

No. 07-35021

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CV-06-1411-MJP

AURELIO DURAN GONZALES, et. al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et. al.,

Defendants-Appellants.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, CV-06-1411-MJP

AMICUS BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTRODUCTION

Legal terms have only a single meaning, and, under Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), courts say what that meaning is. Id. at 177. The same is true for prior judicial precedent: a court opinion has only one meaning and it is the province of the courts to say finally what that meaning is.¹

Plainly, administrative agencies will interpret prior judicial precedent and will apply (or not apply, as the case may be) prior precedent to the parties appearing before them. This is, after all, why courts publish precedent. Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001). However, since the Ninth Circuit issued Duran Gonzales v. DHS, 508 F.3d 1227 (9th Cir. 2007) ("Duran"), and applied the Supreme Court's opinion in National Cable & Telecommunications Ass'n v. Brand X Internet Service, 545 U.S. 967 (2005), the Board of Immigration Appeals ("Board") and the Department of Homeland Security ("DHS") have aggressively asserted their own power to decide cases in derogation of prior circuit precedent. Viewing prior circuit precedent as provisional, the Board and DHS have embarked on a project whereby prior judicial interpretations of statute - which have governed questions of law for many years - will no

¹ See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 520 ("The judicial task, every day, consists of finding the right answer, no matter how closely balanced the question may seem to be. In appellate opinions, there is no such thing as a tie.").

longer bind them. The power they assert is not supported by the Supreme Court's decisions in Brand X or Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984). The panel opinion in Duran, which was wrongly decided, provides support to the agency's mistaken notion and undermines the stability of circuit precedent.

Because (1) the Board and DHS's view of Brand X infects the verticality of our appellate system, (2) the panel opinion in Duran applies an unworkable analytical framework for overruling prior precedent, and (3) the Duran decision has the potential to cause havoc in the Ninth Circuit's immigration docket as well as across the whole range of administrative agency cases, Amicus urges the court to convene *en banc* and resolve the matter.²

STATEMENT OF INTEREST OF AMICUS

The American Immigration Lawyers Association ("AILA") is a national association with more than 10,000 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 to immigration, nationality and naturalization;

² It is not unimportant that immigration cases represent a significant portion of cases on the Ninth Circuit's docket. According to statistics provided by the Ninth Circuit Executive Office, immigration petitions for review represented 41% of total appeals filed in 2005. Resolving this issue *en banc* will save future panels from struggling with Duran's unworkable rule and the agency's misplaced ideas of its power under Brand X.

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 and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

ARGUMENT

Brand X instructs that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982. The Duran panel misconstrued two crucial points when it applied Brand X. First, the Duran panel incorrectly found that an agency can overrule circuit court precedent, thereby undermining entrenched principles of judicial review and the verticality of the appellate system. The Duran court's directive has contributed to widespread confusion within the agency about its own ability to disregard and overrule circuit court precedent. Second, the Duran panel misapprehended its role in applying a previous

judicial interpretation of a statute. To promote the stability of precedent and protect circuit court uniformity, a panel should be bound by a previous panel's statement that is deciding an issue under Step One of Chevron.

III. The Duran Opinion Disrupts The Well-Established Verticality Of Our Federal Court System.

The vertical nature of our appellate system requires inferior adjudicative bodies to obey the decisions of superior courts. Hart, 266 F.3d at 1171. The Board of Immigration Appeals is the type of reviewing body which, by means of its rank in our scheme of judicial review, is bound by the law of the circuit courts of appeals. As the Seventh Circuit has explained,

[W]e think it not unwise to recall a basic tenet in our federal system of administrative practice and review. The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review, is much akin to a . . . District Court . . . That is to say, it is the 'inferior' tribunal, whose decisions, both substantive and, in some instances, adjective, are subject to review and consequent approval or disapproval by the reviewing body.

See Morand Bros. Beverage Co. v. NLRB, 204 F.2d 529, 532 (7th Cir. 1953); Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) (holding that the BIA "is obligated to follow circuit precedent in cases originating within that circuit.").

The Board itself has had a well-established framework in following precedent circuit court decisions. Matter of Vasquez-

Muniz, 23 I&N Dec. 207, 217-19 (BIA 2002) (en banc) (Rosenberg, J., dissenting and concurring). In Matter of Vasquez-Muniz, the Board reconsidered and overturned its own precedent, in part, to “assure uniformity of the law nationwide” following a recent Ninth Circuit opinion that was contrary to the Board’s own precedent. Id. at 213. Indeed, the Board has routinely and methodically followed circuit precedent in cases which arise in the circuit court’s jurisdiction. Id. at 216-19 (Rosenberg, J., dissenting and concurring).

The Board must follow circuit law even if the agency disagrees with the decisions announced by the circuit courts because there cannot be competing interpretations within the same jurisdiction of the same statute. “When courts interpret a statute, they search for its true meaning - and there can never be more than one true meaning.” Mesa Verde Construction Co., v. Northern Ca. District Council of Laborers, 861 F.2d 1124, 1146 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting). Once a circuit court determines the meaning of a statute, that meaning controls how inferior judicial bodies apply the particular statute. Hart, 266 F.3d at 1171. Brand X does not alter this rule of verticality, but Duran does.

The panel opinion in Duran incorrectly concluded that an inferior body’s decision, such as the Board of Immigration Appeals’ decision, may “effectively overrule” circuit precedent.

Duran, 508 F.3d at 1236 n.7. In light of Duran's mistaken holding, the immigration agencies and, in particular, the Board, incorrectly view Brand X as disrupting the well-established framework of following circuit court precedent in cases arising in that circuit's jurisdiction. Emboldened by this novel and incorrect theory, the Board has begun to decide cases in derogation of Ninth Circuit decisions despite the on-point force of precedent.

Prior to Duran, the Board understood and applied Brand X with an appropriate view of its status in the appellate hierarchy. In several decisions, published and unpublished, the Board has acknowledged that under Brand X, in the appropriate context, contrary circuit precedent would need to eventually give way to a Board interpretation. The Board specifically recognized that until the circuit court acted to overrule the precedent, it would be bound. See, e.g., Guajardo-Coronado, A95-929-111, 2006 WL 3203519 (Oct. 2, 2006, BIA) (unpublished) (citing Brand X, Board noted its interpretation contrary to circuit court, but following circuit court under *stare decisis*); Martinez-Velasquez, A44-245-224, 2006 WL 3203635 (Aug. 29, 2006, BIA) (unpublished) (same); Montes Perez, A45-744-491, 2006 WL 3203676 (Aug. 28, 2006, BIA) (unpublished) (same); Espinal, A38-676-095, 2006 WL 3252544 (Aug. 17, 2006, BIA) (unpublished) (same); Matter of Briones, 24 I&N Dec. 355, 371 n.9 (BIA 2007)

(noting disagreement with Ninth and Tenth Circuit precedent, but not resolving issue); Matter of Babaisakov, 24 I&N Dec. 306, 322 (BIA 2007) (citing Brand X and holding “[w]e leave for another day any questions that may arise with respect to circuit law that may be in tension with this decision, as we ordinarily follow circuit law in cases arising within the particular circuit and the grounds for any departure would need to be developed in the context of specific cases.”).³

After Duran, the Board understands that its power has expanded and that it may “effectively overrule” contrary circuit precedent. See e.g., Sawyers, A44-852-478, 2007 WL 4711443 (Dec. 26, 2007, BIA) (unpublished) (citing Duran to decide case in derogation of contrary Ninth Circuit precedent); Hernandez Barron, A75-178-354, 2007 WL 4818603 (December 31, 2007, BIA) (unpublished) (same).

This new theory of Board prerogative is unworkable because, while, a *circuit court* may indeed overrule its own prior precedent in light of a subsequent Chevron-deferrable interpretation, certainly the Board, the Immigration Judges, and the numerous front-line immigration adjudicators may not usurp this authority. The agency adjudicative bodies must abide by

³ Following the Board’s suggested mode of citation, we cite precedent decisions with “Matter of” and the case name. Unpublished opinions are cited without a modifier. BIA Practice Manual, Appendix J, J-2 (June 14, 2004).

circuit court precedent until the court of appeals abrogates it. Hart, 266 F.3d at 1170 (“Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point is the law.”) (emphasis in original).

The decision in Duran, which permits a Board decision to “effectively overrule” a circuit court opinion will lead to disunity. The well-established rule of verticality in our appellate system promotes predictability, consistency and uniformity within the circuit. Hart, 266 F.3d at 1171–1175. Predictability is of particular concern as to the statutory construction question raised in Duran. Although the law was passed more than ten years ago, the agency has made no demonstrable effort to create new regulations and waited for over a decade before issuing a published opinion addressing its view of the statutory provisions at issue here. The delay has proven of no benefit to anyone: the courts, the litigants, or even the agency itself.⁴

⁴ The Court’s concerns in Brand X regarding the timing and order of judicial and agency decisions are not implicated here. See Brand X, 545 U.S. at 983. The courts cannot be faulted for interpreting a statute before the Board has issued an interpretation where the Board refrained from issuing a published decision for more than a decade after the law came into effect and waited several years after the circuit courts began weighing in on the issue. If it is possible to abdicate an agency’s chance under Chevron for first bite at the apple, the Board’s disdain for its duties under the guise of

If indeed the Board may decide cases in derogation of prior precedent - even if the issue is one in which the Board's interpretation may ultimately prevail under Chevron - the potential for havoc is great. "In short, experience has taught that causes are disposed of most expeditiously when the correction of errors is left to the superior tribunals and those enjoying judicial or administrative inferiority studiously endeavor to comply with the mandate issued to them." Morand Bros. Beverage Co., 204 F.2d at 532.

II. A Panel's Statement That It Is Issuing A Decision Under Step One Of Chevron Binds Later Panels.

The Duran panel's decision also raises an important issue about a panel's power to second-guess a prior panel's Chevron analysis, particularly where the first panel issued its ruling before the Supreme Court issued its decision in Brand X. The analytical methodology employed by the Duran panel to disregard a previous panel's Chevron analysis is unworkable, destabilizes

streamlining would be a perfect example. Beginning in 2002, the Board adopted a policy of issuing decisions at a rate of tens of thousands each year without too much thought for its delegated role of administering the nation's immigration system. The euphemistic "streamlining" of cases resulted in the transfer of decision-making authority (and the cost of making all those decisions) from the agency to the federal courts. Dorsey & Whitney LLP, Board of Immigration Appeals: Procedural Reforms to Improve Case Management, at 39 (July 22, 2003), <<http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf>> (last visited 3/5/2008); John R.B. Palmer, The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis, 51 N.Y.L. Sch. L. Rev. 13, 18-20 (2006).

the rule of law, and disregards principles of *stare decisis*. Instead, the *en banc* court should find that once it is clear that an earlier panel intended to issue its decision under Step One of Chevron, a subsequent panel is bound by that decision.

While Chevron's two-step analytical framework is doctrinally pristine, the Ninth Circuit - like all courts reviewing agency decision-making - employs different words and phrases when addressing the central question of Chevron's first step: is the statute clear? Given the myriad of ways in which judges phrase their decisions, the issue for the courts after Brand X is how later panels should analyze earlier on-point decisions that would otherwise control the issue at hand. In other words, how does a reviewing court decide when an earlier opinion is a decision under Step One or Step Two of Chevron?

Brand X instructs courts to:

hold judicial interpretations contained in precedents to the same demanding Chevron step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

545 U.S. at 982-83. This rule is fairly straightforward to apply where the initial judicial decision was decided after Brand X since Brand X directs courts to overtly and plainly

communicate whether its holding is under the first step of Chevron.

Application of this precept is altogether a thornier issue when faced with the two decades of case law issued between Chevron and Brand X. As an initial matter, those judicial opinions were not written with Brand X's future directive in mind and therefore did not always use the exacting language noted by Brand X. See Brand X, 545 U.S. at 1018 (Scalia, J., dissenting) (questioning the implications for pre-Brand X cases and asking "what of the many cases decided in the past, before this dictum's requirement was established?"). "Opinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis." United States v. Muckleshoot Indian Tribe, 235 F.3d 429, 433 (9th Cir. 2000). Accordingly, applying an overly rigorous rule to pre-Brand X opinions would not be practical.

Moreover, some decisions that are plainly issued under the first step of Chevron nonetheless buttress their arguments with additional reasoning or alternative justifications. See, e.g., Riverkeeper, Inc. v. EPA, 475 F.3d 83, 110 (2d Cir. 2007) (explaining that "our primary conclusion in [a pre-Brand X decision] was that restoration measures are 'plainly inconsistent' with the statute's text, and our statements

regarding the legislative history of a proposed amendment, which we offered as ancillary, but not dispositive, support for our construction of the statute, in no way diminish the force of our conclusion that Congress unambiguously expressed its intent in the statute.”). As in Riverkeeper, a court’s discussion of ancillary matters for exposition purposes should not undercut a Step One finding.

Similarly, not all courts follow a strict textualist approach in evaluating the first step of Chevron, instead relying on various tools of construction, including legislative history. See, e.g., Mark Seidenfeld, A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 Tex. L. Rev. 83, 94–95 (1994) (explaining that there is no consensus on how the choice between “textualism” and “purposivism” manifests itself in the requisite level of clarity that a court demands in its Step One analysis). Even though jurists do not always agree as to what tools of construction may be relied on at the first step of the analysis, this should not provide a mechanism to undercut a previous panel’s insistence that its decision is issued under Step One of Chevron.

A subsequent panel should not be permitted to undo a previous panel’s finding that a statute is clear simply because the initial panel’s decision also contains dicta about what it

might do at Step Two, bolsters its finding by referencing an ancillary matter, or reaches its Step One decision based on an interpretive analysis as opposed to a strictly textualist approach. Rather, when it is clear that an earlier panel intended to issue its decision under Step One of Chevron, a subsequent panel should follow that decision.

The Ninth Circuit's decision in Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004), was issued prior to the Supreme Court's ruling in Brand X. The Perez-Gonzalez panel specifically stated that it was issuing the decision under Step One of Chevron. In Duran, the panel rejected the plain statement of the prior panel that it was deciding the issue under Step One of Chevron. See Perez-Gonzalez, 379 F.3d at 786. Instead of relying on the plain statement of the prior precedent, Duran applied a searching analysis of Perez-Gonzalez to conclude that, contrary to the text of the opinion, the decision appeared to rest on Step Two of Chevron. The Duran opinion then overruled Perez-Gonzalez and deferred to the Board's precedent decision in Matter of Torres-Garcia, 23 I&N Dec. 866 (BIA 2006).⁵

⁵ Duran's deference to Matter of Torres-Garcia was questionable because the Board found that the statutory language was clear. See Duran-Gonzalez, 508 F.3d at 1238; Matter of Torres-Garcia, 23 I&N Dec. at 875. When the Board finds a statute is clear, it is constrained by the statutory language and must give effect to congressional intent. Chevron, 467 U.S. at 843 ("If the intent

Brand X does not require that a searching analysis be applied to pre-Brand X cases. The investigative model employed in Duran is unworkable for two reasons. First, it is impractical. Application of Brand X to pre-Brand X cases requires a reasoned, workable approach rather than an overly strict standard. Its impracticality will cause confusion, additional litigation, and unsettle expectations across the range of administrative law holdings. The Fourth Circuit was recently confronted with a similar question and acknowledged that a searching analysis was inappropriate for pre-Brand X cases. Fernandez v. Keisler, 502 F.3d 337, 347-48 (4th Cir. 2007).

Second, it is a dangerous rule. A primary reason for adherence to precedent is to constrain judicial decision-making. "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them[.]" The Federalist

of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Where the Board finds that it is simply applying unambiguous statutory language, it is not interpreting the statute, filling statutory gaps, or giving concrete meaning to ambiguous terms through case-by-case adjudication. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (describing Board's role in interpreting the statute). Accordingly, where the Board finds a statute is clear, there is no agency interpretation to which the courts owe deference.

No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also Mesa Verde, 861 F.2d at 1146-47 (Kozinski, J., dissenting) (“Because courts are bound by the best construction of the statute, they may alter their interpretation only in response to a powerful new insight as to the law’s meaning, not because a different panel of judges prefers a different result.”). True, panels have always parsed prior precedent to determine if it was binding. Hart, 266 F.3d at 1170-71. It is a power of a different kind, though, if one panel can parse a prior decision, reject its plain wording, and overrule it. The Duran rule is, accordingly, unworkable.

CONCLUSION

For the reasons stated above, the petition for rehearing should be granted.

Submitted this 5th day of March, 2008,

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I, Stephen W. Manning, certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this amicus brief is double spaced, using monofaced typeface of 10.5 characters or fewer per inch and contains 3,424 words (not including the table of contents, table of authorities, certificate of service, and certificate of compliance).

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