No. 21-_____

IN THE

Supreme Court of the United States

THEWODROS WOLIE BIRHANU,
Petitioner,

v.

MERRICK B. GARLAND,
Attorney General of the United States,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a noncitizen who, "having been convicted by a final judgment of a particularly serious crime[,] is a danger to the community of the United States," faces severe immigration-related consequences. 8 U.S.C. 1231(b)(3)(B)(ii); see 8 U.S.C. 1158(b)(2)(A)(ii).

The question presented is:

Whether the Board of Immigration Appeals' ruling that the particularly-serious-crime analysis may never include consideration of a person's mental health is entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

PARTIES TO THE PROCEEDING

Petitioner Thewodros Wolie Birhanu was the petitioner below.

Respondent Merrick B. Garland, Attorney General of the United States, was the respondent below.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

- *Birhanu* v. *Garland*, No. 19-9599 (10th Cir. Mar. 9, 2021) (denying petition for review), rehearing denied (Aug. 3, 2021).
- *In re Birhanu*, A058-985-652 (Board of Immigration Appeals).
- *In re Birhanu*, A058-985-652 (Aurora Immigration Court).

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INTRODUCTION

In the decision below, the Tenth Circuit affirmed a Board of Immigration Appeals (BIA) decision deeming petitioner, a longtime permanent resident, to have committed a "particularly serious crime" under federal immigration law. That determination rendered him ineligible for withholding of removal or asylum. Had this case arisen outside of the Tenth Circuit, the result would have been different.

The Tenth Circuit deferred under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the BIA's determination that a noncitizen's mental health cannot be considered in evaluating whether a crime is "particularly serious" for purposes of withholding of removal or asylum. As the Tenth Circuit expressly acknowledged, that holding split with decisions of the Eighth and Ninth Circuits, which have both rejected the BIA's ruling as an unreasonable interpretation of the statutory text. If this case had arisen in either of those circuits, petitioner would not have had his ability to obtain withholding of removal stripped away. And the Tenth Circuit's decision to defer to the agency—despite recognizing that the agency's interpretation is not the best reading of the statute—is emblematic of the ways in which the courts of appeals are misusing the *Chevron* doctrine, particularly in immigration cases.

This Court's review is warranted to restore uniformity. Review is particularly necessary given the "high and momentous" stakes for noncitizens as to the issue on which the Tenth Circuit diverged from its sister circuits. *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947). A conviction for a particularly serious crime is a bar to withholding of removal and asylum—even for a noncitizen who has established that he will

be persecuted on religious or other grounds if he is forced to leave the United States. The importance of a uniform interpretation of the relevant statutory provisions—one that is faithful to the text of the statute that Congress enacted, and that eschews improper deference to an agency interpretation of that text—therefore cannot be overstated.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is published at 990 F.3d 1242. The order denying rehearing en banc (Pet. App. 92a) is unpublished. The order of the Board of Immigration Appeals (Pet. App. 48a) and the orders of the immigration judge (Pet. App. 62a, 85a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2021. Pet. App. 1a. A timely petition for rehearing was denied on August 3, 2021. Pet. App. 92a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to the petition. Pet. App. 94a.

STATEMENT OF THE CASE

1. Under federal immigration law, convictions for "particularly serious" crimes bar access to both withholding of removal and asylum, which are critical protections afforded to refugees.

Congress first introduced limitations on immigration relief for noncitizens convicted of "particularly serious" crimes in the Refugee Act of 1980. A "primary purpose[]" of that Act was to "implement the principles" of the 1967 United Nations Protocol Relating to

the Status of Refugees (Protocol) and the United Nations Convention Relating to the Status of Refugees (Convention). *Negusie* v. *Holder*, 555 U.S. 511, 520 (2009) (citations omitted). One such principle was the requirement that nations not "expel or return ('refouler') a refugee" to "territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Protocol Relating to the Status of Refugees, Art. 33(1), Jan. 31, 1967, 19 U.S.T. 6223, T. I. A. S. No. 6577; see Convention Relating to the Status of Refugees, Art. 33(1), July 28, 1951, 189 U. N. T. S. 150. The Protocol and Convention contained a narrow exception to that "non-refoulement" principle for individuals who, "having been convicted by a final judgment of a particularly serious crime, constitute[] a danger to the community." Protocol, Art. 33(2); Convention, Art. 33(2); U.N. High Comm'r for Refugees, *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading*, ¶ 11 (July 2007) (under that provision, "an assessment of the present or future danger posed by the wrong-doer" is required), http://www.unhcr.org/en-us/576d237f7.pdf.

In the 1980 statute, Congress implemented that exception by making a noncitizen ineligible for withholding of removal "if the Attorney General determines that" the noncitizen, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." Pub. L. No. 96-212, § 203(e), 94 Stat. 102 (1980). In 1996, Congress enacted a similar bar for asylum seekers. Pub. L. No. 104-208, § 604(a), 110 Stat. 3009 (1996).

Today, a conviction for a "particularly serious crime" remains a bar to withholding of removal and

asylum. Withholding of removal is generally mandatory if an individual proves that his "life or freedom would be threatened" in the country of removal because of religion, race, or some other protected ground. 8 U.S.C. 1231(b)(3)(A). But Congress provided that withholding is unavailable if a noncitizen, "having been convicted by a final judgment of a particularly serious crime[,] is a danger to the community of the United States." 8 U.S.C. 1231(b)(3)(B)(ii). Congress also provided that convictions for aggravated felonies with an aggregate sentence of at least five years are per se "particularly serious" for purposes of applying that limitation on withholding of removal. 8 U.S.C. 1231(b)(3)(B)(iv). Similar restrictions apply in the context of asylum determinations under a different provision of the immigration statutes. See 8 U.S.C. 1158(b)(2)(A)(ii) (asylum unavailable if noncitizen, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States"); 8 U.S.C. 1158(b)(2)(B)(i) (conviction for any aggravated felony is considered particularly serious for purposes of asylum).

Congress has not provided a formal definition of "particularly serious crime." The BIA has adopted a "case-by-case" approach to assessing whether a crime is particularly serious, with a focus on whether a conviction demonstrates that the noncitizen is a danger to the community. *Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (BIA 1982); see *Matter of Carballe*, 19 I. & N. Dec. 357, 360 (BIA 1986) ("In determining whether a conviction is for [a particularly serious] crime, the essential key is whether the nature of the crime is one which indicates that the alien poses a danger to the community."). And the BIA has emphasized that the necessary inquiry is fact-bound and must look to the

particulars of the conviction, including "the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community." *Matter of Frentescu*, 18 I. & N. Dec. at 247; see *In re N-A-M-*, 24 I. & N. Dec. 336, 342-345 (BIA 2007); *id.* at 348 ("all reliable information may be considered in making a particularly serious crime determination").[1]

Despite that directive to examine "the totality of the circumstances," *Matter of Frentescu*, 18 I. & N. Dec. at 247; see *In re N-A-M-*, 24 I. & N. Dec. at 342-345, the BIA ruled in *Matter of G-G-S-*, 26 I. & N. Dec. 339 (BIA 2014)—a precedential decision—that it was not permissible to take account of a noncitizen's "mental condition at the time a crime was committed" in determining whether a crime is particularly serious, *id.* at 345. The BIA has continued to adhere to that ruling. See, *e.g.*, Pet. App. 18a; *Shazi* v. *Wilkinson*, 988 F.3d 441, 446 (8th Cir. 2021).

2. Petitioner Thewodros Wolie Birhanu is a citizen of Ethiopia who was admitted to the United States as a lawful permanent resident in 2007. Pet. App. 2a. He has a history of paranoid schizophrenia, which he was able to manage with prescription medication while living in the United States. Pet. App. 2a-3a.

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[1] The BIA and the courts of appeals agree that the categorical approach is inapplicable in this context. The statutory language asks not only about the fact of an existing conviction but also about its level of "serious[ness]" and about the noncitizen's "dangerous[ness]," which are questions that cannot be answered by using the categorical approach. 8 U.S.C. 1231(b)(3)(B)(ii).

In 2016, while a student at Weber State University, Mr. Birhanu suffered a psychotic episode during which he made threatening comments before entering a university building and subsequently sent a threatening email to a university employee. Pet. App. 3a. He was charged with two counts of making threats in violation of Utah Code § 76-5-107.3(1)(b)(ii), which criminalizes recklessly "threaten[ing] to commit any offense involving bodily injury, death, or substantial property damage; and * * * act[ing] with intent to * * * prevent or interrupt the occupation of a building or a portion of the building." Mr. Birhanu pleaded "guilty but mentally ill" to both counts. Pet. App. 3a (citation omitted).

3. a. When Mr. Birhanu's criminal custody ended, he was transferred to immigration custody and the Department of Homeland Security initiated removal proceedings. Pet. App. 3a. The immigration judge (IJ) found Mr. Birhanu removable on the ground that his two Utah convictions constitute "two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct." Pet. App. 85a-90a (citing 8 U.S.C. 1227(a)(2)(A)(ii)). The IJ also concluded that his convictions qualify as "particularly serious crime[s]," thus making him ineligible for withholding of removal or asylum. Pet. App. 75a-77a; 8 U.S.C. 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii).

b. The BIA affirmed. Pet. App. 59a. In concluding that Mr. Birhanu had been convicted of a "particularly serious crime," the BIA refused to take account of Mr. Birhanu's mental-health status at the time he committed the offenses in question. Pet. App. 59a-60a. While acknowledging that the law of the Ninth Circuit, where *Matter of G-G-S-* arose, would require a different analysis, the BIA explained that in cases arising outside the Ninth Circuit it would follow the rule that

it had laid out in *Matter of G-G-S-*. See Pet. App. 59a-60a (citing *Gomez-Sanchez* v. *Sessions*, 892 F.3d 985 (9th Cir. 2018)).[2]

4. Over a strong dissent, the Tenth Circuit denied Mr. Birhanu's petition for review. Pet. App. 33a.

a. The majority upheld the BIA's decision that Mr. Birhanu is not eligible for withholding of removal or asylum on the ground that he has been convicted of a "particularly serious crime."[3] In doing so, the majority gave *Chevron* deference to the BIA's refusal to consider a noncitizen's mental health in determining whether a crime is "particularly serious," Pet. App. 19a-29a—even though the most important consideration in the particularly-serious-crime analysis is whether the "circumstances" of the crime indicate that the noncitizen is a "danger to the community," Pet. App. 22a (emphasis omitted) (quoting *Matter of G-G-S-*, 26 I. & N. Dec. at 343-344).

In deferring to the agency's statutory interpretation, the majority expressly acknowledged that it was splitting with both the Eighth and Ninth Circuits. Pet. App. 24a-25a & n.4. The majority recognized that the BIA's decision in *Matter of G-G-S-* "may not provide the most obvious framework" for interpreting the statutory language, and observed that "Mr. Birhanu's criticisms of that decision, as well as the criticism voiced by the Ninth Circuit * * * , are well taken." Pet. App. 29a. The majority nevertheless decided that *Chevron*

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[2] At the time of the BIA's decision, the Eighth Circuit had not yet issued its opinion rejecting *Matter of G-G-S-*. See *Shazi*, 988 F.3d 441; p. 11, *infra*.

[3] The Tenth Circuit also separately upheld the BIA's conclusion that Mr. Birhanu is removable. Pet. App. 18a. That determination is not challenged here.

deference was appropriate, accepting that the "particularly serious crime" statute "is 'ambiguous or silent' as to whether immigration courts may consider * * * mental health," Pet. App. 20a, and ruling that the BIA's decision to deem "irrelevant" one particular category of "evidence bearing on * * * dangerousness" is reasonable, Pet. App. 27a.

b. Judge Bacharach dissented. He explained that, "[i]n upholding the Board's disregard for evidence of mental illness, the majority creates a circuit split." Pet. App. 34a.

In Judge Bacharach's view, the approach taken by other circuits "makes particular sense here." Pet. App. 34a. Noting that immigration judges deciding whether a conviction is for a particularly serious crime "can consider every other circumstance of the crime" with the "singular exception" of evidence of mental illness, he concluded that the rule of *Matter of G-G-S-* is arbitrary and inconsistent with the BIA's own precedent. Pet. App. 39a-47a. He also explained that the facts of this case dictate a different result, because the BIA ignored the criminal court's own finding that Mr. Birhanu was mentally ill at the time of his offenses. Pet. App. 39a-41a.

c. The Tenth Circuit denied Mr. Birhanu's petition for rehearing en banc. Pet. App. 92a.

REASONS FOR GRANTING THE PETITION

A. The decision below creates an acknowledged conflict with the Eighth and Ninth Circuits.

Section 1231(b)(3)(B)(ii) provides that withholding of removal is unavailable if a noncitizen, "having been convicted by a final judgment of a particularly serious

crime[,] is a danger to the community of the United States." 8 U.S.C. 1231(b)(3)(B)(ii). And Section 1158(b)(2)(A)(ii), using virtually identical language, applies the same bar to asylum.

Here, the panel majority deferred under *Chevron* to the BIA's determination that Mr. Birhanu's "mental condition at the time of his offense is not a relevant consideration in the particularly serious crime analysis," Pet. App. 59a-60a; see *Chevron*, 467 U.S. 837, which reflects the BIA's "blanket rule" that mental-health facts are *never* appropriately considered when deciding whether the "crime of conviction is particularly serious," *Gomez-Sanchez* v. *Sessions*, 892 F.3d 985, 992 (9th Cir. 2018). The majority's decision here sharply and undeniably conflicts with decisions of the Eighth and Ninth Circuits—as both the majority and dissent expressly recognized. Pet. App. 25a-26a & n.4; Pet. App. 33a-34a (Bacharach, J., dissenting).

In *Gomez-Sanchez* v. *Sessions*, 892 F.3d 985 (9th Cir. 2018)—which directly reviewed and vacated the BIA decision in *Matter of G-G-S-*, to which the majority here deferred—the Ninth Circuit held impermissible the BIA's refusal to consider a noncitizen's mental health at the time of the offense in assessing whether the offense is a particularly serious crime.[4] The Ninth Circuit reasoned that the BIA's approach is contrary to the "clearly expressed" text of Section 1231(b)(3)(B), which identifies some crimes that are per se particu-

[4] The BIA has declared that it will not revisit *Matter of G-G-S-* for immigration proceedings outside the Ninth Circuit's jurisdiction, even though the Ninth Circuit vacated that decision. See Pet. App. 60a. Accordingly, there is no possibility that later action by the BIA will ameliorate the circuit split described here.

larly serious (*i.e.*, certain aggravated felonies) but "requires the agency to conduct a case-by-case analysis of convictions falling outside th[at] category." *Gomez-Sanchez*, 892 F.3d at 992 (citation omitted). A blanket refusal to consider an entire category of pertinent mental-health information, the Ninth Circuit explained, is not consistent with the requirement that each case be examined on its own merits. See *ibid.*

The Ninth Circuit also concluded that even if the statute were ambiguous on that score, the BIA's treatment of mental health is nevertheless unreasonable and therefore unworthy of *Chevron* deference. *Gomez-Sanchez*, 892 F.3d at 992-993. As the Ninth Circuit explained, the BIA's inflexible exclusion of facts about mental illness for purposes of the serious-crimes analysis is "at least inconsistent with, if not directly in contradiction with," the BIA's own statements that the analysis should include consideration of "all reliable information" and should evaluate "the circumstances and underlying facts of the conviction * * * and, most importantly, whether the type and circumstances of the crime indicate that the [individual] will be a danger to the community." *Id.* at 991, 994-995 (quoting *In re N-A-M-*, 24 I. & N. Dec. at 342, and *Matter of Frentescu*, 18 I. & N. Dec. at 247). In addition, the Ninth Circuit reasoned, the BIA's rule cannot be squared with the BIA's own recognition of "the relevance of motivation and intent to the particularly serious crime determination," because mental health obviously can influence motivation. *Id.* at 996 & n.10. Finally, the Ninth Circuit rejected the BIA's assertion that consideration of the noncitizen's mental health at the time of the offense would require reexamination of the criminal court's findings, since immigration au-

thorities are "not retrying the question of guilt" in assessing the seriousness of the crime and since the criminal court might never have considered any facts relating to the noncitizen's mental health. *Id.* at 993-994 & n.8.

In *Shazi* v. *Wilkinson*, 988 F.3d 441 (8th Cir. 2021), the Eighth Circuit joined the Ninth Circuit in holding that the BIA's exclusion of mental-health facts is not entitled to *Chevron* deference. Unlike the Ninth Circuit, the Eighth Circuit understood Section 1231(b)(3)(B) to be ambiguous regarding how the agency should evaluate the seriousness of crimes that are not expressly classified by the statutory text. 988 F.3d at 448-449. But the Eighth Circuit agreed with the Ninth Circuit that the BIA's approach is unreasonable because it cannot be squared with the BIA's own recognition that "all reliable information" should be considered in a "case-by-case analysis" of whether a crime is particularly serious. *Id.* at 449 (emphasis omitted) (quoting *In re N-A-M-*, 24 I. & N. Dec. at 342). The Eighth Circuit also noted that the BIA's assumption that mental health is never relevant to particular seriousness is nonsensical given the agency's own acknowledgment of "the impact mental illness can have on an individual's behavior." *Id.* at 450 (quoting *Matter of G-G-S-*, 26 I. & N. Dec. at 347).

As the dissent here observed, and the majority agreed, the majority reached exactly the opposite result—one that conflicts with both the Eighth and Ninth Circuit decisions. See Pet. App. 24a-25a & n.4 (majority stating that it was "unpersuaded by the Ninth Circuit's" approach, and noting that "the Eighth Circuit agreed" with the Ninth Circuit that deference is not warranted); Pet. App. 34a (Bacharach, J., dis-

senting) ("In upholding the Board's disregard for evidence of mental illness, the majority creates a circuit split."). Although both the Eighth and Ninth Circuits refused to defer under *Chevron* to the BIA's interpretation of the "particularly serious crime" statutory language, deeming that interpretation unreasonable, the majority here accepted the BIA's interpretation as a reasonable one—while at the same time acknowledging that the agency's interpretation does not represent the best reading of the words that Congress wrote. Pet. App. 29a.

The specific reasoning of the decision below is also irreconcilable with the reasoning of the Eighth and Ninth Circuits. Whereas the Ninth Circuit (but not the Eighth Circuit) ruled that the statutory language unambiguously foreclosed the agency's interpretation, the majority here understood the statute to be "ambiguous as to what factors immigration courts may consider in their particularly serious crime analysis." Pet. App. 20a n.2. Whereas both the Ninth Circuit and the Eighth Circuit found the BIA's approach to mental health to be irreconcilable with the BIA's overall approach to the particularly-serious-crime analysis, which looks at all facts and circumstances, the majority here explained away that conflict by labeling mental-health facts "irrelevant." Pet. App. 27a. And whereas both other courts of appeals explained that immigration authorities' consideration of mental health would not undermine the criminal courts' work, the majority stated vaguely that "the BIA was reasonably concerned that immigration courts might * * * perceive the nature of the crime differently than criminal courts." Pet. App. 28a.

As noted, the majority acknowledged the force of the other circuits' reasoning about how the statutory text

should be interpreted. Pet. App. 29a; see Pet. App. 25a n.4. Yet the majority nevertheless reached a contrary conclusion about the reasonableness of the BIA's blanket rule barring consideration of facts about mental health.

As a result of that stark disagreement among the circuits, noncitizens in circumstances similar to Mr. Birhanu's will be treated differently under federal immigration law in different parts of the country. That is exactly the circumstance in which this Court's review is most warranted. And the disagreement between the circuits is made worse by the fact that a noncitizen convicted in a state within one circuit's jurisdiction might be subject to immigration proceedings in a different circuit. Cf. *Judulang* v. *Holder*, 565 U.S. 42, 58-59 (2011) (criticizing approach that would make "deportation decisions * * * a 'sport of chance'") (citation omitted). That can be happenstance—but it is notable that the government itself has the ability to determine the location of removal proceedings, allowing it to forum shop proceedings into the circuit with the most favorable precedent. See 8 C.F.R. 1003.14(a); 8 C.F.R. 1003.20(a).[5]

B. The decision below is wrong and gives *Chevron* too broad a scope.

The majority's decision to defer to the BIA's reading under *Chevron* is wrong on the merits—and it is emblematic of the problems that often plague application of the *Chevron* doctrine in the courts of appeals, especially in immigration cases. Review of the majority's

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[5] See, *e.g.*, Libby Rainey, *ICE Transfers Immigrants Held in Detention Around the Country to Keep Beds Filled. Then It Releases Them, with No Help Getting Home*, Denver Post, Sept. 17, 2017, https://tinyurl.com/y7tq3rl2.

decision on the "particularly serious crime" analysis would afford this Court the opportunity to place clear limits on the use of *Chevron* deference in situations in which the agency's reading is plainly not the best reading of the statute and in which the agency has no special expertise to bring to bear on the interpretive question.

As both the Eighth and Ninth Circuits have concluded, it is not reasonable to read the statutory language here, as the BIA did, to eliminate from consideration in the "particularly serious crime" analysis one particular category of facts: facts about the noncitizen's mental health. The statutory language at issue states simply that withholding of removal and asylum are unavailable if a noncitizen, "having been convicted by a final judgment of a particularly serious crime[,] is a danger to the community of the United States," 8 U.S.C. 1231(b)(3)(B)(ii); see 8 U.S.C. 1158(b)(2)(A)(ii)—and nothing about that statement suggests in any way that evidence of mental health does not bear on the question of whether a crime is "particularly serious" such that the noncitizen who was convicted of it "is a danger to the community." In fact, as a matter of basic common sense, just the opposite is true. For instance, if someone committed a crime while in the grip of an untreated mental-health condition that caused him to have a delusional break from reality, but has otherwise received medical treatment that controls that mental-health issue and eliminates the delusions, that information is highly relevant to whether that person "is a danger to the community" if he remains in the United States. Cf. *Gomez-*

Sanchez, 892 F.3d at 996 n.10 (providing additional example).[6]

Apart from mental-health facts, the agency has reasonably determined that an examination of *all* of the facts and circumstances relating to the crime is necessary in order to determine whether the standard set forth in Sections 1158(b)(2)(A)(ii) and 1231(b)(3)(B) for depriving a noncitizen of protection from persecution has been satisfied. And where Congress wanted to cut off an examination of all facts and circumstances, it did so expressly. Congress specifically provided that, in deciding whether a noncitizen is barred from withholding of removal, convictions for aggravated felonies with an aggregate sentence of at least five years are automatically deemed "particularly serious"—and so, in that circumstance, neither mental-health facts nor any other kind of facts (other than the basic fact of conviction and sentence) are relevant to that determination. 8 U.S.C. 1231(b)(3)(B)(iv). And in the asylum

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[6] That conclusion holds true regardless of whether the relevant statutory language is understood to focus only on the seriousness of the crime in the past, with seriousness measured in part by an assessment of likely future dangerousness, see *Matter of Frentescu*, 18 I. & N. Dec. at 247, or instead to require the agency to make a determination about the dangerousness in the present of a noncitizen who previously committed a particularly serious crime. See *Ahmetovic* v. *INS*, 62 F.3d 48, 52-53 (2d Cir. 1995) (discussing distinction between those inquiries). But there is little question that the plain statutory text asks about present dangerousness, because it uses the present tense ("is a danger," 8 U.S.C. 1231(b)(3)(B)(ii), in the withholding of removal context, or "constitutes a danger," 8 U.S.C. 1158(b)(2)(A)(ii), in the asylum context)—and under that correct understanding of the statute, facts about the noncitizen's mental health are *especially* pertinent. See generally *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1568 (2017) (analysis of the statutory meaning "begins, as always, with the text").

context, Congress provided that a conviction for *any* aggravated felony is automatically a "particularly serious" one. 8 U.S.C. 1158(b)(2)(B)(i). But Congress said nothing about eliminating mental-health facts from consideration where—as here—the conviction in question is not for an aggravated felony. If Congress had wanted to eliminate that evidence from consideration in *every* case, no matter the circumstances, it would have done so.

The majority below recognized that the agency's interpretation is highly questionable. The majority stated that "*Matter of G-G-S-* may not provide the most obvious framework for determining whether an offense is a 'particularly serious crime.'" Pet. App. 29a. And the majority stated that "Mr. Birhanu's criticisms of that decision, as well as the criticism voiced by the Ninth Circuit in *Gomez-Sanchez*, are well taken." Pet. App. 29a. But the majority nevertheless mistakenly thought that it was obligated to defer to the agency, even though there was nothing to recommend the agency's approach. Pet. App. 29a ("[o]ur precedent requires us to defer") (citation omitted). In fact, the agency's interpretation is well outside the zone of reasonable statutory interpretation, amounting to just the kind of policymaking that must remain a job for Congress rather than being handed over to unaccountable executive officials.

That the majority felt constrained to defer to the agency in those circumstances points up serious flaws in the way that the majority, and courts of appeals more generally, are applying *Chevron* deference. As Judge Kethledge recently observed, "the federal courts have become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first." *Valent* v. *Comm'r of Soc. Sec.*, 918 F.3d

516, 525 (6th Cir. 2019) (Kethledge, J., dissenting). Indeed, "all too often, courts abdicate th[eir] duty" to say what the law is. *Arangure* v. *Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) (Thapar, J.); see, *e.g.*, *Michigan* v. *EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (explaining that "*Chevron* deference precludes judges from exercising [independent] judgment" and "wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive") (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). And "[i]n too many cases, courts do so almost reflexively, as if doing so were somehow a virtue, or an act of judicial restraint—as if [courts'] duty were to facilitate violations of the separation of powers rather than prevent them." *Valent*, 918 F.3d at 525 (Kethledge, J., dissenting). Those problems are magnified in immigration cases, in which statutory provisions are long and complex and the relevant agency has often made policy, with little or no linkage to the governing statutory text, under the guise of "interpreting" a statute. Cf. *Decker* v. *Nw. Env't Def. Ctr.*, 568 U.S. 597, 618-619 (2013) (Scalia, J., concurring in part and dissenting in part) ("[T]he purpose of interpretation is to determine the fair meaning of the rule—to 'say what the law is.' Not to make policy, but to determine what policy has been made") (quoting *Marbury*, 1 Cranch 137).

The majority's decision here is characteristic of two ways in which *Chevron* deference is being applied overly broadly. First, the majority's decision does not treat the agency's interpretation as a tie-breaker in a circumstance in which the statutory text is so inscrutable that there is no interpretation of it that is more obviously correct than another. Rather, the decision suggests that any imprecision in the statutory text

means that the agency's interpretation must carry the day, even if it is plain using "all the standard tools of interpretation" that a much better reading of the statute exists. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2414 (2019); see Pet. App. 29a. That is just another way of saying that the agency's interpretation must prevail even though there is no "genuine[] ambigu[ity]," *ibid.*—and that, in turn, means that the agency is free to adopt a reading of the text that a court disagrees with and would not select under any other circumstances. But it is the duty of the courts to say what the law is, and that duty should not be stripped from them merely because the agency has devised an incorrect interpretation—even assuming that the interpretation has a veneer of reasonableness. Allowing the agency to dictate the meaning of a statute in that way presents a serious separation-of-powers problem. Cf., *e.g.*, *City of Arlington* v. *FCC*, 569 U.S. 290, 312-316 (2013) (Roberts, C.J., dissenting); *Michigan*, 576 U.S. at 760-764 (Thomas, J., concurring); *Kisor*, 139 S. Ct. at 2446 n.114 (Gorsuch, J., concurring in the judgment); *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149-1158 (10th Cir. 2016) (Gorsuch, J., concurring).

Second, the BIA has no special expertise in deciding whether mental-health facts are relevant to whether a crime is "particularly serious." To be sure, as a general matter, the BIA has had occasion to apply the relevant statutory provision before. But deciding the role that mental-health facts should play in the analysis of how serious a criminal conviction is, with dangerousness in the community as a touchstone of that inquiry, is not fundamentally a matter of *immigration* expertise. Although *Chevron* deference, like *Auer* deference, may be appropriate where an agency is exercising its "exper-

tise-based" judgement, such that it has more "substantive expertise" than a court does, *Kisor*, 139 S. Ct. at 2414, 2417; see *id.* at 2413 (referring to expertise that is "often of a scientific or technical nature"), *Chevron* deference is not appropriate where a court has just as much or *more* expertise than the agency does. And that is very much true here. Courts know much more than the agency knows about what role mental-health facts can play in the seriousness of crimes and in assessing the danger that offenders may pose to the community. See *id.* at 2417 ("Some interpretive issues may fall more naturally into a judge's bailiwick.").

C. Whether a crime is "particularly serious" is a highly significant question.

The question presented is also of great practical significance. A noncitizen who has been convicted of a particularly serious crime is ineligible both for withholding of removal and for asylum—exactly the result that the court below reached as to Mr. Birhanu. That means that even a person who has demonstrated a *clear probability* of religious, racial, or other persecution abroad—including persecution likely to result in that person's death—must be denied protection from that harm because of such a conviction. See 8 U.S.C. 1158(b)(1)(B)(i), 1231(b)(3).

Given those severe consequences, there is real danger associated with an overbroad understanding of what constitutes a "particularly serious crime" and with a crabbed understanding of the kind of facts that are relevant to making the "particularly serious crime" determination. The danger caused by the majority's decision is made greater by the fact the majority's analysis has no clear stopping point. If the agency is free to eliminate facts related to mental health from

the particularly serious crime analysis, there is nothing preventing the agency from eliminating other kinds of facts from consideration as well—even if that truncated analysis means abuse or death for a noncitizen who has lived in this country for years and who poses no danger to anyone in the United States. This Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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