No. 17-302

In The Supreme Court of the United States

RONY ESTUARDO PEREZ-GUZMAN
AKA RONNIE PEREZ-GUZMAN,

Petitioner,

v.

JEFFERSON B. SESSIONS III,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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December 21, 2017

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REPLY BRIEF FOR THE PETITIONER

The Ninth Circuit abdicated its responsibility to say what the law is. Instead of resolving a statutory conflict on the plain text, it deferred under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to an agency regulation that did not discuss or even acknowledge the conflict. That decision is flawed in multiple respects and has serious practical consequences. It warrants this Court's review.

Although the government opposes certiorari, its brief in opposition confirms that this Court's review is warranted. First, the government offers no substantive response to Perez's *Chevron* arguments. Second, the government agrees that the conflict between 8 U.S.C. § 1158's asylum provision and 8 U.S.C. § 1231(a)(5)'s reinstatement bar should be resolved on the plain statutory text. Third, as the petition noted, the courts of appeals are split on the proper way to reconcile these two provisions and on what *Chevron*'s role is in deciding that legal question. *See* Pet. 12-13, 32-34. The government has not identified any feature of this case that would make it an unsuitable vehicle for resolving both of these questions. The Court should grant the petition.

ARGUMENT

1.a. The government fails to offer any substantive response to the merits of Perez's arguments on the first question presented. *Compare* Br. in Opp. 22-26, *with* Pet. 14-23.

The government's response to the question of *Chevron*'s reach rests entirely on *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). *See* Br. in Opp. 22-26. It argues that *Home Builders* refutes Perez's position that "a statutory conflict creates neither a gap nor ambiguity, and thus that *Chevron* deference does not apply." Br. in Opp. 22. But *Home Builders* has not resolved that question for all circumstances, as illustrated by the separate opinions in *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014). *See* Pet. 15-18.

The government downplays the significance of *Scialabba* based on the facts. The brief in opposition suggests that the concurrence's reasoning applies only to conflicts within a single statutory provision like the one involved in that case. Br. in Opp. 25-26. Again, however, the government offers no legal argument or analysis in support of the theory that, from a *Chevron* perspective, intra- and inter-statutory conflicts are analytically different. And like in *Scialabba*, the statutory sections at issue here were enacted simultaneously, meaning that *Home Builders*'s reliance on the presumption against implied repeal does not apply.[1] *See Scialabba*, 134 S. Ct. at 2214 n.1 (Roberts, C.J., concurring in the judgment).

The government likewise avoids any serious discussion about the basic principle that "*Chevron* is

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[1] Congress enacted both sections as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009.

rooted in a background presumption of congressional intent." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). The brief in opposition does not attempt to explain how conflicting legislative commands reveal congressional intent to delegate authority to an administrative agency. *Cf.* Pet. 16-20.

In short, the government's opposition defends the Ninth Circuit's *Chevron* ruling on the facts of *Home Builders* and *Scialabba*, but it does not respond to Perez's arguments on the merits of the underlying legal principles, including courts' duty to say what the law is. The legal question about the proper scope and application of *Chevron* deference warrants this Court's review.

1.b. The government also contends that the "agency's resolution of any tension between Sections 1158(a)(1) and 1231(a)(5) was, at a minimum, reasonable, and thus entitled to *Chevron* deference." Br. in Opp. 21. To support this claim, the government repeats its arguments on the merits of the statutory text. *See id.* ("As discussed above, . . . the regulation *reflects the reasonable view*" that § 1231(a)(5) is more specific than § 1158(a)(1)) (emphasis added); *id.* ("given the distinctions between asylum, on the one hand, and withholding of removal and CAT protection, on the other, *it was at least reasonable*" for the agency to conclude that the reinstatement bar precludes the former but not the latter) (emphasis added).

But the agency provided none of these explanations when writing the regulations. *See* Pet. 22-23. And

this Court's precedent requires courts to assess the reasonableness of agency action based on the agency's explanation. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

As the petition explained, the Ninth Circuit's deference to unreasoned agency action sharpens the separation-of-powers concerns implicated by its erroneous interpretation of *Chevron*. Pet. 21-23. The government summarily dismisses these concerns with a citation to *Home Builders*. *See* Br. in Opp. 26 (dismissing Perez's separation-of-powers arguments as "running straight into *Home Builders*, which held that . . . 'it is appropriate to look to the implementing agency's expert interpretation' and the manner in which it has harmonized them. 551 U.S. at 666."). But when enacting 8 C.F.R. § 1208.31, the agency never claimed to have applied its expertise to harmonize §§ 1158(a)(1) and 1231(a)(5). *See* Pet. 21-23.

2.a. On the merits of the second question presented, the government posits that Perez's reading of § 1158(a)(1)'s asylum provision would nullify § 1231(a)(5) because the Chapter's other relief provisions (cancellation of removal, adjustment of status, voluntary departure, etc.), likewise do not cross-reference the reinstatement bar. Br. in Opp. 15-16. Not so. In contrast to these other types of relief, which are entirely within the Attorney General's discretion, § 1158(a)(1) provides an affirmative right to apply for asylum "irrespective of such alien's status." *Compare* 8 U.S.C. § 1158(a)(1), *with* 8 U.S.C. § 1229b(a) ("The Attorney General may cancel removal"); *id.* § 1229c

("The Attorney General may permit an alien voluntarily to depart"); *id.* § 1255(a) (noncitizen's status "may be adjusted by the Attorney General, in his discretion"). Thus, unlike § 1158(a)(1), the plain text of the other immigration remedies does not conflict with § 1231(a)(5).

2.b. The government responds to Perez's arguments concerning the *Charming Betsy* doctrine by asserting that the "canon applies where a statute is ambiguous." Br. in Opp. 18. Under *Charming Betsy*, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Accordingly, this canon should be used to resolve the tension between § 1158(a)(1) and § 1231(a)(5), thereby rejecting the government's position at either *Chevron* step one or step two.

The government also counters *Charming Betsy* by emphasizing the discretionary nature of asylum. Br. in Opp. 18-19. That misses the point. Preventing a refugee from *seeking* relief conflicts with the Refugee Convention and is not an exercise of discretion. *See* Scholars of Immigration and International Law Amicus Br. 14. The government's discretion has limits; the agency cannot refuse to consider a bona fide asylum application in a manner that conflicts with United States statutes or international law.

In addition, the government argues that Perez did not properly raise *Charming Betsy* below. Br. in Opp. 18. But the court considered the argument. The panel

noted that "[t]he court is particularly interested in the government's response to the arguments" raised by the international scholars concerning *Charming Betsy*. Dkt. 108 (Order) at 2.

2.c. On the merits of the international law arguments, the government responds that Perez's position "would upend United States immigration law." Br. in Opp. 19. Specifically, it argues that Article 34 of the Refugee Convention is a "discretionary regime," and contends that if asylum were mandatory, numerous provisions of U.S. immigration law would be in violation of the country's treaty obligations. Br. in Opp. 18-19 (emphasis omitted).

But Perez does not claim that "asylum is mandatory." Br. in Opp. 19. Rather, Perez argues that categorically barring refugees from seeking asylum implicates several treaty obligations, such as Article 31(1) of the Refugee Convention, which prohibits member countries from penalizing refugees solely "on account of their illegal entry or presence." Pet. 30 (citation omitted). After all, the government has not purported to exercise *discretion* to deny Perez's asylum claim. Rather, it disputes that Perez "should have been entitled to *apply* for asylum." Br. in Opp. 13 (emphasis added).

The government's only response to these points is a summary denial. For example, it asserts that "[s]tatutory limitations on the discretionary relief of asylum, including the reinstatement bar, do not . . . constitute 'penal[ties]' under Article 31(1)." Br. in Opp. 19. But the reinstatement bar does not just "limit" discretionary asylum relief; for people like Perez, it eliminates it. The

government concedes as much when it argues that Congress intended the reinstatement bar to "cut off certain avenues of relief," including asylum. *See* Br. in Opp. 15.

3. Finally, the government contends that this Court's review is unwarranted because nine courts of appeals "have reached the same conclusion" and held that noncitizens subject to reinstatement may not seek asylum. *See* Br. in Opp. 13, 27. In reality, however, the courts of appeals have fractured in their reasoning, approach, and result. *See* Pet. 32-34. Out of the nine appellate courts to consider this issue, only one has concluded that the plain text of the reinstatement bar controls based on a comprehensive analysis of § 1158 and § 1231. *See Mejia v. Sessions*, 866 F.3d 573, 584-87 (4th Cir. 2017).

Moreover, the courts of appeals' opinions reflect significant disagreement about *Chevron*'s role in resolving the conflict between the asylum and reinstatement provisions. Four courts of appeals have interpreted the plain text of the reinstatement provision as barring asylum. *See Mejia*, 866 F.3d at 576; *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 489-90 (5th Cir. 2015); *Garcia v. Sessions*, 873 F.3d 553, 557 (7th Cir. 2017); *Jimenez-Morales v. U.S. Att'y Gen.*, 821 F.3d 1307, 1310 (11th Cir. 2016). As noted above, however, only one of those opinions undertook an in-depth analysis of both § 1231 and § 1158, and the decision was not unanimous. *See Mejia*, 866 F.3d at 584-87; *id.* at 590-97 (Traxler, J., dissenting) (suggesting that the court lacked jurisdiction). The other three opinions

purporting to rule on the plain statutory text discussed the asylum provision only in passing, or not at all.[2]

Five other courts of appeals have declined to rule on the statutory text and instead deferred to the agency's view under *Chevron*. *See Garcia v. Sessions*, 856 F.3d 27, 31 (1st Cir. 2017); *Herrera-Molina v. Holder*, 597 F.3d 128, 138-39 (2d Cir. 2010);[3] *Cazun v. Att'y Gen. U.S.*, 856 F.3d 249, 251 (3d Cir. 2017); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1082 (9th Cir. 2016); *R-S-C v. Sessions*, 869 F.3d 1176, 1177 (10th Cir. 2017). Although these cases are aligned in terms of result, only two of the decisions were issued by unanimous three-judge panels.[4] Moreover, ruling in the agency's favor at *Chevron* step two does not suggest that a plenary review of the plain text would lead to the same result.

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[2] The Seventh Circuit's analysis of § 1158(a) consists of a single paragraph. *See Garcia*, 873 F.3d at 557. The Fifth and Eleventh Circuit opinions "did not discuss § 1158(a)(1)." Pet. App. 12 (Ninth Circuit Op., citing *Ramirez-Mejia*, 794 F.3d at 490 and *Jimenez-Morales*, 821 F.3d at 1310).

[3] Although at least one circuit described *Herrera-Molina v. Holder* as a ruling on the plain text of the reinstatement and asylum provisions, *see Mejia*, 866 F.3d at 583, the Second Circuit's decision rested on an earlier case applying *Chevron* deference to the agency's view. *See Herrera-Molina*, 597 F.3d at 138-39 (citing *Garcia-Villeda v. Mukasey*, 531 F.3d 141 (2d Cir. 2008)).

[4] In *Garcia v. Sessions*, the dissent concluded that the agency's interpretation was unreasonable under the *Charming Betsy* doctrine. 856 F.3d at 43-44 (Stahl, J., dissenting). The concurrence in *Cazun v. Attorney General* disagreed that *Chevron* deference was appropriate. 856 F.3d at 266-67 (Hardiman, J., concurring). And *R-S-C v. Sessions*, was decided by a quorum of two judges, rather than the ordinary three. 869 F.3d at 1177 n.1.

In short, the sharp differences in the courts of appeals' handling of this question of statutory interpretation reflect significant confusion over how to resolve the conflict between § 1158(a)(1) and § 1231(a)(5), as well as the role of *Chevron* deference in deciding that question. This Court's review is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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