IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRACE, *et al*.,

Plaintiffs,

v.

JEFFERSON BEAUREGARD SESSIONS, III, in his official capacity as Attorney General of the United States, *et al*.,

Defendants.

Civil Action No. 1:18-cv-01853-EGS

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INTEREST AND IDENTITY OF *AMICI CURIAE*[1]

Amici are law professors who specialize in administrative law, statutory interpretation, and immigration law. Through their academic work, *amici* are knowledgeable about the *Chevron* issues presented in this case. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). They are interested in this case because it implicates fundamental questions about the balance between judicial and executive branch authority to interpret Congress's statutory direction. *Amici* do not address the underlying immigration law issues addressed in the Plaintiffs' brief. They instead seek to contextualize the parties' arguments within the broader administrative law framework the Court will apply to determine how much, if any, of *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), merits deference. *Amici* are the following scholars:

- Lenni B. Benson, Professor of Law, New York Law School;
- Michael J. Churgin, Raybourne Thompson Centennial Professor, University of Texas School of Law;
- David Freeman Engstrom, Professor of Law and Associate Dean, Stanford Law School;
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[1] Counsel for *amici curiae* state that (1) this brief was written by counsel for *amici curiae* and not by counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money that was intended to fund preparing or submitting the brief; and (3) apart from *amici curiae* and their counsel, no person contributed money that was intended to fund preparing or submitting the brief. Pursuant to the Court's minute order of August 29, 2018, *amici curiae* further state that all parties have consented to the filing of this brief.

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INTRODUCTION

Plaintiffs rely on settled precedent to argue that *Matter of A-B-* does not merit wholesale deference. Rather, a faithful application of settled principles of administrative law requires the Court to determine whether the *Chevron* framework applies to each statutory issue raised in *Matter of A-B-*; whether Congress left a gap for the Attorney General to fill; and whether the Attorney General filled any such gap in a way that is consistent with the statutory framework. Each statutory question requires its own analysis.

Because *Matter of A-B-* does not merit blanket deference, the Attorney General and the United States Citizenship and Immigration Services Guidance (the "Guidance") claim impermissible agency prerogative in directing asylum officers to disregard circuit law inconsistent with anything in *Matter of A-B-*. While the Guidance invokes *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005), for the premise that agency interpretations can trump prior judicial interpretations, that premise is true only to the extent that an agency has reasonably interpreted an ambiguous statutory term that Congress authorized it to interpret. The court should reject the Attorney General's expansive claims, and faithfully apply the well-established *Chevron* framework.

ARGUMENT

I. PLAINTIFFS' ARGUMENTS ARE GROUNDED IN SETTLED *CHEVRON* PRINCIPLES

This Court's assessment of how much, if any, of *Matter of A-B-* merits deference implicates the two-step framework defined in *Chevron*, 467 U.S. at 842. *Chevron* is, at its core, a search for a statutory "gap" and an inquiry into the scope and boundaries of that gap. *See Brand X*, 545 U.S. at 982 ("*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps."). Its theoretical basis is that a statutory ambiguity represents a congressional

"delegation of authority to the agency" that administers that statute to interpret that "specific provision." *Chevron*, 467 U.S. at 843-44; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (confirming "implicit delegation" theory). In determining how much of *Matter of A-B-* merits deference, the Court must first determine whether Congress has "directly spoken to the precise question at issue," and, if so, give effect to that "unambiguously expressed intent." *Chevron*, 467 U.S. at 844. If Congress instead "left a gap for the agency to fill," *id.*, the Court must "consider 'whether the agency's answer is based on a permissible construction of the statute.'" *Kaufman v. Nielsen*, 896 F.3d 475, 482 (D.C. Cir. 2018) (quoting *Chevron*, 467 U.S. at 842-43). A review of these principles demonstrates that *Matter of A-B-* speaks to a wide range of issues that – assuming Plaintiffs are correct on the underlying issues of immigration law – do not warrant deference.

A. *Chevron* Applies Only To Certain Agency Interpretations

The Court's inquiry begins by asking whether the *Chevron* framework properly applies – an analysis referred to as "step zero" in academic literature.[2] This inquiry is necessary because "[n]ot every agency interpretation of a statute is appropriately analyzed under *Chevron*." *Alabama Educ. Ass'n v. Chao*, 455 F.3d 386, 392 (D.C. Cir. 2006). As a starting point, *Chevron* applies to only issues of statutory interpretation arising from a statute the agency administers. *Bush-Quayle '92 Primary Comm., Inc. v. Fed. Election Comm'n*, 104 F.3d 448, 452 (D.C. Cir. 1997). Moreover, a number of agency interpretations do not fall within the two-step

[2] *See generally* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833 (2001) (defining the term *Chevron* "Step Zero"); Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006) (discussing situations in which courts do not apply the *Chevron* framework). Some scholars have also suggested that separation of powers concerns must eclipse agency deference in certain immigration contexts. *See*, *e.g.*, Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Cases*, 90 N.Y.U. L. Rev. 143 (2015) (arguing that *Chevron* deference should not apply to the BIA's interpretation of immigration detention provisions in the context of habeas corpus).

Chevron framework, such as when an agency does not "set out with a lawmaking pretense in mind," *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001); interprets a statute it does not administer, *Brown & Williamson*, 529 U.S. at 159; or addresses a "question of deep 'economic and political significance' that is central to [a] statutory scheme," *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). These limitations are important both as part of the Court's overall inquiry and because they underscore the need to preserve *Chevron* within its proper boundaries. *See also Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J. concurring) (referring to "reflexive deference" as "troubling").

B. The Step One Inquiry Asks Whether Congress Has Left A Gap For The Agency To Fill With Regard To A Specific Issue

The formal *Chevron* inquiry begins by asking whether Congress has "unambiguously expressed" its intent with regard to a particular issue, or left a "gap for the agency to fill." *Chevron*, 467 U.S. at 844. Because the focus is on each "specific issue," *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 487 (D.C. Cir. 2007), the entire *Matter of A-B-* opinion is not automatically afforded deference if this Court concludes that one of the terms that *Matter of A-B-* interprets is ambiguous. *Contra Defendants' Memorandum Of Law In Support Of Their Motion For Summary Judgment* at 26-27 (Sept. 12, 2018), ECF No. 57-1 ("Defs.' Mem."). Rather, the Court must separately address each of an agency's claims of authority to interpret a particular statutory gap. For example, Plaintiffs challenge the requirement that asylum applicants who fear non-governmental persecutors must show their home government "condoned" their persecution or "demonstrated a complete helplessness" to protect them. *Plaintiffs' Memorandum In Support Of Their Cross Motion For Summary Judgment And Opposition To Defendants' Motion For Summary Judgment* at 38-39, 56 (Sept. 26, 2018), ECF No. 64-1 ("Pls.' Mem."). They argue that the longstanding "unable or unwilling" standard was a well-established construction of the

term "persecution" at the time the 1980 Refugee Act was enacted, and was therefore incorporated into that Act when it used the word "persecution." *Id. Amici* do not address the merits of this argument, but it illustrates two important features of the first step of *Chevron*.

First, as noted, the Court must apply the first *Chevron* step to the specific issue on which the agency seeks deference. The government argues that *Matter of A-B-* is entitled to deference because it interpreted a statutory term, "particular social group," which is one of the five protected grounds on the basis of which an applicant can seek asylum. *See* 8 U.S.C. § 1158(b)(2)(A)(i). But, to the extent that the Attorney General's discussion of the "condoned or complete helplessness" standard in *Matter of A-B-* is an interpretation of the asylum statutes, it cannot be an interpretation of "particular social group" – as both *Matter of A-B-* and the government's brief recognize, the "unable or unwilling" standard is an interpretation of the separate term "persecution." *See* 27 I. & N. Dec. at 337 ("Board precedents have defined 'persecution' " to include the requirement that "the harm or suffering must be 'inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.' ") (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985)); Defs.' Mem. 4; 8 U.S.C. § 1101(a)(42) (a "refugee" eligible for asylum is one who is "persecuted or who has a well-founded fear of persecution on account of," among other things, "membership in a particular social group").[3] Thus, Plaintiffs' argument that the new formulation violates the settled construction at the time Congress enacted the term "persecution" is properly assessed

[3] To the extent that the government argues that *Matter of A-B-* adopts this formulation because it has been "used in published decisions" of three courts of appeals, Defs.' Mem. 29, that discussion does not merit deference, because the *Chevron* framework applies to agency interpretations of congressional gaps in a statute the agency administers, *District of Columbia v. Dep't of Labor*, 819 F.3d 444, 449 (D.C. Cir. 2016), not to agency interpretations of judicial opinions.

under *Chevron* as a distinct question from the interpretation of "particular social group." The distinction between the two interpretive tasks is particularly important because the government previously concluded Congress used the term "persecution" to incorporate a precise meaning. *Matter of Acosta*, 19 I. & N. Dec. at 222-23 (concluding, in adopting the "unable or unwilling" standard, that Congress "intended" the term to incorporate the "judicial and administrative construction" of the term "persecution" existing at the time).

Second, the kind of argument Plaintiffs have offered on this issue is well-established as a way to demonstrate that Congress has answered the question at issue at *Chevron* step one. The *Chevron* framework directs this Court to use the "traditional tools of statutory construction" to discern whether "Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9; *see also id.* (courts must "reject administrative constructions which are contrary to clear congressional intent"). Whether a statute displays a clear congressional intent or left a gap to fill is a "pure question of statutory construction" that is "for the courts to decide." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

The question is not whether a term is linguistically ambiguous (although such ambiguity is relevant). Rather, courts rely on the full range of tools for interpreting a statute, including the "text, structure, and the overall statutory scheme, as well as the problem Congress sought to solve." *Fin. Planning Ass'n*, 482 F.3d at 487; *see Pereira*, 138 S. Ct. at 2113 (*Chevron* deference inapplicable where the Court concluded, based on the text, statutory context, and "common sense," that Congress had "supplied a clear and unambiguous answer to the interpretive question at hand"); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (finding "clear sense of congressional intent" in statute's "text, structure, purpose," "history," and "relationship to other federal statutes"). For example, in *United States v. Home*

Concrete & Supply, LLC, 566 U.S. 478, 488-89 (2012), the plurality observed that, despite some "linguistic ambiguity," Congress had clearly spoken to the issue based on the text, statutory context, legislative history, and the fact that the agency's interpretation would create "patent incongruity" within the statutory scheme. *See also Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001) (concluding that, although the word "payment" was susceptible to several meanings, Congress had clearly spoken to the issue and left no gap for the agency to fill).

Of particular relevance to *Matter of A-B-* is the longstanding principle that Congress is presumed to have incorporated prior administrative and judicial interpretations of a statute when it uses the same language in a subsequent enactment. *See Sekhar v. United States*, 570 U.S. 729, 733 (2013) (explaining that "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress is aware of interpretations of a statute and is presumed to adopt them when it re-enacts them without change); *Shapiro v. United States*, 335 U.S. 1, 16 (1948) (Congress presumed to have incorporated "settled judicial construction" of statutory language through re-enactment); *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932) (when Congress re-enacts the term with "consistent construction" by agency, the court presumes that Congress did not intend to change that interpretation); *cf. Cardoza-Fonseca*, 480 U.S. at 439-40 (conclusion regarding congressional intent supported by academic understandings of the relevant term). This rule applies to any use of "words or phrases that have already received authoritative construction." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012).

Thus, when Congress uses a term with a settled meaning, it demonstrates a clear congressional intent for purposes of the first *Chevron* step. *See Fin. Planning Ass'n*, 482 F.3d at 490 (longstanding agency understanding of statutory language supports conclusion that statutory meaning is "unambiguous"); *cf. B & H Med., LLC v. United States*, 116 Fed. Cl. 671, 685 (2014) (a term with a "judicially settled meaning" is "not ambiguous" for purposes of deference under *Auer v. Robbins*, 117 S. Ct. 905 (1997)). For example, in *Prudencio v. Holder*, the Fourth Circuit held that the term "involving" is unambiguous under Step One because it is used as part of a term of art with long-settled meaning. 669 F.3d 472, 482 (4th Cir. 2012); *cf. Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75 (D.C. Cir. 1990) (holding that *Chevron* deference does not apply to agency's interpretation of "employee" where Congress intended the term to incorporate "common law agency principles"). Courts interpreting statutes in a wide range of circumstances have treated settled interpretations that exist upon enactment as part of the "plain meaning" of the statute. *Harris v. Garner*, 216 F.3d 970, 973-975 (11th Cir. 2000) ("plain meaning" requires interpreting statutory term in line with settled meaning at the time of enactment) (citing *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993)). This principle applies in full force to administrative constructions. *See Commissioner v. Noel's Estate*, 380 U.S. 678, 682 (1965) ("longstanding administrative interpretation" not addressed by subsequent re-enactments and amendments to statute, has "received congressional approval and has the effect of law").

Thus, Plaintiffs correctly argue that Congress's use of "persecution" is unambiguous for purposes of Step One if it incorporates prior judicial or administrative constructions of the "unable or unwilling" standard.

C. *Matter of A-B-* Merits Deference Only To The Extent It Is A Reasonable Construction Of The Statute

Plaintiffs also correctly rely on established *Chevron* doctrine in arguing that various aspects of *Matter of A-B-* merit no deference, even if assessed under Step Two. At the second step, a court will defer to the agency's approach if it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842. As in Step One, the Court needs to decide whether the agency's choice stayed within its congressionally delegated bounds. But, while Step One looks to whether Congress clearly addressed a specific issue or left a gap for the agency to fill, Step Two looks to whether, in filling that gap, the agency's interpretation was reasonable and not arbitrary. *See City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) ("[W]here Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow."); *Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000) (Step Two does not allow a court to "rubber stamp agency actions" because to do so would be "tantamount to abdicating the judiciary's responsibility under the Administrative Procedure Act") (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995)). The Step Two inquiry thus overlaps with the question whether an agency action is arbitrary and capricious. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (Step Two analysis asks "whether an agency interpretation is arbitrary or capricious in substance") (internal quotation marks omitted); *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (same); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1268 (1997) (noting overlap).

Under Step Two, the Court again employs the traditional tools of statutory interpretation, including the text, statutory structure, and practical implications of the agency's interpretation on the statutory scheme as a whole. *See*, *e.g.*, *District of Columbia*, 819 F.3d at 454 (agency's interpretation was "unreasonable in light of the statute's text, structure, and purpose" because it

significantly expanded the reach of the statute and had other practical results inconsistent with the statute as "long understood"). This approach reflects the core *Chevron* theory that statutory gaps are a delegation of authority to the agency to answer a specific question in a reasonable way. *See Negusie v. Holder*, 555 U.S. 511, 523 (2009). It follows from this principle that the agency is *not* authorized to address matters outside the gap, and that the agency will employ reasoned decision making. It also reflects the core interpretive principle that statutes are not interpreted by "look[ing] merely to a particular clause," but are considered "in connection with . . . the whole statute." *Dada v. Mukasey*, 554 U.S. 1, 16 (2008).

Thus, Plaintiffs' arguments that aspects of *Matter of A-B-* are not entitled to deference because they are unreasonable are grounded in Step Two doctrine. For example, Plaintiffs argue that some of the challenged policies related to *Matter of A-B-* are illogical. *See, e.g.*, Pls.' Mem. 29. "Illogic and internal inconsistency are characteristic of arbitrary and unreasonable agency action." *Chamber of Commerce of United States of Am. v. Dep't of Labor*, 885 F.3d 360, 382 (5th Cir. 2018), *judgment entered sub nom. Chamber of Commerce of Am. v. Dep't of Labor*, No. 17-10238, 2018 WL 3301737 (5th Cir. June 21, 2018). Likewise, Plaintiffs point to a number of ways in which the challenged policies are inconsistent with other parts of the asylum statutes. *See, e.g.*, Pls.' Mem. 39-40, 43-44. Assuming the Court does not resolve these inconsistencies at Step One, an interpretation is not reasonable if it is "at odds with the structure and manifest purpose" of the statute. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001) (invalidating statute under Step Two); *Daley*, 209 F.3d at 755 (interpretation that conflicts with goals of statute and lacked reasoned analysis fails at Step Two). Finally, a statute is also unreasonable if it represents an "unexplained departure from prior [agency] policy and practice." *Northpoint Tech.*, 412 F.3d at 156 (interpretation that represents unexplained prior departure held

unreasonable); *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010) (interpretation of statute unreasonable where it "depart[ed] from prior policy *sub silentio*") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Thus, Plaintiffs' arguments that various policies related to *Matter of A-B-* fail because they are unreasonable are grounded in established principles of *Chevron* and statutory interpretation.

II. THE GUIDANCE DIRECTING ASYLUM OFFICERS TO DISREGARD ALL CIRCUIT PRECEDENT CONTRARY TO *MATTER OF A-B-* VIOLATES *BRAND X*

Plaintiffs likewise invoke well-established principles of administrative law in arguing that the Guidance, which implements *Matter of A-B-* and directs asylum officers to "apply the case law of the relevant federal circuit court, [only] to the extent that those cases are not inconsistent with *Matter of A-B-*," improperly ignores binding judicial authority. *See* Guidance at 8. An agency interpretation of a statute can trump a prior judicial construction only if, at Step One, a court concludes that Congress left a gap for the agency to fill. *Brand X*, 545 U.S. at 982.[4] This is because, if a statute is unambiguous, it "contains no gap for the agency to fill," and an agency interpretation gets no deference. *Id.* at 983; *see also Fernandez v. Keisler*, 502 F.3d 337, 347 (4th Cir. 2007) ("*Chevron* step one remains *Chevron* step one after *Brand X*") (quoting *Chevron*, 467 U.S. at 842). And even if a statute has been deemed ambiguous, *Brand X* permits the Court to defer to an agency's interpretation only if the interpretation is reasonable.[5] *See*, *e.g.*, *Gonzales*

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[4] *Brand X* also does not apply if an agency decision "is not an interpretation of any statutory language." *Judulang*, 565 U.S. at 52 n.7.

[5] Courts have also suggested that only the judiciary – and not agencies – have authority to determine whether *Brand X* applies. *See*, *e.g.*, *De Niz Robles v. Lynch*, 803 F.3d 1165, 1174 n.7 (10th Cir. 2015) (Gorsuch, J.) ("An agency in the *Chevron* step two/*Brand X* scenario may enforce its new policy judgment only with judicial approval."); *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 514 n.7 (9th Cir. 2012) (explaining that even under *Brand X*, the courts "still retain ultimate authority to determine whether to defer to the agency's interpretation"). To the extent that the Guidance directs officers to apply *Matter of A-B-*, notwithstanding any potential judicial

v. Dep't of Homeland Sec., 508 F.3d 1227, 1241 (9th Cir. 2007) (explaining that for a BIA interpretation to be entitled to *Chevron* deference under *Brand X*, the interpretation must be reasonable); *cf. NLRB v. New Vista Nursing & Rehab.*, 870 F.3d 113, 135 n. 14 (3d Cir. 2017) (explaining in dicta that "*Chevron* or *Brand X* deference would not allow us to adopt an unreasonable interpretation").

In ruling on the merits of Plaintiffs' claims for relief, this Court should recognize that *Matter of A-B-*, as implemented through the Guidance, cannot trump prior judicial precedent to the extent that the Attorney General has attempted to interpret unambiguous terms. *Brand X*, 545 U.S. at 982. In the alternative, if the Court determines that aspects of *Matter of A-B-* fail at Step Two, then *Brand X* does not authorize the agency to reject the relevant circuit authority. *See United States v. Eurodif S. A.*, 555 U.S. 305, 316 (2009) (noting that, even under *Brand X*, a court need not accept an agency's "unreasonable resolution of language that is ambiguous").

Moreover, to the extent that the Attorney General has opined in *Matter Of A-B-* on matters that are not dispositive to his decision, these views are mere dicta. *See In re Sealed Case*, 449 F.3d 118, 123 (D.C. Cir. 2006) (explaining that language in an opinion is dicta if it is unnecessary to the "disposition of the case"). Several courts have not granted *Chevron* deference to dicta in agency opinions. *See*, *e.g.*, *Mercy Home Health v. Leavitt*, 436 F.3d 370, 379 (3d Cir. 2006) (dismissing an agency determination as "mere dicta"); *SEC v. Baker*, No. A-12-CA-285-SS, 2012 WL 5499497, at *11 (W.D. Tex. Nov. 13, 2012) (assigning no deference to "agency equivalents of dicta"); *but see Fitzpatrick v. Morgan S., Inc.*, 261 F. Supp. 2d 978, 986 (W.D. Tenn. 2003) (explaining that "[a]lthough [the agency's] statement [was in] dicta . . . it carries

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opinion to the contrary, such policies have been "roundly 'condemned' by every circuit that has addressed the issue." *Grant Med. Ctr. v. Burwell*, 204 F. Supp. 3d 68, 79 (D.D.C. 2016) (citing cases from the Second, Third, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits).

significant weight" and citing to *Chevron*). No exception applies for agency decisions in the immigration context. *See Velazquez-Herrera v. Gonzales*, 466 F.3d 781 (9th Cir. 2006); *see also Florentino-Francisco v. Lynch*, 611 F. App'x 936, 937 n.2 (10th Cir. 2015) (finding that dicta in a BIA opinion is "not precedential"). In *Velazquez-Herrera*, the Ninth Circuit considered whether to defer to the BIA's interpretation of "child abuse" for purposes of the INA. 466 F.3d at 782. The BIA had previously defined this statutory term "in another context" where its interpretation was "dictum not essential to the Board's holding." *Id.* The Ninth Circuit did not defer, because this "dictum" did not "constitute[ ] 'a statutory interpretation that carries the 'force of law.' " *Id.* at 783 (quoting *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 922 (9th Cir. 2006)). Such reasoning accords with the dictates of *Chevron*, which permit agency deference only when an agency "set[s] out with a lawmaking pretense in mind." *Mead Corp.*, 533 U.S. at 233. *Brand X* does not permit agencies to rely on dicta in administrative opinions and ignore binding circuit authority.

CONCLUSION

In *Matter of A-B-* and the Guidance, the Attorney General asks the Court to ignore the *Chevron* framework in favor of blanket deference. The Court should reject this claim of expansive agency powers and instead faithfully apply each step of the well-established *Chevron* framework to each statutory question the Attorney General addresses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 28, 2018, I caused the foregoing brief to be filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all registered ECF participants as identified on the Notice of Electronic Filing.

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