No. 19-15077

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KARASTAN L. EDWARDS,
Petitioner,
v.
U.S. ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS
A[redacted]

MOTION OF IMMIGRANT DEFENSE PROJECT AND 14 ORGANIZATIONS OF PREEMINENT IMMIGRATION LAWYERS AND LEGAL SCHOLARS FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING EN BANC

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ADDITIONAL AMICI CURIAE

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- Capital Area Immigrants' Rights Coalition
- Immigrant Legal Resource Center
- Kathryn O. Greenberg Immigration Justice Clinic at Benjamin N. Cardozo School of Law
- Kurzban, Ira
- Lawyers for Civil Rights
- National Immigration Project of the National Lawyers Guild
- Oregon Justice Resource Center
- Prisoners' Legal Services of New York
- Professor Jason Cade
- Professor Kate Evans
- Professor Tiffany Jia-Huey Lieu
- Professor Philip Torrey
- Professor Michael Vastine

Karastan L. Edwards v. U.S. Attorney General, No. 19-15077

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1-1 through 26.1-3 and 29-2, counsel for proposed *amici curiae* hereby certifies that, upon information and belief, the following persons and entities, in addition to those set forth in Petitioner Karastan L. Edwards's Petition for Rehearing En Banc, have or may have an interest in the outcome of this appeal:

1. Anguiano, Nadia (counsel for *amici curiae*)
2. Black Alliance for Just Immigration (*amicus curiae*)
3. Capital Area Immigrants' Rights Coalition (*amicus curiae*)
4. Immigrant Defense Project (*amicus curiae*)
5. Immigrant Legal Resource Center (*amicus curiae*)
6. Kathryn O. Greenberg Immigration Justice Clinic at Benjamin N. Cardozo School of Law (*amicus curiae*)
7. Kurzban, Ira (*amicus curiae*)
8. Lawyers for Civil Rights (*amicus curiae*)
9. Marritz, Amelia (counsel for *amici curiae*)

10. National Immigration Project of the National Lawyers Guild (*amicus curiae*)

11. Oregon Justice Resource Center (*amicus curiae*)

12. Prisoners' Legal Services of New York (*amicus curiae*)

13. Professor Jason Cade (*amicus curiae*)

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15. Professor Tiffany Jia-Huey Lieu (*amicus curiae*)

16. Professor Philip Torrey (*amicus curiae*)

17. Professor Michael Vastine (*amicus curiae*)

18. Shastri, Seiko (counsel for *amici curiae*)

19. Siddiquee, Nabilah (counsel for *amici curiae*)

20. Wachtenheim, Andrew (counsel for *amici curiae*)

Pursuant to FED. R. APP. P. 26.1 and 29(a)(4)(A) and Eleventh Circuit Rules 26.1-1 and 29.2, *amici curiae* listed below represent that they do not have parent corporations or publicly held companies holding 10% or more of any stock.

- Black Alliance for Just Immigration

- Capital Area Immigrants' Rights Coalition
- Immigrant Defense Project
- Immigrant Legal Resource Center
- Kathryn O. Greenberg Immigration Justice Clinic at Benjamin N. Cardozo School of Law
- Lawyers for Civil Rights
- National Immigration Project of the National Lawyers Guild
- Oregon Justice Resource Center
- Prisoners' Legal Services of New York

/s/ Seiko Shastri
Seiko Shastri
Counsel of Record for Amici Curiae

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(b) and Eleventh Circuit Rule 29-1, proposed amici Immigrant Defense Project, Black Alliance for Just Immigration, Capital Area Immigrants' Rights Coalition, Immigrant Legal Resource Center, Ira Kurzban, Kathryn O. Greenberg Immigration Justice Clinic at Benjamin N. Cardozo School of Law, Lawyers for Civil Rights, National Immigration Project of the National Lawyers Guild, Oregon Justice Resource Center, Prisoners' Legal Services of New York, Professor Jason Cade, Professor Kate Evans, Professor Tiffany Jia-Huey Lieu, Professor Philip Torrey, and Professor Michael Vastine move the Court for leave to file the attached amicus brief in support of the petition for rehearing en banc. All parties have consented to the filing of this brief. In support of this motion, *amici* state as follows:

1. Proposed *amici* are organizations of immigration lawyers and legal scholars who practice and study immigration law. From daily practice in the United States' criminal and immigration legal systems and courts, proposed *amici* are acutely familiar with the content and application of the Immigration and Nationality Act ("INA") and its

predecessor legislation, including the substantial criminal law provisions. Based on this extensive expertise, proposed *amici* submit that their perspective may benefit the Court in its consideration of the important issues presented in the instant rehearing petition. Proposed *amici* have no monetary interest in the above-captioned case.

2. **Immigrant Defense Project ("IDP")** is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact with the criminal legal and immigration detention and deportation systems. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights.

3. **Black Alliance for Just Immigration ("BAJI")** is a national nonprofit racial justice and migrant rights organization which engages in legal representation, advocacy, community organizing, and cross-cultural alliance-building in order to end the racism, criminalization, and

economic disenfranchisement of African American and Black immigrant communities. BAJI engages in advocacy on behalf of all Black immigrants and refugees, and today has offices in New York, NY; Los Angeles, CA; Oakland, CA; Atlanta, GA; Miami, FL; Washington, DC; Minneapolis, MN; and Houston, TX. Like all Black people living in the US, Black immigrants disproportionately experience racial discrimination in the form of criminalization, policing, detention, and deportation. To further its mission, BAJI creates and disseminates presentations, reports, articles, interviews, testimony, social media, and blog posts to educate the public about challenges to immigration detention and deportation.

4. **Capital Area Immigrants' Rights ("CAIR") Coalition ("CAIR Coalition")** is a nonprofit legal services provider that represent noncitizens, sometimes individuals with prior contact with the criminal justice system, in removal proceedings. CAIR Coalition seeks to highlight to the Board the importance of reopening removal proceedings after the vacatur of a criminal conviction, particularly in the context of fear-based relief through asylum and withholding of removal. Specifically, CAIR Coalition seeks to advance immigrants' due process rights and promote

the government's existing commitment to non-refoulement by ensuring that removal proceedings are reopened when a now-vacated criminal conviction had been central to denying relief in the original proceedings, regardless of the timeliness of any Motion to Reopen, so that a noncitizen's risk of harm upon removal can be adequately considered.

5. **Immigrant Legal Resource Center ("ILRC")** is a national nonprofit resource center based in San Francisco, California. Its mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Along with other work, the ILRC is recognized as a national expert in the intersection between immigration and criminal law. Each year ILRC provides assistance to thousands of attorneys defending noncitizens in criminal prosecutions and removal proceedings throughout the Ninth Circuit and nationally, but particularly in California. As part of this work, the ILRC analyzes state criminal offenses to advise defenders about the immigration consequences. The ILRC has a vital interest in ensuring that the law pertaining to the immigration consequences of crimes is interpreted as

fairly, rationally, and consistently as possible, to better enable counsel to correctly advise their clients.

6. **Ira Kurzban** has received national recognition for his work in the immigration field. He is the author of *Kurzban's Immigration Law Sourcebook*, the most widely used one-volume immigration source in the United States. He is an adjunct faculty member in immigration and nationality law at the University of Miami School of Law and has lectured and published extensively in the field of immigration law, including articles in the Harvard Law Review, Columbia University Press, San Diego Law Review, and other publications. He is an honorary fellow of the University of Pennsylvania School of Law where he was honored for his exemplified signal service to every aspect of the legal profession. He is a past-national President and General Counsel of the American Immigration Lawyers Association. He is the recipient of the Wasserstein Fellowship at Harvard University Law School, the Leonard J. Theberge Award for Private International Law, the National Law Journal's designation as one of the top twenty immigration lawyers in the United States, the Tobias Simon Pro Bono Award presented by the Chief Justice of the Florida Supreme Court, the University of Miami

Lawyers of the Americas Award, the Jack Wasserman Award for excellence in federal litigation, and the Edith Lowenstein Memorial Award for excellence in the advancement of immigration law. He has litigated over 100 federal cases involving the rights of noncitizens, including before the Supreme Court of the United States.

7. **Kathryn O. Greenberg Immigration Justice Clinic, Benjamin N. Cardozo School of Law** is a non-profit clinic dedicated to providing quality legal representation for indigent immigrants facing deportation and advocacy work to support immigrant communities. Clinic students have won relief for many individuals facing deportation, and their work has helped change laws and policies affecting immigrants nationally.

8. **Lawyers for Civil Rights ("LCR")** works with communities of color and immigrants to fight discrimination and foster equity through creative and courageous legal advocacy, education, and economic empowerment. In partnership with law firms and community allies, LCR provides free, life-changing legal support to individuals and families. LCR protects the constitutional rights of immigrant communities.

9. **National Immigration Project of the National Lawyers Guild ("NIPNLG")** is a non-profit organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. NIPNLG provides technical assistance to the bench and bar, hosts continuing legal education seminars on the rights of noncitizens and is the author of numerous practice advisories as well as Immigration Law and Crimes, a leading treatise on the intersection of criminal and immigration law published by Thompson-Reuters. NIPNLG has a direct interest in ensuring that the rules governing classification of criminal convictions for immigration purposes are fair and predictable.

10. **Oregon Justice Resource Center ("OJRC")** works to promote civil rights and improve legal representation to traditionally underserved communities, including noncitizens. OJRC serves this mission by focusing on the principle that our justice system should be founded on fairness, accountability, and evidence-based practices. Ensuring that post-conviction changes to sentences and convictions are duly recognized is part of the OJRC mission.

11. **Prisoners' Legal Services of New York ("PLS")** is a nonprofit organization that has provided civil legal services for over forty-five years to indigent individuals incarcerated in New York State. As part of the New York Immigrant Family Unity Project, PLS provides free legal representation to noncitizens incarcerated in New York State prisons undergoing immigration removal proceedings within the Institutional Hearing Program, in addition to noncitizens held in immigration detention in Albany, Batavia, and Plattsburgh, New York. PLS also provides representation in habeas corpus proceedings to detained immigrants in the U.S. District Courts for the Southern and Western Districts of New York and on petitions for review and civil appeals before the U.S. Court of Appeals for the Second Circuit. PLS has a strong interest in protecting the due process rights of incarcerated and detained persons and minimizing the harmful effects of prolonged detention.

12. **Professor Jason Cade**, J. Alton Hosch Professor of Law, University of Georgia School of Law, appears in his personal capacity.

13. **Professor Kate Evans**, Clinical Professor of Law, Duke University, appears in her individual capacity.

14. **Professor Tiffany Jia-Huey Lieu**, Albert M. Sacks Clinical Teaching and Advocacy Fellow, Harvard Law School, appears in her personal capacity.

15. **Professor Philip Torrey**, Managing Attorney of Harvard Immigration and Refugee Clinical Program and Lecturer on Law, Harvard Law School, appears in his personal capacity.

16. **Professor Michael Vastine**, Professor of Law, St. Thomas University School of Law Immigration Clinic, is a legal scholar who practices, teaches, and studies immigration law. From daily practice in the United States' criminal and immigration legal systems and courts, Professor Vastine is acutely familiar with the content and application of the Immigration and Nationality Act ("INA") and its predecessor legislation, including the substantial criminal law provisions at issue in the instant litigation.

17. Proposed *amici*'s brief is desirable because, while the petition for rehearing focused more on the retroactivity considerations presented in this case, proposed *amici*'s brief provides in-depth analysis of the text and history of the INA provision central to the outcome of this case—8 U.S.C. § 1101(a)(48)(B). Proposed *amici*'s brief additionally provides

expert insight as to the former Attorney General Barr's interpretation of 8 U.S.C. § 1101(a)(48)(B) in *Matter of Thomas & Thompson*, 27 I. & N. Dec. 674 (A.G. 2019), and its relationship to the deference framework set out in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

5. *Amici*'s counsel has communicated with counsel for the Petitioner and counsel for the Respondent. Counsel for Petitioner consents to and has no objection to the filing of this amicus brief. Counsel for the Respondent has stated that Respondent does not oppose this motion for leave to appear as *amici curiae*.

WHEREFORE, Proposed *amici* respectfully request the Court's leave to appear as *amici curiae* in the above-captioned matter.

Date: March 15, 2023

Respectfully submitted,

/s/ Seiko Shastri

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Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on March 15, 2023, I electronically filed the foregoing document titled **Motion of Immigrant Defense Project and 14 Organizations of Preeminent Immigration Lawyers and Legal Scholars for Leave to File an *Amici Curiae* Breif in Support of Petitioner's Petition for Rehearing En Banc** with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Seiko Shastri
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[redacted]

BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT AND 14 ORGANIZATIONS OF PREEMINENT IMMIGRATION LAWYERS AND LEGAL SCHOLARS IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING EN BANC

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1. Anguiano, Nadia (counsel for *amici curiae*)
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- Oregon Justice Resource Center
- Prisoners' Legal Services of New York

/s/ Seiko Shastri
Seiko Shastri
Counsel of Record for Amici Curiae

CIRCUIT RULE 35-5(C) CERTIFICATION

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Hylton v. U.S. Att'y Gen.*, 992 F.3d 1154 (11th Cir. 2021).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: Does 8 U.S.C. § 1101(a)(48)(B) require immigration adjudicators to give full legal effect to a criminal court order modifying a sentence, irrespective of the reasons for the modification?

Date: March 15, 2023

/s/ Seiko Shastri
Seiko Shastri
Counsel of Record for Amici Curiae

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are organizations of preeminent immigration lawyers and legal scholars who practice and study immigration law. *Amici*'s interest statements are provided in the accompanying motion for leave to file this brief.

STATEMENT OF THE ISSUE WARRANTING EN BANC CONSIDERATION

Does 8 U.S.C. § 1101(a)(48)(B) require immigration adjudicators to give full legal effect to a criminal court order modifying a sentence, irrespective of the reasons for the modification?

SUMMARY OF ARGUMENT

This Court should grant rehearing en banc because the Panel erroneously deferred to former Attorney General ("AG") Barr's decision in *Matter of Thomas & Thompson*, 27 I. & N. Dec. 674 (A.G. 2019) ("*Thomas & Thompson*"), at step two of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Amici* respectfully submit this

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of this brief or contributed money intended to fund this brief's preparation or submission.

brief to assist this Court in identifying and correcting the errors in *Thomas & Thompson* and in the Panel opinion, which wrongly interpret the terms "sentence" and "term of imprisonment" in the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1101(a)(48)(B).

Section I explains that the Panel did not exhaust the required tools of statutory interpretation before deeming the statute ambiguous. *See Edwards v. U.S. Att'y Gen.*, 56 F.4th 951, 964 (11th Cir. 2022). The plain text and application of the prior construction canon, criminal rule of lenity, and presumption against deportation preclude the former AG's interpretation. Section II explains that because the terms "sentence" and "term of imprisonment" have both civil and criminal application, they are beyond the *Chevron* framework. Finally, Section III explains that even if *Chevron* were applicable, *Thomas & Thompson* is unreasonable because it fails to apply requisite statutory interpretation principles, misapprehends legislative history, and irrationally conflates the distinct concepts of guilt and sentencing.

This Court should grant rehearing en banc. Alternatively, it should hold the petition for rehearing until the Supreme Court decides *Pugin v. Garland*, No. 22-23 (U.S.) (to be argued Apr. 17, 2023), and *Garland v.*

Cordero-Garcia, No. 22-331 (U.S.) (same). In both cases, the Board of Immigration Appeals ("BIA") found the dual application statutory term "aggravated felony" ambiguous but failed to apply germane rules of statutory interpretation, including the criminal rule of lenity and the presumption against deportation. The Supreme Court's decisions will accordingly bear on the instant petition.

ARGUMENT

I. The Panel's Decision Violates the Supreme Court's Statutory Interpretation Jurisprudence and Misses That Congress Unambiguously Legislated the INA to Defer to Criminal Court Sentencing Modifications.

Rehearing should be granted because 8 U.S.C. § 1101(a)(48)(B) unambiguously provides that sentence modifications should *always* be given effect, regardless of the underlying reasons, and the Panel erred in concluding otherwise. Supreme Court precedent requires that courts independently and rigorously analyze whether a statute has clear meaning at step one of *Chevron*, including through consideration of ordinary meaning and application of canons of construction. *See Chevron*, 467 U.S. at 843 n.9; *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). The Panel impermissibly failed to exhaust these traditional tools of statutory interpretation at *Chevron* step one. *See, e.g.*, *Pereira v.*

Sessions, 138 S. Ct. 2105, 2113-14 (2018) (holding *Chevron* deference inappropriate where "Congress has supplied a clear and unambiguous answer to the interpretive question at hand"); *Hylton*, 992 F.3d at 1158 ("To determine whether a statute has plain meaning, we ask whether its meaning may be settled by the 'traditional tools of statutory construction.'" (citation omitted)). Proper analysis of the statutory text and application of the prior construction canon confirm that § 1101(a)(48)(B) unambiguously gives legal effect to modified sentences. Application of the criminal rule of lenity and presumption against deportation further preclude both the former AG's interpretation in *Thomas & Thompson* and the Panel's decision to defer.

A. The Plain Text of 8 U.S.C. § 1101(a)(48)(B) Unambiguously Recognizes Sentencing Modifications.

The plain text of § 1101(a)(48)(B) unambiguously requires giving full legal effect to a criminal court order modifying a sentence, irrespective of the reasons for the modification.[2] The statute states:

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[2] The Panel formulated the issues as focusing on the purpose of the state court modification and as asking "which period of confinement counts for purposes of immigration law, the original one or the modified one." *Edwards*, 56 F.4th at 963-64. *Amici*'s arguments respond to both formulations because § 1101(a)(48)(B) unambiguously gives full effect to

> Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

8 U.S.C. § 1101(a)(48)(B).

The text of this statute is straightforward: a "sentence" or "term of imprisonment" for immigration law purposes is determined by the "order[]" of the sentencing court, with a narrow exception relating *only* to suspended sentences. The text does not provide that adjudicators may disregard some court orders regarding modified sentences while giving effect to others; it states simply, and clearly, that the "order[]" of the "court of law" controls.

The INA's deference to criminal sentencing "order[s]" makes sense because state criminal courts have ultimate authority over criminal sentencing as part of the States' inherent police powers. *See Bond v. U.S.*, 572 U.S. 844, 858 (2014) (describing "the punishment of local criminal activity" as "[p]erhaps the clearest example of traditional state authority"). If Congress intended to depart from this principle, it could

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criminal court sentencing modification orders and is not tethered to a criminal court's motivation for modifying a sentence.

have easily done so—as reflected in its explicit inclusion of suspended sentences. Yet nowhere does § 1101(a)(48)(B) authorize immigration adjudicators to disregard certain criminal sentence modification orders while giving full effect to others. Because the INA does nothing to alter the traditional authority of criminal courts over sentencing decisions, immigration adjudicators must give effect to *all* criminal court sentencing modification orders. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (describing the "plain statement" rule requiring Congress to make an "unmistakably clear" statement of intent to intrude on States' police powers).

B. The Prior Construction Canon Further Confirms the Plain Meaning of § 1101(a)(48)(B).

The Panel further erred by not employing additional tools of statutory interpretation to determine "whether a statute has a plain meaning[.]" *Hylton*, 992 F.3d at 1158 (explaining that a court must apply traditional tools of statutory construction—including the prior construction canon—to determine whether statutory meaning is unambiguous at *Chevron* step one); *see Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) ("[If] the canons supply an answer, '*Chevron* leaves the stage.'" (citation omitted)). Here, the prior construction canon—which

provides that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)—further confirms that § 1101(a)(48)(B) unambiguously recognizes *all* sentencing modifications.

Congress codified the INA "sentence" and "term of imprisonment" definitions knowing that the BIA's longstanding precedent unequivocally gave full effect to sentence modifications for immigration purposes; Congress therefore unambiguously intended the definition of "sentence" and "term of imprisonment" to continue doing the same. *See, e.g.*, *Matter of J-*, 6 I. & N. Dec. 562, 566 (B.I.A. 1955) (holding that a state parole board's sentence commutation should be deferred to); *Matter of C-P-*, 8 I. & N. Dec. 504, 508 (B.I.A. 1959) (holding that trial court sentencing alterations or modifications should be given full effect); *Matter of H-*, 9 I. & N. Dec. 380, 383 (B.I.A. 1961) (holding a state court's vacatur of a sentence should be deferred to); *Matter of Martin*, 18 I. & N. Dec. 226, 227 (B.I.A. 1982) (holding that a state court sentence modification should be deferred to). When Congress codified the definitions of "sentence" and "term of imprisonment" in 1996, it chose not to alter these precedents

except as to suspended sentences. *See* 8 U.S.C. § 1101(a)(48)(B); *see also* H.R. Conf. Rep. No. 104-828 at 224 (1996) (explaining purpose of provision is to overturn BIA precedent regarding effect of suspended sentences). That is the *only* statutory departure from the historical treatment of sentencing in immigration cases. Had Congress intended to expand the sentence definition to withhold legal effect from sentencing modifications for immigration purposes, Congress would have done so. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018) (explaining that "[t]he fact that Congress did not adopt a readily available and apparent alternative strongly support[ed] the conclusion" that Congress did not intend for the INA to be interpreted and applied in that manner (cleaned up)). *Thomas & Thompson*'s contrary interpretation therefore violates the statute.

C. Alternatively, Any Statutory Ambiguity Must Be Resolved in Favor of Defendants and Noncitizens Under the Criminal Rule of Lenity and Presumption Against Deportation.

Even if § 1101(a)(48)(B) were ambiguous, the Panel erred by not applying the criminal rule of lenity and presumption against deportation to narrow the statute's punitive reach and to resolve any ambiguity in favor of noncitizens and defendants. Section 1101(a)(48)(B) has both civil

and criminal application, *see infra* Section II. The Supreme Court mandates that in such cases the criminal rule of lenity applies to favor individuals to ensure criminal penalties are not imposed without clear congressional authorization. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) ("Because we must interpret the [INA] consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

The Supreme Court further requires that because of "the grave nature of deportation," ambiguities in the INA must be resolved in favor of noncitizens. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018); *see also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (describing "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]"). The Panel applied neither interpretive tool, instead finding the statute ambiguous and immediately deferring to the former AG. *See Edwards*, 56 F.4th at 964.

II. The Panel Failed to Consider that the INA's Sentence Definition Is Dual Application and Therefore Not Eligible for *Chevron* Deference.

The Panel was wrong to defer to *Thomas & Thompson* because, as a dual application statute, § 1101(a)(48)B) is wholly beyond the *Chevron*

framework. Section 1101(a)(48)(B) has civil application, such as deportability and ineligibility for immigration relief and benefits. *E.g.*, 8 U.S.C. § 1227(a)(2)(A)(i) (removability ground for a crime involving moral turpitude conviction "for which a sentence of one year or longer may be imposed"); 8 C.F.R. § 316.10(b)(1)(ii) (permanently barring noncitizens convicted of an aggravated felony from establishing "good moral character" for naturalization). It also has criminal law application, such as enhanced federal sentences for defendants prosecuted for "illegal reentry": a noncitizen previously removed for an aggravated felony conviction is subject to a *ten-fold enhancement* of the baseline two-year maximum sentence—up to 20 years imprisonment. 8 U.S.C. §§ 1326(a); (b)(2). Section 1101(a)(48)(B) defines the elements of multiple aggravated felony provisions that trigger this sentencing enhancement. *See, e.g.*, *id.* §§ 1101(a)(43)(F), (G), (S)[3].

Importantly, the Supreme Court has *never* extended *Chevron* deference to agency interpretations of dual application INA provisions,

[3] The scope of the aggravated felony provision at 8 U.S.C. § 1101(a)(43)(S) is the subject of *Pugin v. Garland* and *Garland v. Cordero Garcia*, which the Supreme Court is reviewing during its current term. *See supra* at 2-3.

like those concerning aggravated felony grounds of removal. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017) (interpreting sexual abuse of a minor aggravated felony provision); *Torres v. Lynch*, 578 U.S. 452 (2016) (interpreting explosive materials aggravated felony provision); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (interpreting drug trafficking aggravated felony provision). And for good reason. Deferring to the BIA's construction of a statute with criminal application would raise serious constitutional concerns by allowing an agency to create the elements of criminal and sentencing laws without express congressional authorization. *See U.S. v. Davis*, 139 S. Ct. 2319, 2323 (2019) (holding that "[o]nly the people's elected representatives in Congress have the power to write new federal criminal laws"). The need for a consistent interpretation of dual application statutes means that federal agencies not authorized to interpret criminal statutes receive no deference when analyzing their meaning.

While *amici* acknowledge that this Court has previously deferred to agency interpretations of dual application terms in the INA, *see, e.g.*, *Alim v. Gonzales*, 446 F.3d 1239, 1250 (11th Cir. 2006), this Court has done so without considering the dual application issue and without

applying pertinent statutory interpretation principles. Accordingly, prior precedent not "squarely address[ing]" a particular issue does not bind later panels on that question. *Brecht v. Abramson*, 507 U.S. 619, 631 (1993). The dual application role of § 1101(a)(48)(B) precludes *Chevron* deference to *Thomas & Thompson*.

III. Even Under *Chevron*, the Panel Wrongly Deferred to *Thomas & Thompson* as Reasonable.

Even under *Chevron*, for four principal reasons, *Thomas & Thompson* is unreasonable so the Panel erroneously deferred to it. First, to warrant *Chevron* deference, an agency must "consider[] all the 'relevant factors' and 'important aspect[s] of the problem.'" *Bidi Vapor LLC v. FDA*, 47 F.4th 1191, 1202 (11th Cir. 2022) (quoting *Michigan v. E.P.A.*, 576 U.S. 743, 749-54 (2015)). In *Thomas & Thompson*, the former AG violated *Chevron* and its progeny by conducting improper and incomplete statutory interpretation and thus arriving at an impermissible construction that is contrary to congressional intent. *See supra* Section I.

Second, the Panel's deference to *Thomas & Thompson*—without any meaningful analysis, *Edwards*, 56 F.4th at 964—contravenes the principle that courts "look to the language of the relevant statute[]" and

must rigorously assess the agency's action before deferring at *Chevron* step two. *Bidi Vapor LLC*, 47 F.4th at 1202-06 (holding Food and Drug Administration arbitrarily and capriciously ignored relevant evidence in denying tobacco companies' marketing applications).

Third, without textual justification, *Thomas & Thompson* imported the BIA's interpretation of a different INA provision—8 U.S.C. § 1101(a)(48)(A), defining "conviction," not "sentence" or "term of imprisonment"—into the *sentencing* context. 27 I. & N. Dec. at 681-84. To do so, the former AG relied on *Matter of Roldan*, 22 I. & N. Dec. 512, 518-19 (B.I.A. 1999), where the BIA interpreted § 1101(a)(48)(A) (defining "conviction") based on its reading of that provision's legislative history. *See id.* (discussing H.R. Conf. Rep. No. 104-828, at 224 (1996)). Both *Roldan* and the legislative history of § 1101(a)(48)(A) are irrelevant to identifying the permissible reading of § 1101(a)(48)(B). *See also supra* Section I.B. (discussing the separate legislative history of § 1101(a)(48)(B), H.R. Conf. Rep. No. 104-828, at 224).

Fourth, the former AG's conflation of these two distinct concepts of convictions and sentencing is additionally arbitrary because it contravenes U.S. legal history, which has long identified the distinct roles

of a verdict and sentencing. *See Williams v. N.Y.*, 337 U.S. 241, 246 (1949) (noting that, since the founding era, U.S. courts have given sentencing judges "wide discretion. . . in determining the kind and extent of punishment to be imposed" in contrast to "[t]ribunals passing on the guilt of a defendant"). Nothing in § 1101(a)(48)(B) even remotely suggests that Congress intended for the agency to contradict this basic aspect of criminal law.

CONCLUSION

The Court should grant rehearing en banc to overturn the Panel's erroneous decision deferring to *Thomas & Thompson*.

Dated: March 15, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(g)(1), the attached brief of amici curiae complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font. In addition, the attached brief complies with FED. R. APP. P. 29(b)(4) and 11th Cir. R. 29-3 because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 11th Cir. R. 32-4, this document contains 2,593 words.

Dated: March 15, 2023

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CERTIFICATE OF SERVICE

I certify that on March 15, 2023, I electronically filed the foregoing **Brief of *Amici Curiae* Immigrant Defense Project and 14 Organizations of Preeminent Immigration Lawyers and Legal Scholars in Support of Petitioner's Petition for Rehearing En Banc** with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that on March 15, 2023, I caused the required number of bound copies of the foregoing motion to be filed via first-class mail with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit.

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