

No. 96-15495

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHOLIC SOCIAL SERVICES, INC.
(CENTRO DE GUADALUPE IMMIGRATION CENTER), ET AL.,

Plaintiffs-Appellees,

v.

JANET RENO, ATTORNEY GENERAL OF THE
UNITED STATES, AND DORIS MEISSNER, COMMISSIONER
OF IMMIGRATION AND NATURALIZATION SERVICE,

Defendants-Appellants.

INTERLOCUTORY APPEAL FROM ORDERS
OF THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

DEFENDANTS-APPELLANTS' REPLY BRIEF RE:
SECTION 377 OF THE ILLEGAL IMMIGRATION REFORM
AND IMMIGRANT RESPONSIBILITY ACT OF 1996

FRANK W. HUNGER
Assistant Attorney General
Civil Division

DONALD E. KEENER
Deputy Director
Office Of Immigration Litigation

STEPHEN W. FUNK
KEISHA DAWN BELL
Attorneys
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4909

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CERTIFICATE OF COMPLIANCE WITH RULE 32(E)(3)

Pursuant to Ninth Circuit Rule 32(e)(3), the undersigned counsel certifies that the following reply brief for Defendants-Appellants is monospaced, has 10 characters per inch, and contains 6,249 words.


STEPHEN W. FUNK
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4909

INTRODUCTION

Faced with a Congressional enactment that clearly and explicitly precludes the members of the plaintiff class from asserting an interest under the legalization program, Plaintiffs-Appellees ("plaintiffs") now have grasped upon two constitutional arguments to somehow convince this Court to disregard the clear intent of Congress and to permit them to prosecute their allegations that they were wrongfully deprived of the rights and benefits provided by the amnesty program. What plaintiffs fail to appreciate, however, is that they have no constitutional right to receive any of the immigration benefits provided by the Immigration Reform And Control Act of 1986 ("IRCA"). Rather, their rights under the amnesty program are a matter controlled by the political branches of government (Congress and the President), the entities that created the amnesty program in the first place and have been vested with the constitutional authority to determine who may be granted lawful residence in this country. Indeed, as the Supreme Court has held, the judiciary does not have the authority to provide the benefits of the legalization program (including temporary work authorization and stays of deportation) to persons whom Congress and the President have determined are statutorily ineligible for such relief. Instead, the courts' role is limited only to ascertaining the intent of Congress and then strictly enforcing the terms and conditions of the statute in accordance with the legislated will.

Here, the intent of Congress could not be more clear. Notwithstanding plaintiffs' allegations, Congress has provided that aliens who did not in fact file a timely application or submit a complete application and application fee to INS prior to the expiration of the statutory deadline on May 4, 1988, are statutorily ineligible for legalization and may not assert any interest under the legalization program in the courts. By so doing, Congress sought to put an end to litigation seeking to extend the application deadline and to obtain the benefits of the amnesty program for persons (such as the members of the plaintiff class) who did not satisfy the substantive eligibility requirement of a timely application.

From the beginning of the legalization litigation in 1987 and 1988, plaintiffs have pursued the central goal of overturning the 12-month application period prescribed by IRCA as one of the eligibility requirements for receiving the statutory benefit of legalization. Ten years later, plaintiffs continue in their efforts to set aside this eligibility requirement. When Congress enacted IRCA in 1986, it stressed the inviolability of the application period in two ways. First, Congress provided that the submission of a timely application by May 4, 1988, was the first eligibility requirement for legalization. 8 U.S.C. § 1255a(a)(1). Second, Congress provided that the denial of an application as untimely simply was not reviewable by any tribunal or court. 8 U.S.C. § 1255a(f)(2). Section 377 is Congress' most recent expression of its policy judgment that aliens are not even

within the scope of the statute unless they actually submitted a timely application and that the courts should not entertain litigation over timeliness claims.

Having lost the policy battle in Congress and the Executive Branch, plaintiffs continue to try to win the battle in the courts. These legalization cases have turned into nothing more than an attempt to legislate through the courts a policy that has been rejected by Congress. This is not what the courts are for. Congress, not the courts, makes the policy over the terms and conditions that govern an alien's admission into lawful residence in this country. It is time to put an end to plaintiffs' unlawful attempt to override the policy judgment of Congress that persons who did not actually submit a timely application should not be granted the benefit of lawful residence in this country. Accordingly, Defendants respectfully request that the Court vacate the district court's interim relief orders and bring this case to an end.

REPLY TO PLAINTIFFS' ARGUMENTS

- I. SECTION 377 CLEARLY WAS INTENDED TO PRECLUDE ALIENS WHO FAILED TO SUBMIT A TIMELY APPLICATION FROM BRINGING ANY CLAIM SEEKING TO ASSERT RIGHTS AND INTERESTS CREATED BY IRCA FOR THE PURPOSE OF OBTAINING THE BENEFITS PROVIDED BY IRCA.**

In their "supplemental memorandum" regarding Section 377, plaintiffs contend that Congress did not intend to preclude their "constitutional" claims because it did not state explicitly that Section 377 applies to "all constitutional claims asserting an interest under [IRCA]." Pl. Supp. Mem. at 21. This construction

of the "clear and convincing evidence" standard, however, has been rejected by the Supreme Court:

In the context of preclusion analysis, the 'clear and convincing evidence' standard is not a rigid evidentiary test but a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.

Block v. Community Nutrition Institute, 467 U.S. 340, 351 (1984).

Thus, in determining whether a statute precludes judicial review, the intent of Congress "is determined not only from [the statute's] express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.'" Lindahl v. Office Of Personnel Management, 470 U.S. 768, 779 (1985) (quoting Block, 467 U.S. at 345).

There can be no doubt what Congress intended here. Section 377 was not enacted in a vacuum. It was enacted specifically in response to pending legalization litigation brought on behalf of aliens who failed to comply with the statute's eligibility requirement of a timely application. Certainly, Congress was aware of the allegations made, the claims asserted (including the claims of alleged "constitutional" violations), and the orders issued in this case and the other pending legalization cases. Yet, notwithstanding plaintiffs' allegations, Congress decided to impose a jurisdictional "Limitation On Legalization Litigation" by precluding the universe of legalization-related claims (i.e., "any cause of action or claim by or on behalf of any person asserting an interest under [IRCA]") (emphasis added) in order

"to put an end" to litigation efforts designed to extend the application deadline and to obtain the benefits of the amnesty program for persons who did not submit a timely application. By so doing, Congress sought to preserve the limited and short-term nature of the legalization program, to reinforce the strict eligibility requirements and prohibitions on judicial review imposed by 8 U.S.C. §§ 1255a(a)(1) and (f)(2) for persons who failed to submit a timely application, and to ensure that the judiciary does not frustrate the statute's objectives by providing benefits under IRCA to persons who have no legally-cognizable interest under the legalization program.

In this regard, this case is similar to Block, supra, where the question was not whether Congress intended to "to strip the judiciary of all authority to review" executive action, but only whether it intended to foreclose a particular class of persons (individual consumers of milk) from asserting an interest under the statutory milk marketing program in question. Block, 467 U.S. at 346-47. Even though the court of appeals in Block found that the interests of consumers were clearly implicated by the executive action at issue, the Court held that the consumers did not have a "judicial remedy" for their alleged injuries because they did not have, and could not assert, an interest under the program. Id., 467 U.S. 346-353. Indeed, as in the case of lawsuits brought by aliens who did not file timely applications, the Court reasoned that precluding judicial review of consumer suits was "necessary to ensure the achievement of the Act's most

fundamental objectives" and "to ensure that statute's objectives will not be frustrated" by suits by parties who lacked a legally-cognizable interest in the program. Id. at 352.

Thus, unlike Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986), and the other cases cited by plaintiffs, in which Congress had enacted judicial review schemes in a vacuum and may have intended not to preclude unknown and unspecified constitutional claims, it is clear in this case that Congress specifically intended to preclude all of plaintiffs' legalization-related claims.^{1/} Otherwise, Section 377 would be rendered meaningless, given that all of plaintiffs' legalization claims have been characterized as "constitutional" claims as well as "statutory" claims. See Stone v. INS, 115 S. Ct. 1537, 1545 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect").

In their supplemental memorandum, plaintiffs spend approximately six pages discussing legislative history from 1986 that they contend demonstrates that Congress intended that the legalization program should "be implemented in a liberal and generous fashion," or, in other words, in their favor. Pl. Supp. Mem. at 23-29. In discussing this legislative history, however,

^{1/} This case also differs from Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987), where the issue was whether Congress could enact a statute and, at the same time, preclude the courts from considering its constitutionality. This case is completely inapposite here. The government does not contend that the Court may not consider the constitutionality of Section 377; only that the courts may not hear plaintiffs' underlying legalization claims, which seek to assert rights and interests created by IRCA for the purpose of obtaining the benefits provided by IRCA.

plaintiffs ignore the text and legislative history of Section 377 itself and other clear and convincing evidence that Congress intended that the application deadline should be strictly enforced to preclude all attempts by aliens who failed to submit a timely application by May 4, 1988, to obtain the benefits of the legalization program. In particular, plaintiffs ignore the fact that:

- (1) Congress required the Attorney General to establish a one-year application period that would begin no later than six months after November 6, 1986 (May 5, 1987), and hence end no later than May 4, 1988;
- (2) Congress established a "timely application" as the first substantive eligibility requirement for amnesty;
- (3) Congress precluded aliens who were denied legalization on account of a late application from obtaining judicial review of their denial;
- (4) Congress rejected last-minute attempts to extend the application deadline in April 1988; and
- (5) Congress enacted Section 377 as part of bill that clearly was designed to take a more conservative and less forgiving approach to aliens who have reside in the United States illegally.

See 8 U.S.C. §§ 1255a(a)(1) and (f)(2); Ayuda v. Thornburgh, 948 F.2d 742, 759 n.13 (D.C. Cir. 1991) (discussing Congress' rejection of attempts in 1988 to extend the application deadline)

Plaintiffs' "alternative" constructions of Section 377 should be rejected by this Court. The text of Section 377, its own legislative history, its place within the statutory scheme of legalization, and the protracted history of the legalization

cases leave no ambiguity over what Congress intended.

Accordingly, this Court should enforce Section 377 as written and not adopt some "alternative" construction that would do violence to the clear intent of Congress in enacting this provision. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986) ("'[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it") (citations omitted); see also Mansell v. Mansell, 490 U.S. 581, 594 (1989) ("[W]e decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history").^{2/}

^{2/} In their brief, plaintiffs also argue that Section 377 does not apply to this case because Congress put the amendment in the wrong place. Pl. Supp. Mem. at 5. This is another interesting twist on Section 377 that should be summarily rejected by this court. Plaintiffs' construction of 8 U.S.C. § 1255a(f) ignores the plain language and legislative purpose of Section 377 and renders the provision meaningless in violation of well-established principles of statutory construction. See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 116 S. Ct. 1529, 1533 (1996) ("[T]he more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight"); Stone, 115 S. Ct. at 1545, supra.

II. IT DOES NOT VIOLATE THE DUE PROCESS CLAUSE FOR CONGRESS TO PRECLUDE ALIENS WHO DID NOT SUBMIT A TIMELY APPLICATION FROM ASSERTING IN THE COURTS THAT THEY ARE ENTITLED TO RECEIVE THE STATUTORY RIGHTS AND INTERESTS CREATED BY IRCA.

In their supplemental memorandum, plaintiffs contend that Section 377 should be construed as not precluding their "constitutional" claims because "'all agree that Congress cannot bar all remedies for enforcing federal constitutional rights.'" Pl. Supp. Mem. at 19 (citing Bowen, 476 U.S. at 681 n. 12). In their efforts to circumvent the intended effect of Section 377, however, plaintiffs fail to appreciate that their claims are not, as they contend, seeking to enforce any constitutional rights. Rather, all of their claims seek to enforce statutory rights and interests created by IRCA for the purpose of obtaining the statutory benefits created by IRCA. Whether plaintiffs have a "right" or "interest" under the amnesty program, however, is not a question determined by the United States Constitution. It is a question determined entirely by Congress, the entity with the constitutional and statutory authority to prescribe the terms and conditions by which an alien can be admitted to this country as a lawful immigrant and thus with the authority to determine who can be granted legalization and who can assert an interest under the legalization program in the courts. See Kleindeist v. Mandel, 408 U.S. 753, 766 (1973) ("The Court without exception has sustained Congress' plenary authority to make rules for the admission of aliens and to exclude those who possess those characteristics that Congress has forbidden"); see also Fiallo v.

Bell, 430 U.S. 787, 792 (1977) ("'[O]ver no conceivable subject is the legislative power more complete'") (citations omitted).^{2/}

Here, Congress has made it absolutely clear that persons who neither timely filed for legalization nor "attempted to file a complete application and application fee with an authorized legalization officer of the [INS], but had the application and fee refused by that officer," and who thus are statutorily ineligible for legalization, may not assert any interest under the legalization program in the courts. Accordingly, regardless of the merit of plaintiffs' "constitutional" and "statutory" claims, it is clear that they cannot be awarded the relief that they seek, i.e., the benefits provided by the statutorily-created legalization program. Congress has determined that they have no interest in such benefits, and this Court must strictly enforce the terms and conditions of the statute in accordance with the legislated will. As the Supreme Court stated in Pangilinan:

An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and

^{2/} Plaintiffs attack the authority of Congress to distinguish between persons who submitted a complete application and application fee and those who did not. Pl. Supp. Mem. at 36. It is well-established that Congress may draw distinctions between aliens for purposes of determining who may lawfully reside in the United States. See Fiallo v. Bell, 430 U.S. 787 (1977); Mathews v. Diaz, 426 U.S. 67 (1976). Here, Congress clearly had the authority to draw a distinction between aliens who in fact complied with the statute's eligibility requirement of a timely application and aliens who did not. Plaintiffs' other suggestion that Congress drew a distinction between aliens who were front-desked by "legalization officers" and aliens who were front-desked by "clerks" is meritless. Nothing in the text of Section 377 or its legislative history suggests that the term, "legalization officer," does not include all employees of the INS who had the authority to receive completed applications.

conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will so vital to the public welfare.

Id., 486 U.S. at 884; see also Commissioner v. Lundy, ___ U.S. ___, 116 S. Ct. 647, 656-657 (1996) ("We are bound by the language of the statute as it is written, and even if the rule Lundy advocates might 'accor[d] with good policy,' we are not at liberty 'to rewrite [the] statute because [we] might deem its effects susceptible of improvement'") (citations omitted).^{4/}

Indeed, plaintiffs cannot circumvent the clear will of Congress simply by alleging that their legalization claims seek to vindicate "constitutional" rights. As other courts have done, this Court should look beyond the label attached to plaintiffs' claims and determine whether they have presented "colorable" constitutional claims that seek to redress "serious" constitutional violations. See Webster v. Doe, 486 U.S. 592, 603 (1988) (noting that a "serious constitutional question" would arise only if a federal statute were construed to deny any judicial forum for a "colorable constitutional claim") (emphasis added); Hata v. United States, 23 F.3d 230, 233 (9th Cir. 1994) (noting that "review of constitutional claims may still be

^{4/} See Coleman v. Lyng, 864 F.2d 604, 611 (8th Cir. 1988), cert. denied, 493 U.S. 953 (1989) (court lacked jurisdiction to hear due process claim "because the actual source of any relief in this case is necessarily the statutory provision for agricultural credit which Congress amended in the 1987" and because "although it could order the provision of statutory benefits [allegedly] denied without due process," it could not do so given that Congress validly amended "the statute authorizing benefits").

available" under the Military Claims Act, but only "upon a sufficiently pleaded allegation of a serious constitutional violation 'going to the heart of the administrative determination,'" and then finding that plaintiff's due process claim was not a "colorable constitutional claim"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990) (rejecting plaintiff's attempt to circumvent a statute precluding judicial review of security clearance decisions on the ground that his due process claim was not a "colorable constitutional claim"); see also Sugrue v. Derwinski, 26 F.3d 8, 11 (2d Cir. 1994) ("Although Sugrue's complaints invoke provisions of the Fifth Amendment and are styled in part as constitutional actions, the courts do not acquire jurisdiction to hear challenges to benefit determinations merely because those challenges are cloaked in constitutional terms").^{5/}

In this case, plaintiffs have not raised any "colorable" constitutional claims that seek to redress "serious" constitutional violations. Their "due process" claims, for example, allege that INS unconstitutionally deprived plaintiffs of the statutory benefits afforded by IRCA by promulgating

^{5/} The courts have never accepted the label placed on a claim as conclusive. They have always "looked to the substance of the complaint, not the labels used in it." In re Carter, 618 F.2d 1093, 1101 (5th Cir. 1980), cert. denied, 450 U.S. 949 (1981). See also Bright v. Bechtel Petroleum, Inc., 780 F.2d 766, 769 (9th Cir. 1986) ("A plaintiff will not be allowed to conceal the true nature of a complaint through "'artful pleading'"); Dolmetta v. Uintah Nat'l Corp., 712 F.2d 15, 19 (2d Cir. 1983) ("courts look at the essence of the stated claim and not the label by which a plaintiff chooses to identify it").

unlawful interpretations of the substantive eligibility criteria, and then wrongfully implementing the regulations by advising potential applicants that they were ineligible to apply for legalization on account of the challenged regulations. This attack, however, does not allege any constitutional violation. It alleges violations of the statute, i.e., that INS promulgated regulations that are inconsistent with IRCA and that INS employees took actions that exceeded their statutory authority. Plaintiffs' attempt to dress up these alleged statutory violations as constitutional violations should be rejected by this Court. Compare Perales v. Reno, 48 F.3d 1305, 1312 (2d Cir. 1995), cert. denied, 116 S. Ct. 699 (1996) (rejecting attempt to circumvent CSS by dressing up their substantive attack on INS's eligibility regulations as a procedural due process claim).

Under the plaintiffs' analysis, any violation of the statute would necessarily give rise to a constitutional claim since, under their theory, the unauthorized agency action deprived them of the "rights" and "benefits" provided by Congress in IRCA without due process of law. This contention -- that an unauthorized action by a government agency necessarily constitutes a constitutional violation -- cannot be reconciled with the Supreme Court's decision in Dalton v. Specter, ___ U.S. ___, 114 S. Ct. 1719 (1994). In that case, the Supreme Court rejected an attempt to circumvent the provisions of the Defense Base Closure and Realignment Act of 1990 precluding judicial review of executive base closing decisions. Citing the Court's

decision in Franklin v. Massachusetts, 505 U.S. 788 (1992), respondents contended that the courts had jurisdiction to hear their claims because they sought to redress significant constitutional violations. Dalton, 114 S. Ct. at 1725. Looking beyond respondents' construction of their own claims, however, the Court found that they were precluded by statute because they did not seek to remedy any constitutional violations:

Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is ipso facto in violation of the Constitution. . . . [These] decisions . . . establish that claims simply alleging that the President exceeded his statutory authority are not "constitutional" claims, subject to judicial review under the exception recognized in Franklin. As this case demonstrates, if every claim alleging that the President exceeded his statutory authority were considered a constitutional claim, the exception identified in Franklin would be broadened beyond recognition.

Id. at 1727. In this regard, the Court specifically rejected the argument that the denial of judicial review would be unconstitutional:

Respondents tell us that failure to allow judicial review here would virtually repudiate Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803), and nearly two centuries of constitutional adjudication. But our conclusion that judicial review is not available for respondents' claim follows from our interpretation of an Act of Congress, by which we and all federal courts are bound. The judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution.

Id. at 1728.

Furthermore, plaintiffs' due process claim must fail because plaintiffs have no cognizable liberty or property interest in the amnesty program that might give rise to a colorable due process claim. As the Supreme Court held in Board of Regents v. Roth, 408 U.S. 564, 571 (1972), "[a] due process claim is cognizable only if there is a recognized liberty or property interest at stake." Erickson v. United States, 67 F.3d 858, 861 (9th Cir. 1995) (citing Schroeder v. McDonald, 55 F.3d 454, 462 (9th Cir. 1995)). Here, as previously discussed, plaintiffs have no constitutional right to any of the statutory benefits provided by IRCA. Any right to claim an interest in such benefits arises only if provided by statute. See Roth, 408 U.S. at 577 (holding that recipients' rights to receive public benefits are "grounded in the statute defining eligibility for them"). "Where there is no right, no process is due under the Constitution." Dorfmont, 913 F.2d at 1403.

Contrary to the plaintiffs' suggestions, the amnesty program is different from other public welfare entitlement programs. It is not an ongoing, welfare entitlement program. It was unprecedented, one-time act of legislative grace. In order to preserve the limited nature of the program, Congress established a one-year application period and provided that the submission of a timely application was a substantive eligibility requirement for legalization. 8 U.S.C. § 1255a(a)(1). Thus, as the Supreme Court noted in its decision in this case, unlike other programs, IRCA does not "automatically bestow[]" benefits on eligible

aliens, but "requires each alien desiring the benefit to take further affirmative steps" to submit a timely application. See Reno v. Catholic Social Services, Inc., 509 U.S. 43, 58 (1993) ("CSS"). Consequently, IRCA differs from other welfare benefit entitlement programs where the courts have held the establishment by Congress of certain eligibility criteria may create a constitutionally-protected property interest for dependent recipients, although we note that the Supreme Court has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause" Lyng v. Payne, 476 U.S. 926, 942 (1986); see also Sandin v. Connor, ___ U.S. ___, 115 S. Ct. 2293, 2298-2300 (1995) (rejecting argument that creation of a non-discretionary statutory right or benefit automatically creates a constitutionally-protected interest, focusing instead on the nature of the issue at stake).

In any event, in light of the enactment of Section 377, it is clear that the members of the plaintiff class cannot claim any interest in the amnesty program. See Atkins v. Parker, 472 U.S. 115, 128 (1985) ("The procedural component of the Due Process Clause does not 'impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits'" (quoting Richardson v. Belcher, 404 U.S. 78, 81 (1971))); Austin v. City of Bisbee, 855 F.2d 1429, 1436 (9th Cir. 1988) ("Property rights to public benefits are defined by the statutes or customs that create the benefits. When, as

here, the statute authorizing the benefits is amended or repealed, the property right disappears") (quoting Jones v. Reagan, 748 F.2d 1331, 1338-39 (9th Cir. 1984)); see also Sheridan Square Partnership v. United States, 66 F.3d 1105, 1109 (10th Cir. 1995) (holding that due process claims against Department of Housing and Urban Development had been "extinguished irrespective of their prior merits" by new law); Story v. Green, 978 F.2d 60, 63 (2d Cir. 1992) ("when the statute that once has authorized the benefit in question is repealed, any property right in that benefit is extinguished"); Coleman, 864 F.2d at 611 ("Congress, however, can change the statutory rights of litigants, even where this change may retroactively eliminate an initially meritorious [due process] claim, except where the new statute itself is unconstitutional"). Accordingly, their "due process" claim cannot be considered a colorable constitutional claim.^{6/}

Similarly, plaintiffs' "equal protection" claim cannot be considered a colorable constitutional claim. This claim simply

^{6/} It is well-established that the termination of a claimant's right or interest in a statutorily-created benefit through the normal legislative process does not violate the Due Process Clause. See Atkins, 472 U.S. at 143 (Brennan, J., dissenting) ("Congress may reduce the entitlement level or alter the formula [for food stamps benefits] through the normal legislative process, and that process pretermits any claim that Congress' action constitutes unconstitutional deprivation of property") (emphasis added); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-33 (1982); United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174 (1980); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Flemming v. Nestor, 363 U.S. 603, 611 (1960); see also Story, 978 F.2d at 62-63 (discussing Atkins and other cases addressing this issue).

recasts their challenge to the adequacy of the procedures used by INS employees in handling legalization inquiries and requests for legalization applications. Like the due process claim, therefore, it does not seek to challenge any constitutional violations by INS, but instead challenges the promulgation and implementation of substantive eligibility regulations that plaintiffs believe are inconsistent with IRCA. Moreover, like the due process claim, the "equal protection" claim is not a colorable constitutional claim because it seeks to vindicate rights and interests created by statute, which Congress has now conclusively determined does not provide any rights or interests to persons who did not actually submit a timely application.

Therefore, contrary to plaintiffs' assertions, the members of the plaintiff class have not been deprived of a judicial forum to enforce their "federal constitutional rights." They have been deprived of a judicial forum to assert rights and to obtain benefits statutorily created and defined by Congress in IRCA. Here, because all of the members of the plaintiff class admit that they did not submit a timely application, their lawsuit must come to an end. Congress has determined that they fall outside the "zone of interests" for which the amnesty program was created and that they are not entitled to any judicial relief for the alleged deprivation of the benefits provided by IRCA. See Campos v. INS, 62 F.3d 311, 314 (9th Cir. 1995) (applying new law in determining that incarcerated aliens "lack standing to sue for any relief under [8 U.S.C. § 1252(i)] because they are outside

the 'zone of interests' of the statute"); see also INS v. Legalization Assistance Project, Inc., 509 U.S. 1301, 1305 (1993) (O'Connor, Circuit Justice 1993) ("LEAP") (organizational plaintiffs lack standing to bring legalization-related claims because they are outside the "zone of interests" that IRCA seeks to protect). Accordingly, this Court should reject plaintiffs' constitutional attack on Section 377 and apply the amendment as written to all of plaintiffs' legalization claims.

III. IT DOES NOT VIOLATE ANY SEPARATION OF POWERS PRINCIPLES FOR CONGRESS TO ENACT A LAW PRECLUDE PLAINTIFFS FROM ASSERTING AN INTEREST UNDER THE AMNESTY PROGRAM IN THE FEDERAL COURTS.

In their brief, plaintiffs also contend that Section 377 is unconstitutional because it "seeks to dictate the particular outcome" of this case. Pl. Supp. Mem. at 8 (citing United States v. Klein, 80 U.S. (13 Wall.) 128 (1871)). This argument is meritless. As the Supreme Court has recognized, Congress can enact a law, even for the purpose of ending litigation, so long as it exercises its legislative powers under Article I by establishing the statutory law that courts must apply in deciding the case, rather than merely dictating to the courts to dismiss the case without amending the applicable law. See Robertson v. Seattle Audubon Society, 503 U.S. 429, 436 (1992) ("Congress may amend or repeal any law, even for the purpose of ending pending litigation"); see also Atonio v. Wards Cove Packing Co., Inc., 10 F.3d 1485, 1492 (9th Cir. 1993) (rejecting challenge to Section 402(b) of the Civil Rights Act of 1991, which plaintiffs

contended was "so clearly an attempt by Congress to legislate an end to this litigation").

As the Supreme Court recently explained in Plaut v. Spendthrift Farm, Inc., ___ U.S. ___, 115 S. Ct. 1447 (1995), "[w]hatever the precise scope of Klein, . . . later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" Id., 115 S. Ct. at 1452 (citing Robertson, 503 U.S. at 441); Gray v. First Winthrop Corp., 989 F.2d 1564, 1569-70 (9th Cir. 1993) ("Robertson indicates the high degree of judicial tolerance for an act of Congress that is intended to affect litigation so long as it changes the underlying substantive law in any detectable way").

In light of this well-established principle, therefore, there can be no question that Section 377 does not violate any separation of powers principles. As in Robertson, Congress sought to end pending litigation, which it may do, by amending the underlying law that the courts must apply in deciding whether the district court has subject matter jurisdiction over this case. In particular, Congress amended IRCA's limited judicial review scheme by adding a new subsection (f)(4)(C) to 8 U.S.C. § 1255a(f), the same section of IRCA that the district court, this Court, and the Supreme Court have all looked to and applied in determining whether subject matter jurisdiction exists over plaintiffs' legalization claims. Now, this Court must look to 8 U.S.C. § 1255a(f), as amended by Section 377, and apply the law as written to the facts of this case. Congress did not dictate

how the courts must apply the law; it amended the law that the courts must apply. By so doing, it put an end to this litigation by exercising its legislative powers under Article I, not by dictating how the courts must exercise their judiciary powers under Article III.

In their supplemental memorandum, plaintiffs contend that Section 377 violates Klein because it "does not amend the substantive law of legalization." Pl. Supp. Mem. at 15. This argument is meritless. As discussed in defendants' opening brief, Congress has the authority under Article I to enact laws that define the jurisdiction of the federal courts, especially with respect to a statutory program that it created and defined pursuant to its well-established plenary authority over immigration. In fact, the courts have never held that Congress infringes upon the judiciary's Article III powers when it repeals the judiciary's authority to hear a particular claim. Quite the contrary, Klein itself expressly acknowledges that if Congress had simply amended the law to repeal the Court's jurisdiction over the claims in question, "it would be our duty to give it effect." Id., 80 U.S. at 145; see, e.g., Ex Parte McCardle, 78 U.S. (6 Wall.) 506, 514 (1868) (dismissing pending case for lack of jurisdiction after Congress repealed the Supreme Court's appellate jurisdiction over habeas corpus cases, reasoning that such a repeal is not "the exercise of judicial power by the legislature"). Thus, plaintiffs' argument that an amendment to

IRCA's judicial review scheme does not constitute "a change in the underlying law" is clearly wrong and should be rejected.

Indeed, a quick review of the case law demonstrates that it is irrelevant whether the amendment in question actually changes the substantive law governing the merits of plaintiffs' claims. In Gray, for example, the amendment at issue did not change the substantive standards underlying the plaintiff's securities claims. It only changed the statute of limitations, which like a jurisdictional statute addresses only whether a court has the authority to hear a claim, not the merits. Id., 989 F.2d at 1570-71; see also Lundy v. Morgan Stanley & Co., 794 F. Supp. 346, 348-49 (N.D. Cal. 1992) (rejecting argument that amendment to statute of limitations violates Klein because it "does not constitute a substantive change or amendment to existing legislation," holding that Congress "may enact legislation applicable to pending cases that substantively or procedurally changes or amends existing law"). The question, therefore, is not whether the amendment alters the substantive law underlying the merits of the plaintiff's claims, only whether it actually amends the statutory law that the court must apply in deciding the issues presented in the case. See United States v. Sioux Nation of Indians, 448 U.S. 371, 406 (1980) (rejecting Klein argument raised to challenge an enactment that waived defense of res judicata for certain legal claims).

In any event, plaintiffs are wrong when they contend that Section 377 does not affect the substantive law governing the

merits of their legalization claims. IRCA's judicial review scheme is an essential substantive component of the amnesty program because it seeks to achieve two of IRCA's most fundamental substantive objectives -- the termination of the program on or before May 4, 1988, and the inviolability of the 12-month application period. Indeed, the eligibility requirement of a timely application is organically integrated with IRCA's judicial review scheme (subsection (f)(2)), which absolutely bars judicial review of an application that was denied as untimely. See CSS, 509 U.S. 60, n.20 (noting the relationship between jurisdictional concerns and the timely application requirement); Ayuda v. Thornburgh, 948 F.2d 742, 758-59 (D.C. Cir. 1991) (subsection (f)(2) bars district courts from ordering interim injunctive relief (temporary work authorization) that would effectively eliminate the timely application requirement), remanded for further consideration, 113 S. Ct. 3026 (1993), reaffirmed on remand, 7 F.3d 246 (D.C. Cir. 1993), cert. denied, 115 S. Ct. 70 (1994).

In like manner, Section 377's amendment to IRCA's judicial review scheme directly affects plaintiffs' substantive rights because it makes clear that persons who did not submit a timely application have no legally-cognizable interest under IRCA that they can assert in the courts. In so doing, Congress further expressed the organic integration of the eligibility requirements and the jurisdictional provisions created by IRCA in 1986. The fact that Congress imposed this limitation on plaintiffs' rights

by amending IRCA's judicial review scheme, rather than by amending IRCA's substantive eligibility requirements is beside the point. As the Court explained in Robertson, Congress can modify a statute "directly or indirectly; the form is not decisive." Apache Survival Coalition v. United States, 21 F.3d 895, 902 (9th Cir. 1994) (discussing Robertson). What is decisive is whether Congress "did amend the applicable law," which it clearly did here. Robertson, 503 U.S. at 441.

For these reasons, the Court also should reject plaintiffs' contention that Section 377 violates Klein by dictating to the courts how they must decide the "ripeness" question currently at issue in this litigation. Contrary to plaintiffs' assertions, Section 377 does not even purport to define "ripeness" under Article III. It merely creates a statutory restriction on jurisdiction by amending IRCA's judicial review scheme to make clear that persons who did not submit a timely application may not assert an interest under the amnesty program in the courts, regardless of whether they have a ripe claim. By so doing, Congress did not tell the courts how to decide the ripeness issue. It amended the statutory law that the courts must apply in determining whether it has subject matter jurisdiction to hear plaintiffs' claims.

This does not mean, however, that Section 377 has no effect on whether the plaintiffs' claims are "justiciable" under Article III. Standing involves both constitutional requirements and prudential limitations. See Lujan v. Defenders of Wildlife, 504

U.S. 555, 559-60 (1992). Thus, even where a plaintiff has suffered a concrete injury sufficient to create a case or controversy under Article III, he or she nonetheless will not have standing unless "the interest sought to be vindicated falls 'within the zone of interests protected by the law invoked.'" United States v. Mindel, 80 F.3d 394, 397 (9th Cir. 1996) (citing Allen v. Wright, 468 U.S. 737, 751 (1984)). "Under the zone-of-interests test a litigant lacks 'a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" Id. (citations omitted).

Here, in Section 377, Congress declared that the plaintiffs' interests are "so marginally related to [and] inconsistent with the purposes" of the statute that they should not be able to challenge INS's administration the amnesty program in court. Consequently, under the "zone of interests" test, they lack standing to bring their claims. See LEAP, 510 U.S. at 1305 (organizational plaintiffs lack standing to bring similar claims because they are outside IRCA's "zone of interests"). This fact does not violate Klein, however, in that Congress did not purport to dictate how the courts must decide the "standing" question, but merely amended the statutory law that the courts must apply in deciding this issue. It is up to the courts to apply the law as written in determining whether the plaintiffs have standing to assert an interest under IRCA in the courts.

CONCLUSION

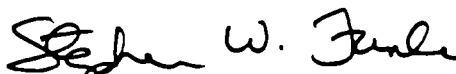
For the foregoing reasons, the government respectfully requests that the Court overturn the district court's interim relief orders and remand the case with instructions to dismiss the case for lack of subject matter jurisdiction.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

DONALD E. KEENER
Deputy Director

KEISHA DAWN BELL
Attorney



STEPHEN W. FUNK
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4909

Dated: January 10, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January 1997, two (2) copies of the foregoing **REPLY BRIEF RE: SECTION 377 OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996** was served on counsel of record for Plaintiffs-Appellees via first class mail, postage prepaid, at the following addresses:

Peter A. Schey
Carlos Holguin
Center For Human Rights And
Constitutional Law
256 S. Occidental Blvd.
Los Angeles, CA 90057

Ralph Santiago Abascal
2436 Russell Street
Berkeley, CA 94705

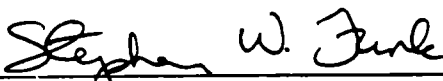
Stephen A. Rosenbaum
c/o DREDF
2212 6th Street
Berkeley, CA 94710

Robert H. Gibbs
Robert Pauw
Gibbs Houston Pauw
1111 Third Avenue
Suite 1210
Seattle, WA 98101

Michael Rubin
Altshuler, Berzon,
Nussbaum, Berzon & Rubin
177 Post Street
Suite 300
San Francisco, CA 94108

Luis Cespedes
701 E St., Suite C
Sacramento, CA 95814

In addition, a copy of the motion also was served on plaintiffs' lead counsel, Peter Schey, via Federal Express for delivery on Monday, January 13, 1997.



STEPHEN W. FUNK

No. 96-15495

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHOLIC SOCIAL SERVICES, INC.
(CENTRO DE GUADALUPE IMMIGRATION CENTER), ET AL.,

Plaintiffs-Appellees,

v.

JANET RENO, ATTORNEY GENERAL OF THE
UNITED STATES, AND DORIS MEISSNER, COMMISSIONER
OF IMMIGRATION AND NATURALIZATION SERVICE,

Defendants-Appellants.

ON APPEAL FROM ORDERS OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

OPPOSITION TO PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

FRANK W. HUNGER
Assistant Attorney General

DONALD E. KEENER
STEPHEN W. FUNK
KEISHA DAWN BELL
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044-0878
Telephone: (202) 616-4906

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The Illegal Immigration Reform and Immigrant Responsibility Act of 1996:

Section 377	2, <u>passim</u>
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INTRODUCTION

This long-standing class action was originally filed over ten years ago to challenge certain "advance parole" regulations promulgated by the Attorney General to interpret the eligibility requirements for legalization under the Immigration Reform and Control Act of 1986 ("IRCA"). The present issue is the validity of the district court's interim relief program, which for the past nine years has obligated INS to grant temporary work authorization and stays of deportation to approximately 45,000 illegal aliens who alleged that they did not file timely applications for legalization as required by 8 U.S.C. § 1255a(a)(1) on account of the challenged regulations.

In June 1993, the Supreme Court issued a decision, holding that the district court lacked jurisdiction to grant relief to class members who did not file a timely application for legalization unless they had been "front-desked" by INS, *i.e.*, that they had taken all of the affirmative steps required by IRCA to satisfy the timely application requirement by physically tendering a complete application, along with the required filing fee, to INS, but having the application and fee rejected, upon examination, by an INS legalization assistant at the front desk. See Reno v. Catholic Social Services, 509 U.S. 43, 56-67 (1993). Upon remand, the government moved to vacate all prior orders and to dismiss the case on the ground that none of the plaintiffs in the Seventh Amended Complaint had alleged that they had been "front-desked," but the district court refused. Although the court acknowledged that the plaintiffs had not alleged "that they presented a completed amnesty application and

filing fee to an INS office, which an INS official refused to accept for filing," it nonetheless concluded that their allegations were sufficient to satisfy the Supreme Court's ripeness concerns. CR 330.

After the government filed this appeal, Congress enacted a new law -- the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") -- which, among other things, amended IRCA to preclude aliens who did not take the necessary steps to satisfy the timely application requirement from invoking the jurisdiction of the federal courts to assert an interest under the amnesty program. In particular, Section 377 of IIRIRA provides:

Sec. 377. LIMITATION ON LEGALIZATION LITIGATION.

(a) LIMITATION ON COURT JURISDICTION. -- Section 245A(f)(4) [of the Immigration and Nationality Act] (8 U.S.C. 1255a(f)(4)) is amended by adding at the end the following new subparagraph:

"(C) JURISDICTION OF COURTS. -- Notwithstanding any other provision of law, no court shall have jurisdiction of any cause of action or claim by or on behalf of any person asserting an interest under this section unless such person in fact filed an application under this section within the period specified by subsection (a)(1), or attempted to file a complete application and application fee with an authorized legalization officer of the Service but had the application and fee refused by that officer."

(b) EFFECTIVE DATE. -- The amendment made by subsection (a) shall be effective as if included in the enactment of the Immigration Reform and Control Act of 1986.

IIRIRA § 377. The meaning and purpose of this amendment are clear. As the Conference Committee report explains, Section 377 was enacted "to put an end to litigation seeking to extend the amnesty provisions of the Immigration Reform and Control Act of 1986, and to

limit claims under that section to aliens who in fact filed an application for legalization under that section within the prescribed time limits, or attempted to do so but their application was refused by an immigration officer." See H.R. Conf. Comm. Rep. No. 828, 230 (1996).

In proceedings below, in their briefs on appeal, and at oral argument, plaintiffs' counsel did not contend that any of the plaintiffs satisfied the requirements of Section 377, nor could they given that discovery closed in December 1995 and none of the plaintiffs had made such allegations. Instead, both in their briefs and at oral argument, they contended that Section 377 was unconstitutional because it infringed upon the judiciary's authority under Article III and violated the Fifth Amendment's due process and equal protection guarantees by requiring the dismissal of their pending claims. After considering the briefs and oral argument, however, this Court rejected plaintiffs' constitutional attack, issuing a judgment that implemented the will of Congress by vacating the district court's interim relief program and remanding with instructions to dismiss the action for lack of jurisdiction. See Catholic Social Services v. Reno, 113 F.3d 922 (9th Cir. 1997).

Plaintiffs now seek rehearing of this opinion, contending that the Court should reconsider their challenge to Section 377 because it presents "a question of palpably exceptional importance." Reh'g Pet. at 11. In requesting this extraordinary relief, however, plaintiffs have failed to demonstrate how the panel's decision creates an inter-circuit or intra-circuit conflict or otherwise is in error. Moreover, while plaintiffs contend that the panel's opinion should be corrected in order to permit the district court to hear the claims of class

members who satisfy the requirements of Section 377 and to hear their equal protection challenge to the statute, they have failed to mention that (i) their equal protection attack was briefed and fully discussed at oral argument, but for reasons discussed below, was so meritless that it failed to persuade the panel to overturn Section 377 as unconstitutional; and (ii) that plaintiffs' counsel, in response to a question posed by the panel, conceded that none of the plaintiffs has alleged facts sufficient to satisfy Section 377. The panel, therefore, did not overlook or misapprehend the arguments presented in the briefs or the facts contained in the record. See Fed. R. App. P. 40(a). Rather, after fully considering and rejecting the constitutional arguments presented, it quite appropriately concluded that the district court lacked jurisdiction over this case and implemented the will of Congress by bringing this long-standing class action to an end. Accordingly, this Court should deny the petition for rehearing.

DISCUSSION

I. The Panel's Decision Is Consistent With Long-Standing Supreme Court Precedent Upholding The Plenary Power Of Congress To Define Who May Assert An Interest Under A Statutorily-Created Immigration Program.

Plaintiffs contend that rehearing en banc is warranted in order to decide the important question of "[w]hether Congress may preclude the federal courts from deciding constitutional claims." Reh'g. Pet. at 13. In their efforts to circumvent the intended effect of Section 377, however, plaintiffs fail to appreciate that their claims are not, as they contend, seeking to enforce constitutional rights. Rather, all of their claims seek to enforce

the statutory provisions of IRCA in order to obtain the statutory benefits of IRCA. Whether plaintiffs have a "right" or "interest" under the amnesty program, however, is not a question determined by the United States Constitution. It is a question determined by Congress, the branch entrusted by the Constitution with the authority to prescribe the terms and conditions by which an alien can be admitted to this country as a lawful immigrant and thus with the authority to determine who may assert an interest under the legalization program in the courts. See Kleindeist v. Mandel, 408 U.S. 753, 766 (1973) ("The Court without exception has sustained Congress' plenary authority to make rules for the admission of aliens and to exclude those who possess those characteristics that Congress has forbidden").

Indeed, as the panel properly concluded, Section 377 does not raise any due process concerns because it does not preclude all judicial review under IRCA. It merely restricts judicial review to persons who actually took the affirmative steps required by Congress to comply with the IRCA's substantive eligibility requirement of a timely application. CSS, 113 F.3d at 927.^{1/} In this regard, this case is analogous to Block v. Community Nutrition Inst., 467 U.S. 340 (1984), where the issue presented was not whether Congress intended "to strip the judiciary of all authority to review" executive action, but whether it intended to foreclose review to a particular class of persons (individual consumers of milk) who were

^{1/} As the Supreme Court has explained, "front-desked" aliens satisfied IRCA's timely application eligibility requirement because they, by definition, "presented at an INS office to an INS employee" a complete application and application fee prior the expiration of the application deadline in compliance with the statutory requirements. CSS, 509 U.S. 61-62, 65-67, n. 27 & n. 29.

seeking to assert an interest under a statutory program created by Congress to regulate the price of milk. Id. at 346-47, 352. Even though the lower court had found that the interests of consumers were implicated by the executive's actions, the Court nevertheless held that the consumers did not have a "judicial remedy" for their alleged injuries because Congress sought to restrict judicial review only to "the parties directly affected by the statutory scheme." Id. at 346-53. Furthermore, as in the case of legalization claims filed by aliens who did not file timely applications, the Court reasoned that permitting such "consumer suits might . . . frustrate achievement of the statute's objectives." Id.; INS v. Legalization Assistance Project, 509 U.S. 1301, 1305 (O'Connor, Circuit Justice 1993) (holding that claims brought by organizations on behalf of aliens who did not file timely applications were barred because they were outside the zone of interests that IRCA seeks to protect).

Here, as previously discussed, Congress enacted Section 377 in order to restrict judicial review only to persons who actually satisfied IRCA's timely application requirement. By so doing, it sought to preserve the limited and short-term nature of the legalization program, to reinforce the strict time-based eligibility requirements and prohibitions on judicial review imposed by 8 U.S.C. §§ 1255a(a)(1) and (f)(2), and to ensure that persons who did not take the affirmative steps required to become eligible for legalization cannot frustrate the statute's objectives by "entangl[ing] the INS in litigation over application timing claims" and obtaining an unwarranted extension of the application deadline. CSS, 509 U.S. at 60, n. 20; H.R. Conf. Comm. Rep. 828, 230 (1996). Consequently, regardless of their

alleged equities, it is clear that the plaintiffs' litigation efforts to obtain the benefits of the amnesty program are contrary to the statute's objectives and must come to an end. Congress has determined that they have no interest in such benefits, and this Court must strictly enforce the terms and conditions of the statute in accordance with the legislative will. See INS v. Pangilinan, 486 U.S. 875, 884 (1988) ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare") (citations omitted).^{2/}

II. This Court Should Reject Plaintiffs' Invitation To Delay Resolution Of This Case By Reconsidering Their Equal Protection Challenge To Section 377.

Plaintiffs also contend that the Court should amend its opinion in order to permit them to renew their equal protection challenge to Section 377 in district court. Reh'g Pet. at 7-10. This Court should reject this unjustified and obvious ploy to delay final resolution of this case. Contrary to plaintiffs' assertions, their equal protection argument was fully considered and rejected by the panel in this case. It was presented in their "Supplemental Memorandum" on Section 377 (at 35-36) and it was discussed at length at oral argument.

^{2/} Contrary to plaintiffs' contentions, this case does not conflict with Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987). There, the issue was whether Congress could enact a statute and, at the same time, preclude the courts from considering its constitutionality. The government does not contend that the courts may not consider the constitutionality of Section 377, only that the courts may not hear the plaintiffs' underlying legalization claims.

The equal protection argument, however, failed to persuade the panel to overturn Section 377 as unconstitutional, and it does not require further proceedings to decide that the challenge is meritless as a matter of law.^{3/}

In their supplemental memorandum, plaintiffs contended that Section 377 was unconstitutional, in part, because it allegedly is "irrational" for Congress to distinguish between persons who submitted a complete application and application fee to INS and persons who did not.^{4/} Over immigration laws and policies, however, the Supreme Court has held that Congress has extraordinarily broad power to draw distinctions between aliens "that would be unacceptable if applied to citizens." Fiallo v. Bell, 430 U.S. 787, 792 (1977); Mathews v. Diaz, 426 U.S. 67, 80-82 (1976); Boutilier v. INS, 387 U.S. 118, 123 (1967).

As the Court explained:

We are dealing here with an exercise of the Nation's sovereign power to admit or exclude foreigners in accordance with the

^{3/} Of course, if the equal protection argument was not adequately raised in the briefs or at oral argument, it should be deemed waived.

^{4/} Plaintiffs also contend that it is "irrational" for Congress to distinguish between persons who submitted a complete application and application fee to an INS "legalization officer" and persons who submitted a complete application and application fee to an INS "clerk" or a Qualified Designated Entity ("QDE"). Reh'g Pet. at 9-10. As discussed in defendants' reply brief on Section 377 (at 10, n.3), this argument is meritless. Nothing in the text of Section 377 or its legislative history suggests that the term, "legalization officer," does not include all INS employees with the authority to examine and to reject completed applications pursuant to the front-desking policy. See CSS, 509 U.S. at 61-63 (discussing the legalization manual's front-desking policy). In any event, since none of the plaintiffs has alleged that he or she actually submitted a complete application and application fee to an INS "clerk" or a QDE, none has the requisite standing to assert this equal protection challenge. See Def. Reply Brief, at 21-25 (filed on 7/18/96).

perceived national interests. Although few, if any, countries have been as generous as the United States in extending the privilege to immigrate, or in providing sanctuary to the oppressed, limits and classifications as to who shall be admitted are traditional and necessary elements of legislation in this area . . . In the inevitable process of 'line drawing,' Congress has determined that certain classes of aliens are more likely than others to satisfy national objectives without undue cost, and it has granted preferential status only to those classes.

Fiallo, 430 U.S. at 787, n. 6.

Here, Congress clearly has the constitutional authority to draw a distinction between aliens who took all of the affirmative steps necessary to comply with IRCA's timely application requirement and aliens who did not. In fact, this distinction is the same distinction that the Supreme Court drew in deciding whether persons who did not file timely applications had been concretely affected by INS's alleged conduct. Thus, as the panel concluded, "[g]iven Congress' sweeping power over immigration policy," it is not unconstitutional for Congress to enact a statute that "restricts individuals who may bring claims to those who have been directly affected by INS conduct." CSS, 113 F.3d at 927 (citing Fiallo, 430 U.S. at 787). Accordingly, this Court should reject plaintiffs' request to hold further proceedings on this legal question, which already has been properly rejected by this Court.

III. The Record Reveals Quite Clearly That None Of The Plaintiffs Satisfies The Requirements Of Section 377.

Plaintiffs also contend that the panel should amend its opinion because there are class members in existence who fall within the ambit of Section 377. Reh'g Pet. at 4-7. As plaintiffs' counsel conceded at oral argument, however, there are no plaintiffs who have alleged that they attempted to file a complete application and application fee and had the application and the fee refused by the INS. In fact, in their rehearing petition, plaintiffs have not pointed to any evidence in the record to support their contention. Instead, they merely attach to their rehearing petition an extra-record affidavit from a single purported class member who alleges in a conclusory fashion that he satisfies the requirements of Section 377.^{5/} See United States v. Elias, 921 F.2d 870, 874 (9th Cir. 1990) ("Documents or facts not presented to the district court are not apart of the record on appeal").

It is plaintiffs' obligation to allege all facts necessary in the complaint to establish subject matter jurisdiction. See 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 1206 (2d ed. 1986). In the four years following the Supreme Court's decision, however, plaintiffs have never amended their complaints to allege that one or more

^{5/} The affidavit does not establish that this purported class member satisfies the requirements of Section 377. Although he alleges in a conclusory fashion that he "attempted to file a completed legalization application and application fee at the INS office in Chicago," he does not provide any specific information about the alleged incident to demonstrate (a) whether he physically tendered a complete application and application fee to an authorized legalization officer; and (b) whether the application and the fee was actually examined and "refused" by that officer. Instead, he merely asserted that he was "told" that he was ineligible and that "[t]his is why my application was not filed." Pls. Ex. 1 at ¶ 4.

of the members of the plaintiff class had been "front-desked" by INS. CR 315. Indeed, following the enactment of Section 377 when the government renewed its motion to vacate the injunctions in district court, plaintiffs' counsel did not seek to amend the complaint or to reopen discovery in order to engage in a renewed search for "front-desked" aliens.^{6/} Rather, as in this Court, they only contended that Section 377 was unconstitutional. Consequently, when the district court considered this issue on November 18, 1996, both plaintiffs and the district court acknowledged that the sole remaining issue in the case was the constitutionality of Section 377, which the district court decided, upon the request of plaintiffs' counsel, should be resolved conclusively by this Court in the context of the present appeal. See Order of November 19, 1996 [CR 428-30] (Addendum).

Now that the government has prevailed on its jurisdictional arguments on appeal, plaintiffs should not be able to circumvent the panel's judgment by raising new facts in their rehearing petition that were not raised in the district court, in the briefs, or at oral argument.^{7/}

^{6/} The discovery period was closed in December 1995 by the district court. At that time, when plaintiffs requested an extension, the district court refused, stating that "[p]laintiffs have had ample time for discovery and ample notice of the date that it would be closing." See Order of December 26, 1995 [CR 367]. There is no justifiable reason, therefore, for reopening discovery again at this late juncture.

^{7/} Even assuming that plaintiffs can raise this new factual allegation at this late juncture, the allegation of a single class member does not justify continuation of nationwide relief to all of the approximately 45,000 members of the plaintiff class who, as plaintiffs' counsel concedes, do not satisfy the requirements of Section 377. See Lewis v. Casey, 116 S. Ct. 2174, 2184 & n. 7 (1996) (even where a few plaintiffs allege that they were injured, "a further questions remains: Was that inadequacy widespread enough to justify systemwide relief? . . . [c]ourts have no power to presume and remediate harm that has not been established").

See United States v. Tisor, 96 F.3d 370, 378 (9th Cir. 1996) (appellate court has the discretion to decide issues not presented in the district court but only when "to do so would not require the development of new facts") (emphasis added); Export Group v. Reef Industries, Inc., 54 F.3d 1466, 1471 (9th Cir. 1995) (appellate court may not consider "newly asserted" jurisdictional facts that were not pled in the complaint); Boardman v. Estelle, 957 F.2d 1523, 1534 (9th Cir. 1992) (arguments raised for first time in a rehearing petition are deemed waived). As this Court explained in Armster v. United States District Court, 806 F.2d 1347 (9th Cir. 1986), a petition for rehearing was not designed to permit the non-prevailing party to undercut the Court's decision by presenting post-judgment facts that are not contained in the record and were not previously brought to the Court's attention. "A properly drawn petition for rehearing serves a very limited purpose," i.e., to ensure that the panel did not "overlook" or "misapprehend" the relevant information presented in rendering its decision. Id. at 1356. Consideration of new facts not previously presented "is, thus, beyond the scope of a petition for rehearing." Id. at 1356-57; see Goland v. Central Intelligence Agency, 607 F.2d 339, 370-71 (D.C. Cir. 1978) (rehearing cannot be granted based on "newly discovered facts outside the record," noting the absence of cases authorizing such action).

These fundamental principles are especially applicable where, as here, the new allegations are based on events that occurred almost a decade ago and ordinarily would be time barred by the statute of limitations. Absent a more specific statute of limitations to the

contrary, civil actions against the government are governed by the six-year statute of limitations period set forth at 28 U.S.C. § 2401(a). In this case, however, any alleged acts of "front-desking" would have occurred nine to ten years ago during the application period between May 5, 1987, and May 4, 1988. Any allegations of "front-desking," therefore, that might be brought are stale and should not be subjected to litigation.

Indeed, it would be highly unfair and prejudicial to permit plaintiffs to offer up new factual theories at this late juncture. For the past few years, defendants have expended considerable time and resources conducting discovery and preparing and filing motions in the district court and appeals in this Court based upon, and in response to, the specific allegations presented by plaintiffs in the Seventh Amended Complaint. Having finally prevailed on their jurisdictional defenses in this Court, defendants should not be compelled to undergo yet another round of litigation in order to respond to yet another set of factual allegations that could and should have been developed long before. See Vincent v. Trend Western Technical Corp., 828 F.2d 563, 570-71 (9th Cir. 1987) (plaintiff may not raise new factual theory on appeal where he offered "no satisfactory explanation of his failure to fully develop his contentions originally"); see also Western Shoshone National Council v. Molini, 951 F.2d 200, 204 (9th Cir. 1991); Schlacter-Jones v. General Telephone, 936 F.2d 435, 443 (9th Cir. 1991); M/V American Queen v. San Diego Marine Const., 708 F.2d 1483, 1492 (9th Cir. 1983) (all rejecting attempts to introduce new factual theories after the completion of discovery, the filing of dispositive motions, or on the eve of trial).

Such a ruling would not only be prejudicial to the government and contrary to the will of Congress, but it would be detrimental to the proper administration of justice by this Court. As Judge Alarcon explained in USA Petroleum Co. v. Atlantic Richfield Co., 13 F.3d 1276 (9th Cir. 1994):

Under the law of this circuit, a party cannot assert one theory before this court and, upon losing, return again and assert an entirely different theory. . . . Our courts are too burdened with meritorious claims to permit skillful counsel to abuse their right of appeal by offering up successive claims until they finally find one that will persuade at least two judges of this court.

Id. at 1290 (Alarcon, J., concurring); see Securities Investor Protection Corp. v. Vigman, 74 F.3d 932, 937 (9th Cir. 1996) ("a party cannot offer up successively different legal or factual theories that could have been presented in a prior request for review") (citing Judge Alarcon's opinion).

Contrary to plaintiffs' assertions, nothing in the Supreme Court's decision requires this Court to delay final resolution of this ten-year-old lawsuit by remanding the case at this late juncture to search for "front-desked" aliens. All the Supreme Court stated was that at the time of its decision the current record was insufficient to determine whether any of the class members had been "front-desked" because the lower courts had never addressed the issue. CSS, 509 U.S. at 66-67. Here, by contrast, plaintiffs have been provided ample opportunity over the past four years to search for and to present a class member who was "front-desked," but they have failed to do so. There is absolutely no reason, therefore, why this case should continue for yet another four or five years to undergo yet another search for

"front-desked" aliens. See Ayuda v. Reno, 7 F.3d 246, 250-51 (D.C. Cir. 1993), cert. denied, 115 S. Ct. 70 (1994) (rejecting plaintiffs' request to remand case for further proceedings on whether a person was "front-desked" by INS because their counsel previously "conceded that there were none" and "we see no justification in continuing this lawsuit").

CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing and suggestion for rehearing en banc.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General



DONALD E. KEENER
STEPHEN W. FUNK
KEISHA DAWN BELL
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-4906

ADDENDUM

FILED

NOV 19 1996

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CATHOLIC SOCIAL SERVICES, INC.,
(CENTRO DE GUADALUPE IMMIGRATION
CENTER), et al.,

NO. CIV. S-86-1343 LKK

Plaintiffs,

v.

ORDER

JANET RENO, Attorney General of the
United States of America, et al.,

Defendants.

This matter comes before the court on defendants' motion to dismiss the seventh amended complaint and vacate prior orders, and on plaintiffs' ex parte application to stay the proceedings. Pursuant to Local Rule 230(h), the court disposes of the matter upon the pleadings and papers on file herein, and upon oral argument by the parties at hearing on November 18, 1996.

Defendants argue that the court lacks jurisdiction over plaintiffs' claims pursuant to the newly enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996

1 ("IIRIRA") § 377, Pub. L. No. 104-208, 110 Stat. 3009 (1996). At
2 oral argument, however, defendants agreed that the court could not
3 grant their request to dissolve the preliminary injunction without
4 making a determination relative to the constitutionality of section
5 377 of the IIRIRA. Because the constitutionality of this same
6 provision is currently pending before the Ninth Circuit on an
7 appeal in this case and in Immigrant Assistance Project v. INS, No.
8 C88-379R (W.D. Wash.), appeal of interlocutory order pending, No.
9 95-36295 (9th Cir.), it would be inefficient for this court to
10 address the constitutionality of the statute at this time. Thus,
11 the court will stay the entire proceeding pending a resolution by
12 the Ninth Circuit of the government's appeal in this case.

13 For all the above reasons, the court makes the following
14 ORDERS:

15 1. The proceedings in this action are STAYED pending a
16 resolution by the Ninth Circuit of the government's appeal in this
17 case;

18 2. Not later than ten (10) days from the Ninth Circuit's
19 disposition of the appeal, plaintiffs shall notify the court of the
20 Ninth Circuit's ruling; and

21 3. The Clerk is ordered to VACATE all scheduled dates.

22 IT IS SO ORDERED.

23 DATED: November 19, 1996.

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LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

---o0o---

BEFORE THE HONORABLE LAWRENCE K. KARLTON, CHIEF JUDGE EMERITUS

CATHOLIC SOCIAL SERVICES, INC.,)
(CENTRO DE GUADALUPE IMMIGRATION)
CENTER) et al.,)

Plaintiffs,)

VS.)

CASE NO. CIV. S-86-1343 LKK

JANET RENO, Attorney General)
United States of America,)
DORIS MEISSNER, Commissioner,)
Immigration and Naturalization)
Service,)

Defendants.)

---o0o---

MONDAY, NOVEMBER 18TH, 1996

REPORTER'S TRANSCRIPT

RE: DEFENDANTS' MOTION TO VACATE PRIOR ORDERS
AND PLAINTIFFS' MOTION TO STAY

---o0o---

Reported by:

CATHERINE E. F. BODENE
CSR No. 6926

1 APPEARANCES

2 ---o0o---

3
4 For the Plaintiffs:5 STEPHEN A. ROSENBAUM,
6 Attorney At Law
7 2212 Sixth Street
8 Berkeley, California 947109 CENTER FOR HUMAN RIGHTS AND
10 CONSTITUTIONAL LAW
11 256 Occidental Boulevard
12 Los Angeles, California 90057
13 BY: CARLOS HOLGUIN,
14 Attorney At Law15
16 For the Defendants:17 UNITED STATES ATTORNEY
18 3305 Federal Building
19 650 Capitol Mall
20 Sacramento, California 95814
21 BY: GLYNDELL EARL WILLIAMS,
22 Special Assistant
23 U.S. Attorney24 OFFICE OF IMMIGRATION LITIGATION
25 Civil Division
U. S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
BY: STEPHEN W. FUNK,
Attorney

and

BY: ANTHONY WRAY NORWOOD,
Attorney

---o0o---

SACRAMENTO, CALIFORNIA

MONDAY, NOVEMBER 18TH, 1996

(Morning Calendar)

---o0o---

THE CLERK: Civil S-96-1343, Catholic Social Services
versus Orantes.

MR. WILLIAMS: Good morning, Your Honor.

Glyn Williams for the Government.

MR. FUNK: Stephen Funk for the Government from the
Department of Justice, Washington, D.C. Also with me is
Tony Norwood from our office.

MR. HOLGUIN: Good morning, Your Honor.

Carlos Holguin, Center For Human Rights And
Constitutional Law.

MR. ROSENBAUM: Good morning, Your Honor.

Stephen Rosenbaum for Plaintiffs.

THE COURT: I can't imagine why the Government wants me
to do all of this work. The Ninth Circuit is going to tell
me -- I mean, I didn't sign the stay because you manifested
great stress at the thought that I wouldn't decide this
adverse to you -- not that I would -- but I'm just saying, you
know, there is that possibility after all.

MR. FUNK: Well, I think our position is that we just
want the matter decided as expeditiously as possible.

THE COURT: I agree with that.

1 And the most expeditious way is not for me to decide
2 it, because if I decide it, and I made a mistake and decided
3 against the Government, then you would have to be on appeal,
4 and then you would all be doing that work while the Ninth
5 Circuit went ahead and decided the matter.

6 When the Ninth Circuit decided the matter, then they
7 would have to take this matter up pending cert. It's silly.

8 MR. FUNK: Well, I mean, there is no guarantee the
9 Ninth Circuit will decide the matter. They could very well
10 remand it back and let the District Court decide in the first
11 instance.

12 THE COURT: If they were to do that, then, by golly, I
13 would have my marching orders.

14 MR. FUNK: But they may just simply say we remand it
15 back and let the District Court decide in the first instance
16 without any marching orders.

17 THE COURT: That's what I'm saying. But then I have
18 the order to go ahead and decide it.

19 MR. FUNK: But that would be a year or so down the
20 road.

21 THE COURT: So what?

22 Oh, I see. Because you want to get rid of the
23 restraining order.

24 MR. FUNK: That's right.

25 THE COURT: Let me ask you this. Maybe there is an

1 expeditious way to do this without trying to address these
2 awful questions, which God knows I have no idea what the
3 answer to is.

4 I don't want you guys to get excited, but I'm going to
5 say something that may get you excited.

6 Maybe the right thing to do is to say I have no idea
7 whether these statutes are unconstitutional or not, but they
8 certainly raise tremendously serious problems about the
9 viability of this Court's previous order, and that what I
10 ought to do is to dissolve all the previous orders and stay
11 that, in light of the new statute, and stay that dissolution
12 for 20 days so you can go get a stay from the Ninth Circuit so
13 that they can review all of that, and then you get the case up
14 there that way.

15 MR. ROSENBAUM: Your Honor, if I may, it's not clear to
16 us all the remedial orders that are still in effect. The
17 Court issued an order last November that really put an end to
18 a lot of the on-going interim relief.

19 THE COURT: But there is still some relief going on.

20 MR. ROSENBAUM: There is relief in the pipeline, but
21 there are no new applicants coming forward.

22 THE COURT: I know. But there are lots of people out
23 there who are still in this country that these folks want to
24 deport.

25 MR. ROSENBAUM: Well, would that mean, Your Honor, in

1 fact anyone who has employment authorization and a stay of
2 deportation --

3 THE COURT: By virtue of these orders.

4 MR. ROSENBAUM: By virtue of that, those would no
5 longer be in effect, employment authorization evoked and stays
6 of deportation.

7 THE COURT: No. They could do whatever they want.

8 The Court will simply dissolve its previous order, and
9 they can respond any way they want to respond.

10 MR. ROSENBAUM: I'm just saying, Your Honor, it's not
11 clear to me what dissolving the orders will mean.

12 Maybe the Government will want to say what the net
13 impact would be.

14 MR. FUNK: That's what we mean. Yeah.

15 THE COURT: Sure. Sure. That's what would happen.

16 MR. HOLGUIN: Your Honor, if I might, it strikes me
17 that we're talking about very serious consequences for a
18 substantial number of people who have been in this country for
19 a very, very long time. And --

20 THE COURT: That's a great argument to make to
21 Congress.

22 MR. HOLGUIN: And we are doing it on the basis of a
23 statute that we believe presents grave concerns of
24 constitutionality.

25 I don't see how we get to the point of dissolving an

5

1 order that is going to surely result in irreparable injury to
2 hundreds, if not thousands of people, unless we deal with the
3 substance of the constitutionality of Section 377.

4 THE COURT: It seems to me -- and I'm serious -- my
5 desire -- I have no desire to alter the condition of all of
6 these folks who have been here. But as I said, those are
7 arguments to make to Congress.

8 Of course, if they just keep it quite enough so nobody
9 knows the statute is going through, you don't even get a
10 chance to make the argument to Congress.

11 That is one of the more remarkable things about this
12 statute. But be all that as it may. Not that you could have
13 dissuaded them, but at least common decency would suggest they
14 ought to give you an opportunity to pretend.

15 Anyhow, the real question is whether or not I still
16 believe that a preliminary injunction under these
17 circumstances is justified because you have a significant
18 chance of prevailing.

19 And your answer is, You can't know the answer to that
20 Judge until you deal with the question of the
21 constitutionality of the statute; and therefore, this is just
22 another element to be litigated and resolved.

23 Why isn't that right?

24 MR. FUNK: Well, Your Honor, we would just submit that
25 I think you're right, that the analysis would be that you

1 would have to take some time to decide the constitutional
2 questions, and then you would make a preliminary
3 determination.

4 THE COURT: If I have got to do that, then there is no
5 sense in my doing that. Because the matter is pending before
6 the Circuit, and the Circuit ought to --

7 MR. FUNK: Right. That's why we think if it's a legal
8 issue, the Court can decide it now, and then --

9 THE COURT: Okay. This matter is stayed pending
10 further resolution by the Ninth Circuit.

11 If you think that's not the appropriate thing to do, go
12 tell the Circuit to make me do it. I will do it just like a
13 shot.

14 Just seems to me if I've got to take up the question of
15 the constitutionality in order to resolve -- dissolve the
16 restraining order, then I ought not to be doing that until the
17 Circuit decides that I ought to do it.

18 That will be the order of the Court.

19 Thank you, folks.

20 MR. HOLGUIN: Thank you, Your Honor.

21 MR. ROSENBAUM: Thank you, Your Honor.

22 MR. FUNK: The other issue was the upcoming Pretrial
23 Conference.

24 THE COURT: Vacated. Everything is vacated.

25 Everything is stayed.

(Whereupon, the matter was concluded.)

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REPORTER'S CERTIFICATE

---oOo---

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, CATHERINE E. F. BODENE, certify that I was the
Official Court Reporter, and that I reported verbatim in
shorthand writing the foregoing proceedings; that I thereafter
caused my shorthand writing to be reduced to typewriting, and
the pages numbered 1 through 7, constitute a complete, true,
and correct record of said proceedings:

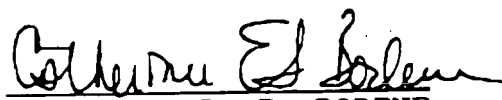
COURT: UNITED STATES DISTRICT COURT,
 EASTERN DISTRICT OF CALIFORNIA

JUDGE: HONORABLE LAWRENCE K. KARLTON

CAUSE: CATHOLIC SOCIAL SERVICES Vs. JANET RENO,
 CASE NO. CIV. S-86-1343 LKK

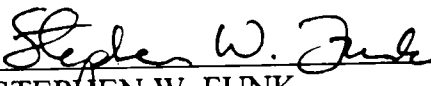
DATE: MONDAY, NOVEMBER 18TH, 1996

IN WITNESS WHEREOF, I subscribe this certificate at
Sacramento, California, on this 21ST day of NOVEMBER, 1996.


CATHERINE E. F. BODENE
CSR NO. 6926

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Opposition To Petition For Rehearing And Suggestion For Rehearing En Banc is double-spaced, utilizes proportionally-spaced 13-point typeface, and contains fewer than 4,200 words.


STEPHEN W. FUNK
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044-0878
Telephone: (202) 616-4906

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 1997, true and correct copies of foregoing Opposition To Petition For Rehearing And Suggestion For Rehearing En Banc were served on counsel of record for Plaintiffs-Appellees, via first class mail, postage prepaid, at the following addresses:

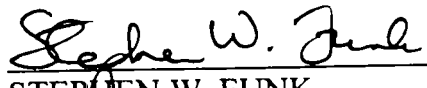
Peter Schey
Carlos Holguin
Center for Human Rights And
Constitutional Law
256 S. Occidental Boulevard
Los Angeles, California 90057

Stephen A. Rosenbaum
2212 6th Street
Berkeley, California 94710

Michael Rubin
Altshuler, Berzon, Nussbaum
Berzon and Rubin
177 Post Street, Suite 300
San Francisco, CA 94108

Robert H. Gibbs
Robert Pauw
Gibbs, Houston and Pauw
1111 Third Avenue, Suite 1210
Seattle, Washington 98101

Luis Cespedes
701 E Street, Suite C
Sacramento, CA 95814


STEPHEN W. FUNK