478, 492 (2012) (citation omitted); see also *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931) ("[I]t is not within the judicial province to read out of the statute the requirement of its words").[7]

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[7] Petitioner's superfluity argument fails. Petitioner claims (Pet. 26) that if asylum is not available to individuals with reinstated removal orders, then Section 1158(a)(2)(D), which permits an individual to seek asylum a second time based on changed circumstances, would have no work to do, "[b]ecause an unsuccessful asylum application will almost always result in removal" and, on petitioner's view, reinstatement. As the court of appeals explained, however, the government has discretion *not* to reinstate the prior order of removal, at which point Section 1158(a)(2)(D) could apply. See Pet. App. 29-30 (addressing this issue). But see Pet. 26 (stating that the court "dismissed [Section 1158(a)(2)(D)] in a footnote"). Moreover, many applicants denied asylum are not immediately removed: judicial review of such a denial can sometimes take a long time, or DHS may be unable to obtain travel documents, see *Zadvydas* v. *Davis*, 533 U.S. 678, 685-686 (2001). And some applicants are not subject to removal at the time asylum is denied because, for example, CAT protection is granted, or the applicant is lawfully present in the United States. See 8 C.F.R. 1208.14(c)(2). For these categories of aliens, Section 1158(a)(2)(D) continues to apply despite the reinstatement bar.

ii. Second, petitioner contends that the canon that "the specific governs the general" supports his interpretation. Pet. 27 (quoting *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 644 (2012)). Petitioner points to the number of words in the asylum provision (*ibid.*), as well as its "detailed" exceptions. Pet. 28. As previously discussed, however, this canon favors the government's position because Section 1158 addresses all individuals who are potentially eligible for asylum, whereas Section 1231 focuses narrowly on those aliens who are subject to reinstatement of removal. See p.15, *supra*.

iii. Third, petitioner argues (Pet. 29-32) that international law requires reading Section 1158's asylum provision to trump Section 1231(a)(5)'s reinstatement bar. Congress adopted the original version of the asylum provision as part of the Refugee Act of 1980, § 201, 94 Stat. 105, which was aimed at "implement[ing] the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees [(1967 Protocol)], Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577 (1968)," which "incorporates by reference Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees [(Refugee Convention)], 189 U.N.T.S. 150 (July 28, 1951), reprinted in 19 U.S.T. at 6259, 6264-6276." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (citing *Cardoza-Fonseca*, 480 U.S. at 436-437). According to petitioner (Pet. 30), "[a]pplying the general reinstatement bar to prevent refugees from seeking asylum in the United States * * * contradicts multiple obligations under the Refugee Convention," and thus must be avoided under the *Charming Betsy* canon that "a statute 'ought never to be construed to

violate the law of nations if any other possible construction remains,'" Pet. 29 (quoting *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

Petitioner's argument fails for several reasons. As an initial matter, it is not properly presented for the Court's review: petitioner did not raise the argument until his petition for rehearing in the court of appeals, and that court did not address it.[8] See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is one "of review, not of first view"). More fundamentally, the *Charming Betsy* canon applies where a statute is ambiguous, see 6 U.S. (2 Cranch) at 118; here, it clearly prohibits an alien whose prior order of removal has been reinstated from seeking asylum.

In any event, Congress's decision to bar an alien whose removal order is reinstated from applying for the discretionary relief of asylum does not violate international law. As this Court has explained, asylum implements Article 34 of the Refugee Convention, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176, which calls on nations to facilitate the admission of refugees "as far as possible." *Cardoza-Fonseca*, 480 U.S. at 441 (citation omitted). Section 1158 thus implements a *discretionary* regime. *Ibid.*; see *INS* v. *Stevic*, 467 U.S. 407, 428 n.22 (1984). By contrast, withholding of removal under 8 U.S.C. 1231(b)(3) implements Article 33(1) of the Refugee Convention, 19 U.S.T. 6276, 189 U.N.T.S. 176 (via the 1967 Protocol), *Stevic*, 467 U.S. at 426 n.20, 428 n.22, an obligation that is mandatory, *Cardoza-Fonseca*, 480 U.S. at 440-441; see *R-S-C* v. *Sessions*, 869 F.3d 1176,

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[8] The argument was made for the first time by one of petitioner's amici in a supplemental filing. See Am. Immigration Lawyers Ass'n Supp. Amicus Br. 7-11.

1178-1179, 1188 & n.11 (10th Cir. 2017). Statutory limitations on the discretionary relief of asylum, including the reinstatement bar, do not "violate[]" Article 34, 19 U.S.T. 6276, 189 U.N.T.S. 176; nor do they constitute "penal[ties]" under Article 31(1), 19 U.S.T. 6275, 189 U.N.T.S. 174. Pet. 30; see *Mejia* v. *Sessions*, 866 F.3d 573, 588 (4th Cir. 2017). Indeed, petitioner's suggestion that asylum is mandatory would upend United States immigration law. Under petitioner's logic, any determination by an agency to deny an asylum application as a matter of discretion, or as untimely under the one-year filing deadline in 8 U.S.C. 1158(a)(2), would contravene the United States' treaty obligations.[9]

2. a. Although the government thus believes that the reinstatement bar is clear, the Board's decision should in any event be sustained under the second step of *Chevron U.S.A. Inc.* v. *Natural Resources Defense*

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[9] Petitioner's arguments (Pet. 30-31) that the bar to asylum in 8 U.S.C. 1231(a)(5) is inconsistent with the Refugee Convention's "right to * * * employment" under Article 17, 19 U.S.T. 6262, 189 U.N.T.S. 164, and "right to travel" under Article 28, 19 U.S.T. 6274, 189 U.N.T.S. 172, fail for similar reasons. They were first raised in the court of appeals in a supplemental amicus filing, were not addressed by that court, and have been properly rejected by several other circuits. See *R-S-C*, 869 F.3d at 1188; *Cazun* v. *Attorney Gen. U.S.*, 856 F.3d 249, 257 n.16 (3d Cir. 2017); *Garcia* v. *Sessions*, 856 F.3d 27, 42-43 (1st Cir. 2017). And petitioner's brief assertion (Pet. 29 n.6) that the court of appeals should have applied the "immigration lenity canon" fares no better. See also Cato Inst. Amicus Br. 13-17. As this Court has explained, while lenity (like "principles of criminal culpability [and] concepts of international law") "may be persuasive in determining whether a particular agency interpretation is reasonable, * * * [it] do[es] not demonstrate that the statute is unambiguous." *Negusie* v. *Holder*, 555 U.S. 511, 518 (2009); see also *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 n.18 (1995).

Council, Inc., 467 U.S. 837 (1984). See *Aguirre-Aguirre*, 526 U.S. at 425 (deferring to agency's interpretation of provision barring certain individuals from eligibility for withholding of removal).

The Attorney General promulgated regulations that reasonably interpret the complex web of immigration statutes to prohibit an illegal reentrant whose prior removal order has been reinstated from seeking asylum. As a general matter, consistent with Section 1231(a)(5), "[a]n alien who illegally reenters the United States after having been removed * * * shall be removed by reinstating the prior order." 8 C.F.R. 1241.8(a). The regulation goes on to provide:

> If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture pursuant to § 1208.31 of this chapter.

8 C.F.R. 1241.8(e). Section 1208.31(e), in turn, provides that if an asylum officer finds that an alien possesses a reasonable fear of returning, the request shall be referred to an immigration judge for "full consideration of the request for withholding of removal only," 8 C.F.R. 1208.31(e), which includes any claim for withholding under 8 C.F.R. 1208.16(b) or for CAT protection under 8 C.F.R. 1208.16(c). As the agency explained in adopting Section 1208.31, the regulations are so limited because "aliens subject to reinstatement of a previous removal order" are "ineligible for asylum," but "may * * * be entitled to withholding" of removal or CAT protection. 64 Fed. Reg. at 8485.

The agency's resolution of any tension between Sections 1158(a)(1) and 1231(a)(5) was, at a minimum, reasonable, and thus entitled to *Chevron* deference. As discussed above, see p. 15, *supra*, the regulation reflects the reasonable view that "§ 1231(a)(5) is a more specific provision than § 1158," and thus that it is "'more deserving of credence'" if the two provisions conflict. Pet. App. 24 (quoting Scalia & Garner 183). In addition, the regulation "is consistent with Congress's intent in IIRIRA that the reinstatement of a previous removal order would cut off certain avenues of relief from removal." *Id.* at 25. And given the distinctions between asylum, on the one hand, and withholding of removal and CAT protection, on the other, it was at least reasonable for the agency to conclude that aliens whose prior orders of removal have been reinstated should be eligible for the latter, but not the former. That is particularly so because, as the Fifth Circuit has recognized, "withholding of removal and application of the CAT are often referred to as forms of protection, not relief," and thus are not plainly subject to Section 1231(a)(5)'s bar on "relief." *Ramirez-Mejia*, 794 F.3d at 489.

Moreover, the provision of the INA for granting for withholding of removal to a particular country where the alien would be threatened with persecution appears later in the same section of the Act that provides for reinstatement of a prior order. See 8 U.S.C. 1231(b)(3). It therefore is reasonable to conclude that that mandatory prohibition applies to an alien who would be removed pursuant to reinstatement of a prior order of removal as provided in Section 1231(a)(5), but that the discretionary relief of asylum provided for elsewhere in the Act is barred by the provision in Section 1231(a)(5) that the alien is not eligible for any "relief" under the

relevant chapter of the INA. And because withholding or deferral of removal under the CAT is not provided for under the INA, but rather by regulations promulgated pursuant to separate statutory authority, see p. 6, *supra*, it is likewise reasonable to construe Section 1231(a)(5) not to bar protection under the CAT.

b. Petitioner objects (Pet. 13-23) to the manner in which the court of appeals found the Act ambiguous—*i.e.*, by finding Sections 1231(a)(5) and 1158(a)(1) to be in direct conflict. See Pet. App. 12-18. As just explained, however, even if the Act is not found to be unambiguous in foreclosing eligibility for asylum, in context it is at least ambiguous on that point without regard to what the court of appeals saw as a direct conflict between Sections 1231(a)(5) and 1158(a)(1).

In any event, petitioner is incorrect in asserting that, having found the statute ambiguous on the basis of that seeming conflict, the court of appeals should not have applied deference.

i. Petitioner first contends (Pet. 14-18) that a statutory conflict creates neither a gap nor ambiguity, and thus that *Chevron* deference does not apply. This Court's decisions refute that argument. In *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644 (2007) (*Home Builders*), this Court examined "the interplay between two federal environmental statutes" that imposed "seemingly categorical—and, at first glance, irreconcilable—legislative commands." *Id.* at 649, 661. After examining the statutory provisions using the traditional tools of statutory construction, the Court was "left with a fundamental ambiguity that [wa]s not resolved by the statutory text." *Id.* at 666. Recognizing that one of the "differing mandates * * * must give way," the Court found it "appropriate to look to the

implementing agency's expert interpretation" to determine which one. *Ibid.* Because the Court found the agency's interpretation "reasonable in light of the statute's text and the overall statutory scheme," the regulation was "entitled to deference under *Chevron*." *Ibid.*

Petitioner addresses (Pet. 17 n.3) *Home Builders* only in a footnote, suggesting that the decision involved conflicting mandates that could be "harmonize[d]" by the agency based on its "policy expertise," whereas in this case, "[r]econciling the conflicting mandates" in Sections 1158(a)(1) and 1231(a)(5) "is a question of statutory interpretation for the courts." That conclusory assertion ignores this Court's consistent recognition that given the complex policy questions involved, "[d]eference 'is especially appropriate in the immigration context.'" Pet. App. 23 (quoting *Aguirre-Aguirre*, 526 U.S. at 425). And it gives short shrift to the agency's application of expertise in this case. See *id.* at 24 n.3 (finding that the agency "applied its expertise by crafting an expedited screening process and balancing the fair resolution of claims for relief from removal against Congress' desire to provide for streamlined removal of certain classes of individuals, including those subject to reinstated removal orders").

Moreover, petitioner ignores the similarities between *Home Builders* and this case: there, the agency "harmonize[d]" two seemingly inconsistent statutory provisions by concluding that a statutory command (the consultation requirement of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*) applied to agency action that was "discretionary," but did not "override" agency action that was mandatory (including the permitting requirement of the Clean Water Act, 33 U.S.C. 1251 *et seq.*). 551 U.S. at 666; see *id.* at 664-668. So too

here: the regulations provide that Section 1231(a)(5) applies to prohibit discretionary relief in the form of asylum, but does not affect an alien's eligibility for withholding of removal and CAT protection, which are mandatory protections when all requirements are met. Indeed, as noted above, the bar to "relief" in Section 1231(a)(5) is reasonably construed to refer to *discretionary* relief from removal altogether—such as asylum, but also cancellation of removal, voluntary departure, and adjustment of status—but not protection from removal to particular countries that is mandatory under Section 1231 itself or the regulations implementing the CAT. See pp. 19-22, *supra*.

Rather than engage with *Home Builders*, petitioner contends (Pet. 15-18) that the opinions in *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191 (2014), suggest that conflicting statutory provisions cannot give rise to ambiguity warranting *Chevron* deference. That is incorrect. *Cuellar de Osorio* considered two clauses of 8 U.S.C. 1153 that, according to the three-Justice plurality, "address[ed] th[e] [question presented] in divergent ways." 134 S. Ct. at 2203. The plurality deferred to the BIA's interpretation of the "Janus-faced" provision, *ibid.*, specifically relying on *Home Builders* and explaining that "[w]hen an agency * * * resolves statutory tension, ordinary principles of administrative deference require us to defer." *Id.* at 2207 (citing *Home Builders*, 551 U.S. at 666).

The other opinions engaged in different analyses, but all acknowledged the continued vitality of *Home Builders*. Justice Sotomayor dissented, joined by Justice Breyer and Justice Thomas; those three Justices found no ambiguity in Section 1153's provisions because they found no conflict. *Cuellar de Osorio*, 134 S. Ct. at

2220-2221. But Justice Sotomayor, joined by Justice Breyer, specifically recognized that conflict "can make deference appropriate to an agency's decision to override unambiguous statutory text." *Id.* at 2219 n.3 (Sotomayor, J., dissenting) (citing *Home Builders*, 551 U.S. at 661, 662-663, 666).[10]

Petitioner relies primarily (Pet. 15-16) on the Chief Justice's opinion concurring in the judgment, joined by Justice Scalia, as well as Justice Alito's dissent. While the Chief Justice stated that "[d]irect conflict is not ambiguity," *Cuellar de Osorio*, 134 S. Ct. at 2214 (Roberts, C.J., concurring in the judgment), and Justice Alito (the author of *Home Builders*) quoted that language, *id.* at 2216 (Alito, J., dissenting), petitioner takes it out of context. Rather than express disagreement with *Home Builders*, the Chief Justice explained that it was "not to the contrary" because in *Home Builders*, the Court "deferred to an agency's reasonable interpretation, which 'harmonize[d]'" "two different statutes" that presented "'seemingly categorical—and, at first glance, irreconcilable—legislative commands.'" *Id.* at 2214 n.1 (Roberts, C.J., concurring in the judgment) (citation omitted; brackets in original). By contrast, in his view, *Cuellar de Osorio* concerned "the consequences of a single statutory provision that appears to give divergent commands." *Ibid.*; see *id.* at 2220 (Sotomayor, J., dissenting) (noting that "the conflict" in *Cuellar de Osorio* was "not between two different statutes or even two separate provisions within a single statute, but between two clauses in the same sentence"). It was in that context that the Chief Justice stated that "[d]irect conflict is not

[10] Although Justice Thomas did not join this footnote, he joined the majority in *Home Builders*, 551 U.S. at 647.

ambiguity." *Id.* at 2214 (Roberts, C.J., concurring in the judgment).

ii. Petitioner next argues (Pet. 18-20) that where two statutes conflict and Congress was silent as to how to reconcile them, affording deference to the agency's interpretation would violate the separation of powers. This argument, too, runs straight into *Home Builders*, which held that for a court to determine which of the "differing mandates * * * must give way," "it is appropriate to look to the implementing agency's expert interpretation" and the manner in which it has harmonized them. 551 U.S. at 666.

iii. Petitioner also contends (Pet. 21) that the court of appeals should not have deferred to the agency because the agency supposedly has failed to "address[]the statutory conflict at issue." As petitioner acknowledges (*ibid.*), however, the court below held that any challenge to the sufficiency of the agency's reasoning in promulgating the regulation itself was not properly before the court. Pet. App. 19-23. While petitioner seems to disagree with that holding (Pet. 7-9, 11-12, 21 & n.4), he does not ask this Court to review it (Pet. 18-31).

Moreover, petitioner is mistaken in suggesting (Pet. 22-23 & n.5) that deference is not warranted because the agency did not rely on statutory ambiguity or the regulation in this case. The Board specifically cited 8 C.F.R. 1208.31(e) in holding that petitioner was not eligible for asylum. Pet. App. 33 n.1. And although in this litigation the government argued that the case could be resolved in its favor at *Chevron*'s first step, it responded to the court of appeals' request for supplemental briefing by noting that "if there exists any ambiguity in 8 U.S.C. § 1231(a)(5) concerning the availability of discretionary relief such as asylum, the agency reasonably

promulgated 8 C.F.R. § [1]208.31(e) to preclude asylum and permit only a claim for withholding of removal under 8 U.S.C. § 1231(b)(3) and withholding or deferral of removal under the CAT." Gov't C.A. Supp. Br. 1.

3. This case does not warrant this Court's review. Nine courts of appeals have considered the question, and each has held that an alien whose prior order of removal has been reinstated is ineligible for asylum. See Pet. App. 10-31; *Garcia* v. *Sessions*, 856 F.3d 27, 30 (1st Cir. 2017); *Herrera-Molina* v. *Holder*, 597 F.3d 128, 139 (2d Cir. 2010); *Cazun* v. *Attorney Gen. U.S.*, 856 F.3d 249, 261 (3d Cir. 2017); *Mejia*, 866 F.3d at 587 (4th Cir.); *Ramirez-Mejia*, 794 F.3d at 489-490 (5th Cir.); *Garcia* v. *Sessions*, 873 F.3d 553, 555 (7th Cir. 2017); *R-S-C*, 869 F.3d at 1189 (10th Cir.); *Jimenez-Morales*, 821 F.3d at 1310 (11th Cir.).

To be sure, as petitioner notes (Pet. 33), the courts have not reached their judgments in the same way. Some have held that the statute clearly bars asylum, while others, like the court below, have found the statutory scheme ambiguous and deferred to the agency's interpretation. See *Garcia*, 873 F.3d at 556-557 & nn.2-3 (collecting cases). But such variations in approach do not warrant plenary review. Petitioner would be ineligible to apply for asylum in every circuit that has considered the issue.

4. Finally, even if review of this issue were otherwise warranted, this case would present a poor vehicle in which to consider it because the decision below is interlocutory. In light of intervening precedent, and with the agreement of the parties, the court of appeals remanded petitioner's claims for withholding of removal and CAT protection to the Board. It is thus possible that even without this Court's intervention, petitioner

will obtain protection from removal in one of those forms.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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