

No. 09-35174

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**AURELIO DURAN GONZALEZ; et al.,
Plaintiffs - Appellees,**

v.

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

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

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I. INTRODUCTION

Despite an involved procedural history, the pertinent facts at issue in this appeal are relatively straightforward. The named Plaintiffs and a proposed redefined class¹ applied for adjustment of status in conjunction with applications for waivers of their prior removal orders (hereinafter “I-212 waivers” because they are filed on Form I-212). They filed these applications in reliance on this Court’s prior decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), which established clear eligibility to apply for permanent residency with I-212 waivers, despite a prior deportation and unlawful reentry. After Defendants, the Department of Homeland Security, refused to comply with the *Perez-Gonzalez* decision, Plaintiffs and class members sought and won preliminary injunctive relief to prevent Defendants from refusing to apply the *Perez-Gonzalez* decision.

On appeal, this Court ruled that, pursuant to the Supreme Court’s decision in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005) (“*Brand X*”), it was bound to defer to and adopt the Board of Immigration Appeals’ (BIA) interpretation of the statute and regulations as set forth in *Matter of Torres-Garcia*, 23 I. & N. Dec. 866

¹ On remand, the District Court refused to certify the proposed class, which was narrower than the originally certified class in that it included only class members who filed I-212 waiver applications prior to the announcement of the new law, *i.e.*, in reliance on the old law. E.R. 8.

(BIA 2006).² See *Duran Gonzales v. Dept. of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007). As such, this Court announced that it would no longer follow the rule in *Perez-Gonzalez*. By adopting the BIA's interpretation in *Matter of Torres-Garcia*, the Court held that noncitizens who had previously been removed and reentered were no longer eligible to file I-212 waivers in conjunction with their applications for permanent residency.

The remaining issue that is now before this Court is whether the new rule adopted by this Court in *Duran Gonzales* should be retroactively applied to class members who acted in reliance on this Court's prior rule in *Perez-Gonzalez*, or whether Plaintiffs and the proposed redefined class should be found to be permanently ineligible for residency and subject to summary expulsion from the United States.

Plaintiffs and the proposed redefined class submit that under both the retroactivity analysis set forth in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982) and retroactivity tests employed in similar contexts, the new rule announced in *Duran Gonzales* should not be applied retroactively because it would result in undue hardship and manifest

² *Matter of Torres Garcia* held that a person is not eligible for an I-212 waiver until ten years have elapsed since the applicant's departure from the country. 23 I. & N. Dec. 866, 873.

injustice to those persons who acted in reliance on the law in effect at the time they filed their applications.

II. JURISDICTION

A. Basis of District Court's Subject-Matter Jurisdiction

The instant appeal arises from the District Court's final judgment dismissing the complaint and denying Plaintiffs' motions to amend the complaint and modify the class. The District Court had jurisdiction to review the claims pursuant to 28 U.S.C. §§ 1331 and 1651, as a civil action arising under the Constitution and laws of the United States; 5 U.S.C. § 701 *et seq.*, as an action to compel agency action unlawfully withheld or unreasonably delayed; 28 U.S.C. § 1361, as an action to compel an officer or employee of the United States to perform a duty; and 28 U.S.C. §§ 2201-02, as an action to obtain declaratory judgment.

B. Basis of Jurisdiction in Court of Appeals

This Court has jurisdiction to review final orders of the United States District Court for the Western District of Washington pursuant to 28 U.S.C. §§ 1291, 1294. The Notice of Appeal was filed on March 5, 2009.

Plaintiffs-Appellants Excerpt of Records (hereinafter, "E.R.") 1. This appeal

challenges the final judgment of the District Court issued on February 27, 2009 and its corresponding orders denying Plaintiffs' motion for leave to file an amended complaint and motion to amend class certification. E.R. 2-9. Thus, the appeal is timely as it was filed within 60 days of these final judgments. *See* Federal Rule of Appellate Procedure § 4(a)(1)(B).

III. STATEMENT OF ISSUES PRESENTED

1. Whether the District Court erred in denying Plaintiffs' motions to amend the complaint and modify the class definition to include only persons who were eligible for I-212 waivers under the old rule and filed their applications prior to this Court's adoption of the new rule.
2. Whether the District Court erred in dismissing the case by failing to apply the analysis laid out in the *Montgomery Ward* in order to determine whether the newly adopted rule should be applied retrospectively to persons who were eligible for I-212 waivers under the old rule and filed their application in reliance on the old rule, *i.e.*, prior to this Court's adoption of the new rule.
3. Whether the District Court erred in failing to apply Supreme Court and Ninth Circuit retroactivity principles to determine that the newly adopted rule announced in *Duran Gonzales* does not apply retroactively.

IV. STATEMENT OF THE CASE

On September 28, 2006, Plaintiffs filed a complaint for injunctive and declaratory relief on behalf of themselves and proposed class members.

E.R. 64-65. Plaintiffs alleged that Defendants' policy of refusing to adhere to this Court's decision in *Perez-Gonzalez* violated Plaintiffs' and proposed class members' constitutional, statutory, and regulatory rights to have their applications for adjustment to lawful permanent resident status adjudicated pursuant to the law. The District Court entered an order granting a motion for temporary restraining order on October 11, 2006. E.R. 66. On November 13, 2006, the District Court entered an order granting Plaintiffs' Motion for Preliminary Injunction and Class Certification. E.R. 67.³ The

³ The certified class includes individuals who have already applied and all individuals who will file applications in the future:

- (a) Individuals who are inadmissible under INA § 212(a)(9)(C)(i)(II) and have filed an I-212 waiver application within the jurisdiction of the Ninth Circuit in conjunction with their application for adjustment of status under INA § 245(i), prior to any final reinstatement of removal determination, where USCIS denied the I-212 application because 10 years had not elapsed since the date of the applicant's last departure from the United States; and
- (b) Individuals who are inadmissible under INA § 212(a)(9)(C)(i)(II) and have filed or will file an I-212 waiver application within the jurisdiction of the Ninth Circuit in conjunction with their application for adjustment of status under INA § 245(i), prior to any final reinstatement of removal

District Court entered an order modifying the preliminary injunction on December 19, 2006. E.R. 67.

Defendants appealed the District Court's order granting the preliminary injunction, and this Court overturned the preliminary injunction. *Duran Gonzales v. Dept. of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007). In vacating the preliminary injunction, this Court applied the Supreme Court's decision in *Brand X*, and found that it must defer to the agency's interpretation of an ambiguous statute – an interpretation which precludes class members from qualifying for adjustment of status. *Duran Gonzales*, 508 F.3d at 1241-42. The Court then remanded the case to the District Court for further proceedings consistent with its opinion adopting the new rule. *Id.* at 1242-43. Plaintiffs filed a Petition for Rehearing With Suggestion for Rehearing En Banc on February 27, 2008. The Court denied the petition on January 16, 2009 without comment.

On remand, Plaintiffs sought to amend the complaint, redefine the previously certified class, and obtain preliminary injunctive relief for the redefined class. E.R. 69. Plaintiffs sought to enjoin Defendants from

determination, where USCIS has not yet adjudicated the application but where USCIS will deny their I-212 application on the grounds that 10 years have not elapsed since the date of the applicant's last departure from the United States.
E.R. 5.

applying the newly adopted rule from this Court's decision in *Duran Gonzales* to Plaintiffs and a sub-class of persons (the proposed redefined class) who filed I-212 waiver applications on or before November 30, 2007, the date this Court announced the new rule in *Duran Gonzales*.⁴

On February 6, 2009, the District Court denied Plaintiffs' motion for the modified provisional class certification and preliminary injunctive relief. E.R. 10. On February 27, 2009, the Court denied Plaintiffs' motion to amend the complaint and redefine the class. E.R. 3. On that same date, the Court issued a final judgment. E.R. 2. Plaintiffs then filed this timely appeal and now submit their opening brief.

V. STATEMENT OF THE FACTS

A. Statutory Framework.

The Immigration and Nationality Act provides a process through

⁴ Specifically, Plaintiffs asked the District Court to modify the class definition to consist of:

Individuals who are inadmissible under INA § 212(a)(9)(C)(i)(II) and whose I-212 waiver applications were filed within the jurisdiction of the Ninth Circuit in conjunction with applications for adjustment of status under INA § 245(i) and were pending at any time on or after August 13, 2004 and on or before November 30, 2007 and prior to any final reinstatement of removal decision.

E.R. 22.

which certain employers and U.S. citizens and lawful permanent resident family members may file immigrant visa petitions on behalf of noncitizens in the United States. *See* 8 U.S.C. §§ 1151, 1153. The beneficiary of an approved immigrant visa petition may apply for adjustment of status to lawful permanent resident status. 8 U.S.C. § 1255.

In general, persons who have unlawfully entered the United States are ineligible for adjustment of status to lawful permanent residency because they have not been “inspected and admitted or paroled” for purposes of 8 U.S.C. § 1255(a). However, Congress created a limited exception: 8 U.S.C. § 1255(i), INA § 245(i), (hereafter INA § 245(i)) allows for persons who are the beneficiaries of visa petitions filed on or before April 30, 2001 to file for adjustment of status notwithstanding their unlawful entry, provided they pay an additional penalty fee of \$1,000.00. Thus, INA § 245(i) affords an “exception” to the “general rule” that “aliens who entered the country without inspection are ineligible to seek adjustment to lawful permanent status.” *Chan v. Reno*, 113 F.3d 1068, 1071 (9th Cir. 1997). This case deals with only a limited class of individuals who are beneficiaries of visa petitions filed *before* April 30, 2001.

Even if a person otherwise qualifies for adjustment of status to lawful permanent resident status under INA § 245(i), they nonetheless may be

inadmissible (and thus, generally ineligible for adjustment of status) if they have been previously removed from the United States and subsequently unlawfully reentered. *See* 8 U.S.C. §§ 1182(a)(9)(C)(i)(II), 1182(a)(9)(C)(ii) (barring re-entry and not allowing for requests to reenter until more than 10 years after the date of last departure). Moreover, if a person has previously been deported and then unlawfully reenters the United States, Immigration and Customs Enforcement (ICE) may detain and summarily remove the individual through an expedited process known as reinstatement of removal. 8 U.S.C. § 1231(a)(5), INA § 241(a)(5). In addition, ICE may initiate removal proceedings against the person under 8 U.S.C. § 1229b, INA § 240.

Persons who had been previously deported or removed can seek a discretionary waiver curing their unlawful entry under 8 U.S.C. §§ 1182(a)(9)(A)(iii) and 1255(i). The regulation at 8 C.F.R. § 212.2(e) expressly provides that a person who has been ordered deported or removed and unlawfully reenters may apply for adjustment of status as long they apply for consent to reapply on form I-212. Both the governing regulation and precedent decisions from the Board of Immigration Appeals confirm that if such consent is granted, it retroactively cures the unlawful re-entry. *See* 8 C.F.R. § 212.2(i)(2). *See also Matter of Garcia-Linares*, 21 I. & N. Dec. 254, 257 (BIA 1996); *Matter of Roman*, 19 I. & N. Dec. 855, 859 (BIA

1988). In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), introduced an additional ground of inadmissibility at 8 U.S.C. § 1182(a)(9)(C)(i)(II), which applies to persons who have been previously removed and who subsequently unlawfully reenter the United States. A waiver of that ground is available after ten years. 8 U.S.C. § 1182(a)(9)(C)(ii).

B. This Court's Decision in *Perez-Gonzalez v. Ashcroft*.

On August 13, 2004, this Court held that a person who was previously deported and unlawfully reentered before ten years elapsed nevertheless was entitled to have his I-212 waiver application adjudicated in conjunction with his application for adjustment of status under INA § 245(i). *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). The *Perez-Gonzalez* Court based its decision on the additional waivers provided by 8 U.S.C. §§ 1182(a)(9)(A)(iii) and 1255(i), and the explicit language of the governing regulation at 8 C.F.R. § 212.2. *Perez-Gonzalez*, 379 F.3d at 793. In sum, the *Perez-Gonzalez* Court upheld the regulatory language that if DHS approved an I-212 waiver application, the approval would cure *nunc pro tunc* the prior unlawful entry and would allow the applicant to adjust her or

his status to lawful permanent resident under INA § 245(i). *Id.* If, on the other hand, the I-212 application was denied as a matter of discretion for failure to demonstrate sufficient equities, then the government could reinstate the prior order of removal pursuant to 8 U.S.C. § 1231(a)(5). As a precedent decision, *Perez-Gonzalez* was binding on all applications for adjustment of status filed within the Ninth Circuit.

C. The BIA's Decision in *Matter of Torres-Garcia* and USCIS' Policy Memo.

Subsequent to the Court's decision in *Perez-Gonzalez*, the Board of Immigration Appeals (BIA) issued a decision in direct conflict with the Ninth Circuit's rule. *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006). In *Matter of Torres-Garcia*, the BIA held that a person is not eligible for an I-212 waiver unless ten years had passed since his or her last departure. The BIA found that the regulation at 8 C.F.R. § 212.2, relied upon by this Court, does not correspond with the governing statute. *Id.* at 876.

Following the BIA's decision, on March 31, 2006, USCIS issued an Interoffice Memorandum providing field guidance for the adjudication of I-212 waiver applications in light of *Perez-Gonzalez*. E.R. 46. The *Perez-Gonzalez* Memo acknowledged that *Perez-Gonzalez* was controlling in the

Ninth Circuit: “This ruling, however, is limited only to aliens whose cases are governed by Ninth Circuit law.” E.R. 47. The Memo set out general guidance for USCIS officers outside the Ninth Circuit (consistent with *Matter of Torres-Garcia*), and then provided a “Special Rule for Cases Arising in the Ninth Circuit.” E.R. 48.

D. Named Plaintiffs and the Proposed Redefined Class Are Applicants for Adjustment of Status Who Were Eligible for I-212 Waivers Prior to this Court’s Adoption of the New Rule.

Named Plaintiffs and the proposed redefined class are applicants for adjustment of status to lawful permanent residence under INA § 245(i) who applied affirmatively for adjustment of status along with I-212 waiver applications for having previously been deported or removed. All applied for adjustment of status within the jurisdiction of the Ninth Circuit Court of Appeals. All submitted their adjustment applications and I-212 waiver applications prior to this Court’s decision in *Duran Gonzales*, at a time when they were eligible for adjudication of their I-212 waiver applications based on prior law, as affirmed by this Court in *Perez-Gonzalez*.⁵ Specifically, at

⁵ Plaintiff Aurelio Duran Gonzalez filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Seattle USCIS office on March 24, 2006. Plaintiff Karina Noris filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Los Angeles USCIS office

the time they filed their applications, all named Plaintiffs qualified for adjudication of their I-212 waiver applications.

All named Plaintiffs also filed their applications in reliance on this Court's holding in *Perez-Gonzalez*. Indeed, several of the named Plaintiffs explicitly noted this Court's decision in *Perez-Gonzalez* when they submitted their applications. See E.R. 42 (cover letter attached to the application of Plaintiff Irma Palacios de Banuelos specifically outlining her eligibility under *Perez-Gonzalez*); E.R. 44 (cover letter attached to the application of Plaintiff Lucia Muniz de Andrade stating "as a 245(i) adjustment applicant she is protected by the controlling circuit court opinion in *Perez-Gonzalez v. Ashcroft*"); E.R. 49 (cover letter attached to the application of Plaintiff Luisa Martinez de Munguia stating "[t]his application

on June 15, 2005. Plaintiff Adriana Pouparina filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Los Angeles USCIS office on March 28, 2005. Plaintiff Maria Luisa Martinez de Munguia filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Yakima USCIS office on May 5, 2006. Plaintiff Maria C. Estrada filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Seattle USCIS office on April 1, 2005. Plaintiff Irma Palacios de Banuelos filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Sacramento USCIS office on February 3, 2006. Plaintiff Lucia Muniz de Andrade filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Sacramento USCIS office on March 28, 2006. E.R. 41-53. See also District Court Docket Number 2, attachment #2 for complete applications.

is made pursuant to *Perez-Gonzalez v. Ashcroft*"); E.R. 53 (cover letter attached to the application of Plaintiff Adriana Pouparina stating that she was filing a "[c]ompleted Form I-601 and Form I-212 pursuant to *Perez-Gonzalez v. Ashcroft* decision"); E.R. 51 (cover letter of Plaintiff Karina Noris citing to *Perez-Gonzalez*).

In addition, Plaintiffs originally submitted declarations from attorney practitioners in the Ninth Circuit in support of their motion for class certification in order to demonstrate numerosity. E.R. 25-40. These declarations also make clear the explicit reliance of others who filed applications pursuant to this Court's holding in *Perez-Gonzalez*. Andrew Knapp, a former asylum officer for the government 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 for consent to reapply after admission after deportation or removal.

E.R. 36. Maria Andrade, an attorney in Boise, Idaho, wrote in her declaration that "I have filed three I-212 applications within the Ninth Circuit's jurisdiction in reliance on *Perez-Gonzalez* in cases where ten years have not elapsed since the date of the person's last departure." E.R. 31. Marisela Cobos-Soto, an attorney in Los Angeles similarly declared, "[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." E.R. 29. Likewise, Soren Rottman, an attorney in Granger, Washington declared, "[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." E.R. 26.

In each case the government accepted the applications and the filing fees pursuant to the rule announced in *Perez-Gonzalez*, 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).

VI. SUMMARY OF ARGUMENT

On remand from this Court, the District Court abused its discretion when it denied Plaintiffs' motions to amend the complaint and redefine the class to consider retroactivity claims *arising out of* the *Duran Gonzales* decision. The District Court's sole reason for denying the motions was its

mistaken belief that that Plaintiffs' and proposed redefined class members' claims already had been decided by the *Duran Gonzales* Court. However, the *Duran Gonzales* Court never addressed the retroactivity claims brought by Plaintiffs on remand as these claims stem directly from that Court's announcement of a new rule. The new rule was announced in overturning preliminary injunctive relief, not in a final judgment of the case. Simply stated, the retroactivity claims raised by Plaintiffs and members of the proposed redefined class post-date the *Duran Gonzales* decision.

The District Court's belief that the *Duran Gonzales* Court intended the new rule to apply retroactively to all class members misreads the decision. As both parties agree, the *Duran Gonzales* decision clearly establishes a new rule which applies to all future applicants, which were included in the certified class that received injunctive relief. However, the retroactivity question now presented is whether the new rule should be applied to those class members who had already filed their applications before the new rule was announced, *i.e.*, in reliance on the old rule under which they were eligible to have their waiver applications adjudicated.

The District Court erred in failing to apply the retroactivity principles laid out by the Supreme Court in *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (counseling against the retroactive application of new rules where

doing so would result in manifest injustice), and this Court in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982). The District Court should have applied the test set forth in *Montgomery Ward* to determine whether a new rule announced by the agency and then adopted by this Court would be impermissibly retroactive, or manifestly unjust, if applied to cases where the applications were filed in reliance on the old rule, *i.e.*, prior to the *Duran Gonzales* Court's adoption of the BIA's interpretation in *Matter of Torres-Garcia*.

Had the District Court applied the *Montgomery Ward* test, it would have concluded that all five factors of that test favor prospective application of the new rule. First, *Matter of Torres-Garcia* is not a case of first impression. Second, the new rule constitutes an abrupt departure from the old rule. Third, Plaintiffs and the proposed redefined class relied heavily on the old rule. Fourth, retroactive application of the new rule imposes a heavy burden on Plaintiffs and members of the proposed redefined class members. Fifth, the statutory interest in applying the new rule is negligible. Thus, application of the *Montgomery Ward* test precludes retroactive application of the new rule.

Moreover, even if the District Court did not apply the *Montgomery Ward* test, it could have applied the basis tenets of retroactivity law as set

forth by the Supreme Court and Ninth Circuit in other contexts. Under any analysis, the District Court would have had to conclude that the agency's new rule, now adopted by this Circuit, would cause an unlawful retroactive effect if applied to Plaintiffs and class members who submitted applications prior to the new rule being adopted by this Circuit. *See, e.g., Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1171 (9th Cir. 2003) (where an intervening statute introduced a change in a general rule, the Court recognized the need for a retroactivity analysis, even after announcing the new rule); *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971) (although there is a presumption of retroactive application of judicial rule, applies a three-part test to determine if retroactive application of judicial decision would be inappropriate for the case at hand); *Landgraf v. USI Film Products*, 511 U.S. 244, 267-268 (1994) (when there is a new statute enacted by Congress, court must determine whether application of the new rule to past conduct would be impermissibly retroactive, in that 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").

The District Court erred by failing to undertake any retroactivity analysis whatsoever in order to determine whether the new rule applies to litigants who acted in reliance on binding law at the time. This is so

especially given that the law was subsequently reversed because of an intervening factor *that did not invalidate the legitimacy of the original circuit court decision.*

VII. ARGUMENT

A. Standard of Review

The Court reviews the District Court's failure to grant leave to amend the complaint and refusal to modify the class definition for an abuse of discretion. *Mt. Hood Polaris, Inc. v. Martino (In re Gardner)*, 563 F.3d 981, 990 (9th Cir. 2009) (leave to amend); *Lozano v. AT&T Wireless Servs.*, 504 F.3d 718, 724-25 (9th Cir. 2007) (class certification). Likewise, the Court reviews the District Court's decision to deny the permanent injunction for an abuse of discretion. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 650 (9th Cir. 2007). The Court reviews *de novo* any legal conclusions underlying that decision. *Id.*

B. The District Court Erred in Failing to Allow Plaintiffs to Amend the Complaint and Modify the Class Definition.

The District Court erred in finding that relief to Plaintiffs was only available on appeal, and thus refusing to allow Plaintiffs to amend the

complaint and modify the class definition: “Plaintiffs’ redress lies in appeal, not in class modification or in an amended complaint.” E.R. 9.

The District Court was obligated to follow the Federal Rules of Civil Procedure, which provide that “leave [to amend a party’s pleadings] shall be freely given when justice so requires” and an “order that grants or denies class certification may be altered or amended before final judgment.” Federal Rules of Civil Procedure 15(a) (leave to amend)⁶ and 23(c)(1)(C) (class certification). Indeed, it was appropriate to amend and narrow the class in light of Plaintiffs’ new retroactivity claims following this Court’s remand. *See Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982) (trial judge is free to modify certification order in light of subsequent developments in the litigation); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) (noting that under Federal Rule of Civil Procedure 23(c)(1)(C) the district court on remand “is free to reconsider its class certification order as often as necessary before judgment”).

⁶ *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (stating that in “the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be ‘freely given’” (emphasis added)). *See also DCD Programs Limited v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (“[r]ule 15’s policy of favoring amendments to pleadings should be applied with ‘extreme liberality’”).

The District Court erred in finding that the *Duran Gonzales* Court conclusively held that the BIA's interpretation of the statute applied to Plaintiffs and thus any further litigation on this point is futile. E.R. 8. Significantly, the *Duran Gonzales* decision did not address – yet alone conclusively decide – the question presented on remand to the District Court: whether the newly adopted rule should be applied retroactively to proposed class members who already had submitted applications in reliance upon the old rule.⁷ Rather, the *Duran Gonzales* Court was faced with a legal interpretation of the rule for the class as certified, which includes both past and future applicants for adjustment of status seeking consent to reapply after having been previously removed.⁸

⁷ The proposed redefined class consists only of persons who filed I-212 applications before the *Duran-Gonzalez* decision, and does not include those who either filed after that date, or who have not yet filed (as the prior class definition did). All named Plaintiffs fall within the proposed narrowed class.

⁸ Specifically, the District Court relied on the Court's statement that, pursuant to *Matter of Torres Garcia*, "plaintiffs as a matter of law are not eligible to readjust their status because they are ineligible to receive I-212 waivers." *Duran Gonzales*, 508 F.2d at 1241. However, as noted the certified class included two very different groups of individuals – those who had already filed applications, and all others who would file applications in the future. Thus, the Court applied the adopted the agency's interpretation in *Matter of Torres Garcia* to the entire class without addressing or deciding whether retroactivity concerns preclude applying the new rule to the subclass of past applicants who relied on the old rule.

This issue is similar to the issue addressed by this Court in *Nguyen v. United States*, 792 F.2d 1500 (9th Cir. 1986). In that case, the Court ruled against grocery store owners who challenged the government's refusal to permit them to participate in the Food Stamp Program. As here, the court remanded the case to the district court with instructions to enter judgment for the government. *Nguyen*, 792 F.2d at 1501. On remand, the District Court granted Plaintiffs leave to amend their complaint. On appeal, the Ninth Circuit upheld the District Court's decision to allow the amended complaints, reasoning that the mandate of its prior decision was controlling only as to issues actually considered and decided and thus, the lower court was free to consider additional matters. *Nguyen*, 792 F.2d at 1502-03.

In addition, contrary to the District Court's implicit conclusion, the law of the case doctrine simply does not apply. Under that doctrine, decisions made by appellate courts cannot be reconsidered if they were affirmatively decided during a prior appeal, either explicitly or by necessary implication. *Snow-Erlin v. USA*, 470 F.3d 804, 807 (9th Cir. 2006) (citations omitted). Here, the issue of whether the ten year rule applies to persons, like the named Plaintiffs, who filed I-212 waiver applications in reliance on the old law was never considered or decided by the *Duran Gonzales* Court. *Id.* This retroactivity question was not presented to the

Duran Gonzales Court in the original briefing on government’s preliminary injunction appeal or at oral argument. Indeed, it would not have made sense for this Court to resolve such retroactivity issues because the District Court neither defined the class, nor issued the preliminary injunction, based on retroactivity concerns. Plaintiffs raised retroactivity issues on rehearing, however, the *Duran Gonzales* Court’s denied the petition without comment. *Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 499 n.5 (3d Cir. 2008) (citation omitted) (denial of rehearing petition does not “imply any judgment on the merits and has no jurisprudential significance”).

The District Court summarily concluded that the *Duran Gonzales* adoption of the *Matter of Torres-Garcia* decision applied to all class members without appropriately considering of the retroactivity claims raised by class members who applied for adjustment and I-212 waivers in reliance on the old law. However, as set forth above, because the *Duran Gonzales* Court itself did not “squarely address” these retroactivity claims, the District Court’s conclusion was wrong. *See Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (*stare decisis* is not applicable unless the issue was “squarely addressed” in the prior decision).⁹

⁹ *See also Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) (“unstated assumptions on non-litigated issues are not precedential holdings binding future decisions”); *Estate of Magnin v.*

In sum, the District Court, relying on an overly broad construction of the *Duran Gonzales* decision, erroneously failed to permit Plaintiffs to amend the complaint and narrow the class definition. Nothing in that decision precluded the District Court on remand from considering Plaintiffs' retroactivity challenge.

C. The District Court Erred in Failing to Apply the Principles Laid Out by this Court in *Montgomery Ward*.

1. The *Montgomery Ward* Test Governs.

This Court has made clear that when an agency introduces a new rule careful attention must be paid to avoid an unfair retroactive application. *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982). The Supreme Court first expressed these concerns in *SEC v. Chenery Corp*, 332 U.S. 194, 203 (1947), and later clarified that where a new rule is announced by an agency in an adjudicatory decision, an analysis is required to determine whether it would be manifestly unjust to apply the rule retrospectively to persons who relied on the old rule. *Heckler v. Cmty.*

Commissioner, 184 F.3d 1074, 1077 (9th Cir. 1999) (“When a case assumes a point without discussion, the case does not bind future panels”); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*, 435 F.3d 1140, 1143 (9th Cir. 2006) (“Because we did not discuss the applicability of the rule in that case, *Bush* is not controlling authority on the issue of whether FRAP 5 governs appeals under § 1453(c)(1))” citing *Sakamoto*, 764 F.2d at 1288.

Health Servs. of Crawford County, Inc., 467 U.S. 51, 60 n.12 (1984)

(recognizing the principle that “an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests”); *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) (acknowledging that exceptions to retroactive application are made to prevent manifest injustice); *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 282 (1969) (same).

This case raises acute retroactivity concerns as not only is there a new rule, but in addition the new rule directly contravenes the standing rule. In its prior decision, this Court relied on *Brand X* and accordingly deferred to and adopted the agency interpretation of an ambiguous statute – an interpretation in direct conflict with this Court’s prior, settled case law. In doing so, it announced the new rule of this Circuit. There is no dispute that the newly adopted rule applies to all applications for relief filed after the date of that decision. Rather, the legal question presented here is whether the agency’s interpretation, as adopted by this Court in *Duran Gonzales*, should be retroactively applied to individuals who filed applications in reliance on the old rule.

In *Montgomery Ward* this Court adopted the general test developed by the D.C. Circuit in *Retail, Wholesale and Department Store Union v. NLRB*,

466 F.2d 380, 390-93 (D.C. Cir. 1972), for determining whether an agency rule shall apply retrospectively. Other circuits have applied the same test as well.¹⁰ *Montgomery Ward*, 691 F.2d at 1333, n.20.

In overturning the preliminary injunction granted in this case, this Court issued its first clarification of the *Brand X* principles, and its first application of *Brand X* in the immigration context. As such, this Court has not yet had the opportunity to specifically address the application of the *Montgomery Ward* test in the context of an administrative rule adopted by a court pursuant to *Brand X*. However, this Court has previously applied the *Montgomery Ward* test to other agency interpretations promulgated in immigration decisions.¹¹

In *Montgomery Ward*, this Court established five non-exhaustive factors for determining when an agency's retroactive application of an adjudicatory decision is invalid:

- (1) whether the particular case is one of first impression,
- (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled

¹⁰ See, e.g., *Lehman v. Burnley*, 866 F.2d 33, 37-38 (2d Cir. 1989) (applying the factors and finding retroactive application of new rule impermissible); *Laborers' Int'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 392 (3d Cir. 1994) (adopting and applying the five factors); *Stewart Capital Corp. v. Andrus*, 701 F.2d 846, 848-50 (10th Cir. 1983) (applying the factors and finding retroactive application of new rule impermissible).

¹¹ See *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007); *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003).

- area of law,
- (3) the extent to which the party against whom the new rule is applied relied on the former rule,
- (4) the degree of the burden which a retroactive order imposes on a party, and
- (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

691 F.2d at 1333. These factors are meant to “balance [] a regulated party’s interest in being able to rely on the terms of a rule as it is written against an agency’s interest in retroactive application of an adjudicatory decision.”

Miguel-Miguel v. Gonzales, 500 F.3d 941, 951 (9th Cir. 2007) citing *Chang v. United States*, 327 F.3d 911, 928 (9th Cir. 2003). According to this Court, an agency may “clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted.”

Montgomery Ward, 691 F.2d at 1328. See also *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. at 60 n.12.

In applying the *Montgomery Ward* factors, this Court has noted that “retroactive application generally is not favored.” *Great Western Bank v. Office of Thrift Supervision*, 916 F.2d 1421, 1431 (9th Cir. 1990). In *Chang v. United States*, 327 F.3d 911, 928 (9th Cir. 2003), this Court applied these factors to immigrant investors who sought to become lawful permanent residents based on their investments and consequent job creation within the United States. After the legacy Immigration and Naturalization Service

(INS) had approved the plaintiffs' initial residency petitions, and they submitted their investments and had come to the United States in reliance on the approved petitions, the agency then issued a number of precedent decisions undermining their applications.

These decisions changed the rules midstream, rendering plaintiffs ineligible for residency based on the very same investments legacy INS had previously approved. As a result, this Court applied the *Montgomery Ward* factors to these cases and found that the application of the new agency decisions was impermissibly retroactive. *Chang*, 327 F.3d at 929.

Similarly, in *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007), this Court applied the *Montgomery Ward* five-part test to the Attorney General's decision in *Matter of Y-L-*, 23 I. & N. Dec. 270 (Op. Att'y Gen. 2002), to determine if the agency decision applied to convictions entered prior to the Attorney General's decision. In *Matter of Y-L-*, the Attorney General issued a decision finding that controlled substance trafficking offenses were presumed to bar eligibility for asylum and withholding of removal, which was a new rule and a departure from past agency decisions. Utilizing the *Montgomery Ward* test, this Court concluded in *Miguel-Miguel* that the Attorney General's decision could not

be retroactively applied to a plea bargain entered prior to the agency's change in position.

Application of the *Montgomery Ward* test is appropriate here to determine whether the new rule adopted in *Duran Gonzales* may apply retroactively. Thus, the District Court erred by failing to undertake this analysis.

2. Application of the *Montgomery Ward* Factors Counsels Against Retroactive Application of the Newly Adopted Rule.

As in *Chang* and *Miguel-Miguel*, the *Montgomery Ward* factors counsel against retroactive application of the agency's interpretation in *Matter of Torres-Garcia*.

a. *Matter of Torres-Garcia* was not a case of first impression.

The first factor is whether the administrative case was one of first impression. This factor "is directed towards maintaining an incentive for litigants to raise novel claims by allowing a litigant who successfully argues for a new rule to get the benefit of that rule." *Miguel-Miguel*, 500 F.3d at 951.¹² It also ensures that agencies do not issue advisory opinions. *Id.*

¹² In *Chang*, the Court noted that "[t]he present case is one of first impression, which weighs in the government's favor." 327 F.3d at 928.

In the instant case, as in *Miguel-Miguel*, the issue addressed by the agency in *Matter of Torres-Garcia* was not an issue of first impression; this Court had previously addressed the issue in *Perez-Gonzalez*. In fact, the agency acknowledged that its decision was contrary to the Ninth Circuit's interpretation. *Matter of Torres-Garcia*, 23 I. & N. Dec. at 873.

Furthermore, like *Miguel-Miguel*, the agency's published decision in *Matter of Torres-Garcia* was an unrelated proceeding. Importantly, there was no reason for the BIA to consider the issue of retroactive application to applicants who relied on *Perez-Gonzalez* given that *Matter of Torres-Garcia* arose outside of the Ninth Circuit where there was no conflicting precedent on point and there was no indication that the BIA planned to apply its decision in the Ninth Circuit. *See infra* note 13.

b. The new rule regarding I-212 waiver eligibility is completely opposite to the prior rule.

The second factor is 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. Here, the agency's interpretation in *Matter of Torres-Garcia* unquestionably represents a departure from the holding and

However, the court still found that retroactive application was impermissible after all five *Montgomery Ward* factors were applied. 327 F.3d at 928.

rule established by this Court in *Perez-Gonzalez*, as the two reach contrary results. The agency was previously required to follow *Perez-Gonzalez* in cases arising in the Ninth Circuit. *See Matter of K-S-*, 20 I. & N. Dec. 715 (BIA 1993) (requiring the Board to follow circuit precedent in cases arising in that judicial circuit); *Matter of Anselmo*, 20 I. & N. Dec. 25 (BIA 1989) (same).¹³

However, by now deferring in *Duran Gonzales* to the agency's contrary interpretation, this Court's adoption of an agency interpretation represents a clear departure from the previously established rule. *See Chang*, 327 F.3d at 928 (“[t]he approval of Appellants’ own I-526 petitions containing such provisions shows that this practice continued at least until shortly before the publication of the precedent decisions; the rules introduced in those decisions were an abrupt departure”). Thus, the second factor also favors a prospective application of the new rule.

¹³ Defendants issued a memorandum, the *Perez-Gonzalez* Memo, purporting to comply with this Court's rule in *Perez-Gonzalez*. Even though the Memo blatantly failed to implement this Court's holding, it nonetheless demonstrates that the agency recognized it was bound by this Court's decision for all applications filed in the Ninth Circuit. E.R. 54-57.

c. Plaintiffs and proposed redefined class members relied on the old rule, under which they were eligible to have their I-212 waiver applications adjudicated.

The third factor is the extent to which the party against whom the new rule is applied relied on the former rule. In *Miguel-Miguel*, the Ninth Circuit noted that at the time Miguel plead guilty to his controlled substance offense, he had a “realistic chance” of winning at the BIA. *Miguel-Miguel*, 500 F.3d at 952. Similarly, when the proposed redefined class of Plaintiffs filed their I-212 and adjustment applications prior to the Ninth Circuit’s adoption of *Matter of Torres-Garcia*, they also had a “realistic chance” of success before the agency.

Here, Plaintiffs and the proposed redefined class all submitted applications, paying thousands of dollars in filing fees and attorneys fees, in unequivocal reliance on the law of this Circuit, as affirmed by *Perez-Gonzalez*.¹⁴ Indeed, several of the named Plaintiffs explicitly noted this Court’s decision in *Perez-Gonzalez* when they submitted their applications. *See supra* sect. V.D; E.R. 41-53. The record in this case further

¹⁴ In addition, subsequent Ninth Circuit case law reinforced the holding in *Perez-Gonzalez*. *See Acosta v. Gonzales*, 439 F.3d 550, 553-54 (9th Cir. 2006) (restating the holding in *Perez-Gonzalez* and finding that the decision controls whether a different group of individuals – those inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(I) – are eligible for § 245(i) relief).

demonstrates that immigration lawyers assisted numerous clients in filing applications in reliance on the prior rule. *See Supra* sect. V.D; E.R. 25-40.

d. Retroactive application of the new rule would unduly burden Plaintiffs and the proposed redefined class.

The fourth factor is the degree of the burden which a retroactive order imposes on a party. Here, it is clear that retroactive application imposes an immense burden on those within the class who filed I-212 waivers in reliance on *Perez-Gonzalez*. If *Duran Gonzales*' adoption of *Matter of Torres-Garcia* is applied retroactively, those individuals will be 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.

e. Defendants statutory interest in applying the new rule is negligible.

The fifth factor is the statutory interest in applying a new rule despite the reliance of a party on the old standard. In *Duran Gonzales* this Court ruled that the prior panel in *Perez-Gonzalez* held that Congress's intent was

ambiguous regarding whether individuals who were previously removed and unlawfully reentered could qualify for lawful permanent residency with an I-212 waiver. *Duran Gonzales*, 508 F.3d at 1237 (“[w]e conclude that, despite some language to the contrary, *Perez-Gonzalez* was based on a finding of statutory ambiguity that left room for agency discretion”). Because Congress was ambiguous regarding its intent, there is no clear statutory interest in *denying* Plaintiffs permanent residency.

In addition, the interests of INA § 245(i) (8 U.S.C. § 1225(i)) are served because that provision exists for individuals, like Plaintiffs, who have unlawfully entered the United States. As previously noted, Plaintiffs are all eligible for adjustment of status under § 245(i), by paying the penalty fee of \$1,000, in addition to the filing fees for the adjustment application and the waivers in order for USCIS to accept their applications. *See Chang*, 327 F.3d at 929 (“[f]rom Appellants' perspective, the INS's approving and receiving the benefits of their investments, only to renege on the promise of LPR status once those benefits were garnered, must seem very unfair”). The last factor therefore also counsels in favor of Plaintiffs.¹⁵

¹⁵ The statutory interest counseled in favor of the government in *Chang*, but the Court found that the statutory interest in retroactive application was insufficiently substantial to outweigh the other factors. *Chang*, 327 F.3d at 929. Notably, in *Miguel-Miguel*, this was the only factor which the Ninth Circuit found counseled in favor of the government's retroactive application

As the District Court noted below, Defendants failed to even address these five factors in responding to Plaintiffs' motions: "Defendants simply ignore this argument and fail to address *Montgomery Ward* in their response." E.R. 16. Nonetheless, as discussed in the prior section of this brief, the District Court concluded that it was precluded from engaging in this analysis. *See supra* sect. VII.B. Plaintiffs now respectfully assert that the District Court erred in failing to apply the factors laid out in *Montgomery Ward*. Moreover, Plaintiffs have demonstrated that the factors militate toward barring the newly adopted rule from being applied in a retrospective manner.

D. The District Court Failed to Undertake Any Retroactivity Analysis as Required by the Supreme Court and Ninth Circuit.

As set forth above, the Court should apply the *Montgomery Ward* test to determine whether to retroactively apply the new rule adopted in *Duran Gonzales* to Plaintiffs and members of the proposed redefined class.

of *Matter of Y-L- Miguel-Miguel*, 500 F.3d at 952. There, the court concluded that Congress had afforded the Attorney General wide discretion with regard to "particularly serious crime" determinations. However, the court noted that those same interests are served by prospectively applying *Matter of Y-L-* and therefore that "[f]orbid[ding] the Attorney General from applying *Y-L-* retroactively in this case therefore does not severely limit his efforts to pursue the statutory mandate." *Miguel-Miguel*, 500 F.3d at 952.

However, even if the District Court did not recognize the *Montgomery Ward* test, it still should have undertaken a retroactivity analysis guided by governing Supreme Court and Ninth Circuit principles of retroactivity law.¹⁶ There must be an assessment of whether it would be manifestly unjust to apply *Duran Gonzales* to members of the class who affirmatively represented themselves to the government, filed I-212 applications, incurred substantial fees, and now are at risk of summary removal because they acted in reliance of this Court's prior rule.

Courts have engaged in various tests to assess impermissible retroactivity of new rules. These other tests illustrate the importance of assessing retroactivity issues, and application of the principles underlying all of these tests counsel against applying the new rule in this case retroactively.

¹⁶ Importantly, this Court did not find that the Circuit's prior rule, as affirmed in *Perez-Gonzalez*, was unlawful or erroneous. *Duran Gonzales* held that Congress was *ambiguous* as to the meaning of the statute and therefore invoked *Brand X*. Thus, this is not a situation where Plaintiffs and the proposed redefined class relied on law that existed at the time that was later reversed upon a finding that the prior rule was erroneous. *See e.g. George v. Camacho*, 119 F.3d 1391, 1396 (9th Cir. 1997) (en banc) (reversing the prior panel's decision because it misinterpreted the clear federal rule regarding the time afforded to appeal from the district court). Rather, the Court found that because the agency had subsequently offered a different, reasonable interpretation of the law, the Court must defer to that interpretation.

1. Ninth Circuit Retroactivity Law Dictates That It Is Manifestly Unjust to Apply a New Judicial Rule to Past Actions Conducted in Reliance on the Law at the Time.

In *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1171 (9th Cir. 2003), this Court noted the special retroactivity concerns that existed where noncitizens filed petitions for review in reliance on Ninth Circuit law, which was later abrogated by a change in statute. The *Zazueta-Carrillo* Court announced a new judicial rule regarding whether voluntary departure was stayed during a petition for review and overruled a rule from a prior decision *Contreras-Aragon v. INS*, 852 F.2d 1088 (9th Cir. 1988). *Id.* at 1171. The Court explained that its decision fundamentally altered the judicial rules governing prospective requests for voluntary departure and also recognized that applying those rules to Mr. Zazueta would be inherently unfair. *Id.* at 1174. It explained:

Our decision today makes clear that *Contreras-Aragon* is no longer the law of this circuit. At the time that *Zazueta-Carrillo* delayed his departure beyond the specified voluntary departure date, however, *Contreras-Aragon* still stood as the announced law of this circuit. *Zazueta-Carrillo* thus acted in the expectation that the pendency of his petition on the merits would result in the delay of the commencement of his period for voluntary departure. Under the Board's order, that reliance has cost him dearly.

Id. Thus, the Court remanded to the agency with the suggestion for a remedy. *Id.*

Zazueta-Carrillo and its progeny provide additional guidance because they hold that retroactivity concerns that involve the interplay of agency interpretation may be addressed subsequent to the announcement of the new rule. In the present case, the *Duran Gonzales* Court did not address whether its newly adopted rule would apply to cases where the person had relied on the prior law. Likewise, although the *Zazueta-Carrillo* Court recognized the inherent unfairness in applying the rule retroactively to the petitioner, ultimately, the Court declined to state whether the *Zazueta-Carrillo* rule would apply retroactively. In a subsequent case, *Garcia v. Ashcroft*, 368 F.3d 1157, 1160 (9th Cir. 2004), this Court acknowledged that the retroactive application of *Zazueta-Carrillo*'s new rule was an open question. 368 F.3d at 1160 (noting, but not deciding, "the question of whether, in light of their reliance on *Contreras-Aragon*, petitioners should be deemed to have overstayed their period of voluntary departure, or whether, if they leave the country, they should be deemed to have voluntarily departed or removed"); accord *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 982 (9th Cir. 2006).¹⁷

¹⁷ In *Padilla Padilla*, the court recognized that the agency had interpreted the *Zazueta-Carillo* decision to apply prospectively only, even though the *Zazueta-Carillo* panel decision failed to reach such a conclusion. 463 F.3d at 982.

In sum, the reliance principle underlying the analysis in *Zazueta-Carrillo* and its progeny further supports the principle of reliance as a primary factor in retroactivity jurisprudence. Consideration of this factor strongly counsels in favor of not applying the new rule adopted in *Duran Gonzales* to those who acted in reliance on the pre-*Duran Gonzales* rule.

2. Supreme Court and Ninth Circuit Retroactivity Law Counsel Against Retroactive Application of New Statutes to Persons Who Acted in Reliance on the Prior Law.

Courts also have refused to apply new rules retroactively where a statute is enacted and Congress is ambiguous as to the temporal scope of that new provision as applied to past conduct. *Landgraf v. USI Film Products*, 511 U.S. 244, 267-268 (1994). There, the courts look to whether retroactive application 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.” *Landgraf*, 511 U.S. at 280. Although the *Landgraf* analysis is not directly applicable to the instant case as the new rule was not enacted by statute, *Landgraf* is instructive in its analysis and concern that individuals conformed their conduct to the law, that the law was subsequently changed, and that Congress was unclear as to whether the law

applied to these individuals. Under the second step of the *Landgraf* test,¹⁸ the court examines whether application of the statute will have retroactive effect.

Here, application of the new rule to named Plaintiffs and the proposed redefined class who filed I-212 waivers in reliance on the prior rule would clearly demonstrate impermissible retroactivity because it would “impair rights a party possessed when he acted” and “increase a party’s liability for past conduct.” *Landgraf*, 511 U.S. at 280. These Plaintiffs affirmatively presented themselves to DHS and applied for adjustment of status with I-212 waivers in reliance on the old rule as affirmed by *Perez-Gonzalez*. Further, they were immediately eligible for relief at the time. Hence, the *Landgraf* line of cases are instructive in demonstrating that retroactive application of the new rule divested these Plaintiffs of rights that they possessed when they acted. *See, e.g., Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1089-90 (10th Cir. 2007) (finding that it would be fundamentally unfair to apply the reinstatement of removal statute, 8 U.S.C. § 1231(a)(5), to individuals who

¹⁸ The *Landgraf* analysis involves two steps. The first is a determination of whether Congress was clear as to the temporal scope of the statute, and the second is an assessment of the application of the new statute to past conduct. *Landgraf*, 511 U.S. at 266. Plaintiffs analogize to the second step of the *Landgraf* test because, as in the *Brand X* context, Congress was ambiguous as to the meaning of the statute, and therefore the courts must determine if retroactive application is impermissible.

had applied for lawful residency prior to the change in law); *Arevalo v.*

Ashcroft, 344 F.3d 1, 15 (1st Cir. 2003) (same); *Faiz-Mohammad v.*

Ashcroft, 395 F.3d 799, 810 (7th Cir. 2005) (same).

4. Supreme Court Retroactivity Law Also Counsels Against Retroactive Application of Judicial Decisions to Persons Who Acted in Reliance on Prior Precedent.

Last, the Supreme Court's decision in *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971), counsels against retroactive application.¹⁹ *Chevron Oil* establishes the following three part test: First, the court considers whether a decision establishes a new principle of law. If so, it may be applied

¹⁹ *Duran Gonzales* is this Court's announcement that the agency adjudication is now the law of the Circuit and thus, as discussed above, the *Montgomery Ward* test applies. The *Chevron Oil* test is not directly applicable to a *Brand X* decision because *Chevron Oil* only applies where a change in judicial interpretation is based on a finding that Congress was *clear* in its enactment of a rule or statute, and that the prior panel's decision was an erroneous interpretation of the law. See e.g. *George v. Camacho*, 119 F.3d at 1396 (first decision misinterpreted federal rule regarding filing of appeal); *Glazner v. Glazner*, 347 F.3d 1212, 1215 (11th Cir. 2003) (first panel erred in finding an interspousal exemption to the federal wiretapping provisions at 18 U.S.C. §§ 2510-22); *In re Mersmann*, 505 F.3d 1033, 1038 (10th Cir. 2007) (prior panel misinterpreted bankruptcy code).

These cases, which later apply the *Chevron Oil* test, are an interpretation of the meaning of the law as it always had been. Conversely, *Duran Gonzales* was premised on a finding that Congress was *not* clear in its intent, and therefore prior precedent was reversed based on deference to the agency under *Brand X*. *Duran-Gonzales*, 508 F.3d at 1235-56. While the *Chevron Oil* cases demonstrate a reading of the law as it always has been, the *Brand X* case has no one clear interpretation.

prospectively (as opposed to retrospectively). *George v. Camacho*, 119 F.3d at 1401.²⁰ Second, the court examines whether retrospective application will advance the new holding. *Id.* Third, the Court looks to fundamental principles of fairness. *Id.* The *Chevron Oil* exception is generally recognized to apply to civil cases where a judicial panel has overruled prior precedent.

Applying this test, which involves unambiguous statutes, counsels against retroactive application of the new rule adopted in *Duran Gonzales* to the subclass who filed I-212 waivers in reliance on *Perez-Gonzalez*. First, the decision in *Duran Gonzales* overturning the grant of a preliminary injunction established a new principle of law. Contrary to *Perez-Gonzalez*, the *Duran Gonzales* panel, deferring to the Board's decision in *Matter of Torres-Garcia*, found that 8 U.S.C § 1182(a)(9)(C)(i)(II) requires an adjustment applicant to wait ten years before applying for an I-212 waiver

²⁰ The *Chevron Oil* test was originally applied on a case-by-case basis and hence, in one case a new judicial decision could be applied prospectively only based on the facts of the case, while in another, that same new judicial decision could be applied retrospectively. *George*, 119 F.3d at 1399 n.9. However, in *Harper v. Va. Dept. of Tax.*, 509 U.S. 86, 97 (1993) and *James B. Beam Distilling Co. v. Georgia*, *supra*, the Supreme Court withdrew from *Chevron Oil*'s piecemeal assessment of whether a new judicial decision should be applied prospectively. The Ninth Circuit recognizes the *Chevron Oil* test continues to apply if applied uniformly so as to protect fairness and reliance interests. *George v. Camacho*, 119 F.3d 1393, 1396 (1997) (*en banc*).

and permanent residency. *Duran Gonzales*, 508 F.3d at 1242. As such, the panel announced a new principle of law.

Second, retroactive application of *Duran Gonzales* will not advance the new holding. *George v. Camacho*, 119 F.3d at 1401. In relying on *Brand X* and overturning *Perez-Gonzalez*, the intent of the *Duran Gonzales* decision was to afford the agency space to render its own interpretation of an ambiguous statute. 508 F.3d at 1242. *See Brand X*, 545 U.S. at 980 (Congress leaves statutory gaps for an agency to fill “in reasonable fashion. Filling these gaps... involves difficult policy choices that agencies are better equipped to make than courts”). *Duran Gonzales* did not provide an interpretation of the statute, Congressional intent, or the regulations. Rather, it found that Congress was unclear as to the meaning of § 1182(a)(9)(C)(i) and that the agency’s interpretation of the statute was reasonable. As such, retrospective application of the decision does not advance the new holding clarifying that the Court will defer to a reasonable agency interpretation. *Duran Gonzales* allows for the agency to apply its own interpretation to all future cases. This principle would not be further enhanced by reversing the law for those class members who had already filed applications based on this Court’s prior interpretation in *Perez-Gonzalez*.

Last, it would be fundamentally unfair to apply the decision retrospectively to Plaintiffs and members of the proposed redefined class who applied for lawful permanent residency based on this Court's clear holding in *Perez-Gonzalez*. *George v. Camacho*, 119 F.3d at 1401. Prior to *Perez-Gonzalez*, it was unclear whether class members were eligible to apply for lawful permanent residency, or whether they would simply be subject to summary expulsion if they affirmatively brought themselves to the attention of the government. 8 U.S.C. § 1231(a)(5). However, after the Ninth Circuit decided *Perez-Gonzalez*, the named Plaintiffs and members of the proposed redefined class, reasonably relying on this Court's decision, took affirmative steps to apply for permanent residency by submitting I-212 waiver applications and paying the filing fees, including the additional \$1000 penalty for adjustment under INA § 245(i).

Indeed, not only did they risk substantial monetary sums, but also risked detention and indefinite separation from their U.S. citizen or lawful permanent resident family members who had filed the original petitions on their behalf. *See Holt v. Shalala*, 35 F.3d 376, 381 (9th Cir. 1994) (finding that the plaintiffs' reasonable reliance on the prior decision rendered retrospective application fundamentally unfair); *Glazner v. Glazner*, 347 F.3d at 1220 (noting that it would be fundamentally unfair to subject a class

of persons to the “strong likelihood of liability” where they faced no likelihood of liability before). Thus, the retroactivity concerns outlined by the Supreme Court in *Chevron Oil* also support prospective application of the new rule regarding I-212 waiver eligibility.

VIII. CONCLUSION

This Court should reverse the District Court’s denial of Plaintiffs’ motions to amend the complaint and redefine the class. The Court should remand the case to the District Court with instructions to amend the complaint, redefine the class, and find that the newly adopted rule should not be applied retroactively to members of the redefined class who acted in reliance on the law in effect prior to the *Duran Gonzales* decision.

Date:

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Federal Rules of Appellate Procedure 28-2.6, Plaintiffs – Appellants state that they are not aware of any related cases currently before this Court.

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

I certify that:

1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is:

✓ Proportionally spaced, has a typeface of 14 points or more and contains 10,209 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

✓ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

6/22/09
Date

S/ Matt Adams
Signature of Attorney

CERTIFICATE OF SERVICE

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

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

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Executed in Seattle, Washington, on June 22, 2009.

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