No. 13-70579
PRO BONO

In the United States Court of Appeals
for the Ninth Circuit

RONY ESTUARDO PEREZ-GUZMAN, a/k/a Ronnie Perez-Guzman, A# 200-282-241

Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

On Petition for Review of a
Decision of the Board of Immigration Appeals
Agency No. A200-282-241

PETITIONER'S REPLY BRIEF

Eric M. Fraser (Ariz. No. 027241)
OSBORN MALEDON, P.A.
2929 N. Central Ave., Suite 2100
Phoenix, Arizona 85012-2793
602-640-9321
efraser@omlaw.com

Appointed PRO BONO
Attorney for Petitioner

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INTRODUCTION ON REPLY

Perez filed a petition for review of three claims: (1) asylum, (2) relief under the CAT, and (3) withholding of removal. The government agrees that the claims concerning CAT and withholding should be remanded.

The primary question remaining, therefore, is what the scope of remand should be. Should this Court limit remand to CAT and withholding, or should it remand for all of Perez's claims, including asylum? It should remand on all claims. On Perez's claim for asylum, the government offers two arguments, both of which fail.

First, it argues that Perez failed to exhaust his administrative remedies. But Perez met any exhaustion requirement he had because he gave the BIA an opportunity to rule on the issue and in fact the BIA did so. Moreover, the particulars of Perez's case mean that Perez did not have an exhaustion requirement.

Second, the government argues that the reinstatement bar trumps the asylum statute. Tellingly, however, it offers no response to the core arguments Perez made to the contrary. Perez demonstrated that the text, structure, purpose, and history of the statutory scheme at issue all

indicate that asylum claims are available in reinstatement proceedings.

For these reasons, this Court should grant Perez's petition for review and remand to the BIA for consideration of Perez's asylum, CAT, and withholding claims.

ARGUMENT

I. The Parties Unanimously Agree That Remand Is Appropriate on Perez's CAT and Withholding Claims.

The government and Perez agree that this case should be remanded for the BIA to reconsider its decisions on Perez's claims for relief under CAT and for withholding of removal. (Opening Brief at 49-68; Answering Brief at 9-10.) The BIA, however, should reconsider Perez's claims on all of the bases identified by Perez, rather than on the limited bases identified by the government.

II. Perez Met Any Exhaustion Requirement He Had.

The government argues (at 11-16) that this Court lacks jurisdiction because Perez failed to exhaust his administrative remedies with respect to his claim that he is eligible to seek asylum. This argument fails for two independent reasons. First, even if Perez had an obligation to exhaust his administrate remedies, he did so. Second, Perez had no obligation to exhaust his administrative remedies because

the BIA based its decision on a rule that, as applied, conflicts with a statute. It has long been the rule that a petitioner need not exhaust his administrative remedies in that scenario.

A. Additional Background on Exhaustion.

Perez speaks Spanish and required an interpreter in his proceedings below.[1] He proceeded before the IJ and the BIA pro se.[2] Despite facing decisionmakers who did not speak his language and despite appearing pro se, Perez repeatedly made requests for asylum.

In his proceedings before the IJ, Perez signed a declaration expressly requesting asylum.[3] The IJ refused to consider his asylum claim because of his status in reinstatement.[4]

Perez directly appealed that ruling to the BIA. Perez's brief to the

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[1] *E.g.*, AR000080:13-14 ("The Respondent speaks Spanish and we do have our interpreter in Spanish.").

[2] AR000002 ("Pro se"); AR000007 ("PRO SE").

[3] AR000171 ¶ 1 ("I am requesting asylum. . ."); AR000173 ¶ 16 ("I am asking for asylum in the United States because my life is in danger in Guatemala.").

[4] AR000007-08 ("Respondent is not eligible for asylum under INA 208, because the Respondent has been previously ordered removed pursuant to Section 238 or 235 of the Act and the DHS officials have, pursuant to their authority under the law and regulations, reinstated that prior Order of Removal.").

BIA identified his asylum claim four times. He mentioned his asylum application[5] and identified the issue under the summary of argument section of his brief.[6] In the body of his argument section, Perez correctly noted that "The asylum laws of the United States under INA § 208 protect people who meet the definition of a refugee."[7] He then went on to argue that he met the definition of a refugee and met all statutory requirements for asylum. In his conclusion, he specifically identified the IJ's asylum decision as error and requested asylum relief.[8] In addition to these references in his brief, he identified his asylum claim in his notice of appeal to the BIA.[9]

The BIA expressly acknowledged that Perez appealed the IJ's ruling on his asylum claim: "On appeal, the applicant argues that the

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[5] AR000031 ("respondent filed his 1-589 Application for asylum").

[6] AR000032 ("Respondent argues that the immigration judge wrongly denied his application for asylum").

[7] AR000034 (capitalization altered).

[8] AR000037 ("For the aforementioned reasons, the immigration Judge further erred in denying respondent's Application for asylum"); *id.* (requested relief to "grant respondent's application for asylum").

[9] AR000049 ("The Immigration Judge erred In Denying My Application for asylum").

Immigration Judge erred in denying his application for asylum."[10] It then affirmed the IJ's ruling on the same basis as articulated by the IJ. Specifically, the BIA claimed that a federal rule prohibited consideration of Perez's asylum claim: "Because the Department of Homeland security ('DHS') reinstated a prior order of removal in this case, the Immigration Judge's consideration was limited to the applicant's request for withholding of removal and CAT protection (I.J. at 1-2). *See* 8 C.F.R. § 1208.31(e)."[11] Perez then filed a petition for review in this Court, challenging the BIA's ruling.

B. Perez Exhausted His Administrative Remedies and Preserved His Asylum Claim by Raising It in His Administrative Proceedings.

To the extent Perez had an obligation to exhaust his administrate remedies, he did so. Under 8 U.S.C. § 1252(d)(1), exhaustion means raising the issue with the BIA in order to allow the BIA to consider it. Perez did that by raising his claim for asylum four times in his brief to the BIA, in addition to his notice of appeal. Even if those references somehow were insufficient, the BIA rejected his asylum claim on the

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[10] AR000002 n.1 (citing Perez's notice of appeal and brief).

[11] *Id.*

same basis as the IJ did, and on the same basis which Perez challenges in this petition for review.

The government's arguments to the contrary miss the mark. The government's primary authorities address a petitioner challenging a different issue, rather than whether a petitioner's brief references suffice. Similarly, this Court has rejected the government's contention that a petitioner's brief to the BIA must go into detail when the issue is legally complicated.

At bottom, the exhaustion requirement ensures that the BIA has an opportunity to rule on an issue before a court may address it. Here, the BIA had an opportunity to rule and in fact did rule on whether Perez could raise an asylum claim. For these reasons, he satisfied the exhaustion requirement.

1. Perez Raised His Claim to Asylum in His Brief Before the BIA, Which Is All This Court Requires for Exhaustion.

Perez raised his claim for asylum four times in his brief before the BIA.[12] The BIA even acknowledged that Perez raised a claim for

[12] *See* notes 5-8, *supra*.

asylum.[13] Those references sufficiently satisfy the exhaustion requirement by giving the BIA an opportunity to evaluate whether Perez could raise an asylum claim. This Court has repeatedly held that in cases involving petitioners without representation before the BIA, the exhaustion requirement may be satisfied through short, cursory references in a brief submitted to the BIA.

For example, in *Coronado v. Holder*, 759 F.3d 977, 986 (9th Cir. 2014), this Court held that a pro se petitioner exhausted his remedies on an ineffective assistance of counsel claim by making three short references in his brief to the BIA. It also held that even more fleeting references to allegations of personal attacks by the IJ put the BIA on notice of his claim of bias. *Id.* The petitioner in that case, like Perez, made very short references to his claims rather than making "artful," nuanced arguments, but this Court held that the succinct references "were sufficient to put the BIA on notice of his claim[s]." *Id.*

Similarly, in *Zhang v. Ashcroft*, 388 F.3d 713, 721 (9th Cir. 2004), this Court suggested that exhaustion requires little more than mentioning the claim for relief:

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[13] *See* AR000002 n.1 (citing "Respondent's Brief").

> Here, Zhang explicitly *mentioned* in his brief to the BIA that he was requesting reversal of the IJ's denial of relief under the Convention Against Torture. Zhang's request was sufficient to put the BIA on notice that he was challenging the IJ's Convention determination, and the agency had an opportunity to pass on this issue. *Zhang raised the issue of Convention relief before the BIA, and our precedent requires nothing more*.

Id. (citation omitted, emphases added).

This Court reached the same conclusion in *Aden v. Holder*, 589 F.3d 1040, 1047 (9th Cir. 2009). *Aden* cites *Zhang*'s analysis of the exhaustion requirement and reiterates the key principle that mentioning a claim gives sufficient notice to the BIA: "Here, as in *Zhang*, the petitioner *mentioned* his Convention Against Torture claim in his brief to the BIA. Accordingly, Hassan Aden adequately exhausted his claim before the BIA, and we have jurisdiction to address that claim on appeal." *Id.* (emphasis added).

These cases demonstrate that Perez's short, succinct references to the claim satisfy the exhaustion requirement. This Court has explained that "we do not employ the exhaustion doctrine in a formalistic manner." *Figueroa v. Mukasey*, 543 F.3d 487, 492 (9th Cir. 2008). That is particularly true when the petitioner had no representation before

the BIA. "[E]specially where the petitioner is *pro se*, general contentions can suffice as long as they put the BIA on notice of the contested issues." *Ren v. Holder*, 648 F.3d 1079, 1083 (9th Cir. 2011) (citation and internal quotation marks omitted). Perez's claims should be "construe[d] liberally" because he appeared before the BIA pro se. *Id.* (citation omitted).

The cases upon which the government chiefly relies do not address whether mentioning the claim satisfies the exhaustion requirement. Rather, they address situations in which the petitioner raised one issue before the BIA, and then reversed course, pursuing an entirely different set of issues before the Ninth Circuit.

For example, the government relies (at 13-14) on *Arsdi v. Holder*, 659 F.3d 925 (9th Cir. 2011). Arsdi was denied asylum and withholding of removal because he "point[ed] a pump action shotgun into the faces of two innocent people" during a robbery. *Id.* at 928. Thus, he committed a "particularly serious" crime. *Id.* Before the BIA he argued only his fears of persecution, but he petitioned for review based on whether the IJ had applied "the appropriate standard to determine whether his crime was 'particularly serious.'" *Id.* Thus, the court noted, "Arsdi

raised issues *completely unrelated* to his current contention." *Id.* at 929 (emphasis added). It later explained, "he argued *completely different* objections to the IJ." *Id.* (emphasis added). Moreover, because of Arsdi's failure to raise his concerns to the BIA, the agency did not even discuss the "particularly serious" issue in its decision. *Id.* at 930. By contrast, Perez challenges precisely the issue on which the BIA based its decision.

Similarly, in *Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004), the petitioner also raised *different* issues before the Ninth Circuit than she did before the BIA. Before the BIA, Zara raised only "the IJ's alleged factual error in finding that the Aquino Party was no longer in power at the time she departed the Philippines and the impact that factual finding had on her application for asylum and other applications for relief." *Id.* By contrast, in her petition for review she challenged "the IJ's adverse credibility determination" and the sufficiency of the evidence on past persecution. *Id.* Because of that major discrepancy, she had not exhausted her administrative remedies. *See id.* ("The issues Zara presents to this court in her petition for review differ from the issues she presented in her appeal to the BIA.").

By contrast, Perez brings the same issue to this Court as he raised before the BIA. Perez raised his claim to asylum below but the IJ and BIA refused to consider it. Perez's argument was simple: *Here I am, here is the statute, I meet the requirements, so please consider my claim*. That is his claim and that is all he needed to say for the BIA to evaluate his claim on the merits. Tellingly, that is Perez's claim before this Court — he meets all the statutory requirements for asylum and the BIA should have considered his claim. Before this Court his legal argument is trussed up with legislative history, Latin canons of construction, and more. But the fundamental claim remains the same, and he properly raised that claim before the BIA.

The government relies on *Figueroa v. Mukasey* for the proposition that the petitioner must "'put the [Board] on notice' as to the specific issues." (Answering Brief at 12 (quoting 543 F.3d at 492).) Perez did put the BIA on notice, and, moreover, that case reveals the limited burden the exhaustion requirement places on the petitioner. It emphasizes that the petitioner need not set forth an elaborate argument in the brief to the BIA. The petitioner must present the claim; "[o]ur precedent requires nothing more." *Figueroa*, 543 F.3d at

492 (citation omitted). Tellingly, that case held that the petitioner had satisfied the exhaustion requirement.

2. Even If Perez's Identification of His Asylum Claim Somehow Were Insufficient, the BIA and IJ Rulings Demonstrate That He Has Exhausted His Administrative Remedies.

Even if Perez's own brief somehow failed to meet this Court's standard for exhaustion, the ruling of the BIA shows that Perez's petition should not be dismissed on exhaustion grounds. As this Court has observed, the exhaustion requirement gives the agency an opportunity to correct its own error without intervention from the court system. It does so by requiring that a petitioner at least mention his claim before the agency. As this Court's cases have held, that bar is a low one — the petitioner need not develop a sophisticated legal argument. But the agency must at least have an opportunity to rule on the question.

Here, the BIA had an opportunity to rule and in fact did rule. The BIA squarely rejected Perez's asylum claim on the very basis that Perez challenges before this Court. Its ruling both [1] recognized that Perez raised an asylum claim before the BIA, and then [2] rejected it because of the reinstatement bar:

> [1] On appeal, the applicant argues that the Immigration Judge erred in denying his application for asylum. [2] Because the Department of Homeland Security ("DHS") reinstated a prior order of removal in this case, the Immigration Judge's consideration was limited to the applicant's request for withholding of removal and CAT protection.[14]

This ruling demonstrates that the agency in fact ruled on the very question Perez has asked this Court to review. An agency may not rule on a question and then claim that the administrative remedies have not been exhausted. *See Rodriguez-Castellon v. Holder*, 733 F.3d 847, 852 (9th Cir. 2013) ("[W]e may review any issue addressed on the merits by the BIA, regardless whether it was raised to the BIA by the petitioner.").

Moreover, Perez's brief to the BIA should be considered in light of the IJ ruling and the BIA ruling together. The IJ ruling rejected the asylum claim on the same basis: the reinstatement bar.[15] Perez then made *four* references to his asylum claim. Even if those references were

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[14] AR000002 n.1 (citations omitted).

[15] AR000007-08 ("Respondent is not eligible for asylum under INA 208, because the Respondent has been previously ordered removed pursuant to Section 238 or 235 of the Act and the DHS officials have, pursuant to their authority under the law and regulations, reinstated that prior Order of Removal.").

ambiguous (they were not), the only natural implication is that he alleged error with the stated basis of the IJ's ruling, namely the reinstatement bar. Tellingly, the BIA rejected his asylum claim on the same basis. Consequently, there is no realistic question about what Perez wanted the BIA to do, and the BIA had every opportunity to correct the IJ's mistake.

For this reason, the government's attempt to distinguish between the BIA's ruling versus the "validity of the [IJ] determination" and the "merits" makes no sense. (Answering Brief at 14-15 (emphasis removed).) The BIA ruled on the same basis as the IJ, and Perez necessarily challenged that basis both before the BIA and now on a petition for review.

Although neither the IJ nor the BIA considered the "merits" of Perez's asylum claim, Perez's eligibility to make an asylum claim constitutes the "merits" of his appeal to the BIA and his petition for review in this Court. The BIA considered — and rejected — the question of Perez's entitlement to make an asylum claim. Hence, he meets the exhaustion requirement. *See Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1186 (9th Cir. 2001) (en banc) ("Finally, we agree with

[Petitioner] that regardless of the clarity with which he raised the equitable tolling argument in his briefs, the BIA did, in fact, address the question whether equitable considerations should toll the limitations period set forth in [the regulation].").

3. The Complexity of the Question Presented Has No Bearing on Exhaustion.

The government suggests (at 15-16) a relationship between the exhaustion requirement and the legal complexity of the argument. It contends that "given the particular types of statutory construction arguments" at issue here, Perez had to present a more sophisticated argument in order to enable the BIA to effectively address the arguments. But no such relationship exists between the complexity of the question and the exhaustion requirement.

This Court has squarely held that a petitioner's "failure to elaborate on his general contention with a specific statutory argument is . . . immaterial for jurisdiction purposes." *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1173 n.1 (9th Cir. 2007).

In *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 873 (9th Cir. 2008), upon which the government relies, this Court collected cases describing the contours of the exhaustion requirement. It recalled that "this Court

found the petitioner's claim exhausted where he did not make the precise statutory argument in the proceedings below [but] . . . did raise his general argument," and that "the issue in question may have been argued in a slightly different manner [to the BIA] and still be preserved for appeal." *Id.* (citations and quotation marks omitted; alterations in original).

Under these principles, Perez did what he needed to do. Particularly in light of the IJ's stated basis (the reinstatement bar) and the BIA's stated basis (the reinstatement bar), Perez did not need to single out and cite the reinstatement bar in order to exhaust his remedies. *See Socop-Gonzalez*, 272 F.3d at 1183-84 ("We hold that even though Socop never specifically invoked the phrase 'equitable tolling' in his briefs to the BIA, he sufficiently raised the issue before the BIA to permit us to review the issue on appeal."). He did not need to make the "precise argument" that he makes before this Court. *Vizcarra-Ayala*, 514 F.3d at 873.

Perez did not probe the legislative history of the relevant statutes or invoke Latin canons of construction. But he did not need to. A pro se petitioner need not use the "exact legalese." *Agyeman v. I.N.S.*, 296

F.3d 871, 878 (9th Cir. 2002). "A *pro se* petitioner is not required to use the precise legal terminology . . . to make clear the basis of his challenge." *Ren*, 648 F.3d at 1084. Nor need he make "a specific statutory argument." *Moreno-Morante*, 490 F.3d at 1173 n.1. Nor should we expect more from an unrepresented alien in detention who does not speak the language. For these reasons, when reviewing his claims to the BIA, this Court "construe[s] them liberally." *Ren*, 648 F.3d at 1083 (citation omitted). He properly exhausted his remedies even if he did so "inartfully." *Agyeman*, 296 F.3d. at 877.

The exhaustion requirement is not a high bar, nor should it be. The exhaustion requirement does not evaluate how skillfully the petitioner presented his case. Rather, the requirement represents a jurisdictional question based on the doctrine of the separation of powers. *See Marathon Oil Co. v. United States*, 807 F.2d 759, 768 (9th Cir. 1986) ("Statutory exhaustion requirements implicate concerns of separation of powers and, therefore, the failure to comply with the requirements deprives us of jurisdiction."). It exists in part to prohibit consideration in an Article III court of issues an Article I agency never considered or never could have considered. But here, the agency did in

fact consider the issue and denied Perez relief *on the same basis he challenges here.* Nothing is premature.

C. Perez Did Not Need to Exhaust His Administrative Remedies Because the BIA's Decision Presents a Conflict Between a Rule and a Statute.

In refusing to consider Perez's asylum claim, the BIA expressly invoked 8 C.F.R. § 1208.31(e),* a regulation purporting to limit reinstatement proceedings to "consideration of the request for withholding of removal only." That regulation is the only authority cited for the BIA's conclusion that "the Immigration Judge's consideration was limited to the applicant's request for withholding of removal and CAT protection."[16] Perez's petition for review directly challenges the position that reinstatement status bars consideration of a claim for asylum. The rule on which the BIA based its decision conflicts with the asylum statute. (*See* Opening Brief at 46-49.)

This Court has jurisdiction to consider Perez's petition for review regardless of whether he exhausted his administrative remedies. As

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* Perez does not concede that this rule controls the case. But it was the sole basis for the BIA's decision, and thus this Court has jurisdiction to consider Perez's petition for review.

[16] AR000002 n.1 (citing 8 C.F.R. § 1208.31(e)).

this Court has explained, Perez "had no right to challenge the validity of the regulation before the BIA, because '[t]he BIA simply has no authority to invalidate a regulation that it is bound to follow.'" *Coyt v. Holder*, 593 F.3d 902, 905 (9th Cir. 2010) (quoting *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1273 (9th Cir. 1996)). Even though Perez did in fact raise his claim for asylum before the BIA, the agency refused to consider it because it concluded it was bound by regulation. In other words, "the argument would necessarily have fallen on deaf ears." *Espinoza-Gutierrez*, 94 F.3d at 1273.

Consequently, "[b]ecause the BIA has no authority to declare a regulation invalid, 'the exhaustion doctrine does not bar review of a question concerning the validity of an INS regulation because of a conflict with a statute.'" *Coyt*, 593 F.3d at 905 (quoting *Espinoza-Gutierrez*, 94 F.3d at 1273-74). Thus, this Court has jurisdiction to consider the claim regardless of whether Perez exhausted his administrative remedies. *See id.* Despite acknowledging (at 14) that the BIA based its decision on a citation to 8 C.F.R. § 1208.31(e), the government ignores this longstanding doctrine.

III. The Reinstatement Bar Does Not Bar Perez's Asylum Claim.

Turning to the central issue in the case, the government cannot defend the BIA's decision to refuse to consider Perez's asylum claim. Most of the arguments in Perez's brief are met with silence. The government does not respond to Perez's arguments concerning the structure, purpose, and history of the statutes. When it does respond, it attempts to set forth meaningless distinctions that have no basis in the text of the statutes and do not apply in this case. At bottom, the government cannot dispute that the asylum statutes guarantee broad availability of asylum regardless of an alien's status, and as a matter of law the blunt instrument of the reinstatement bar cannot and does not eviscerate those protections.

A. The Government Agrees with, Concedes, or Fails to Address Most of the Arguments Raised in Perez's Opening Brief.

1. The Government Does Not Dispute That *Chevron* Deference Does Not Apply and That the Statutes Should Be Construed in Favor of Perez.

Perez argued in the opening brief (at 27-28 and 44-49) that the BIA's decision should not get *Chevron* deference. The government does not dispute this. Accordingly, the government has not taken the position that the statutes are ambiguous and that the agency used its

expertise to apply a reasonable interpretation of them. To the contrary, the government contends as a matter of law that an entire category of applicants may not claim asylum, despite the express statutory command that "any alien" may apply for asylum.

Nor does the government dispute the other statements of the standard review. It does not dispute that this Court reviews this legal question de novo. (*Cf.* Opening Brief at 27.) It does not dispute that any ambiguities in the removal statutes must be construed in favor of Perez — and that this principle applies with special force in an asylum claim. (*Cf.* Opening Brief at 33.)

Similarly, the government does not dispute that this Court has not yet ruled on the issue and that no binding precedent controls the question. (*Cf.* Opening Brief at 42-43.) For these reasons, this Court should address on the merits this important question by applying de novo review, with any ambiguities resolved in favor of Perez.

2. The Government Does Not Address the Specific Statutory Structure for Successive Asylum Applications, Along with the Consequences of That Framework.

Perez argued in the opening brief that the government's position would eviscerate the specific statutory provision regarding successive

asylum applications. (Opening Brief at 34-37; *see also* Amicus Curiae Brief at 24-27.) In particular, the asylum statute specifically addresses how to handle repeat claims of asylum. It generally bars further claims of asylum if an asylum claim has been denied. *See* 8 U.S.C. § 1158 (a)(2)(C) ("Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied."). But the statute contains an exception to that bar. An applicant may still apply for asylum, notwithstanding an earlier denial, if there have been "changed circumstances which materially affect the applicant's eligibility for asylum." 8 U.S.C. § 1158(a)(2)(D).

Despite the several pages devoted to this topic in the opening brief, the government completely ignored this argument.* The statute's structure in this regard is important for three reasons. First, it ensures that a ruling in Perez's favor will not open the floodgates to successive and unmeritorious asylum claims. Second, it demonstrates that the government's position collides with a specific regime the Congress established for asylum seekers. Third, it provides further evidence that

* The government's brief mentions the successive-application bar only in passing (at 22).

as between the asylum statute and the reinstatement bar, the asylum statute is the more specific statute that should be applied when applicant has previously been removed and then makes an asylum claim. Yet the government completely failed to address this important statutory provision.

The opening brief (at 36-37) set forth a detailed hypothetical example of an applicant who first made an asylum application that was properly denied, after which the applicant was removed from the United States. Upon returning to his country, conditions dramatically deteriorated and he was sent to a government-run forced labor camp because of his religion. The government does not dispute that these "changed circumstances" *should* entitle him to relief under 8 U.S.C. § 1158(a)(2)(D). Nor does it dispute that, under the government's position, the reinstatement bar would kick in and prevent any consideration whatsoever of the second (and legitimate) asylum application. This example demonstrates a severe flaw in the government's position — a flaw the government cannot square.

Consider another example. A refugee enters the United States with a valid claim for asylum. He receives an expedited removal order

without consideration of his asylum claim. Upon return to his home country, he faces the same circumstances that gave him a valid claim for asylum. He returns again, tries to make a claim for asylum, but is denied that opportunity simply because he had been previously removed — despite having a valid claim for asylum all along. That scenario is not uncommon. The Amicus Curiae describes several real instances of such tragedies. (Amicus Brief at 2-4, 20-22.) Again, the government offers no response.

In addition to illustrating the consequences of the government's position, the existence of the specific regime for successive asylum seekers demonstrates that in these circumstances, the specific asylum statute must be given effect over the broader reinstatement bar. The government argues (at 23-25) that the reinstatement bar is the specific statute, rather than the other way around. But in light of the two examples, the reinstatement bar functions as the blunt general instrument, whereas the asylum statute provides the specific surgical tool to address what to do when an applicant makes a new asylum application after having been removed from the country. The government's contention to the contrary reflects its inability to address

the specific text, structure, and purpose of the statutory regime for successive asylum applications.

3. The Government Does Not Dispute the Relevant Legislative History.

Both Perez and the Amicus Curiae described in detail the relevant legislative history of both the asylum statute and the reinstatement statute. (Opening Brief at 37-39; Amicus Brief at 10-13.) Tellingly, the government offers no response to any of the relevant history.

Moreover, the history provided in the briefs does not pluck isolated phrases from committee reports or floor statements. To the contrary, it provides the crucial history of how the statute came to being — specifying which Public Laws and which changes to the text. As described in both briefs, the history demonstrates that the reinstatement bar should not disrupt the detailed asylum reform passed at the same time.

B. The Government Cannot Dispute the Plain Text of the Asylum Statute, nor Does It Dispute That Other Forms of Relief are Available After Reinstatement, "*Notwithstanding*" the Reinstatement Bar.

1. The Government Ignores the Plain-Text Meaning of the Asylum Statute and Instead Makes an Unsupported Assertion about the Reinstatement Bar.

The opening brief began the asylum argument (at 30-31) with a simple plain-text argument. The asylum statute permits asylum applications regardless of the immigration status of the applicant: "Any alien who is physically present in the United States or who arrives in the United States . . . *irrespective of such alien's status*, may apply for asylum in accordance with this section." 8 U.S.C. § 1158(a)(1) (emphasis added).

The government does not dispute or even address this plain-text argument. Instead, it responds with a purported plain-text argument of its own, based on the notion that there are no exceptions to the reinstatement bar: "The plain language of the reinstatement bar is unqualified. . . . There are *no exceptions* found elsewhere in the statute, *nor any authority to create such exceptions*." (Answering Brief at 22-23 (emphases added).) But what about the exceptions?

The opening brief outlined why the statutory bar to "any relief" does not, and cannot, actually mean "any relief." Among other reasons, this Court and other courts have repeatedly held that certain forms of relief are available in reinstatement, "*notwithstanding*" the statutory bar. (Opening Brief at 39-42 (collecting cases).) The government acknowledges (at 26) that withholding of removal and CAT protection are available in reinstatement *notwithstanding* the statutory bar. It does not dispute that U Visa relief is also available in reinstatement. Contrary to the government's contention, therefore, the government's own concessions demonstrate that the reinstatement bar *is* qualified and that there *are* exceptions.

In addition, the government incorrectly suggests (at 25-26) that Perez argued that any form of relief is available in reinstatement unless the statute granting relief has a special exception for reinstatement status. Not so; Perez's argument applies only to asylum and the specific protections made available by the asylum statute. Notably, the statutes providing for the other forms of relief identified by the government (at 25) (voluntary departure, adjustment of status, and cancellation of removal) do not contain the same broad guarantee as the asylum

statute, which applies to "[a]ny alien . . . irrespective of" status. 8 U.S.C. § 1158(a)(1). For this reason, the Congress did not enact a legal nullity. The reinstatement bar still bars certain forms of relief, but only when consistent with the rest of the statutory framework and the international obligations of the United States.

It is true that the reinstatement bar is written is absolute terms. But so is the asylum statute. And, despite the government's assertion to the contrary, the reinstatement bar has never actually been *interpreted* as absolute. Perez acknowledges that both statutes have absolute terms and has proposed how to harmonize them in a manner consistent with this Court's prior holdings and the structure and history of both statutes. The government, by contrast, characterizes only one of the statutes as absolute, thereby ignoring the text of the asylum statute and providing no help to harmonize the statutory scheme.

2. The Discretionary Nature of Asylum Relief Does Not Excuse a Legal Error and Does Not Answer the Question.

The government does not dispute the availability of relief in reinstatement notwithstanding the statutory bar, nor could it. Its only response (at 26) is that asylum is discretionary whereas withholding

and CAT protection are non-discretionary. That argument fails for three reasons.

First of all, the discretionary nature of relief does not provide a workable distinction. A U Visa is available in reinstatement, as explained in the opening brief (at 41 (citing *Torres-Tristan v. Holder*, 656 F.3d 653, 662 (7th Cir. 2011)). But granting a U Visa is discretionary, rather than automatic or mandatory. *See L.D.G. v. Holder*, 744 F.3d 1022, 1024 (7th Cir. 2014) ("U Visas are not automatically granted to qualifying noncitizens. The decision whether to grant a U Visa is statutorily committed to the discretion. . . ."). Thus, the government's asserted distinction falls apart upon inspection.

Second, even if the distinction withstood scrutiny, the government provides no explanation for why the discretionary nature matters. It has no basis in the text of the statutes. The government cites (at 26) only *Herrera-Molina v. Holder*, 597 F.3d 128, 133 (2d Cir. 2010), which states the proposition without explanation. The government cannot prevail on an extratextual distinction that remains unexplained.

Third, the BIA did not deny asylum to Perez based upon any exercise of discretion. To the contrary, the BIA denied asylum based

upon the incorrect *legal conclusion* that the reinstatement order meant that "in this case, the Immigration Judge's consideration was limited" to non-asylum claims.[17] The government cannot invoke the discretionary nature of relief to deny *consideration* of an asylum claim. *See Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004) ("[The IJ's] faulty determination that [the petitioner] was not *eligible* for asylum impermissibly colored his discussion of whether or not she was *entitled* to asylum.").

For this reason, this Court routinely reviews asylum claims — the government must follow the law, even when considering exercises of agency discretion. In fact, the immigration statutes expressly provide jurisdiction for reviewing questions of law on denials of discretionary relief. *See* 8 U.S.C. § 1252(a)(2)(D); *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (per curiam) (describing scope of jurisdiction to review questions of law and statutory construction). The courts also have jurisdiction to review discretionary denials of asylum in particular. *See* 8 U.S.C. § 1252(a)(2)(B)(ii); *Hosseini v. Gonzales*, 471 F.3d 953, 956 (9th Cir. 2006) ("We also have jurisdiction to review the BIA's

[17] AR000002 n.1.

discretionary denial of [the] application for asylum."). The discretionary nature of asylum relief does not work as a general distinction, nor does it have any basis in this case. The BIA based its decision on an incorrect legal premise, and that legal error must be corrected.

C. The Government's Remaining Arguments Fail.

1. Perez Need Not Show Irreconcilable Conflict or an Absurd Result.

The government contends (at 19-20) — with no citation — that Perez must show an irreconcilable conflict or absurd results from the government's application of the statutes. Not so. The opening brief quoted (at 32) the "fundamental canon of statutory construction" about harmonizing statutory provisions:

> the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.

Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, 273 F.3d 1229, 1241 (9th Cir. 2001) (internal quotation marks and citations omitted). The government does not dispute that point. Indeed, the government acknowledges (at 20) that, when possible, courts should allow statutes

to coexist. That coexistence should be governed by the text, structure, purpose, and history of the statutes.

2. The Government's Distinction Between Applying for Relief and Eligibility for Relief Is Irrelevant.

The government (at 21) argues that there is a meaningful difference between who "may *apply* for asylum" versus who is "[]*eligible*" for asylum relief. Any difference between those phrases has no bearing in this case because the government selectively quoted the relevant statute. The reinstatement bar actually purports to bar *applications* for relief.

The government argues, in effect, that the asylum statute states that any alien "may apply for asylum," 8 U.S.C. § 1158(a)(1), while the reinstatement statute states that an alien who has been removed "is not eligible" for relief, 8 U.S.C. § 1231(a)(5). But the reinstatement bar does not stop at barring eligibility. It actually purports to bar applications. Quoted more completely, it states that "the alien is not eligible *and may not apply for* any relief under this chapter." 8 U.S.C. § 1231(a)(5) (emphasis added). The government quoted only the first portion. Thus, the government's argument (at 21) that "there is obviously nothing

irreconcilable about having separate requirements for who may apply for relief, and who may be eligible," largely misses the point.

Moreover, both the asylum statute and the reinstatement statute address both applications and eligibility. The asylum statute addresses the ability to apply in 8 U.S.C. § 1158(a)(1) (labeled "Authority to apply for asylum"), and addresses eligibility in 8 U.S.C. § 1158(b)(1)(A) (labeled "Eligibility"). The reinstatement bar addresses both applications and eligibility in 8 U.S.C. § 1231(a)(5). The government selectively quoted only the application portion of the asylum statute, and only the eligibility portion of the reinstatement statute. But both statutes address both topics.

In addition, the purported distinction drawn by the government would apply to equal force to the other forms of relief for which an alien in reinstatement proceedings may both apply and be eligible: withholding, CAT, and U Visa. (*See* Opening Brief at 40-41.) Thus, the alleged distinction between applying for relief and being eligible for relief falls apart upon review.

3. The Ability to Create Additional Limitations for Asylum Does Not Excuse the BIA's Decision in this Case.

The government points out (at 22-23) that the asylum statute permits the Attorney general to establish "*by regulation* . . . additional limitations and conditions." 8 U.S.C. § 1158(b)(2)(C) (emphasis added). The government does not contend (nor could it) that the Attorney General has exercised authority under that statute to bar aliens in reinstatement. Nor does it contend that reinstatement falls under the statutory exceptions. Rather, it seeks to interpret the reinstatement bar as an additional exception despite not being in the enumerated list. All the while, it seeks to avoid the exceptions (such as for withholding, CAT, and U Visa) to the purportedly absolute reinstatement bar. For these reasons, the provision permitting additional limitations does not excuse the BIA's failure to consider Perez's asylum claim when no such additional limitations have been promulgated.

Moreover, the provision permitting additional limitations requires them to be "consistent with this section [§ 1158]." 8 U.S.C. § 1158(b)(2)(C). A blanket limitation on aliens in reinstatement status would violate that restriction because it would not be "consistent with"

the portions of the asylum statute addressing successive asylum applications. The asylum statute permits an asylum application based on changed circumstances even after an alien has been removed after the denial of a previous asylum application. *See* 8 U.S.C. § 1158(a)(2)(D). Upon reentry, the alien would be placed in reinstatement status. The Attorney General could not use the authority from 8 U.S.C. § 1158(b)(2)(C) to bar asylum while in reinstatement because such a regulation would be inconsistent with 8 U.S.C. § 1158(a)(2)(D).

D. Perez's Asylum Claim Should Be Remanded for Consideration of Whether He Is Entitled to Asylum, Not Whether the Reinstatement Statute Bars His Claim.

Perez and the government both agree that if Perez prevails before this Court, then his asylum claim should be remanded along with his claims for withholding of removal and protection under the CAT. (*See* Opening Brief at 49; Answering Brief at 17.) The government, however, asserts (at 17) that the BIA should consider "in the first instance" the legal question whether someone in reinstatement proceedings may apply for asylum. The BIA, however, has already considered that issue

and reached a legal conclusion.[18] This Court is reviewing that legal decision. The proper disposition is to remand for consideration of Perez's application for asylum.

CONCLUSION

The parties unanimously agree that this Court should grant Perez's petition for review and remand to the BIA for consideration of Perez's CAT and withholding claims. In addition, the BIA should consider Perez's asylum claim on the merits because it legally erred in concluding that his status in reinstatement proceedings barred consideration of his asylum claim.

RESPECTFULLY SUBMITTED this 2nd day of February, 2015.

OSBORN MALEDON, P.A.

By s/ Eric M. Fraser

Eric M. Fraser
2929 North Central Avenue,
Suite 2100
Phoenix, Arizona 85012-2794

PRO BONO Attorney for Petitioner

[18] *See* AR000002 n.1. It has also considered the issue in other cases. (*See* Amicus Brief at 2 & n.1.)

CERTIFICATE OF COMPLIANCE PURSUANT TO

FED. R. APP. P. 32(a) FOR CASE NO. 13-70579

I certify that:

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Dated this 2nd day of February, 2015.

s/ Eric M. Fraser
Eric M. Fraser
PRO BONO Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 2, 2015.

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Rony Estuardo Perez-Guzman
939 South Nutwood Street
Anaheim, CA 92804

s/ Eric M. Fraser
Eric M. Fraser
PRO BONO Attorney for Petitioner

5795830