No. 09-35174

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AURELIO DURAN GONZALEZ; et al.,
Plaintiffs - Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; et al.,
Defendants - Appellees.

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

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS

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I. INTRODUCTION

Pursuant to the Court's order dated August 3, 2011, Plaintiffs-Appellants hereby submit supplemental briefing addressing the impact of the Court's *en banc* ruling in *Nunez-Reyes v. Holder*, __ F.3d __, 2011 WL 2714159 (9th Cir. July 14, 2011), on this appeal. The issue presented in the instant appeal is whether the District Court erred in failing to engage in a retroactivity analysis to determine if the new rule adopted by this Court in *Duran Gonzales v. Dept. of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007) (*Duran Gonzales I*), applies to Plaintiffs and a subgroup of class members who relied on the old rule set forth in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).

In the first appeal of this case, the Court overturned the District Court grant of preliminary injunctive relief to Plaintiffs and class members and, in doing so, announced a new rule with respect to adjustment of status eligibility for individuals inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(II).[1] Significantly, the preliminary injunction had covered persons who already had applied for adjustment of status in reliance on the prior rule, as well as future adjustment applicants. Although this Court vacated the preliminary injunction, it remanded the case to the District Court

[1] A noncitizen with an approved visa petition is eligible to adjust his or her status to that of a lawful permanent resident provided the person is admissible under the grounds set forth in 8 U.S.C. § 1182, *or* the Department of Homeland Security (DHS) waives their inadmissibility. This case involves eligibility to apply for a waiver of the inadmissibility ground located at 8 U.S.C. §1182(a)(9)(C)(i)(II) for having reentered after a prior removal order.

for further proceedings consistent with its opinion adopting the new rule. *Id.* at 1242-43.

On remand, Plaintiffs moved to amend the complaint and to redefine the previously certified class, so as to address the reliance claims of class members who already had filed adjustment applications with the necessary waiver prior to this Court's holding in *Duran Gonzales I*.[2] The District Judge denied the motion to amend the complaint and redefine the class; she found that any such modification would be futile because the Ninth Circuit's order must be applied retroactively. Plaintiffs-Appellants Excerpt of Records (hereinafter, "E.R.") 3. Plaintiffs appealed the District Court's order.

Following the District Court's decision, and after Plaintiffs filed the instant appeal, another panel of this Court, in *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1090-91 (9th Cir. 2010), held the new rule adopted in *Duran Gonzales I* applies retroactively pursuant to its understanding of traditional rules regarding judicial interpretations.[3] However, the retroactivity holding in *Morales-*

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[2] The redefined proposed class consists only of persons who filed applications to waive their inadmissibility under 8 U.S.C. § 1182(a)(9)(C)(i)(II) on Form I-212 (hereinafter, "I-212 applications") before the *Duran-Gonzalez* decision, and does not include those who either filed after that date, or who have not yet filed (as the prior class definition did). All named Plaintiffs fall within the proposed narrowed class.

[3] Notably, the petitioner in *Morales-Izquierdo* did not present the issues of reliance that Plaintiffs do in this appeal, as the law at the time Mr. Morales-Izquierdo submitted his waiver already disqualified him from establishing

Izquierdo has since been superseded by this Court's *en banc* opinion in *Nunez-Reyes*. *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1019 (9th Cir. 2006) (holding that where the reasoning of a prior authority is irreconcilable with the reasoning of an intervening higher authority, panel is bound by intervening higher authority).

The *en banc* opinion in *Nunez-Reyes* makes clear that it was incumbent on the District Court to engage in a retroactivity analysis to determine whether the new rule announced in this case should be applied prospectively only. Specifically, *Nunez-Reyes* clarifies that the District Court should have applied the three factor test laid out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *Nunez-Reyes*, 2011 WL 2714159 at *4-6. In light of *Nunez-Reyes*, this Court should reverse the District Court's order denying Plaintiffs' motion to amend the complaint and redefine the class and remand this case to allow the District Court to conduct the retroactivity analysis.[4]

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eligibility given that he did not timely file his waiver application. *See Padilla v. Ashcroft*, 334 F.3d 921, 925-26 (9th Cir. 2003).

[4] This Court now is reviewing the District Court's failure to engage in any retroactivity analysis. *Nunez-Reyes* settles the question of which retroactivity test applies (*Chevron Oil)*. Plaintiffs submit that the Court should remand the case to the District Court for the purpose of applying the test in the first instance. *Duran Gonzales I* did not address the issue of retroactivity and was reviewing only a decision on a preliminary injunction, and then remanded proceedings back to the District Court. Plaintiffs contended at that time that it was proper for the court to engage in a retroactivity analysis but the court declined to do so. *Nunez-Reyes* now requires that the court engage in the *Chevron Oil* analysis. Plaintiffs further submit

II. ARGUMENT

A. The District Court Should Have Applied the Retroactivity Test Laid Out Under *Chevron Oil*.

Plaintiffs' motions to amend their complaint and redefine the proposed class were appropriate and necessary because *Duran Gonzales I* did not address whether its decision announcing a new rule applied retroactively. Plaintiffs and Defendants agree that the decision in *Duran Gonzales I* establishes a new rule for all future applicants. However, the retroactivity question subsequently presented to the District Court is whether the new rule should be applied to class members who already had filed their applications before the new rule was announced, i.e., in reliance on the old rule under which they were eligible to have their waiver applications adjudicated. The *en banc* decision of this Court in *Nunez-Reyes* has now confirmed that indeed, the District Court erred in finding that the retroactivity test in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) was inapplicable. E.R. 17.[5]

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that remand for this purpose is consistent with the Court's prior remand for further proceedings consistent with *Duran Gonzales I*. *Duran Gonzales I,* 508 F.3d at 1242-43.

[5] This Court reviews the District Court's denials of Plaintiffs' motions for an abuse of discretion. *See Mt. Hood Polaris, Inc. v. Martino (In re Gardner)*, 563 F.3d 981, 990 (9th Cir. 2009) (leave to amend); *Lozano v. AT&T Wireless Servs.*, 504 F.3d 718, 724-25 (9th Cir. 2007) (class certification). *See also* Fed. R. Civ. Proc. 15(a) ("leave shall be freely given when justice so requires"); Fed. R. Civ. Proc. 23(c)(1)(C) (an "order that grants or denies class certification may be altered or amended before final judgment").

In *Nunez-Reyes*, the Court overturned its prior precedent *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). *Nunez-Reyes*, 2011 WL 2714159 at *3. In doing so, the Court recognized that many noncitizens had relied on *Lujan-Armendariz*. *Nunez-Reyes*, 2011 WL 2714159 at *6. Consequently, it reviewed whether the new rule should be applied retroactively to persons who had been convicted prior to the new rule being announced. *Id*.

The *Nunez-Reyes* Court recognized that, while the "default principle" is that a court's decision applies retroactively to all cases pending before the courts, the court may depart from that "default principle" when the new judicial decision meets the criteria set forth in *Chevron Oil*. *Nunez-Reyes*, 2011 WL 2714159 at *6. The Court found that it is obliged to apply the *Chevron Oil* test whenever there is a new rule of law announced in a civil case that does not concern the Court's jurisdiction. *Nunez-Reyes*, 2011 WL 2714159 at *7.

B. Had the District Court Applied the Three Factor Retroactivity Test Laid Out Under *Chevron Oil*, It Would Have Concluded that the New Rule Announced in *Duran Gonzales I* Applies Prospectively Only.

In light of *Nunez-Reyes*, the District Court should be instructed to apply the correct retroactivity test as established in *Chevron Oil*. This test requires a three-part analysis:

> First, the court considers whether a decision establishes a new principle of law. If so, it may be applied prospectively only.

> Second, the court examines whether retroactive application will advance the new holding.
>
> Third, the Court looks to fundamental principles of fairness.

Nunez-Reyes, 2011 WL 2714159 at *7.

First, the new rule adopted in *Duran Gonzales* unquestionably established a new principle of law by overruling the Court's earlier precedential decision in *Perez-Gonzalez*, on which the proposed narrowed class relied. *Accord Nunez-Reyes*, 2011 WL 2714159 at *6 ("There is no question that our decision today 'establish[es] a new principle of law . . . by overruling clear past precedent on which litigants may have relied.'") (internal citation omitted). Indeed, this Court already has recognized that *Duran Gonzales I* overruled this Court's decision in *Perez-Gonzalez*. *See Duran Gonzales*, 508 F.3d at 1242 ("we hold today that we are bound by the BIA's interpretation of the applicable statutes in *In re Torres-Garcia*, even though that interpretation differs from our prior interpretation in *Perez-Gonzalez*") and 1236 n.7; *see also Morales-Izquierdo*, 600 F.3d at 1081 ("the law of our circuit relating to Form I-212 waivers changed. In [*Duran Gonzales I*], we overruled our prior precedent and held that a Form I-212 waiver could *not* be used to waive the statutory ten-year bar to readmission for previously removed aliens.").

Further, as in *Nunez-Reyes*, it would be fundamentally unfair to apply the decision retroactively to those who applied for lawful permanent residency based on this Court's clear holding in *Perez-Gonzalez*. *See Nunez-Reyes*, 2011 WL 2714159 at *6-7; *see also Holt v. Shalala*, 35 F.3d 376, 381 (9th Cir. 1994) (finding plaintiffs' reasonable reliance on prior decision rendered retroactive application fundamentally unfair); *Glazner v. Glazner*, 347 F.3d 1212, 1220 (11th Cir. 2003) (noting that it would be fundamentally unfair to subject a class of persons to the "strong likelihood of liability" where they faced no likelihood of liability before).

In assessing this factor, the *Nunez-Reyes* Court examined the clarity of the prior overruled precedent and actions taken in reliance on that precedent, reasoning that the ability to "make a fully informed decision" is paramount to the analysis. *Nunez-Reyes*, 2011 WL2714159 at *7. Notably, the *en banc* Court examined the reliance of litigants generally, rather than on the particular petitioner before the court. *Nunez-Reyes,* 2011 WL 2714159 at *6-7.

These concerns equally are applicable here, where the *Perez Gonzalez* holding was clearly established, and Plaintiffs and proposed narrowed class members applied for this benefit with explicit reliance on the Court's holding.[6] In

[6] *See* Plaintiffs-Appellants Opening Br. 12-15. The agency itself acknowledged the prior rule under *Perez-Gonzalez*, and declared itself bound by that holding. *See* March 31, 2006, Interoffice Memorandum, providing field

addition, subsequent Ninth Circuit case law reinforced the holding in *Perez-Gonzalez*. *See Acosta v. Gonzales*, 439 F.3d 550, 553-54 (9th Cir. 2006) (finding that *Perez Gonzales* controls where persons inadmissible under 8 U.S.C. § 1182(a)(9)(C) (i)(I) are eligible for adjustment of status under 8 U.S.C. § 1255(i)). By applying *Duran Gonzales I* prospectively, future applicants will know that they are not eligible to apply for an I-212 waiver and, thus, "will be able to make a fully informed decision" about applying for adjustment of status. *Nunez-Reyes,* 2011 WL2714159 at *7.

Here, named Plaintiffs and proposed redefined class members submitted their adjustment applications, paying thousands of dollars in filing fees and attorney fees in unequivocal reliance on *Perez-Gonzalez*. Only after doing so did the rule change, rendering named Plaintiffs and proposed redefined class members ineligible for residency, forcing them to suffer great financial loss, and even more devastating, subjecting them to summary expulsion and indefinite separation from their lawful permanent resident and U.S. citizen families. Thus, retroactive application imposes an immense burden on Plaintiffs and others like them who filed applications in reliance on *Perez-Gonzalez*.

In *Nunez-Reyes,* the Court also looked to other tests governing retroactivity in assessing whether it is fundamentally unfair to apply a new judicial decision

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guidance for the adjudication of I-212 waiver applications in light of *Perez-Gonzalez*, March 31, 2006. E.R. 54-57.

retroactively. 2011 WL 2714159 at * 6 (discussing *INS v. St. Cyr*, 533 U.S. 289, 322 (2001), which involved the retroactive application of a new statute, as opposed to a new judicial decision). Similarly, here, *Chay Ixcot v. Holder*, No. 09-71597, __ F.3d. __, 2011 WL 2138234 (9th Cir. June 1, 2011), offers guidance. In *Chay Ixcot* the Court found that the change in law should not be applied to persons who applied for asylum before it took effect and eliminated their eligibility for relief. *Id.* at *9. *See also Faiz–Mohammad v. Ashcroft,* 395 F.3d 799, 809-10 (7th Cir. 2005) (finding that application of change in law eliminating eligibility for adjustment of status would have impermissible retroactive effect if applied to person who filed adjustment of status application in reliance on prior law); *Sarmiento Cisneros v. Attorney General*, 381 F.3d 1277, 1284 (11th Cir. 2004) (same); *Arevalo v. Ashcroft,* 344 F.3d 1, 5 (1st Cir. 2003) (same).

Likewise, in the instant case, Plaintiffs filed their I-212 waiver applications before the new law took effect. Just as it was fundamentally unfair to apply the new law eliminating eligibility for asylum and adjustment of status in the aforementioned cases, applying the judicial change made by *Duran Gonzales I* retroactively to Plaintiffs and proposed class members also would be fundamentally unfair.

Finally, retroactive application of *Duran Gonzales I* will not advance the new holding. In assessing this factor, the *Nunez-Reyes* court looked to the new

rule's "history, purpose, and effect." *Nunez-Reyes*, 2011 WL 2714159 at *8. The court ultimately concluded that, "Nothing in the statute or its history, purpose, or effect suggests that Congress intended adverse immigration consequences for those whose [actions taken in reliance of prior precedent] turned out to be so ill-informed." *Nunez-Reyes*, 2011 WL 2714159 at *8. Here, the Court has concluded that Congress' intent was ambiguous with regards to the interplay between the waiver and the adjustment provision, and has ultimately deferred to the agency's reasonable construction of the statute. *Duran Gonzales*, 508 F.3d at 1237-38. There was no indication that Congress intended such adverse consequences for Plaintiffs' "ill-informed" actions. *See Nunez-Reyes*, 2011 WL 2714159 at *8. Moreover, the history, purpose and effect of the applicable adjustment of status statute at issue here, 8 U.S.C. § 1255(i), similarly demonstrate that Congress's goal was family unification, which, in fact, is furthered by applying the new rule prospectively only.

At issue here is the interaction of the grounds of inadmissibility with the sun-setting adjustment provision at 8 U.S.C. § 1255(i). 8 U.S.C. § 1255(i) created an "exception" to the "general rule" that "aliens who entered the country without inspection are ineligible to seek adjustment to lawful permanent status." *Chan v. Reno*, 113 F.3d 1068, 1071 (9th Cir. 1997). Section 1255(i) had previously expired, but under the Legal Immigration and Family Equity (LIFE) Act, Congress

provided a one-time extension of the sun-setting provision, until April 30, 2001, for the specific purpose of allowing U.S. citizen and lawful permanent resident family members to remain together with their loved ones, despite immigration violations that the undocumented relative may have committed. Pub. L. No. 106-554, 114 Stat. 2763, 2763A-324 (2000). Thus, this limited-time benefit only is available to a relatively small group of individuals. 8 U.S.C. § 1255(i). The applicant must also pay a penalty fee of $1,000.00, in addition to the general application fees. 8 U.S.C. § 1255(i)(1).

In both *Perez-Gonzalez* and *Acosta*, this Court recognized that the legislative history of the LIFE Act demonstrated congressional intent of not separating families, even where the applicants would otherwise be inadmissible for prior immigration violations and unlawful entry. *Perez-Gonzalez*, 379 F.3d at 793; *Acosta*, 439 F.3d at 554.[7] Because the retroactive application would frustrate the

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[7] The Acosta Court explained:

> We stated that '[t]he statutory terms of § 245(i) clearly extend adjustment of status to aliens living in this country without legal status.' *Id.* This broad statement was based on a recognition that the statute's purpose is to allow relatives of permanent residents to avoid separation from their loved ones. *Id.* (citing Joint Memorandum, Statement of Senator Kennedy, 146 Cong. Rec. S11850-52 (daily ed. Dec. 15, 2000)).

439 F.3d at 554.

specific purpose of the LIFE Act, i.e., providing for family unity for a limited class of beneficiaries, it does not advance the holding to apply it retroactively.

It also is telling that in *Duran Gonzales I*, the Court adopted an agency policy of an ambiguous statute as opposed to ascertaining clear congressional intent. In relying on *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), and overturning *Perez Gonzalez*, the Court acknowledged the prerogative of the agency to render its own interpretation of an ambiguous statute. *Duran Gonzales I*, 508 F.3d at 1242. The *Duran Gonzales I* Court overturned its prior rule from *Perez-Gonzalez* because it was necessary to defer to the agency's subsequent, alternative interpretation of an ambiguous statute. *Id.* Thus, *Duran Gonzales I* did not present a situation where a court is "correcting an 'erroneous' interpretation of a statute and reaffirming what the statute has always meant." *See Morales-Izquierdo*, 600 F.3d at 1088-89; *see also Brand X*, 545 U.S. at 983 (cited in *Morales-Izquierdo*, 600 F.3d at 1089) ("[T]he agency's decision to construe the statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction . . . ."). Because *Duran Gonzales* allows for the agency to apply its own interpretation of an ambiguous statute to all future cases, the Court's holding there is not advanced by reversing the law for

those class members who had already filed applications in reliance on *Perez Gonzalez*.[8]

III. CONCLUSION

This Court should overturn the District Court's decision, and order the District Court to apply the three-factor civil retroactivity test announced in *Chevron Oil*. As in *Nunez-Reyes*, application of this test counsels in favor or applying the rule in *Duran Gonzales I* prospectively only.

Date: August 24, 2010

Respectfully submitted,

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[8] Indeed, based on the unusual circumstance of a circuit court deferring to the agency's subsequent, contrary interpretation of an ambiguous statute, Plaintiffs previously have asserted that the retroactivity test presented in *Montgomery Ward & Co., Inc. v. FTC,* 691 F.2d 1322 (9th Cir. 1982), is applicable to the current situation. *See* Plaintiffs-Appellants Br. p. 24-35. This very question is currently pending in a petition for rehearing *en banc* in *Garfias-Rodriguez v. Holder*, No. 09-72603. The panel (FISHER, BYBEE, SHEA) ordered the government to respond to the rehearing petition and briefing is due to be completed on September 8, 2011.

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CERTIFICATION OF COMPLIANCE TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1, CASE NUMBER 09-35174

I certify that:

__**1.** Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, and pursuant to the Court's Order dated August 3, 2011, the attached supplemental brief is:

✓ Proportionally spaced, has a typeface of 14 points and pursuant to the Court's order does not exceed fifteen pages in length.

August 24, 2011 _____S/ Matt Adams_____
Date Signature of Attorney

CERTIFICATE OF SERVICE

RE: Duran Gonzalez, et al., v. U.S.D.H.S., et al., Case No. 09-35174

I hereby certify that I electronically filed the supplemental brief with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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