No. 09-72603

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO JAVIER GARFIAS-RODRIGUEZ,
Petitioner,

v.

ERIC H. HOLDER JR., Attorney General,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS
A079-766-006

BRIEF OF AMICI CURIAE NAMED PLAINTIFFS AND PROPOSED REDEFINED CLASS IN *DURAN GONZALES v. DEPARTMENT OF HOMELAND SECURITY*, No. 09-35174 (9th Cir.) IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. INTRODUCTION

This case raises the important and novel issue regarding the proper analysis for determining whether a new agency rule applies retroactively when a court of appeals defers to the new rule under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"). Although other panels of this Court also have dealt with this issue over the past two years, no other circuit court has yet to address it. *See*, *e.g.*, *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076 (9th Cir. 2010); *Duran Gonzales v. Dep't of Homeland Sec.*, 659 F.3d 930 (9th Cir. 2011) ("*Duran Gonzales III*").

Amici curiae are the named Plaintiffs and proposed redefined class in the pending class action *Duran Gonzales v. Department of Homeland Security*, No. 09-35174 (9th Cir. petition for rehearing filed Dec. 9, 2011). The issue currently before this Court in *Duran Gonzales* is the same retroactivity issue presented here and the factual scenarios in both cases are strikingly similar. Like the instant case, the issue before the Court on rehearing in *Duran Gonzales* is whether individuals who presented themselves to the government by filing an adjustment of status and waiver applications and paying the fees *at a time when they were statutorily eligible for lawful permanent resident status* are subject to the retroactive application

of a Board of Immigration Appeals decision. *See* Petition for Rehearing, *Duran Gonzales v. Department of Homeland Security*, No. 09-35174 (9th Cir. Dec. 9, 2011). Thus, the outcome of the Court's en banc review of *Garfias-Rodriguez* undoubtedly will impact Amici Curiae.[1]

Amici ask the Court to announce the applicable retroactivity test for assessing whether a new agency rule applies retroactively when a court of appeals defers to that new rule pursuant to *Brand X* In so doing, Amici urge the Court to adopt a presumption of prospectively applying new agency rules that impact individuals, like the named Plaintiffs in *Duran Gonzales* and members of the proposed amended class, whose past actions comported with then governing law. The retroactivity test also should be guided by principles of equity and fairness.

As discussed below, this Court already has a suitable test, laid out in *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322 (9th Cir. 1982), that the Court may adopt for the *Brand X* situation. However, should the Court

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[1] In addition to the retroactivity issues, the underlying merits issues in *Duran Gonzales* and *Garfias-Rodriguez* are related. Both cases involve eligibility for lawful permanent residence when a person is inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i). *See* Petition for Rehearing at 14-17, *Garfias-Rodriguez v. Holder*, No. 09-72603 (9th Cir. filed June 27, 2012) (eligibility when person is subject to 8 U.S.C. § 1182(a)(9)(C)(i)(I)); *Duran Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227, 1239-42 (9th Cir. 2007) ("*Duran Gonzales II*") (eligibility when person is subject to 8 U.S.C. § 1182(a)(9)(C)(i)(II)).

decide that the appropriate retroactivity test is the test this Court applies to new rules announced in civil decisions, *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) ("*Chevron Oil*"), Amici urge the Court to clarify the parameters and proper application of this test to reflect the complications that arise in *Brand X* situations.

II. STATEMENT OF AMICI CURIAE

Amici curiae, the named Plaintiffs and proposed redefined class in *Duran Gonzales*, submit this brief pursuant to FED. R. APP. P. 29 and 9TH CIR. R. 29-2. Neither a party nor any other person contributed money intended to fund preparing or submitting this brief. *See* FED. R. APP. P. 29(c)(5)(B) & (C). However, the named Plaintiffs and class members in *Duran Gonzales* have been represented by lead counsel for Petitioner Garfias-Rodriguez, Matt Adams, since the outset of the *Duran Gonzales* case. Consequently, Mr. Adams has been involved in the drafting of this brief. *See* FED. R. APP. P. 29(c)(5)(A).

A. Procedural History of *Duran Gonzales* Class Action[2]

The named Plaintiffs and a proposed redefined class[3] are individuals who applied for adjustment of status in conjunction with applications for

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[2] The procedural history summarized here is described in detail in *Duran Gonzales III*, 659 F.3d at 933-35.

waivers of their prior removal orders (hereinafter "I-212 waivers" because they are filed on Form I-212). At the time they filed these applications, they were eligible to apply for permanent residency, as affirmed by this Court's prior decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Subsequently, the Board of Immigration Appeals' (BIA or Board) rejected this Court's interpretation of the immigration statute governing I-212 waivers. *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) (rejecting *Perez-Gonzalez*). Under *Matter of Torres-Garcia*, individuals like the *Duran Gonzales* named Plaintiffs and proposed class members are ineligible to apply for I-212 waivers (and consequently for permanent residence) until ten years after their departure from the country. 23 I&N Dec. at 873.

Thereafter, pursuant to *Brand X*, this Court deferred to and adopted the BIA's interpretation in *Matter of Torres-Garcia*. *See Duran Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227 (9th Cir. 2007) ("*Duran Gonzales II*").

On remand to the district court, the named Plaintiffs sought to amend the complaint and enjoin Defendants from applying the new rule to named Plaintiffs and a proposed redefined class comprised only of class members who filed I-212 waiver applications on or before the date this Court adopted

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[3] As explained below, the proposed redefined class is a subset of the certified class and is comprised of plaintiffs that have retroactivity claims.

the BIA's new rule in *Duran Gonzales II*. The District Court denied Plaintiffs' motions, and on appeal, this Court affirmed the District Court, concluding that the new rule applies retroactively. *Duran Gonzales III*, 659 F.3d at 938. Plaintiffs filed a petition for rehearing en banc on December 9, 2011, asking the Court to reconsider its analysis for determining whether a new agency rule applies retroactively when the circuit court defers to the new rule under *Brand X*.

B. Retroactive Effect of the New Rule on Amici Curiae

The named Plaintiffs and members of the proposed redefined class filed applications for adjustment of status and I-212 waivers in reliance on this Court's prior rule and before *Duran Gonzales II* announced the new rule. *Duran Gonzales III*, 659 F.3d at 932, 934 Significantly, all named Plaintiffs also filed their applications when they were eligible for relief, as affirmed by this Court in *Perez-Gonzalez*. 379 F.3d at 789.

The record in *Duran-Gonzales* further demonstrates that immigration lawyers throughout the Ninth Circuit assisted numerous clients in filing applications in reliance on the prior rule. *See* Attachment. For example, Andrew Knapp, a former immigration officer and now a private attorney in Los Angeles wrote:

> In reliance on the Ninth Circuit's decision in Perez-Gonzalez v. Ashcroft, our Office notified many potential clients, whom we had previously turned away, of their potential eligibility to concurrently apply for adjustment of status and for consent to reapply after admission after deportation or removal.

Id., Declaration of Andrew Knapp. Similarly, Maria Andrade, a private lawyer in Boise, Idaho, stated, "I have filed three I-212 applications within the Ninth Circuit's jurisdiction in reliance on *Perez-Gonzalez* in cases where 10 years have not elapsed since the date of the person's last departure." *Id.*, Declaration of Maria E. Andrade.[4]

In each case the government accepted the applications and the filing fees, including the additional thousand dollar penalty fee for having unlawfully entered the country, and the I-212 filing fee for the waiver required by their prior deportation. *See* 8 C.F.R. § 103.7(b)(1) (prescribing USCIS filing fees).

In *Duran Gonzales II*, the Court reversed its prior ruling in *Perez-Gonzalez*, and, relying on the Board's decision in *Matter of Torres-Garcia*,

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[4] *See also id.*, Declaration of Marisela Cobos-Soto ("[o]ur law office has filed adjustment applications under INA § 245(i) together with I-212 waiver applications at the Los Angeles District Office for six clients, within the Ninth Circuit's jurisdiction, in reliance on *Perez-Gonzalez* wherein 10 years have not elapsed since their last departure."); Declaration of Soren Rottman, ("[o]f the five (5) applications my office has filed with USCIS pursuant to *Perez-Gonzalez v. Ashcroft*, three (3) were approved prior to the USCIS newly announced policy described above and two (2) remain pending with that agency").

held that noncitizens who had been removed and then unlawfully reentered the United States were ineligible to apply for adjustment of status. 508 F.3d 1227. The retroactive application of the new *Duran Gonzales II* rule means that the named Plaintiffs and proposed redefined class are subject to denials of their applications for permanent residency and to removal from the United States, including under "reinstatement of removal" which renders them ineligible for any other relief and subject to removal without a hearing before an immigration judge. 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8. They will have lost thousands of dollars, and for many, be subject to summary expulsion and indefinite separation from their families.

III. ARGUMENT

A. The *Brand X* Situation Demands a Robust Retroactivity Analysis With a Presumption of Prospectivity.

The En Banc Panel faces the question of what retroactivity standard applies to individuals like Mr. Garfias-Rodriguez and the named Plaintiffs and proposed class members in *Duran Gonzales* as well as the many others who are facing, or will face, retroactivity claims arising out of an agency's invocation of *Brand X*. Like the case before the Court, cases involving a change in law pursuant to *Brand X* generally involve a basic fact pattern: (1) a circuit court precedent finding a statute or regulation ambiguous and,

therefore, interpreting said statute or regulation; (2) a subsequent agency precedent rejecting the circuit court's interpretation and adopting a new interpretation; and (3) a circuit court precedent acknowledging that it is now obligated to defer to the agency's new interpretation. Courts then need to decide whether the new interpretation applies retroactively to those who acted when the circuit court's "old" interpretation was good law.

Significantly, the *Brand X* scenario has two defining features that shape the contours of the retroactivity analysis and make such an analysis critically important to those affected by this Court's decision: the prominence of the agency's role in interpreting the statute and the existence of a circuit court precedent.

With respect to the prominence of the agency's role, as the Supreme Court emphasized, "the agency remains the authoritative interpreter (within the limits of reason)" of ambiguous statutes. *Brand X*, 545 U.S. at 983. As a result, the agency may choose to adopt an interpretation at odds with a prior circuit court precedent, thus trumping the prior rule. *See id.*

Because it is the *agency* that plays the principal role in interpreting a statute, this Court's retroactivity analysis must consider whether the retroactive application of a new interpretation is "contrary to a statutory design or to legal and equitable principles." *See SEC v. Chenery Corp.*, 332

U.S. 194, 203 (1947). Moreover, agency rules should not apply retroactively, "when to do so would unduly intrude upon reasonable reliance interests," *see Heckler v. Community Health Servs.*, 467 U.S. 51, 60 n.12 (1984), or where doing so would result in manifest injustice, *see Thorpe v. Housing Auth. of the City of Durham*, 393 U.S. 268, 282 (1969). As this Court has acknowledged, "a regulated party's interest in being able to rely on the terms of a rule" is significant and must be considered in determining whether a new agency rule applies retroactively. *See Montgomery Ward*, 691 F.2d at 1333.

At the same time, it is also important to recognize that a *Brand X* scenario involves first and foremost a court of appeals precedent. That a subsequent agency interpretation may trump a circuit court decision does not alter the fact that the court of appeals previously announced a rule that it intended those within that circuit to follow and rely upon. The existence of a circuit precedent thus underscores the importance of a robust retroactivity analysis guided by equitable principles.

Justice Scalia's dissent in *Brand X* supports this contention. In his dissent, he highlights the uncertainties and complications that flow from a decision that permits an agency to undo established circuit precedent. *See*

Brand X, 545 U.S. at 1017-19 (Scalia, J., dissenting).[5] He also noted that that the Supreme Court's decision raises separation of powers concerns because the Executive has authority to reverse Article III courts. *Id*. at 1016-18. These concerns highlight the basic challenge that *Brand X* presents: by allowing an agency to trump established circuit precedent, the decision fundamentally undermines the stability of the law and creates a new paradigm where those within the court's jurisdiction and bound by its precedent decisions are unable to rely on them.

Given the anomalies and confusion that result when an agency disregards a circuit precedent, as well as the equitable principles that a court must take into account when an agency announces a new rule, a *Brand X* retroactivity test must encompass a presumption of prospectivity. *Accord Landgraf v. USI Film Products*, 511 U.S. 244, 265-66, 270-72 (1994) (noting fairness concerns). Such a presumption is particularly appropriate given that *Brand X* scenarios involve interpretations of *ambiguous* statutes – where Congress has left a gap to fill – and thus there is no concern that applying the new rule prospectively frustrates Congress' clear intent.

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[5] In fact, he predicted that *Brand X* would create a "wonderful new world" for law professors and litigators grappling to apply it. *Id.* at 1019.

B. The *Montgomery Ward* Test Is A Suitable Retroactivity Test for Cases Involving a Change of Law Pursuant to *Brand X*.

This Court already has established a suitable test for addressing the issues addressed above: the *Montgomery Ward* test, which this Court uses to assess whether a new agency rule applies retroactively. *Montgomery Ward*, 691 F.2d at 1333. The En Banc Panel should adopt this same test when an agency changes its position by invoking *Brand X*. Whether the agency has invoked *Brand X* or whether a court is reviewing the agency's rule in the absence of circuit precedent[6] is a distinction without a difference for purposes of determining the appropriate retroactivity analysis. The agency's change of position – regardless whether pursuant to *Brand X* – is what triggers the retroactivity concerns in both situations.

An examination of each of the five factors in the *Montgomery Ward* test reveals that the test is well suited to address the concerns that arise in *Brand X* scenarios. The first *Montgomery Ward* factor looks to whether the administrative case changing the law is one of "first impression," and, as such, results in an actual precedential change in the law. 691 F.2d at 1333.

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[6] For example, in *Miguel-Miguel v. Gonzales*, this Court deferred to the agency's new interpretation of an ambiguous statute and found that the agency's interpretation was permissible. *See Miguel-Miguel v. Gonzales*, 500 F.3d 941, 947-49 (9th Cir. 2007). The *Miguel-Miguel* Court then recognized that the rules had changed and considered whether the new rule should apply retroactively. *Id.* at 950-53 (employing *Montgomery Ward* test).

Similarly, the second factor further examines whether the new rule "represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law." *Id.* The third and fourth factors focus on the impact of the new rule on the litigant by requiring the court to examine "reliance on the former rule" and the "burden" the litigant will face if he or she no longer has the benefit of that reliance. *Id*. Through the final factor, the court considers "the statutory interest" in fashioning a rule that would subject litigants to a new rule despite reliance on an old rule.[7] *Id.* Together, these factors take into account the concerns present in a *Brand X* situation: they address the inequities that may flow from a new agency rule and the uncertainty that arises when an agency departs from an established circuit precedent.

Thus, because *Montgomery Ward* already provides an appropriate framework for weighing retroactivity concerns arising out of an agency's invocation of *Brand X*, the En Banc Court should apply it to Mr. Garfias-Rodriguez case. Application of the test supports the conclusion that the

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[7] In determining whether a statutory change in law is impermissibly retroactive, the Supreme Court recently reaffirmed that "[a]lthough not a necessary predicate for invoking the antiretroactivity principle, the likelihood of reliance on prior law strengthens the case for reading a newly enacted law prospectively." *Vartelas v. Holder*, No. 10-1211, 565 U.S. __, 2012 WL 1019971, at *11 (Mar. 28, 2012). Similarly here, a showing of reliance "strengths the case" for interpreting a new agency rule prospectively, but is not singularly dispositive.

Board's decision in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) cannot apply retroactively. *See* Petition for Rehearing at 12-14, *Garfias-Rodriguez v. Holder*, No. 09-72603 (9th Cir. filed June 27, 2012).

The suitability of the *Montgomery Ward* balancing test is further illustrated by applying it to the named Plaintiffs and proposed redefined class members in *Duran Gonzales*. Indeed, the two cases are tightly interwoven, as the both panel's decision in *Garfias-Rodriguez* and the panel's decision in *Duran-Gonzales III* relied heavily on this Court's retroactivity analysis in *Morales-Izquierdo*, 600 F.3d at 1076.

Matter of Torres-Garcia was not a case of first impression (at least for cases arising within this Court's jurisdiction) because this Court had previously addressed the issue in *Perez-Gonzalez*.[8] Yet, because the agency rejected this Court's interpretation in *Perez Gonzales* and adopted a new and contrary interpretation in *Matter of Torres-Garcia*, it is indisputable that the new interpretation set forth in *Matter of Torres-Garcia*, and deferred to by this Court, constituted an abrupt departure from both prior practice and law. Significantly, for several years following *Perez-Gonzalez*, the agency took

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[8] In a *Brand X* scenario, the agency necessarily is revisiting a statutory interpretation the circuit court previously addressed on appeal from the agency. Thus, application of the first two *Montgomery Ward* factors will be the same in each case: it is not an issue of first impression and it represents an abrupt departure from the Court of Appeals' contrary interpretation.

the position that *Perez-Gonzalez* was controlling and followed it within the Ninth Circuit.[9]

Furthermore, as set forth in § II.B of this brief, the named Plaintiffs in *Duran Gonzales* acted in explicit reliance on prior law, under which they were eligible to apply for permanent residency with an I-212 waiver. These individuals bear a tremendous burden if they no longer have the benefit of that reliance; they have been, and will continue to be, denied permanent residency and removed from the United States. They also have lost thousands of dollars that they paid in filing fees, penalty fees and attorneys' fees.

The final factor also weighs in favor of not applying *Matter of Torres Garcia* retroactively: since Congress was ambiguous regarding its intent,[10] there is no clear statutory interest in finding individuals *in*eligible for

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[9] *See*, *e.g.*, *In re Wenceslao Rendon-Eligio*, A91 639 708, 2007 WL 4182278 (BIA Oct. 15, 2007) (unpublished) (remanding case to IJ in order to proceed with his application pursuant to *Perez-Gonzalez*); *In re Manuel Luna-Sanchez*, A75 616 296, 2007 WL 2197539 (BIA June 29, 2007) (unpublished) (agreeing with DHS position that case should be remanded to IJ for adjudication of adjustment application); *In re Jose Luis Chavez A.K.A. Jose Luis Chavez Temores*, A78 436 173, 2007 WL 1129205 (BIA Feb. 16, 2007) (unpublished) (finding individual eligible for relief under *Perez-Gonzalez*).

[10] *Duran Gonzales II*, 508 F.3d at 1237-39 (holding that *Perez-Gonzalez* was based on a finding of statutory ambiguity).

waivers when they filed their applications at a time when they were eligible.[11]

In sum, as application of the *Montgomery Ward* factors to the *Duran Gonzales* case exemplifies, *Montgomery Ward* provides an appropriate retroactivity test for cases involving a change of law pursuant to *Brand X*.[12] As such, the En Banc Panel should adopt the *Montgomery Ward* test. In the alternative, Amici urges the Court to adopt a modified version of this test which includes a presumption of prospectivity and calls on the Court to evaluate the change in law and its impact on the parties. This approach would take into account the equitable principles involved when an agency announces a new rule as well as the concerns about abandoning established circuit precedent.

C. Alternatively, *Chevron Oil's* Retroactivity Test Applies.

Alternatively, if the Court finds that *Montgomery Ward* does not apply, and does not adopt a similarly guided test unique for *Brand* X, it

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[11] Like the first and second *Montgomery Ward* factors, the fifth factor is also somewhat predictable in that *Brand X* only authorizes the agency to disavow a prior agency decision if it finds Congress' intent unclear.

[12] The *Duran Gonzales III* panel concluded that it was bound by *Morales-Izquierdo*'s determination that *Duran Gonzales II* applies retroactively. *Duran Gonzales III*, 659 F.3d at 939-40 (relying upon *Morales-Izquierdo*, 600 F.3d at 1076). Amici agree with Petitioner that the analysis in *Morales-Izquiredo* is flawed.

should apply the retroactivity test set forth in *Chevron Oil*, 404 U.S. at 106-07.

Just last year, an en banc panel of this Court held that it is bound 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. *See Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011). Under this test, the court must consider,

> First, whether a decision establishes a new principle of law. If so, it may be applied prospectively only.
>
> Second, whether retroactive application will advance the new holding.
>
> Third, fundamental principles of fairness.

Id. (citing *Chevron Oil*, 404 U.S. at 106-07).

Should the En Banc Court reach the *Chevron Oil* test, Amici urge the Court to clarify the parameters and proper application of this test. In so doing, the Court has the opportunity to rectify the *Duran Gonzales III* panel's misguided discussion about *Chevron Oil*.[13] *See Duran Gonzales III*, 659 F.3d at 940-41.

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[13] Notably, *Morales-Izquierdo* predated the en banc opinion in *Nunez-Reyes* and did not address *Chevron Oil*. Prior to *Nunez-Reyes*, there was an intracircuit split regarding whether *Chevron Oil* was controlling. *Compare George v. Camacho*, 119 F.3d 1393, 1409 n.9 (9th Cir. 1997) (en banc), *overruled on other grounds by Nunez-Reyes v. Holder*, 646 F.3d at 690-91 (holding that *Chevron Oil* test still applied), *with Ditto v. McCurdy*, 510 F.3d

First, the Court should clarify that the *Chevron Oil* test applies regardless of whether the case involves the waiver of constitutional rights. *See*, *e.g.*, *Duran Gonzales III*, 659 F.3d at 940 (in dicta, distinguishing *Nunez-Reyes*'s application of the *Chevron Oil* test because *Duran II* did not involve a waiver of constitutional rights in reliance on the prior opinion). Although *Nunez-Reyes* involved the waiver of the constitutional right to trial in reliance on this Court's precedent, *Chevron Oil* itself was a case involving statutory interpretation, not a waiver of constitutional rights. *Chevron Oil*, 404 U.S. at 100. *See also Holt v. Shalala*, 35 F.3d 376, 380 (9th Cir. 1994) (applying *Chevron Oil* to a non-constitutional decision); *Crowe v. Bolduc*, 365 F.3d 86, 93-94 (1st Cir. 2004) (same); *Shah v. Pan Am. World Servs.*, 148 F.3d 84, 92 (2d Cir. 1998) (same).

Further, should the Court apply *Chevron Oil*, it should make clear that depriving noncitizens of the opportunity to apply for permanent residence after they submitted applications and paid the accompanying application and penalty fees raises significant equitable concerns. To the extent that the *Duran Gonzales* panel suggested otherwise, its reasoning was flawed. Not only was its reliance on *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006),

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1070, 1077 n.5 (9th Cir. 2007) (saying that *Chevron Oil* test did not apply) and *United States v. Newman*, 203 F.3d 700, 701 (9th Cir. 2000) (same).

misplaced,[14] but the panel suggests that *Chevron Oil* is only applicable in situations involving a quid pro quo (such as a plea agreement). *See Duran Gonzales III*, 659 F.3d at 940-41. As the Supreme Court recently confirmed, retroactivity concerns arise not only where a person makes a calculated decision in light of prior law, but also where he or she completes conduct before the change in law. *See Vartelas*, 2012 WL 1019971, at *11.[15]

Finally, hould it elect to apply the *Chevron Oil* test in *Brand X* situations, the En Banc Court should announce a presumption of prospectivity. Such a presumption would clarify the parameters and proper application of the test to reflect the complications that arise in *Brand X* situations.

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[14] *See*, *e.g.*, *Ixcot v. Holder*, 646 F.3d 1202, 1213 (9th Cir. 2011) (finding that change in law should not be applied to persons who applied for asylum before it took effect and eliminated their eligibility for relief); *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).

[15] Moreover, the Supreme Court also emphasized that reliance is not necessary to demonstrate impermissible retroactive effect. *Vartelas*, 2012 WL 1019971, at *11.

April 11, 2012

Respectfully submitted,

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