
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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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CERTIFICATION 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 10.5 or fewer characters per inch, and contains fewer than 7,000 words.



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INTRODUCTION

Plaintiffs-Appellees ("Plaintiffs") seek to prevent this Court from deciding the clearly presented legal issues that compel a reversal of the district court's orders by raising a number of arguments which fail to appreciate that Defendants-Appellants ("Defendants") have appealed the district court's orders on jurisdictional grounds. Thus, the district court did not have the authority to enter any order against the Defendants, let alone the appealable orders of November 3, 1995, and December 26, 1995, or to grant any relief, including any "interim" relief, to the members of the plaintiff class. Accordingly, Defendants respectfully request that the Court overturn the district court's orders and remand the case to the district court with instructions to dismiss the class action.

Plaintiffs seek to preserve the broad, expansive, nationwide relief originally provided by the district court in 1988 to tens of thousands of aliens who have alleged only that they did not timely apply for legalization because they believed they were ineligible. It is time for this long-standing "interim" relief program to come to an end because it has been rendered null and void by the Supreme Court's decision in this case. As discussed more fully below, none of the Plaintiffs have alleged that they were "front-desked" or that the front-desking policy was a substantial cause of their failure to apply. Moreover, none of the Plaintiffs are entitled to any of the benefits afforded by the Immigration Reform and Control Act of 1986 ("IRCA") because they failed to file a timely application, a substantive

eligibility requirement. Thus, the district court's orders should be vacated and the case dismissed.

Even assuming that there are a few Plaintiffs who may have a ripe claim for adjudication and are entitled to some relief, this does not mean that the district court was justified in continuing to extend broad, expansive nationwide relief to the tens of thousands of persons who were members of the original class. As the Supreme Court recently explained in Lewis v. Casey, 1996 WL 340797 (June 24, 1996), even where one or two named plaintiffs have been injured, "a further question remains: Was that inadequacy widespread enough to justify systemwide relief?" Id. at *9.¹ Here, Plaintiffs have not made even a preliminary showing pursuant to Fed. R. Civ. P. 65(a) that all of the tens of thousands of class members remain entitled to the broad, expansive "interim" relief provided by the district court in its 1988 Orders. Id. ("Courts have no power to presume and remediate harm that has not been established"). Therefore, even if the Court were to permit this class action to stand, it should nevertheless overturn the two interlocutory orders in question and remand this case with instructions to the district court to limit greatly the scope of the action in accordance with the mandate of the Supreme Court.

¹ A copy of the Casey decision is attached hereto in the Addendum to this brief.

REPLY TO PLAINTIFFS' ARGUMENTS

I. THIS COURT HAS THE APPELLATE JURISDICTION UNDER 28 U.S.C. § 1291(a)(1) TO HEAR THE INSTANT APPEAL

A. The Defendants' Appeal From The District Court's Appealable Order Of November 3, 1995, Was Timely

Following the submission of Defendants' opening brief, Plaintiffs filed a motion to dismiss the instant appeal as untimely. In this motion, Plaintiffs acknowledged that Defendants filed a timely motion to alter or amend the Court's November 3rd Order on November 16, 1995, as required by Fed. R. App. P. 4(a)(4), and that Defendants' notice of appeal from the district court's orders was filed within sixty (60) days of the district court's denial of Defendants' motion, as provided by 28 U.S.C. § 2107(b). Nevertheless, they contended that the appeal was neither timely nor ripe because Defendants' November 16th "Motion to Clarify Class Definition" only sought to amend or to alter the portion of the district court's order that modified the class definition, an order which they contended was completely separate and distinct from the district court's injunctive relief orders and thus unappealable under 28 U.S.C. § 1292(a)(1). Accordingly, Plaintiffs contended that the filing of Defendants' November 16th motion did not operate to toll the time for filing the appeal under Fed. R. App. P. 4(a)(4).

As discussed more fully in the Defendants' brief in opposition to the motion to dismiss,^{2/} Plaintiffs' motion to

^{2/} In their brief, Plaintiffs have incorporated by reference all of the arguments raised in their motion to dismiss.

(continued...)

dismiss is completely without merit. This Court has repeatedly and consistently held that Fed. R. App. P. 4(a)(4) should be construed broadly to include any motion that seeks to alter or amend an appealable order in any fashion in order to ensure that all outstanding issues in the district court have been fully resolved prior to appeal. Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1419 (9th Cir. 1984) (citing cases). Here, Defendants' motion to clarify sought to alter the terms of the November 3rd Order for the purpose of limiting the scope of the injunctive relief orders that had been instituted and continued by the district court in its November 3rd Order. As previously discussed in Defendants' opening brief, the district court's November 3rd Order required the INS to review all pending class membership applications and to determine within six months whether they were members of the plaintiff class. If they were members of the plaintiff class, the INS then was obligated by the November 3rd Order to grant to the class member a stay of deportation and temporary work authorization without the payment of the usual fee. DN 347.^{3/}

The motion to clarify was filed, therefore, in order to limit the scope of injunctive relief by narrowing the class definition governing which persons should receive the benefits of

^{2/} (...continued)
Consequently, Defendants hereby incorporate by reference all of the arguments raised in opposition to the motion to dismiss.

^{3/} "DN" refers to the docket number in the Clerk's Record. Copies of all of the relevant orders and other pleadings have been reproduced in the Excerpts of Record on file with the Court.

class membership. As Defendants explained in their ex parte application filed in conjunction with the motion to clarify:

. . . defendants seek a clarification of the class definition set forth in the Court's November 3, 1995 Order in order to ensure that the INS interprets and applies the class definition as the Court and the parties intended. The INS needs this clarification promptly in order to ensure that it has sufficient time to process and to adjudicate the class membership applications and appeals within the deadlines established by the Court.

See Ex Parte Application For A Telephonic Hearing and Order Shortening Time On Defendants Motion To Clarify Class Definition and Declaration of Donald E. Keener In Support Of Ex Parte Application. [DN 357 and 358].^{4/}

Plaintiffs have suggested that the Defendants' motion to clarify was unnecessary because "[n]either the plaintiffs nor the court has insisted that prior to trial defendants re-evaluate the class member status of already interviewed applicants for interim relief using the modified class definition . . . [n]or has anyone insisted that defendants apply the modified class definition while conducting the remaining interviews of class member applicants who filed applications before the December 3, 1995, cut-off date ordered by the District Court in response to defendants' motion to modify the stipulated interim relief order." Plaintiffs'-Appellees' Brief ("Pl. Brf.") at 12. The issue, however, is not whether, in retrospect, Defendants needed

^{4/} Copies of the Defendants' Ex Parte Application and the Declaration of Donald Keener were attached as Exhibits A and B to the Defendants' brief in opposition to the Motion to Dismiss. For ease of reference, however, the two documents have been attached hereto in the Addendum to this reply brief.

to file a motion to limit the scope of injunctive relief ordered by the district court. The question is whether Defendants' motion actually sought to limit the scope of the injunctive relief (which it clearly did). Indeed, as the Supreme Court explained in United States v. Ibarra, 502 U.S. 1, 7 (1991), Defendants were not "required to guess at their peril" whether their motion to clarify tolled the time for filing the appeal. Rather, Defendants were entitled to rely on the clear, bright-line rule that their timely motion, which on its face sought to amend or to alter the scope of the injunctive relief ordered by the district court, operated to toll the time for filing an appeal under Fed. R. App. P. 4(a)(4). Therefore, the motion to dismiss the appeal as untimely and unripe should be denied.

B. This Court Has The Appellate Jurisdiction To Decide All Of The Legal Issues Presented By This Appeal

Plaintiffs contend that this Court does not have appellate jurisdiction to hear this appeal because it raises arguments and seeks relief that were not raised or sought in the district court. Pl. Brf. at 7-8, 11-14. It is well-settled, however, that an appeal under 28 U.S.C. § 1292(a)(1) "brings before the appellate court the entire order, not merely the propriety of injunctive relief, and that the appellate court may decide the merits of the case and order dismissal of the action." Barrett v. Smith, 530 F.2d 829, 830 (9th Cir. 1975), cert. denied, 425 U.S. 977 (1976); see also Bernard v. Air Line Pilots Ass'n, 873 F.2d 213, 215-16 (9th Cir. 1989).

Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development. Any other rule frequently would require wasted litigation without any offsetting advantage in economy of appellate effort or uninterrupted trial court proceedings.

9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 3921, at 17 (1986).

This broad rule does not mean that the Court's jurisdiction extends to all issues presented in the case; but it does mean that the Court may consider all issues relating to the propriety or validity of the appealable order in question, including whether the district court had the subject matter jurisdiction to enter the injunction and whether the district court had the jurisdiction and the equitable authority to grant relief, including any "interim" relief, to the members of the plaintiff class. See Fentron Indus., Inc. v. Nat. Shopmen Pension Fund, 674 F.2d 1300, 1304 (9th Cir. 1982) (citations omitted); see also Continental Airlines, Inc. v. Intra Broker, Inc., 24 F.3d 1099, 1102 (9th Cir. 1994); Marathon Oil Co. v. United States, 807 F.2d 759, 763-65 (9th Cir. 1986), cert. denied, 480 U.S. 940 (1987); Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc., 682 F.2d 802, 805 (9th Cir. 1982).

In this case, it would serve the interests of judicial economy to decide the issues presented by this appeal because, contrary to Plaintiffs' assertions (Pl. Brf. at 13), they are all legal issues that have been fully presented to the district court

on numerous occasions⁵ and are ripe for appellate review. As the Supreme Court explained in Smith v. Vulcan Works, 165 U.S. 518 (1897), the intent of the statute was to authorize:

an appeal to be taken from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction . . . [and] not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests, but also to save both parties from the expense of further litigation, should the appellate court be of the opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.

Id. at 525; see also 9 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 3921 (discussing the broad scope of interlocutory injunctive appeals).

Even though none of the Defendants' arguments are issues that have been raised for the first time on appeal, they all nevertheless fall within one or more of the recognized exceptions

⁵ Defendants raised their jurisdictional objections concerning the district court's continued enforcement of the 1988 Orders and the ripeness of the new claims set forth in the Seventh Amended Complaint in their Motion To Vacate Prior Orders and To Implement Mandate, filed on November 17, 1994 [DN 312], their Motion To Dismiss Seventh Amended Complaint, filed on December 15, 1994 [DN 317], their Opposition to Class Certification, filed on April 17, 1995 [DN 338], their Motion To Modify Prior Orders, filed on April 17, 1995 [DN 339], their Motion To Stay The Orders Pending Appeal, filed on February 27, 1996, and their Motion For Summary Judgment, filed on February 29, 1996. Similarly, Defendants' arguments regarding the district court's lack of jurisdiction and equitable authority to grant relief were raised to this Court during the first appeal in this case and to the Supreme Court in Defendants' petition for writ of certiorari. See Def. Brf. at 45-47 (discussing this Court's holding that the district court had the authority to grant relief to persons who did not file a timely application, as well as Justice O'Connor's explicit rejection of this Court's holding).

to the "first time on appeal" rule. See Murrelet v. Babbitt, 83 F.3d 1060, 1063-64 (9th Cir. 1996).

The issues raised in Defendants' brief are issues of law that do not depend on an inadequately developed factual record. Even Defendants' ripeness arguments, which Plaintiffs erroneously contend require more factual development to resolve (Pl. Brf. at 36-38), are purely legal issues that may be decided based on the sufficiency of the allegations in the Seventh Amended Complaint. As the district court, in its Order of March 17, 1995 recognized^{6/}, it is a basic and universal legal principle that named plaintiffs must allege all facts necessary to give the court jurisdiction of the subject matter. See, e.g., Stewart v. United States, 199 F.2d 517, 520 (7th Cir. 1952); Patton v. Baltimore & Ohio R.R. Co., 197 F.2d 732, 743 (3d Cir. 1952). See also Casey, 1996 WL 340797 *8 ("named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent'"); 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1206, at 87 & n.4 (1986) ("the complaint in federal court must demonstrate that a basis for federal jurisdiction exists") (citing 63 cases).

Plaintiffs attempt to limit the well-settled principle that federal jurisdiction is determined based upon the facts in existence when the complaint is filed by arguing that the

^{6/} See DN 330 at 17 n.14.

principle is solely applicable in diversity cases. See Pl. Brf. at 24-26. Contrary to the Plaintiffs' assertion, the Supreme Court has applied the principle in cases that are within the statutory federal question jurisdiction. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 569-570 n.4 (1992) (plurality); Keene Corp. v. United States, 508 U.S. 200 (1993).

Plaintiffs reliance on Mullaney v. Anderson, 342 U.S. 415 (1952), does not support the broad proposition that a district court can add parties "to obviate questions about the standing of the original parties." Pl. Brf. at 24. Instead, Mullaney supports, at most, the addition of aliens who were members of the six plaintiff organizations. In this case no allegation is made that the named Plaintiffs were members of plaintiff organizations (and after Justice O'Connor's opinion in INS v. Legalization Assistance Project, 114 S. Ct. 422, 424 (1993), and the D.C. Circuit in Ayuda, Inc. v. Reno, 7 F.3d 246, 250 (1990), it cannot be credibly argued that plaintiff organizations have standing). It follows that Mullaney does not provide a basis for permitting the amended complaint. Plaintiffs' reliance on Armour v. City of Anniston, 654 F.2d 382 (5th Cir. Unit B. 1981) is unpersuasive. In this case, the deficiency with the Plaintiffs' case is not limited to the merits of their claims, but also relates to jurisdiction. Plaintiffs cannot show that their claims against the advance parole regulation and any alleged INS blocking actions, policies or rules could possibly have existed on November 12, 1986, several days after IRCA was enacted, and

months before any regulations were issued and the application period opened in mid-1987. Moreover, Plaintiffs have not identified any authority to support its contention that a court can permit substitution of parties in cases where the original parties failed to establish jurisdiction.

Since Defendants' arguments are primarily jurisdictional in nature and relate to the scope of the Court's equitable authority, it is important that the arguments be considered in order "to prevent a miscarriage of justice or to preserve the integrity of the judicial process", Murrelet, 83 F.3d at 1063-64, and it does not matter whether they were properly presented to the district court. See Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action") (emphasis added).

All federal courts have an independent obligation to determine their subject matter jurisdiction in a particular case, regardless of whether the issue has been properly presented by the parties. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990); C.T. Carden v. Arkoma Associates, 494 U.S. 185, 195 (1990); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541; 546-47 (1986); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); Rosenfeld v. United States, 859 F.2d 717, 723 (9th Cir. 1988).^{7'}

^{7'} In this very case, the Supreme Court noted this rule. See Catholic Social Services v. Reno, 113 S. Ct. 2485, 2495 n.18 (continued...)

Thus, it can hardly be considered "palpable overreaching" for Defendants to request that the Court not only vacate the district court's most recent orders for lack of jurisdiction, but also instruct the district court to dismiss this case. After all, if this Court were to determine that the district court lacked the subject matter jurisdiction to enter the two orders in question, then it would have no choice but to remand the case to the district court with instructions to vacate all prior orders and to dismiss all pending claims. See United States, Lyon et al. v. Huckabee, 16 Wall, 83 U.S. 414 (1872); Amusement & Music Operators v. Copyright Royalty, 636 F.2d 531, 533 (D.C. Cir. 1980), cert. denied, 450 U.S. 912 (1981).

Furthermore, since the Plaintiffs here seek injunctive relief, not money damages, it is entirely proper for the Court to determine whether the district court has the jurisdiction and the equitable authority to compel the INS to grant any relief to the members of the plaintiff class in contravention of the express requirements of IRCA. See Aerojet-General Corp. v. The Am. Arbitration Ass'n, 478 F.2d 248, 252 (9th Cir. 1973). For all of these reasons, this Court should reject the Plaintiffs' attempts to limit the scope of appellate review and consider all of the issues raised in Defendants' opening brief.

²(...continued)
(1993) ("CSS") ("Even when a ripeness question in a particular case is prudential, we may raise it on our own motion, and 'cannot be bound by the wishes of the parties'") (citations omitted).

**II. SINCE THE ISSUES PRESENTED BY THIS APPEAL ARE LEGAL,
THE COURT MUST EMPLOY A DE NOVO STANDARD OF REVIEW**

Plaintiffs contend that the district court's Order of November 3, 1995, was "in the nature of a preliminary injunction" and thus "should be reviewed only for abuse of discretion or application of an erroneous legal standard." Pl. Brf. at 13. If the district court's order of November 3, 1995, however, was a "preliminary injunction," then it must be reversed because the district court entered the injunction without "employing the appropriate legal standards which govern the issuance of preliminary injunctions." Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 752 (9th Cir. 1982); see Def. Brf. at 29-30.

In any event, Plaintiffs are wrong in contending that this Court should not employ a de novo standard of review in this case. While Plaintiffs are correct that preliminary injunctions are ordinarily reviewed for abuse of discretion, it is well-established that where, as here, the appellant raises legal challenges, such as the district court's lack of subject matter jurisdiction to the validity of an interlocutory order, the Court must employ de novo review. See Bidart Brothers v. The California Apple Comm'n, 73 F.3d 925, 928 (9th Cir. 1996); Lou v. Belzberg, 834 F.2d 730, 734 (9th Cir. 1987). Thus, this Court should reject the Plaintiffs' arguments and conduct de novo review of the legal issues presented in Defendants' brief.

III. THE 1988 STAY ORDERS AND THE 1993 STIPULATION ARE ALL BASED UPON THE 1988 JUDGMENT ENTERED IN PLAINTIFFS' FAVOR WHICH HAS BEEN RENDERED NULL AND VOID BY THE SUPREME COURT'S DECISION IN THIS CASE AND THUS NO LONGER PROVIDES ANY BASIS TO CONTINUE THE DISTRICT COURT'S "INTERIM" RELIEF PROGRAM

Plaintiffs concede that the three remedial orders which were the subject of the first appeal, i.e., the Order of June 10, 1988, and the two Orders of August 11, 1988, have been vacated and/or rendered null and void by the Supreme Court's decision in this case. See Pl. Brf. at 21. The Plaintiffs contend, however, that all of the other orders remain in effect, i.e., the Order of May 3, 1988, invalidating the advance parole regulation, the 1988 "Stay Orders," which stayed portions of the district court's permanent injunction pending appeal, and the Stipulation and Order of March 4, 1993, which set forth the terms by which the stay orders would be enforced.

The Plaintiffs fail to appreciate that the Supreme Court vacated the three remedial orders on jurisdictional grounds. While it remanded for further proceedings, the Court nevertheless determined that the district court, at the time it entered its 1988 Orders, did not have any jurisdictional basis to invalidate the advance parole regulation and thus did not have the jurisdiction to enter any of its remedial orders, including the 1988 Stay Orders and the 1993 Stipulation and Order, which were entered only because the district court had invalidated the advance parole regulation. See CSS, 113 S. Ct. at 2500.

In response to this argument, Plaintiffs contend that the Supreme Court did not reach such a broad jurisdictional ruling

because it expressly found that the district court would have subject matter jurisdiction to hear claims brought by persons who were "front-desked." Pl. Brf. at 22, 34-35. The Supreme Court's holding, however, did not mean that the district court had subject matter jurisdiction to invalidate the advance parole regulation or to enter any injunctive relief based on the invalidation of the advance parole regulation. As previously discussed in Defendants' opening brief, this Court held in Naranjo-Aguilera v. INS, 30 F.3d 1106, 1113 (9th Cir. 1994), that the central teaching of CSS is that district courts lack subject matter jurisdiction over all claims that seek to challenge or to invalidate INS's interpretation of IRCA's substantive eligibility requirements.

Plaintiffs contend that Naranjo-Aguilera did not categorically foreclose all district court challenges to the validity of INS's regulations because it expressly recognized that "those plaintiffs whose applications had never even been accepted, due to the alleged INS practice called 'front-desking' could bring claims in district court if their application were front-desked based on the regulation at issue." See Pl. Brf. at 35 n.17 (citing Naranjo-Aguilera, 30 F.3d at 1112). Once again, Plaintiffs miss the point. The point is not that the district courts lack subject matter jurisdiction over "front-desked" aliens. Rather, as the Naranjo court acknowledges, "district courts have jurisdiction over 'collateral,' 'procedural'

challenges to INS practices in the processing of applications, such as the front-desking in CSS." Id. at 1112-13.⁸

This does not mean, however, that district courts have the jurisdiction to invalidate INS's regulations when presented with a "front-desked" alien. As the Supreme Court explained in Casey, the relief provided must be commensurate with the specific procedural injury inflicted, which, in this case, would be an order requiring INS to accept and to process the application as it would any other application that had been timely filed. Id., 1996 WL 340797, *7 ("The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established"). Then, if the application was denied by the INS based on the advance parole regulation, the "front-desked" alien would be able to challenge the validity of the challenged regulation in the Court of Appeals under 8 U.S.C. § 1255a(f).

Even if the Plaintiffs are correct that the district court would have the subject matter jurisdiction to hear a substantive challenge to the advance parole regulation brought by a "front-desked" alien, the fact remains that there are no "front-desked" aliens in this case, and more importantly, there was no evidence of any "front-desked" aliens at the time either the district

⁸ This statement does not mean that the district court has subject matter jurisdiction over all procedural claims. To the contrary, where, as here, the Plaintiffs are persons who did not take all of the required affirmative steps that they could take to file a timely application for legalization, their "procedural" challenge would not be ripe for adjudication because they cannot demonstrate that, but for the challenged procedural actions, they would have complied with the statute's eligibility requirement of a timely application. See Def. Brf. at 36-38.

court entered its 1988 Orders or the Plaintiffs first filed their complaint in November 1986. Thus, the district court did not have any jurisdictional basis to invalidate the advance parole regulation or to enter any remedial orders based on the invalidation of the advance parole regulation. Consequently, all of the prior orders, which were entered only because Plaintiffs had prevailed on such a claim, have been rendered null and void and must be vacated for lack of subject matter jurisdiction.

Plaintiffs suggest that, even if the three remedial orders that were appealed have been vacated or rendered null and void by the Supreme Court's ruling, the 1988 Stay Orders, which by their terms were entered only to stay portions of the district court's injunctions pending appeal, and the Stipulation and Order of March 4, 1993, which by its terms was designed to remain in effect so long as the 1988 Stay Orders remained in effect, continue to impose independent obligations on INS, notwithstanding the Supreme Court's decision in this case. In their effort to preserve the broad, expansive relief provided by the district court back in 1988, Plaintiffs apparently have forgotten why the stay orders were entered in this case. Surely, the stay orders were based on the district court's 1988 remedial orders. If the Plaintiffs had not prevailed on their challenge to the advance parole regulation and on their request to extend the application deadline to permit applicants who did not timely apply for legalization to submit applications for class membership, there would have been no reason or any legal basis to

stay the district court's injunctions pending appeal or to determine the terms and conditions of the stay. Thus, this Court should reject Plaintiffs' argument and hold that the stay orders, including the 1993 Stipulation and Order, have been rendered null and void by the Supreme Court's decision in this case and can no longer provide any legal basis for continuing the interim relief program instituted by the district court.

IV. CONTRARY TO THE PLAINTIFFS' ASSERTIONS, THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE PLAINTIFFS' CLAIMS ARE NOT RIPE FOR ADJUDICATION

A. Plaintiffs' Claims Are Not Ripe For Adjudication

As set forth more fully in Defendants' Opening Brief, none of the named Plaintiffs in the Seventh Amended Complaint are "front-desked" aliens and none fall within the provisions of footnote 28. See Def. Brf. at 36-41. In apparent recognition of the insufficiency of their allegations, the Plaintiffs have now constructed a convoluted legal theory that they believe demonstrates as a matter of law that the INS had a policy of denying potential applicants the right to apply. See Pl. Brf. at 29-30. Citing 8 C.F.R. § 245a.2(b), the Plaintiffs contend that the INS "expressly prescribed who was eligible 'to apply' for legalization." Pl. Brf. at 29. Plaintiffs' theory, however, could not be more off the mark. This regulation simply repeated the statutory eligibility requirements for legalization. It did not instruct INS personnel to screen potential applicants or to deny application forms to persons who were ineligible. Moreover, it never stated that persons who did not meet specific

requirements would not be permitted to apply. In fact, the Plaintiffs' distorted interpretation of § 245a.2(b) is rebuffed by the immediately preceding subsection, which affirmatively invited aliens to apply. See 8 C.F.R. § 245a.2(a)(1). It was the alien's responsibility to submit an application on time and challenge the regulations later. Otherwise, the alien is forever ineligible.

Furthermore, the regulation that does speak specifically to aliens who were ineligible to apply for legalization, 8 C.F.R. § 245a.2(c), has no bearing on the Plaintiffs' case. None of the named Plaintiffs appear to fall within the categories set forth in this subsection. Even if they did fall within this subsection, the language of the subsection does not state that they are ineligible to apply for legalization. It merely states that they are ineligible to obtain legalization. If the alien believed that he was eligible, there was simply nothing within the framework of this regulation that would have or should have prevented him from applying for legalization.

Even if the regulation could be construed (after the fact) as instructing INS personnel to deny the right to apply to persons who failed to satisfy these requirements, none of the named Plaintiffs allege that this regulation was used by the INS to deny ~~them~~ the right to apply.^{9/} For the reasons discussed

^{9/} The Plaintiffs point to Admission No. 2 and Admission No. 10 to support this contention. See Pl. Brf. at 45. These admissions, however, do not demonstrate that the INS applied the regulations to **prevent** aliens from applying for legalization. In
(continued...)

above, the court should reject the Plaintiffs' theory that 8 C.F.R. § 245a.2 denied them a right to apply.

Moreover, Plaintiffs' contention that aliens have a ripe claim because an INS employee told them that they were ineligible to apply is without merit because the Supreme Court heard and rejected this identical argument. Pl. Brf. at 31-32. See CSS, 113 S. Ct. at 2495-96 n.20; 2500 n.27. Surely, if the Supreme Court intended for such an allegation to be considered a substantial cause of an alien's failure to apply for legalization, it is highly probable that the Court would have specifically pointed in footnote 28 to footnote 27 by way of example. Since the Supreme Court did not make such a statement, this shows that such an allegation is insufficient to satisfy even the requirements of footnote 28.

Under CSS, the Plaintiffs must have been prevented from applying by the INS. Id. at 2496. Here, it is indisputable that the Plaintiffs were not prevented from applying because they could have taken other steps to apply for legalization. The Plaintiffs do not contest this fact. Rather, they ridicule the

⁹(...continued)
fact, Admission No. 2 simply states that the INS informed aliens that they did not qualify to apply for legalization. Under footnote 27 an alien making this factual allegation does not state a ripe claim. Moreover, Admission No. 10 simply admits that 8 C.F.R. § 245a.2(b) sets forth the categories of aliens eligible to apply for legalization. If the promulgation of a regulation does not give an alien a ripe claim, then the oral communication of the regulation does not give an alien a ripe claim. Therefore, the fact that INS employees may have orally informed aliens of the eligibility regulation and told them they were ineligible to apply does not state a ripe claim.

analysis set forth in CSS, which requires them to take the affirmative steps that they can take in order to file a timely application and, spurning the CSS ripeness analysis, they argue that they need not take those steps. See Pl. Brf. at 32.

B. Plaintiffs' Reliance On Their "QDE Front-Desking Theory" And Their "Predictive Front-Desking Theory" To Satisfy Ripeness Is Meritless

The Plaintiffs contend that "evidence at trial will establish, the QDEs, acting directly as agents of the INS and pursuant to its instructions, turned away many otherwise eligible class members." Pl. Brf. at 39. Plaintiffs' contention regarding the QDEs, however, is irrelevant because none of the named Plaintiffs have alleged that they were "front-desked" by a QDE. As stated in Casey, "even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" Casey, 1996 WL 340797 * 8 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40, n.20 (1976)). In any event, even if the named Plaintiffs in this case alleged that they were "front-desked" by a QDE, their argument would be unpersuasive because a QDE cannot "front-desk" class members.

Under IRCA, QDEs were authorized to assist applicants in completing their applications, to receive completed applications,

and to transfer them to the INS on their behalf.¹⁰ See 8 U.S.C. § 1255a(c)(2) (providing that QDEs were designated "[f]or the purpose of assisting in the program of legalization"). QDEs, however, did not have the authority to reject any application or to make any other determination on the merits of the application.¹¹ Clearly, the "front-desking" policy, which was a policy set forth in the Legalization Manual, only allegedly authorized INS legalization assistants to review completed applications and reject the application if the applicant clearly was statutorily ineligible for legalization. Neither the Legalization Manual, nor any other regulation promulgated by INS, however, authorized QDEs to reject completed applications or to otherwise refuse to accept an application. See CSS, 113 S. Ct. at n.21; 2500. In accordance with this basic principle, the Supreme Court held that speaking to a QDE was insufficient evidence to establish that the alien "would have applied but for the invalid regulations." Id., 113 S. Ct. at 2496 n.21. See also id. at n.19

Likewise, a QDE's actions cannot create a ripe claim under the provisions of footnote 28. Under footnote 28, the "front-desking" policy must be a "substantial cause" of the alien's failure to apply. Since the "front-desking" policy did not apply

¹⁰ Legalization applications could have been filed with the QDE, but only if the alien consented that the application be forwarded to the Attorney General. 8 U.S.C. § 1255a(c)(1)-(3).

¹¹ See 8 U.S.C. § 1255a(c)(3) ("No such entity may make a determination required by this section to be made by the Attorney General.").

to QDEs, and for that matter, could not have authorized QDEs to reject applications in light of 8 U.S.C. § 1255a(c)(3), it is clear that the actions of QDEs cannot be considered sufficient to create a ripe claim under the provisions of footnote 28.

The fact that the actions of a QDE cannot be used to create a ripe claim, however, is not the only flaw in Plaintiffs' "QDE front-desking theory." Plaintiffs have also failed to allege that the actions of a QDE can be attributed to the INS.

It is well-established that a principal-agent or master-servant relationship does not exist unless the principal or master has the "right to control" the actions of the agent or servant. Gen. Bld. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 392 (1982); United States v. Orleans, 425 U.S. 807, 816 (1976); Logue v. United States, 412 U.S. 521 (1973); Ducey v. United States, 713 F.2d 504, 516 (9th Cir. 1983). As the Supreme Court explained in Orleans, "[t]he question here is not whether the community action agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Orleans, 425 U.S. at 816; see also Ducey, 713 F.2d at 516.

Here, the INS did not have the right to control the actions of the QDEs or the ability to supervise their day-to-day activities. IRCA barred any access by the INS to the applications submitted by an alien absent their written consent. 8 U.S.C. § 1255a(c)(4). In reality, because there were over 977 QDEs as opposed to only 107 INS legalization offices, it would

have been impossible for INS to control the day-to-day activities of the QDEs, even if the INS had tried to exercise such control. See CSS, 113 S. Ct at 2500. In this sense, QDEs are more akin to independent contractors whose actions are not attributable to the government. See Orleans, 425 U.S. at 815 ("A critical element in distinguishing an agency from a contractor is the power of the Federal Government 'to control the detailed physical performance of the contractor'") (citing Logue, 412 U.S. at 528); see also Carrillo v. United States, 5 F.3d 1302, 1304 (9th Cir. 1993).

Even if QDEs could be viewed as the government's agents, it is a long-standing principle of law that the government cannot be bound by the unauthorized acts of its agents. See Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947); United States v. Stewart, 311 U.S. 60, 70, reh'g. denied, 311 U.S. 729 (1940); Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1917); Saulque v. United States, 663 F.2d 968, 976 (9th Cir. 1981). While QDEs had the authority under the IRCA to receive applications and to transfer them to INS with the applicant's consent, they did not have the authority to reject an application or to make any other determination on the merits of an application on the Attorney General's behalf. See 8 U.S.C. § 1255a(c)(1); 8 U.S.C. § 1255a(c)(2). Thus, the QDEs' unauthorized actions, to the extent they occurred, cannot be attributed to the INS.

Like Plaintiffs' "QDE front-desking theory," Plaintiffs "predictive front-desking theory" must also fail. Plaintiffs

contend that they "will present evidence showing that had class members presented completed applications, the INS 'would have subjected [them] to front-desking,' effectively blocking their ability to complete the application process." Pl. Brf. at 40. None of the named Plaintiffs, however, allege that they presented a completed application at an INS office. Thus, the Plaintiffs' contention is highly speculative and relies heavily upon a predictive theory. While it is the Plaintiffs' position that the alien would surely have been "front-desked" if he or she had submitted a completed application to the INS (Pl. Brf. at 40), the Supreme Court has determined that the assertion of predictability is insufficient to state a ripe claim. See CSS, 113 S. Ct. at 2496 n.19 (rejecting prediction that plaintiffs would have been denied if they had applied).

V. THE DISTRICT COURT LACKS THE EQUITABLE AUTHORITY TO ORDER THE INS TO GRANT RELIEF TO MEMBERS OF THE PLAINTIFF CLASS

The Plaintiffs present three theories (P. Brf. at 39, 44-47) in support of their argument that the district court can fashion a remedy despite the Plaintiffs' failure to satisfy the statutory requirement of a timely application. Defendants' opening brief anticipated and answered their estoppel theory and their "full-12 month application period" theory (see Def. Brf. at 41-47), but it did not anticipate Plaintiffs' "constructive filing" theory. The logic of that theory posits that a front-desked alien, whose completed application and fee were rejected, did not really apply, but the Supreme Court found that the alien "applied".

Thus, the Plaintiffs, who never submitted a completed application and fee because they appeared at an INS office to apply but were allegedly turned away, argue that the Court should find that they "applied" just like the front-desked alien.

This clever theory is contrary to the law and to CSS. The statute provides that an individual must "apply" for legalization. See 8 U.S.C. § 1255a(a)(1). The date the alien actually submits a "completed application" to the INS is the date that the alien "applied" for legalization. See 8 C.F.R. § 245a.2(f). Yet, the Plaintiffs want this Court to define "apply" as making an "appearance" at an INS office within the 12-month application period. The Plaintiffs' argument conflicts with the Supreme Court's decision in CSS, as well as the IRCA and the regulatory definition of the term "applied." In CSS, the Court held that, in order to have "applied" for legalization, an alien must have completed an application and submitted it along with a filing fee to the INS, and it drew a bright-line between the front-desked alien who complied with the statutory requirement of "applied" and aliens who did not comply. See CSS, 113 S. Ct. at 2500 nn.27-29.^{12/} Rather than suggesting a constructive definition of "apply", the Court applied the law when it construed the word "applied."

^{12/} "Front-desked" aliens complied with the statutory requirement because they actually presented a completed application within the application period.

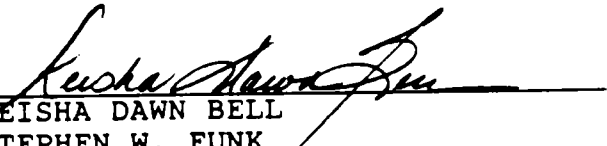
CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court reverse the district court's orders of November 3, 1995, and December 26, 1995, and remand the case with instructions to dismiss the complaint.

Respectfully submitted,

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Dated: July 18, 1996

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FOR THE EASTERN DISTRICT OF CALIFORNIA

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

18 Plaintiffs,)
19)
20 v.)

21 JANET RENO, Attorney)
General of the United States)
22 of America, DORIS MEISSNER,)
Commissioner Immigration &)
23 Naturalization Service,)

24 Defendants.)
25)

CIV. NO. S-86-1343 LKK

DEFENDANTS' EX PARTE
APPLICATION FOR A
TELEPHONIC HEARING AND
ORDER SHORTENING TIME ON
DEFENDANTS' MOTION TO
CLARIFY CLASS DEFINITION

Date: December 18, 1995
Time: 10:00 a.m.
Place: Courtroom 4

26 Defendants apply for an emergency telephonic hearing and for
27 an order shortening time, pursuant to Local Rule 142(e), on the
28 notice and hearing of Defendants' Motion To Clarify Class

1 Definition. As set forth in the attached declaration and the
2 memorandum submitted in support of the motion to clarify,
3 defendants seek a clarification of the class definition set forth
4 in the Court's November 3, 1995 Order in order to ensure that the
5 INS interprets and applies the class definition as the Court and
6 the parties intended. The INS needs this clarification promptly
7 in order to ensure that it has sufficient time to process and to
8 adjudicate the class membership applications and appeals within
9 the deadlines established by the Court. Therefore, Defendants
10 respectfully request that the Court enter an Order shortening
11 time on the notice and hearing of Defendants' motion to clarify
12 and to rule on Defendants' motion forthwith.

1 Respectfully submitted,

2 FRANK W. HUNGER
3 Assistant Attorney General
4 Civil Division

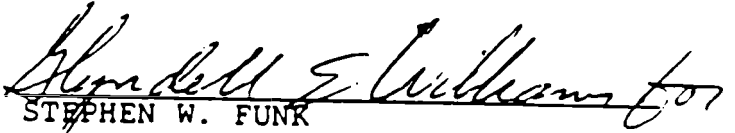
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27 Dated: November 15, 1995
28

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

That on November 16, 1995, one copy of DEFENDANT'S EX PARTE APPLICATION FOR A TELEPHONIC HEARING AND ORDER SHORTENING TIME ON DEFENDANTS' MOTION TO CLARIFY CLASS DEFINITION upon the plaintiffs, by placing it in the United States Attorney's Office mail room at Sacramento, California for same day mailing, addressed to:

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FILED

NOV 13 1995

U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____

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7 Civil Division

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15 FOR THE EASTERN DISTRICT OF CALIFORNIA

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

20 v.

21 JANET RENO, Attorney
22 General of the United States
of America, DORIS MEISSNER,
23 Commissioner Immigration &
Naturalization Service,
24
25 Defendants.

CIV. NO. S-86-1343 LKK

DECLARATION OF DONALD E.
KEENER IN SUPPORT OF EX
PARTE APPLICATION FOR
TELEPHONIC HEARING AND
ORDER SHORTENING TIME ON
DEFENDANTS' MOTION TO
CLARIFY CLASS DEFINITION

Date: December 18, 1995
Time: 10:00 a.m.
Place: Courtroom 4

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1 shortening time. Mr. Schey stated that he opposed the order
2 shortening time, but did not oppose the telephonic hearing.
3

4 Pursuant to 28 U.S.C. § 1746, I declare under penalty of
5 perjury that the foregoing is true and correct.
6

7 Executed this 15th day of November, 1995.
8

9 *Donald E. Keener*
10 *by Elizabeth E. Keener*
11 DONALD E. KEENER
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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

That on November 16, 1995, one copy of DECLARATION OF DONALD E. KEENER IN SUPPORT OF EX PARTE APPLICATION FOR TELEPHONIC HEARING AND ORDER SHORTENING TIME ON DEFENDANTS' MOTION TO CLARIFY CLASS DEFINITION upon the plaintiffs, by placing it in the United States Attorney's Office mail room at Sacramento, California for same day mailing, addressed to:

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KAREN CLARK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July, 1996, a true and correct copy of **Reply Brief For Defendants-Appellants** was served on opposing counsel by deposit in the established Department of Justice mail collection location in sufficient time for same-day collection and transmittal to the U.S. Postal Service for first-class mailing to:

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