

No. 13-70579  
PRO BONO

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**In the United States Court of Appeals  
for the Ninth Circuit**

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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.

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

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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Pursuant to this Court's Notice (Doc. 50), Petitioner Rony Estuardo Perez-Guzman ("**Perez**") submits this Supplemental Brief.

## ARGUMENT

### **I. The Fifth Circuit reached, and incorrectly decided, the issue of asylum relief in reinstatement.**

After briefing was complete in this case, the Fifth Circuit issued its decision in *Ramirez-Mejia v. Lynch*, [794 F.3d 485](#) (5th Cir. 2015). That case held that an individual with reinstatement status "may not apply for asylum." *Id.* at 491.

A petition for rehearing en banc is currently pending, the decision does not address most of the arguments Perez has presented to this Court, and the decision's stated bases are incorrect. The decision is not binding on this Circuit and should not be followed.<sup>1</sup>

### **II. The Fifth Circuit has called for a response to a petition for rehearing en banc.**

The petitioner in *Ramirez-Mejia* filed a petition for rehearing en

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<sup>1</sup> This Court has frequently disagreed with the Fifth Circuit on immigration issues. *See, e.g., Oropeza-Wong v. Gonzales*, [406 F.3d 1135](#), 1142 n.5 (9th Cir. 2005) (noting Fifth Circuit decision that "reached a different result" and stating, "we disagree"); *Sareang Ye v. I.N.S.*, [214 F.3d 1128](#), 1134 n.4 (9th Cir. 2000) ("In reaching this conclusion, we decline to follow the Eighth and Fifth Circuits, which have held that vehicle burglary is a crime of violence.").

banc. Several organizations filed amicus curiae briefs in support of the petitioner (including separate briefs from two of the three amici curiae that supported Perez). The Fifth Circuit called for a response from the government and specifically directed the government to respond to the amici. *See* Clerk Letter (Doc. 00513247559), *Ramirez-Mejia v. Lynch*, No. 14-60546 (5th Cir. Oct. 27, 2015).

**III. The Fifth Circuit decision did not address the arguments Perez has presented to this Court in support of his petition.**

The Fifth Circuit did not fully address the reasons why applicants like Perez must be permitted to apply for asylum. Conspicuously, the decision did not attempt to reconcile the text of the two statutes. It did not apply any interpretive canons or acknowledge that any ambiguities must be construed in favor of the alien. *See* Opening Brief at 32-34. It did not address how to reconcile its holding with the specific statutory provision that permits successive asylum applications in limited circumstances notwithstanding the reinstatement bar. *See* Opening Brief at 34-37; Reply Brief at 27-31 (discussing [8 U.S.C. § 1158\(a\)\(2\)\(D\)](#)). It did not address the legislative history of the statutes. *See* Opening Brief at 37-39; Reply Brief at 31. For these reasons, this

Court should consider all of Perez's arguments and grant his petition for review.

**IV. The Fifth Circuit's decision is incorrect and relies on incorrect bases.**

**A. The Fifth Circuit incorrectly differentiated between asylum versus withholding and CAT relief.**

The government in this case does not dispute that several other forms of relief are available in reinstatement status, *notwithstanding* the bar to "any relief" while in reinstatement status. Relief under the Convention Against Torture and withholding of removal are available. The Fifth Circuit addressed that tension in part by noting that asylum is a form of "relief," but the Convention and withholding are "forms of protection, not relief." *Ramirez-Mejia*, 794 F.3d at 489. That distinction makes no sense.

First, the Fifth Circuit did not base its reasoning on any legal difference between the terms. Rather, it relied on common usage. But the terms are frequently used interchangeably. Asylum is frequently characterized as a form of "protection." *See, e.g., Afriyie v. Holder*, 613

[F.3d 924](#), 934 n. 7 (9th Cir. 2010) (“asylum protection”).<sup>2</sup> And this Court has referred to both the Convention Against Torture and withholding as forms of “relief.” *See, e.g., Avendano-Hernandez v. Lynch*, [800 F.3d 1072](#), 1075 (9th Cir. 2015) (“relief under Article 3 of the Convention Against Torture”; “CAT relief”; “relief under CAT”); *Vitug v. Holder*, [723 F.3d 1056](#), 1064-65 (9th Cir. 2013) (“Withholding of removal is a form of relief from deportation”; “withholding of removal relief”). Thus, the purported distinction in usage does not justify distinguishing those terms. Nor does the dictionary definition provided for “relief” provide any distinction — it accurately describes both the Convention Against Torture and withholding.

Moreover, if relief under the Convention Against Torture and withholding did not fall under the bar to “any relief” in the statute, then this Court would not have needed to explain repeatedly that those forms of relief are available “*notwithstanding*” the reinstatement bar. *See* Opening Brief at 40 (quoting *Ixcot v. Holder*, [646 F.3d 1202](#), 1207 (9th Cir. 2011) (“*Notwithstanding* the seemingly absolute bar on

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<sup>2</sup> In addition, the asylum statute itself suggests that asylum is equivalent to a form of “protection.” *See* [8 U.S.C. § 1158\(a\)\(2\)\(A\)](#) (“a claim to asylum *or equivalent temporary protection*” (emphasis added)).



immigration relief . . . even aliens subject to the new statute may seek withholding of removal.” (emphasis added)); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 956 n.1 (9th Cir. 2012) (Convention Against Torture relief available “*notwithstanding* the statute.” (emphasis added))).

**B. The Fifth Circuit incorrectly relied on agency rules that do not address the question and deserve no deference.**

The Fifth Circuit also cited agency rules as a basis for its decision. *See Ramirez-Mejia*, 794 F.3d at 490 (citing 8 C.F.R. §§ 241.8(a), (e); 208.31(e)). But those rules do not purport to interpret the asylum statute or answer the specific question at issue. For these and other reasons, the rules provide no basis for the Fifth Circuit’s conclusion and are not entitled to *Chevron* deference. *See* Opening Brief at 44-49. In this case, the government has not relied on those rules or any deference to support its argument. *See* Reply Brief at 26-27.

**C. The asylum statute does create rights and benefits.**

The Fifth Circuit reasoned that the asylum statute (8 U.S.C. § 1158) “does not ‘create any substantive or procedural right or benefit.’” *Ramirez-Mejia*, 794 F.3d at 490 (quoting 8 U.S.C. § 1158(d)(7)). But that statement expressly applies only to “this subsection,” i.e., to 8 U.S.C. § 1158(d). A different subsection guarantees the right to apply

for asylum. *See* [8 U.S.C. § 1158\(a\)](#) (“Any alien who is physically present . . . irrespective of such alien’s status, may apply for asylum.”).

**D. Neither the discretion given to the government nor the ability to impose regulations justify the Fifth Circuit’s decision.**

The Fifth Circuit relied on the discretionary nature of asylum relief and the ability of the government to write rules concerning asylum. *See Ramirez-Mejia*, [794 F.3d at 490](#). Those bases make no sense, as addressed in the briefing in this case. *See* Reply Brief at 34-37 (addressing discretionary nature); *id.* at 40-41 (addressing rulemaking). Fundamentally, the government does not argue that it has promulgated rules or exercised its discretion in this case. To the contrary, it argues that the statutory text “unambiguously prohibits” granting asylum in reinstatement status. Answering Brief at 18.

**E. The Fifth Circuit ignored the purpose of the asylum statute.**

The Fifth Circuit relied on the purpose of the reinstatement bar, *Ramirez-Mejia*, [794 F.3d at 490](#), but ignored the purpose of the asylum statute. The purpose of the asylum statute must be considered and, because it governs the particular form of relief requested by Perez, should control.

**F. Cases concerning adjustment of status do not apply to asylum.**

The Fifth Circuit also relied on cases concerning adjustment of status. *See Ramirez-Mejia*, 794 F.3d at 490-91. But that relief does not enjoy the broad guarantee provided by the asylum statute, which applies to “[a]ny alien . . . irrespective of” status. 8 U.S.C. § 1158(a)(1). *See* Reply Brief at 33-35.

**CONCLUSION**

The Fifth Circuit’s decision in *Ramirez-Mejia v. Lynch* is incorrect, is not binding, and should not be followed in this Circuit.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of November, 2015.

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**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED. R. APP. P. 32 (a) FOR CASE NO. 13-70579**

I certify that:

1. This brief complies with the length limitation from this Court's Notice (Doc. 50) calling for the Supplemental Brief because it contains seven substantive pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).\*

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Century.

Dated this 18<sup>th</sup> day of November, 2015.

s/ Eric M. Fraser

Eric M. Fraser

PRO BONO Attorney for Petitioner

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\* Note that the brief begins with the cover on page 1 in order to make the page numbering match the blue ECF page numbering and the PDF electronic page numbers. The substantive portions of the brief fit within the length limitation.

## 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 November 18, 2015.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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