No. 19-1220

In the Supreme Court of the United States

ISTVAN SZONYI, PETITIONER

v.

WILLIAM P. BARR, 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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QUESTIONS PRESENTED

An alien is removable from the United States if the alien "is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial." 8 U.S.C. 1227(a)(2)(A)(ii). The questions presented are as follows:

1. Whether the court of appeals correctly applied this Court's decision in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), to uphold the Board of Immigration Appeals' interpretation of the phrase "arising out of a single scheme of criminal misconduct" as used in 8 U.S.C. 1227(a)(2)(A)(ii), notwithstanding earlier circuit precedent adopting a different interpretation.

2. Whether the court of appeals correctly rejected petitioner's retroactivity arguments, where the Board of Immigration Appeals adjudicated his case in accordance with its longstanding interpretation of Section 1227(a)(2)(A)(ii).

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 33a-60a) is reported at 942 F.3d 874. The decision of the Board of Immigration Appeals (Pet. App. 89a-96a) is unreported. The decision of the immigration judge (Pet. App. 97a-111a) is unreported. Prior decisions of the Board (Pet. App. 112a-115a) and the immigration judge (Pet. App. 116a-143a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2019. A petition for rehearing was denied on November 13, 2019. On January 24, 2020, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including April 10, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an alien, was convicted of four sex crimes involving two victims and was sentenced to 12 years of imprisonment. He was later charged with being removable from the United States based on those convictions. Pet. App. 52a. An immigration judge (IJ) found him removable as an alien "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," 8 U.S.C. 1227(a)(2)(A)(ii), and denied his requests for relief from removal. Pet. App. 116a-143a. The Board of Immigration Appeals (Board or BIA) remanded for further consideration of whether the convictions at issue arose "out of a single scheme of criminal misconduct," 8 U.S.C. 1227(a)(2)(A)(ii). Pet. App. 112a-115a. The IJ again found petitioner removable, *id.* at 97a-111a; the Board dismissed his appeal, *id.* at 89a-96a; and the court of appeals denied his petition for review, *id.* at 33a-60a.

1. Before the 1952 enactment of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), federal law provided for the removal of any alien "sentenced more than once" to a term of imprisonment of a year or more "because of conviction in this country of any crime involving moral turpitude, committed at any time after entry" into the United States. 8 U.S.C. 155(a) (1946). This Court construed that provision as "authoriz[ing] deportation only where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 9-10 (1948).

When Congress enacted the INA, it broadened the multiple-crimes provision to render deportable any alien "who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial." INA § 241(a)(4), 66 Stat. 204. That amendment eliminated any requirement that the two convictions be from separate or sequential proceedings. See *In re B-*, 8 I. & N. Dec. 236, 238 (B.I.A. 1958). With minor changes, the same language is now found in Section 1227(a)(2)(A)(ii) as a ground for removal.

In a series of decisions beginning in 1954, the Board interpreted the phrase "'single scheme of criminal misconduct' * * * to mean that when an alien has performed an act, which, in and of itself, constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct." *In re Adetiba*, 20 I. & N. Dec. 506, 509 (B.I.A. 1992) (collecting cases); see *id.* at 511 ("[T]he statutory exception refers to acts * * * performed in furtherance of a single criminal episode, such as where one crime constitutes a lesser offense of another or where two crimes flow from and are the natural consequence of a single act of criminal misconduct.").

The Board adhered to that interpretation in *Adetiba*, while acknowledging that some courts of appeals, particularly the Ninth Circuit, had adopted "a more expansive interpretation of the language in question." 20 I. & N. Dec. at 510. In *Wood* v. *Hoy*, 266 F.2d 825 (1959), the Ninth Circuit had vacated the Board's finding that an

alien's convictions for robbing a liquor store and a drive-in theater did not arise out of a single scheme, where the evidence indicated that the robberies—committed three days apart—had been planned together in advance, see *id.* at 831-832. The Board rejected that "emphasis on * * * planning," finding it implausible that Congress would have intended to provide an exception to deportation for those aliens who pre-plan multiple separate crimes, but not aliens who commit the same crimes "without any overall plan." *Adetiba*, 20 I. & N. Dec. at 511. Accordingly, the Board determined that it would continue to "apply its historical analysis" in those cases where circuit precedent did not require an alternative approach. *Ibid.*; see *id.* at 510.

2. Petitioner, a native and citizen of Hungary, was admitted to the United States as a lawful permanent resident in 1957, when he was four years old. Pet. App. 34a, 117a. "In 1981, after a day of heavy drinking, he forced three women to commit sexual acts under threat of violence over a five- to six-hour period." *Id.* at 34a. Petitioner was employed at the time as a clerk in a television repair shop in Los Angeles, California. *Id.* at 125a. According to the probation officer's report, petitioner encountered the three women at about 11 p.m., after two of them were turned away from a nightclub next to the repair shop because they were only 17 years old. Administrative Record (A.R.) 744-745. The women accompanied petitioner into the repair shop, where he held them at gunpoint. A.R. 745. Petitioner ordered the women to undress, "and six hours of sexual horrors ensued with all types of sexual abuse being committed on the three girls." *Ibid.* (capitalization omitted). Among other things, petitioner forced the women to perform oral sex and sexually assaulted each of them with his

fingers and with various objects. A.R. 745-746. Eventually one of the women was able to strike petitioner with an ashtray and grab his handgun. A.R. 746. Petitioner then retrieved a shotgun from elsewhere in the shop; the woman who had grabbed the handgun shot him in the shoulder with it; and petitioner relented, allowing the women to escape. *Ibid.*

Petitioner was arrested and charged with 16 felonies in state court. See A.R. 701-732 (felony complaint). He ultimately pleaded guilty to four felonies involving two of the women: two counts of forced oral copulation and two counts of sexual penetration with a foreign object, in violation of Sections 288a(c) and 289 of the California Penal Code respectively. Pet. App. 34a; see A.R. 735. At the time, Section 288a(c) proscribed "participat[ing] in an act of oral copulation * * * when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." Cal. Penal Code § 288a(c) (West 1981). Section 289(a) proscribed "caus[ing] the penetration, however slight, of the genital or anal openings of another person, by any foreign object * * * when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person for the purpose of sexual arousal, gratification, or abuse." *Id.* § 289(a). Petitioner "received a sentence of twelve years, of which he served a total of six before obtaining release on parole in 1986." Pet. App. 117a.

3. a. In 2005, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner, ultimately charging him with being removable from the United States under Section 1227(a)(2)(A)(ii) based on

his multiple convictions for crimes involving moral turpitude—namely, the four felony sex offenses to which petitioner had pleaded guilty in 1981. Pet. App. 34a-35a; A.R. 958-960.[1] Petitioner did not dispute that each of those offenses qualified as a "crime[] involving moral turpitude." 8 U.S.C. 1227(a)(2)(A)(ii). He maintained, however, that the convictions did not render him removable under Section 1227(a)(2)(A)(ii) because they all arose "out of a single scheme of criminal misconduct." *Ibid.*; see Pet. App. 133a-134a.

In September 2011, an IJ found petitioner removable, denied his requests for relief from removal, and ordered him removed to Hungary. Pet. App. 116a-143a. As relevant here, the IJ resolved the parties' dispute over whether petitioner's crimes involving moral turpitude arose "out of a single scheme of criminal misconduct," 8 U.S.C. 1227(a)(2)(A)(ii), by applying Ninth Circuit precedent, which the IJ understood to focus on whether the crimes were part of a single "plan or program," *Leon-Hernandez* v. *INS*, 926 F.2d 902, 905 (9th Cir. 1991) (citation omitted). At a hearing, petitioner had testified that he had been drinking heavily on the day of the incident. Pet. App. 125a. He maintained that, after meeting the three women, one of them suggested that they go to the television repair shop to smoke marijuana. *Ibid.* He further maintained that he could not

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[1] DHS initially charged petitioner with being removable as an alien "convicted of an aggravated felony at any time after admission." 8 U.S.C. 1227(a)(2)(A)(iii). During his removal proceedings, a divided panel of the Ninth Circuit held in another case that Section 1227(a)(2)(A)(iii) does not apply to pre-1988 convictions. See *Ledezma-Galicia* v. *Holder*, 636 F.3d 1059, 1062 (2010). DHS then withdrew the Section 1227(a)(2)(A)(iii) charge and substituted a charge under Section 1227(a)(2)(A)(ii). Pet. App. 113a.

recall what happened after that point due to an alcohol-induced blackout. *Ibid.* Based in part on petitioner's own testimony, the IJ found that his crimes did not arise out of a single coherent plan or program and were instead the result of "impulse-driven conduct." *Id.* at 135a.

b. Shortly after the IJ's decision, the Board held in *In re Islam*, 25 I. & N. Dec. 637 (2011), that its prior decision in *Adetiba*, *supra*, should be applied in all removal proceedings, even those subject to review by a court of appeals that had previously adopted a different interpretation of Section 1227(a)(2)(A)(ii). *Islam*, 25 I. & N. Dec. at 641. The Board reasoned that "the phrase 'single scheme of criminal misconduct' [is] a quintessentially ambiguous term," *ibid.*, and that the Board's resolution of that ambiguity is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Board further reasoned that its interpretation would be entitled to deference even in those circuits in which the court of appeals had "previously issued a contrary decision." *Islam*, 25 I. & N. Dec. at 641 (citing *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005)).

c. After issuing its decision in *Islam*, the Board remanded petitioner's case to the IJ to "apply the *Matter of Adetiba* standard." Pet. App. 114a; see *id.* at 112a-115a. On remand, the IJ again found petitioner to be removable, denied his requests for relief from removal, and ordered him removed. *Id.* at 97a-111a. In particular, the IJ found that petitioner's crimes "did not arise out of a single scheme of criminal misconduct" under *Adetiba* because each criminal act of forced oral copulation or sexual penetration "constituted [a] complete, in-

dividual, an[d] distinct crime[].” *Id.* at 108a. The IJ explained that petitioner’s abuse of a second victim “did not flow from and was not a natural consequence of a single act” also involving the first victim. *Id.* at 109a (quoting *Adetiba*, 20 I. & N. Dec. at 512). The IJ also observed that petitioner “committed these acts during a six-hour period” and thus “certainly ‘had the opportunity to disassociate himself from his enterprise.’” *Ibid.* (quoting *Adetiba*, 20 I. & N. Dec. at 512).

d. The Board dismissed petitioner’s appeal, upholding the IJ’s determinations. Pet. App. 89a-96a. In the Board’s view, the fact “[t]hat all of [petitioner’s] convictions cover conduct occurring on the same day in the same location is irrelevant” because “[t]he crimes are not interdependent.” *Id.* at 94a. The Board, echoing the IJ, emphasized that “[t]he abuse of one victim did not flow from and was not a natural consequence of the abuse of [petitioner’s] previous victim,” and that, given the six-hour timeframe, “[a]fter the abuse of any one victim, [petitioner] had the opportunity to cease his activities and reflect on what he had done.” *Ibid.*

4. The court of appeals denied a petition for review, over Judge Fisher’s dissent. Pet. App. 33a-60a (amended opinion).

a. As relevant here, the court of appeals first applied *Brand X* to determine that Ninth Circuit precedent did not foreclose upholding the Board’s interpretation of the phrase “a single scheme of criminal misconduct” in 8 U.S.C. 1227(a)(2)(A)(ii). Pet. App. 36a-41a. The court acknowledged that in *Wood*, *supra*, it had “interpreted ‘single scheme’ more broadly than the BIA.” Pet. App. 38a. The court explained, however, that *Wood* did not hold that its interpretation “followed from the unambiguous terms of the statute.” *Id.* at 39a (brackets omitted)

(quoting *Brand X*, 545 U.S. at 982). More broadly, the court determined that "no circuit precedent hold[s] that the text of the statute unambiguously forecloses the [Board's] interpretation." *Id.* at 40a. The court also found that the Board's interpretation of the ambiguous statutory phrase is reasonable and therefore entitled to *Chevron* deference. *Id.* at 40a-42a.

The court of appeals next rejected petitioner's argument that principles of non-retroactivity forbade the Board from applying its longstanding interpretation of Section 1227(a)(2)(A)(ii) in adjudicating his case. Pet. App. 42a-44a. The court noted that, as of petitioner's 1981 guilty pleas, the Board "had not clearly indicated" whether it would apply its interpretation of the statute even in cases reviewable in a circuit, such as the Ninth Circuit, that had "adopted a more expansive interpretation." *Id.* at 43a. Accordingly, the court reasoned that the Board's application of its standard to petitioner's case could not have come as a "complete surprise" to him. *Ibid.*

Finally, the court of appeals rejected petitioner's challenge to the Board's application of *Adetiba* to the particular facts of this case. Pet. App. 44a-48a. The court emphasized that petitioner held his victims for a six-hour period. See *id.* at 45a, 48a. In its view, the Board "could have reasonably concluded" that "sexual crimes committed over a span of six hours against separate victims" distinguished this case from other Board precedents invoked by petitioner. *Id.* at 48a.

b. Judge Fisher dissented. Pet. App. 51a-60a. He "agree[d] with much of the majority opinion but disagree[d] with the majority's conclusion" that the Board had correctly applied the *Adetiba* standard to the facts of this case. *Id.* at 51a; see *id.* at 59a. He would have

granted the petition and remanded to the Board for further explanation of its decision. *Id.* at 60a.

c. The court of appeals denied petitioner's request for rehearing en banc. Pet. App. 2a-3a. Judge Collins, joined by Judge Bea, dissented from the denial. *Id.* at 3a-33a. The dissenting judges agreed that "the statutory language is ambiguous, and that nothing in *Wood* requires a contrary conclusion." *Id.* at 19a. But they would have held that the interpretation the Board adopted in *Adetiba* was itself unreasonable. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14-21) that the decision below is inconsistent with this Court's decision in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), because the court of appeals deferred to an agency interpretation that the court had purportedly rejected as foreclosed by the statutory text in a prior case, *Wood* v. *Hoy*, 266 F.2d 825 (9th Cir. 1959). The court of appeals, however, rejected petitioner's premise that *Wood* foreclosed the Board's interpretation. Petitioner's case-specific disagreement with the Ninth Circuit's understanding of its own precedent does not warrant this Court's review. Moreover, the court's decision to defer to the Board's interpretation of Section 1227(a)(2)(A)(ii) is consistent with the decision of every other court of appeals that has reached the same question. Further review of that question would be particularly unwarranted here because the IJ applied the standard that petitioner would prefer and nonetheless found him to be removable.

Petitioner also seeks review to address the question "[w]hether a rule promulgated through adjudication by an agency exercising its *Chevron* step two and *Brand X* powers can have retroactive effect." Pet. i; see Pet. 21-

29. Petitioner's framing of that question reflects a basic confusion between agency policies adopted through adjudication and agency rules, which by definition are not the product of adjudication. See 5 U.S.C. 551(4)-(7). This Court set forth the authoritative standards for determining whether an agency's adoption of a new policy in an *adjudication*—as opposed to a rulemaking—is impermissibly retroactive in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), and the decision below is consistent with those standards. The Court recently denied petitions for writs of certiorari concerning similar questions in *Olivas-Motta* v. *Barr*, 140 S. Ct. 1105 (2020) (No. 19-282), and *Mercado Ramirez* v. *Barr*, 140 S. Ct. 1105 (2020) (No. 19-284). The same course is warranted here.

1. a. In *Brand X*, this Court addressed whether a court of appeals should afford *Chevron* deference to an agency's interpretation of an ambiguous statute if that interpretation conflicts with a decision previously issued by the same circuit. See 545 U.S. at 982. The Ninth Circuit had found *Chevron* to be inapplicable in those circumstances unless the prior decision had itself been based on deference to the agency. See *Brand X Internet Servs.* v. *FCC*, 345 F.3d 1120, 1131 (2003) (per curiam). This Court reversed, explaining that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982.

The Court explained that "[t]his principle follows from *Chevron* itself," which had "established a 'presumption that Congress, when it left ambiguity in a

statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *Brand X*, 545 U.S. at 982 (quoting *Smiley* v. *Citibank (S.D.), N. A.*, 517 U.S. 735, 740-741 (1996)). The Court further observed that allowing a prior panel opinion resolving a statutory ambiguity to foreclose an agency from resolving the same ambiguity differently in the future would contravene "*Chevron*'s premise * * * that it is for agencies, not courts, to fill statutory gaps." *Ibid.* Instead, the Court held, the "better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Id.* at 982-983.

b. The court of appeals correctly applied those principles here, reviewing its prior decisions in detail and concluding that none of them "unambiguously foreclose[d] the [Board's] interpretation" of the relevant language in Section 1227(a)(2)(A)(ii). Pet. App. 40a. The court recognized that it had "previously adopted a different, broader interpretation" than the Board's longstanding interpretation, confirmed in *In re Adetiba*, 20 I. & N. Dec. 506 (B.I.A. 1992), and that the court had twice "reaffirmed" its interpretation. Pet. App. 33a-34a (citing *Wood*, *supra*; *Gonzalez-Sandoval* v. *INS*, 910 F.2d 614 (9th Cir. 1990); and *Leon-Hernandez* v. *INS*, 926 F.2d 902 (9th Cir. 1991)). In particular, the court explained that, "in contrast to the BIA's approach," its precedent

had previously interpreted the phrase "'single scheme'" to "encompass[] distinct crimes that were part of the same overall plan." *Id.* at 38a-39a.

As the court of appeals explained, however, its prior decisions had not held that the statutory text unambiguously requires the reading the court had adopted or unambiguously forecloses the Board's interpretation. To the contrary, in *Wood*, the court had "noted * * * that the INA did not itself define the term, and that the legislative history did not shed any light on Congress's intent in drafting the provision." Pet. App. 38a (citing *Wood*, 266 F.2d at 828-829). And the court's later decisions in *Gonzalez-Sandoval* and *Leon-Hernandez* had applied the interpretation first adopted in *Wood* without "mentioning any different BIA standard," let alone finding the Board's interpretation foreclosed by the statute. *Id.* at 40a.

The court of appeals also observed that its decision to defer to the Board's interpretation of Section 1227(a)(2)(A)(ii) was "consistent with the decisions of other circuits that have considered the [Board's] interpretation after *Chevron*." Pet. App. 40a. Indeed, every other court of appeals to squarely decide the question has deferred to the Board's interpretation. See *Chavez-Alvarez* v. *Attorney Gen.*, 850 F.3d 583, 586-587 (3d Cir. 2017); *Abdelqadar* v. *Gonzales*, 413 F.3d 668, 675 (7th Cir. 2005); *Akindemowo* v. *INS*, 61 F.3d 282, 286-287 (4th Cir. 1995); *Balogun* v. *INS*, 31 F.3d 8, 9 (1st Cir. 1994) (per curiam); *Nguyen* v. *INS*, 991 F.2d 621, 623-624 (10th Cir. 1993); *Iredia* v. *INS*, 981 F.2d 847, 849 (5th Cir.), cert. denied, 510 U.S. 872 (1993); cf. *Hyacinthe* v. *U.S. Attorney Gen.*, 215 Fed. Appx. 856, 862 (11th Cir. 2007) (per curiam) (deferring in an unpublished opinion); *Michel* v. *INS*, 206 F.3d 253, 260 &

n.4 (2d Cir. 2000) (declining to decide whether the Board's interpretation should be given effect over contrary earlier circuit precedent, where both approaches dictated the same result).

c. Petitioner does not develop any argument that the phrase "arising out of a single scheme of criminal misconduct" in 8 U.S.C. 1227(a)(2)(A)(ii) has a single, unambiguous meaning. Nor does he dispute that the Board's resolution of an ambiguity in the INA is ordinarily entitled to *Chevron* deference. See, *e.g.*, *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 56 (2014) (plurality opinion) ("Principles of *Chevron* deference apply when the BIA interprets the immigration laws.") (citing *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999)). Petitioner thus appears to concede that the preconditions for *Chevron* deference are present in this case—as the panel concluded, and as even the two judges who dissented from the denial of rehearing agreed. See Pet. App. 19a (Collins, J., dissenting from denial of rehearing en banc); *id.* at 34a (majority opinion).

Petitioner nonetheless contends (Pet. 16-18) that the court of appeals misunderstood its own precedent and that, under a proper application of *Brand X*, the panel should have been required to adhere to the Ninth Circuit's prior decision in *Wood*, *supra*. In petitioner's view, *Wood* "clearly indicated that Congress had foreclosed the BIA's approach" (Pet. 16), thereby triggering the rule in *Brand X* that "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation * * * displaces a conflicting agency construction," 545 U.S. at 982-983.

Petitioner's case-specific disagreement with the court of appeals' understanding of its own precedent

does not warrant this Court's review. The effect of applying *Brand X* in this case was simply to allow the panel below to treat *Adetiba* as a ground for departing from the Ninth Circuit's prior decision in *Wood* without convening an en banc court. See Fed. R. App. P. 35. Even without *Brand X*, the court of appeals sitting en banc would not have been bound by the prior panel decision in *Wood*, and it would have been required to defer to the Board's interpretation under *Chevron*. It would be an atypical use of this Court's resources to grant review to police the boundary between the issues that a court of appeals panel may decide and those that are reserved for an en banc court.

In any event, petitioner's *Brand X* challenge lacks merit. The gravamen of the challenge is that *Wood* held that the statute "foreclose[s] the BIA's approach." Pet. 16. But *Wood* contains no such holding. The alien in that case was convicted of two counts of robbery for two incidents that occurred three days apart but involved the same group of co-defendants. *Wood*, 266 F.2d at 831. The alien had agreed beforehand to a plan to participate in both robberies. See *ibid.* On those facts, the court of appeals remanded for further consideration of whether the two robberies arose "out of a single scheme of criminal misconduct." *Ibid.* In the course of its reasoning, the court criticized several then-recent Board decisions as effectively "appl[ying] the statute as if it read 'single criminal act,'" rather than a "'single scheme of criminal misconduct.'" *Id.* at 830 (citation omitted). But even assuming for the sake of argument that the interpretation the court rejected in *Wood* was the same as the one the Board set forth in *Adetiba*, the

court in *Wood* nowhere indicated that the statute "unambiguously" forecloses the Board's interpretation. *Brand X*, 545 U.S. at 985.

Petitioner points (Pet. 16-17) to the *Wood* court's statement that it would "take the language of the statute as [it] find[s] it," 266 F.2d at 830, and its observation that, had Congress wished to make the exception applicable only to multiple crimes arising out of a single "'act,'" it "could have so declared," *ibid.* (emphasis omitted). But those statements merely expressed disagreement with the Board's interpretation, without indicating that the statute necessarily foreclosed it. And they must be read in light of the court's earlier recognition that the INA itself "does not define what is a 'single scheme of criminal misconduct,'" and that the INA's legislative history does not "shed any light on what was the intent of Congress in drafting this provision." *Id.* at 828-829; see Pet. App. 38a-39a.

Indeed, the statements from *Wood* on which petitioner relies are not meaningfully different from the equivalent discussion in the circuit precedent at issue in *Brand X*. In the relevant prior case, the court of appeals had stated that it would "look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy." *AT&T Corp.* v. *City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000) (citation omitted); see *Brand X*, 545 U.S. at 979. This Court readily determined that the court of appeals had adopted what it perceived to be "the *best* reading of" the statute, without holding that its reading "was the *only permissible* reading." *Brand X*, 545 U.S. at 984. So too here.

Petitioner errs in suggesting (Pet. 20-21) that this case is distinguishable from *Brand X* because the Board

had already adopted an interpretation of the statute before *Wood*. This Court made clear in *Brand X* that the happenstance of whether an agency or a court is the first to confront a particular question of statutory interpretation should make no difference. See 545 U.S. at 983 ("[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur."). The critical question is therefore not which construction "come[s] first" (Pet. 21), but rather whether a court has determined that a statute unambiguously forecloses the agency's interpretation. The Ninth Circuit correctly understood its own prior decision not to do so here, and its conclusion aligns the court with the deference afforded to the Board's interpretation of the statutory text by every other court of appeals to have squarely resolved the issue.

2. Petitioner also contends that the court of appeals erred in permitting the Board to give "retroactive" effect to its interpretation of Section 1227(a)(2)(A)(ii) in his case, and that the court's decision to do so implicates a division of authority within the courts of appeals regarding "whether an agency rule promulgated through adjudication can have retroactive effect." Pet. 21 (capitalization and emphasis omitted); see Pet. 21-29. Petitioner is mistaken in both respects.

a. The court of appeals correctly rejected petitioner's retroactivity argument. First, this case does not involve the adoption of any new agency "rule," and review of petitioner's second question presented could be denied on that basis alone. Pet. 22. The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect."

5 U.S.C. 551(4). To adopt such a rule, with certain exceptions, agencies generally must engage in the formal or informal rulemaking procedures set forth in the APA itself. See 5 U.S.C. 551(5) (defining "rule making"); 5 U.S.C. 553 (informal rulemaking procedures). When an agency instead proceeds by adjudication—as the Board did here and in *Adetiba*—the result of the process is not a "rule" but rather an "order." 5 U.S.C. 551(6)-(7); see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-294 (1974).

The difference is not merely semantic. For rulemaking, this Court has held that agencies are presumed to lack "the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms," just as statutes are generally presumed not to have retroactive effect. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). For adjudication, however, the Court has long taken a different approach, grounded in the presumptive retroactivity of judicial decisions:

> Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

Chenery, 332 U.S. at 203; cf. *Bowen*, 488 U.S. at 221 (Scalia, J., concurring) (explaining that "retroactivity is not only permissible but standard" for agency adjudication, because "[a]djudication *deals* with what the law was"). Petitioner's suggestion (Pet. 3) that the courts of appeals "[l]ack[] * * * guidance" on the retroactive

effect of agency adjudications is therefore unfounded. This Court already identified the relevant considerations more than 70 years ago, and petitioner offers no sound basis to revisit *Chenery*.

Second, this case does not involve any genuinely "new" agency rule or policy. Pet. 21. In *Adetiba*, decided in 1992, the Board merely confirmed an interpretation of the phrase "single scheme of criminal misconduct" with roots in Board decisions dating to the 1950s. See 20 I. & N. Dec. at 509 (collecting cases); cf. *Akindemowo*, 61 F.3d at 285 (stating in 1995 that "[f]or approximately forty years, the BIA unfailingly has followed this interpretation"). Indeed, a central premise of petitioner's own *Brand X* challenge to the decision below is that the Board had *already* adopted that interpretation as of 1959, when the Ninth Circuit decided *Wood*. Cf. Pet. 28 n.5. The only relevant change is that, after this Court's decision in *Brand X*, the Board determined to apply its own longstanding interpretation even in cases reviewable in those circuits that had previously adopted a different approach. See *In re Islam*, 25 I. & N. Dec. 637, 641 (B.I.A. 2011); p. 7, *supra*.

Petitioner does not explain why such a change in the Board's practice would qualify as "retroactive" agency action in the requisite sense. The Board did not purport to "attach[] new legal consequences" to the crimes to which petitioner had pleaded guilty in 1981. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269-270 (1994) (discussing retroactive legislation). It merely applied its own settled understanding of Section 1227(a)(2)(A)(ii), while anticipating—correctly—that those courts of appeals that had previously taken a different approach would no longer do so in light of *Brand X*.

This Court has long recognized that "[i]t is only when the law changes in some respect that an assertion of nonretroactivity may be entertained." *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 534 (1991) (plurality opinion); see *Chenery*, 332 U.S. at 203 (considering retroactivity in the context of a "*new* principle" or a "*new* standard") (emphases added). Retroactivity analysis is generally inappropriate where a court—or an administrative agency—merely applies "settled principles and precedents of law to the disputes that come to bar." *James B. Beam Distilling*, 501 U.S. at 534.

Even if the sequence of events here were viewed as raising retroactivity concerns, the court of appeals correctly upheld the Board's decision. The court applied a "test for retroactivity" drawn from D.C. Circuit case law and ultimately based on this Court's decision in *Chenery*. Pet. App. 42a; see *Montgomery Ward & Co.* v. *FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982) (citing *Retail, Wholesale & Dep't Store Union* v. *NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (citing *Chenery*, 332 U.S. at 203)). Among other things, the court considered whether the Board's decision marked an "abrupt departure" and whether petitioner had relied on the "former rule," Pet. App. 42a (citation omitted), finding that both considerations favored allowing the Board to give effect to its interpretation in this case, see *id.* at 43a-44a. Petitioner argues (Pet. 28) that he could not have predicted this Court's decisions in *Chevron* or *Brand X* when he pleaded guilty in 1981. But he makes no effort to demonstrate any bona fide reliance on the Ninth Circuit's prior interpretation of Section 1227(a)(2)(A)(ii), and his complaints center on judicial developments,

which ordinarily are retroactive, rather than any alleged overreach by the agency, which applied an interpretation tracing back more than 60 years.

b. Petitioner contends (Pet. 22-25) that the courts of appeals are divided on retroactivity principles for agency actions implicating *Brand X*. Petitioner relies principally on the Tenth Circuit's decision in *De Niz Robles* v. *Lynch*, 803 F.3d 1165 (2015) (Gorsuch, J.). The court there acknowledged that *Chenery* had adopted a "balancing test" for retroactivity concerns in the context of agency adjudications. *Id.* at 1176. But it nonetheless determined that a different approach was warranted in the particular context of an agency adjudication involving a "*Chevron* step two/*Brand X* scenario" in which the agency "avowedly and self-consciously" uses its delegated authority to adopt a new policy that will displace contrary judicial precedent. *Id.* at 1173. In those circumstances, the court adopted a "presumption of prospectivity." *Id.* at 1172; see *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1144 (10th Cir. 2016) (Gorsuch, J.) (describing *De Niz Robles* as having held "that because the agency's promulgation of a new rule of general applicability under *Chevron* step two and *Brand X* is an exercise of delegated legislative policymaking authority, it is subject to the presumption of prospectivity that attends true exercises of legislative authority").

No other court of appeals has adopted the Tenth Circuit's distinct approach, and this case presents no occasion to consider it.[2] The premise of *De Niz Robles* was

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[2] Petitioner also exaggerates (Pet. 23) the alleged conflict between *De Niz Robles* and the multi-factor approach applied in the decision below. In fact, the Tenth Circuit stated in *De Niz Robles* that its approach was compatible with the multi-factor test that the

that the Board was exercising its delegated authority to "overrule" a judicial precedent. 803 F.3d at 1176. But see *Brand X*, 545 U.S. at 983-984 ("The [judicial] precedent has not been 'reversed' by the agency, any more than a federal court's interpretation of a State's law can be said to have been 'reversed' by a state court that adopts a conflicting (yet authoritative) interpretation of state law."). As explained above, this is not such a case. The Board here merely adhered to its longstanding interpretation of the ambiguous phrase "single scheme of criminal misconduct" in 8 U.S.C. 1227(a)(2)(A)(ii), and the Ninth Circuit gave effect to that interpretation over contrary circuit precedent. Nothing the Board did resembles the set of circumstances that concerned the Tenth Circuit in *De Niz Robles*. Moreover, the Tenth Circuit itself has in other cases afforded *Chevron* deference to the same Board interpretation at issue here. See *Nguyen*, 991 F.2d at 623-624 ("We hold that this is a permissible interpretation of the statute and, accordingly, we adopt that interpretation within the Tenth Circuit after giving due deference to the Board pursuant to *Chevron*[.]"). Thus, petitioner has failed to demonstrate that the result in this case would have been any different had the case arisen in the Tenth Circuit rather than the Ninth Circuit.

3. In any event, this case would be an unsuitable vehicle for resolving both questions petitioner seeks to present because neither would make any practical difference to the correct disposition of this case. The upshot of both questions is that the Board and the Ninth Circuit panel should have been required to apply the Ninth Circuit's prior interpretation of Section

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Tenth Circuit itself generally applies when considering retroactivity challenges to agency adjudication. 803 F.3d at 1177.

1227(a)(2)(A)(ii) in adjudicating petitioner's case. But the IJ already applied those standards in her initial decision and found petitioner to be removable. Pet. App. 134a-136a. The Ninth Circuit's precedent had focused on whether separate crimes were "planned in advance." Pet. 6 (citing *Wood*, 266 F.2d at 831); see Pet. App. 32a (panel's explanation that, "[u]nder the *Wood* test, where two predicate crimes were planned at the same time and executed in accordance with that plan, they arise out of a single scheme of criminal misconduct") (citation and internal quotation marks omitted); Pet. App. 114a (Board's statement that the "Ninth Circuit's precedents" had focused on "whether the [alien's] conduct evinced advance planning"). The IJ observed petitioner testify in person and concluded, consistent with his testimony, that his multiple sex offenses committed against two different victims over a six-hour period were not the product of a coherent advanced plan or scheme, but rather "impulsive" and "spontaneous" separate crimes. Pet. App. 135a. Accordingly, petitioner would have been found to be removable even under the Ninth Circuit's prior approach.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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