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SUPREME COURT, U.S.

No. 22-868

IN THE

Supreme Court of the United States

ARIEL MARCELO BASTIAS,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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June 6, 2023

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REPLY BRIEF FOR PETITIONER

After Mr. Bastias filed his petition in this case, this Court granted certiorari in *Loper Bright Enterprises v. Raimondo*, No. 22-451, to consider, in relevant part, whether to "overrule *Chevron*." Pet. at i-ii, *Loper Bright Enterprises*, *supra* (No. 22-451). The Eleventh Circuit decision below depended entirely on *Chevron*: The court did not hold that the Board's decision was the best reading of the statute, but only that it was a "reasonable policy choice for the agency to make" given the statute's purported ambiguity. Pet. App. 9a (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005)). This Court should therefore hold this petition pending its decision in *Loper Bright Enterprises*. If this Court overrules or significantly modifies *Chevron* in *Loper Bright Enterprises*, then the Court should grant this petition, vacate the decision below, and remand.

If this Court does not hold this case for *Loper Bright Enterprises*, or if the Court ultimately upholds *Chevron*, then this Court should hold this case pending this Court's consideration of the petition in *Diaz-Rodriguez v. Garland*, No. 22-863 (filed Mar. 8, 2023), and any further proceedings in this Court, and then dispose of this case as appropriate in light of the Court's disposition of *Diaz-Rodriguez*. The government agrees that this petition "raises the same question" as *Diaz-Rodriguez*. Opp. 9 n.2 The government urges this Court to deny the petition for a writ of certiorari in *Diaz-Rodriguez*, but does not dispute that this petition should be held pending this Court's disposition of *Diaz-Rodriguez*.

I. This Court should hold this case pending its decision in *Loper Bright Enterprises* and, if the Court overrules or modifies *Chevron*, grant, vacate and remand this case.

After Mr. Bastias filed his petition, this Court granted certiorari in *Loper Bright Enterprises* to decide "[w]hether the Court should overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." Pet. at i-ii, *Loper Bright Enterprises*, *supra* (No. 22-451). Given that the Eleventh Circuit's decision rests entirely on *Chevron*, this Court should hold this petition pending its decision in *Loper Bright Enterprises*.

The decision below depended on *Chevron* deference. The panel began by explaining that it was reviewing the agency's decision "subject to the principles of deference articulated in *Chevron*." Pet. App. 6a. Under those "principles of deference," the court explained, the court asks first whether the statute "unambiguously" answers the interpretive question at issue. Pet. App. 9a. If it does not, then the court must accept the agency's interpretation so long as it is "a reasonable policy choice for the agency to make." Pet. App. 9a (quoting *Brand X*, 545 U.S. at 986).

Applying that two-step framework, the court first held that it is "bound by circuit precedent"—specifically, its prior decision in *Pierre v. U.S. Attorney General*, 879 F.3d 1241 (11th Cir. 2018)—"to conclude at *Chevron* step one that [the statute] is ambiguous." Pet. App. 9a. The court recognized "good arguments going both ways" as to whether the statute is, in fact,

sufficiently ambiguous to permit the agency's interpretation. Pet. App. 9a. But the court held that *Pierre* had definitively established the statute's ambiguity. As discussed in the petition (at 6-7), Judge Newsom concurred in his own panel decision to criticize the Eleventh Circuit's prior decision in *Pierre*, but agreed that *Pierre*, despite its flaws, was binding. Pet. App. 18a-22a.

The court then turned to *Chevron*'s second step—which, according to the court, permits "policy-based choices to adopt less-than-best readings" of a statute—and concluded that the Board's decision that child "abuse," "neglect," or "abandonment" "include[s] culpably negligent conduct likely to result in harm is a reasonable interpretation of the statute" and thus entitled to deference. Pet. App. 11a-17a.

If this Court overrules *Chevron*, the Eleventh Circuit's opinion plainly cannot survive. Without *Chevron*, the Eleventh Circuit would have had to decide not just whether the agency's decision was "a reasonable policy choice for the agency to make," Pet. App. 9a, but whether the agency had adopted the best reading of the statute. Had the court faced that question, it is very likely that the Eleventh Circuit would have come out the other way. Indeed, the panel recognized "good arguments" that Mr. Bastias's interpretation of the statute was not just correct, but was *unambiguously* correct. Pet. App. 9a.

The proper course is thus to hold this petition pending this Court's decision in *Loper Bright Enterprises* and then, if this Court overrules *Chevron* or modifies it in a relevant way, grant this petition, vacate the decision below, and remand to the Eleventh Circuit.

Remarkably, despite all of this, the government addresses *Loper Bright Enterprises* only in a footnote. Opp. 12 n.3. According to the government, *Loper Bright Enterprises* is irrelevant because this case "does not implicate any question about statutory silence because the INA contains an *express* delegation of authority." Opp. 12 n.3. But that addresses only the second half of the question presented in *Loper Bright Enterprises* (*i.e.*, whether "statutory silence ... does not constitute an ambiguity"). This Court also granted certiorari to decide "[w]hether the Court should overrule *Chevron*." The government does not—and cannot—explain why this Court should not hold this case until the Court decides whether to "overrule *Chevron*."

II. If the Court declines to hold this case pending its decision in *Loper Bright Enterprises* or reaffirms *Chevron* in that case, the Court should grant certiorari in *Diaz-Rodriguez* and hold this case pending its decision in *Diaz-Rodriguez*.

The government agrees that this petition presents the "same question" as the petition in *Diaz-Rodriguez*, *supra*. Opp. 9 n.2. And the government does not dispute that, if this Court were to grant certiorari in *Diaz-Rodriguez*, it should hold this case pending its resolution of *Diaz-Rodriguez*. *See* Pet. 8. The Court should therefore hold the petition in this case pending the disposition in *Diaz-Rodriguez*, then dispose of this petition as appropriate in light of the Court's disposition of *Diaz-Rodriguez*.

CONCLUSION

The petition for a writ of certiorari in this case should be held pending this Court's decision in *Loper Bright Enterprises*. If this Court overrules or modifies *Chevron*, the petition in this case should be granted, the judgment below should be vacated, and the case should be remanded for further consideration in light of *Loper Bright Enterprises*.

If this Court does not hold this case pending its decision in *Loper Bright Enterprises*, or if this Court reaffirms *Chevron* in *Loper Bright Enterprises* (or does not modify it in any way relevant to this case), then the petition for a writ of certiorari in this case should be held pending this Court's consideration of the petition in *Diaz-Rodriguez v. Garland*, No. 22-863, and any further proceedings in this Court, and then disposed of as appropriate in light of the Court's disposition of that case.

Respectfully submitted.

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