No. 19-___

IN THE

Supreme Court of the United States

ISTVAN SZONYI

Petitioner,

v.

WILLIAM P. BARR, in his official capacity as Attorney General of the United States,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 10, 2020

QUESTIONS PRESENTED

In the case at hand, the United States Court of Appeals for the Ninth Circuit deferred to an agency standard deliberately designed to make the "greatest number of twice-convicted aliens" eligible for removal. *Matter of Z-*, 8 I. & N. Dec. 170, 175 (BIA 1958). It did so in the face of circuit precedent holding that this very same standard was "not what the statute says." *Wood v. Hoy*, 266 F.2d 825, 830 (9th Cir. 1959). And it then proceeded to apply that standard retroactively to conduct that took place decades before its adoption.

While it is clear that a prior judicial decision articulating what a statute unambiguously *does* mean trumps an agency construction otherwise entitled to *Chevron* deference, the status of a prior judicial construction explaining what a statute unambiguously *does not* mean it is apparently less clear. Likewise, while there is no dispute that an agency may fill gaps in statutory law through adjudication, the circuits are divided on whether such rulemaking can have retroactive effect.

The questions presented are:

1. Whether *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) requires deference to an agency standard a court has already deemed to be an impermissible reading of the statutory text.

2. Whether a rule promulgated through adjudication by an agency exercising its *Chevron* step two and *Brand X* powers can have retroactive effect.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Istvan Szonyi and Respondent William P. Barr, in his official capacity as Attorney General of the United States.[1] There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

United States Department of Justice Executive Office for Immigration Review, Immigration Court:

- *In the Matter of Istvan Szonyi*, No. A010-977-327 (Sept. 19, 2011)
- *In the Matter of Istvan Szonyi*, No. A010-977-327 (December. 19, 2013)

United States Department of Justice Executive Office for Immigration Review, Board of Immigration Appeals:

- *In re: Istvan Szonyi*, No. A010-977-327 (June 18, 2013)
- *In re: Istvan Szonyi*, No. A010-977-327 (Oct. 21, 2015)

United States Court of Appeals for the Ninth Circuit:

- *Szonyi v. Whitaker*, No. 15-73514 (Feb. 13, 2019)
- *Szonyi v. Barr*, No. 15-73514 (Nov. 13, 2019)

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[1] Attorney General Barr was substituted for former Acting Attorney General Matthew Whitaker, who was substituted for former Attorney General Jefferson B. Sessions III, who was substituted for former Attorney General Loretta E. Lynch.

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PETITION FOR A WRIT OF CERTIORARI

The Immigration and Nationality Act ("INA") provides that an immigrant "convicted of two or more crimes involving moral turpitude" is removable *unless* those crimes "aris[e] out of a single scheme of criminal misconduct." 8 U.S.C. § 1227(a)(2)(A)(ii). Since 1954, the Board of Immigration Appeals ("BIA" or the "Board") has insisted that this single-scheme exception applies only to "alien[s] who ha[ve] been twice convicted for what was essentially one act." *Matter of B-*, 8 I. & N. Dec. 236, 238 (BIA 1958); *Matter of D-*, 5 I. & N. Dec. 728 (BIA 1954). And since 1959, the Ninth Circuit has steadfastly explained that the BIA's interpretation "is not what the statute says." *Wood v. Hoy*, 266 F.2d 825, 830 (9th Cir. 1959). "[A]rising out of a single scheme of criminal misconduct" does not mean "'arising out of a single criminal act'": "[i]f such [a] reading had been the intent of Congress[,] they could have so declared." *Id.*

Undeterred, the BIA continued to adhere to its preferred interpretation of the single-scheme exception in cases arising outside circuits, such as the Ninth, that had rejected the agency's efforts to "expand[] its power to order deportation." Pet.App.5a. (Collins, J., dissenting). And in the wake of *Brand X,* "the BIA decided that it was time for" all federal courts "to fall in line." *Id.* The agency thus decreed that its "exceptionally narrow" interpretation of the single scheme exception should be applied throughout the country. *Id.* Here, the Ninth Circuit "surrendered to the BIA's flawed construction," *id.* 6a, creating a patent incongruity whereby a standard that court had—literally—declared to be "not what the statute says" is now the law of the circuit, *Wood*, 266 F.2d at 830.

This "excess of deference" raises grave "separation-of-powers concerns" and "well illustrates why *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) has become the subject of so much recent criticism." Pet.App.3a (Collins, J., dissenting). Contrary to the panel's evident belief, nothing in *Brand X* allows an agency to revive a previously promulgated standard a court has already found to be precluded by the statutory text. Where, as here, circuit "precedent hold[s] that the statute unambiguously forecloses the agency's interpretation," *Brand X*, 545 U.S. at 982-83, that precedent "is the law and must be given effect," *Chevron*, 467 U.S. at 843 n.9. In holding otherwise, the Ninth Circuit endorsed an approach to *Brand X* that "'suggests an abdication of the Judiciary's proper role in interpreting federal statutes.'" Pet.App.4a (Collins, J., dissenting) (citation omitted). Whatever else *Brand X* may require, it certainly does not compel a court to "uph[o]ld an agency construction [it] has consistently *rejected* as being based on an impermissible rewriting of the statutory text." *Id.* In such circumstances, "the proper course [is] to remand the matter to the [agency] for it to adopt a new construction that interprets, rather than rewrites, the statute." *Id.* 32a (citing *Michigan v. EPA*, 135 S. Ct. 2699 (2015)).

Even if *Brand X* permits the BIA to trump circuit precedent prospectively, "settled principles of due process and equal protection" "preclude agencies from retroactively enforcing the new policies they announce under the authority granted to them by *Chevron* step two and *Brand X*." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015) (Gorsuch, J.). Those principles undergird a presumption "nearly as

old as the common law": the exercise of legislative power has only *prospective* effect. *Id.* at 1169. Because "an agency operating under the aegis of *Chevron* step two and *Brand X* comes perhaps as close to exercising legislative power as it might ever get," the "same presumption" that applies to congressional action "should attach when Congress's delegates seek to exercise delegated legislative policymaking authority." *Id.* at 1172. Namely, agency rules "should be presumed prospective in operation unless Congress has clearly authorized retroactive application." *Id.*

Applying this logic, this Court has already held that the presumption against retroactivity attaches when agencies announce policies via rulemaking. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Lacking similar guidance regarding rules promulgated through adjudication, the circuits have divided. The Tenth Circuit has adopted a bright-line rule: absent express congressional authorization, agency policymaking under *Chevron* step two and *Brand X* has only prospective effect. *De Niz Robles*, 803 F.3d at 1168. While the Fifth Circuit has shown sympathy for the Tenth Circuit's rule, *Monteon-Camargo v. Barr*, 918 F.3d 423, 431 (5th Cir. 2019), at least the Ninth, Eighth, Seventh, Third, Second, and D.C. Circuits apply various iterations of a multi-factor balancing test to assess, on a case-by-case basis, whether agency rules issued via adjudication operate retroactively. *Infra* pp. 23-25.

These differing approaches have real-world consequences. When Mr. Szonyi entered his plea in 1981—over two decades before *Brand X*—it was eminently reasonable to expect the Ninth Circuit's "more expansive" interpretation of the single-scheme exception to

govern any subsequent immigration proceedings. Pet.App.43a. "Normally, people are entitled to rely on judicial precedents as definitive interpretations of what the law is." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1147 (10th Cir. 2016) (Gorsuch, J.). And the BIA had long "defer[red] to adverse circuit precedent so long as that precedent remained on the books, even when the agency may have disagreed with it." *Id.* at 1147-48. Nevertheless, Mr. Szonyi was subjected to "the BIA's narrower definition," "making [him] subject to removal when he might not have been under [the Ninth Circuit's] standard." Pet.App.34a.

Accordingly, Mr. Szonyi respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit.

OPINIONS BELOW

The Immigration Judge's ("IJ") initial removal order, *id.* 116a-43a, and the BIA's reversal of that order, *id.* 112a-15a, are unreported. The IJ's decision on remand, *id.* 97a-111a, and the BIA's affirmance, *id.* 89a-96a, are likewise unreported.

The Ninth Circuit's denial of Mr. Szonyi's petition for review, *id.* 61a-88a, is published at 915 F.3d 1228. That court's order amending its opinion and denying rehearing and rehearing en banc over Judge Collins' dissent, *id.* 1a-60a, is published at 942 F.3d 874.

JURISDICTION

The Ninth Circuit entered judgment on February 13, 2019. *Id.* 61a. That court amended its opinion and denied rehearing en banc on November 13, 2019. *Id.* 1a. On January 24, 2020, Justice Kagan extended the time to file this petition until April 10, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISION INVOLVED

8 U.S.C. § 1227(a)(2)(A)(ii) provides:

> Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

STATEMENT OF THE CASE

A. Legal Background

To make the "greatest number of twice-convicted aliens" removable, the BIA has long read § 1227(a)(2)(A)(ii)'s single-scheme exception to apply only to "the twice-convicted criminal whose acts are essentially one act." *Matter of Z-*, 8 I. & N. Dec. 170, 175 (BIA 1958); *B-*, 8 I. & N. Dec. at 237-38 (same). The agency thus limits the exception to cases where "in the [per]formance of one unified act of criminal misconduct several criminal offenses . . . are committed," *Matter of J-*, 6 I. & N. Dec. 382, 386 (BIA 1954), or a scenario in which "two crimes flow from and are the natural consequence of a single act of criminal misconduct." *Matter of Z-*, 6 I. & N. Dec. 167, 169 (BIA 1954).

The effect of the BIA's "single act" standard is that "when an alien has performed an act which, in and of itself, constitutes a complete, individual and distinct crime," "he becomes deportable when he again commits such an act." *D-,* 5 I. & N. Dec. at 729. This remains true even if the acts "follow [each] other closely," are "similar in character," or are "part of an overall plan of criminal misconduct." *Id.*

In the 1959 case of *Wood v. Hoy*, the Ninth Circuit concluded that the BIA's rule was incompatible with the "language of the statute." 266 F.2d at 829-30 & n.4. The Board's interpretation, the court explained, "treated the matter as if the words 'not arising out of a single scheme of criminal misconduct' had not been added to the statute." *Id.* at 831. While the government had defined "'arising out of a single scheme of criminal misconduct'" to mean "'arising out of a single criminal act,'" that "is not what the statute says." *Id.* at 830. Thus, the court remanded the matter, explaining that the government bore the burden to establish that the "crimes in question did not arise out of a single scheme." *Id.* at 831. Considerations relevant to that analysis included the "nature of the crimes themselves," "the time or circumstances of their commission," and whether they were planned in advance. *See id.*

Since *Wood*, the Ninth Circuit has repeatedly reaffirmed its conclusion that the BIA's interpretation is "legally erroneous." *Gonzalez-Sandoval v. INS*, 910 F.2d 614, 617 (9th Cir. 1990); *Leon-Hernandez v. INS*, 926 F.2d 902 (9th Cir. 1991). Instead, it has held that the exception can even encompass scenarios in which "two predicate crimes were planned at the same time and executed in accordance with that plan," even if those crimes took place in different locations and at different times. *Gonzalez-Sandoval*, 910 F.2d at 616. But in all events, "'[t]he statutory language'" "'is not so narrow as a single criminal act or transaction.'" *Id.* at 617 (citation omitted).

While the Ninth Circuit consistently refused to interpret "single scheme" to mean "single act," *id.* at 616, the BIA followed its contrary rule in circuits

where it had not been rejected, *Matter of Adetiba*, 20 I. & N. Dec. 506, 509, 511 (BIA 1992). That changed in 2011, when the BIA sought to "uniformly apply" its interpretation "in all circuits." *Matter of Islam*, 25 I. & N. Dec. 637, 641 (BIA 2011). Describing the "phrase 'single scheme of criminal misconduct'" as "a quintessentially ambiguous term," the BIA asserted that *Brand X* empowered it to issue a "controlling" interpretation of the statutory text, "even where a court has previously issued a contrary decision." *Id.*

B. Factual Background

Petitioner Istvan Szonyi is a 67-year-old lawful permanent resident who has continuously resided in this country since he was four years old. Pet.App.90, 99a-100a. Mr. Szonyi and his family were admitted as refugees in 1957, *id.* 34a, after fleeing the Soviet invasion of their native Hungary.

The conduct relevant to this case occurred on October 10, 1981. "[A]fter a day of heavy drinking," *id.*, Mr. Szonyi "invited three women into his nearby place of work," where he forced them to commit sexual acts under the threat of violence "over a period of five or six hours," *id.* 52a. The record does not "reveal when during this five or six hour period the four criminal offenses for which Szonyi was convicted occurred. Nor does it explain how much time elapsed between the offenses, or whether there was a substantial interruption between them." *Id.*

On December 18, 1981, Mr. Szonyi "pled guilty to two counts of oral copulation in violation of California Penal Code § 288a(c) and two counts of sexual penetration with a foreign object in violation of California Penal Code § 289." *Id.* 35a, 117a. Two of those counts

"pertain to nonconsensual sexual acts with one woman," and the other two "counts pertain to nonconsensual sexual acts with a second woman." *Id.* 92a. Mr. Szonyi was sentenced to twelve years in prison. *Id.* 91a. "Through good behavior," he secured early release on parole in 1988. *Id.* 103a.

Over thirty years later, Mr. Szonyi is an entirely different man. *Id.* 104a-06a. He has had no further run-ins with the law, no longer uses drugs, and has not had a full glass of alcohol since he was paroled, *id.* 104a. He has reconciled with his estranged sister, *id.* 104a-05a, engaged in charitable work (e.g., counseling individuals participating in rehabilitation programs), *id.* 95a, and maintained steady employment until his retirement, including over seven years with the Salvation Army, *id.* 95a, 103a.

Mr. Szonyi's retirement was prompted by a cascading series of medical issues, including heart disease. *Id.* 103a. Among other things, Mr. Szonyi suffers from kidney disease, "atrial fibrillation, a knee tumor, a torn meniscus, rheumatoid arthritis, sleep apnea, [and] morbid obesity." *Id.* He takes "approximately nineteen different medications." *Id.*

C. Procedural Background

In 2005, nearly two decades after Mr. Szonyi was paroled, the government commenced removal proceedings against him, eventually charging him under § 1227(a)(2)(A)(ii). *Id.* 63a. Mr. Szonyi did not dispute that his crimes involved "moral turpitude," but—given that they occurred in a single location, over a single, continuous period of time—contended that they arose "out of a single scheme of criminal misconduct." *Id.* 133a-35a.

At the time Mr. Szonyi was charged, the BIA applied its single-act interpretation only in circuits that had not rejected it. Because Mr. Szonyi's case arose within the Ninth Circuit, the IJ purported to apply that court's standard. *Id.* According to the IJ, though Mr. Szonyi's crimes took place in a single room over a five-to-six-hour period, they were not "'planned at the same time,'" and thus, were not part of a single scheme. *Id.* (citation omitted). The IJ consequently ordered him removed to Hungary. *Id.* 142a-43a.

Mr. Szonyi appealed to the BIA. While his appeal was pending, the BIA handed down *Islam*, applying its single-act test throughout the country. 25 I. & N. Dec. at 641. Accordingly, the BIA remanded Mr. Szonyi's appeal. *Id.* 115a. Applying the BIA's standard, the IJ again found Mr. Szonyi removable. *Id.* 107a-11a. The Board affirmed. *Id.* 89a-96a.

Mr. Szonyi filed a petition for review in the Ninth Circuit, contending that nothing in *Brand X* authorizes an agency to resurrect a legal standard a federal court has found to be unambiguously foreclosed by the statutory text. Among other things, Mr. Szonyi further maintained that because the agency followed the Ninth Circuit's more capacious standard when he entered his plea, it could not employ its cramped reading of the single-scheme exception in his case.

A Ninth Circuit panel denied the petition for review. From the outset, the panel acknowledged it was being asking to adopt the same standard "rejected" by *Wood*. *Id.* 67a. Nevertheless, the panel concluded that "no circuit precedent forecloses the BIA's interpretation." *Id.* According to the panel, the "agency's approach" "would [be] foreclose[d]" only if *Wood*—which

"was decided before *Chevron*"—articulated a standard that "'follow[ed] from the unambiguous terms of the statute.'" *Id.* 67a-68a. Because there was no such articulation, and because "[t]he *Wood* decision likewise did not directly address the reasonableness of the BIA's approach under *Chevron* step two," the panel deferred to the BIA's "narrow[] definition" that "broaden[ed] the application of the removal provision." *Id.* 62a, 68a.

The panel also "conclude[d] that retroactive application of the BIA's interpretation" "was not improper" under the five-factor test adopted by *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 512, 520 (9th Cir. 2012) (en banc). *Id.* 72a. After noting that the first factor (whether the case is one of first impression) is "irrelevant" in immigration proceedings, the panel held that the remaining factors favored the government by a 3–1 margin. *Id.* 70a-73a. Specifically, "the fourth factor" (the burden on the petitioner) "favor[ed] Szonyi," "'because deportation is unquestionably a substantial burden,'" while the fifth factor (the statutory interest in applying the new rule) "favor[ed] the government," given its interest in uniform application of a statutory scheme. *Id.* 72a. The second and third factors thus proved dispositive. These "'intertwined'" factors boiled down to whether "'a party could reasonably have anticipated the change in the law.'" *Id.* 71a (citation omitted). Though acknowledging that when Mr. Szonyi pled guilty, the Ninth Circuit—as well as "courts in most jurisdictions"—had rejected the BIA's standard, the panel claimed—sua sponte—that "[i]t was not until 1992, a decade after Szonyi pled guilty," that the BIA "announced" it would not apply its interpretation within the Ninth

Circuit. *Id.* 71a-72a. Accordingly, it would have been unreasonable to expect the Ninth Circuit's standard to govern Mr. Szonyi's proceedings. *Id.* 72a-73a.[2]

Mr. Szonyi petitioned for rehearing and rehearing en banc, challenging the panel's adoption and retroactive application of the BIA's standard. After the panel made minor amendments to its retroactivity analysis, the court denied the petition over the dissent of Judge Collins, joined by Judge Bea. *Id.* 2a-3a. According to the dissent, the panel failed to "rigorously enforce *Chevron*'s condition that an agency's construction of an ambiguous provision merits deference only if it is a reasonable reading of the *actual words* of the statute." *Id.* 4a (Collins, J., dissenting).

As Judge Collins explained, the BIA has insisted on an "exceptionally narrow view of what constitutes a 'single scheme of criminal misconduct,' thereby allowing it more easily to divide up a single criminal episode into multiple crimes and expanding its power to order deportation." *Id.* 5a. "For sixty years," the Ninth Circuit "refused to follow that construction because [it] correctly recognized that it rewrites the statute 'as if it read 'single criminal *act*' rather than 'single *scheme* of criminal misconduct.'" *Id.* (citation omitted). The panel's "surrender[] to the BIA's flawed construction" "squarely contravened *Wood*'s holding that the BIA's interpretation rests on a legally impermissible rewriting of the text." *Id.* 6a.

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[2] Judge Fisher joined the panel's *Brand X* and retroactivity analysis, but dissented because the agency failed to provide "'a reasoned explanation'" for denying relief under the BIA's single-act standard. *Id.* 79a (Fisher, J., dissenting).

The panel's error, Judge Collins reasoned, was rooted in its failure to appreciate that *Wood*, in effect, had "two separate holdings." *Id.* 29a. True, the phrase "single scheme of criminal misconduct" is "ambiguous." *Id.* 21a. Thus, insofar as *Wood* "adopt[ed] [its] *own* interpretation" of the exception—an interpretation not based on the unambiguous text of the statute—that construction is not binding. *Id.* 29a (emphasis added). But that was not all *Wood* did. In addition, *Wood* "rejected the BIA's reading [of the single-scheme exception] as impermissibly divorced from the statutory language." *Id.* In modern parlance, that holding "necessarily translates, in *Chevron* step-two terms, into a conclusion that that the BIA's construction is unreasonable and not entitled to deference." *Id.* That "aspect of [the court's] decision" in *Wood* "remains binding," and "it controls the answer to the *Chevron* step-two inquiry." *Id.* 29a-30a. *Chevron*, after all, "does not require (or permit)" a court "to defer to an interpretation that essentially rewrites the statute's text so that it is more to the agency's liking." *Id.* 29a. Accordingly, "[u]nder *Wood*, the agency's reading of the exception is unreasonable, and it must be rejected." *Id.* 30a.

Nonetheless, "'the agency remains the authoritative interpreter (with the limits of reason)'" of the single-scheme exception. *Id.* 31a (citation omitted). The case thus should have been remanded to allow the BIA "to propose an alternative reading of the statutory text." *Id.* 6a. Indeed, a remand "is particularly appropriate here, because this is *not* a case in which the petitioner would lose under any conceivable reading of 'single scheme.'" *Id.* 6a-7a. The crimes at issue "all occurred during a single episode in a sin-

gle room," so "it is possible to posit reasonable competing interpretations of the [single-scheme exception,] some of which would cover Szonyi's conduct and some of which would not." *Id.* 7a. But in deciding among those interpretations, the BIA "needs to do what it has failed to do for many years—namely, to articulate a reasonable construction that is faithful to the meaning of the phrase 'single *scheme*,' rather than continue to apply a test that disregards that phrase and instead rewrites the provision as if it read 'single *act*.'" *Id.*

REASONS FOR GRANTING THE PETITION

This case presents the opportunity to "tame some of *Brand X*'s more exuberant consequences." *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring). This Court should grant certiorari for three reasons. *First*, the Ninth Circuit's decision conflicts with this Court's precedent, significantly expanding an agency's power to effectively overturn judicial precedent. This "excess of deference" is inconsistent with separation-of-powers principles and *Brand X* itself. *Second*, the circuits have divided on whether agency rules promulgated through adjudication can have retroactive effect, particularly in the context of *Brand X*. Adopting the Tenth Circuit's presumption of prospectivity would rein in an agency's ability to overrule circuit precedent. *Third*, this case is an ideal vehicle to clarify and circumscribe the scope of agency authority under *Brand X*. As the Ninth Circuit's decision indicates, such clarity is both needed and overdue.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT

Brand X confers upon executive branch agencies the extraordinary power to effectively overrule prior judicial decisions. A court must defer to an agency's reasonable construction of ambiguous statutory language, even if that court has previously articulated an alternative reading of the relevant statute. *See Brand X*, 545 U.S. at 982-85. This authority to "revis[e]" a "judicial declaration of the law's meaning," *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring), appears to "wrest[] from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive." *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (citation omitted). While one might have assumed that "powerful and centralized authorities like today's administrative agencies would have warranted less deference from other branches, not more," *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring), courts instead must "bow to the nation's most powerful litigant, the government, for no reason other than it is the government," *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring).

As various Justices have remarked, this "concentrat[ion of] federal power" "seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring); *Baldwin v. United States,* 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting) (describing *Brand X* as "inconsistent with the Constitution"): *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting) (describing the majority opinion as "probably unconstitutional"). "[I]f an agency can not only con-

trol the court's initial decision but also revoke that decision at any time, how can anyone honestly say the court, rather than the agency, ever really 'determine[s]' what the [law] means?" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., concurring, joined by Thomas, Alito, Kavanaugh, JJ.).

"Given these separation-of-powers concerns," this Court must scrupulously define and police the boundaries of agency authority under *Brand X*. Pet.App.4a (Collins, J., dissenting). That authority "draw[s] upon a potent brew of executive, legislative, and judicial power," but it is not without limits. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting). Especially where an agency is interpreting "statutory provisions that concern the scope of its own authority"—in this case, the breadth of the BIA's power to order deportation—"reflexive deference" risks executive usurpation of "the function and province of the Judiciary." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring).

Here, the Ninth Circuit's "reflexive deference" allowed the BIA to entrench "an unreasonably narrow and atextual reading" of the single-scheme exception that "expand[s the agency's] power to order deportation." Pet.App.5a, 28a (Collins, J., dissenting). Nothing in *Brand X* requires this result. To the contrary, the Ninth Circuit's approach conflicts with this Court's precedent and threatens to arrogate even more authority to the executive.

1. *Brand X* itself cabins an agency's ability to overcome contrary circuit precedent. The Ninth Circuit was correct that an agency cannot overrule a pri-

or judicial construction that "'follow[s] from the unambiguous terms of the statute.'" Pet.App.66a (quoting *Brand X*, 545 U.S. at 982). In other words, if a court declares what a statute unambiguously *does* mean, that interpretation "'is the law and must be given effect,'" *United States v. Home Concrete & Supply LLC*, 566 U.S. 478, 488 (2012) (plurality op.) (citation omitted). What the panel failed to realize, however, is that a judicial declaration of what a statute unambiguously *does not* mean should have the same effect.

By its terms, *Brand X* provides that an agency may not overcome "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation." 545 U.S. at 982-83; Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 Va. L. Rev. 597, 606 n.32 (2009) (stating that an agency is bound by "a prior judicial construction . . . if the earlier court's holding clearly indicated that the alternative interpretation now favored by the agency was unambiguously forbidden"). This remains true even if the relevant precedent issued prior to *Chevron*. *See Home Concrete*, 566 U.S. at 488-89 (plurality op.). Regardless of whether it purports to apply *Chevron*, "'[i]f a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.'" *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9).

That is precisely what the Ninth Circuit did in *Wood*. Indeed, short of using the word "unambiguous," it is difficult to conceive how that court could have more clearly indicated that Congress had foreclosed the BIA's approach. Fully "aware it was reject-

ing the expert opinion of the [BIA],"[3] the court began by "*employing traditional tools of statutory construction*." *Id.* at 488-89, 493. Looking first to the text, the panel promised to "take the language of the statute as we find it." *Wood*, 266 F.2d at 830. And that language "says 'not arising out of a single scheme of criminal misconduct'; it does not say 'not arising out of a single criminal act.'" *Id.* As for congressional intent, the court was even more explicit: "If such [a] reading had been the intent of Congress *they could have so declared*." *Id.* (emphasis added).

Meanwhile, *Wood* contains none of the tell-tale indicators of ambiguity. There is no concession that the interpretative question "cannot be resolved conclusively by resort to the text." *Garfias-Rodriguez*, 702 F.3d at 512. There is no holding that, among multiple possibilities, the court's interpretation was merely the "*best* reading" of the statute. *Brand X*, 545 U.S. at 984. There is no resort to "[agency] regulations" for guidance. *Gonzalez v. Dep't of Homeland Sec.*, 508 F.3d 1227, 1238-39 (9th Cir. 2007). Rather, there is a striking degree of certainty that the BIA's test is simply "not what the statute says." *Wood*, 266 F.2d at 830.

To be sure, *Wood* does not expressly state that the BIA's interpretation is "unambiguously foreclosed." But operating in a pre-*Chevron* world, that panel can hardly be faulted for its failure to "utter the magic words." *Home Concrete*, 566 U.S. at 493 (Scalia, J., concurring); *id.* at 488 (plurality op.). After all, a plu-

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[3] *See Wood*, 266 F.2d at 830 & n.4 (rejecting the standard of the "Board of Immigration Appeals" and citing *D-*, 5 I. & N. Dec. 728; *J-*, 6 I. & N. Dec. 382; *Z-*, 6 I. & N. Dec. 167).

rality of this Court was able to deem prior precedent binding even though it found the relevant statute "not 'unambiguous.'" *Id.* (citation omitted). And here, there are far more explicit indications that the Ninth Circuit had already concluded that the BIA's standard was inconsistent with "the intent of Congress," *Wood*, 266 F.2d at 830. "It may be that judges today would use other methods to determine whether Congress left a gap to fill. But that is beside the point." *Home Concrete*, 566 U.S. at 489 (plurality op.). The fact remains that *Wood* squarely held that the statute cannot mean what the BIA—and now the Ninth Circuit—claims it means.

2. This conclusion also follows from the logic of *Chevron* itself. Whether *Wood*'s holding that the BIA's test is "not what the statute says" is understood as a ruling at "step one" or "step two" of the *Chevron* analysis, the result is the same.

As various courts and commentators have noted, while the traditional *Chevron* analysis "asks first whether a statute [i]s ambiguous and, if so, whether the agency's interpretation of it [i]s reasonable," *United States v. Garcia-Santana*, 774 F.3d 528, 542-43 (9th Cir. 2014), "a more elegant formulation of the inquiry might simply be: Has the agency permissibly interpreted the statute?" *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1024 (6th Cir. 2016), *rev'd on other grounds*, 137 S. Ct. 1562 (2017); *Garcia-Santana*, 774 F.3d at 542-43 (approving a "one-step approach"). Whether or not a court makes an explicit finding of ambiguity, if it determines that "Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said" is, by definition, "unreasonable." *Entergy Corp. v.*

Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009); Stephenson & Vermeule, *supra*, at 599 (same). As relevant to the *Brand X* analysis, this means that "if the prior court stated clearly that the agency's (current) interpretation was outside the zone of . . . . permissible [constructions], then the agency may not now adopt that interpretation." *Id.* at 606 n.32; *cf. Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 399 (5th Cir. 2014) ("Even assuming *arguendo* that [our] prior interpretation left room for discretion, an agency is not entitled to deference when it offers up an interpretation of the Regulation that we have already said to be unambiguously foreclosed by the regulatory text.").

Again, that is exactly what *Wood* did. Though it did not explicitly deem the BIA's interpretation unreasonable, Pet.App.68a, the court was clear that it "contradict[ed] what Congress has said." *Entergy Corp.*, 556 U.S. at 218 n.4; *supra* pp. 16-17. Thus, even granting that there are multiple permissible readings of the statutory text, Pet.App.6a (Collins, J., dissenting), *Wood* held that under no circumstances can the word "scheme" be contorted to mean "act." *See Home Concrete,* 566 U.S. at 493 n.1 (Scalia, J., concurring) ("It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'"); *cf. City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 339 (1994) (stating that the agency's interpretation "goes beyond the scope of whatever ambiguity [the statute] contains" because the text "simply cannot be read to contain the . . . exemption petitioners seek"); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 109 (1993) ("By reading the words 'to the extent' to mean nothing more than 'if,' the Department has ex-

ceeded the scope of available ambiguity."). For all the reasons articulated in *Wood*, such an interpretation is unreasonable on its face, and cannot now be resurrected by the BIA.[4]

3. There is another reason *Brand X* does not authorize the sort of deference at issue here. In *Brand X*, the initial circuit precedent the lower court (erroneously) found controlling did not analyze an agency interpretation of the statute—and therefore could not have rejected it as an impermissible construction of the text—because no such interpretation had yet been issued. "[T]he court in that case was not reviewing an administrative proceeding," *Brand X*, 545 U.S. at 980; in fact, the relevant agency had "declined, both in its regulatory capacity and as amicus curiae, to address the issue before [the court]," *AT&T Corp. v. Portland*, 216 F.3d 871, 876 (9th Cir. 2000). Here, in contrast, the BIA *had already opined* on the meaning of "single scheme" at the time of *Wood*. *See* 266 F.2d at 830 & n.4. It is one thing to say that a court must defer to an agency rule it has not yet considered; it is quite another to allow an agency to reimpose a rule an appellate court has rejected as inconsistent with the statutory text.

Indeed, one of the primary concerns animating *Brand X* was the fear that an agency's role as "the authoritative interpreter" of a statute it was "charged with administering" would be jeopardized by the happenstance that a "court's construction [of that statute] came first." 545 U.S. at 983 (stating that def-

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[4] As Judge Collins detailed, even absent *Wood*, the BIA's single-act interpretation would be an "unreasonable reading" of the statute. Pet.App.22a-28a (Collins, J., dissenting).

erence should not "depend on the order in which the judicial and administrative constructions occur[ed]"). This, the Court warned, "would 'lead to the ossification of large portions of . . . statutory law' by precluding agencies from revising unwise judicial constructions of ambiguous statutes." *Id.* (citation omitted).

Here, however, the court's construction did not come first. The BIA had already interpreted "single scheme of criminal misconduct" when the Ninth Circuit considered and rejected that standard in *Wood*. That being the case, the concerns underlying *Brand X* are simply inapposite.

* * *

The Ninth Circuit's decision to adopt a test it previously deemed irreconcilable with the statutory text reflects a fundamental misunderstanding of the deference owed to agencies under *Brand X*. This Court should grant certiorari both to correct that misunderstanding and to ensure other courts do not display a similar "excess of deference." Pet.App.4a (Collins, J., dissenting). After cabining the scope of *Brand X*, this Court should remand "the matter to the [BIA] for it to adopt a new construction that interprets, rather than rewrites, the statute." *Id.* 32a.

II. THE CIRCUITS ARE DIVIDED AS TO WHETHER AN AGENCY RULE PROMULGATED THROUGH ADJUDICATION CAN HAVE RETROACTIVE EFFECT

In *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), this Court stated that the "ill effect[s]" associated with retroactive application of a new agency rule promulgated through adjudication should be "balance[d]" against "the mischief of producing a result which is

contrary to a statutory design or to legal and equitable principles." *Id.* at 203. But in "the absence of any [further] guidance from [this] Court," *Garfias-Rodriguez*, 702 F.3d at 520, the circuits have divided on how that balancing should occur, particularly in the context of *Brand X*. While the Tenth Circuit has adopted a bright-line rule, other courts apply various iterations of a multi-factor balancing test to assess retroactivity on a case-by-case basis. Because the Tenth Circuit's approach promotes "familiar [due process] considerations of fair notice, reasonable reliance, and settled expectations," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) while "semi-taming" the separation-of-powers concerns inherent in *Brand X*, *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring), this Court should grant certiorari and adopt that court's standard.

A. The Circuits Are Split

1. The Tenth Circuit has adopted a categorical rule: when it defers to a newly promulgated agency rule under *Brand X* or *Chevron* step two, that rule "should be presumed prospective in operation unless Congress has clearly authorized retroactive application." *De Niz Robles*, 803 F.3d at 1172. In other words, "an agency's revision of a judicial decision of what the law is may bear only prospective effect, governing only future cases and controversies." *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring). Consequently, whether through rule-making or adjudication, "an executive agency may [not] revise a judicial decision about the law's meaning with retroactive effect." *Id.*

2. In contrast, when the Ninth Circuit "overturn[s its] own precedent following a contrary statutory interpretation by an agency authorized under *Brand X*," that court considers "whether the agency's statutory interpretation (to which [it] defer[ed]) applies retroactively under the [five-factor] test" initially adopted by the D.C. Circuit in *Retail, Wholesale & Department Store Union, AFL-CIO v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972). *Garfias-Rodriguez*, 702 F.3d at 520. That test asks:

> "(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 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."

Id. at 518 (citation omitted). These factors are analyzed "on a case-by-case basis." *Id.* at 519; Pet.App.42a-44a (applying this test).

3. The split only widens beyond the specific context of *Brand X*, with courts applying a menagerie of multi-factor tests to determine whether agency rules issued through adjudication apply retroactively.

"[U]sually," courts employ some iteration of "'the five factors articulated in *Retail* [*Union*].'" *Monteon-Camargo*, 918 F.3d at 430 n.12 (citation omitted). That is the case in at least the Second, Third, Seventh, and Ninth Circuits. *Obeya v. Sessions*, 884 F.3d

442, 445 (2d Cir. 2018); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 581 (7th Cir. 2014); *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 392 (3d Cir. 1994): *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982); *see also Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 300 (4th Cir. 2018) (directing the BIA to consider the *Retail Union* factors).

The *Retail Union* factors, however, are not ubiquitous. The Eighth Circuit has adopted a three-factor analysis. *Ryan Heating Co. v. NLRB* 942 F.2d 1287, 1289 (8th Cir. 1991) (asking "(1) whether the losing party relied on established Board policy when choosing the course of conduct that led to the unfair labor practices charge; (2) whether the Board abruptly changed that policy without clearly foreshadowing its intent to do so; and (3) the severity of the penalty imposed on the losing party."). The First Circuit asks only whether retroactivity would result in a "manifest injustice." *C.E.K. Indus. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350, 357 (1st Cir. 1990). And the Fifth Circuit has rejected the *Retail Union* factors altogether, deeming them "of little practical use." *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998). Instead, that court simply "'balance[s] the ills of retroactivity against the disadvantages of prospectivity,'" *Monteon-Camargo*, 918 F.3d at 430-31 (citation omitted), and has, like the Tenth Circuit, indicated that "[a] 'presumption of prospectivity'" "should generally attach when an agency 'exercise[s] delegated legislative . . . authority.'" *Id.* (quoting *De Niz Robles*, 803 F.3d at 1171-72); *id.* at 430 n.12 ("contrast[ing]" this approach with that of "[o]ther circuits").

Even within the D.C. Circuit, the five factors have been called into question. That court "has not been entirely consistent in enunciating a standard to determine when to deny retroactive effect," *Verizon Tel. Companies v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001), applying no less than three different tests. *United Food & Commercial Workers Int'l Union, AFL-CIO, Local No. 150-A v. NLRB*, 1 F.3d 24, 34 (D.C. Cir. 1993). Though *Retail Union* theoretically remains the law of the circuit, the court has since dismissed the "need to plow laboriously through" the five factors. *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998).

B. The Tenth Circuit's Standard Is Superior

Among these variously articulated tests, there are several reasons to favor the Tenth Circuit's standard.

1. As an initial matter, the Tenth Circuit's approach best accords with separation-of-powers and due process principles. To be sure, "agencies exercising delegated legislative power" under *Brand X* would still be able to "effectively overrule judicial precedents." *Gutierrez-Brizuela*, 834 F.3d at 1148. But in doing so, they would be subject to the same restrictions that apply to congressional action. "Retroactivity is not favored in the law," *Bowen*, 488 U.S. at 208, and "persons should [not] be left in worse shape simply because they are the subjects of delegated legislative action rather than subjects of true legislative action," *Gutierrez-Brizuela*, 834 F.3d at 1145. Accordingly, "to the extent the executive is permitted to exercise delegated legislative authority to overrule judicial decisions, logic suggests it should

be bound by the same presumption of prospectivity that attends true legislative enactments." *Id.*

Likewise, a categorical presumption of prospectivity "addresses some of the due process and equal protection problems that follow from allowing politicized decisionmakers to decide cases and controversies about the meaning of existing law." *Id.* at 1151. "[I]f there is any area where the 'ill effect[s]' of retroactivity in an agency adjudication outweigh the 'mischief' associated with pure prospectivity, the *Chevron* step two/*Brand X* scenario fits the bill." *De Niz Robles*, 803 F.3d at 1175 (citation omitted). In such circumstances, the "ill effect[s]" are "easy to see": "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." *Id.* at 1176. On the other hand, because an "agency in the *Chevron* step two/*Brand X* scenario isn't seeking to enforce the law as it is but instead seeks to exploit a gap in the law to implement its own . . . vision of what the law should be," it is "pretty hard" to "see how requiring prospectivity in these circumstances would be 'contrary to [any] statutory design or to legal and equitable principles'—the sort of 'mischief' *Chenery II* feared." *Id.* (citation omitted). In short, there is no reason to require (often unsophisticated) litigants "to bear the cost of ignoring directly controlling judicial precedent in favor of the speculative possibility that an executive revision might ultimately prevail." *Gutierrez-Brizuela*, 834 F.3d at 1147.

2. The Tenth Circuit's standard would also bring uniformity to this Court's jurisprudence. If that standard "sound[s] familiar it's because" it is. *De Niz*

Robles, 803 F.3d at 1172. Relying on the same "analogy between legislation and agency rulemaking," this Court in *Bowen* held that "newly promulgated agency rules"—issued through formal rulemaking—"should apply only prospectively." *Id.* "[C]ongressional enactments," this Court explained, "will not be construed to have retroactive effect unless their language requires this result." *Bowen*, 488 U.S. at 208. "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." *Id.*

Adopting the Tenth Circuit's standard would thus mean that agency rules, whether issued via adjudication or rulemaking, would have only prospective effect. "Any other conclusion would . . . leave [this] Court's teaching in *Bowen* on doubtful footing." *De Niz Robles*, 803 F.3d at 1173. It would also provide a "strange incentive" for agencies to choose adjudication over rulemaking in order to evade *Bowen*. *Id.*

3. The Tenth Circuit's standard is also easier to administer. Application of that standard is straightforward and leads to predictable results: agency rules promulgated under *Chevron* step two and *Brand X* would apply only prospectively.

In contrast, the multi-factor tests applied by other circuits are a "judicial chore—and the job isn't made any easier when the number of factors [courts are] asked to juggle proliferates." *De Niz Robles*, 803 F.3d at 1180. This is particularly so where, as here, courts are asked to weigh "incommensurate goods like, for example, the protection of settled expectations

against the government's policy interests in retroactive application of a new rule." *Id.* at 1175. Such a task is akin to "asking [courts] to compare the weight of a stone to the length of a line." *Id.* What is more, multi-factor tests have a tendency to become not "test[s] at all but an invitation [for courts] to make an ad hoc judgment." *City of Arlington*, 569 U.S. at 307.

This case illustrates the pitfalls of an ad hoc approach. Applying the Ninth Circuit's multi-factor test, the panel below concluded that even though there was controlling circuit precedent directly on point, Mr. Szonyi should have anticipated that the BIA's standard would control his case. Pet.App.43a. How, exactly, Mr. Szonyi was to have made that prediction is left unexplained: he entered his plea in 1981—three years before *Chevron* was decided and over twenty years before *Brand X*. He can hardly have been expected to intuit *Chevron* deference, much less *Brand X*—no less a legal mind than Justice Scalia referred to the latter as a "breathtaking novelty." 545 U.S. at 1016 (Scalia, J., dissenting).[5]

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[5] The panel's claim that the BIA did not announce it would defer to Ninth Circuit precedent until 1992 is irrelevant and wrong. Pet.App.43a. Regardless of the standard the *BIA* applied, the *Ninth Circuit* was bound by its prior precedent: had the BIA ignored *Wood*, it would have been reversed. In any event, far from announcing a new standard in 1992, *Adetiba*, 20 I. &. N. Dec. at 509, the BIA merely articulated a longstanding practice: prior to *Brand X*, the BIA "historically followed a court's precedent in cases arising in that circuit." *Matter of Anselmo*, 20 I. & N. Dec. 25, 31 (BIA 1989); *see also Matter of Herrera*, 18 I & N Dec. 4, 5 (BIA 1981) (following Ninth Circuit precedent); *Matter of Bowe*, 17 I. & N. Dec. 488, 489-90 (BIA 1981) (same); *Matter of Patel*, 17 I. & N. Dec. 597, 600-01 (BIA 1980) (same); *Matter*

The Tenth Circuit's standard, on the other hand, does not require litigants to be clairvoyant. Rather, it removes all guesswork from the equation. And here, it would have precluded application of the BIA's single-act test.

III. THIS CASE IS AN APPROPRIATE VEHICLE TO RESOLVE THE IMPORTANT QUESTIONS PRESENTED

The questions presented are important and ripe for resolution by this Court. *Brand X* already gives agencies tremendous powers: if it is to remain the law of the land, those powers must be clearly defined and carefully circumscribed. This case is an appropriate vehicle to do just that.

A. This Case Presents Important Questions Regarding the Nature and Scope of *Brand X*

1. A grant of certiorari would allow this Court to clarify how courts should address prior holdings indicating that the statutory text *precludes*, rather than *requires*, a particular interpretation. There is little direct guidance on this question, as *Brand X* and *Home Concrete* both focused on what would essentially be *Chevron* "step one" questions. *Home Concrete*, 566 U.S. at 480; *Brand X*, 545 U.S. at 982-85. That is, they primarily provided instruction regarding interpretations a prior court found to be mandated by the statutory text, whereas, in "modern parlance," a holding that "the particular reading adopted by the

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of Bonnette, 17 I. & N. Dec. 587, 588 (BIA 1980) (same); *Matter of Kondo*, 17 I. & N. Dec. 330, 330 (BIA 1980) (same).

[agency] lack[s] support in the actual statutory language" "is more in the nature of a *Chevron* step-two analysis." Pet.App.21a(Collins, J., dissenting). This case would give this Court the opportunity to explain whether, and in what circumstances, such holdings bind agencies going forward.

Such guidance would be particularly useful with respect to pre-*Chevron* decisions where a court had no reason to "directly address the reasonableness of the [agency's] approach under *Chevron* step two." Pet.App.39a. After all, in *Home Concrete*—this Court's only attempt to apply *Brand X* to pre-*Chevron* caselaw—"the Court was badly fractured on the issue of how to apply the broad agency deference statement in *Brand X*; no position commanded a majority." *MikLin Enters., Inc. v. NLRB*, 861 F.3d 812, 823 (8th Cir. 2017). That question could be definitively resolved here.

While there is language in *Brand X* and *Home Concrete* that speaks to these issues, *supra* pp. 15-21, this case illustrates that courts are confused as to its import and application. If there is any case in which it could be said that prior precedent "unambiguously foreclosed" an agency interpretation, this is it. *Supra* pp. 16-17. Yet the Ninth Circuit still chose to adopt the agency's approach. This is not the first time that court has exhibited a willingness to defer to an agency standard flatly rejected by prior precedent. *E.g.*, *Or. Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 356-365 (9th Cir. 2016) (O'Scannlain, J., dissenting). Absent intervention from this Court, it is unlikely to be the last.

2. The circuit split described above demonstrates a similar need for clarity regarding the retroactivity of agency rules issued through adjudication. *Supra* pp. 22-25. Even within the Ninth Circuit, the first case to apply the *Retail Union* factors in the *Brand X* context resulted in a sharply divided en banc panel. Six judges "pick[ed] one test while three others pick[ed] a different test." *Garfias-Rodriguez*, 702 F.3d at 532 (Kozinksi, C.J., disagreeing with everyone). "One judge believe[d] that either test comes to the same result, and another agree[d] with the majority's conclusion while applying the test favored by the dissent." *Id.* (citation omitted). Such diversity of opinion serves only to "thoroughly confuse[]" both lawyers and judges, *id.*—confusion that would be eliminated by adoption of the Tenth Circuit's standard.

B. This Case Is an Appropriate Vehicle to Provide Needed Clarity

1. Considerations that may have prompted this Court to deny certiorari in related petitions are not present in this case. While the petition in *Baldwin v. United States*, No. 19-402, asked this Court to overrule *Brand X*, this petition seeks only to "tame" it. *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring). Likewise, though both *Mercado-Ramirez v. Barr*, No. 19-284, and *Olivas-Motta v. Barr*, No. 19-282, noted the divide in authority on the retroactivity issue, here, the split is squarely presented. Unlike those cases, *e.g.*, *Olivas-Motta v. Barr*, 910 F.3d 1271, 1276-79 (9th Cir. 2018), there is no dispute that here, the BIA "changed," rather than "clarified," the law. And as the government conceded, the split is most apparent "with respect to cases that implicate *Brand X*." BIO at 12, *Olivas-Motta*, 2020 WL 133924 (No.

19-282). "That circumstance [wa]s not presented" in *Mercado-Ramirez* and *Olivas-Motta*, *id.*, but it is here. Furthermore, this case shows that the *Retail Union* test is not always "compatible" with the Tenth Circuit's bright-line rule. *Id.* Employing the *Retail Union* factors, the Ninth Circuit applied the BIA's single-act test retroactively, Pet.App.42a-44a, whereas it would have only prospective application under the Tenth Circuit's standard.

2. This case also starkly illustrates the consequences of the Ninth Circuit's approach both to *Brand X* and the retroactivity analysis. Had the Ninth Circuit properly applied *Brand X* and remanded the case to the BIA to articulate a standard that does not rewrite "single scheme" to mean "single act," the outcome would have been very different. This, after all, "is *not* a case in which the petitioner would lose under any conceivable reading of 'single scheme.'" Pet.App.6a-7a (Collins, J., dissenting). To the contrary, crimes of the same nature, that occur in a single room, over a single, continuous period of time, are crimes arising from a "single scheme of criminal misconduct" under any reasonable definition of that phrase.

Alternatively, barring the BIA from retroactively applying its single-act test to Mr. Szonyi would mean that his case would be governed by the Ninth Circuit's "more expansive" standard. Pet.App.43a. There can be little doubt that Mr. Szonyi would fare better under that test than one intended to make the "greatest number of twice-convicted aliens" removable. *Z-*, 8 I. & N. Dec. at 175. As the panel acknowledged, application of the BIA's standard "ma[de Mr. Szonyi] subject to removal when he might not have

been under [the Ninth Circuit's] standard." Pet.App.34a; *INS v. St. Cyr*, 533 U.S. 289, 325 (2001) ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation."). Indeed, when Mr. Szonyi entered his plea, the only appellate decision applying the Ninth Circuit's standard to facts even remotely analogous to his case had held in the immigrant's favor. *Sawkow v. INS*, 314 F.2d 34, 38 (3d Cir. 1963). And as the Ninth Circuit's interpretation of the single-scheme exception extends even *beyond* crimes that "'take place at one time,'" it a fortiori includes crimes of a similar nature that took place at the same location during a "'temporally integrated episode of continuous activity.'" *Gonzalez-Sandoval*, 910 F.2d at 615-16 (citation omitted). At the least, this Court cannot discount the possibility that the BIA, properly applying the Ninth Circuit's standard, would so find. *E.g.*, *Gonzales v. Thomas*, 547 U.S. 183, 186-87 (2006) (per curiam).

3. Finally, the Ninth Circuit made much of the fact that other circuits to consider the question ultimately acquiesced in the BIA's interpretation. Pet.App.40a-41a. But that is no barrier to this Court's review.

As Judge Collins noted, the panel's observation is "irrelevant": regardless of what other circuits have done, *Brand X* and *Home Concrete* required the panel "to follow Ninth Circuit precedent." *Id.* 30a (Collins, J., dissenting). Tellingly, none of the cited cases involved circuit precedent that "unambiguously foreclosed" the BIA's single-act test. Indeed, none of those decisions applied either *Brand X* or *Home Concrete*.

Moreover, some of those decisions exhibited a "troubling" level of "reflexive deference" and "cursory analysis." *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring). At times, the *Chevron* analysis amounted to little more than an assertion that the BIA's standard was "a permissible interpretation of the statute," *Nguyen v. INS*, 991 F.2d 621, 623 (10th Cir. 1993), or a note that other circuits had "sustained [the BIA's test] as reasonable," *Abdelqadar v. Gonzalez*, 413 F.3d 668, 675 (7th Cir. 2005). The deference only increased as more circuits sided with the BIA: in its rush to "join our fellow Courts in concluding that the BIA's interpretation is reasonable," the Third Circuit failed even to cite—much less apply *Brand X*—to its prior decision applying a contrary standard. *Compare Chavez-Alvarez v. U.S. Att'y Gen.*, 850 F.3d 583, 586-87 (3d Cir. 2017), *with Sawkow*, 314 F.2d at 37-38. "[I]n fairness to the other circuit courts," "it is not clear that the facts presented to them brought into comparably sharp relief the extraordinary narrowness of the BIA's position." Pet.App.30a (Collins, J., dissenting). But in any event, the Ninth Circuit "should [have] no more acquiesce[d] in [its] sister circuit's misapplication of *Chevron* deference in construing the meaning of the statute than [it] should [have] accede[d] to the BIA's unwarranted invocation of that deference." *Id.* 31a.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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