No. 19-15077

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Karastan Laughton EDWARDS,
Petitioner

v.

U.S. Attorney General,
Respondent

On Petition for Review of Final Decision of the Board of Immigration Appeals
Agency No. A

PETITION FOR REHEARING OR REHEARING *EN BANC*

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March 8, 2023

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, undersigned counsel hereby certifies that, upon information and belief, the following persons and entities have or may have an interest in the outcome of this appeal:

1. BLEIMAIER, John Kuhn, Attorney for Petitioner, Princeton, New Jersey;
2. EDWARDS, Karastan L., Petitioner, [redacted];
3. GARLAND, Merrick, Respondent, Attorney General of the United States, U.S. Department of Justice, Washington, D.C.;
4. BOCCHINI, Walter, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.;
5. BYRD, Sarah, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.;
6. Board of Immigration Appeals, Falls Church, Virginia;
7. Offices of the Chief Counsel, U.S. Department of Homeland Security, Atlanta, Georgia;
8. Office of the Chief Counsel, U.S. Department of Homeland Security, Lumpkin, Georgia.

Pursuant to Federal Rule of Appellate Procedure Rules 26.1 and 29(a)(4)(A) and Eleventh Circuit Rules 26.1-1 and 29.2, undersigned counsel represents that they do not have parent corporations or publicly held companies holding 10% or more of any stock.

/s/ John Kuhn Bleimaier
John Kuhn Bleimaier
Counsel for Petitioner

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the following decisions 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:

1. *SEC v. Chenery*, 332 U.S. 194 (1947);
2. *Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435 (11th Cir. 1987);
3. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984);
4. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. May an agency retroactively apply a new administrative rule established by adjudication to an individual who relied on a prior rule that was in the place at the time of relevant legal proceedings?
2. May a reviewing court deem a statute ambiguous, and defer to an agency interpretation, prior to applying the relevant rules of statutory construction?

/s/ John Kuhn Bleimaier
John Kuhn Bleimaier
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STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

1. Where the Board of Immigration Appeals ("BIA") and Attorney General ("AG") reverse and replace a longstanding agency rule, under *SEC v. Chenery*, 332 U.S. 194 (1947), and its progeny may the agency apply the new rule retroactively without considering potential harms and injustice?

2. May a reviewing court deem a statute ambiguous and defer to an agency interpretation under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), without first applying relevant rules of statutory construction that would reveal unambiguous statutory meaning?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF CASE

Karastan Edwards, a lawful permanent resident, has been married to his U.S. citizen wife [redacted]. Administrative Record ("A.R.") at 319. They and their U.S. citizen son live together in Georgia. A.R. at 349-50. [redacted]

In 2015, U.S. Immigration and Immigration and Customs Enforcement ("ICE") initiated removal proceedings against Mr. Edwards based on the battery conviction, deeming it a "crime of violence" aggravated felony for which a one year jail sentence had been imposed. A.R. at 1299-1301. The Immigration Judge ("IJ") sustained the

removability charge and consequently found Mr. Edwards's ineligible to apply for cancellation of removal or asylum. A.R. at 897-93. While removal proceedings were ongoing, the Georgia criminal court issued two sentencing orders in Mr. Edwards's battery case clarifying and modifying his sentence to be for probation, not jail time. A.R. at 545, 903. If a conviction is for a "crime of violence," it is not an aggravated felony unless a minimum sentence of one year incarceration is imposed. *See* 8 U.S.C. § 1101(a)(43)(F). As Mr. Edwards argued before the Immigration Court and the BIA, the orders would have been recognized under the BIA precedents in place at the time[1], and made clear that the conviction was not for an aggravated felony.

For nearly a century, BIA and Attorney General precedent gave full effect to sentencing modifications in immigration cases. *See, e.g.*, *Matter of Martin*, 18 I. & N. Dec. 226, 227 (BIA 1982). In the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress codified the terms "sentence" and "term of imprisonment." 8 U.S.C. § 1101(a)(48)(B). In doing so, Congress narrowly abrogated state court deference regarding suspended sentences, but otherwise did not disturb prior precedent deferring to criminal court sentencing judgments, including modified and clarified sentences. *See id. See also Song*, 23 I. & N. Dec. at 174; *Cota-Vargas*, 23 I. & N. Dec. at 852.

Nevertheless, the BIA declined to recognize the sentencing modification orders in Mr. Edwards's case, holding that for immigration purposes the sentence attached to the Georgia conviction was for 12 months' jail time, not probation. But after Mr. Edwards petitioned for review to this Court, the Department of Justice ("DOJ") sought remand

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[1] *See Matter of Song*, 23 I. & N. Dec. 173, 174 (BIA 2001); *Matter of Cota-Vargas*, 23 I. & N. Dec. 849, 852 (BIA 2005).

to "allow the agency to consider whether the Georgia criminal court's order . . . must be given full faith and credit under *Matter of Cota*." A.R. at 62.

Following the remand, in a different case, *Matter of Thomas & Thompson*, former Attorney General Barr reversed *Cota-Vargas* and *Song*, instituting a new agency rule for assessing sentencing modifications and clarifications in immigration cases. 27 I. & N. Dec. 674, 680 (A.G. 2019). The rule holds that sentencing alterations "will have legal effect for immigration purposes if they are based on a procedural or substantive defect in the underlying criminal proceeding, but not if they are based on reasons unrelated to the merits, such as rehabilitation or immigration hardship." *Thomas & Thompson*, 27 I. & N. Dec. at 680. The BIA applied the *Thomas & Thompson* rule retroactively to Mr. Edwards and found him ineligible to apply for cancellation of removal or asylum. A.R. at 1-5. Mr. Edwards had submitted two hundred pages of evidence in support of his relief applications and offered the testimony of several witnesses. He also applied for withholding and deferral of removal under the INA and Convention Against Torture ("CAT"), which the IJ and BIA denied on an unrelated, but unjustified and incorrect, basis.

The Panel upheld the BIA decision. The Panel found the INA terms "sentence" and "term of imprisonment" ambiguous as to the effect of certain state court sentencing modification and clarification orders. *See Edwards v. Att'y Gen.*, 56 F.4th 951, 962-64 (11th Cir. 2022). The Panel found the former Attorney General's decision in *Thomas & Thompson* reasonable at *Chevron* step two. *Id.* The Panel allowed the BIA to retroactively apply *Thomas & Thompson* against noncitizens like Mr. Edwards. *Id.*

Finally, the Panel upheld the denials of withholding and deferral of removal under the INA and CAT. *Id.* at 965.[2]

STATEMENT OF FACTS

Mr. Edwards has been a lawful permanent resident of the United States for twenty years. *See* A.R. at 763. He and his wife and son have begged for the Immigration Court to grant him relief and allow their family to remain together, [redacted] . A.R. at 312-490 (letters and affidavits of support; longstanding tax return history; [redacted]). He is in removal proceedings for a single misdemeanor battery conviction for which he was originally sentenced to one year probation without jail time. A.R. at 1251, 1270. [redacted]

When Mr. Edwards pleaded guilty and was sentenced, he was not represented by counsel. A.R. at 1230-33.

Three years after pleading guilty, ICE arrested Mr. Edwards and issued a putative "notice to appear in removal proceedings"[3] charging him as removable for conviction of

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[2] Mr. Edwards further submits the Panel opinion denying CAT relief and providing inadequate judicial review of the CAT denial conflicts with *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020).

[3] The putative "notice to appear" did not contain the statutorily required date and time for a removal hearing. *See* A.R. at 1299. *Cf. Pereira v. Session*, 138 S. Ct. 2105, 2110 (2018) (citing 8 U.S.C. § 1229(a)(1)); *Bastide-Hernandez v. United States*, No. 22-6281, 2023 WL 350056, at *1 (U.S. Jan. 23, 2023) (denying certiorari over whether a putative notice

an aggravated felony for the misdemeanor battery conviction. *See* A.R. at 1299-1301. He sought to apply for cancellation of removal which focuses on an individual's family ties, length of residence, work and tax history, and hardship to family members in the event of deportation. *See* Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 1165-73 (2022). He also sought asylum. But an aggravated felony determination prevents a noncitizen from even requesting cancellation of removal or asylum. *See* 8 U.S.C. §§ 1229b(a)(3), 1158(b)(2)(A)(ii), 1158(b)(2)(B)(i).

In 2015, the Georgia court issued an order clarifying that Mr. Edwards's initial sentence had been to probation, not jail time. *See* A.R. at 903. The IJ held the order would not be given immigration effect, and the BIA affirmed. A.R. at 80-83, 598-606. Mr. Edwards filed a petition for review with this Court. In 2017, the Georgia court issued an additional clarification order that Mr. Edwards's original sentence had been for probation, not jail time, and also modified the sentence to reduce the period of probation to eleven months and 27 days. A.R. 545 The BIA reopened and remanded removal proceedings. A.R. 546. The IJ again ruled the order would not be given immigration effect, and the BIA affirmed. A.R. at 80-83, 183-192. Mr. Edwards again petitioned for review to this Court, the case was again remanded to the BIA on motion by the Department of Justice, and while the case was pending at the BIA on remand, former AG Barr issued *Thomas & Thompson*, overruling *Cota-Vargas*. The BIA retroactively applied the new rule to Mr. Edwards to hold the sentencing modification order would not be given effect. A.R. at 5.

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to appear that does not contain statutorily required date and time for a removal hearing divests the immigration court of jurisdiction over the removal proceedings).

ARGUMENT

The Panel opinion conflicts with precedents of the Supreme Court and courts of appeals on three questions of exceptional importance. First, the Panel opinion conflicts with *SEC v. Chenery*, 332 U.S. 194 (1947), the prevailing standard for analyzing retroactivity of new agency rules established through adjudication or other agency action. *See infra* § I. At its core, *Chenery* requires balancing of interests in deciding whether retroactive application is permissible, which the Panel opinion did not do. *Contra Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1454 (11th Cir. 1987) ("In analyzing this retroactivity, we are guided by the Supreme Court's statement that the effects of 'retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" (quoting *Chenery*, 332 U.S. at 203)). Instead applying the wrong retroactivity standard governing judicial decisions, not agency rules and policymaking, the Panel allowed for retroactive application without further inquiry.

Second, the Panel opinion conflicts with the Seventh Circuit's decision in *Zaragoza v. Garland*, which does not allow for retroactive application of *Thomas & Thompson*. 52 F.4th 1006, 1016-24 (7th Cir. 2022). It also conflicts with the retroactivity cases of every circuit court of appeals, including this Court, all of which call for a balancing test or multi-factor test to implement *Chenery*'s mandate. *See infra* § II.

Third, by finding the relevant INA provisions ambiguous as to the effect of a state court sentencing modification or clarification without considering germane statutory interpretation principles, and by then deferring to the BIA and AG at *Chevron* step two, the Panel opinion conflicts with *Chevron* and with the Supreme Court's and this Court's

statutory interpretation precedents. *E.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (stating that "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction"); *Hylton v. Att'y Gen.*, 992 F.3d 1154, 1160 (11th Cir. 2021) ("Where, as here, the canons supply an answer, *Chevron* leaves the stage." (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018)). *See infra* § III.

To maintain uniformity of this Court's decisions as to retroactivity and statutory interpretation in agency cases, consideration by the full court is necessary. *See* Fed. R. App. P. 35(a)-(b).

I. THE PANEL'S DECISION CONFLICTS WITH RETROACTIVITY JURISPRUDENCE OF THIS COURT AND THE SUPREME COURT.

"In deciding whether to grant or deny retroactive force to newly adopted administrative rules, reviewing courts must look to the standard established by the Supreme Court in *SEC v. Chenery*." *Retail, Wholesale and Department Store Union, AFL–CIO v. NLRB*, 466 F.2d 380, 389 (D.C. Cir. 1972). *Chenery* requires that courts consider "the ill effect of the retroactive application of a new standard," including rules announced through adjudication. *Chenery*, 332 U.S. at 203; *see also Tallahassee*, 815 F.2d at 1454. The Panel did not. *See Edwards*, 56 F.4th at 962. Applying this principle, reliance on an agency's prior rule is a significant factor in every circuit court of appeals, including this Court. *See Tallahassee*, 815 F.2d at 1454 (balancing interests in order to implement the mandate of *Chenery*). *See infra* § II (collecting cases from every court of appeals).

But in finding retroactive application permissible, the Panel did not mention *Chenery*, *Tallahassee*, or the balancing test. Instead, the Panel briefly addressed

retroactivity, citing only *Yu v. Att'y Gen.*, 568 F.3d 1328, 1333 (11th Cir. 2009), an inapposite case that relies on Supreme Court precedent concerning retroactivity of judicial decisions interpreting federal statutes, not agency adjudications interpreting federal statutes:

> "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."

Rivers v. Roadway Exp., Inc., 511 U.S. 298, 313 (1994) (relied on in *Yu*). By relying on the *Rivers* rationale and holding, the Panel incorrectly equated the Supreme Court's ultimate authority over statutory meaning with the Attorney General's rulemaking power under the INA. *See Yu*, 568 F.3d at 961-62. The two are not the same, and the Panel was wrong to equate them for retroactivity purposes. *Contra De Niz Robles v. Lynch*, 803 F.3d 1165, 1172 (10th Cir. 2015) (Gorsuch, J.) ("[W]hen Congress's delegates seek to exercise delegated legislative policymaking authority: their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application."); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 579 (7th Cir. 2014) (concluding that "a new agency rule announced by adjudication is no different from a new agency rule announced by notice-and-comment rulemaking, for purposes of retroactivity analysis"); *Garfias–Rodriguez v. Holder*, 702 F.3d 504, 515 (9th Cir. 2012) (en banc). *See Edwards*, 56 F.4th at 961-62 (citing *RTC Transp. Inc. v. I.C.C.*, 731 F.2d 1502, 1505 (11th Cir. 1984)) (describing *Thomas & Thompson* as announcing new policy through adjudication).

Chenery provides the correct standard in this case, not *Rivers*. Rehearing is necessary to correct the Panel opinion's conflict with *Chenery*.

II. THE PANEL'S RETROACTIVITY HOLDING CONFLICTS DIRECTLY WITH THE SEVENTH CIRCUIT'S DECISION IN *ZARAGOZA V. GARLAND.*

The Panel's opinion conflicts directly with the Seventh Circuit, which does not allow for retroactive application of *Thomas & Thompson* due in large part to noncitizens' reasonable reliance on *Matter of Cota-Vargas* at the time of sentencing modification or clarification. The Panel's opinion further conflicts with the precedents of every circuit court of appeals which call for some kind of balancing test or direct application of *Chenery* to determine whether retroactivity is allowed in cases of agency policymaking, whether by adjudication or other means. The Seventh Circuit applied a five-factor balancing test applied by nearly every circuit court of appeals. The Panel's break with the rest of the circuit courts of appeals on this question of retroactivity of agency rules is a question of great importance requiring the full court's intervention.

The Seventh Circuit held that "applying the new rule" from *Thomas & Thompson* to Ms. Zaragoza "would work a manifest injustice", while the Panel held that doing so to Mr. Edwards presents "no retroactivity problem." *Compare Zaragoza*, 52 F.4th at 1024 *with Edwards*, 56 F.4th at 962. While the Panel conducted no balancing test and considered no countervailing factors, the Seventh Circuit applied the five-factor agency adjudication retroactivity test developed by the D.C. Circuit and adopted in full or in part by every circuit court of appeals, and focused heavily on Ms. Zaragoza's reliance interests:

> (1)Whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, 3) the extent to which the party against whom the new rule is applied relied on the former rule, 4) the degree of burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Zaragoza, 52 F.4th at 1023. *Zaragoza* held that, under this prevailing standard, *Thomas & Thompson* could not be applied retroactively.

Factor 1: The Seventh Circuit found this was not a case of "first impression" because Ms. Zaragoza "had already acquired a right to relief from removal by operation of the prior rule of *Cota-Vargas*." *Zaragoza*, 52 F.4th at 1023. The court found this factor weighed against retroactive application. *Id.*

Factor 2: Considering "whether a new rule constitutes an abrupt departure from well-established practice or merely fills a void," the Seventh Circuit held that *Thomas & Thompson* "overruled *Cota-Vargas* and therefore departed from well-established practice, so this factor too disfavors retroactive application." *Id.*

Factor 3: The Seventh Circuit found that Ms. Zaragoza's "reliance interests" in the prior rule from *Cota-Vargas* have "a significant role to play" in determining retroactivity and disfavored retroactive application. *Id.* at 1023-24. The court found that it was "objectively reasonable" for Ms. Zaragoza to rely on the then-existing rule of *Cota-Vargas*, under which she "had clear right to relief" under the immigration laws and a complete defense to removability based on her sentence modification. *Id.* The same is true for Mr. Edwards. *Matter of Cota-Vargas* was incontrovertibly the agency precedent in place at the time the Georgia court issued sentencing modification and clarification

orders in his case in 2015 and 2017. Like Ms. Zaragoza, it was reasonable for him to rely on that precedent in seeking sentencing modification, and giving effect to the sentencing modification would further entitle him to a hearing on his applications for discretionary relief from removal.

Factor four: The Seventh Circuit found "the degree of burden that the retroactive rule imposes" "clearly favors Zaragoza," as "[c]ourts have long recognized the obvious hardship imposed by removal." *Id.* at 1024 (quoting *Velasquez-Garcia*, 760 F.3d at 584).

Factor five: The Seventh Circuit found "the statutory interest in applying the new rule despite reliance on the old standard" was the only factor that did not weigh against retroactive application, noting this factor will often "point in favor of the government because non-retroactivity impairs the uniformity of the statutory scheme." *Id.* The court concluded that applying the new rule to Ms. Zaragoza "would work a manifest injustice." *Id.*

Every circuit court of appeals either applies this exact test to determine permissibility of retroactive application of an agency rule, or a version of this balancing test to implement *Chenery*'s mandate. *See Retail, Wholesale*, 466 F.2d at 389; *Haas Elec., Inc. v. N.L.R.B.*, 299 F.3d 23, 35 (1st Cir. 2002); *Lugo v. Holder*, 783 F.3d 119, 121 (2d Cir. 2015); *Francisco-Alonso v. Att'y Gen.*, 970 F.3d 431 (3d Cir. 2020); *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 300 (4th Cir. 2018); *McDonald v. Watt*, 653 F.2d 1035, 1042 (5th Cir. 1981); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 581 (7th Cir. 2014); *Minnesota Licensed Prac. Nurses Ass'n v. N.L.R.B.*, 406 F.3d 1020, 1026 (8th Cir. 2005); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007); *De Niz Robles*, 303 F.3d at 1177-80 (Gorsuch, J.); *see also N.L.R.B. v. E & B Brewing Company*, 276

F.2d 594, 600-01 (6th Cir. 1960) (affirming *Chenery*'s balancing of interests as the prevailing retroactivity standard in instances of policy established by agency adjudication). So too does this Court. *See supra* § I (discussing *Tallahassee*, 815 F.2d at 1454). The Panel opinion creates conflict over these questions of exceptional importance and requires the full court's review.

III. *THOMAS & THOMPSON* IS INCORRECT AS A MATTER OF LAW; THE PANEL'S DEFERENCE TO IT CONFLICTS WITH *CHEVRON*.

Both the Supreme Court and this Court require applying traditional tools of statutory construction at *Chevron* step one before considering deference to an agency's interpretation of a statute. *See, e.g.*, *Hylton*, 992 F.3d at 1158 ("To determine whether a statute has a plain meaning, we ask whether its meaning may be settled by the 'traditional tools of statutory construction.'" (quoting *Chevron*, 467 U.S. at 843 n.9)). *See also Pereira*, 138 S. Ct. at 2120-21 (Kennedy, J., concurring) (cautioning against "reflexive deference" to the BIA without a fulsome statutory analysis). The Panel failed to do the statutory analysis required at *Chevron* step one and instead "skip[ped]ahead to step two," deferring to the agency without analysis. *Bastias v. Att'y Gen.*, 42 F.4th 1266, 1276 (11th Cir. 2022) (Newsom, J., concurring) (stating that the "Supreme Court has taken pains to clarify that *Chevron* step one has teeth: We judges must actually do the hard work of statutory interpretation."). Rehearing is necessary to maintain uniformity of the Court's decisions.

In *Thomas & Thompson*, the former AG conducted a superficial review of the statute's plain text, failed to apply germane statutory interpretation principles that confirm Congress unambiguously legislated the INA to continue deferring to state court sentencing modification and clarification orders. A correct statutory interpretation

exercise requires reviewing the statute's plain text and applying the prior construction canon, federalism canon, presumption against deportation, and criminal rule of lenity, which the Panel opinion did not do.

Statutory meaning must first be sought in the statute's plain language. *See Caminetti v. United States*, 242 U.S. 470, 485 (1917). The plain text of 8 U.S.C. § 1101(a)(48)(B) says nothing about Congress's intent to withhold effect from criminal court sentencing modifications and clarifications. To the contrary, the statute states congressional intent to withhold effect only from sentence suspensions.

The prior construction canon confirms this reading of the statute. In codifying a definition of the terms "sentence" and "term of imprisonment" at 8 U.S.C. § 1101(a)(48)(B), Congress intended to incorporate the decades' of pre-IIRIRA BIA precedents interpreting those terms to give full effect to sentencing modifications orders. *See Hylton*, 992 F.3d at 1158 (applying the prior construction canon to find an INA provision unambiguous at *Chevron* step one (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 54, at 322 (2012)). *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144–46 (2000) (applying the principle that when Congress adopts language from authoritative decisional law, it is presumed that Congress intended to import judicial and administrative interpretations of that language, absent clear indication to the contrary).

Principles of federalism further confirm that Congress intended to respecting sentencing modification and clarification orders in immigration cases. "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v.*

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). State criminal convictions fall squarely within the States' traditional police powers to regulate their own criminal laws. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 89 (1985). In the INA, there is no statement—let alone an "unmistakably clear" statement—of intent from Congress to intrude on the States' police powers to define the sentence imposed in a criminal case. *See Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

The criminal rule of lenity and presumption against deportation further confirm that the INA defers to criminal court sentencing modification and clarification orders. As discussed *infra*, the statute's plain text abrogates deference to such orders only as to sentence suspensions, not modifications or clarifications. Any ambiguities would resolve in favor of defendants and noncitizens by narrowing the statute's punitive reach. *See United States v. Bass*, 404 U.S. 336, 347-48 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (noting the rule of lenity applies to a criminal statute that has both criminal and noncriminal application—including in the deportation context—and requires the Court "to interpret any ambiguity in the statute in petitioner's favor"); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (explaining that the Court has long construed "any lingering ambiguities in deportation statutes in favor of the [noncitizen]").

The Panel opinion did not apply these outcome-determinative statutory interpretation principles at *Chevron* step zero or step one before deferring to the BIA and AG in this case. The opinion conflicts with precedent of this Court and the Supreme Court and for this reason this Court should grant rehearing.

CONCLUSION

This Court should grant rehearing or rehearing en banc.

Respectfully submitted,

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March 8, 2023

CERTIFICATE OF SERVICE

I, John Kuhn Bleimaier, hereby certify that on March 8, 2023, I electronically filed and mailed 15 paper copies of the foregoing Petition for Rehearing or Rehearing En Banc with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit.

I certify that all participants in the case are registered ACMS and CM/ECF users and that service will be accomplished by the ACMS or CM/ECF system upon the following individuals:

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