No. 19-1220

IN THE
Supreme Court of the United States

ISTVAN SZONYI

Petitioner,

v.

WILLIAM P. BARR, in his official capacity as Attorney General of the United States,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The Government dismisses this Petition as a "case-specific disagreement with the Ninth Circuit's understanding of its own precedent." BIO 10. In truth, the Ninth Circuit misunderstood (or ignored) *this* Court's precedent. That misunderstanding has far-reaching consequences. If *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) requires a court to adopt a test that same court has—literally—declared to be "not what the statute says," there are real questions not only as to which judicial precedents are safe from executive revision, but also as to which branch of government possesses "ultimate interpretative authority to 'say what the law is.'" *Michigan v. EPA*, 135 S. Ct. 2699 2712 (2015) (Thomas, J., concurring).

At a minimum, if *Brand X* allows the executive to overrule the judiciary, it should be subject to the same restrictions as the legislature when doing so. As the Government effectively concedes, the circuits have split on whether those restrictions apply to agency action. This Court should resolve that dispute and "tame some of *Brand X*'s more exuberant consequences," *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring).

More than that, this Court should prevent the single-scheme exception from being rendered a veritable nullity. The efforts of the Board of Immigration Appeals ("BIA" or the "Board") to make the "greatest number of twice-convicted aliens" eligible for removal, *Matter of Z-*, 8 I. & N. Dec. 170, 175 (BIA 1958), have been remarkably effective. In the nearly seventy years the BIA's single-act standard has been in place,

only one immigrant appears to have successfully invoked its protection. *Matter of Pataki*, 15 I. & N. Dec. 324 (BIA 1974). This case should thus be remanded to the BIA "to propose an alternative reading of the statutory text"—one "that interprets" the statute, "rather than rewrites" it to further the agency's policy goals. Pet.App.6a, 29a, 32a (Collins, J., dissenting).

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT

The Ninth Circuit's reflexive deference to the BIA allowed that agency to entrench "an unreasonably narrow and atextual reading" of the single-scheme exception that dramatically "expand[s the Board's] power to order deportation." Pet.App.5a, 28a (Collins, J., dissenting); Pet. 14-21. The panel's willingness to ignore a prior holding that the BIA's standard was "not what the statute says," *Wood v. Hoy*, 266 F.2d 825, 830 (9th Cir. 1959), not only runs afoul of this Court's precedent, but also raises grave separation-of-powers concerns, Pet. 14-15.

1. In response, the Government claims the Ninth Circuit concluded *Wood* did not "unambiguously foreclose[]" the BIA's test. BIO 12-13. The panel, however, misunderstood what that standard requires.

According to the panel, the "agency's approach" "would [be] foreclose[d] under *Brand X*" if *Wood* articulated a test that "'follow[ed] from the unambiguous terms of the statute.'" Pet.App.67a-68a. In other words, a prior judicial decision articulating what the statute *does* mean (i.e., a *Chevron* step-one ruling) would foreclose a contrary agency interpretation. That is true as far as it goes. But an articulation of what a statute *cannot* mean (i.e., a *Chevron* step-two

ruling) is equally authoritative. Pet.App.29a-30a (Collins, J., dissenting).

As this Court has explained, a court applying *Brand X* must assess whether the prior panel "'*employ*[*ed*] *traditional tools of statutory construction*" to "'ascertain[whether] Congress had an intention on the precise question at issue.'" *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488-89 (2012) (plurality op.) (citation omitted). That intention can be affirmative or negative: a particular interpretation can "follow[] from the unambiguous terms of the statute," *Brand X*, 545 U.S. at 982, or it can "contradict what Congress has said," *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009). In either scenario, that intention "'is the law and must be given effect,'" *Home Concrete*, 566 U.S. at 488 (citation omitted).

Here, the panel performed the first step, but not the second. It looked only to whether *Wood* articulated an *affirmative* construction of the statute; it did not appreciate that a *negative* holding—i.e., that the agency's reading "was not a permissible construction of the statutory text"—could also be "binding." Pet.App.29a-30a (Collins, J., dissenting). Thus, the panel acknowledged that *Wood* "rejected" the single-act standard. Pet.App.68a. But rather than analyze whether that rejection resulted from the conclusion that the BIA's construction "contradict[s] what Congress has said," *Entergy Corp.*, 556 U.S. at 218 n.4, the Ninth Circuit attributed it to the *Wood* panel's preference for its "own interpretation of the test." Pet.App.68a. Had the panel performed the requisite analysis, it could reach only one conclusion: *Wood* "rejected the BIA's reading as impermissibly divorced

from the statutory language." Pet.App.29a-30 (Collins, J., dissenting); PLF Amicus Br. 8-9.

2. Faced with this reality, the Government struggles mightily to argue that *Wood* does not mean what it plainly says. In so doing, it describes passages from that opinion as "not meaningfully different from the equivalent discussion in the circuit precedent at issue in *Brand X*." BIO 16. Notably absent from the Government's selections is the declaration that the BIA's interpretation was "not what the statute says." 266 F.2d at 830. Perhaps the Government does not recognize a "meaningful[] differen[ce]" between such language and a commitment to "'look first'" to the statutory text, BIO 16 (citation omitted), but this Court's precedent does. And under that precedent, *Wood* plainly "foreclose[d] the BIA's approach." Pet. 16-18.

Indeed, the claim that "*Wood* contains no such holding," BIO 15, is reminiscent of the "magic words" analysis rejected in *Home Concrete*. 566 U.S. at 493 (Scalia, J., concurring); *id.* at 488 (plurality op.); Pet. 17-18; PLF Amicus Br. 6-7. Of course, *Wood* did not state that the statute "unambiguously foreclosed" the BIA's single-act standard. But that pre-*Chevron* panel cannot be faulted for being "unaware" of "the utility (much less the necessity) of making the ambiguous/nonambiguous determination." 566 U.S. at 493 (Scalia, J., concurring).

What *Wood does* say merits quotation in full. After noting that the BIA "has applied the statute as if it read 'single criminal act,'" which is "not what the statute says," the panel explained:

> We must take the language of the statute as we find it. It says 'not arising out of a single

> scheme of criminal misconduct'; it does not say 'not arising out of a single criminal act.' If such latter reading had been the intent of Congress they could have so declared.

266 F.2d at 830. Such language necessarily and "unambiguously forecloses" the BIA's test.[1]

3. The Ninth Circuit's crabbed understanding of *Brand X* could subject swaths of caselaw to agency revision. If the language quoted above fails to show Congress "left 'no gap for the agency to fill,'" it is fair to ask what would. *Home Concrete*, 566 U.S. at 489 (plurality op.) (citation omitted).[2] For example, is it enough for a court to conclude that one statute "prevails over" another, leaving the "unmistakable conclusion that Congress" intended the first to apply? *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440, 448 (5th Cir. 2019). The Fifth Circuit thought it was: it is not clear the Ninth would so hold. Likewise, what about a holding that one statutory provision

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[1] The Government questions whether *Wood* analyzed the BIA's current standard. BIO 15. As the panel and the Government admitted below, it did. *See* Pet.App.67a-68a; Resp. Br. at 5, *Szonyi v. Whitaker,* 915 F.3d 1228 (9th Cir. 2019) (No. 15-73514) (Dkt. 36). *Compare Wood*, 266 F.2d at 830 & n.4 (rejecting standard set forth in three BIA decisions), *with Matter of Adetiba*, 20 I. & N. Dec. 506, 509 (BIA 1992) (citing the same three decisions as basis for standard).

[2] The Government claims applying *Brand X* "simply" allowed the panel to avoid "convening an en banc court." BIO 15. Setting aside the propriety of bypassing circuit precedent for convenience, as previously explained, Pet. 11-13, 15-21, it is not at all clear an en banc panel would have rejected *Wood* and "defer[red]." BIO 15. While other circuits have adopted the BIA's standard, *id.* 13, the reasoning of those decisions is suspect, Pet. 33-34.

"limits the scope" of another? *Sierra Club v. Envtl. Prot. Agency*, 479 F.3d 875, 878-81 (D.C. Cir. 2007) (per curiam). That was sufficient for the D.C. Circuit; the Ninth might feel differently. Particularly in light of that court's willingness to creatively interpret prior precedent, Pet. 30, the *Brand X* methodology adopted below will work mischief absent this Court's intervention.

II. THE CIRCUITS ARE DIVIDED AS TO WHETHER AN AGENCY RULE PROMULGATED THROUGH ADJUDICATION CAN HAVE RETROACTIVE EFFECT

The Government all but admits the circuits are split as to whether the results of agency adjudication under "*Chevron* step two/*Brand X*" can have retroactive effect. BIO 21. While the Tenth Circuit has adopted a bright-line "'presumption of prospectivity'" akin to that which "'attends true exercises of legislative authority,'" other circuits apply some iteration of "the multi-factor approach applied in the decision below." *Id.* 21 & n.2; Pet. 22-25. Nevertheless, the Government maintains that "this case presents no occasion" to resolve this divide. BIO 21. The Government is mistaken.

1. The Government's primary argument is that this case "does not involve any genuinely 'new' agency rule or policy." *Id.* 19. Rather, the Board "merely adhered to its longstanding interpretation" of the single-scheme exception. *Id.* 19-20, 22. Not so.

The notion that the Board simply "applied an interpretation tracing back more than 60 years," *id.* 21, ignores entirely the BIA's invocation of *Brand X* to "uniformly apply" that interpretation—for the first

time—“in all circuits.” *Matter of Islam*, 25 I. & N. Dec. 637, 641 (BIA 2011). Because the BIA had previously acquiesced to contrary authority, *Adetiba*, 20 I. & N. Dec. at 510-11, in one fell swoop, *Islam* subjected immigrants in at least the Second, Third, and Ninth Circuits to a completely different legal regime.

This plainly “‘attached new legal consequences’ to the crimes to which [Mr. Szonyi] pleaded guilty in 1981.” BIO 19 (citation omitted). Prior to *Islam*, Mr. Szonyi’s removal was governed by the Ninth Circuit’s “more expansive” standard. Pet.App.43a. After *Islam*, he was subject to the BIA’s “exceptionally narrow” approach. Pet.App.5a. (Collins, J., dissenting). As even the panel acknowledged, this “ma[de Mr. Szonyi] subject to removal when he might not have been under [the Ninth Circuit’s] standard.” Pet.App.34a. And “for purposes of retroactivity analysis,” “[t]here is a clear difference” between “possible deportation” and “certain deportation.” *INS v. St. Cyr*, 533 U.S. 289, 325 (2001).[3]

Mr. Szonyi was not alone in understanding that the law changed. The Ninth Circuit certainly believed it did. That is why the panel applied the five-factor test employed when that court “overturn[s its] own precedent following a contrary statutory interpretation by an agency authorized under *Brand X*.” *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 520 (9th Cir. 2012) (en banc); Pet.App.42a-44a. That is also pre-

[3] While evidence of reliance is not required, *contra* BIO 20-21, it would certainly have been reasonable to rely on application of the Ninth Circuit’s standard. *Vartelas v. Holder*, 566 U.S. 257, 273-74 (2012); *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1295 (9th Cir. 2018) (citing *St. Cyr*, 533 U.S. at 322–23); Pet. 28.

sumably why the Government argued for application of this same test below, Resp. Br. at 46, *Szonyi*, 915 F.3d 1228 (No. 15-73514), a test it elsewhere indicates applies only when there is a "change" in the law. *See* BIO at 8-12, *Olivas-Motta v. Barr*, 140 S. Ct. 1105 (2020) (No. 19-282), 2020 WL 133924. By these actions, the panel and the Government acknowledged the obvious: for retroactivity purposes, it makes no difference whether an agency adopts a new interpretation of the law or simply imposes its existing interpretation in a circuit where it previously acquiesced to contrary authority. In either scenario, the law has changed.

2. Having conceded the split at issue is most apparent "with respect to cases that implicate *Brand X*," BIO at 12, *Olivas-Motta*, 2020 WL 133924 (No. 19-282), the Government must argue that this is not such a case. According to the Government, "[n]othing the Board did" here "resembles the set of circumstances" "in *De Niz Robles*." BIO 22. Again, the Government is incorrect.

In fact, the two cases are on all fours. In both cases, the BIA had promulgated a "new agency rule" through adjudication.[4] *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167, 1173 (10th Cir. 2015); Pet.App.35a, 42a. In both cases, the agency knew it was adopting that new rule despite contrary circuit precedent. *In re*

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[4] The Government's extended discussion of "rules" and "orders" is beside the point. BIO 17-19. Though imprecise, courts routinely refer to the results of agency adjudications as "rules." *E.g.*, *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374-75 (1998); *Obeya v. Sessions*, 884 F.3d 442, 445 (2d Cir. 2018); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 581 (7th Cir. 2014); *De Niz Robles*, 803 F.3d at 1173; Pet. 42a.

Briones, 24 I. & N. Dec. 355, 370 (BIA 2007); Pet.App.91a. And in both cases, the contrary circuit precedent was (or had been) set aside under *Brand X*. 803 F.3d at 1168-69; Pet.App.36a-41a. In short, in both cases, the BIA "overrule[d] settled judicial interpretations to announce a new rule of general applicability." *De Niz Robles*, 803 F.3d at 1176.

The Government evidently does not like the terminology then-Judge Gorsuch used to describe the "set of circumstances" in *De Niz Robles*. BIO 22. But such language is hardly novel. *E.g.*, *Baldwin v. United States*, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting) ("effectively overrule"); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., concurring, joined by Thomas, Alito, Kavanaugh, JJ.) ("revoke"); *Brand X*, 545 U.S. at 1016 (Scalia, J., dissenting) ("revers[e]"). In any event, however described, those same circumstances are present here.[5]

3. Finally, a grant of certiorari need not require "revisit[ing]" *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). BIO 19. The "'guidance'" sought by the lower courts, *id.* 18, involves how that decision should be applied. The Tenth Circuit has articulated one standard, while other circuits follow their own. Pet. 22-25.[6] This Court should resolve that dispute.

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[5] The Tenth Circuit's deference to the BIA's single-scheme interpretation is irrelevant. BIO 22; Pet. 33-34 (questioning the propriety of that deference). What is relevant is how the retroactivity analysis would have played out had the Ninth Circuit employed the Tenth Circuit's presumption of prospectivity rather than its own multi-factor test.

[6] The Tenth Circuit's standard is consciously "consistent" with *Chenery*. 803 F.3d at 1175-77. This case shows, however,

III. THIS CASE IS AN APPROPRIATE VEHICLE TO RESOLVE THE IMPORTANT QUESTIONS PRESENTED

The Government speculates that Mr. Szonyi would be "removable even under the Ninth Circuit's prior approach," making this case "an unsuitable vehicle" for resolving both questions presented. BIO 22-23. To that end, the Government relies heavily on the Immigration Judge's ("IJ") first decision finding Mr. Szonyi removable under that standard. *Id.*

This Court, however, cannot affirm the BIA on a ground upon which it did not rely. *Chenery*, 332 U.S. at 196. Here, the BIA analyzed the single-scheme exception under the *Board's* test, not the Ninth Circuit's. Pet.App.93a-95a. Indeed, the BIA vacated and remanded the IJ's first decision for failure to apply *Adetiba*. BIO 7. Whatever the IJ did in that decision is immaterial; it was never adopted by the Board.[7]

The IJ's decision was also wrong. Pet. 32-33. Both the Government and the IJ appear to believe the Ninth Circuit's standard requires "separate crimes" to be "planned in advance." BIO 23. But direct evidence of premeditation is only one consideration un-

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that it is not always consistent with the Ninth Circuit's multifactor analysis. Pet. 32; *contra* BIO 21 n.2.

[7] The IJ did incorporate her initial analysis of the Ninth Circuit's standard into her second decision. Pet.App.109a. But the BIA *expressly disclaimed* reliance on that portion of her opinion because it relied on a "probation officer's report" "mischaracterized" as "testimony." Pet.App.93a n.1. That report (Exhibit 2A) formed the primary—if not sole—basis for the IJ's removability finding under the Ninth Circuit's standard. Pet.App.135a-36a.

der that test. Pet.App.43a. Also relevant are the "very nature of the crimes themselves, or the time or circumstances of their commission." *Wood*, 266 F.2d at 831; *Nason v. INS*, 394 F.2d 223, 227 (2d Cir. 1968) (evaluating "the similarity of two crimes in terms of intent, motive, purpose, techniques, similarity of victims and the like"). As noted previously, Pet. 33, the Third Circuit applied this standard to find for the immigrant when the "crimes" at issue "[we]re of the same nature and were committed within an interval of, at the very most, a day"—even absent direct evidence of a plan. *Sawkow v. INS*, 314 F.2d 34, 38 (3d Cir. 1963). Here, crimes of "the same nature" were committed "within an interval" of several hours. *Id.*; *Gonzalez-Sandoval v. INS*, 910 F.2d 614, 617 (9th Cir. 1990) (deeming *Nason* and *Sawkow* "consistent with *Wood*").

Even assuming the necessity of a "plan," as courts have recognized in different contexts, premeditation can be found where actions appear "impulsive[]." *E.g.*, *Fisher v. United States*, 328 U.S. 463, 465-66 (1946) (finding "clearly" "sufficient evidence to support a verdict" of premeditated murder despite the seemingly spontaneous nature of the crime); *Jackson v. Virginia*, 443 U.S. 307, 324-35 (1979) (explaining that "premeditation need not exist for any particular length of time," that intent "may be formed at the moment" of the crime, and that "evidence [petitioner] had been drinking" did not preclude premeditation); *United States v. Begay*, 673 F.3d 1038, 1040, 1043-45 (9th Cir. 2011) (en banc) (finding sufficient evidence of premeditation where defendant stood by a care for "about a minute," returned to his truck to retrieve a rifle, and opened fire). As the panel suggested,

Pet.App.34a, the Board on remand could conclude the crimes here displayed a similar level of calculation. In short, this is "is *not* a case" where remand would be futile. Pet.App.6a-7a (Collins, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

August 4, 2020 Respectfully submitted,

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