Brand X Marks the Spot (of Conflict) in the Tenth Circuit: A Review of the Tenth Circuit's Clash with the BIA in *De Niz Robles v. Lynch* and *Gutierrez-Brizuela v. Lynch*

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INTRODUCTION

Generally, legislative enactments apply only prospectively, whereas judicial decisions apply both prospectively and retroactively. "But what's the rule when an executive agency exercises delegated legislative policymaking authority in what looks like a judicial proceeding?"[1]

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court held that "[a] court's prior construction of a statute trumps an agency construction otherwise entitled to Chevon deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[2] Where an agency's construction of a statute stems from an ambiguous statute and *Chevron*[3] step-two is met, an agency "may . . . choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes."[4] In other words, under *Brand X*, the agency's decision should prevail even when a past contrary court decision appears to control.

To lay this out in another way[5]: Imagine we have a statute that could reasonably mean X or Y, and a court (T1) initially finds the statute to be ambiguous but declares X the "better" reading. Then, an agency (T2) with the authority to promulgate rules under the ambiguous statute later determines that Y, not X, is the better reading. *Chevron*/*Brand X* dictate that the agency's reading at T2 trumps the court's reading at T1.

Imagine that later still, a court (T3) reviews the agency's decision and defers to meaning Y as a reasonable choice. Which interpretation of the statute should

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1. De Niz Robles v. Lynch, 803 F.3d 1165, 1167 (10th Cir. 2015).
2. 545 U.S. 967, 982 (2005).
3. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
4. *Brand X*, 545 U.S. at 983.
5. *See* Cory J. Marsolek, Note, *The Law of Rules*, 38 MITCHELL HAMLINE L. J. PUB. POL'Y & PRAC. 5 (2017) (laying out this scenario "with an algebraic flourish").

apply in court to a litigant who filed between the court's interpretation at T1 and the agency's subsequent decision at T2? This was the question posed in *De Niz Robles v. Lynch*.[6] Reasoning upon due process and equal protection concerns, then-Judge Gorsuch writing for the Tenth Circuit found that it was the court's decision at T1 that should control.[7]

What about a litigant who filed between the agency's interpretation at T2 and the court's decision at T3? The Tenth Circuit responded to this twist a year later, in *Gutierrez-Brizuela v. Lynch*.[8] In this decision, Judge Gorsuch found that an agency's interpretation at T2 only applies to conduct that occurs *after* a court has reviewed the agency's decision at T3 and deferred to meaning Y as a reasonable interpretation.[9]

These difficult questions and decisions arose only after a long and somewhat complicated saga between the Board of Immigration Appeals ("BIA") and the circuit courts. In order to give the necessary background, Part I[10] of this Note works to provide the legal backdrop of the two Tenth Circuit decisions, focusing on existing federal jurisprudence regarding retroactivity in adjudication and rulemaking, agency deference, and the interpretive history of the conflicting immigration statutes giving rise to these cases. Part II[11] of this Note discusses the *De Niz Robles* decision. Part III[12] assesses the decision in *Gutierrez v. Lynch*, concluding that the court erred in holding that *Briones* had retroactive effect and is seemingly inconsistent with *Brand X*, and a contrary result in this case would still have been equitable.

I. LEGAL BACKDROP

A. RETROACTIVITY OF ADJUDICATIONS: CHENERY II

The leading Supreme Court decision addressing retroactivity in administrative adjudications is *SEC v. Chenery Corp.* (*Chenery II*).[13] In *Chenery II*, while the Court held that an agency should formulate general rules "as much as possible, through th[e] quasi-legislative promulgation of rules to be applied in the future," it declined to completely ban agencies from applying decisions made through ad-hoc adjudication retroactively.[14] The Court acknowledged such adjudication might have a retroactive effect on litigants but found this was "not necessarily

6. *De Niz Robles*, 803 F.3d at 1167–68.
7. *See id.* at 1174–80.
8. 834 F.3d 1142 (10th Cir. 2016).
9. *See id.* at 1147–48.
10. *Infra* Part I.
11. *Infra* Part II.
12. *Infra* Part III.
13. 332 U.S. 194 (1947) (*Chenery II*).
14. *Id.* at 202.

fatal to its validity."[15] Rather, there is "a very definite place for the case-by-case evolution of statutory standards."[16] The Court went on to hold that:

> [R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.[17]

The Court noted that rigid insistence on formal rule promulgation, at the exclusion of ad-hoc adjudication, would "stultify the administrative process."[18] The Court foresaw three situations in which it may be appropriate for an agency to apply results reached through adjudications retroactively.[19] First, the Court noted, problems may arise in unforeseen circumstances that need to be solved retroactively "despite the absence of a relevant general rule."[20] Second, an agency "may not have had sufficient experience" with a particular issue "to warrant rigidifying its tentative judgment into a hard and fast rule."[21] Finally, the problem may be "so specialized and varying in nature" that it is "impossible" to pin down in a general rule.[22] In these scenarios, the Court found that an agency may need the flexibility to progress retroactively, thus it left the choice to proceed through "general rule or by individual, ad hoc litigation . . . primarily in the informed discretion of the administrative agency."[23]

B. RETROACTIVITY OF RULEMAKINGS AND LEGISLATION: BOWEN, LANDGRAF, AND ST. CYR

In *Bowen v. Georgetown University Hospital*, the Supreme Court held that, generally, agencies may not promulgate retroactive rules through rulemaking unless Congress explicitly granted this power.[24] Noting that "retroactivity is not favored in the law," the Court found that even where substantial justification exists for retroactive rulemaking, "courts should be reluctant to find such authority absent an express statutory grant."[25]

In *Landgraf v. USI Film Products*, the Court set out a two-step analysis required to determine if a newly enacted statute has appropriate retroactive

15. *Id.* at 203.
16. *Id.*
17. *Id.*
18. *Id.* at 202.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 203.
23. *Id.*
24. *See* 488 U.S. 204, 208 (1988) ("[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result. . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").
25. *Id.* at 208–9.

effect.[26] The first step, in line with *Bowen*, asks whether Congress provided explicit direction in the statute indicting it should apply retroactively.[27] If Congress has provided an explicit directive, the provision must be applied to past conduct. If no clear statement from Congress exists, a court "must determine whether the new statute would have retroactive effect, *i.e*., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[28] If the statute would operate retroactively, the traditional presumption of prospectivity applies. The Court noted that "deciding when a statute operates "retroactively" is not always a simple or mechanical task."[29] Rather, the determination involves a process,[30] which should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations."[31]

More recently, the Court confirmed the use of the *Landgraf* framework to address new legislation in the immigration context.[32] Although the Court recognized and affirmed Congress' power to act retroactively in the context of immigration, it asserted that "in legislating retroactively, Congress must make its intention plain."[33]

C. AGENCY DEFERENCE: CHEVRON AND BRAND X

In *Chevron*, the Supreme Court established the familiar two-step framework for determining whether an agency's interpretation of a statute is permissible.[34] At step-one, a court looks to whether a statute's plain terms "directly addres[s] the precise question at issue."[35] Step-two instructs that where a statute is "ambiguous," a court must defer to the agency's construction so long as it is "a reasonable policy choice for the agency to make."[36]

National Cable & Telecommunications Ass'n v. Brand X further requires a court to defer to the agency's reasonable construction of an ambiguous statute, even when a pre-existing and conflicting judicial construction of the statue

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26. 511 U.S. 244, 280 (1994).
27. *Id*.
28. *Id*.
29. *Id*. at 268.
30. *See id*. at 270 ("The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.").
31. *Id*.
32. *See* INS v. St. Cyr, 533 U.S. 289, 315–320 (2001).
33. *Id*. at 325 n.55
34. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
35. *Id*. at 843.
36. *Id*. at 845.

presently governs.[37] *Brand X* held that, in line with *Chevron*, "a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative," because "the agency remains the authoritative interpreter . . . of such statutes."[38] Thus, an agency's reasonable construction must trump a court's prior interpretation of an ambiguous statute.

D. STATUTORY INTERPRETATION OF THE IMMIGRATION NATIONALITY ACT (INA)

1. THE CONFLICTING PROVISIONS

Both *De Niz Robles* and *Gutierrez-Brizuela* arose from conflicting interpretations of two facially clashing provisions embedded within our immigration law. The first provision, 8 U.S.C. § 1255(i) instructs that any alien[39] physically present in the country, who entered "without inspection" and "who is the beneficiary" of a petition filed by a relative "may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence."[40] To qualify for this discretionary adjustment, the alien must be "admissible to the United States for permanent residence."[41]

Concerns regarding illegal immigration eventually led Congress to pass the Immigrant Responsibility Act of 1996 (IRIRA), which contains the second relevant provision, 8 U.S.C. § 1182(a)(9)(C).[42] This provision states that "[a]ny alien who has been unlawfully present in the United States for an aggregate period of more than 1 year . . . and who enters or attempts to reenter the United States without being admitted is inadmissible," unless the person departs and remains outside the country for at least ten years after their first removal.[43] These provisions seem to be out of sync. The first provision appears to give the Attorney General discretion to overlook a past unlawful entry and grant lawful residency. The second provision seems to require such aliens who have previously entered unlawfully to remain outside the country for ten years before applying. Thus, the key question is whether an alien who is "inadmissible" under the latter provision would be eligible to apply to the Attorney General for a grant of discretionary adjustment under the earlier provision without fulfilling the ten-year waiting period.

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37. 545 U.S. 967, 982–83 (2005) ("*Chevron* established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996))).

38. *Id.* at 983.

39. *See* 8 U.S.C. § 1101(a)(3) (2012). The U.S. Code refers to these individuals as "aliens" and, for the purposes of maintaining consistency with the Code, this Note will also refer to them as such.

40. 8 U.S.C. § 1255(i) (2012).

41. *Id.* § 1255(i)(2)(A).

42. *See id.* § 1182(a)(9)(C).

43. *Id.*

2. PADILLA I

The Tenth Circuit first addressed this question in 2005 in *Padilla-Caldera v. Gonzalez* ("*Padilla I*").[44] The court concluded that the immigration provisions were contradictory[45] and, given no BIA precedent[46] it sought to reconcile the provisions. Looking to traditional canons of statutory construction[47], the "legislative history" and "the underlying policies of the statutory scheme,"[48] the court concluded that Congress intended § 1255(i)'s remedial powers to prevail over § 1182(a)(9)(C)(i)(I). In other words, the provision granting the Attorney General discretion controlled, so the ten-year bar did not prevent the Attorney General from adjusting the status of aliens who were "inadmissible" under § 1182 but otherwise satisfied the criteria of § 1255(i).

3. IN RE BRIONES

In 2007, the BIA addressed this same statutory tension and reached a conclusion opposite to the Tenth Circuit's in *Padilla I*.[49] Its published decision, *In re Briones*, concluded that aliens inadmissible under § 1182(a)(9)(C)(i) could not seek an adjustment of status under § 1255(i), unless they first satisfied the ten-year waiting period.[50] The BIA undertook a statutory interpretation analysis and put forth policy justifications to conclude that the "language, structure, and purpose of the Act, taken as a whole" support this outcome.[51]

Among other justifications, the BIA found that § 1255(i) had "clear preclusive language"[52] which "unambiguously requires an applicant for adjustment of status to prove that he is 'admissible to the United States. . . .'"[53] Under this construction, an alien would be ineligible for adjustment of status under § 1255 based on his inadmissibility to the United States under § 1182. The court found it noteworthy that Congress "declined to mitigate [this clear language] despite having done

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44. 426 F.3d 1294, 1298–1301 (10th Cir. 2005) (*Padilla I*), *amended and superseded on reh'g by* 453 F.3d 1237, 1242-1244 (2006) (affirming, in relevant part, the holding of the panel decision).

45. *See* Padilla I, 453 F.3d at 1241 ("[T]he text itself gives no indication of which provision Congress intended to supercede the other. . . .").

46. At the time, the only existing guidance on the interplay between these two provisions were an Immigration and Naturalization Service (INS) general counsel memorandum and a conflicting INS internal guidance memorandum, documents to which the court stated it did "not owe rigorous deference." *Id*. at 1244.

47. The Tenth Circuit employed the canon that "conflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute." *Id*. at 1241–42 (quoting Smith v. Robinson, 468 U.S. 992, 1024 (1984)).

48. *Id*. at 1244 ("[T]he overriding goal . . . was family reunification for illegal entrants and status violators who have otherwise 'played by the rules.'" (quoting 146 CONG. REC. S11,263–01 (daily ed. Oct. 27, 2000) (statement of Sen. Hatch))).

49. *See* Briones, 24 I. & N. Dec. 355, 370-71 (B.I.A. 2007).

50. Id. at 358–59, 371.

51. Id. at 371.

52. *Id*. at 370.

53. *Id*. at 362 (quoting 8 U.S.C. § 1255(i) (2012)).

so in analogous contexts."[54] Further, the BIA recognized its outcome to be in line with the underlying purpose of § 1882(a)(9)(C)(i)(I) "to single out recidivist immigration violators and make it more difficult for them to be admitted to the United States after having departed."[55]

4. PADILLA II

After *Padilla I* and *Briones*, the Tenth Circuit reviewed this statutory tension yet again. In 2011, in *Padilla Caldera v. Holder* (*Padilla II*),[56] the Tenth Circuit determined the INA statutes were ambiguous and that the BIA's interpretation in *In re Briones* "provides a reasonable interpretation" of the relationship between the two provisions.[57] "Accordingly," the court invoked *Brand X* to hold the BIA's decision in *Briones* was entitled to deference under *Chevron*.[58] The court thus adopted the BIA's interpretation of the statute as "the authoritative interpretation" and effectively overruled its own prior contrary construction from *Padilla I*.[59]

II. DE NIZ ROBLES

The next clash between the BIA and the Tenth Circuit occurred in *De Niz Robles v. Lynch*.[60] Alfonzo De Niz Robles is a Mexican citizen who entered the United States unlawfully and married a U.S. citizen.[61] In 1999, he was discovered by the authorities and agreed to leave the country.[62] His wife subsequently attempted to obtain a spousal visa for him to no avail.[63]

At the time, Mr. De Niz Robles had two options to pursue lawful residency: he could re-enter the United States and seek adjustment of status from the Attorney General, or he could remain outside of the country for ten years. In reliance on *Padilla I*, he chose the first option, returning to the United States to file an application for adjustment of status in hopes of winning lawful residency in that way.[64] His application was submitted after and in reliance on *Padilla I* but *before* the BIA issued *Briones* in 2007.[65] His petition then sat unreviewed for years. The BIA finally reviewed his petition in 2013, after *Briones* had been issued and adopted by the Tenth's Circuit's decision in *Padilla II*. The BIA ultimately

54. *Id*. at 370.
55. *Id*. at 358.
56. 637 F.3d 1140 (10th Cir. 2011) (*Padilla I*).
57. *Id*. at 1152–53.
58. *Id*.
59. *Id*. at 1152.
60. *See* 803 F.3d 1165 (10th Cir. 2015).
61. *See* David Feder, *Founders Meet* Brand X, YALE J. ON REG.: NOTICE & COMMENT (Aug. 31, 2016), http://yalejreg.com/nc/founders-meet-brand-x-by-david-feder [http://perma.cc/6DJE-V5KW].
62. *Id*.
63. *Id*.
64. *See De Niz Robles*, 803 F.3d at 1167-68.
65. *Id*. at 1168–69.

attempted to apply *Briones* to Mr. De Niz Robles' petition submitted before *Briones* and hold him "categorically ineligible" for an adjustment of status.[66]

Mr. De Niz Robles petitioned the Tenth Circuit to overturn the BIA's ruling.[67] Then-Judge Gorsuch, writing for the Tenth Circuit, first determined that the BIA's order "operate[d] retroactively"[68] as it "surely attaches new consequences to past conduct Mr. De Niz Robles cannot now alter." Specifically, the court found that applying *Briones* would severely disadvantage Mr. De Niz Robles based on past conduct—his decision to remain in the United States rather than depart and start the clock on the ten-year waiting period.[69] By the time his case came before the court, Mr. De Niz Robles would have completed eight years out of the required ten-year waiting period. Thus, the BIA's decision meant "it's eight years lost and ten still to wait" for Mr. De Niz Robles.[70]

The court rejected the BIA's attempt to apply *In re Briones* retroactively to Mr. De Niz Robles. The court started out by noting that courts defer to an agency's new view in the *Brand X* context "because the agency has been authorized to fill gaps in the statutory law with its own policy judgements," not because it is "a superior interpretation of existing law."[71] Thus, in the *Brand X* context, an agency acts "in substance" more like "a legislative actor making new policy" than a judge interpreting existing law.[72] Because an agency decision under *Chevron*/*Brand X* is "a form of administrative activity about as legislative as they come,"[73] the court found "no reason" why *Bowen*'s analogy between legislation and rulemaking would not apply in the *Brand X* scenario presented by Mr. De Niz Robles' case.[74] Applying *Bowen*, the court found that Congress did not expressly authorize the BIA to create retroactive rules, so *Briones* could not apply retroactively to Mr. De Niz Robles.[75]

Recognizing "the indeterminacy of analogies to judicial and legislative action," the court also reviewed the retroactivity issue through the lens of *Chenery II*.[76] *Chenery II* instructs courts to balance "the ill effect" of retroactive application with "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."[77] Balancing the substantial "ill effects" that stem from penalizing people for past conduct without guarantees of

66. *Id*. at 1168.
67. *Id*.
68. *Id*. (citing INS v. St. Cyr, 533 U.S. 289, 321 (2001) ("A statute, order, or edict 'operates retroactively' when it seeks to impose 'new legal consequences to events completed before its' announcement.")).
69. *Id*. at 1168–69.
70. *Id*. at 1169.
71. *Id*. at 1173.
72. *Id*.
73. *Id*. at 1174.
74. *Id*. at 1172.
75. *Id*. at 1172–74.
76. *Id*. at 1174–75.
77. Chenery II, 332 U.S. 194, 203 (1947).

fair notice and equal protection[78] with the fact that prospective-only application here does not appear "contrary to [any] statutory design or legal or equitable principle," the court found the analysis to weigh heavily against retroactive application of the *Briones* rule.[79] The court also found that the circumstances giving rise to this case did not meet any of the situations *Chenery II* foresaw where it may be appropriate to apply the results of an adjudication retroactively.[80]

Finally, the court also applied the Tenth Circuit's own five-factor balancing test adopted in *Stewart Capital Corp v. Andrus*[81] to analyze the appropriateness of retroactivity. Echoing the same due process and equal protection concerns, it concluded that this test, too, supported a prospective-only application of *Briones*.[82]

It is also worth noting that the Tenth Circuit also added one "wrinkle"[83] in a footnote along the way. It stated that "[a]n agency in the *Chevron* step two/*Brand X* scenario may enforce its new policy judgment only with judicial approval."[84]

III. GUTIERREZ V. LYNCH

A. THE FACTS AND DECISION

Gutierrez-Brizuela v. Lynch[85] is the latest development in this saga. In *Gutierrez*, the BIA sought to apply *Briones* to a petition filed by Hugo Gutierrez-Brizuela. The difference between this case and *De Niz Robles* is that Mr. Gutierrez-Brizuela applied for an adjustment of status nearly two years *after* the BIA issued *Briones* but *before* the Tenth Circuit gave deference to the BIA's decision in *Padilla II*. Pointing to "the rule and reasoning" of *De Niz Robles*, then-Judge Gorsuch writing (again) for the Tenth Circuit rejected "retroactive" application of *Briones* to Mr. Gutierrez-Brizuela.[86]

The court started by noting that the *Briones* decision "was not legally effective in the Tenth Circuit" until the court "discharged its obligation" under *Chevron* step-two/*Brand X*, confirmed the statutes at issue were ambiguous and the BIA's

78. *De Niz Robles*, 803 F.3d at 1176. ("In the *Chevron* step two/ *Brand X* context, it's easy to see the "ill effect[s]" of retroactivity: upsetting settled expectations with a new rule of general applicability, penalizing persons for past conduct, doing so with a full view of the winners and losers—all with a decisionmaker driven by partisan politics.").

79. *Id*. at 1174–76 ("[P]ermitting retroactivity would undo settled expectations in favor of a new rule of general applicability rendered by a decisionmaker expressly influenced by policy and politics. In both cases the decisionmaker would be able to punish those who have done no more than order their affairs around existing law—and could accomplish all this with full view of who will stand to flourish or flounder, left not merely to predict who the winners and losers might be, but able to single out disfavored persons and groups and punish them for past conduct they cannot now alter.").

80. *Id*. at 1176–77.

81. 701 F.2d 846, 848 (10th Cir. 1983).

82. *De Niz Robles*, 803 F.3d at 1177–80.

83. *Id*. at 1174 n.7.

84. *Id*.

85. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).

86. *Id*. at 1145–48.

interpretation was reasonable, and held that *Padilla I* was overruled.[87] Thus, before *Padilla II* was decided, *Padilla I* remained binding precedent "on which litigants were free (and expected) to rely, and *Briones* bore no legal force."[88] Under this reasoning, *Padilla I* was good law on which Mr. Gutierrez-Brizuela could be expected to rely when he filed his petition.

Next, the court reasoned that the same due process and equal protection concerns "that animated [the *De Niz Robles*] holding" applied to Mr. Gutierrez-Brizuela's case.[89] The court found the due process concerns "obvious" in that when Mr. Gutierrez made his choice to apply for adjustment, "he had no notice of the law the BIA now seeks to apply."[90] Further, the equal protection concerns were "obvious" too: "if the agency were free to change the law retroactively based on shifting political winds, it could use that power to punish politically disfavored . . . individuals for conduct they can no longer alter."[91]

The court also applied the tests set forth in *Chenery II* and *Stewart Capital* to conclude that *Briones* should not apply retroactively to Mr. Gutierrez-Brizuela.[92] In particular, the court noted that allowing the retroactive application of *Briones* would "invite individuals to disregard on-point judicial precedent . . . because of its potential susceptibility to revision by an executive agency."[93] Further, potential litigants in Mr. Gutierrez-Brizuela's position would need to speculate whether an agency decision would ultimately receive deference and prevail under *Chevron/Brand X* at a later point in ordering their affairs.[94] Given the difficulty of this type of speculation and the extreme costs associated with imposing this level of uncertainty on people with heavy reliance interests, the court ruled against the application of *Briones* to Mr. Gutierrez-Brizuela.[95]

B. THE TENTH CIRCUIT ERRED IN HOLDING THAT PADILLA II HAD RETROACTIVE EFFECT AND A CONTRARY DECISION IN THIS CASE WOULD STILL HAVE BEEN EQUITABLE

In *Gutierrez-Brizuela*, the Tenth Circuit analogized the BIA's adjudicative decision in *Briones* to legislation and agency rulemaking, contexts in which the

87. *Id.* at 1145.
88. *Id.*
89. *Id.* at 1146.
90. *Id.*
91. *Id.*
92. *Id.* at 1147.
93. *Id.* (citing De Niz Robles v. Lynch, 803 F.3d 1165, 1178–79 (10th Cir. 2015)).
94. *Id.*
95. *Id.* ("Are we really to expect that persons in such circumstances should have to bear the cost of ignoring directly controlling judicial precedent in favor of the speculative possibility that an executive revision might ultimately prevail? Add to that the costs associated with imposing this kind of uncertainty on an entire class of persons with significant interests at stake (the potential right to remain lawfully in this country), and the BIA's failure to identify any benefits of any kind that might be vindicated through retroactive application of its new rule . . . and we just do not see how the agency might prevail.").

Supreme Court has held a strong presumption against retroactivity applies.[96] The Supreme Court set forth the test for deciding when a Congressional statute has retroactive effect in *Landgraf* and subsequently in *INS v. St. Cyr*.[97] In fact, the Tenth Circuit cited to *INS v. St. Cyr* in *De Niz Robles* for the proposition that "a statue, order, or edict 'operates retroactively' when it seeks to impose 'new legal consequences to events completed before its' announcement.'"[98] While the court got the general standard right, *Landgraf* involves a two-step inquiry. The first step, stemming from *Bowen*, is to determine whether Congress has clearly granted the law's retroactive application.[99] The second step, stemming from *Landgraf*, "is to determine whether [the provision] attaches new legal consequences to events completed before its enactment, a judgment informed and guided by considerations of fair notice, reasonable reliance, and settled expectations."[100]

Although the equitable result reached in *Gutierrez-Brizuela* is commendable, applying the two-step "impermissible-retroactive-effect determination"[101] test from *St. Cyr* does not lead to the outcome reached in *Gutierrez-Brizuela*. The Tenth Circuit erred in concluding that *Briones* had retroactive effect to Mr. Gutierrez-Brizuela, because such application did not upset considerations of fair notice, reasonable reliance, and settled expectations.

Briones provided fair notice to Mr. Gutierrez-Brizuela. Though the Supreme Court has not weighed in on the appropriate standard to assess fair notice in the context of civil regulations, the Tenth Circuit has found regulations to provide adequate notice and therefore meet due process requirements "so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require."[102]

Applying the Tenth Circuit's own test to Mr. Gutierrez-Brizuela would suggest that a reasonably prudent person in Mr. Gutierrez-Brizuela's position would be aware that *Briones* left him with only one option: to remain outside the country for ten years. *Briones*, a decision published on the BIA's website, had been the "authoritative" decision for two years at the time he applied for adjustment of status. Further, the BIA made clear its conclusion within the *Briones* decision, stating "aliens who are inadmissible under [8 U.S.C. § 1182(a)(9)(C)] cannot qualify for [8 U.S.C. § 1255(i)] adjustment, absent a waiver of inadmissibility."[103] It is

96. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Landgraf v. USI Film Prod., 511 U.S. 244, 280 (1994); INS v. St. Cyr, 533 U.S. 289, 315–16 (2001).

97. *See Landgraf*, 511 U.S. at 269–70; *INS*, 533 U.S. at 316–17, 320.

98. *De Niz Robles*, 803 F.3d at 1168.

99. *INS*, 533 U.S. at 291.

100. *Id.*

101. *Id.*

102. Mainline Rock and Ballast, Inc. v. Secretary of Labor, 693 F.3d 1181 (10th Cir. 2012) (quoting Walker Stone Co. v. Secretary of Labor, 156 F.3d 1076 (10th Cir. 1998).

103. Briones, 24 I. & N. Dec. 355, 371 (B.I.A. 2007).

therefore not "obvious" that Mr. Gutierrez had no notice of the *Briones* rule.[104]

While it is true that *Landgraf* and *St. Cyr* were decided in the context of potentially retroactive statutes, as opposed to rulemakings, accepting the Tenth Circuit's argument that the BIA's decision was analogous to legislative activity, it seems natural that this framework would also apply. The court thus erred in failing to conduct this analysis in *Gutierrez-Brizuela*.

C. THE TENTH CIRCUIT'S OPINION APPEARS INCONSISTENT WITH BRAND X

Brand X held that "a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative," because "the agency remains the authoritative interpreter (within the limits of reason) of such statutes."[105]

Gutierrez-Brizuela seems to position the Tenth Circuit out of sync with *Brand X*[106] and numerous other circuits that have allowed agencies to exercise their powers under *Brand X* without judicial approval.[107] It seems incongruous that the agency is both the "authoritative" interpreter of an ambiguous statute under its authority and also that its interpretations do not apply until a court has approved it.[108] Further, courts tend to presume that statutes passed by Congress[109] take effect on the day of their enactment, and agency rules[110] generally take effect within thirty days post announcement, without the need for judicial approval. Given the Tenth Circuit's argument that in the *Chevon*/*Brand X* scenario, agencies are exercising what amounts to legislative activity, why is the BIA's ruling

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104. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1146 (10th Cir. 2016).

105. *Brand X*, 545 U.S. at 983.

106. *See* Daniel Hemel, *The Tenth Circuit vs*. Brand X, YALE J. ON REG.: NOTICE & COMMENT (Aug. 24, 2016), http://yalejreg.com/nc/the-tenth-circuit-vs-brand-x/ [http://perma.cc/K6RQ-LVCK]. *But see* David Feder, *Founders Meet* Brand X, YALE J. ON REG: NOTICE & COMMENT (Aug. 31, 2016), http://yalejreg.com/nc/founders-meet-brand-x-by-david-feder [http://perma.cc/6DJE-V5KW] (asserting that *Gutierrez-Brizuela* is consistent with *Brand X* because an agency's interpretation of a statute can be authoritative and not self-executing).

107. Hemel, *supra* note 106, at 4 (citing as examples Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12 (1st Cir. 2006), United States v. McGee, 763 F.3d 304, 314–15 (3d Cir. 2014), Puentes Fernandez v. Keisler, 502 F.3d 337, 348 (4th Cir. 2007), Metro. Hosp. v. HHS, 712 F.3d 248, 258 (6th Cir. 2013), Rush Univ. Med. Ctr. v. Burwell, 763 F.3d 754, 762 (7th Cir. 2014), and Medina-Nunez v. Lynch, 788 F.3d 1103, 1104 (9th Cir. 2015)).

108. If the agency's interpretation could be both authoritative and non-self-executing, this may account for the difference. *See* Feder, *supra* note 106, at 5.

109. *See, e.g*., Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) (unanimous opinion) ("It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.").

110. *See, e.g*., Administrative Procedure Act, 5 U.S.C. § 553(d)(2012) (suggesting that final rules are not effective until 30 days after publication in the Federal Register); Rowell v. Andrus, 631 F.2d 699, 704 (10th Cir. 1980) (finding that regulation not promulgated in conformity with Administrative Procedure Act was not void, but rather it would take effect 30 days following publication of the rule).

not presumed to have near-immediate effect from the point it was handed down in 2007?[111]

D. THE TENTH CIRCUIT'S OPINION LEAVES KEY QUESTIONS UNANSWERED

A major problem left unanswered by *Gutierrez-Brizuela* is the way in which an agency can get a court to uphold its new ruling prospectively, thus giving it legal effect, in the *Chevron*/*Brand X* scenario. The *Gutierrez* holding leaves the agency rule in limbo, and it is hard to see how the agency remains the "authoritative" interpreter in line with *Brand X*. Perhaps the agency can generate a test case to put before the court.[112]

Upon determining that the action in *Briones* was more akin to legislative activity, the court stated that "logic suggests it should be bound by the same presumption of prospectivity that attends true legislative enactments."[113] It further found the due process and equal protection concerns that "animated [its] holding" in *De Niz Robles* to also apply to Mr. Gutierrez-Brizuela.[114] While due process and equal protection concerns as applied to Mr. De Niz Robles appear clear, this reasoning does not suffice to explain why *Briones* was applied prospectively from 2011, when it was handed down by the BIA in 2007 in Mr. Gutierrez-Brizuela's case.

CONCLUSION

Brand X certainly poses a puzzle for administrative law, clearly evidenced by the saga between the BIA and the Tenth Circuit. While the decision in *De Niz Robles* seems to rest on solid ground, that in *Gutierrez-Brizuela* does not. Although the equitable result reached in *Gutierrez-Brizuela* is commendable, the Tenth Circuit erred in concluding that *Briones* had retroactive effect to Mr. Gutierrez-Brizuela, because such application did not upset considerations of fair notice, reasonable reliance, and settled expectations. Thus, a contrary result would have still been equitable. Further, *Gutierrez-Brizuela* is seemingly inconsistent with *Brand X*, and it leaves key practical questions unanswered. Given the circuit split that exists in this area, the Supreme Court should take up this issue to ensure consistency across the circuits.

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111. *See* Recent Case, Gutierrez-Brizuela v. Lynch: Tenth Circuit Holds that Certain Agency Interpretations Have No Legal Effect Until Courts Approve, 130 HARV. L. REV. 1496 (2017). ("[I]magine that Congress, not the BIA, reconciled the immigration provisions in 2007. In that case, there is little doubt that the Tenth Circuit would have applied Congress's 2007 rule to Gutierrez-Brizuela's 2009 application for adjusted status. What's the difference here?").

112. *See* Hemel, *supra* note 106, at 3 (asserting that *Gutierrez* requires agencies to act unlawfully "to generate a test case" in which the court can uphold an agency's new ruling). *But see* Feder, *supra* note 106, at 4 (arguing that agencies creating a test case may be awkward but not unlawful).

113. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1145 (10th Cir. 2016); *see also* De Niz Robles v. Lynch, 803 F.3d 1165, 1172 (10th Cir. 2015).

114. *Gutierrez-Brizuela*, 834 F.3d at 1146.