06-0120-pr
To Be Argued By:
SANDRA S. GLOVER

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FOR THE SECOND CIRCUIT

United States Court of Appeals

Docket No. 06-0120-pr

CLAUDIOUS W. CHANNER,
Petitioner-Appellant,

-vs-

DEPARTMENT OF HOMELAND SECURITY, INS, STRANGE, Warden,
Respondents-Appellees.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR RESPONDENTS

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STATEMENT OF JURISDICTION

On July 9, 2004, Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the District of Connecticut (Hon. Janet B. Arterton, U.S.D.J.). *See* Petitioner's Appendix ("PA") 2 (Docket Entry #1). On August 16, 2005, the Department of Homeland Security filed a motion to transfer the petition to the Court of Appeals as a petition for review under § 106(c) of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. PA 3 (Docket Entries #17 & #20). The district court denied the Government's motion on December 16, 2005, and at the same time, denied Petitioner's amended habeas petition as moot. *See Channer v. Department of Homeland Security*, 406 F. Supp.2d 204 (D. Conn. 2005). Petitioner filed a notice of appeal on January 9, 2006. PA 3 (Docket Entry # 28).

In an order dated October 27, 2006, this Court found that the district court improperly failed to transfer this case to the Court as a petition for review under § 106(c) of the REAL ID Act. Thus, because Petitioner's underlying immigration proceedings were completed within this Circuit in Hartford, Connecticut, this Court should transform this habeas petition into a petition for review. *See* REAL ID Act § 106(c) (habeas cases pending in district court on date of enactment shall be transferred "to the court of appeals for the circuit in which a petition for review could have been properly filed under [8 U.S.C. § 1252(b)(2)]"); 8 U.S.C. § 1252(b)(2) (petition for review to be filed "with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the application of res judicata by the Board of Immigration Appeals is a question of law over which this Court has jurisdiction under the REAL ID Act.

2. Assuming res judicata applies in removal proceedings, whether it bars the institution of new removal proceedings on the basis of a conviction that could not have formed the basis for earlier deportation proceedings.

United States Court of Appeals

FOR THE SECOND CIRCUIT

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CLAUDIOUS W. CHANNER,
Petitioner-Appellant,

-vs-

DEPARTMENT OF HOMELAND SECURITY, INS, STRANGE, Warden,
Respondents-Appellees.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENTS

Preliminary Statement

Petitioner Claudious W. Channer, a native and citizen of Jamaica, raises a res judicata defense to a final order of removal from the Board of Immigration Appeals ("BIA"). Channer came to the United States in 1980. In 1990, he was convicted in federal court of using and carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1), and in 1991, he was convicted in state court of first degree robbery and conspiracy to commit

robbery in violation of Connecticut General Statutes §§ 53a-48 and 53a-134(a)(4). In 1991, the Immigration and Naturalization Service ("INS") instituted deportation proceedings against Channer, alleging that he was deportable as an aggravated felon based on his federal conviction. An IJ ordered Channer deported on this ground, but after Channer's federal conviction was vacated, this deportation order was vacated in 1998. In 1999, the INS initiated removal proceedings against Channer, this time alleging that he was removable as an aggravated felon based on his 1991 state court robbery conviction. Again, an IJ ordered him removed, and the BIA affirmed. In this Court, Channer argues that res judicata bars the 1999 removal proceedings against him because the INS could have included his state court conviction as a separate ground of deportability in the 1991 deportation proceedings.

This Court should deny the petition for review. The application of res judicata in removal proceedings is a question properly left to the BIA in the first instance, subject to limited review in this Court for consistency with the Constitution and the governing statute. In this case, however, there is no need for this Court to decide whether the BIA *must* apply res judicata, because the BIA found that it does not bar the proceedings against Channer. Even if res judicata applies in this context, it does not bar the 1999 removal proceedings because Channer's state court conviction could not have been used as a ground of deportation when the INS first initiated proceedings against him in 1991. This conclusion, a straightforward application of basic principles of res judicata, is fully

consistent with the Constitution and the Immigration and Nationality Act ("INA").

Statement of the Case

The INS instituted deportation proceedings against Channer in 1991, alleging that he was deportable as an aggravated felon based on a 1990 federal conviction.[1] In 1994, an Immigration Judge ("IJ") found Channer deportable on this ground and ordered him deported. After Channer's federal conviction was vacated, however, the INS moved to reopen and terminate his deportation proceedings. That motion was granted in August 1998. *See* PA 16.

On February 2, 1999, the INS again initiated removal proceedings against Channer alleging that he was removable as an aggravated felon on the basis of a 1991 Connecticut conviction for first degree robbery.[2] PA 19.

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[1] The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in various sections of the U.S.C.), eliminated the INS and reassigned its functions to subdivisions of the newly created Department of Homeland Security. *See Spina v. Department of Homeland Security*, 470 F.3d 116, 119 n.1 (2d Cir. 2006). However, because all of the relevant actions in this case were undertaken by the INS, this brief will uniformly refer to the pertinent agency as the INS.

[2] In 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA), Pub. L. No. 104-208, Congress created a new "removal" proceeding that largely replaced the old "deportation" and "exclusion" (continued...)

On April 16, 1999, an IJ found him removable on that basis and ordered him removed to England, or alternatively, to Jamaica. PA 20. Channer appealed, and the BIA dismissed his appeal on November 8, 1999. PA 26.

On July 9, 2004, Channer filed the instant habeas petition in the United States District Court for the District of Connecticut (Hon. Janet B. Arterton, U.S.D.J.), challenging his 1999 removal order. While this petition was pending, the President signed into law the REAL ID Act of 2005, and the Department of Homeland Security moved to transfer the petition to this Court under § 106(c) of that Act. The district court denied the transfer motion in an opinion dated December 16, 2005, and at the same time, denied the habeas petition. *Channer v. Department of Homeland Security*, 406 F. Supp.2d. 204 (D. Conn. 2005). Channer filed a notice of appeal on January 9, 2006, *see* PA 3 (Docket Entry), and was removed from the United States that same day.

On October 27, 2006, this Court granted Channer's motion for appointment of counsel and found that the district court erred in declining to transfer this case under the REAL ID Act. The Court ordered the parties to brief two issues: "whether (1) the *res judicata* issue presented by this case is a question of law over which this Court has jurisdiction under the REAL ID Act; and (2) *res judicata*

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[2] (...continued)
proceedings. *See, e.g.*, *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2426 n.1 (2006) ("What was formerly known as 'deportation' is now called 'removal' in IIRIRA.").

applies to removal proceedings and precludes a subsequent removal proceeding . . . ." Order (October 27, 2006).

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS PETITION

A. Channer's Criminal History

Petitioner Claudious W. Channer, a native and citizen of Jamaica, was admitted to the United States as an immigrant in December 1980. *See* PA 21-22. Approximately ten years later, he was convicted of two separate crimes of relevance to this petition. First, on January 9, 1990, Channer was convicted in the United States District Court for the District of Connecticut of using and carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). He was sentenced to five years in prison for this violation. *See* PA 5 (Judgment).

Second, in late 1990, Channer was convicted by a jury in Connecticut Superior Court of robbery in the first degree, in violation of Connecticut General Statutes § 53a-134(a)(4) and conspiracy to commit robbery, in violation of Connecticut General Statutes §§ 53a-48 and 53a-134. On February 21, 1991, he was sentenced to twenty years' imprisonment for these convictions, to be served consecutively to his federal sentence. PA 10. The Connecticut Appellate Court affirmed his conviction on July 7, 1992. *Connecticut v. Channer*, 612 A.2d 95 (Conn. App.), *cert. denied*, 614 A.2d 826 (Conn. 1992).

B. The 1991 Deportation Proceedings

On May 20, 1991, the INS initiated deportation proceedings against Channer by issuing an Order to Show Cause ("OSC") alleging that he was deportable as an alien convicted of a crime involving a firearm. *See* PA 11 (relying on INA § 241(a)(2)(C)). Later, the INS amended the charges against Channer to include an allegation that he was deportable as an aggravated felon. *See* PA 13-15 (noting addition of charge under INA § 241(a)(2)(A)(iii)). Both of these charges were based on Channer's 1990 federal conviction for using and carrying a firearm in violation of 18 U.S.C. § 924(c)(1). *See* PA 11, 13-15.

On February 7, 1994, an IJ found Channer deportable and ordered him deported to Jamaica. (Exhibit 6 to Response to Order to Show Cause, Docket Entry #4). Channer appealed the deportation order, but subsequently withdrew his appeal. (Exhibit 9 to Response to Order to Show Cause).

C. The Termination of Channer's Deportation Proceedings

On December 6, 1995, after Channer had completed serving his federal sentence and was in state custody serving his state sentence, the United States Supreme Court decided *Bailey v. United States*, 516 U.S. 137 (1995). In that decision, the Supreme Court held that a conviction under § 924(c)(1) for "using" a firearm requires "active employment" of the firearm. *Id.* at 143. On the basis of that decision, on June 17, 1998, the United States District Court for the District of Connecticut vacated

Channer's 1990 federal conviction. *See Channer v. United States*, Nos. 3:89CR91 (PCD), 3:96CV1863 (PCD), 2003 WL 22345727 (D. Conn. Apr. 11, 2003) (describing June 17, 1998 ruling).

Subsequently, because the conviction that had served as the basis for Channer's deportation had been vacated, the INS moved to reopen Channer's deportation proceedings to terminate those proceedings. The IJ granted the INS's motions and terminated the deportation order against Channer on August 26, 1998. PA 16-18.

D. The 1999 Removal Proceedings

On February 4, 1999, while Channer was still in state custody, the INS initiated removal proceedings against Channer by issuing a Notice to Appear ("NTA") alleging that he was removable as an aggravated felon under INA § 237(a)(2)(A)(iii).[3] The conviction underlying the NTA was Channer's 1991 Connecticut state court conviction for robbery. *See* PA 19. On April 16, 1999, an IJ found him removable on this ground and ordered him removed to England, with an alternate order of removal to Jamaica. *See* PA 20. Channer appealed the removal order to the BIA.

On November 8, 1999, the BIA dismissed Channer's appeal. *See* PA 26-28. As relevant here, the BIA rejected

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[3] INA § 241, codified at 8 U.S.C. § 1251, was renumbered as INA § 237 and codified at 8 U.S.C. § 1227, prior to the commencement of Channer's removal proceedings. *See* IIRIRA § 305(a), 110 Stat. at 3009-598.

Channer's argument that res judicata bars the removal proceedings against him. According to the BIA, res judicata does not apply because the immigration charges in the two proceedings were based on separate convictions from separate jurisdictions. PA 27.

E. The Habeas Corpus Proceeding

On July 9, 2004, Channer filed a petition for writ of habeas corpus in the United States District Court for the District of Connecticut to challenge his removal order.[4] In this petition, he argued, *inter alia*, that res judicata bars the 1999 removal proceedings against him. Before this petition was decided, however, the President signed into law the REAL ID Act of 2005. The Government subsequently moved to transfer the habeas petition to this Court under § 106(c) of that Act. PA 3 (Docket Entries #17 & #20). On December 16, 2005, the district court denied the Government's transfer motion and Channer's habeas petition. *Channer v. Department of Homeland Security*, 406 F. Supp.2d. 204 (D. Conn. 2005). Channer filed a notice of appeal on January 9, 2006, *see* PA 3 (Docket Entry), and was removed from the United States that same day.

On October 27, 2006, this Court entered an order granting Channer's motion for appointment of counsel and finding that the district court had erred in denying the

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[4] As recounted in Petitioner's Brief, Channer's 2004 habeas petition is his second such petition filed to challenge his 1999 removal order. *See* Petitioner's Br. at 5. His first petition, filed in 2001, was never resolved on the merits.

Government's motion to transfer this case under the REAL ID Act. In addition, the Court ordered the parties to brief two issues: "whether (1) the *res judicata* issue presented by this case is a question of law over which this Court has jurisdiction under the REAL ID Act; and (2) *res judicata* applies to removal proceedings and precludes a subsequent removal proceeding . . . ." Order (October 27, 2006).

SUMMARY OF ARGUMENT

1. This Court has jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to consider Channer's challenge to the BIA's application of res judicata in his case. Section 1252(a)(2)(D) provides this Court with jurisdiction to review Constitutional questions and questions of law in petitions for review. Here, the question at issue – whether res judicata bars the 1999 removal proceedings against Channer – requires this Court to consider whether the BIA's decision was consistent with the Constitution and the governing statute. Those questions are purely legal questions subject to review in this Court. Moreover, this Court has traditionally reviewed questions of res judicata as legal questions, and as such, they fall within the ambit of § 1252(a)(2)(D).

2. The BIA's conclusion that res judicata does not bar the 1999 proceedings against Channer is correct and fully consistent with the Constitution and the INA. Administrative agencies are vested with broad authority to formulate their own rules of procedure and pursue methods of inquiry that permit them to discharge the important public duties that Congress has entrusted to their care. Indeed, as the Supreme Court explained in *Vermont*

Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), when Congress directs agencies to conduct administrative proceedings, it intends the discretion of those agencies, and not that of courts, be exercised in determining whether to adopt procedural rules beyond those expressly required by statute. This principle has even more force in the immigration context, where the political branches exercise plenary authority, and in the context of immigration charging decisions, which are akin to the exercise of prosecutorial discretion. As a result, the limited role of a reviewing court is to ensure that the agency's rules are consistent with the mandates of the Constitution and of statutory law. If the agency's procedures meet these requirements, the judiciary is not authorized to engraft its own notions of proper procedures upon the executive branch agency that Congress has selected to fulfill important statutory functions.

In this case, this Court need not decide whether res judicata applies generally in removal proceedings because even assuming it applies, it does not bar the proceedings against Channer. Res judicata does not bar the INS from relying on Channer's state court conviction in the 1999 removal proceeding because, under the law applicable when it initiated the 1991 deportation proceedings against Channer, it could not have relied on Channer's state court conviction as a ground for deportation. When the INS initiated deportation proceedings against Channer in 1991, his state court conviction was not yet final on appeal and therefore he was not subject to deportation for that conviction. Thus, because the INS could not have relied on Channer's state court conviction when it initiated the 1991 deportation proceedings, res judicata does not bar it

from relying on that conviction in the 1999 removal proceedings. This conclusion is fully consistent with the Constitution and the INA.

ARGUMENT

I. THE ISSUE OF RES JUDICATA PRESENTED HERE IS A QUESTION OF LAW OVER WHICH THIS COURT HAS JURISDICTION

A. Governing Law

Pursuant to § 1227(a)(2)(A)(iii) (2006) of Title 8, United States Code, any alien who has been convicted of an "aggravated felony" at any time after he has been admitted into the United States is removable. *See Vargas-Sarmiento v. United States Dep't of Justice*, 448 F.3d 159, 165 (2d Cir. 2006). "As a rule, federal courts lack jurisdiction to review final agency orders of removal based on an alien's conviction for certain crimes, including aggravated felonies." *Id.* at 16; 8 U.S.C. § 1252(a)(2)(C) (2005).

The REAL ID Act of 2005, however, recently clarified that this Court retains jurisdiction to review a limited class of issues. Section 106 of the REAL ID Act specifies that "[n]othing in [8 U.S.C. § 1252(a)(2)(B)] or (C), or in any other provision of [the INA] (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition of review filed with an appropriate court of appeals in accordance with this section." 8 U.S.C. § 1252(a)(2)(D).

Interpreting § 1252(a)(2)(D) in *Xiao Ji Chen v. United States Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006), this Court explained that the term "questions of law" was ambiguous, *id.* at 324, and proceeded to construe it as encompassing "the same types of issues that courts traditionally exercised in habeas review over Executive detentions," *id.* at 326-27. As this Court noted, according to the Supreme Court, habeas jurisdiction "traditionally had 'encompassed detentions based on *errors of law*, including the erroneous *application or interpretation* of statutes,' . . . as well as challenges to 'Executive interpretations of immigration laws,' . . . and determinations regarding an alien's 'statutory eligibility for discretionary relief.'" *Id.* at 327 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302, 307, 314 n.38 (2001)) (emphasis in *Xiao Ji Chen*).

The *Xiao Ji Chen* Court ultimately concluded that it "need not determine the precise outer limits of the term 'questions of law' under the REAL ID Act, nor . . . define the full extent of those issues that were historically reviewable on habeas, or what the Suspension Clause itself requires on direct, non-habeas review of a removal order." *Id.* at 328-29 (internal quotation marks and citations omitted). Rather, on the facts of that case, it was enough "to hold simply that, although the REAL ID Act restores our jurisdiction to review 'constitutional claims or questions of law,' . . . we remain deprived of jurisdiction to review decisions under the INA when the petition for review essentially disputes the correctness of an IJ's factfinding or the wisdom of his exercise of discretion." *Id.* at 329 (citation omitted).

B. Discussion

The question presented in this case is subject to review in this Court under § 1252(a)(2)(D). There are no factual issues in dispute and no challenges to the agency's exercise of discretion. *See* Brief for Petitioner at 10; *Xiao Ji Chen*, 471 F.3d at 329 (court lacks "jurisdiction to review decisions under the INA when the petition for review essentially disputes the correctness of an IJ's factfinding or the wisdom of his exercise of discretion"). The only question presented challenges the agency's application of res judicata in administrative removal proceedings. Because, as described below, this Court's role is limited to determining whether the agency's application of a procedural rule, such as res judicata, is consistent with the Constitution and the governing statute, *see* Part II.B., *infra*, review in this Court is necessarily limited to questions of law.

Moreover, to the extent this Court considers and applies common law principles of res judicata, those principles, too, have generally been considered questions of law. *See, e.g.*, *Nestor v. Pratt & Whitney*, 466 F.3d 65, 70 (2d Cir. 2006) ("We review *de novo* a district court decision as to whether a federal action is precluded by a prior adjudication."); *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 400 F.3d 139, 141 (2d Cir. 2005) ("We review *de novo* the district court's application of the principles of *res judicata*."); *but cf. Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 93-94 (2d Cir. 2005) (acknowledging general rule, but noting ambiguity in caselaw as to whether questions of privity in res judicata analysis should be reviewed as questions of fact). As

questions of law, they fall squarely within the provisions of § 1252(a)(2)(D) providing for review of "questions of law." *See also Andrade v. Gonzales*, 459 F.3d 538, 542 (5th Cir. 2006) (claim that removal proceedings were barred by res judicata is subject to review under § 1252(a)(2)(D)), *cert. denied*, 127 S. Ct. 973 (2007); *Hamdan v. Gonzales*, 425 F.3d 1051, 1057 (7th Cir. 2005) (claim based on res judicata is legal question subject to review under § 1252(a)(2)(D)).

II. EVEN ASSUMING RES JUDICATA APPLIES IN REMOVAL PROCEEDINGS, IT DOES NOT BAR THE AGENCY HERE FROM INSTITUTING REMOVAL PROCEEDINGS AGAINST CHANNER

This Court directed the parties to brief "whether . . . *res judicata* applies to removal proceedings and precludes a subsequent removal proceeding . . . ." Order (October 27, 2006). In response, Channer argues that res judicata bars the Government's initiation of removal proceedings against him based on his state court conviction, which he believes could have been used as a ground of deportation in his first deportation proceedings. As this Court has acknowledged, however, the "issue of the proper application of res judicata in removal proceedings is a complicated one," and the question raised by Channer's argument, namely "whether res judicata may be applied . . . to bar the [government] from lodging additional removability grounds" is a "difficult question." *Johnson v. Ashcroft*, 378 F.3d 164, 172 n.10 (2d Cir. 2004).

As described more completely below, the "difficult question" presented here on the applicability of res judicata to removal proceedings is properly committed to the agency, subject to only limited review in this Court. And in this case, there is no need for this Court to decide whether the BIA *must* apply res judicata because the BIA found that res judicata does not bar the subsequent proceedings against Channer. In other words, even assuming that res judicata applies in this context, it does not bar the proceeding at issue. This conclusion involves a straightforward and proper application of the doctrine of res judicata and is fully consistent with both the Constitution and the INA.

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

Courts have applied principles of preclusion in their own proceedings as a matter of "judicial policy" and, in doing so, have developed the common law doctrine of res judicata as a procedural rule to prevent the relitigation of a claim in court which has previously been resolved against a litigant in an earlier litigation. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-108 (1991); *see also Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 91 (1954) (doctrine of collateral estoppel was "established as a procedure for carrying out the public policy of avoiding repetitious litigation"). The existence of common law rules of

preclusion for federal court proceedings, however, does not speak to whether executive branch agencies must follow the same rules of preclusion in their own administrative proceedings.

It is a basic tenet of administrative law that "agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge the[] multitudinous duties" that Congress has entrusted to their care. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-44 (1978) (internal quotations omitted). The "formulation of [such] procedures" is thus generally "left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments" because implicit in such statutory grants of authority is "the congressional determination that administrative agencies . . . will be in a better position than federal courts . . . to design procedural rules adapted to the peculiarities of the . . . tasks of the agency involved." *Id.* at 524-25. In other words, when Congress entrusts executive agencies with the responsibility to conduct their own proceedings, "Congress intend[s] that the discretion of [these] *agencies* and not that of the courts be exercised in determining" whether to provide any procedural rights beyond those that Congress expressly granted in statute. *Id.* at 546. Thus, while "[a]gencies are free to grant additional procedural rights in the exercise of their discretion," "reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Id.* at 524; *accord*

Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654-55 (1990).[5]

For these reasons, the Supreme Court has cautioned courts sitting in review of agency action "not [to] stray beyond the judicial province" by "engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee*, 435 U.S. at 525, 549. Indeed, the Court has made clear that the "limited judicial responsibility" of a federal court engaged in "review of administrative procedural rule[s]" is merely "to insur[e] consistency with governing statutes and the demands of the Constitution." *See FCC v. Schreiber*, 381 U.S. 279, 290-91 (1965); *accord Dia v. Ashcroft*, 353 F.3d 228, 244 & n.11 (3d Cir. 2003) (en banc); *Exxon Corp. v. FTC*, 665 F.2d 1274, 1279 (D.C. Cir. 1981). If an agency's procedures satisfy these requirements, they are not subject to modification on review.

This bedrock administrative principle has "even more force in the immigration context where [the judiciary's] deference [to the executive] is especially great." *Dia*, 353 F.3d at 238. The power to remove aliens from the United States and to formulate immigration policy has long been recognized as "a fundamental sovereign attribute exercised

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[5] This principle applies whether the agency's procedural rules are adopted as regulations or as byproducts of case-by-case adjudication. *Cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion"); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (same).

by the Government's political departments largely immune from judicial control." *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (internal quotations omitted); *see also, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952). As a result, the judiciary's role in assessing challenges to immigration procedures is limited to "determining whether the procedures meet the essential standard of fairness under the Due Process Clause" and comply with statutory mandates. *See Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982). This limited role in immigration matters precludes judicial imposition of procedural rules upon the BIA's adjudicatory process that displace policy choices made by the political branches.[6] *See id.*

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[6] The need for judicial deference to executive policy choices is heightened in the context of this case because, as this Court recognized in *Johnson*, the application of res judicata to immigration charging decisions raises significant and difficult questions of law. 378 F.3d at 172 n.10. Although removal proceedings are civil proceedings, the agency's decision to file removal charges against an alien involves the exercise of discretion similar to the exercise of prosecutorial discretion in the criminal context, an executive branch function historically exempt from rules of res judicata. *See Garrett v. United States*, 471 U.S. 773, 790 (1985); *see also Johnson*, 378 F.3d at 172 n.10 (analogizing filing of criminal charges to filing of removal charges); *Martinez-Garcia v. Ashcroft*, 366 F.3d 732, 735 (9th Cir. 2004) ("the decision to place an alien in immigration proceedings, and when to do it . . . is akin to prosecutorial discretion"); *In re Ramirez-Sanchez*, 17 I. & N. Dec. 503, 505 (BIA 1980) ("The decision to institute deportation proceedings involves the exercise of prosecutorial discretion and is one which neither the immigration judge nor this Board reviews."). (continued...)

These controlling principles of administrative and immigration law have been applied "in a variety of applications." *See Vermont Yankee*, 435 U.S. at 544 & n.18 (citing illustrative cases). The Supreme Court's decision in *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944), for example, rejected the contention that federal courts could properly require that the National Labor Relation

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[6] (...continued)

Furthermore, a holding that res judicata requires the agency to bring *all* charges of removability against an alien in one proceeding would impose significant restrictions on the exercise of the agency's prosecutorial discretion by requiring the agency to spend significant resources on individual cases to prove potentially unnecessary grounds for removal. *See DeFaria v. INS*, 13 F.3d 422, 423 (1st Cir. 1993) (noting that "there is no requirement that the INS advance every conceivable basis for deportability in the original show cause order," because "such a rule would needlessly complicate proceedings in the vast majority of cases").

In addition, the application of res judicata in the immigration charging context could operate to thwart the agency's enforcement of the INA. Deportation proceedings are not designed "to punish past transgressions but rather to put an end to a continuing violation of the immigration laws." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984); *see also Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999) ("And in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law."). Thus, a rule that operates to preclude new proceedings to enforce an ongoing violation of law would be inconsistent with the INA's strong public policy of halting ongoing violations of immigration law.

Board apply the common law principle of estoppel in the Board's proceedings. *See id.* at 253. Explaining that differences between administrative agencies and courts make such impositions of court-made procedural rules inappropriate, *Wallace* held that the agency, not federal courts, had the "power to fashion its procedure to achieve the [National Labor Relation] Act's purpose." *See id.* Consequently, the Court concluded that the judiciary "cannot, by incorporating the judicial concept of estoppel into its procedure, render the Board powerless to prevent an obvious frustration of the Act[]." *Id.*

These cases illustrate that the common law preclusion rules that federal courts have developed for federal court proceedings cannot be imposed upon agencies by reviewing courts. The basic point that federal courts may act in a common law fashion to develop preclusion rules for their own proceedings, but may not generally impose those rules upon other types of tribunals is further illustrated by the fact that state courts formulate their own versions of common law preclusion for state court proceedings.[7] Indeed, the Supreme Court has decided (as a matter of federal common law) that the preclusive effect of a diversity judgment issued by a federal court is determined by reference to the state common law

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[7] Of course, the Supreme Court does have authority to decide what res judicata effect state courts must give to a prior federal court judgment in order to give those federal judgments enforceable effect. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-08 (2001) (stating that Supreme Court "has the last word on the claim-preclusive effect of all federal judgments").

preclusion rules of the state in which the diversity court sat. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

Like state courts, federal agencies have broad authority to develop their own rules of preclusion appropriate for their own proceedings, which may parallel or diverge from the federal judiciary's common law formulations of the doctrine. So long as the agency's rule is consistent with the Constitution and relevant statutory provisions, it is not subject to modification by a reviewing court.

C. Discussion

As explained above, the application of res judicata in removal proceedings, and in the context of immigration charging decisions, in particular, presents difficult questions that are for the agency to answer in the first instance. In this case, there is no need for this Court to decide whether res judicata applies generally in this context because the agency here considered the doctrine and found that it does not bar the 1999 proceedings against Channer. In other words, even assuming that res judicata applies in this context, it does not bar the current proceedings. This conclusion is a straightforward application of res judicata doctrine. Furthermore, the agency's decision here is fully consistent with the Constitution and the INA.

1. Res judicata does not bar the 1999 proceedings because the claims underlying the two immigration proceedings were separate claims and they could not have been brought together in the 1991 proceedings.

The doctrine of res judicata provides that "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1463 (2d Cir. 1996) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)). To demonstrate that a claim is precluded under this doctrine, "a party must show that (1) the previous action involved an adjudication on the merits; (2) the previous action involved the [parties] or those in privy with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 284-85 (2d Cir. 2000) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

In determining whether res judicata bars a second suit:

> [T]he fact that both suits involved essentially the same course of wrongful conduct is not decisive, . . .; nor is it dispositive that the two proceedings involved the same parties, similar or overlapping facts, and similar legal issues, ... A first judgment will generally have preclusive effect only where the transaction or connected series of

> transactions at issue in both suits is the same, that is where the same evidence is needed to support both claims, and where the facts essential to the second were present in the first.

First Jersey Securities, 101 F.3d at 1463-64 (internal quotation marks, alterations, and citations omitted). Moreover, "[i]f the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim preclusion." *Id.* at 1464. Indeed, "'[a]s a matter of logic, when the second action concerns a transaction occurring after the commencement of the prior litigation, claim preclusion generally does not come into play.'" *Legnani*, 400 F.3d at 141 (quoting *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 97 (2d Cir. 1997)).

As applied here, these principles affirm that res judicata does not bar the 1999 proceedings against Channer. Specifically, the claims at issue in the two proceedings were not the same claims. In 1991, the INS charged Channer with deportability based on his 1990 federal conviction; in 1999, the INS charged he was removable because of his state court robbery conviction. The facts at issue did not involve the same operative facts and were essentially two separate transactions. Although both convictions subjected Channer to removal from this country as an aggravated felon, they were separate causes of action requiring proof of different convictions from different jurisdictions. *See, e.g.*, *Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d 164, 168 (2d Cir. 1992) (rejecting res judicata defense because "preclusion is limited to the transaction at issue in the first action. Litigation over other actions, though involving the

same parties and similar facts and legal issues, is not precluded.").

Furthermore, the two causes of action could not have been brought together in the original deportation proceeding. *See Legnani*, 400 F.3d at 141 ("'Claims arising subsequent to a prior action need not, and often perhaps could not, have been brought in the prior action; accordingly, they are not barred by *res judicata* regardless of whether they are premised on facts representing a continuance of the same course of conduct."). Channer's state court conviction could not have been used as a ground for deportability in the 1991 proceeding because it was not final for immigration purposes when INS issued the original OSC in 1991. Under the law as it existed when INS issued the OSC in 1991, a conviction was not final for immigration purposes, i.e., it could not be used as a basis for deportation of an alien, unless and until appellate review was completed.[8] *See Montilla v. INS*, 926 F.2d 162, 164 (2d Cir. 1991) ("[T]he drug conviction is considered final and a basis for deportation when appellate review of the judgment . . . has become final."); *Marino v. INS*, 537 F.2d 686, 691-92 (2d Cir. 1976) ("[A]n alien is not deemed to have been 'convicted' of a crime under the Act until his conviction has attained a substantial degree

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[8] In IIRIRA, Congress eliminated this "finality" requirement when it enacted a definition of conviction that treats an alien as convicted when a court enters a formal judgment of guilt. *See* 8 U.S.C. § 1101(a)(48)(A) (defining conviction). *See generally Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (*per curiam*) (describing change in law).

of finality. . . . Such finality does not occur unless and until direct appellate review of the conviction . . . has been exhausted or waived."). Under this standard, although Channer was found guilty and sentenced in state court before the INS issued the OSC in May 1991, his conviction was not "final" for use in deportation proceedings until it was affirmed on appeal in 1992. Thus, because Channer's conviction arose after the INS instituted proceedings, the INS is not barred from relying on that conviction in subsequent proceedings. *See Legnani*, 400 F.3d at 141 (because retaliatory discharge action arose after commencement of original litigation, res judicata does not bar subsequent litigation of that claim).

Furthermore, even though Channer's state court conviction became "final" during the pendency of the original proceedings, the INS was not required by res judicata to amend its charges to include the new cause of action. *See First Jersey Securities*, 101 F.3d at 1464-65. Although the INS could have amended its charges to include Channer's state court conviction, it was not required to do so; "its election not to do so is not penalized by application of res judicata to bar a later suit on that subsequent conduct." *Id.* at 1464.

In *First Jersey Securities*, this Court rejected a res judicata defense on facts analogous to this case. In that case, the SEC brought an enforcement action in 1985 alleging that the defendants had violated various securities law statutes from 1982-1985. *Id.* at 1456. The defendants raised a res judicata defense, relying primarily on the 1984 settlement of an administrative proceeding commenced by the SEC in 1979, which had alleged that the defendants

violated various securities laws in transactions between 1975 and 1976. *Id.* at 1462. The defendants argued that because the SEC could have amended its pleadings in the 1979 proceeding, before settlement, to include some of the transactions at issue in the 1985 proceeding, res judicata barred the later action. This Court disagreed, and specifically rejected the defendants' argument that the SEC was obligated by principles of res judicata to amend its pleadings to reflect conduct that occurred after initiation of the original action:

> We reject the notion that the SEC had a procedural obligation to expand the scope of the 1979 Proceeding to assert claims that [the defendants] engaged in unlawful acts and transactions after the commencement of that proceeding or be forever barred from challenging that subsequent conduct. . . . The notion that the agency must either perpetually expand its charges to pursue new unlawful acts in an ongoing proceeding or lose the ability to pursue the persistent violator for misdeeds between the start and conclusion of the proceeding would in effect confer on the miscreant a partial immunity from liability for future violations. Such a notion is both antithetical to the regulatory scheme and inconsistent with the doctrine of res judicata.

Id. at 1465. Thus, as in *First Jersey Securities*, the INS was not required by res judicata to amend its pleadings in its original action to include Channer's state court conviction once it became final.

2. Channer's arguments for the application of res judicata in this case are without merit.

Channer argues that res judicata bars the 1999 removal proceedings but his arguments all miss the mark. He relies primarily on a number of decisions that have held, directly or indirectly, that res judicata applies to removal proceedings. *See* Petitioner's Br. at 13-19. None of these decisions, however, have considered the proper "limited judicial responsibility" in reviewing an agency's application of its own procedural rules. *Schreiber*, 381 U.S. at 290-91. In other words, these courts have all substituted their judgment for that of the expert agency – in direct contravention of Supreme Court precedent – when they imposed res judicata in the administrative context.

Furthermore, only two of the cases cited applied res judicata in the context of immigration charging decisions, and those decisions are both distinguishable. *Murray v. Ashcroft*, 321 F. Supp.2d 385 (D. Conn. 2004) applied res judicata but did not address the special concerns that arise in the context of applying res judicata to immigration charging decisions that are akin to the exercise of prosecutorial discretion. *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007) similarly applied res judicata to bar the lodging of additional grounds of removability, but the court there misinterpreted a regulation. In that case, the court relied on a regulation that permits the agency to lodge additional grounds of removability during the pendency of proceedings, *id.* at 1360 (citing 8 C.F.R. § 3.30 (2003), recodified in 8 C.F.R. § 1003.30 (2007)),

but contrary to the Ninth Circuit's analysis, there is nothing in the cited regulation that suggests that once removal proceedings have terminated, the agency is precluded from initiating new proceedings based on charges which could have been brought in the prior proceedings. Nor does the cited regulation *require* the agency to bring additional charges of removability that may become final during pendency of the removal proceedings. Furthermore, in *Bravo-Pedroza*, the agency's original ground of removability was eliminated (by judicial decision) while the alien's case was on review in the Ninth Circuit. Although the court remanded the case to the BIA, the agency took no steps to lodge additional charges of removability. Instead, the agency waited until the BIA vacated the original order of removal before initiating new proceedings based on different charges. Here, by contrast, there is no suggestion or argument that the agency ignored a change in law during Channer's original deportation proceedings because the relevant change in law, i.e., the Supreme Court's decision in *Bailey* and the subsequent vacatur of Channer's federal conviction, did not occur until well after the conclusion of those proceedings.

Finally, Channer has cited no cases – whether in the removal context or otherwise – that would bar the proceedings based on Channer's state court conviction when the INS could not have included that charge in the 1991 deportation proceedings.

3. The decision in this case is consistent with the Constitution and the INA.

In this case, the BIA determined that res judicata does not bar the 1999 removal proceedings against Channer. This conclusion is fully consistent with the Constitution and the INA. *See Schreiber*, 381 U.S. 290-91 (explaining that "limited judicial responsibility" of federal court engaged in "review of administrative procedural rule[s]" is merely "to insur[e] consistency with governing statutes and the demands of the Constitution").

The Fifth Amendment guarantee of procedural due process is the only constitutional provision that might apply to this case. However, due process poses no barrier to the BIA's decision to allow the parties to litigate the question of Channer's removability in the removal proceedings.

An agency's decision *not* to apply res judicata normally will not give rise to due process concerns because denying a claim to estoppel merely permits the parties to have a full and fair opportunity to litigate the claim in the agency's current proceedings. This is entirely consistent with the due process requirement that the agency's procedures provide notice and "a meaningful opportunity [for the litigant] to present their case." *See Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976).[9]

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[9] The Government acknowledges the possibility that due process might impose some upper limit on the number of times that an agency may bring successive complaints against a (continued...)

The BIA's application of res judicata in this case is likewise consistent with the INA. The INA explicitly provides aliens with several procedural rights in removal proceedings, *see* 8 U.S.C. § 1229a(b)(4), and expressly provides that an alien in proceedings *may* be charged with any applicable ground of admissibility or deportability, 8 U.S.C. § 1229a(a)(2). The Act does not direct the agency to apply res judicata in removal proceedings, however, and nothing in the Act provides aliens with any procedural right to rely on the doctrine of res judicata. In any event, the agency considered the doctrine here and found that it does not bar the proceedings.

In sum, the BIA's decision here is fully consistent with the Constitution and the INA.

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[9] (...continued)
regulated entity in the absence of a legitimate justification for such multiple successive adjudications. *Cf. Continental Can Co. v. Marshall*, 603 F.2d 590, 593 n.3, 593-96 (7th Cir. 1979) (ruling that agency's refusal to apply collateral estoppel to bar relitigation of 16 identical complaints against the same company constitutes harassment violating due process). *But cf. R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 433 (7th Cir. 1991) (indicating that Supreme Court may have abrogated *Continental Can's* recognition of a due process right not to be successively tried). The two administrative proceedings brought by the INS against Channer, however, are a far cry from the large number of successive proceedings that could constitute a pattern of vexatious and harassing prosecutions that might violate due process.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Dated: April 18, 2007

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,768 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

8 U.S.C. § 1252(a) Applicable provisions

. . .

(2) Matters not subject to judicial review

. . .

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.