CHEVRON DEFERENCE IN IMMIGRATION: RESOLVING THE CONFLICT BETWEEN REMOVAL REINSTATEMENT AND ASYLUM SEEKERS

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I. INTRODUCTION

In the United States, immigrants historically have been treated with skepticism and fear, from Irish persecution in early colonial days to prejudice against Eastern and Southern Europeans and Asians in the 1900s.[1] And though attitudes towards immigrants have been steadily growing more accepting, suspicion and animus toward immigrants remains.[2] A poignant example of the interplay between the reticence

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1. Katherine Fennelly, *Why Immigration Worries Americans–Especially Rural Residents,* SCHOLARS STRATEGY NETWORK (Feb. 1, 2012), http://www.scholarsstrategynetwork.org/brief/why-immigration-worries-americans-%E2%80%93-especially-rural-residents.

2. *Id.* Although immigrants from Latin American countries come to mind when the topic of anti-immigrant sentiment is brought up today, virtually every wave of immigrants that were not from Western and Northern Europe since colonization had faced a backlash of nationalistic belief. Eastern and Southern Europeans, and subsequently immigrants from Asian countries, were initially ostracized as they sought to settle in the land of the free. *See generally* T. ALEXANDER ALEINKOFF ET. AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 798 (8th ed. 2016).

toward and acceptance of immigrants is shown in *R-S-C v. Sessions*[3] and similar decisions.[4] These cases deal with a supposed contradiction in the Immigration and Nationality Act (INA) concerning asylum petitions and removal orders.[5] Under the INA, the government is required to allow anyone seeking asylum the chance to apply for it, regardless of their immigration status.[6] Conversely, the government may enforce a removal order against an alien who has already had an order issued against them without allowing any further application for relief, including asylum.[7]

As a result, in cases in which someone seeking asylum has already had a removal order enacted upon them, the agency in charge of enforcing the statute is also tasked with interpreting the statute.[8] In this instance, the United States Immigration and Naturalization Service (USCIS), which is under the purview of the Department of Justice, and ultimately the U.S. Attorney General, is given the opportunity to interpret the seeming contradiction in either a lenient or harsh manner.[9] Attorney Generals Eric Holder, Loretta Lynch, and Jeff Sessions have provided an answer to the question raised by the language of the statute and have affirmed that the removal provision overpowers the provision regarding asylum.[10] So far courts, relying upon deference to agencies, have been unwilling to overrule this determination.[11] This Note argues that deference should not be given to the USCIS and that the rule of

3. R-S-C v. Sessions, 869 F.3d 1176 (10th Cir. 2017).

4. *See infra* Section II .C.

5. *See, e.g., R-S-C*, 869 F.3d 1176.

6. 8 U.S.C. § 1158(a)(1) (2019). In July of 2017, 10,014 applications for asylum were submitted to the United States. Of those, less than 4,000 were adjudicated, and 1,252 were approved. An additional 1,330 were referred for another hearing. The top five countries from which applicants were coming from were Venezuela, China, El Salvador, Mexico, and Guatemala–collectively making up more than 50% of the applicants. USCIS ASYLUM DIVISION, ASYLUM OFFICE WORKLOAD: JULY 2017, (2017), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_AsylumStats_July2017.pdf.

7. 8 U.S.C. § 1231(a)(5) (2019). The provision for reinstatement of removal was added to the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) and applies retroactively to those who entered the United States illegally before April 1, 1997. Dree K. Collopy, *Crisis at the Border, Part III: Reinstatement of Removal and Demonstrating a Reasonable Fear of Persecution or Torture*, 16-10 IMMIGR. BRIEFINGS 1 (2016).

8. *R-S-C*, 869 F.3d at 1177.

9. *Id.* The USCIS replaced the Immigration and Naturalization Service in 2003. Immigration matters are handled by USCIS in the Department of Homeland Security and the Executive Office of Immigration Review (EOIR) in the Department of Justice (DOJ). The *former* INS-promulgated regulations are still in use. *See, e.g.,* 8 C.F.R. § 1208.31 (2019).

10. *R-S-C,* 869 F.3d at 1179.

11. *See infra* Sections II.C, II.D.

lenity mandates that the asylum provision should prevail in such circumstances.

II. BACKGROUND

A. Process for Removal Order and Relief

For a removal order to be placed upon a noncitizen, an enforcement officer must apprehend them prior to the initiation of removal proceedings.[12] Ordinarily, this apprehension is the result of a criminal proceeding or after an application for immigration benefits, such as asylum, is denied.[13] The removal proceedings occur before an Immigration Judge (IJ), who is an Article I judge within the Department of Justice rather than an Article III judge.[14] During the proceeding, the IJ first looks at the removability of the individual and, where the individual is removable, determines if there is any relief that may be provided from that order.[15] Many reasons exist why a noncitizen would be subject to removal under the INA and would, therefore, be deportable.[16] Some of the more prominent reasons include: the noncitizen was inadmissible at the time of entry,[17] or the noncitizen was convicted of certain criminal offenses such as crimes of moral turpitude,[18] multiple criminal convictions,[19] or controlled substance violations.[20]

Once a removal order has been enacted and a noncitizen is removed from the country, those individuals will often seek to reenter, especially if their family remains in the United States.[21] Rather than go through another deportation hearing, the court simply reinstates the previous

12. Jennifer Lee Koh, *Removal in the Shadows of Immigration Court,* 90 S. CAL. L. REV. 181 (2017).

13. *Id.* at 188.

14. *Id.* In 2013, reinstatements of removal accounted for nearly 39% of all removals, and this number has been steadily increasing since 2005. Individuals from Latin American countries such as Honduras, El Salvador, Guatemala, and Mexico accounted for 99% of all reinstatements of removal. Notably, these are among the countries sending the most asylum-seekers. These numbers illustrate the importance of proper legal procedure in the reinstatement process. Collopy, *supra* note 7.

15. Koh, *supra* note 12, at 189.

16. *Id.*

17. 8 U.S.C. § 1227(a)(1) (2019).

18. 8 U.S.C. § 1227(a)(2)(A)(i).

19. 8 U.S.C. § 1227(a)(2)(A)(ii).

20. 8 U.S.C. § 1227(a)(2)(B)(i).

21. Koh, *supra* note 12, at 203.

removal order after illegal reentry.[22] Given that it is a reinstatement of a prior order, it is not subject to review.[23] Additionally, the noncitizen may not apply for any relief under federal immigration laws.[24] Reinstatement often takes place near the border and is an extremely expedited process, lasting only a matter of hours in some cases.[25]

If the noncitizen is found to be deportable under any of the statutory provisions other than the reinstatement of a removal order, however, they may then seek relief from removal.[26] One way they may obtain relief is from voluntary departure.[27] Certainly, this option is not initially appealing to the noncitizen, as they are voluntarily leaving the United States, where they presumably wanted to stay. Benefits to leaving voluntarily do exist. Because having a removal order placed against a

22. *Id.* The process for reinstatement of removal involves three elements: (1) there must be a prior removal order; (2) the identity of the noncitizen matches that of the removal order; and (3) there was a subsequent illegal reentry. 8 U.S.C. § 1231(a)(5) (2015); *see also* Collopy, *supra* note 7. After verifying that all three requirements for reinstatement are met, the Department of Homeland Security is to ask the individual whether they have a reasonable fear of persecution. Collopy, *supra* note 7. If they answer in the affirmative, DHS *must* refer them to an asylum officer. *Id.*

23. Koh, *supra* note 12, at 203. Reinstatement of removal is a power first granted to Congress in 1950. In 1952, it was interpreted to "include individuals who had previously been deported under grounds of deportation tied to crimes, falsification of documents[,] and security." Since its inception, the number of reinstatement deportations has increased dramatically. In 2001, nearly 39,000 individuals were removed through reinstatement of deportation orders, but that number increased to over 130,000 by 2010. Lee J. Teran, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 SCHOLAR 583, 658 (2012).

24. 8 U.S.C. § 1231(a)(5) (2019). The regulations regarding the removal order stipulate that the "alien has no right to a hearing before an immigration judge" and the immigration officer is given the power to determine whether the alien qualifies for reinstatement. There are minimal requirements pertaining to notice and opportunity to be heard; immigration officers need only provide the alien with written notice of the determination and allow the noncitizen to create a written statement if they wish to do so. There is no required waiting period for which the noncitizen may request to obtain counsel. Koh, *supra* note 12, at 206 (citing 8 U.S.C. § 1231(a)(5)).

25. Koh, *supra* note 12, at 205.

26. U.S. DEP'T OF JUSTICE, FACT SHEET: FORMS OF RELIEF FROM REMOVAL (Aug. 3, 2004), https://www.justice.gov/sites/default/files/eoir/legacy/2004/08/05/ReliefFromRemoval.pdf.

27. *Id.*

noncitizen results in that person being inadmissible to the United States for ten years, those who leave voluntarily may have that ban waived.[28]

The noncitizen may also apply for asylum after a removal order has been placed against them.[29] To qualify for asylum, the applicant must show that they cannot return to their country due to past persecution or "a well-founded fear of future persecution based upon race, religion, nationality, membership of a particular social group, or political opinion."[30] In some situations, an alien may not be eligible for asylum even if this requirement is met.[31] If the applicant failed to apply within their first year of arrival in the United States, has been convicted of an aggravated felony, or is designated a national security risk, they may be denied asylum.[32] Once granted asylum, the alien will not be removed from the United States and is permitted to work.[33] Their derivatives, such as spouses and children, will also be granted asylum.[34] In addition, asylum grants a pathway to a green card or to United States citizenship.[35]

The last pertinent form of relief that may be requested is a withholding of removal.[36] Like asylum, those seeking withholding of removal need to show that they will likely face persecution based on their race, religion, nationality, membership in a particular social group, or political opinion.[37] However, they must demonstrate a likelihood of more than 50% that this will occur.[38] Withholding of removal requires a higher standard of proof than the asylum requirement, which mandates only a well-founded fear—the actual probability of persecution need not be a statistical likelihood.[39] This is counterintuitive because withholding of removal offers fewer benefits than asylum.[40] Withholding of removal, for example, offers no pathway to citizenship, does not extend to spouses

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28. 8 U.S.C. § 1231(c). Voluntary departure is a discretionary form of relief, that may be granted either prior to the completion of immigration proceedings or at the conclusion of those hearings before an immigration judge. The alien is permitted to stay in the United States for 120 days if voluntary departure is granted before the hearing and 60 days if granted during the hearing. FACT SHEET, *supra* note 26.

29. *Id.*

30. 8 U.S.C. § 1158(2)(A) (2019).

31. FACT SHEET, *supra* note 26.

32. *Id.*

33. 8 U.S.C. § 1158(b)(3)(A).

34. *Id.*

35. *See generally* ALEXANDER ALEINKOFF ET AL., *supra* note 2.

36. *Withholding of Removal and CAT*, IMMIGRATION EQUALITY, https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/withholding-of-removal-and-cat/ (last visited May 7, 2019).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

and children, and bars grantees from leaving the United States because they will be considered "self-deported" if they do.[41] Applications for asylum and withholding of removal are often submitted at the same time, but withholding of removal is not subject to the one-year ban to which asylum applicants are subject.[42]

B. Statutory Conflict

The key provisions that this Note addresses include both asylum and removal. The removal provision maintains:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.[43]

In contrast, the provision regarding asylum application states:

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum.[44]

A problem arises when someone seeks asylum who already has a removal order enacted against them.[45] In this situation, the removal reinforcement provision states that the alien is ineligible for any relief under the Act,[46] but the asylum provision maintains that a person is entitled to an application regardless of their status—and presumably this includes having a removal order placed against them.[47] Certainly, both provisions cannot be met simultaneously, so it has been left to the courts to determine the correct course of action in these situations.

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41. *Id.*
42. *Id.*
43. 8 U.S.C. § 1231(a)(5) (2019).
44. 8 U.S.C. § 1158(a)(1) (2019).
45. *See* R-S-C v. Sessions, 869 F.3d 1176 (10th Cir. 2017).
46. *Id.* at 1179.
47. *Id.*

C. Chevron Deference: Resolving Ambiguity

The reliance on agency determinations in our political system necessarily requires that courts determine the extent to which they may review agency action, especially in instances of statutory ambiguity.[48] The Supreme Court answered this question in the seminal case of *Chevron USA v. Natural Resources Defense Council, Inc.*[49] Before *Chevron*, the standard for deference came from *Skidmore v. Swift & Co.*[50] *Skidmore* displayed similar deference to that entailed by *Chevron*, however, it does not have the power that *Chevron* enjoys today and *Skidmore* involves a more stringent test.[51] Under *Skidmore*, the amount of deference afforded to agencies "depend[s] upon the thoroughness evident in [the administrative agency's] consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all those factors which give it power to persuade, if lacking power to control."[52] Under *Skidmore*, courts are only required to defer to an agency interpretation if the court finds it "persuasive."[53] Persuasiveness is determined based on multiple factors, including "agency consistency, deliberativeness, and whether the interpretation was issued contemporaneously with the enactment of the underlying statute."[54]

Roughly forty years after *Skidmore*, the Supreme Court heard *Chevron* to determine whether the Environmental Protection Agency's decision to allow states to treat all pollution-emitting devices within the same industrial grouping as one in a "bubble" was a reasonable statutory interpretation.[55] The Court then established a two-step framework, allowing courts to review an agency's interpretation.[56] In order for the court to defer to an agency's interpretation of an ambiguity within a statute, it must first determine, after applying traditional tools of statutory interpretation, "whether Congress has directly spoken to the precise question at issue."[57] This is known as "step one" of the *Chevron*

48 *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

49. *Id.*

50. Caitlin Miller, *The Balancing Act Between Chevron Deference and the Rule of Lenity*, 18 TEX. TECH. ADMIN L. J. 193, 196 (2017); *see also* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

51. Miller, *supra* note 50, at 196.

52. *Skidmore*, 323 U.S. at 140.

53. Miller, *supra* note 50, at 197.

54. *Id.*

55. *Id.*

56. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842 (1984).

57. *Id.*

analysis.[58] If the court determines that Congress has not directly spoken to the issue, the court must then ask whether the agency's interpretation is a reasonable one, or in other words, whether it is a plausible way to read the statute at hand.[59] This determination is referred to as "step two" of the *Chevron* analysis.[60] If the court determines that Congress has already spoken to the issue (failure at step one) or that the agency's interpretation was not a reasonable one (failure at step two), then the court will not defer to the agency and will apply its own interpretation.[61]

While *Chevron*'s effect on administrative law and judicial review of agency action is certainly immense, the *Chevron* deference test itself is fairly ambiguous.[62] Determining whether Congress has directly spoken to an issue is not always as easy as it may seem, and deciding whether an agency's interpretation of a statute is reasonable is harder still.[63]

Since *Chevron*, the test has expanded at the front end. A "step zero" has been added to the *Chevron* framework, which asks the question, before even considering whether Congress has spoken to the issue at hand, whether Congress intentionally delegated interpretation powers to the agency in the statute.[64] Here, courts are to look at the totality of the circumstances to make this determination.[65] If the statute appears to contain an intention to delegate, the court then applies step one of *Chevron*.[66] However, if not, the court is to apply the old *Skidmore* test, which is a higher burden—requiring persuasiveness rather than reasonableness—before the court defers to agency interpretation.[67] All this suggests that, while agency deference is extremely prominent and a heavily relied on doctrine, courts acknowledge that such deference should not be as broad as *Chevron* initially indicated.[68] Needless to say,

58. Dan Farber, *Everything You Always Wanted to Know About the Chevron Doctrine,* LEGALPLANET (Oct. 23, 2017), http://legal-planet.org/2017/10/23/everything-you-always-wanted-to-know-about-the-chevron-doctrine/.

59. *Chevron,* 467 U.S. at 842.

60. Farber, *supra* note 58.

61. Miller, *supra* note 50, at 198.

62. *Id.*

63. *Id.*

64. *See, e.g.,* United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris Cty., 529 U.S. 576 (2000).

65. *Mead,* 533 U.S. at 241.

66. *Id.*

67. *Id.* A more controversial consideration that has been made in several cases is referred to as the "major question exception." In these instances, the Court "will not defer to an agency's interpretation of certain 'economically and politically significant' statutory provisions," even if the other requirements for *Chevron* have been met. *Major Question Objections,* 129 HARV. L. REV. 2191, 2196 (2016); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

68. *See Mead,* 533 U.S. 218.

application of *Chevron* deference can get very messy, especially in the following cases discussed in this Note.

D. R-S-C v. Sessions and the Application of Chevron

In 2014, R-S-C first fled to the United States from her home country of Guatemala to escape persecution.[69] After being apprehended by the authorities, she explained to them that she feared people were coming to kill her.[70] The officers did not believe her, and a court subsequently ordered her to be removed without referring her to an asylum officer.[71] R-S-C fled to the United States, proclaiming a fear of persecution, two more times that year.[72] Finally, after the third entry, immigration officials referred her to an asylum officer.[73]

Initially, the asylum officer determined she did not have a reasonable fear of persecution.[74] However, the immigration judge vacated the decision and placed her in proceedings for withholding of removal.[75] Because of the increased benefits asylum provides over withholding of removal, R-S-C requested the judge to award asylum instead.[76] This request was denied, but R-S-C appealed to the Board of Immigration Appeals (BIA), claiming those seeking asylum should be eligible for application regardless of whether they had a removal order reinstated against them[77] The BIA, however, disagreed, and R-S-C appealed to the Tenth Circuit.[78]

Having no clarity on which provision of the INA prevails over the other, the Tenth Circuit relied on *Chevron* to determine if the BIA's ruling was reasonable.[79] In this instance, the Attorney General, as head of the Department of Justice, had made the determination that the provision regarding reinstatements of removal orders superseded the contrasting

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69. R-S-C v. Sessions, 869 F.3d 1176, 1180 (10th Cir. 2017). In 2016, over 12,000 people fled Guatemala seeking asylum in other countries, with United States among the most popular destination of choice. Only nine percent of the applicants from Guatemala were denied. *Refugees from Guatemala*, WORLD DATA, https://www.worlddata.info/america/guatemala/asylum.php (last visited May 7, 2019).

70. *R-S-C*, 869 F.3d at 1180.

71. *Id.*

72. *Id.*

73. *Id.* at 1181.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1182.

asylum provision and that R-S-C was, therefore, to be deported without application for asylum.[80]

The court noted that the conflicting provisions were ambiguous, and the only question that remained for the appeals court was step two of *Chevron* analysis—namely, whether the Attorney General's interpretation was reasonable.[81] The court answered in the affirmative.[82] It reasoned that the plain text of the statute was clear and that it was not up to the Attorney General to find contradicting provisions in the statute.[83] Additionally, the court held that it was reasonable for the Attorney General to believe that the withholding provision was more specific than the provision regarding asylum and that it should therefore prevail over the more general provision, adhering to the principle that the specific should govern the general in cases of conflicting statutes.[84] And, because these interpretations by the Attorney General were determined to be reasonable, his holding that the removal provision should overcome the asylum provision was given deference.[85]

E. Ramirez-Meija v. Lynch

In *Ramirez-Meija v. Lynch*, a case strikingly similar to *R-S-C*, the government subjected Ramirez-Meija to a reinstated removal order and denied her the opportunity to seek asylum.[86] Although the Fifth Circuit ultimately reached the same conclusion as the Tenth Circuit in *R-S-C*, the court used strikingly different reasoning.[87] Rather than relying on *Chevron*, the court found the provision in 8 U.S.C. §1231(a)(5) regarding the reinstatement of removal orders dispositive.[88]

There, the court reasoned that § 1231(a)(5) prohibits "aliens subject to reinstated orders of previous removal" from applying for "any relief

80. *Id.* at 1179.
81. *Id.* at 1186.
82. *Id.*
83. *Id.*
84. *Id.* The doctrine of *lex specialis*, which states the specific should govern the general, is an old principle that is used to determine the resolution of conflicts in international law. It provides that when there are inherent conflicts between two norms dealing with the same subject matter, priority should be given to the one that is more specific. Ashika Singh, *The United States, the Torture Convention, and Lex Specialis: The Quest for a Coherent Approach to the CAT in Armed Conflict,* 47 COLUM. HUM. RTS. L. REV. 134, 141 (2016); *see also* Nitro-Lift Techs., LLC v. Howard, 568 U.S. 17 (2012).
85. *R-S-C* 869 F.3d at 1183.
86. Ramirez-Meija v. Lynch, 794 F.3d 485 (5th Cir. 2015).
87. *Id.*
88. *Id.* at 556.

under this chapter"[89] and that asylum is a form of relief from removal.[90] Therefore, this provision covered asylum.[91] The same, the court held, is not true of the asylum provision.[92] Although the asylum statute states that "any alien . . . irrespective of such alien's status, may apply for asylum,"[93] the court reasoned that this provision is inherently discretionary.[94] Because the Attorney General is not required to grant relief, even when the conditions in the statute are met, the court held that the provision was "intended to be amenable to limitation by regulation and by the exercise of discretion."[95]

Today, multiple circuits have ruled on this issue.[96] All have come to the same conclusion—the asylum provision should not prevail over the reinstated removal order provision; however, courts have split into two camps.[97] The Second and Fourth Circuits have come to the same conclusion as *Ramirez-Meija*, holding that the removal provision is dispositive.[98] The First and Ninth Circuits agreed with *R-S-C*, holding that *Chevron* deference must be applied.[99]

Several circuits have couched the importance of this determination by emphasizing that these holdings do not provide that the petitioners in question will be deported back to their home country to face persecution.[100] Rather, the courts emphasize that the petitioner will still be allowed to apply for withholding of removal.[101] As noted above, however, this is not always a suitable outcome because of the reduced benefits that withholding of removal grants[102]—specifically the inability to bring the individual's spouse and children into the country as derivatives, which is often the primary concern of petitioners in these cases.[103] This Note takes the position that not only are the two provisions

89. *Id.* at 490 (quoting Herrera-Molina v. Holder, 597 F.3d 128, 139 (2d Cir. 2010)).
90. *Id.*
91. *Id.*
92. *Id.*
93. 8 U.S.C. § 1158(a) (2019).
94. *Meija*, 866 F.3d at 490.
95. *Id.*
96. *See Meija*, 866 F.3d 573; Garcia v. Sessions, 856 F.3d 27 (1st Cir. 2017); Perez-Guzman v. Lynch 835 F.3d. 1066 (9th Cir. 2016); Herrera-Molina v. Holder, 597 F.3d 128 (2d Cir. 2010).
97. *See id.*
98. *See Meija*, 866 F.3d 573; *Herrera-Molina*, 597 F.3d 128.
99. *See Garcia*, 856 F.3d 27; *Perez-Guzman*, 835 F.3d. 1066.
100. *See, e.g.*, R-S-C v. Sessions, 869 F.3d 1176 (10th Cir. 2017).
101. *Id.*
102. *Withholding of Removal and CAT, supra* note 36, at 3.
103. *Id.*

actually contradictory, but also that the asylum provision should prevail over the provision pertaining to removal orders.

III. ANALYSIS

A. Determining Whether There is Statutory Conflict

Several United States circuit courts that have ruled on this issue maintain that *Chevron* deference is not necessary because the provisions do not conflict.[104] Those courts maintain that § 1231(a)(5), the provision for reinstatement of removal, is more specific than § 1158(a)(1) and must therefore take precedence.[105] Additionally, the court in *Ramirez-Mejia* makes a similar claim; because asylum is a discretionary form of relief, it should be subject to limitation.[106] The mere fact that one of the provisions is subject to discretionary limitation does not necessarily mean the provisions do not conflict nor does it indicate that it is more general than the reinstatement of removal provision.

The argument that the asylum provision must be more general and the reinstatement of removal provision more specific because of the discretionary nature of § 1158(a)(1) is flawed in another way. Some courts and the government support the conclusion that § 1231(a)(5) is ironclad and applies without exception.[107] As a result, it is viewed as specific.[108] In *Ramirez-Mejia*, the Fifth Circuit stated that § 1231(a)(5) "plainly read, broadly denies all forms of redress from removal, including asylum."[109] This argument is not credible when considering that a general exception to the rule of reinstatement exists if the individual demonstrates fear of persecution or torture in the reinstatement process.[110]

Although it acknowledged its sister circuits' rulings, the First Circuit in *Garcia v. Sessions* noted that there "is at least a surface tension

104. *See* Meija v. Sessions, 866 F.3d 573 (4th Cir. 2017); Ramirez-Meija v. Lynch, 794 F.3d 485 (5th Cir. 2015); Herrera-Molina v. Holder, 597 F.3d 128 (2d Cir. 2010).

105. *Ramirez-Meija,* 794 F.3d at 490. Additionally, the court reasoned that, while asylum is barred because the reinstatement of removal provision takes precedence, the same is not true for withholding of removal. Withholding of removal, it claims, provides "protection" rather than "relief" and so is still allowable. *Id.* This distinction is relatively novel, as the court cites the government's oral argument as evidence the Convention Against Torture and withholding of removal are often referred to as "protections" rather than relief. *Id.* (citing Wang v. Holder, 569 F.3d 531, 535 (5th Cir. 2009)).

106. *Ramirez-Meija*, 794 F.3d at 490.

107. *Id.*

108. *Id.*

109. *Id.*

110. Collopy, *supra* note 7.

between the two provisions."[111] The Ninth Circuit agreed that no clear evidence exists as to which provision is more specific.[112] Some courts have started to claim withholding of removal is a protection rather than a relief and, therefore, is not subject to the restriction in § 1231.[113] However, this distinction is disingenuous at best. The Department of Justice, while classifying applications for the Convention Against Torture (CAT) as a protection,[114] has lumped withholding of removal and asylum together as forms of relief.[115] If withholding of removal is viewed as not being restricted by § 1231, no reasonable justification exists for barring asylum.[116] The Attorney General's regulations also stipulate that withholding of removal and CAT are not barred from reinstatement orders.[117]

Courts that have found the statute not to be ambiguous have relied on one of two analyses. The first is that those subject to the reinstatement provision are unambiguously ineligible for asylum because it is a form of relief.[118] This interpretation is at odds with the fact that those same courts allow withholding from removal—another form of relief.[119] Other courts, such as the Fifth Circuit in *Ramirez-Meija*, make the distinction between "protection" and "relief."[120] However, an argument could just as easily be made that asylum is a form of protection. Either way, the statute does not unambiguously support the position of these circuits, and their rationale for claiming the reinstatement of removal provision as dispositive is unjustified. We, therefore, must now turn to the other circuits and their reliance on *Chevron* to ascertain whether their holdings that the Attorney General's interpretation deserves deference are justified.

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111. 856 F.3d 27, 38 (1st Cir. 2017).

112. Perez-Guzman v. Lynch, 853 F.3d 1066, 1075 (9th Cir. 2016).

113. *See* Meija v. Sessions, 866 F.3d 573 (4th Cir. 2017); *Ramirez-Meija*, 794 F.3d 485; Herrera-Molina v. Holder, 597 F.3d 128 (2d Cir. 2010).

114. FACT SHEET, *supra* note 26. The Convention Against Torture is yet another form of relief in immigration law. Pursuant to the United States' obligations under Article 3 of the United Nations Convention Against Torture, it mandates the protection of aliens from being returned to countries where they would likely face torture. Unlike asylum or withholding of removal, there is not a requirement for persecution as a result of race, religion, nationality, membership of a particular social group, or political opinion; however, the definition of torture is very narrow and difficult to prove. *Id.*

115. FACT SHEET, *supra* note 26.

116. *See* Ixcot v. Holder, 646 F.3d 1202, 1207 (9th Cir. 2011) (quoting Fernandez-Vargas v. Gonzalez, 548 U.S. 30, 35 n.4 (2006)).

117. *Perez-Guzman*, 853 F.3d at 1075.

118. *See* Herrera-Molina v. Holder, 597 F.3d 128 (2d Cir. 2010).

119. *Id.*

120. Ramirez-Mejia v. Lynch, 794 F.3d 485, 490 (5th Cir. 2015).

B. Applying Chevron

The distinction between ambiguity and contradiction is critical when examining the two immigration provisions. *Chevron* deference is applied to an "agency's reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency."[121] That presumption should be invalidated, though, when a contradiction occurs in the law rather than an ambiguity.[122] In such an instance, it cannot fairly be said that Congress *intended* to assign the responsibility to the agency to determine which provision should prevail.[123]

In *Scialabba v. Cuellar De Osorio*, the Supreme Court faced a similar impasse to the one discussed in this Note regarding contradictory provisions in the INA, but Chief Justice Roberts and Justice Scalia's concurrence is particularly relevant for the treatment of contradictory provisions.[124] In the case, a plurality of the Court held that an agency may choose between two statutory directives that are contradictory.[125] The plurality's interpretation from only three Justices fell in line with the ruling in *R-S-C v. Sessions* and allowed for *Chevron* deference to be applied.[126]

Chief Justice Roberts, along with Justice Scalia, concurred in the judgment of the plurality and pointed out the flaw in the plurality's reasoning.[127] The concurrence found that the case did not warrant

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121. Scialabba v. Cuellar de Osorio, 573 U.S. 41, 76 (2014) (Roberts, C.J., concurring) (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)).

122. *Id.* at 76.

123. *Id.*

124. *Id.* The INA allows for US citizens and lawful permanent residents to petition for their derivative family members (including spouses, children, and siblings) to obtain visas for entry into the United States. Notably, the provision allows for children under 21 to be treated as derivatives; however, it often takes years for the petition to be considered. The Child Status Protection Act (CSPA) maintains that the age of the child is to be automatically converted to the appropriate category and understood to be the age they were when the petition was filed, so that children do not "age out" during the wait time. The issue in *Scialabba* was whether "automatically" meant "immediately" or whether a new petition was to be created with a different principal beneficiary. *Id.*; *see also Child Status Protection Act—Immigration—*
Scialabba v. Cuellar de Osorio, 128 HARV. L. REV. 341 (2014).

125. *Child Status Protection Act*, *supra* note 124, at 341.

126. *Scialabba*, 573 U.S. at 75. This, however, seems to be a tough pill to swallow when looking at "step zero" of *Chevron* analysis, essentially claiming that Congress intended to delegate this decision to the agency—indicating a Congressional intention to have contradictory provisions in their statute.

127. *Id.* at 76 (Roberts, C.J., concurring).

deference because *Chevron* deference does not apply in instances of contradiction.[128] According to Chief Justice Roberts, "direct conflict is not ambiguity, and the resolution of such conflict is not statutory construction but legislative choice."[129] The remaining Justices penned several dissents but did not weigh in on whether *Chevron* should be applied to contradicting provisions of a statute.[130]

As it stands now, disagreement continues as to whether *Chevron* deference may be applied to contradictory circumstances.[131] As a result, an agency confronted with contradicting language is forced to determine *which* provision supersedes the other rather than filling in the gaps of *how* a piece of legislation should be interpreted. [132] Such a matter should be for the legislature to decide rather than the agency and should fail under the *Chevron* framework at "step zero" because it cannot be said that Congress *intended* to delegate the choice between contradictory provisions to the former INS.[133] Therefore, deferring to the agency's interpretation violates the purpose of *Chevron* deference.[134]

Even if the government argues that Congress intended to delegate the issue to the agency, its position may still be challenged at the later steps of the *Chevron* framework. Certainly, the first requirement is an obvious one because the agency may not "interpret" what has already been explicitly laid out by Congress.[135] While both provisions by themselves seem clear, the contradiction between the provisions muddies the waters and creates ambiguity.[136]

Unlike the first, the second requirement is unclear as to what is a "permissible construction" of the statute.[137] Courts have since adopted the interpretation that the second *Chevron* requirement should be equated with an "arbitrary and capricious" standard.[138] The Administrative Procedure Act (APA), which introduced the "arbitrary and capricious" standard, stated that "an agency action, finding, or conclusion can be set aside where it is arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law' or is 'unsupported by

128. *See supra* Section II.C.
129. *Scialabba*, 574 U.S. at 76 (Roberts, C.J., concurring).
130. *Child Status Protection Act*, *supra* note 124, at 346.
131. *Id.* at 341.
132. *Id.* at 350.
133. *Id.* at 348.
134. *Id.* at 345.
135 *Id.* at 347–48.
136. *See supra* Section III.A.
137 *See generally* Scialabba v. Cuellar de Osorio, 573 U.S. 41 (2014).
138. Hazardous Waste Treatment Council v. U.S. EPA, 886 F.2d 355 (D.C. Cir. 1987) (citing AFL-CIO v. Brock, 835 F.2d 912, 917 (D.C. Cir. 1987)).

substantial evidence."[139] Generally deferring to the agency under the APA, courts only set aside an agency ruling for being arbitrary and capricious when:

> (1) the agency 'relied on factors which Congress has not intended to consider,' (2) the agency 'failed to consider an important aspect of the problem,' (3) the agency explained its decision in a way 'that runs counter to evidence' or (4) the action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[140]

Under this reading of arbitrary and capricious, whenever an agency elects to choose one provision over another contradicting one, it can be said to have violated the standard and that ruling must then be thrown out.[141] Certainly, it is safe to assume that Congress does not *intend* to create a statute with contradicting provisions.[142] When an agency chooses to completely ignore one provision of a legislative statute over the application of a contradictory one, it is arguable that the decision was based on a factor which Congress did not intend for them to consider.[143] The decision, then, automatically fails under the arbitrary and capricious standard even if *Chevron* deference is used.[144]

C. Rule of Lenity

United States courts have long recognized the serious implications of deportation.[145] Consequently, courts have applied in immigration cases a rule of lenity, which narrowly construes ambiguities in immigration statutes in favor of the noncitizen.[146] Because the stakes for deportation

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139. Gary Gauthier, *The Arbitrary and Capricious Standard Under the APA*, LANDMARK PUBLICATIONS (May 23, 2017) (internal quotation marks omitted) (citing 5 U.S.C. § 706(2)(A) (2019), http://www.landmark-publications.com/2017/05/the-arbitrary-and-capricious-standard.html.

140. *Id.* (quoting Miccosukee Tribe of Indians of Fla v. United States, 566 F.3d 1257, 1264 (11th Cir. 2009)).

141. *See id.*

142. *Scialabba*, 573 U.S. 41, 87 (Alito, J., dissenting).

143. *See* Gauthier, *supra* note 139.

144. *See id.*

145. Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 519–20 (2003) (citing Fong Haw Tan v. Phelan, 333 U.S. 6 (1948)).

146. *Id.* at 519–20; *see also* David S. Rubenstein, *Putting the Immigration Rule of Lenity in its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 494 (2007). Rubenstein argues against using the rule of lenity as dispositive against *Chevron* deference. He notes that the rule is not based on constitutional protections, and

are so high, the court "will not assume that Congress means to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the word used."[147] The rule of lenity is originally a canon of criminal law, wherein criminal statutes are to be strictly construed in favor of the accused.[148] It has since been adopted by immigration courts.[149] As in a criminal case, the immigration rule of lenity is invoked once courts have determined that a statute is ambiguous after checking other traditional methods of statutory construction.[150] Although established many decades ago, the rule is still used frequently in immigration courts today[151] and has been referred to as "the most important rule of statutory interpretation peculiar to immigration."[152]

While the immigration rule of lenity initially referred specifically to deportation provisions, it has since been broadly applied to other immigration applications as well, including the asylum provision.[153] Both deportation and asylum have been subjected to the rule of lenity in the past.[154] Read generally, one would expect that the rule of lenity should have come into the DOJ's consideration when choosing to apply the removal provision over the asylum provision.[155] If the DOJ were to follow the rule of lenity canon in that context, it should have come to the conclusion that the ambiguity is to be settled *in favor* of the non-immigrant and apply the asylum provision over the removal order.

The interplay between *Chevron* deference and the rule of lenity regarding immigration issues is not new.[156] In most deportation cases, for

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instead should be viewed as a judicial doctrine—the same as *Chevron*. He importantly notes that, by itself, the rule of lenity should not be dispositive over *Chevron*, but concedes that many cases have used it in conjunction with other factors to a dispositive effect. Rubenstein, *supra*.

147. Slocum, *supra* note 145, at 520 (quoting Fong Haw Tan v. Phelan 333 U.S. 6 (1948)).

148. Slocum, *supra* note 145, at 520.

149. *Id.*

150. *Id.*

151. *Id.* at 521.

152. *Id.* (quoting STEPHEN H. LEGMOSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 156 (1987)).

153. Slocum, *supra* note 145, at 521; *see also* INS v. Cardozo-Fonseca, 480 U.S. 421 (1987); Matter of J-J-, 21 I. & N. Dec. 976, 987 (B.I.A. 1997) ("[T]he principle of lenity toward asylum seekers under domestic and international law, warrant our reopening of the applicant's case . . . as well as to provide a reasoned decision under controlling law on the merits of his claim."). Seemingly the only areas of immigration law that do not apply the rule of lenity are the provisions concerning those who have not yet entered the United States and are being excluded from doing so. Slocum, *supra* note 145, at 523.

154. Slocum, *supra* note 145, at 523.

155. *See id.* at 531.

156. *Id.* at 515.

example, if the court finds the relevant statute ambiguous, the agency contends that *Chevron* deference should be granted to the broad interpretation of the statue.[157] Conversely, the individual facing deportation will argue for a narrow interpretation of the statute by invoking the rule of lenity.[158] Before *Chevron* is able to be applied in these instances, the court must determine "using traditional tools of statutory construction"[159] whether Congress has addressed the issue.[160] Although there is some uncertainty as to what these traditional tools may be, doctrinal canons, such as the rule of lenity, arguably are chief among them.[161]

In determining which canons are to be used as "traditional tools" for *Chevron* purposes, we can separate canons into three different categories: textual canons, extrinsic source canons, and substantive canons.[162] Textual canons promulgate "inferences that are usually drawn from the drafters' choice of words, their grammatical placement in sentences, and their relationship to other parts of the 'whole' statute."[163] Substantive canons, rather than being rooted in the language of the statute, are rooted in value judgments and policy.[164] The rule of lenity is considered a substantive one, as it enforces an underlying policy.[165] Although some textual canons, when squared with *Chevron*, can be applied to the first requirement of *Chevron* as traditional tools of statutory construction, it is more difficult to determine when substantive canons should be applied.[166] If, for example, the substantive rule of lenity can be applied to the first requirement of *Chevron*, and is determined to be "a traditional tool of statutory construction," then the court can be said to have already spoken on the issue, negating the need to look further to the second requirement.[167]

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157. *Id.* at 539.

158. *Id.*

159. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 849 (1984).

160. Slocum, *supra* note 145, at 540.

161. *Id.*

162. *Id.* (citing WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION, 375–83 (2000)). Extrinsic source canons can also be used for *Chevron* purposes. *Id.*

163. Slocum, *supra* note 145, at 540 (quoting WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 634 (2d ed. 1995)).

164. Slocum, *supra* note 145, at 540.

165. *Id.*

166. *Id.* at 541. Substantive canons are further divided into four subcategories: (1) tie-breakers directing statutes to be construed loosely or liberally, (2) rebuttable presumptions, (3) clear statement rules, and (4) "super-strong clear statement rules." *Id.* at 544.

167. *Id.* at 544.

The canon of constitutional avoidance, for example, is a substantive canon which displaces *Chevron*.[168] If a court determines that the constitutional avoidance canon is applicable, it will not even consider whether *Chevron* should apply or not.[169] The rule of lenity, however, has not been reconciled with *Chevron*, and the Supreme Court has not made a determination of whether the rule of lenity should displace *Chevron* deference as a "traditional tool of statutory construction."[170] Because substantive canons are rooted in public policy and protect important rights, they should be dispositive.[171] Even if the rule of lenity is not determined to be dispositive of *Chevron*, however, the rule should be taken into consideration by the agency and measured against the second requirement asking whether the agency's determination was reasonable.

The rule of lenity has previously been invoked in both steps one and two of *Chevron*, and "the courts that have chosen lenity over deference have not been clear whether lenity is a Step One traditional tool of statutory construction that is dispositive or merely a factor in the analysis of congressional intent or, is instead a Step Two factor."[172] If we take for granted that step one has been satisfied,[173] and the reading of the two contrasting provisions of the INA result in an ambiguity, the rule of lenity may be utilized at step two as a factor in determining whether the agency's analysis was reasonable.[174] Even if the rule of lenity were simply used as a factor in consideration rather than completely dispositive in instances of statutory contradiction, such as the one at issue here, the factor is enough to tip the scales in favor of the asylum applicant.[175]

Treating the rule of lenity as a factor also allows for more flexibility in its application, depending on the circumstance.[176] Legal questions requiring agency expertise, for example, should be more apt to ignore the rule of lenity and defer to the experts.[177] On the other hand, in "questions of law that do not implicate agency expertise, the argument for *Chevron* deference is weak, thus the immigration rule of lenity should apply with

168. *Id.* at 546.
169. *Id.*
170. *Id.* at 547.
171. *Id.*
172. *Id.* at 555; *see also* Naderpour v. INS, 52 F.3d 731 (8th Cir. 1995).
173. *See supra* Section III.A.
174. Slocum, *supra* note 145, at 577.
175. *Id.* Some may criticize using the rule of lenity, as merely a factor in the determination because it is uncertain how much weight to give to any one factor. Slocum notes, however, that "[d]eference standards are not used precisely by courts, so using lenity as a factor would not add uncertainty." *Id.*
176. Slocum, *supra* note 145, at 577.
177. *Id.* at 579.

full force."[178] The issue regarding contradicting provisions is clearly not related to agency expertise, but is rather a policy decision best left for the legislature.

IV. CONCLUSION

The conflict between the asylum provision in the INA and the provision regarding reinstatement of removal orders is a true contradiction within the statute. The resolution that the USCIS has put forth, mandating that the reinstatement of removal order provision supersede asylum, should not be given deference by the courts. The government's position in *Ramirez-Meija*, that the statutory language is unambiguously dispositive in favor of the reinstatement of removal orders, is clearly incorrect due to the ambiguity that the contradictory statutes create. Likewise, the deference given to the INS in cases such as *R-S-C* are unjustified. As Justice Scalia notes in *Scialabba*, a contradictory set of provisions should not invoke *Chevron* because there is no congressional intent to delegate the issue to the agency. It therefore fails at "step zero" of the *Chevron* framework.

If Congress refuses to exercise its legislative authority to clarify which provision prevails over the other in such a contradictory statute—authority which an agency should not possess—then the rule of lenity doctrine should be applied. The rule can be applied both to step one and, perhaps more strongly, to step two of *Chevron*. The application of the removal order provision over the asylum provision is unreasonable under *Chevron* because the rule of lenity should be used to necessitate that the asylum provision prevails. Therefore, individuals who are seeking asylum should not be precluded from doing so because of a removal order that had previously been placed against them. Rather than being allowed merely to apply for withholding of removal, those under threat of having an existing removal order placed against them should have the opportunity to enjoy the benefits and protections that asylum offers—to bring their spouses or children safely into the United States and eventually apply for citizenship.

178. *Id.*; *see also* Patel v. Ashcroft, 294 F.3d 465, 467 (3d Cir. 2002) (stating that questions of law that do not warrant agency expertise should not be afforded *Chevron* deference).