

No. 09-72603

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Francisco Javier Garfias-Rodriguez
A 079-766-006

Petitioner

v.

Eric Holder, U.S. Attorney General
Respondent

Petition for Reivew of an Order of Removal by the Board of
Immigration Appeals

Brief of Amicus, American Immigration Lawyers Association, in
support of Petitioner's Petition for En Banc Rehearing

Not Detained

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INTRODUCTION

“That is real life reliance,” Judge Fletcher commented during a recent *en banc* oral argument. *Nunez-Reyes v. Holder*, 602 F.3d 1102 (9th Cir. 2010), *reh’g en banc granted*, 631 F.3d 1295 (9th Cir. Sept. 24, 2010), No. 05-74350 (argued en banc Dec. 14, 2010) (http://www.ca9.uscourts.gov/media/view_subpage.php?pk_vid=0000006126, at 40:30). In the situation presented here, like in *Nunez-Reyes*, the Ninth Circuit published precedent interpreting an immigration statute which many real people relied on to seek immigration benefits. These individuals would otherwise be exposed to deportation but for the Ninth Circuit ruling in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). Numerous individuals, as exemplified in this brief, relied on the published precedent of *Acosta* as a statement of law – and why shouldn’t they because isn’t that, after all, what precedent is for? Thus, non-citizens who have otherwise played by the rules understood that they were eligible for adjustment of status under a special penalty-fee program in spite of a checkered immigration history.

And so it was, because *Acosta* said it was, until just a few months ago when a panel published a new opinion in *Garfias-Rodriguez v. Holder*, --F.3d--, 2011 WL 1346960 (9th Cir. April 11, 2011), that overruled *Acosta*. Critical for the analysis here, the panel in *Garfias-Rodriguez* overruled *Acosta* not because *Acosta* was incorrect but rather because the Board of Immigration Appeals had issued a decision after *Acosta* that reached a contrary interpretation in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). The *Garfias-Rodriguez* panel believed that it was compelled to defer to the BIA opinion because of the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). *Garfias-Rodriguez*, 2011 WL 1346960 at *4.

Amicus, the American Immigration Lawyers Association, conducted a survey of its members to ascertain the full extent of “real life reliance” engendered by the *Acosta* decision. Relying on the results of that survey, we report some of the stories of individuals impacted by the quick and detrimental change in interpretation in order to explain why the *Garfias-Rodriguez*

decision should be reheard *en banc* because a new mode of analysis is required in a post-*Brand X* regime when BIA interpretations unsettle reasonable expectations based on prior judicial precedent.¹

STATEMENT OF INTEREST

The American Immigration Lawyers Association (“AILA”) is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining

¹ It also appears that the panel opinion in *Garfias-Rodriguez* may be premature because two important questions raised in the case are presently being considered by the Ninth Circuit *en banc* and it may be prudent to withdraw the panel decision until the *en banc* courts have resolved the related questions. In *Nunez-Reyes v. Holder*, the en banc court is considering the proper weight to afford to non-citizens’ reliance interests on published case law when there is a change in circuit law. *See* Transcript of Oral Argument, *Nunez-Reyes v. Holder*, No. 05-74350 (9th Cir. Dec. 14, 2010) (en banc), 2010 WL 5628784. In *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009), *reh’g en banc granted*, 621 F.3d 957 (9th Cir. Sept. 2, 2010) (argued en banc Dec. 16, 2010), a question posed to the court is if the BIA does not premise its published interpretation of a statute on an ambiguity, but merely declares that plain language controls the statute (as the BIA did in *Matter of Briones*), would *Chevron* (and therefore administrative deference) be implicated at all?

to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS") and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts.

ARGUMENT

I. *Acosta* was a watershed case that created important reliance interests.

As explained in *Acosta*, the penalty-fee adjustment program permitted individuals with close family or community ties to the United States, who had immigration violations but otherwise played by the rules, to come out of the shadows and seek permanent residence. *Acosta*, 439 F.3d at 554. Filing for adjustment, however, was perilous because it would expose these individuals to removal in light of their checkered immigration

histories. *See, e.g.*, 8 U.S.C. §§ 1182(a)(6)(A); 1182(a)(9)(B); 1182(a)(9)(C)(i)(I) (making noncitizens with unlawful presence and uninspected entries removable). *Acosta* clearly resolved the issue in favor of family unification and, as the stories below illustrate, many classes of individuals sought penalty-fee adjustment in reliance on the *Acosta* decision.

For example, numerous individuals who relied on *Acosta* were left exposed to removal without any alternative defense and now, after *Garfias-Rodriguez*, will certainly be deported. Here are representative situations where real life reliance on *Acosta* has exposed noncitizens to deportation without alternative remedies.

- Mr. Tejas Patel is a citizen of India. He is a pilot and flight instructor. Earlier, he had been admitted to the United States in M-1 status, overstayed, and then departed the United States. Mr. Patel entered the United States without inspection. Mr. Patel could have been deported because of his overstay and uninspected entry. He and his United States citizen spouse, as his sponsor, filed a concurrent application for penalty-fee adjustment in August 2007 based on *Acosta*. His application was denied and removal proceedings were commenced. During removal proceedings, Mr. Patel's wife was pregnant with the couple's now-newborn daughter. His wife also suffers from a non-malignant brain tumor that presses on her brain stem and optic nerve, harming her vision and causing severe headaches. DHS

refused humanitarian parole based on the wife's tumor, and Mr. Patel has no options for relief from removal.²

Mr. Patel's case demonstrates how the agency change in interpretation *after* he filed his adjustment application in reliance on *Acosta* has left him exposed to deportation without relief. There are other illustrative cases.

- Maria Guadalupe Miranda is a 45-year old citizen of Mexico who is married to a lawful permanent resident ("LPR") of the United States. Ms. Miranda is the mother of five U.S. citizen children ranging in age from 27 to 8. Her husband suffered a work related injury and is partially disabled. Ms. Miranda is the primary wage earner for her family. She first entered the United States unlawfully in 1988. She departed in 2003 and reentered unlawfully that same year. In June 2007, she filed for penalty-fee adjustment of status. Ms. Miranda sought advice of an attorney. Two years later, USCIS denied her application. She is presently in deportation proceedings.³
- Adalberto Hernandez-Ortiz is a 35-year old Mexican father of four U.S. citizen children, living in California with his children and legal permanent resident wife. Mr. Hernandez-Ortiz arrived in the United States as a minor. He filed for adjustment of

² Letter from Amy Prokop, Attorney, The Law Offices of Carl Shusterman, to Stephen W. Manning, Amicus Committee, American Immigration Lawyers Association (July 6, 2011) (on file with AILA).

³ *Id.*

status in 2006 with counsel relying on *Acosta*. CIS held his case in abeyance for three years pending policy review on *Acosta*, but finally denied his application in 2009 following *Briones*. Mr. Hernandez-Ortiz is now in removal proceedings, with no hope of relief as he is just short of eligibility for cancellation of removal.⁴

- Jose Antonio Rodriguez-Vasquez is a 32-year old Mexican father of two U.S. children living in California with his children and LPR wife. He filed for adjustment of status in 2007 through counsel following *Acosta*, which CIS denied in 2008 following *Briones*. The IJ pretermitted his application in 2010 after *Diaz and Lopez*. Mr. Rodriguez-Vasquez has no form of relief from removal.⁵

For these individuals relying on the published decision of the Ninth Circuit could cost them dearly. All three of these parents went from eligibility for legal permanent residence to the real prospect of deportation, which would strip them of their families and all else that makes life worth living.

Similarly, numerous individuals sought advice from an attorney because of their checkered immigration history and, based on a fair and reasonable reading of *Acosta* as setting forth

⁴ *Id.*

⁵ *Id.*

the law, attorneys advised them that they were eligible.⁶ Take for example the case of Catalina Ruelas Quintana. Ms. Quintana, lives with her husband in Oregon with three U.S. citizen children. Because her husband works as a long-distance truck driver, Ms. Quintana must care for the children alone. She departed the United States once, doing so to care for her mother after a stroke. Ms. Quintana filed for adjustment of status in 2007 through counsel, relying on *Acosta*. She is now in removal proceedings after *Briones*.⁷

Another example illustrates the reliance problem:

- Alejandro Rodriguez Madrigal lives with his U.S. citizen wife, two U.S. citizen children, ages seven and six, his U.S. citizen father and LPR mother. Mr. Rodriguez Madrigal is the only one working, and the five U.S. citizen family members, along with his LPR mother, are dependent on him for

⁶ Notably, without finality and stability of judicially-created rules, attorneys cannot give secure, confident advice. Indeed, it would seem that an attorney would be conducting legal malpractice by counseling a client to act against circuit precedent, especially when the BIA has clarified that circuit precedent is binding in the jurisdiction where the non-citizen resides. *See, e.g., Matter of Cienfuegos*, 17 I&N Dec. 184, 186 (BIA 1979).

⁷ Letter from Jennifer Rotman, Attorney, Immigrant Law Group, to Stephen W. Manning, Amicus Committee, American Immigration Lawyers Association (July 6, 2011) (on file with AILA).

income. Through counsel, Mr. Rodriguez Madrigal quickly filed for adjustment of status after *Acosta* was rendered. Now, after *Briones*, he is in removal proceedings.⁸

The point here is not that lawyers relied on the decision so that the *lawyers* obtained some kind of protection from retroactive rule changes but rather that in the complex world of immigration legislation, even noncitizens seeking competent attorney advice will be caught in the drastic change of interpretation that occurred here.

The family reunification principles that animated the *Acosta* decision drew many noncitizens with compelling histories out of the shadows to seek benefits but who then found themselves in removal proceedings.

- Juan Arteaga lives in Oregon with his wife and 12-year old son. He filed for adjustment through a family petition in 2008, relying on *Acosta*. His wife and son have derivative eligibility through Mr. Arteaga, but have no other immigration options. After the adjustment application was pretermitted, it was referred to the Immigration Court in 2010 in light of *Briones*. Now in removal proceedings, the family's only potential option for relief is an asylum

⁸ *Id.*

claim based on the drug trafficking violence in Mexico.⁹

- David Lemus Alonso is 35 years of age and lives in Oregon with his U.S. citizen wife and three U.S. citizen children, an 11-year old boy and six-year old twins. Mr. Lemus Alonso and his wife both have stable jobs and are homeowners. Based on his marriage, Mr. Lemus Alonso filed an adjustment of status application in 2007 through counsel. He did so relying specifically on *Acosta*. After Mr. Lemus Alonso's adjustment application was denied following *Briones*, he was placed in removal proceedings. His only potential relief is cancellation of removal.¹⁰

Mr. Arteaga and Mr. Lemus face enormous consequences if deported from the United States. They came out of the shadows to seek immigration relief based on the *Acosta* decision.

Importantly, some individuals who relied on *Acosta* had their applications shelved by the agency until the rule change in *Briones*. For example, Maria Cabrera and Ana Toro separately filed adjustment of status applications with USCIS in Oregon in 2007 with assistance of counsel, specifically relying on *Acosta*.

⁹ Letter from Jennifer Rotman, Attorney, Immigrant Law Group, to Stephen W. Manning, Amicus Committee, American Immigration Lawyers Association (July 6, 2011) (on file with AILA).

¹⁰ *Id.*

After holding the cases in abeyance for several years while “waiting on guidance from headquarters regarding *Acosta*,” CIS referred the cases to Immigration Court. Both individuals are now in removal proceedings.¹¹

These stories are exemplars of the individuals who should have been granted permanent residence under *Acosta* but who now face deportation after *Garfias-Rodriguez*. Indeed, the reliance interest inherently tied to *Acosta* is extraordinarily high, complete with severe consequences, a lengthy waiting period during the administrative process, thousands of dollars in attorney fees and agency fees, and in accordance competent legal advice. Notably, the Supreme Court has cautioned that reliance interests are particularly important in immigration proceedings, in large part because of “the severity of deportation – ‘the equivalent of banishment or exile.’” *See Padilla v. Kentucky*, -- U.S.--, 130 S. Ct. 1473, 1486 (2010)..

¹¹ Letter from Nicole H. Nelson, Attorney, Nelson Smith LLP, to Stephen W. Manning, Amicus Committee, American Immigration Lawyers Association (July 6, 2011) (on file with AILA).

It bears remark that the *Acosta* holding was not reversed by an *en banc* court or vacated because it was an incorrect interpretation of the statute – it merely was not the *only* permissible interpretation of the statute. Here, however, there is more than one permissible interpretation. Both *Acosta* and *Briones* are correct interpretations of the statute but the *Briones* interpretation prevails because in the face of a statutory ambiguity, the agency interpretation (if reasonable) prevails. Accordingly, reliance on *Acosta* should be protected because reliance on a permissible interpretation that turns out not to be the only interpretation (as determined several years after the fact) does no harm to the statute or its administration.

While there may be much academic celebration about *Brand X*'s interpretive pluralism and its policy flexibility, there are real people snared in the changing interpretive landscape that it permits.

II. The result in *Garfias-Rodriguez* raises constitutional concerns.

There is a difference between deferring to *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), as a permissible interpretation of a

statute (and not the only compelling interpretation) and rewriting judicial history to make as if *Acosta* were never published. *Brand X* cannot be understood to authorize the historical rewrite because that would implicate constitutional concerns inherent in the judicial function. It is cruel enough that for the numerous noncitizens who sought penalty-fee adjustment in reliance on the Ninth Circuit's published opinion in *Acosta*, the *Garfias-Rodriguez* panel stripped them of that relief and left them exposed to deportation. More troubling still is that the *Garfias-Rodriguez* panel opinion lands a devastating blow to the stability of appellate interpretations: when litigants reasonably rely on a judicial interpretation that is later judicially reversed under *Brand X*, is it really right to pretend that it never happened in the first place? The result in *Garfias-Rodriguez* incorrectly instructs such.

A hypothetical will make *Garfias-Rodriguez's* error plain. Assume that in 2006, it was the BIA (not the Ninth Circuit) that issued a precedent decision in Mr. Acosta's case that held similarly to the Ninth Circuit's precedent in *Acosta*. Assume further that based on this precedent, numerous individuals filed

for benefits exposing themselves to deportation. Finally, assume that sometime later, the BIA published a new precedent such as *Matter of Briones* that overruled its first decision as being unwise policy. It is patently clear under circuit precedent that those who sought benefits under the first agency rule would be protected from the change in agency policy because departure from the BIA precedent would be “excessive” and “unwarranted.” *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1328 (9th 1982). Why should the analysis be different merely because the first interpretation here was judicial? Regardless of whether the first interpretation stemmed from a judicial or administrative decision, the practical effect is the same: the change in the interpretation flips a statutory interpretation from one that provides an ameliorative immigration benefit to a severe immigration detriment.

An *en banc* court should do so because if noncitizens who relied on *Acosta* are left without any remedy, then a constitutional question is presented: whether an executive agency can permissibly erase a judicial decision? The answer is plain: no, because permitting such a result would be an unconstitutional

executive agency interference with the judicial function. The Supreme Court's decision in *Brand X* does not require this result. Indeed, at least two Justices have recognized this constitutional danger. *See, e.g., Brand X*, 545 U.S. at 1017 (2005) (Scalia, J., dissenting) ("Article III courts do not sit to render decisions that can be revised or ignored by executive officers."). Justice Stevens, the author of *Chevron*, touched on this concern. In explaining *Chevron*, he wrote,

The *Chevron* framework thus accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation. That the distinction can be subtle does not lessen its importance . . . Certain aspects of statutory interpretation remain within the purview of the courts, even when the statute is not entirely clear.

Negusie v. Holder, 555 U.S. 511, 129 S. Ct. 1159, 1171-72 (2009) (Stevens, J., concurring in part and dissenting in part). If convened *en banc*, the Ninth Circuit could address this constitutional concern and clarify the *Garfias-Rodriguez* holding.

CONCLUSION

For the foregoing reasons, the petition for rehearing *en banc* should be granted.

CERTIFICATE OF SERVICE

I, Stephen Manning, certify that on July 7, 2011, I electronically filed the Petition for Rehearing with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen W. Manning

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CERTIFICATE OF COMPLIANCE WITH FORMAT

I, Stephen Manning, certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this brief is double spaced, using 14-point proportional font is not more than 15 pages (not including the table of contents, table of citations, certificate of service, certificate of compliance, detention statement and statement of related cases).

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