No. 07-1310

IN THE

Supreme Court of the United States

JULIO CESAR VALENZUELA GRULLON,
Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, MICHAEL J. GARCIA, EDWARD J. MCELROY, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Valenzuela-Grullon ("Valenzuela") demonstrated in his petition that the "streamlining" regulations precluded the Board of Immigration Appeals ("Board") from ruling in his favor on his challenge to the Board's prior en banc construction of the stop-time rule. The Department of Justice ("DOJ") stated it well when it promulgated those rules: "Appellants *do not have any vested right* or entitlement to review by a three-member panel of the Board [of Immigration Appeals], or even an expectation that their case is more likely than not to be referred to a three-member panel." *Board of Immigration Appeals: Procedural Reforms To Improve Case Management,* 67 FR 54878, 54898-99 (Aug. 26, 2002) (emphasis added). Rather, appellants are directed to a single member of the Board, who "shall affirm the decision ... without opinion" where, as here, the Board has previously decided the legal issue. 8 C.F.R. § 1003.1(e)(4); see Pet. 3-4.

Nowhere does Respondent refute Valenzuela's presentation of the streamlining regulations and their foreclosure of his challenge to a prior en banc decision of the Board. Instead, Respondent points to an administrative regime that DOJ might have created, rather than the one it did create. No one disputes that an agency could allow itself to reconsider its en banc rulings. See BIO 17-18. This agency, however, has denied itself that power in circumstances like Valenzuela's, by adopting rules that compel its members to deny appeals that seek to reverse a prior en banc decision. Under these rules, such an appeal is a wasteful formality that does not constitute an "administrative remed[y] available ... as of right" under 8 U.S.C. § 1252(d)(1) and thus does

not deprive the federal courts of jurisdiction over a petition for review.

Respondent also urges the Court to deny the petition for other reasons – that the split the Second Circuit acknowledged is not a formal split, that federal courts have "described" the stop-time provision as the Board construed it, and that the documentation of the Immigration Judge's ("IJ") decision is not adequate to support the petition. As shown below, none of these objections has merit.

1. The fundamental question presented is whether the streamlining rules so constrain the ability of the Board to entertain an appeal challenging a prior en banc decision that the availability of an appeal procedure is not an administrative remedy available "as of right" under of 8 U.S.C. § 1252(d)(1). The petition sets forth the applicable rules in detail, and explains why, had Valenzuela filed an appeal seeking to overturn the Board's en banc decision in *In re Perez*, 22 I. & N. Dec. 689 (BIA 1999), a single Board member would have been constrained to deny it summarily. Pet. 9-14.[1]

Rather than refute Valenzuela's presentation of the streamlining rules, Respondent points "[f]irst" to "the fundamental nature of agency decisionmaking" which is said to be that "[a]gencies are entitled to change their positions . . . ." BIO 17. One would have thought that "changing positions" (especially those adopted en banc) would be more of an exceptional,

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[1] *Perez* was a precedential decision. See 8 C.F.R. § 1003.1(g). Only the Attorney General or another en banc panel of the Board have authority to overturn an en banc ruling, *id.*, and only in limited circumstances that petitioner could not invoke. See id. § 1003.1(a)(5); § 1003.1(e)(6).

rather than a fundamental, attribute of agency decisionmaking. In any event, the dispositive point is that the streamlining rules have withdrawn from individual Board members whatever freedom the agency might otherwise inherently possess to change precedential decisions. An appeal challenging an en banc decision cannot lead to the kind of reconsideration Respondent now extols, because streamlining requires a board member summarily to deny any such appeal. It is not "petitioner" who "would deprive the Board" of the "means" to reconsider its prior decisions. BIO at 18. That wound was self-inflicted.

Second, Respondent argues that "there is no foundation" for thinking that the IJ denied his request for cancellation under *Perez*. BIO at 18. As shown below (pages 8-11, *infra*), that is flatly incorrect. *Perez* was the only reason for the denial, and the speculative alternatives were not and could not have been considered. Respondent also suggests that perhaps other changes in law might have affected the fate of Valenzuela's appeal to the Board. Such changes did not occur, however, and in all events Valenzuela's appeal could not have prompted them. That lightning might strike in some other proceeding does not transform the Board's truncated process into a remedy available as of right for Valenzuela.

Respondent also argues that a Board appeal remains essential to afford the reviewing court "the benefit of the Board's expertise" on whether "a particular legal argument *is* foreclosed by a prior Board decision . . . ." BIO 19. That is inapposite here, where the legal argument is that the four dissenters in *Perez* were correct. The Board fully addressed the stop-time rule in *Perez*, has reaffirmed

it many times since, and so the usual concerns underlying an exhaustion requirement (BIO at 11) are inapplicable here.

Finally, Respondent argues that an appeal to the Board must be a remedy available as of right because Congress requires IJs to "advise an alien of his 'right to appeal' his removal order. . . . " BIO 12 (*citing* 8 U.S.C. § 1229a(c)(5)), and because it is "mandatory" that aliens file such appeals. BIO 13. These arguments beg the question. No one disputes that the statute permitted Valenzuela to file an appeal with the Board, or that it is mandatory that administrative remedies be exhausted. None of that answers the separate question, which is whether, given that the streamlining rules have withdrawn from the Board any ability to entertain his appeal other than to summarily deny it, an appeal to the Board constitutes a "remed[y] . . . available as of right."

2. The conflicting answers given by the Second, Fifth, and Ninth Circuits to this central question confirm that the circuit split here is a real one that warrants plenary review. It is established law in both the Fifth and Ninth Circuits that where law constrains the Board's ability to rule in favor of an alien on a given issue of law, the alien need not present that issue to the Board in order to exhaust administrative remedies. *Arce-Vences* v. *Mukasey*, 512 F.3d 167 (5th Cir. 2007); *Sun* v. *Ashcroft*, 370 F.3d 932 (9th Cir. 2004).

Respondent principally seeks to distinguish *Arce-Vences* on the ground that the alien failed only to raise a particular issue before the Board, not to take an appeal. That distinction played no role in the Fifth Circuit's decision, however; the only reason that the court found that it had jurisdiction to decide the

claim at issue was because the Board was constrained by law not to remedy that claim and "§ 1252(d)(1) only requires that an alien exhaust administrative remedies that are *available as of right*." *Id.* at 172 (emphasis in original). Respondent argues that in *Arce-Vences* the Board "was powerless to depart from" a controlling decision of a federal court rather than an en banc decision of the Board. BIO at 14. Under the streamlining regulations, however, an individual Board member is every bit as powerless to depart from an en banc Board decision. Respondent further contends that the Fifth Circuit had jurisdiction to consider the unexhausted question "in any event" because it affected the scope of the court's jurisdiction. This is not the grounds on which the Fifth Circuit decided the issue. Indeed, the Fifth Circuit expressly notes that it was *not* holding that § 1252(d)(1) would never bar its consideration of whether an offense was an aggravated felony. *Id.*

Respondent argues that *Sun* v. *Ashcroft*, 370 F.3d 932 (9th Cir. 2004) fails to present a square conflict because the Ninth Circuit ultimately concluded that the alien's argument was not foreclosed by a prior en banc Board decision and it is unknown what the court would have done if it had been foreclosed. *Sun* clearly states, however, that "[s]ome issues may be so entirely foreclosed by prior BIA case law that no remedies are 'available . . . as of right'," *id.* at 942, and this clear statement repeatedly has been treated within the Ninth Circuit as settled law. As Respondent concedes, *see* BIO at 16 n. 5, the Ninth Circuit has applied the rule on two occasions to exercise jurisdiction over claims that aliens had failed to present to the Board. *See Murillo Noguez* v. *Gonzales*, 163 Fed. Appx. 485 (2006); *Orozco-Segura* v. *Gonzales*, 159 Fed. Appx. 779 (2005); *see also Puga*

v. *Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007) (citing *Sun* as settled law, and relying on other grounds (see *Matter of Lozada*, I. & N. Dec. 637 (BIA 1988)) that warranted consideration of the issue by the Board in the first instance). Certainly the Second Circuit understood that its decision conflicted with *Sun* when it stated that it "reject[ed] the Ninth Circuit's interpretation." Pet. App. 12a. However finely *Sun* might be parsed, both the Ninth and Second Circuits have construed it in a manner that conflicts with the decision below.

Respondent suggests that both the Fifth and Ninth Circuits might reach different decisions were they to consider this Court's decision in *Bowles*. *Bowles* is inapposite on the merits here, however, because Valenzuela is not seeking a jurisprudential exception to § 1252(d)(1). *Bowles* is relevant only as it illustrates what the devastating consequences would be of finding a bar to the exercise of federal jurisdiction where – as here – none exists.

Finally, Respondent's suggestion (BIO at 19) that the decision below has created a clear rule misses the point. The confusion lies in the differing understandings of the Second, Fifth, and Ninth Circuits. Indeed, by suggesting ways in which the existing decisions can be limited, Respondent further illustrates how reliance on seemingly clear precedent within a circuit may be a trap for the unwary. The importance of a clear rule is underscored by the tens of thousands of Board appeals subject to the exhaustion rule each year.

3. Respondent suggests that the petition be denied because the Second Circuit has elsewhere rejected Valenzuela's argument regarding the stop-time rule. BIO 19-22. This is incorrect.

Respondent initially and mistakenly asserts that the Second Circuit has "repeatedly (and correctly) *construed* the stop-time rule in a way that is inconsistent with Valenzuela's underlying argument." *Id.* at 11 (emphasis added). Later, however, Respondent states that the Second Circuit and other courts of appeals "have already repeatedly (and correctly) *described* the stop-time rule in terms that reject petitioner's argument on the merits." *Id.* at 20 (emphasis added); *see also id.* at 21. This retreat in terminology is telling. No court of appeals has been squarely presented with the issue of whether the stop-time rule terminates an alien's period of continuous residence upon the date of conviction or of the underlying offense. Respondent's cases confirm this point.

For example, in both *Martinez* v. *INS*, 523 F.3d 365, 369 (2d Cir. 2008), and *Tablie* v. *Gonzales*, 471 F.3d 60, 62 (2d Cir. 2006), the petitioner only challenged the retroactive application of the rule, and the court of appeals appears to have assumed, without deciding, that the Board's construction was correct. In *Reid* v. *Gonzales*, 478 F.3d 510 (2d Cir. 2007), petitioner, who "present[ed] [the court of appeals] with a series of sparse and unsupported arguments," "appear[ed] to argue that petitioner's case falls outside the holding of" *Perez*, but did not challenge *Perez* itself. The rule was not at issue in *Kamagate* v. *Ashcroft*, 385 F.3d 144, 151 n. 11 (2d Cir. 2004), where both the alien's commission of the crime and his conviction for the crime occurred after he had been continuously present in the United States for seven years. The proper construction of the rule also was not an issue in the other cases Respondent cites, because the date of conviction was within seven years of admission. *See Valencia-*

Alvarez v. *Gonzales*, 469 F.3d 1319, 1321 (9th Cir. 2006) (alien admitted in 1991 and convicted in 1997); *Sinotes-Cruz* v. *Gonzales*, 468 F.3d 1190, 1197 (9th Cir. 2006) (alien admitted in 1988 and convicted in 1993); *Peralta* v. *Gonzales*, 441 F.3d 23, 31 (1st Cir. 2006) (alien admitted in 1991 and convicted in 1995); *Heaven* v. *Gonzales*, 473 F.3d 167, 176 (5th Cir. 2006) (alien admitted in 1991 and convicted in 1995); *Okeke* v. *Gonzales*, 407 F.3d 585, 590 (3d Cir. 2005) (alien admitted in 1981 and convicted in 1983).

Because no court of appeals has squarely addressed the issue of whether an alien's period of continuous residence terminates upon conviction for a crime or some earlier date, Valenzuela's petition for review would present the Second Circuit with an important issue of first impression. The fact that four Board members dissented in *Perez* is itself a strong indication that the construction of the stop-time rule warrants federal court review. Further, the difficulties in selecting a date corresponding to the underlying conduct, compared to the certainty with which a date of conviction is known, weighs heavily in favor of employing the latter.

4. Finally, Respondent argues repeatedly that the record does not support a finding that Valenzuela was denied cancellation of removal based upon *Perez*, and that the record would be more complete had Valenzuela appealed to the Board. BIO at 14, 18-19, 22-23. Neither assertion is true.

Valenzuela was ordered removed and denied cancellation at a "master calendar" hearing on August 21, 2003. JA 254; Pet. App. 19a-21a. This was unusual, as master calendar hearings are not typically final hearings. *See* EOIR, *Immigration Court Practice Manual,* Ch. 4.15(a) (rev. ed. March 2008), *available at*

http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.html ("*Manual*") ("A respondent's first appearance before an Immigration Judge in removal proceedings is at a master calendar hearing. Master calendar hearings are held for pleadings, scheduling, and other similar matters.") At a master calendar hearing, the IJ typically advises the alien of his rights, explains the charges, factual allegations, and legal issues, sets deadlines for filing applications for relief and other documents, and schedules an individual hearing to adjudicate contested matters and applications for relief. *See id.* at Ch.. 4.15(e). An alien's challenges to removal and applications for relief are then resolved at the individual hearing. *Id.* at Ch. 4.16(a) ("Evidentiary hearings on contested matters are referred to as individual calendar hearings or merits hearings. Contested matters include challenges to removability and applications for relief.")

Here, the IJ ruled unexpectedly at the master calendar hearing that Valenzuela was not eligible for cancellation of removal because of *Perez*. He never scheduled an individual calendar hearing, and never set any deadlines for filing an application for cancellation (Form EOIR-42A) or supporting papers in advance of such a hearing. Thus, he did not deny, and could not have denied, cancellation of removal on the basis that the request was "past the filing deadline" or "abandoned." BIO 22. Similarly, he did not deny, and could not have denied, cancellation (in addition to or in the alternative to *Perez*) as an exercise of his "discretion." *Id.*; see 8 U.S.C. § 1229b(a). At a master calendar hearing, the record for an exercise of discretion is incomplete; before weighing the equities, the judge would have set an individual hearing and allowed the parties to submit

applications, motions, exhibits and testimony as appropriate. *See Manual* at Ch. 4.16(b).

Instead, the IJ concluded that he could not cancel removal because of *Perez*. Notably, Respondent, who was present at the hearing, has never affirmatively argued that cancellation was denied for some reason other than *Perez*.

Rather, Respondent has asserted that the record fails to establish that *Perez* was the basis for denial. Respondent maintains that if Valenzuela appealed to the Board, the record would contain a transcript of the IJ's oral decision. When Respondent attempted, however, to prepare a transcript of the oral decision in conjunction with Valenzuela's habeas petition, *see* JA 1, it could not do so, because of the poor quality of the available recordings. *See* Respondents' Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, *Valenzuela Grullon* v. *Ashcroft*, Case No. 03 Civ. 8039 (TPG) (S.D.N.Y. filed Mar. 30, 2004) at 5 n. 4 ("Because Valenzuela did not file an appeal with the BIA, the Executive Office for Immigration Review did not prepare a transcript of his appearances before the IJ. *See generally Matter of Ambrosio*, 14 I. & N. Dec. 381, 383 (BIA 1973). ICE obtained copies of recordings thereof for this Office, but the quality of those copies did not permit us to prepare a transcript."). Respondent has never made any showing that the tapes that would have been used for a Board appeal would have been any more audible than the copies provided for the District Court.

Finally, a written decision by the Board would have shed no additional light on the proceedings below. A Board member would have been required, by rule, to issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision

below. The decision below is, therefore, the final agency determination. See *8 CFR 1003.1(e)(4).*" 8 C.F.R. § 1003.1(e)(4)(ii). Such an order "shall not include further explanation or reasoning." *Id.* In short, nothing would have amplified the record had Valenzuela appealed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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