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 THIRD SUPPLEMENTAL 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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Regulations

Pursuant to this Court's Order (Dkt. 84), Petitioner submits this Supplemental Brief.

ARGUMENT

I. *Encino Motorcars* shows why the rules do not get *Chevron* deference.

A. This case should not be resolved based on deference.

The statutory interpretation question presented in this case is complex, but it should not involve deference to regulations. The Executive branch has never directly addressed this question in an authoritative way and has repeatedly declined opportunities to address this question in a way that might implicate deference.[1] Deferring to a regulation that does not purport to fill a statutory gap or resolve a statutory ambiguity would undermine the fundamental premises of *Chevron*. It would put a thumb on the scale in favor of a government

[1] Indeed, the government has not asked for deference from the Court. For example, in the government's first Supplemental Brief, it reiterated that the Court need not address *Chevron* or apply the rule. Dkt. 72 at 1 ("At the outset, however, Respondent respectfully suggests that resolution of this question [i.e., deference to the agency] is not necessary to disposition of the instant petition for review. . . . Thus, the Court need not address the issue of whether *Chevron* deference to the agency's reasonable interpretation of an ambiguous statute is warranted."); *see also* Petitioner's Second Supplemental Brief (Dkt. 74) at 5 (discussing waiver).

misinterpretation rather than requiring a reasoned judgment before giving deference.

In this case, the agency never identified any statutory ambiguity in the two statutes at issue here (8 U.S.C. §§ 1158, 1231(a)(5)), and the government does not even contend that an ambiguity exists. At argument, counsel for the government expressly asserted that the statute is not ambiguous, arguing that the statute compelled this result. *See* Oral Argument at 23:14, https://youtu.be/9L3SvBu7_Bo?t=23m14s ("Q: So, from your perspective, the statute is not ambiguous. / A: Correct."). Even if the Court disagrees, and finds the statute ambiguous, the fact that the government does not agree precludes deference in the first place because it indicates that the government thinks the question is controlled by statute.

Petitioner asks this Court to resolve this dispute by applying standard interpretive tools of statutory construction. If the Court finds the statute ambiguous, and if a future agency decision or regulation seeks to resolve that ambiguity in some other way, the Court may

address that new agency rule at that future time. But for now, it should resolve the question on the statutes, without deference.[2]

B. To the extent the rules address this situation at all, the agency failed to provide adequate explanation.

Encino Motorcars squarely held that when an agency fails to "give adequate reasons for its decisions," then the rule does not deserve *Chevron* deference.[3] *Encino Motorcars, LLC v. Navarro*, No. 15-415 (U.S. June 20, 2016), slip op. at 9. In particular, it explained, "where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." Slip op. at 9. It calls that requirement "one of the basic procedural requirements of administrative rulemaking." *Id.*

Most relevant here, both the agency in this case and the agency in *Encino Motorcars* "did not analyze or explain why the statute should be

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[2] In any event, it would not be helpful to remand to the BIA to resolve the interplay between the statutes because the BIA considers itself bound by regulation. (*See* AR00002 n.1.) The Court should, however, remand to the BIA to consider Perez's claim for asylum on the merits. (*See* Dkt. 20 at 49 (discussing remand).)

[3] That holding is unanimous. *See* Concurring Op. at 1 ("I agree in full that . . . [the agency] did not satisfy its basic obligation to explain. . . ."); Dissenting Op. at 1 ("I agree with the majority's conclusion that we owe no Chevron deference. . . .").

interpreted" in the manner advanced by the agency. Slip op. at 11. Here, the only hint of an explanation is the statement in the rulemaking background that an individual in reinstatement status is "ineligible for asylum." 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999). But that provides no explanation at all; it is merely a conclusory assertion. It has no citation, no authority, and — decisively — no analysis. Moreover, that barebones assertion provides even less explanation than what the Court found inadequate in *Encino Motorcars*, when the agency "stated only that it would not treat service advisors as exempt because 'the statute does not include such positions and the Department recognizes that there are circumstances under which the requirements for the exemption would not be met.'" Slip op. at 11 (citation omitted). In the face of that explanation, the Court held that the agency "said almost nothing"; but even that is more than the agency did here. *Id.*

In addition, the Court held that "the agency must at least display *awareness*" of what it is doing. Slip op. at 9 (emphasis added; quotations and citation omitted). In *Encino Motorcars*, the agency knew it was changing its position; here, the agency displayed no awareness that it was resolving the interplay between two statutes.

That suggests one of two possibilities. First, perhaps the agency brushed up against this issue by mistake, in which case its decision should get no weight. *Cf.* slip op. at 6 (describing part of the rule as "less than precise" and "an inadvertent mistake in drafting" (citing oral argument)). Second, perhaps it thought the statute compelled the result, in which case it should likewise get no deference. *See Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1149 (9th Cir. 2013) ("Deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." (citations and quotation marks omitted)). Either way, it deserves no deference.

Finally, in addition to all of that, the rule at issue here suffers from an even more fundamental defect than in *Encino Motorcars*. In *Encino Motorcars* the agency intentionally and expressly promulgated the rule under its authority to interpret the particular statute. By contrast, the agency here promulgated 8 C.F.R. § 208.31(e) without even citing the asylum statute, and without invoking any authority to promulgate rules regarding asylum. Consequently the rulemaking provided no notice to the public that it would address the interplay

between the asylum and reinstatement statutes, and no indication that the agency considered the complex issues of statutory construction required to harmonize the two statutes.[4]

C. *Encino Motorcars* does not require a change in an agency's position.

In *Encino Motorcars*, the Court applied general administrative law principles to awareness of a change in position, but the Court's holding applies more generally. *Encino Motorcars* characterizes an agency's obligation to "give adequate reasons for its decisions" as "one of the basic procedural requirements of administrative rulemaking." Slip op. at 9.[5] Perez argued similarly in his Opening Brief, filed more than two years before *Encino Motorcars* was issued. (Dkt. 20 at 45.) The

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[4] On top of all of that, the government has conceded that the rulemaking did not follow the Administrative Procedure Act. *See* Oral Argument at 22:12, https://youtu.be/9L3SvBu7_Bo?t=22m12s ("Q: Was that regulation promulgated pursuant to the APA? / A: It was not promulgated pursuant to a formal rulemaking. . . ."); *see also* Petitioner's Second Supplemental Brief (Dkt. 74) at 4 (explaining that neither 8 C.F.R. § 208.31(e) nor § 1208.31(e) were promulgated as final rules through notice-and-comment rulemaking).

[5] In addition, Justice Ginsburg's concurring opinion also explains that the majority opinion does not "disturb[] well-established law" because "there is no 'heightened standard'" when an agency departs from a prior position. Concurring Op. at 2. Thus, the holding of the case applies here, even though the agency has not changed its position.

principle applies without a change in agency position. *See, e.g.*, *Gila River*, 729 F.3d at 1150 ("Without an explanation of the agency's reasons, it is impossible to know whether the agency employed its expertise or simply pick[ed] a permissible interpretation out of a hat." (internal quotation marks and citation omitted)).

D. The agency arguably could have addressed this issue through rulemaking, and arguably still can regardless of how this Court rules.

By statute, the agency "may by regulation establish additional limitations and conditions" on eligibility for asylum. 8 U.S.C. § 1158(b)(2)(C). If the government wanted to address the interplay between the asylum statute and the reinstatement statute, it arguably could have attempted to do so by exercising its statutory rulemaking authority. It did not do so, and consequently the Court should rule based on the statutes, as both parties urge.

If the agency disagrees with this Court's interpretation of how to reconcile the statutory interplay, and if this Court finds the statutes ultimately to be ambiguous, then the agency may be able to propound a different interpretation through rulemaking after the Court issues its opinion in this case. The Supreme Court has held that an agency may

promulgate rules that conflict with a prior federal Court of Appeals decision. *See Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). In other words, ruling in Perez's favor would not usurp the role of the agency in administering the immigration statutes. If the agency has authority to promulgate rules, then it may do so even after this Court rules.

Perez does not concede that a rule prohibiting asylum in reinstatement would be permissible in light of the statutory text. If the agency were to engage in proper rulemaking on this issue, it would have no choice but to confront the asylum statute's plain text and the other reasons supplied by Perez and the amici that show why asylum must be available in reinstatement status.

Indeed, the amici in this case have demonstrated that the agency may "creat[e] rules that harmonize the broad right to seek asylum with the prohibition on relief in reinstatement." (Supplemental Amicus Brief (Dkt. 77) at 5.) For that reason, they have filed a petition for rulemaking asking the agency to promulgate rules to harmonize the statutes in that way. (*See id.* at 6 & n.5.) The government's failure to promulgate rules on this question is not irreversible, but it

demonstrates why this case must be resolved on the statutes rather than rules.

II. No timeliness issues bar Perez's claims.

A. Timeliness is irrelevant in this dispute.

The timeliness issues discussed in *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), and *JEM Broad. Co. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994), do not apply here. Those cases addressed procedural challenges to agency rules.

Perez has consistently maintained that the asylum statute, 8 U.S.C. § 1158, entitles him to apply for asylum, and that the case should be decided on the statutes rather than any regulation. (The government agrees that this case requires the Court to resolve statutes, not rules.) Perez also explained repeatedly that the rules do not apply because they do not expressly prohibit asylum claims in reinstatement status and were not promulgated expressly to answer that question. (Opening Brief (Dkt. 20) at 45; Supplemental Brief (Dkt. 51) at 9-10; Second Supplemental Brief (Dkt. 74) at 6-7.)

In short, ruling in Perez's favor does not require vacating any rules, so he had no obligation to challenge the rules when the agency first promulgated them.

B. The Court should not rule on timeliness because the government never raised it.

The government has never raised the statute of limitations in this case. It had several opportunities to do so if it thought the defense applied. The same situation presented itself in *Encino Motorcars*, and the Court declined even to consider whether any statute of limitations might apply, in light of the government's failure to raise it: "Respondents [the government] do not contest the manner in which petitioner has challenged the agency procedures here, and so this opinion assumes without deciding that the challenge was proper." Slip op. at 8. Faced with the same facts, this Court should do the same.[6]

C. Perez's challenge is timely because it qualifies for exceptions.

To the extent the Court interprets Perez's arguments as challenges to regulations, this case is not time-barred because it qualifies for recognized exceptions.

First, the limitations period does not apply "when agency action fails to put aggrieved parties on reasonable notice of the rule's

[6] The six-year statute of limitations at 28 U.S.C. § 2401(a) (if that even applied) is waivable and not jurisdictional. *See Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770-71 (9th Cir. 1997).

content. . . ." *JEM*, 22 F.3d at 326. As the D.C. Circuit explained, barring a case like this "founders on the erroneous assumption that the [agency's action] had confronted the issue presented in this appeal at all, much less disposed of the question with sufficient clarity to put [petitioner] on notice that failure to pursue its claim would bar subsequent review in this court." *RCA Glob. Commc'ns, Inc. v. FCC*, 758 F.2d 722, 730 (D.C. Cir. 1985); *id.* at 730-31 ("We simply cannot agree that a fair reading of the [agency action] permits the conclusion that [petitioner] did know or should have known that the Commission had confronted, much less resolved, the issue [petitioner] now petitions us to review."). Here, the agency did not mention asylum in the title of the rulemaking, cite the asylum statute or its statutory rulemaking authority under the asylum statute, or even explain that it intended to interpret the question at issue here.

Second, to the extent the rules apply at all in this situation, they exceed the agency's statutory authority. And because this dispute arises in the context of a removal proceeding (i.e., an enforcement action against Perez specifically), he may make that argument. "Regulated parties may always assail a regulation as exceeding the agency's

statutory authority in enforcement proceedings against them." *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 821 (6th Cir. 2015) (citing *Wind River*, 946 F.2d at 714); *see also Herr*, 803 F.3d at 821 ("A federal regulation that makes it six years without being contested does not enter a promised land free from legal challenge.").

In *Wind River*, this Court recognized the distinction between types of challenges and explained that a substantive challenge in an enforcement proceeding is not time-barred. *See* 946 F.2d at 715 ("If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger."); *see also NLRB Union v. FLRA*, 834 F.2d 191, 195 (D.C. Cir. 1987) (discussing substantive challenge "by way of defense in an enforcement proceeding"). For these reasons, Perez's challenge is not time-barred.

CONCLUSION

The petition for review should be granted.

RESPECTFULLY SUBMITTED this 11th day of July, 2016.

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

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 (Dkt. 84) calling for the Supplemental Brief because it contains 2,470 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:

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Dated this 11th day of July, 2016.

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 July 11, 2016.

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

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