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July 20, 2009

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**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS**

In the Matter of

**Salvador Gomez-Barajas, and Fabiola
del Rocio Rodriguez**

Respondents

In Removal Proceedings

File No. A099-330-519, A076-790-174

**BRIEF OF AMICUS CURIAE,
AMERICAN IMMIGRATION LAWYERS
ASSOCIATION**

Introduction

Since its publication in 2005, adjudicators and attorneys at all levels within the immigration components of the Department of Justice and the Department of Homeland Security have called on the principles of the Supreme Court's opinion in *National Cable & Telecommunications Ass'n v. Brand X Internet Service*, 545 U.S. 967 to decide questions of law in derogation of prior judicial precedent – and with good reason. From 2002 until 2007, when the Board jettisoned cases at the rate of tens of thousands each year without too much thought for its role in the administration of the nation's immigration system, *see* Dorsey & Whitney LLP, *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, at 39 (July 22, 2003), (available at <http://www.dorsey.com>); John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. Sch. L. Rev. 13, 18-20 (2006), the circuit courts filled the void and published several authoritative interpretations of law to resolve the cases before them and to guide future decision making on novel statutory issues. Many questions of exceptional importance in the immigration field were decided by the courts of appeals giving the imprimatur of stability to the law so that individuals residing in those circuits could modify their actions accordingly and proceed with life.

Recently, agency decision makers have cited increasingly to the *Brand X* opinion as providing – in their view – an escape hatch from a body of law

viewed as restrictive or insufficiently deferential. *See, e.g.,* EOIR Proposed Rule, *Board of Immigration Appeals: Affirmance Without Opinion, referral for Panel Review, and Publication of Decisions as Precedents*, 73 Fed. Reg. 34654, 34661 (June 18, 2008).¹ In this vein, *Brand X* "offers an important opportunity for the Attorney General and the Board to be able to reclaim *Chevron* deference with respect to the interpretation of ambiguous statutory provisions in the immigration laws, notwithstanding contrary judicial interpretations."

In the case of Fabiola de Rocio Rodriguez, the Immigration Judge asserts that *Brand X* permitted him to decide the question of statutory eligibility for adjustment of status contrary to the Tenth Circuit's decision in *Padilla-Caldera v. Gonzales*, 453 F.3d 1237 (2006). In the case of Salvador Gomez-Barajas, the Immigration Judge conformed his decision to the *Padilla-Caldera* ruling and DHS appealed. In its brief, DHS asserts that the *Brand X* decision allows it or an Immigration Judge to opt out of *Padilla-Caldera's* holding and follow the Board's opinion in *Matter of Briones*, 24 I&N Dec. 355 (2007). Doing so, under the *Brand X* rubric, would require that the Immigration Judge deny Mr. Gomez-Barajas's adjustment application. Both assertions are incorrect.

The Immigration Judge and DHS are mistaken in their framing of the *Brand X* question. They are not alone, however. What *Brand X* is and how courts

¹ There are numerous problems with EOIR's proposed rule; this is merely one unfortunate proposition among many. *See* American Immigration Law Foundation & American Immigration Lawyers Association, *Comments on Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents; EOIR Docket No. 159P* (available at [>>](http://www.aifl.org/lac/chdocs/BIAAWO-regcmts.pdf)).

have employed the *Chevron* two-step test are frequently misunderstood by agency personnel – lawyers, adjudicators, and judges. True, the principles, while simple in statement, can be difficult in application. To aid the Board, Amicus, the American Immigration Lawyers Association, proffers this brief setting forth the critical principles underlying *Brand X* and, more importantly, the Supreme Court’s decision in *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). As explained below, the range of questions subject to agency re-interpretation is narrowly confined by the long-standing principles of *Chevron* and can only be done when the Board acts in a law-making capacity. Even in those limited circumstances where *Chevron* is correctly implicated, in the absence of an on-point, published Board opinion directing adjudication otherwise, every adjudicator within a circuit must follow circuit law in deciding the cases that come before him or her. The Attorney General, the Secretary of Homeland Security, or the Board – and no others – may invoke *Brand X* to decide a case in derogation of circuit law.² Applied in Ms. Rodriguez and Mr. Gomez’s cases, the legal questions are easily resolved in their favor.³

² The Secretary may delegate her authority to other “specific officials” and with the concurrence and approval of the Attorney General publish precedential decisions. 8 C.F.R. § 103.3(c). Here forward in this brief, AILA’s reference to the “Board” includes the Board, Secretary, and Attorney General. AILA addresses the application of *Brand X* in case adjudication. See *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (explaining that the Board is entitled to *Chevron* deference in case by case adjudication). The question of how *Brand X* implicates the Department of Justice or the Department of Homeland Security’s rulemaking power is not presented here. Nor do we address the doctrine of non-acquiescence.

³ AILA’s takes no position on the merits of any of the applications for relief in either case. Our interest is limited to the legal questions.

Statement of Interest

The American Immigration Lawyers Association (“AILA”) is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA’s members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

Argument

I. “In the 25 years since *Chevron* was decided, [the Supreme Court] has continued to recognize that courts and agencies play complementary roles in the project of statutory interpretation.” *Negusie v. Holder*, -- U.S. --, 129 S.Ct. 1159, 1171 (2009) (Stevens, J. concurring in part and dissenting in part). *Brand X* is an unremarkable restatement of the long-standing principles articulated in *Chevron*. It does not alter or modify the interpretive approach to statutory questions in

general. Indeed, it clarifies how courts and agencies work together to achieve the goals articulated by Congress in legislation. Judicial deference to agencies' views on statutes they administer was not born in *Chevron*, and the role of the judiciary to say what the law is did not die with it either. *Id.* at 1170-71. *Chevron* and, by extension, *Brand X* provide a two-step structure for judicial review of agency decision-making while preserving the legitimate authority of an agency and, ultimately, Congress.

At *Chevron* step one, a court determines whether Congress' intent is expressed in the statute's plain language, and if it is, that intent must be given effect. *Chevron*, 467 U.S. at 843-44. However, when Congress has "explicitly left a gap for the agency to fill," a court must proceed to step two, where the inquiry is whether Congress was silent or used language that is ambiguous. If so, the agency's interpretation is given controlling weight unless it is unreasonable. *Chevron*, 467 U.S. at 843-44.

Brand X reiterates this structure and instructs that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* 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." *Brand X*, 545 U.S. at 982. It is a simple enough instruction as stated. In application, though, the three precepts critical to implementing the *Brand X* holding are frequently misunderstood or overlooked by agency adjudicators:

(1) *Brand X* requires the Board to interpret circuit law through the *Chevron* lens; accordingly, the *Chevron* structure remains the central focus when there is a prior judicial interpretation of an immigration statute – *Brand X* is not the starting point. It is a myth that a plain statute is a facially clear statute – yet, it is a myth that has convinced many. *Cf.* Brief of Dept. of Homeland Security in Matter of Rodriguez at 8 (asserting that the use of canons of construction to interpret statute means statute is ambiguous); Brief of Dept. of Homeland Security in Matter of Gomez at 11 (same). Because the Board must interpret circuit law in applying *Brand X*, it is important to state that reliance on tools of statutory construction to ascertain the meaning of the words in a law says nothing – one way or the other – to indicate that a statute is ambiguous or unambiguous. Indeed, *every* adjudicator really ought to resort to the canons of statutory construction to aid in the interpretation of statutory language. The canons of construction are numerous and while not all of them are traditionally employed at step one, the Supreme Court has provided guidance. The Supreme Court has explained that at step one of *Chevron*, the traditional canons allow a court to rely on a statute’s “text, structure, purpose, and history” to resolve meanings of statutory terms. *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004). Only “when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent” may a court turn to step two. *Id.*

When interpreting circuit law through the *Chevron* lens, the Board must be cautious not to over-interpret judicial opinions. “Opinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis.” *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000). A court’s statutory analysis need not “say in so many magic words that its holding is the only permissible interpretation of the statute in order for that holding to be binding on an agency,” particularly where courts were operating without the guidance of *Brand X*, and “the exercise of statutory interpretation makes clear the court's view that the plain language of the statute was controlling and that there existed no room for contrary agency interpretation.” *Fernandez v. Keisler*, 502 F.3d 337, 347 (4th Cir. 2007) (applying *Brand X*).

(2) (a) *Brand X* requires analysis of the Board’s case law as well to determine if there is proper *agency* authority for re-interpreting a prior judicially interpreted statute. The law-making function central to *Chevron* means that only certain opinions of the Board are eligible for *Chevron* deference (and will thus implicate *Brand X*). The form and content matter in determining if any of the Board’s decisions will be *Chevron*-eligible. As to form, only published Board decisions are *Chevron*-eligible. *Rotimi v. Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc). This rule limits *Chevron*’s power to only those Board decisions which have the force of law. Unpublished Board decisions do not have a binding effect and do not create

a rule of law. *Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1991) (“Decisions which the Board does not designate as precedents are not binding on the Service or the immigration judges in cases involving the same or similar issues.”). Decisions by Immigration Judges, like Field Directors, are not *Chevron*-eligible because they lack the capability of making law.

(b) As to content, the Board’s opinion must actually be premised on *Chevron*’s “gap-filling” delegation of congressional authority to implement the statute. That is to say that the Board opinion must “make law” by interpreting ambiguous statutory terms and premise the interpretation on *Chevron*’s implied delegation of authority. *Negusie*, 129 S.Ct. at 1167 (according no *Chevron* deference because “[o]ur reading of these decisions confirms that the BIA has not exercised its interpretive authority.”) When the Board finds a statute is clear, it is constrained by the plain language of the statute and must give effect to congressional intent. *Chevron*, 467 U.S. at 843. If the Board states that it is simply applying the statutory language then it is not: (1) interpreting the statute, (2) filling statutory gaps, or (3) giving concrete meaning to ambiguous terms through case-by-case adjudication. Consequently, neither *Chevron* nor *Brand X* are implicated. *Negusie*, 129 S.Ct. at 1167; *Barraza v. Mukasey*, 519 F.3d 388, 391 (7th Cir. 2008); *Peter Pan Bus Lines Inc. v. Federal Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (collecting cases).

(c) A corollary to this precept is that only the Board can invoke *Brand X* because it is the only actor capable of making law that is binding on third parties. For any adjudicator without a law-making capacity, *Brand X* is irrelevant.

(3) The vertical nature of our appellate system requires inferior adjudicative bodies to obey the decisions of superior courts. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). The Seventh Circuit has explained,

[W]e think it not unwise to recall a basic tenet in our federal system of administrative practice and review. The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review, is much akin to a . . . District Court . . . That is to say, it is the ‘inferior’ tribunal, whose decisions, both substantive and, in some instances, adjective, are subject to review and consequent approval or disapproval by the reviewing body.

Morand Bros. Beverage Co. v. NLRB, 204 F.2d 529, 532 (7th Cir. 1953). Once a circuit court determines the meaning of a statute, that meaning controls how inferior bodies apply the particular statute. *Hart*, 266 F.2d at 1171. *Brand X* does not alter this rule of verticality. Consequently, in the absence of an on-point published opinion of the Board directing otherwise, *every* adjudicator within a circuit *must* follow circuit precedent. *Id.* The Board understands this precept but it has failed to communicate this precept with clarity. *See, e.g., Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008) (invoking *Brand X* and

instructing adjudicators to both disregard on-point step-two circuit law and follow step-one circuit law).⁴

II. (1) Applying these principles to the two cases at hand, several legal points are easily resolved. Every adjudicator within the Tenth Circuit is bound by the decision in *Padilla-Caldera* because, as of this submission, there is no on-point published decision directing otherwise. Cf. *Matter of Armendarez-Mendez*, 24 I&N Dec. at 653. The Immigration Judge in the case of Ms. Rodriguez picked *Matter of Briones* over *Padilla-Caldera* as having the better rule. He was wrong to do so. Immigration Judges cannot make it up as they go along – the vertical nature of the appellate system precludes that haphazard approach. This is so even if the Immigration Judge prefers a different rule or likes the ruling of a different circuit better. “In short, experience has taught that causes are disposed of most expeditiously when the correction of errors is left to the superior tribunals and those enjoying judicial or administrative inferiority studiously endeavor to comply with the mandate issued to them.” *Morand Bros. Beverage Co.*,

⁴ In *Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008), the Board grappled with the prior judicial interpretations in three related cases, *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), *Reynoso-Cisneros v. Gonzales*, 499 F.3d 329 (4th Cir. 2007), *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007). The issue in *Matter of Armendarez-Mendez* was whether the BIA had the authority to reopen removal proceedings if the noncitizen had departed the United States after those proceedings were completed. The Board reaffirmed its longstanding position that it did not have this authority. The Board found that the Ninth Circuit’s interpretations to the contrary were based on the Ninth Circuit’s belief that the regulation was ambiguous. Accordingly, the Board relied upon *Brand X* to justify applying its own interpretation of the statutory terms even within the Ninth Circuit. In *William*, the Fourth Circuit held that the regulation barring motions to reopen after a person’s departure from the U.S. was invalid as it violated the statute under step one. Because *William* was a *Chevron* step one case, the Board determined that it was bound to follow it in cases arising within the Fourth Circuit.

204 F.2d at 532. In a similar sense, the position proffered by DHS in their briefing in Ms. Rodriguez’s and Mr. Gomez’s cases that *Brand X* is applicable in the absence of on-point directed authority should be disapproved.

(2) There is no cause for the Board, the Immigration Judges, or any adjudicator to rely on *Matter of Briones* as providing a platform for the invocation of *Brand X* for two reasons. First, viewed through a *Chevron* lens, it is not subject to serious doubt that the Tenth Circuit applied the traditional canons of statutory construction and enforced the plain language of the statutory terms. In other words, *Padilla-Caldera* resolved the statutory interpretation question at step one of *Chevron*. Second, the *Brand X* rule applies *only* when the Board has used its administrative discretion to interpret ambiguous statutory terms. In *Matter of Briones*, the Board did not, in fact, engage in the “gap-filling” function of statutory implementation intended by *Chevron*. The Board, applying the traditional tools of statutory construction, interpreted the plain language of the statute. The Board did not identify an ambiguity it was resolving. As between the two interpretations – *Padilla-Caldera* and *Briones* – *Brand X* is a bystander. Legal terms have only a single meaning, and, under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Article III courts say what that meaning is. *Id.* at 177. *Padilla-Caldera* sets forth the meaning of the statutory question at issue here for everywhere in the Tenth Circuit. *Matter of Briones* cannot implicate *Brand X* because it does not rely on *Chevron*.

Conclusion

"The *Chevron* framework thus accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert as statutory implementation." *Negusie*, 129 S.Ct. at 1171 (Stevens, J. concurring and dissenting). Here, the Tenth Circuit has used its superior power of statutory interpretation and provided a construction of the statute that, while different than the Board's, controls.

Respectfully submitted this 20th of July, 2009,

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CERTIFICATE OF SERVICE

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