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.

LORETTA E. LYNCH, 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 SECOND SUPPLEMENTAL BRIEF

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Pursuant to this Court's Order (Doc. 71), Petitioner submits this Supplemental Brief regarding 8 C.F.R. § 208.31(e) (the "**Interim Rule**").*

BACKGROUND ON THE INTERIM RULE

A bit of history provides context for the Court's questions. First, the agency promulgated 8 C.F.R. § 208.31(e) as an interim rule, without notice-and-comment rulemaking. *See* 64 Fed. Reg. 8478 (Feb. 19, 1999). It invoked the "good cause" exception from ordinary rulemaking (*17 years ago*). *Id.* at 8486 (citing 5 U.S.C. § 553). The Interim Rule at § 208.31(e) was duplicated as a final rule and renumbered as § 1208.31(e) when the Department of Homeland Security was created, but no substantive changes occurred and it also claimed the same rulemaking exception. *See* 68 Fed. Reg. 9824, 9825 (Feb. 28, 2003) ("no substantive change"); *id.* at 9828 (citing 5 U.S.C. § 553(d)).

Second, the agency promulgated the Interim Rule to implement the Convention Against Torture and § 2242 of the Foreign Affairs

* The Order raised only 8 C.F.R. § 208.31(e). The arguments in this brief apply with equal force to related regulations because the agency has never issued an authoritative interpretation of the interplay between 8 U.S.C. §§ 1158 and 1231(a)(5).

Reform and Restructuring Act of 1998 (Pub. L. No. 105-277). *See* 64 Fed. Reg. at 8478. Indeed, the title of the rulemaking was, "Regulations Concerning the Convention Against Torture." *Id.*

ARGUMENT

I. The government waived *Chevron* deference.

As a threshold matter, the government waived its opportunity to claim deference. Perez addressed *Chevron* in his opening brief. (Opening Brief at 44-49.) The government did not address that issue in response.

Arguments not addressed in an answering brief are waived. *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007). "The government must accept the consequences of its litigation strategies, as must any defendant." *Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1302 n.11 (9th Cir. 2014) (finding waiver).

II. The Interim Rule is not an authoritative interpretation of the interplay between the statutes.

The Interim Rule does not represent the agency's authoritative interpretation of the interplay between 8 U.S.C. §§ 1158 and 1231(a)(5). Neither the text of the Interim Rule itself nor the background

rulemaking information published in the Federal Register indicate that the agency intended to use the Interim Rule to address the interplay between the statutes.

The text of the Interim Rule does not squarely address the interplay between asylum and reinstatement. At best, it uses the imprecise phrase, "request for withholding of removal only." 8 C.F.R. § 208.31(e). That phrase has the procedural and practical effect of preventing an individual in reinstatement status from making a claim for asylum, but it does not indicate that the agency actually meant to address in this Interim Rule the interplay with 8 U.S.C. § 1158, which directs that "any alien" may seek asylum "irrespective . . . of status."

The lack of a direct answer to the question should come as no surprise given the rule's history and purpose. The agency promulgated the Interim Rule to implement the Convention Against Torture and a related statute; it did not set out to implement the asylum or reinstatement statutes specifically.

Had the government intended to create an additional limitation or condition on asylum, it could have relied on its authority in 8 U.S.C.

§ 1158(b)(2)(C). Tellingly, it did not invoke that authority. (Nor could it have properly done so. (*See* Reply Brief at 40-41.))

By creating a withholding-only procedural screening framework to implement the Convention Against Torture (which permits relief notwithstanding the reinstatement bar), the agency naturally brushed up against the question of asylum. But the background discussion in the Federal Register does not acknowledge the interplay between §§ 1158 and 1231(a)(5), purport to resolve it, or identify any ambiguity. The rulemaking states that an individual in reinstatement status is "ineligible for asylum," but it provides no citation, authority, explanation, or analysis for that conclusory assertion. *See* 64 Fed. Reg. at 8485. Instead, the agency merely assumed the conclusion. Conspicuously, the portion of the rulemaking justifying creating 8 C.F.R. § 208.31(e) does not even cite the asylum statute. *See* 64 Fed. Reg. at 8485.

Because the rulemaking does not "squarely address[] the question," or "mention, let alone elaborate on," the interplay between the statutes, it does not represent the agency's authoritative

interpretation of the issue. *John Hancock Mut. Life Ins. Co. v. Harris Trust*, 510 U.S. 86, 107-08 (1993).

III. The Court should not apply *Chevron* deference.

The Interim Rule does not even fall within the domain of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). And if it did, it would fail both steps.

A. The Interim Rule does not fall within the domain of *Chevron*.

The Interim Rule is not the agency's authoritative interpretation of the interplay between the statutes and consequently does not deserve deference. In particular, and as explained above, the rule and background do not purport to address the question, and the agency did not even set out to implement these statutes. If the Interim Rule even addresses the issue, it is not the product of reasoned decisionmaking.

The agency did not confront a statutory ambiguity and attempt to grapple with it. The rulemaking gives no indication that the agency determined that the Congress delegated (expressly or implicitly) a question for it to resolve. And to top it off, the Interim Rule skipped notice-and-comment rulemaking.

If the agency ignored the asylum statute because it mistakenly thought the reinstatement statute compelled the agency's interpretation, then it deserves no deference. "Deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1149 (9th Cir. 2013) (citations and quotation marks omitted).

B. The Interim Rule fails the two-part test.

1. Step one.

A court defers to an agency only for "statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *I.N.S. v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron*, 467 U.S. at 843 n.9). The Interim Rule fails step one because the rule of lenity and the text, history, and purpose of the statute all lead to a single result:

- **Rule of lenity.** If an ambiguity exists, then it must be construed in favor of the alien. (Opening Brief at 33.) *Cf. Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730-36 (6th Cir. 2013) (Sutton, concurring) (discussing lenity and *Chevron*); *but cf. Mujahid v. Daniels*, 413 F.3d 991, 998 (9th Cir. 2005).

- **Statutory text**. After applying standard interpretive tools, particularly that the specific governs the general, no gap remains for the agency to fill. (Opening Brief at 32-34.)

- **Legislative history.** The legislative history indicates that an individual in reinstatement status may claim asylum. The same legislative enactment that added the reinstatement bar also re-codified a broad asylum right, reformed certain asylum procedures, and barred successive claims absent changed circumstances. (Opening Brief at 37-39.)

- **Purpose.** The expansive availability of asylum claims (dating back to the Refugee Act) along with specific exclusions indicates the Congress's intent to codify the broad scope of eligibility and also codify with particularity the exceptions to that broad scope.

Because the Court may determine the proper interpretation of the interplay between the statutes through normal tools of statutory construction, the Court need not defer to the agency's determination.

2. Step two.

If the Interim Rule even addresses this question, its interpretation is not a reasonable interpretation of 8 U.S.C. § 1158(a)(1) and therefore fails step two.

- **Ignores broad eligibility.** The Interim Rule does not grapple with the broad guarantee in the asylum statute that "Any alien who is physically present . . . irrespective of such alien's status, may apply for asylum." 8 U.S.C. § 1158(a)(1). (Opening Brief at 31.)

- **Inconsistent with statutory provision for changed circumstances.** The Interim Rule directly conflicts with an important statutory provision regarding successive asylum applications. The statute specifically addresses what happens if an individual unsuccessfully claims asylum, is removed, and reapplies for asylum in light of changed circumstances. 8 U.S.C.

§ 1158(a)(2)(D). Because the Interim Rule would eviscerate this specific statutory provision, it is not a reasonable interpretation of the statute. (Opening Brief at 34-37; Reply Brief at 40-41.)

CONCLUSION

The petition for review should be granted.

RESPECTFULLY SUBMITTED this 27th day of April, 2016.

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By s/ Eric M. Fraser

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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 Order (Doc. 71) calling for the Supplemental Brief because it contains 1,394 words, 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 27th day of April, 2016.

s/ Eric M. Fraser
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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 April 27, 2016.

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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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