
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

BRIEF FOR DEFENDANTS-APPELLANTS

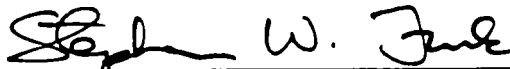
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CERTIFICATION OF COMPLIANCE WITH RULE 32(E)(3)

Pursuant to Ninth Circuit Rule 32(e)(3), the undersigned counsel certifies that the following brief for Defendants-Appellants is monospaced, has 10.5 or fewer characters per inch, and contains fewer than 14,000 words.



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INTRODUCTION

This case is one of the long-standing class actions that have been filed in this Circuit to challenge the Immigration and Naturalization Service's interpretation of the substantive eligibility requirements for legalization under the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, et seq. The occasion for this appeal is the district court's most recent injunctions issued on November 3, 1995, and December 26, 1995, which refused to vacate and/or modify prior orders that were entered before the Supreme Court's decision in favor of the government in this case. See Reno v. Catholic Social Services, 509 U.S. 43, 113 S. Ct. 2486 (1993) ("CSS").

As discussed more fully below, the two orders in question should be overturned because they are based upon and seek to continue prior orders, which are no longer in effect and have been rendered null and void by the Supreme Court's decision for lack of subject matter jurisdiction. Moreover, the district court's orders must be reversed because they grant relief to aliens who have failed to satisfy the Supreme Court's ripeness requirements and who failed to comply with IRCA's substantive eligibility requirement of a timely application. Accordingly, the government requests that the Court overturn the district court's orders of November 3, 1995, and December 26, 1995, and remand the case to the district court with instructions to dismiss the long-standing class action once and for all.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

A. Subject Matter Jurisdiction

The statutory sources of jurisdiction relied upon by plaintiffs below are 28 U.S.C. § 1331 (as a civil action arising under the Constitution and the laws of the United States) and 8 U.S.C. § 1329 (as a cause arising under the Immigration subchapter of INA). The government contests the existence of subject matter jurisdiction over the complaints in this case.

B. Appellate Jurisdiction

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) because the two orders on appeal are interlocutory orders granting, continuing, modifying and refusing to dissolve or modify injunctions for which direct review is not available in the Supreme Court. The government's notice of appeal was filed on February 23, 1996, within the time permitted by 28 U.S.C. § 2107(b). Under Fed. R. App. P. 4(a), the time for filing a notice of appeal begins with the denial of any post-judgment motion that "could have been brought under Rule 59(e)." Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1419 (9th Cir. 1984) (citing cases). Here, the 60-day period for appealing the Court's November 3, 1995 order began to run on December 26, 1995, when the Court denied the government's motion (which was filed on November 16, 1995) to clarify the Court's Order of November 3, 1995. Thus, the appeal from both orders is timely.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in continuing to enforce its permanent injunction of June 10, 1988, and subsequent orders partially staying portions of the injunction pending appeal, when such orders are no longer in effect and have been rendered null and void by the Supreme Court's decision for lack of subject matter jurisdiction.

2. Whether the district court erred in continuing to grant relief to the members of the plaintiff class where plaintiffs have not made any showing that they are entitled to a preliminary injunction based on the new claims set forth in the Seventh Amended Complaint.

3. Whether the district court has the jurisdiction to continue to grant relief to the members of the plaintiff class where all of the claims set forth in the Seventh Amended Complaint seek to challenge the validity of INS's interpretation of IRCA's substantive eligibility requirements.

4. Whether the district court has the jurisdiction to continue to grant relief to the members of the plaintiff class where none of the plaintiffs have satisfied the Supreme Court's ripeness concerns by demonstrating that they were "front-desked" or that the front-desking policy was a substantial cause of their failure to submit a timely application.

5. Whether the district court has the equitable authority to compel INS to grant relief to the members of the plaintiff class where none of the plaintiffs have demonstrated that they

submitted a timely application and fee to INS and thus are not statutorily eligible for legalization and all of its attendant benefits.

STATEMENT OF THE CASE

This class action seeks to challenge certain "advance parole" regulations that were promulgated by INS to interpret the substantive eligibility requirements of IRCA. In 1988, the court entered summary judgment in plaintiffs' favor and invalidated the advance parole regulations. Even though Congress expressly provided that aliens were not eligible for relief if they did not apply for legalization within the statutory filing period, the district court then entered a permanent injunction extending the deadline for the submission of legalization applications and ordering INS to adjudicate all of these late applications as if they had been timely filed.

The government then filed an expedited appeal with this Court. During the pendency of the appellate proceedings, certain portions of the district court's injunction were stayed. Under these stay orders, INS continued to remain obligated to accept legalization applications from any person who alleged that they were a member of the plaintiff class and to grant temporary work authorization, stays of deportation, and other relief to all approved class members who demonstrated that they were prima facie eligible for legalization. It was not, however, obligated to grant an adjustment of status to any member of the class.

After the Supreme Court vacated the judgment and remanded for further proceedings, the government moved to vacate the prior orders and to dismiss the action for lack of subject matter jurisdiction. The district court, however, refused to dismiss the case. Instead, it continued to enforce the prior orders and to require INS to accept class membership applications and to grant temporary work authorization, stays of deportation and other relief to the members of the plaintiff class.

The instant appeal is from the district court's most recent orders of November 3, 1995, and December 26, 1995, which required INS to accept class membership applications for one more month [until December 3, 1995], complete all interviews of all applicants within six months [by June 3, 1996], and continue to grant temporary work employment authorizations, stays of deportation and other relief to the members of the plaintiff class. As discussed more fully below, these orders impose considerable administrative burdens on INS because they require the agency to take extraordinary actions on behalf of aliens who clearly are not entitled to any relief under IRCA or the Supreme Court's decision in this case. Accordingly, the government now seeks appellate review of the orders in this Court.

A. Background: The Amnesty Program

The amnesty program established by IRCA was developed as a one-time opportunity for thousands of illegal aliens to obtain lawful permanent residence here. The statute sets out a number of detailed substantive requirements for an alien to qualify for

this special relief. Generally, those requirements limited relief to aliens who could establish (1) that they submitted a timely application during the 12-month period designated by the Attorney General;^{1/} (2) continuous unlawful residence in the United States since before January 1, 1982; (3) continuous physical presence in the United States since November 6, 1986 (the date IRCA was passed); and (4) admissibility to the United States as an immigrant. 8 U.S.C. § 1255a(a).

An alien could "apply" for legalization under IRCA either by submitting a completed application and the required fee to INS directly, or with a Qualified Designated Entity ("QDE"), which were organizations or persons appointed by the Attorney General to receive applications. 8 U.S.C. § 1255a(c)(1-2); 8 C.F.R. §§ 103.2(c)(1), 245a.2(e); 245a.2(f). The QDE was then obligated to forward the application to an INS legalization office within sixty (60) days unless the applicant did not consent to such forwarding. 8 U.S.C. § 1255a(c)(3); 8 C.F.R. § 245a.2(f). A QDE was not authorized, however, to make "any determination [on the merits of the application] that must be made by the Attorney General." 8 U.S.C. § 1255a(c)(3). The "filing date" of the application was defined as "[t]he date the

^{1/} In authorizing the Attorney General to designate a twelve-month application period, however, Congress explicitly provided that the filing period must be "not later than 180 days after November 6, 1986." In accordance with this provision, therefore, the Attorney General issued a regulation that provided that the application period would begin on May 5, 1987 (the last possible date permitted by Congress) and would run through May 4, 1988. See 8 C.F.R. § 245a.2(a)(1).

alien submits a completed application to a Service Legalization Office or designated entity." 8 C.F.R. § 245a.2(f).

The amnesty program also contains a carefully delimited scheme for an applicant to obtain administrative and judicial review. If INS denied an alien's application, it was required to provide written notice of the reasons for the denial and to advise the alien of the right to seek further review by an administrative appellate authority. 8 U.S.C. § 1255a(f)(3)(A); 8 C.F.R. § 103.3(a)(3); CSS, 113 S. Ct. at 2494-95. If an alien did not obtain relief from the administrative appellate authority, IRCA provided that he or she could then seek judicial review of the denial, but "only in the judicial review of a final order of deportation." 8 U.S.C. § 1255a(f)(4)(A). This review scheme, however, was subject to one important exception. If the application were denied by INS because it was late (i.e., after the statutorily-imposed deadline), there could be no review of the denial "in any court of the United States or any state or . . . in any administrative proceeding of the United States government." 8 U.S.C. § 1255a(f)(2).

B. Procedural History

1. The Initial Round Of Proceedings

This class action was originally filed on November 12, 1986, almost ten years ago. At that time, the litigation centered primarily on the meaning of 8 U.S.C. § 1255a(a)(3), which provides that legalization shall only be granted to individuals who establish "continuous physical presence" in the United States

since November 6, 1986. Under IRCA, Congress modified this strict eligibility requirement by providing that "brief, casual, and innocent absences from the United States" would not disrupt an alien's continuous physical presence in the United States. See 8 U.S.C. § 1255a(a)(3)(B). Following the enactment of IRCA, INS promulgated a regulation that defined "brief, casual, and innocent absences" only to mean departures from the United States that were "authorized by the Service" through a grant of "advance parole." 8 C.F.R. § 245a.1(g).

Almost immediately, six organizational plaintiffs and eleven individual plaintiffs filed a nationwide class action against INS to challenge the validity of the advance parole requirement and to enjoin its implementation. On November 24, 1986, the district court provisionally certified a class and issued a temporary restraining order barring INS from deporting any person who would have been prima facie eligible for legalization under IRCA except for a "brief, innocent and casual unauthorized departure." DN 19, 20.^{2/} On appeal, however, this injunction was reversed by this Court. See Catholic Social Services, Inc. v. Meese, No. 86-2407, 1987 WL 61013, *6 (9th Cir. Apr. 3, 1987).^{3/} After noting that a temporary restraining order is not "[o]rdinarily * * *

^{2/} "DN" refers to the docket number in the clerk's record. Pursuant to Ninth Circuit Rule 30-1, copies of all orders and pleadings from the clerk's record that are relevant to this appeal have been included in the Excerpts Of Record filed with the Court.

^{3/} Copies of the relevant unpublished orders of this Court are attached hereto in the Addendum to Defendants-Appellants' Brief ("Def. Add. B").

an appealable order," this Court concluded that the district court's order was an appealable injunction because it went "beyond merely preserving the status quo," but actually "impair[ed] [INS's] ability to control the borders and prevent illegal immigration." Id. The Court then went on to hold that the district court abused its discretion in issuing the injunction because INS's advance parole requirement was a "reasonable construction of the IRCA" and thus plaintiffs were not "likely to succeed on the merits." Id.^{4/}

After further proceedings, on May 3, 1988, the district court granted summary judgment to plaintiffs and enjoined INS from enforcing its advance parole regulation. See Catholic Social Services v. Meese, 685 F. Supp. 1149 (E.D. Cal. 1988) [DN 163]. Turning to remedial issues, the district court then issued a permanent injunction on June 10, 1988, that directed INS to identify all persons whose applications were denied on the basis of the challenged regulation, to "rescind such denials * * * and [to] readjudicate such applications in a manner consistent with the court's order." See June 10, 1988 Order at ¶ 2 [DN 168]. Moreover, this remedial order required INS to extend the statutory filing deadline for an additional six months until November 30, 1988, and to accept legalization applications from any person who claimed that "they knew of [INS's] unlawful

^{4/} The Court subsequently vacated its prior opinion as moot, however, when INS issued its final regulations that provided that the advance parole requirement would only be applied to persons who departed the United States after May 1, 1987. See 820 F.2d 289 (9th Cir. 1987).

regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application." Id. at ¶ 3-4.

In response to the Supreme Court's June 17, 1988 decision in INS v. Pangilinan, 486 U.S. 875 (1988), the government filed a motion to vacate that portion of the district court's order that extended the statutory filing deadline established by Congress. DN 172. At the same time, the government also moved to stay the permanent injunction of June 10, 1988, pending disposition of the motion to vacate and, in the event the motion was denied, a stay pending appeal. DN 172. On June 24, 1988, the district court entered a partial stay of its June 10, 1988, Order pending disposition of the motion to vacate. See Order of June 24, 1988 at ¶ 1 [DN 174]. In so doing, however, the district court ordered INS not to remove from the country any alien covered by the June 10 injunction during the pendency of the motion. Id. at ¶ 2. Moreover, it provided that INS may require any person seeking a stay of deportation to submit evidence "regarding their membership in the class and prima facie eligibility for legalization." Id. at ¶ 4.

On August 11, 1988, the district court entered an order, denying the government's motion to vacate the permanent injunction of June 10, 1988, and denying the motion to stay any portion of the injunction pending appeal. See Order of August

11, 1988 [DN 187].^{2/} Expressing the view that it "would negate the entire purpose of equity" to require a court sitting in equity to "conform its decisions to the strictures of the statute," the district court concluded that it had authority to extend the statutorily-imposed deadline. Id. at 3-4. Although it "recognize[d] that there is dicta in [Pangilinan] which might suggest that the court is powerless to remedy the harm caused by [INS's] violation of the statute," it nevertheless decided to "rea[d] the holdings of Pangilinan narrowly and as limited by the particular factual and statutory context in which that case arose." Id. at 3.

Furthermore, on the same date, noting the possibility that it might be incorrect in its narrow reading of Pangilinan, the court also entered an alternative injunction to become "effective immediately upon the reversal of [the court's earlier] order." Id. at 4 [DN 187]. The alternative order effectively required defendants to allow the challenged class members to remain in this country indefinitely. This order stated that defendants "will be barred from excluding deporting, or subjecting to voluntary departure any [class] members * * * and must grant such aliens work authorizations." Id.

The government then filed an expedited appeal with the United States Court of Appeals for the Ninth Circuit in which it contended that the district court did not have subject matter

^{2/} In so doing, the district court also vacated its partial stay order of June 24, 1988. Id. at 2.

jurisdiction to hear the case under 8 U.S.C. § 1255a(f) or the equitable authority to extend the statutorily-imposed filing deadline under Pangilinan.^{6/} DN 178, 191. During the pendency the appellate litigation, this Court approved a partial stay of the district court's orders of June 10, 1988 and August 11, 1988, pending appeal, which was based in part on the terms of the district court's partial stay order of June 24, 1988, and which also obligated INS to grant temporary work authorization to all class members who demonstrated that they were prima facie eligible for legalization and to release apprehended class members without bond. Catholic Social Services, Inc. v. Thornburgh, Nos. 88-15046, 88-15127 (9th Cir. Sept. 20, 1988) (see Def. Add. B).

The effect of these "stay orders" was as follows. During the pendency of the appeal, INS was obligated to grant temporary work authorization, stays of deportation, and other relief to all persons who alleged that they were prima facie eligible for legalization, but failed to submit a timely application because they had departed the United States after May 1, 1987, without advance parole and thus believed they were ineligible to apply. As a result, even though the district court only granted a six-month extension of the application period, INS became obligated

^{6/} The government's appeal was taken from the district court's order of June 10, 1988, and the two orders issued on August 11, 1988. Because the INS had ceased to enforce the challenged advance parole regulation, it did not appeal the district court's order of May 3, 1988, that invalidated the advance parole regulation itself.

(during the entire pendency of the appeal) to accept from any person who alleged that they were a member of the CSS class: a completed legalization application and any other supporting documentation that demonstrated that the applicant was prima facie eligible for legalization and did not submit a timely application because they departed the United States after May 1, 1987, without advance parole. INS was then obligated to review these "class membership" applications and to grant temporary work authorization and stays of deportation to any applicant who demonstrated that they were a member of the plaintiff class.^{2/}

On February 13, 1992, this Court issued an opinion affirming the judgment of the district court. Catholic Social Services v. Thornburgh, 956 F.2d 914 (9th Cir. 1992). In its opinion, the Court rejected the government's argument that the district court lacked subject matter jurisdiction to hear the case under 8 U.S.C. § 1255a(f) or the equitably authority to extend the application deadline under the Supreme Court's decision in Pangilinan. The government then filed a motion to stay its obligation to accept additional class membership applications pending the filing of a petition for writ of certiorari with the Supreme Court. This Court decided, however, that it would stay

^{2/} The obligations of INS during the pendency of the appellate proceedings were later set forth in a Stipulation and Order that was executed by the parties and entered by the district court on March 4, 1993. The Stipulation and Order established certain "National Standards" for INS to follow in determining who should receive temporary work authorization, stays of deportation, and other immigration benefits afforded to the members of the plaintiff class pending appeal. See Stipulation and Order of March 4, 1993 [DN 275].

implementation of its mandate only, thereby leaving in place the "existing stay orders . . . [d]uring the pendency of this stay of mandate." Catholic Social Services, Inc. v. Barr, Nos. 88-15046, 88-15127, 88-15128 (9th Cir. May 6, 1992) (see Def. Add. B).

2. The Supreme Court's Decision

On June 18, 1993, the United States Supreme Court vacated the judgment on the ground that the district court did not have subject matter jurisdiction to hear plaintiffs' attack on the advance parole regulation. Reno v. Catholic Social Services, 509 U.S. 43, 113 S. Ct. 2485 (1993) ("CSS"). In particular, the Supreme Court held that the district court did not have subject matter jurisdiction to hear the claims brought by persons who filed timely applications because 8 U.S.C. § 1255a(f) mandated that such persons only could obtain judicial review of their legalization determinations after they became subject to a final order of deportation. Id. at 2497. Moreover, the Court held that the district court did not have jurisdiction to hear claims brought by persons who failed to file timely applications because such persons had not taken all of the steps necessary to satisfy the statutory conditions for legalization and thus did not have a ripe claim. Id. at 2495-97. In particular, the Court stated:

In some cases, the promulgation of a regulation will itself affect parties concretely enough to satisfy [the ripeness] requirement [if it presents] * * * plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation. * * * The regulations challenged here fall on the other side of the line. They impose no penalties for violating any newly imposed restriction, but limit access to a benefit created by [IRCA] but not automatically bestowed on

eligible aliens. Rather, [IRCA] requires each alien desiring the benefit to take further affirmative steps, and to satisfy criteria beyond those addressed by the disputed regulations. [IRCA] delegates to the INS the task of determining on a case-by-case basis whether each applicant has met all of [IRCA's] conditions, not merely those interpreted by the regulations in question. In these circumstances, the promulgation of the challenged regulations did not itself give each * * * class member a ripe claim; a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him.

Id. at 2496-96.

The Court recognized, however, that if a plaintiff demonstrated that he had been "front-desked" (i.e., that he had tendered a completed application and fee, but had the application for legalization rejected by an INS Legalization Assistant), then the district court may have jurisdiction to order INS to accept and to process the application as timely filed. Id. at 2497-98, 2500 n. 29.^{8/} In addition, the Court noted, in dicta, that although unlikely, it could not "rule out the possibility that further facts would allow class members who were not front-desked to demonstrate that the front-desking policy was nevertheless a substantial cause of their failure not to apply, so that they can be said to have had the 'advanced parole' or 'facially valid document' regulation applied to them in a sufficiently concrete manner to satisfy ripeness concerns." Id. at 2500 n. 28.

^{8/} "Because this prefiling rejection of application occur[red] at the front desk of an INS office, it has come to be called 'front-desking.'" Id. at 2498.

The Court remanded the case, therefore, for a determination of whether any of the members of the plaintiff class could satisfy these ripeness concerns. Id. at 2500.

3. The Proceedings Upon Remand

Following the Supreme Court's decision, this Court entered an Order on July 7, 1993, remanding the case to the district court for further proceedings consistent with the Supreme Court's opinion. Catholic Social Services, Inc. v. Reno, 996 F.2d 221, 222 (9th Cir. 1993). Upon remand, the government moved to vacate all of the prior orders on the ground that none of the named plaintiffs had alleged sufficient facts to satisfy the Supreme Court's ripeness concerns. DN 312. In response, plaintiffs moved for leave to file a Seventh Amended Complaint to allege four new "procedural" claims in addition to their direct substantive challenge to the advance parole regulation itself. In particular, the Seventh Amended Complaint alleged the following claims:

- (1) That INS denied plaintiffs the right to apply for legalization by advising them that they were ineligible to apply for legalization and by refusing to provide them with application forms solely because they had departed the country without obtaining advance parole ("First Claim For Relief");
- (2) That INS denied legalization to otherwise qualified aliens solely because they had departed the United States without advance parole in violation of 8 U.S.C. § 1255a and the due process and equal protection guarantees of the Fifth Amendment ("Second Claim For Relief");
- (3) That INS disseminated inaccurate eligibility information in violation of IRCA and the Due Process Clause ("Third Claim For Relief");

- (4) That INS failed to publish certain legalization telexes and wires in the Federal Register in violation of the Freedom of Information Act and the Administrative Procedures Act ("Fourth Claim For Relief"); and
- (5) That INS revoked temporary work authorization and stays of deportation to class members in violation of the district court's stay orders and the Due Process Clause ("Fifth Claim For Relief").^{2/}

See Seventh Amended Complaint ("7th Amd. Comp."), at ¶¶ 39-48 [DN 315]. Like the prior complaint, however, the Seventh Amended Complaint again failed to allege sufficient facts to satisfy the Supreme Court's ripeness concerns. As a result, the government moved to dismiss the complaint for lack of subject matter jurisdiction. DN 317.

On March 17, 1995, the district court denied the government's motions, holding that the Supreme Court's decision did not affect the validity of the prior orders because it only vacated the "appellate ruling on the merits of these orders," not the orders themselves, and that therefore INS continued to remain obligated to accept class membership applications and to grant temporary work authorization and stays of deportation to the individual members of the plaintiff class. See Order of March 17, 1995, at 6-7 [DN 330]. The district court reached this

^{2/} Plaintiffs' Fourth and Fifth Claims are no longer apart of this lawsuit. Plaintiffs' Fifth Claim For Relief was stricken from the Seventh Amended Complaint at the request of plaintiffs' counsel at a hearing held on June 5, 1995. See November 3, 1995 Order at 11 n.5 [DN 347]. Moreover, on April 5, 1996, plaintiffs voluntarily dismissed their Fourth Claim For Relief in response to defendants' motion for summary judgment. Thus, the only remaining claims in the Seventh Amended Complaint are the First, Second, and Third Claims For Relief.

conclusion even though it acknowledged that none of the plaintiffs in the Seventh Amended Complaint had been "front-desked" by INS. Id. at 19. The court concluded, however, that it still retained subject matter jurisdiction over the case because three of the six named plaintiffs had demonstrated that INS's "rejection" policy was a substantial cause of their failure to apply under footnote 28. Id. at 19-24. In addition, the district court held that the other three named plaintiffs had ripe claims for adjudication as well because their new "procedural" claims were independently ripe for jurisdiction, despite the Supreme Court's decision. Id. at 19-21, 24-26. The district court stated, however, that it would entertain motions to modify the prior orders in order to ensure that they were in accordance with the claims presented in the Seventh Amended Complaint. Id. at 8, 29.

Pursuant to the district court's March 17th Order, therefore, the government filed a motion to modify prior orders in which it requested, inter alia, that the district court vacate all prior orders requiring INS to continue to accept class membership applications, to admit class members who seek to re-enter the United States without advance parole if their departure was "brief, casual and innocent," to release apprehended class members without bond, and to provide notice of the lawsuit and the names and addresses of plaintiff counsel. DN 339. Moreover, the government requested that the district court modify the prior orders granting temporary employment authorization to class

members by requiring class members to pay the regular fee for an initial or renewal grant of employment authorization. In its opposition papers, plaintiffs also requested that the district court modify the prior orders to require INS to produce the addresses of persons who have been denied class membership, to interview applicants in a more timely fashion, and to respond to appeals of class membership denials in a more timely fashion.

DN 341.

On November 3, 1995, the district court granted in part, and denied in part, defendants' and plaintiffs' motions for modification of prior orders. In particular, the November 3 order required that INS:

- (a) accept class membership applications for one more month;¹⁰
- (b) complete interviews of all unprocessed applicants for class membership within six months (by June 3, 1996);
- (c) continue to grant temporary work authorization without payment of the usual fee;
- (d) continue to grant stays of deportation to all approved class members;
- (e) respond to plaintiffs' appeals of class membership denials within one month; and
- (f) provide plaintiffs with all supporting documentation submitted by persons denied class membership.

¹⁰ On December 3, 1995, the INS stopped accepting class membership applications, bringing to a close what amounted to a seven-and-a-half year court-ordered extension of the application period.

See Order of November 3, 1995, at 13-17 [DN 347]. Although the November 3 order did not expressly address these issues, it also left in place the prior orders requiring INS to admit class members who seek to re-enter the United States without advance parole and requiring INS to release apprehended class members without bond.

In addition, in its November 3rd order, the district court granted plaintiffs' motion for modification of the class definition to read as follows:

All persons, otherwise eligible for legalization under IRCA, who after November 6, 1986, depart or departed the United States for brief, innocent and casual absences without advance parole, and who (i) are therefore deemed ineligible for legalization, or (ii) were informed that they were ineligible to apply for, or were ineligible for legalization, or were refused by the INS or its QDEs legalization forms, and for whom such information, or inability to obtain the required application forms, was a substantial cause of their failure to timely file or complete a written application.

Id. at 5 [DN 347].

On November 16, 1995, the government filed a Motion To Clarify Class Definition that requested that the district court clarify its Order of November 3, 1995. DN 355. The motion was styled as a "clarification" motion because it did not seek to relitigate the legal issues already decided by the district court, but merely to ensure that the new class definition would be interpreted in accordance with the district court's prior statements and rulings on the subject. On December 26, 1995, however, the district court denied the motion to clarify, stating that the motion would be treated as a motion for reconsideration

and that the government had failed to present any new facts or law that would justify an alteration of the prior order. See Order of December 26, 1995, at 4 [DN 367]. Moreover, the district court held that the government's substantive arguments concerning the ability of class members to obtain relief under the Supreme Court's decision were not ripe for adjudication because they would be decided upon the filing of dispositive motions. Id.

On February 23, 1996, the government filed a Notice of Appeal from the district court's orders of November 3, 1995, and December 26, 1995. DN 371. Shortly thereafter, the government then filed in the district court a motion to stay the two orders pending appeal. DN 374. On February 28, 1996, however, the district court orally denied the government's stay motion during a telephonic hearing. A written order memorializing this decision was issued the next day. DN 373.

SUMMARY OF ARGUMENT

The district court's orders of November 3, 1995, and December 26, 1995, must be reversed because they are based upon and seek to continue prior orders that are no longer in effect and have been rendered null and void by the Supreme Court's decision for lack of subject matter jurisdiction. Indeed, the court's prior orders were entered only because plaintiffs had prevailed on their claim that the advance parole regulation was invalid. This Court has recognized, however, that district courts lack subject matter jurisdiction to invalidate INS's

interpretation of IRCA's substantive eligibility requirements. Naranjo-Aguilera v. INS, 30 F.3d 1106, 1113 (9th Cir. 1994). Thus, upon remand, the district court should have vacated the prior orders and terminated all obligations imposed on INS.

In any event, it is clear that the district court does not have subject matter jurisdiction or the equitable authority to grant any relief to the members of the plaintiff class. Despite the filing of a Seventh Amended Complaint, plaintiffs still have been unable to allege a ripe claim for adjudication. Moreover, they have been unable to demonstrate that they would be eligible for any relief under IRCA even if they ultimately prevail on their claims. After all, the members of the plaintiff class are all persons who failed to comply with IRCA's substantive eligibility requirement of a timely application. Thus, under Supreme Court precedent, the district court does not have the legal or equitable authority to compel INS to disregard IRCA's eligibility requirement of a timely application and to grant relief to the members of the plaintiff class. Accordingly, the district court's orders of November 3, 1995, and December 26, 1995, must be overturned and the Seventh Amended Complaint dismissed.

ARGUMENT

- I. THE DISTRICT COURT'S ORDERS OF NOVEMBER 3, 1995, AND DECEMBER 26, 1995, SHOULD BE REVERSED BECAUSE THEY ARE BASED UPON AND SEEK TO CONTINUE PRIOR ORDERS WHICH ARE NO LONGER IN EFFECT AND HAVE BEEN RENDERED NULL AND VOID BY THE SUPREME COURT'S DECISION FOR LACK OF SUBJECT MATTER JURISDICTION.

The district court's orders of November 3, 1995, and December 26, 1995, arise solely from the district court's permanent injunction of June 10, 1988, and the subsequent orders that partially stayed this injunction pending appeal. The partial stay orders, however, have been dissolved by operation of their own terms. More fundamentally, the district court's injunction of June 10, 1988, has been rendered null and void by the Supreme Court's decision for lack of subject matter jurisdiction and thus that order, together with the subsequent stay orders arising from it, are no longer valid and enforceable. See United States, Lyon et al. v. Huckabee, 16 Wall, 83 U.S. 414 (1872) (where there is no subject matter jurisdiction in the court below, the decrees it enters must be reversed and the claims of the plaintiffs dismissed); Office of Personnel Management v. Government Employees, 473 U.S. 1301, 1305-06 (1985) (Burger, C.J., in chambers) (because Court of Appeals lacked jurisdiction over the appeal from district court order denying TRO, motions panel "necessarily without authority to grant" interim relief); United States v. 87 Skyline Terrace, 26 F.3d 923, 929 (9th Cir. 1994) (order void where court lacked subject matter jurisdiction over underlying action); Watts v. Pinckney, 752 F.2d 406, 409 (9th Cir. 1985) (judgment void where defendant

not subject to suit under statute); Amusement & Music Operators v. Copyright Royalty, 636 F.2d 531, 533 (D.C. Cir. 1980), cert. denied, 450 U.S. 912 (1981) (where statute provided for review in the court of appeals, not in the district court, district court's decision on the merits upholding regulation was vacated and case remanded to district court with instruction to dismiss complaint).

The district court has improperly used the partial stay orders entered in 1988 pending appeal to continue its program of "interim" relief for the members of the plaintiff class. The partial stay orders, however, were never meant to impose permanent obligations on INS. Rather, they only were meant to remain in effect pending appeal. In fact, in its Order of May 6, 1992, this Court specifically stated that "the existing stay orders heretofore issued relating to the alien class remain in full force and effect" only "d]uring the pendency of this stay of mandate." Catholic Social Services v. Barr, Nos. 88-15046, 88-15127, 88-15128 (9th Cir. May 6, 1992) (emphasis added) (see Def. Add. B). Thus, after the Supreme Court vacated the judgment and this Court issued its mandate remanding the case for further proceedings, see Catholic Social Services v. Reno, 996 F.2d at 222, the "existing stay orders" were dissolved.

The district court's rejoinder is simply unpersuasive. In its Order of March 17, 1995, the district court reasoned that the Supreme Court's decision did not vacate all of the prior orders because the decision only vacated the "appellate ruling on the

merits of these orders," not the orders themselves. Order of March 17, 1995, at 6. This holding, however, misinterprets the nature of the Supreme Court's decision. The permanent injunction of June 10, 1988, and the subsequent stay orders, were issued only because the district court had granted summary judgment in plaintiffs' favor on their claim that the advance parole regulation was substantively invalid.

In its decision, however, the Supreme Court held that the district court lacked subject matter jurisdiction to overturn INS's eligibility rules and regulations, and hence the jurisdiction to issue its remedial order of June 10, 1988, and its subsequent stay orders. In short, it lacked jurisdiction over plaintiffs' complaint.^{11/} Thus, the district court's order

^{11/} Indeed, plaintiffs have never contended that their Sixth Amended Complaint (or any of their prior complaints) alleged sufficient facts to satisfy the Supreme Court's ripeness concerns. Quite the contrary, upon remand and upon the filing of the government's motion to vacate prior orders, plaintiffs promptly filed a Seventh Amended Complaint in order to cure the jurisdictional deficiencies in the prior complaint. Since the district court lacked subject matter jurisdiction over the original complaint, however, it should not have permitted the plaintiffs to file an amended complaint. As the Supreme Court explained in Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989), a party ordinarily cannot amend its complaint in order to manufacture subject matter jurisdiction that did not exist at the time of the original complaint. Id. at 830 (although a party may "correct defective statements about jurisdiction that actually exists," it cannot correct defects in the jurisdiction itself); see also Keene Corp. v. United States, 113 S. Ct. 2035, 2040 (1993) (jurisdiction must be judged based on the facts that exist at the time of the original complaint); Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group, 823 F.2d 302, 304 (9th Cir. 1987) (rejecting attempt "to create jurisdiction where none existed"); Summit Office Park, Inc. v. U.S. Steel Corp., 639 F.2d 1278, 1284 (5th Cir. 1981) ("A pleading which abandons the original plaintiff and class and
(continued...)

of June 10, 1988, and the subsequent stay orders, were not legally valid and enforceable orders.

As this Court held in Naranjo-Aguilera v. INS, 30 F.3d 1106 (9th Cir. 1994), the central teaching of CSS is that district courts lack subject matter jurisdiction over any claim that seeks to challenge or to invalidate INS's interpretation of IRCA's substantive eligibility requirements. Id. at 1113 (holding that CSS forecloses "'efforts to gain federal district court review of INS interpretations of IRCA'") (citing Ayuda, Inc. v. Reno, 7 F.3d 246, 249 (D.C. Cir. 1993), reh'g denied, 14 F.3d 61 (1994), cert. denied, 115 S. Ct. 70 (1994) ("the Supreme Court [in CSS] conclusively foreclosed all efforts to gain federal district court review of INS interpretations of IRCA")); see also Proyecto San Pablo v. INS, Nos. 91-16620, 92-15153, and 92-15159, 1995 WL 688845 (9th Cir. Nov. 20, 1995) ("If [district court's] order was issued solely to cause the INS to change its interpretation of 8 U.S.C. § 1255a(g)(2)(B)(i), then the order is invalid" for lack of subject matter jurisdiction) (copy attached hereto as Def. Add. C).^{12/}

^{11/} (...continued)
asserts new claims upon which the original plaintiff and class could not recover, has the characteristics of a new lawsuit rather than an amended complaint," and should not be permitted). Here, all of the alleged facts introduced by plaintiffs in the Seventh Amended Complaint to create jurisdiction occurred after November 12, 1986, when the original complaint was filed.

^{12/} Ninth Circuit Rule 36-3 bars citation of an unpublished Ninth Circuit order, except for purposes of law of the case, res judicata, and collateral estoppel. Here, the government does not cite Proyecto as a binding Ninth Circuit precedent, but merely to
(continued...)

In CSS, the Supreme Court held that an alien's challenge to the validity of the advance parole regulation ordinarily would not ripen unless he or she submitted a completed legalization application and fee to INS within the statutory filing period. In such a situation, however, the Court held that the district court still would not have subject matter jurisdiction over the claim because IRCA's "exclusive review provisions" [8 U.S.C. § 1255a(f)] expressly provided that an alien only could seek judicial review in the Court of Appeals upon the filing of a petition for review of a subsequent deportation order. See 113 S. Ct. at 2497. In this regard, the Court explained that "[t]he ripeness doctrine and the Reform Act's jurisdictional provisions would thus dovetail neatly; in the ordinary case, the courts would not hear a challenge to regulations specifying limits to eligibility before those regulations were actually applied to an individual, whose challenge to the denial of an individual application would proceed within the Reform Act's limited scheme." Id. at 2497. Thus, even if the Supreme Court's decision did not explicitly state that the prior orders were vacated, it effectively nullified these orders by making clear that the district court was without subject matter jurisdiction in 1988 to invalidate the advance parole regulation and consequently to enter any relief in plaintiffs' favor.

^{12/}(...continued)
bring to the Court's attention how it has applied its prior holding in Naranjo-Aguilera in other legalization cases.

This same reasoning applies, even if plaintiffs had been able to present a "front-desked" alien (which they ultimately were unable to do). As the Supreme Court has explained, a "front-desked" alien has a ripe claim for adjudication only because he or she submitted a completed application and fee to INS during the statutory filing period and thus took all of the required steps to comply with IRCA's substantive eligibility requirement of a timely application. Id. at 2497-2500 & n.29. The remedy for a "front-desked" alien, however, is not an order invalidating the challenged regulation. Rather, it would be an order requiring INS to accept and to process the application as it would any other application that had been timely filed. See CSS, 113 S. Ct. 2500 n.29. Then, if the application were denied by INS based on the advance parole regulation, the "front-desked" alien would be able to challenge the validity of the regulation in the Court of Appeals under 8 U.S.C. § 1255a(f). Consequently, even assuming that upon remand plaintiffs had been able to find a "front-desked" alien or any other alien with a ripe claim, which they were not, the district court still would have lacked subject matter jurisdiction to invalidate the advance parole regulation. Thus, all of the prior orders, which were entered only because plaintiffs had prevailed on such a claim, must be vacated for lack of subject matter jurisdiction.

II. PLAINTIFFS ARE NOT ENTITLED TO INTERIM RELIEF BECAUSE THEY HAVE NOT AND CANNOT DEMONSTRATE THAT THEY SATISFY THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

In light of the fact that the district court's permanent injunction of June 10, 1988, has been rendered null and void for lack of subject matter jurisdiction, and the subsequent stay orders that imposed obligations on INS pending appeal are no longer in effect, the district court, upon remand, should have vacated all prior orders and terminated all of the obligations imposed on INS pending appeal. Indeed, since plaintiffs were not entitled to any relief based on their original claim challenging the validity of the advance parole regulation, the district court should not have ordered INS to grant temporary work authorization, stays of deportation, or other relief unless they had moved for a preliminary injunction under Fed. R. Civ. P. 65(a) and demonstrated that they were likely to prevail on their new claims set forth in the Seventh Amended Complaint.

Plaintiffs, however, have not moved for such an injunction or have they attempted to make any showing that they are likely to prevail on their new claims. Thus, the district court did not have the authority to grant any interim relief to the members of the plaintiff class under Fed. R. Civ. P. 65(a). Stanley v. University of Southern California, 13 F.3d 1313, 1319 (9th Cir. 1994) ("An order is reversible for legal error if the [district] court did not apply the correct preliminary injunction standard, or if the court misapprehended the law with respect to the underlying issues in litigation"); Caribbean Marine Services Co.,

Inc. v. Baldridge, 844 F.2d 668, 673-678 (9th Cir. 1988)

(reversing preliminary injunction because district court did not apply the proper legal standard in determining whether to issue the injunction).

Even assuming, however, that plaintiffs had moved for a preliminary injunction, they would not have prevailed. Under Ninth Circuit law, the district court may not enter a preliminary injunction unless plaintiffs show "either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits." Senate of the State of California v. Mosbacher, 968 F.2d 974, 977 (9th Cir. 1992). "If the law is entirely against the position of the requesting party," however, "neither of these alternative tests will permit the issuance of a preliminary injunction." Id. at 978.

Here, plaintiffs are not entitled to interim relief because they cannot show that the district court has subject matter jurisdiction to hear their claims or to provide a remedy if they prevail. Moreover, they cannot show that the balance of hardships tip sharply in their favor. Consequently, even if they had moved for a preliminary injunction, they would not be entitled to any interim relief under Fed. R. Civ. P. 65(a). See, e.g., One World One Family Now v. City and County of Honolulu, 76 F.3d 1009, 1016 (9th Cir. 1996) (reversing preliminary injunction

where plaintiffs failed to demonstrate any "likelihood of success on the merits" of their claims); Committee of Central American Refugees v. INS, 795 F.2d 1434, 1441-42 (9th Cir. 1986) (affirming denial of preliminary injunction because it concluded that plaintiffs had failed to demonstrate "a fair chance of success on the merits" or that "the balance of hardships" tipped sharply in their favor").

Furthermore, because plaintiffs cannot demonstrate that the district court has subject matter jurisdiction over the Seventh Amended Complaint or the authority to grant relief to plaintiffs if they prevail, their action should be dismissed altogether. See Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940); Barrett v. Smith, 530 F.2d 829, 830 (9th Cir. 1975), cert. denied, 425 U.S. 977 (1976); Aerojet-General Corp. v. American Arbitration Corp., 478 F.2d 248, 252-53 (9th Cir. 1973) (recognizing that appellate courts may properly consider whether case should have been dismissed in reviewing an interlocutory order granting or denying preliminary injunction). Accordingly, in overturning the district court's November 3 and December 26 Orders, this Court should remand the case to the district court with instructions to dismiss this long-standing class action once and for all.

A. Plaintiffs Cannot Demonstrate That The District Court Has Subject Matter Jurisdiction Over The Claims In The Seventh Amended Complaint.

- 1. The District Court Lacks Jurisdiction Over Plaintiffs' Claims Because They All Seek To Challenge The Validity Of The Advance Parole Regulation.**

As previously discussed, this Court has held that the central teaching of CSS is that the district courts lack subject matter jurisdiction to hear any claim that seeks to challenge or to invalidate INS's interpretation of IRCA's substantive eligibility requirements. See Naranjo-Aguilera, 30 F.3d at 1113 (holding that CSS forecloses "'efforts to gain federal district court review of INS interpretations of IRCA'"). For this reason, the Second Claim For Relief in the Seventh Amended Complaint, which repeats plaintiffs' prior allegation that the advance parole regulation is substantively invalid, should have been dismissed by the district court for lack of jurisdiction. Moreover, for this same reason, the other two remaining claims in the Seventh Amended Complaint also should have been dismissed for lack of jurisdiction.

Although they ostensibly allege procedural violations, the new claims in the Seventh Amended Complaint are all based on the allegation that INS's advance parole regulation was unlawful and should be invalidated.^{13/} Plaintiffs' Third Claim For Relief,

^{13/} Plaintiffs' attempt to mask their new claims as procedural violations is ineffectual. This Court "must look[] 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., (continued...)

for example, alleges that INS wrongfully discouraged potential applicants from applying for legalization because they disseminated inaccurate eligibility information. 7th Amd. Comp. ¶ 44 [DN 315]. As the Second Circuit held in another legalization case, however, such a claim is not ripe for adjudication because it "turns entirely upon a determination of the regulation's validity." See, e.g., Perales v. Reno, 48 F.3d 1305, 1312 (2d Cir. 1995), cert. denied, 1996 WL 566636 (Jan. 8, 1996) (holding that plaintiffs' dissemination claim was not ripe for adjudication because it "turns upon a determination of a regulation's validity").^{13/} After all, if the advance parole regulation promulgated and disseminated by INS were not unlawful, then INS would not have disseminated "inaccurate" eligibility information as alleged.

Similarly, plaintiffs' First Claim For Relief also requires a judicial determination of the substantive validity of INS's advance parole regulation. Plaintiffs' first claim alleges that INS wrongfully advised prospective applicants who departed the country without advance parole that they were ineligible to apply

^{13/}(...continued)
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").

^{14/} The plaintiffs' petition for writ of certiorari in Perales was based entirely on the contention that the Supreme Court should reverse the Second Circuit's holding that the plaintiffs' dissemination claim was not ripe for adjudication or, in the alternative, that it should revisit its holding in CSS.

for legalization and refused to provide them with application forms. 7th Amd. Comp. ¶ 40 [DN 315]. Such an allegation does not state a valid claim for relief, however, unless the substantive eligibility information provided was inaccurate and erroneous. In other words, if the advance parole regulation was not unlawful, then it would not have been unlawful for INS to advise the potential applicant that they were not eligible to apply for legalization on account of the fact that they departed the United States without advance parole. Plaintiffs' First Claim For Relief, therefore, only states a valid claim because it alleges that INS applied an unlawful regulation in determining whether prospective applicants were eligible to apply and should be provided with an application form.

Finally, the plaintiffs' APA and FOIA claims, which were voluntary dismissed by plaintiffs after the filing of the appeal, did not create subject matter jurisdiction in the district court because they also sought the invalidation of INS's substantive rules and regulations. Plaintiffs' fourth claim alleges that INS had a duty under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 553, to publish the contents of certain "legalization telexes" and "wires" that were sent by INS to its field offices to advise them about INS's interpretation of IRCA's substantive eligibility requirements. 7th Amd. Comp. ¶ 46 [DN 315]. Even if INS violated their publication duties under FOIA and APA as alleged, such an allegation only would entitle plaintiffs to a

judicial declaration that the instructions set forth in the legalization telexes and wires are invalid and unenforceable. Id. ("failure to comply with [FOIA and APA] renders the instructions inapplicable to plaintiffs and the class") (emphasis added).^{15/} Thus, because plaintiffs' Fourth Claim For Relief only seeks an invalidation of INS's advance parole regulation, the district court was without jurisdiction to hear the claim. See Naranjo-Aguilera, 30 F.3d at 1109, 1113 (holding that district court did not have jurisdiction to hear plaintiffs' claims, which included an APA claim, because plaintiffs were "challenging INS regulations or policies interpreting IRCA's substantive eligibility criteria"); Proyecto San Pablo, 1995 WL 688845, at *4 ("If [district court's] order was issued solely to cause the INS to change its interpretation of 8 U.S.C. § 1255a(g)(2)(B)(i), then the order is invalid") (see Def. Add. C).

^{15/} See also Alcaraz v. Block, 746 F.2d 593, 609-10 (9th Cir. 1984) (holding that Section (a)(1)(d) of FOIA, 5 U.S.C. § 552(a)(1)(D) "protects only against the enforcement of unpublished regulations" and that "the only provision for judicial relief in FOIA is section 552(a)(4)(B), giving 'federal district courts jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant'"); State Farm Bureau v. Marshall, 625 F.2d 296 (9th Cir. 1980) (appropriate remedy for APA violation is an invalidation of the challenged rules or an order directing agency to initiate proper rule-making procedures before giving effect to the rules).

**2. Plaintiffs' Claims Are Not Ripe
For Adjudication.**

Besides lacking jurisdiction over the procedural claims because they challenge INS's interpretation of IRCA's eligibility requirements, the district also lacks subject matter jurisdiction over the procedural claims for another reason: plaintiffs cannot show that these alleged procedural violations affected them concretely enough to satisfy the Supreme Court's ripeness concerns. In CSS, the Supreme Court held that challenges to administrative actions are not ripe for adjudication "unless the effects of the administrative action challenged have been 'felt in a concrete way by the challenging parties.'" CSS, 113 S. Ct. at 2495 (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967)).

While in some cases the promulgation of a regulation by itself will affect parties concretely enough to satisfy the requirement, the Supreme Court determined that "the promulgation of [regulations under IRCA] did not itself give each CSS * * * class member[] a ripe claim" because IRCA "requires each alien desiring the benefit to take further affirmative steps" to comply with the statute's eligibility requirement of a timely application. Id. at 2495-96. Thus, the Supreme Court reasoned that "a class member's claim would ripen only once he took the affirmative steps that he could take [to satisfy the statute's requirements of a timely application] before the INS blocked his path [and actually prevented him from obtaining legalization] by applying the regulation to him." Id.

Here, none of the plaintiffs have alleged that INS actually prevented them from submitting a completed application and fee during the application period; rather they have alleged merely that INS discouraged them from applying by wrongfully advising them that they were ineligible for legalization on account of the advance parole regulation. As the Supreme Court explained in CSS, however, it is the alien's obligation to take all of the affirmative steps possible to comply with the statute's eligibility requirement of a timely application. Thus, unless plaintiffs can demonstrate that they took all of the affirmative steps possible, but were actually prevented by INS from submitting a completed application and fee within the statutory deadlines, they cannot demonstrate that INS's alleged procedural violations made a concrete difference as to whether they would have received the benefit of legalization because they cannot show that, but for the alleged procedural actions, they would have complied with the statute's eligibility requirement of a timely application. See CSS, 113 S. Ct. at 2497 n.20 (noting that aliens who did not file a timely application do not have a ripe claim because one does not know whether they had the "willingness" to comply with the statute's eligibility requirements unless they can prove that "the Government prevented them from filing a timely application") (emphasis added); Proyecto San Pablo, 1995 WL 688845, *3 ("In Catholic Social Services, the Court noted that there may be some circumstances where INS procedures prevent an alien from seeking benefits under

the Reform Act and, at the same time, exclude him from even the limited administrative and judicial review provisions of the Reform Act") (emphasis added) (see Def. Add. C).

In its March 17, 1995, Order, the district court reasoned that plaintiffs' new claims were ripe for adjudication because they were "procedural" claims similar to the claims brought in McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991). In McNary, however, all of the plaintiffs actually applied for the benefit in question; they were merely challenging the procedures used in adjudicating completed applications. Thus, it was clear that the aliens had been concretely affected by INS's practices because the 17 unsuccessful applicants had taken all of the affirmative steps possible to satisfy the conditions for receiving the benefit before being blocked by INS's allegedly unlawful processing procedures. See CSS, 113 S. Ct. at 2497, 2499 (discussing McNary).¹⁶

Here, none of the plaintiffs have alleged that they took all of the affirmative steps possible to comply with the statute's timely application requirement. Three of the six plaintiffs have alleged only they did not apply on time because "they went to INS

¹⁶ Indeed, since a timely application is one of the four congressionally-mandated substantive eligibility requirements for legalization, the plaintiffs' request for relief -- that the court order INS to treat their application as timely filed -- "would have the practical effect of . . . deciding their claims for benefits on the merits," rather than merely reopening their files for reconsideration in light of new procedural protections" as in McNary. See Ayuda, Inc. v. Thornburgh, 948 F.2d 742, 758 (D.C. Cir. 1991), vacated and remanded sub nom., Ayuda, Inc. v. Reno, 113 S. Ct. 3026 (1993), reaffirmed on remand, 7 F.3d 246 (D.C. Cir. 1993) (citing McNary, 111 S. Ct. at 897).

offices to apply for amnesty and were told that they were not eligible," and the other three alleged only that they did not apply because they were "told . . . by certain friends, family members, and co-workers" that they were ineligible to apply. See March 17, 1995, Order at 18-19 (discussing plaintiffs' allegations) [DN 330]. As the Supreme Court explained in CSS, however, such allegations are insufficient to demonstrate that an alien took all of the required steps possible to file a timely application. See CSS, 113 S. Ct. at 2500 n. 27 (noting that an individual who alleged that she "came in seeking to apply for legalization" and "was told that she did not qualify for legalization and could not file" may not have a ripe claim because it was not clear "whether she had a completed application ready for filing and payment in hand"); id. at 2496 n. 19 (noting that an individual who alleged that "'she would have applied but for the invalid regulations'" or who contends that she did not apply because "she may have heard of the invalid regulations through a QDE, a private attorney, or 'word of mouth'" does not have a ripe claim) (quoting id. at 2510, 2507) (Stevens, J., dissenting)).

Even if INS had refused to provide an application forms to a person who came to a legalization office to apply, as some of the plaintiffs have alleged, this does not mean that the individual was prevented from applying. After all, the applicant could have taken other affirmative steps, such as obtaining an application from another INS office, a QDE, or some other source, to comply

with the statute's eligibility requirements. Thus, because they failed to take such action, we cannot know whether they truly had the willingness to take all of the steps necessary to complete the application and submit it to INS with the required fee before the expiration of the deadline. See CSS, 113 S. Ct. 2497 n.20 ("[n]either the fact that the application period is now over, nor that the plaintiffs would now like to have the period to be extended, tells us anything about the willingness of the class members to take the required steps, or about their satisfaction of the Act's other conditions").^{17/}

Finally, plaintiffs have not alleged ripe claims for adjudication because they cannot demonstrate that the front-desking policy was a substantial cause of their failure to apply. Id. at 2500 n. 28. As the Supreme Court explained in CSS, the front-desking policy was an explicit policy set forth in the INS Legalization Manual that authorized INS personnel to review completed applications that were submitted and to reject the application at the front-desk if the applicant was statutorily ineligible. Id. at 2497-98. Here, plaintiffs have not made any attempt to establish a causal connection between this policy and the allegation that certain INS officers refused to provide them with application forms or told that they were ineligible to apply. Consequently, their allegations fall short of the

^{17/} Indeed, even if the named plaintiffs had been provided with an application, they would still be in the same position as any other potential applicant who failed, for whatever reason, to file a timely application and consequently did not have a ripe claim for adjudication under the Supreme Court's decision.

exception set forth by the Supreme Court (in dictum) in footnote 28, i.e., that plaintiffs' claims may be ripe if they demonstrated that "the front-desking policy . . . was a substantial cause of their failure not to apply." Id. at 2500 n. 28; see also Villarina v. INS, 18 F.3d 765, 767 (9th Cir. 1994) (describing footnote 28 as "dictum," but finding it unnecessary to decide whether such allegations "produce the requisite ripeness" because the plaintiff "does not allege that, any front-desking policy was a 'substantial cause' of his failure to apply").

B. Plaintiffs Cannot Demonstrate That The District Court Has The Authority To Grant Any Relief To Aliens Who Did Not Satisfy The Substantive Eligibility Requirement Of A Timely Application.

1. The District Court Lacks The Equitable Authority To Order INS To Grant Relief To Members Of The Plaintiff Class.

IRCA was designed by Congress to be a short-term program that would terminate after one year. Thus, in enacting IRCA, Congress specifically provided that the submission of a timely application was a substantive eligibility requirement for legalization. See 8 U.S.C § 1255a(a)(1) ("The Attorney General shall adjust the status of an alien * * * if the alien meets the following requirements: (1) [t]imely application * * * ") (emphasis added). In fact, in establishing this substantive eligibility requirement, Congress made clear that the one-year statutory filing period must begin "not later than 180 days after the enactment of the statute." 8 U.S.C. § 1255a(a)(1)(A). Consequently, while it delegated the determination of when the

application period would begin to the Attorney General, Congress expressly required that the 12-month application period must begin no later than May 5, 1987, and hence end no later than May 4, 1988. 8 U.S.C. § 1255a(a)(1).

Here, all of the members of the plaintiff class are persons who failed to submit a timely application for legalization. Thus, if they were to submit a legalization application, INS would have the statutory authority to deny them as untimely and there would be no administrative or judicial review of this determination. See 8 U.S.C. § 1255a(f)(2) (barring any "court of the United States" from reviewing "denials of adjustment of status * * * based on a late filing of an application for such adjustment"); see also CSS, 113 S. Ct. at 2497 n.20 (noting that § 1255a(f)(2) "flatly bars" all "court[s] of the United States" from reviewing "denial[s] of adjustment of status * * * based upon a late filing of an application for such adjustment").

In order to compel INS to grant relief to persons who failed to file a completed application for legalization within the statutory filing period, the district court would have to estop INS from enforcing the substantive eligibility requirement of a timely application. The Supreme Court, however, has repeatedly made it clear that it will not even consider the possibility that a benefit-conferring agency, such as INS, may be estopped from enforcing a statutory requirement for a benefit unless there is evidence of "affirmative misconduct" on the part of the agency. See Office of Personnel Management v. Richmond, 496 U.S. 414,

421-422 (1990) ("OPM") ; INS v. Miranda, 459 U.S. 14, 19 (1982) (per curiam); Schweiker v. Hansen, 450 U.S. 785, 788 (1981) (per curiam); INS v. Hibi, 414 U.S. 5, 8 (1973) (per curiam); Montana v. Kennedy, 366 U.S. 313, 314-15 (1961); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385-86 (1947).^{18/}

Although the Supreme Court has yet to find a situation where a government agency engaged in "affirmative misconduct," it has consistently held that the government cannot be compelled to disregard a statutory requirement even where, as here, plaintiffs allege that they were unable to satisfy the statutory prerequisite only because they were erroneously advised by a government agent that they were ineligible for relief or otherwise prevented from applying as a result of the government's actions. See OPM, 496 U.S. at 416-18 (government employee was ineligible for disability annuity because he was erroneously advised that he could earn more income than permitted); Hanson, 450 U.S. at 786 (woman was ineligible for social security benefits because she was erroneously advised by a government official that she was ineligible and should not submit a timely written application); Hibi, 414 U.S. at 8 (Filipino war veteran failed to file a timely application for naturalization because government never stationed any officials or publicized the naturalization program in the Philippines Islands); Montana, 366

^{18/} Even then, the Court has yet to hold that estoppel would be warranted. See OPM, 496 U.S. at 421-24 (discussing that the Supreme Court has not decided whether the existence of affirmative misconduct would justify estoppel against the government).

U.S. at 313 (consular official's erroneous advice to petitioner's mother that she could not return to the United States while pregnant prevented petitioner from having been born in the United States and thus deprived him of United States citizenship); Merrill, 332 U.S. at 385 (farmer was ineligible for crop insurance because he relied on the erroneous advice of government official).

This estoppel rule applies, no matter which legal or equitable theory a litigant may rely on to justify an order compelling INS to grant legalization (and its attendant benefits) to untimely applicants. As the Court stated in INS v. Pangilinan, 486 U.S. 875 (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.

* * * Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [a statute's] limitations.

Id. at 885 (emphasis added).

In this regard, the government acknowledges that this Court held in its 1992 decision that, despite Pangilinan, the district court has the equitable authority to extend the application deadline and to require INS to grant benefits to aliens who are eligible for legalization (but for the fact that they failed to file an application during the statutory filing period). See Catholic Social Services, Inc. v. Thornburgh, 956 F.2d 914, 921-23 (9th Cir. 1992), vacated on jurisdictional grounds, 113 S. Ct.

2485 (1993). Because this decision was vacated by the Supreme Court on jurisdictional grounds, however, it has no binding effect here. Alquisalas v. INS, 61 F.3d 722, 725 (9th Cir. 1995).

Indeed, in her concurring opinion in CSS, Justice O'Connor flatly rejected the argument that the district courts have the equitable authority to extend the application period and to compel INS to grant legalization benefits to untimely applicants. CSS, 113 S. Ct. at 2504-05 (O'Connor, J., concurring) ("A court is no more authorized to overlook the valid [requirement] that applications be [submitted] than it is to overlook any other valid requirement for the receipt of benefits'") (citing Schweiker, 450 U.S. at 790) (alteration in original).^{19/} In accordance with Pangilinan and the other equitable estoppel cases that have been decided by the Supreme Court, Justice O'Connor reasoned that, even assuming that the government can ever be estopped, the district court would first have to find "'affirmative misconduct' by the INS." CSS, 113 S. Ct. at 2505 (O'Connor, J., concurring). In this case, however, Justice

^{19/} In this regard, this Court failed to appreciate in its prior decision that the court's remedial orders were not merely ordering INS to adjudicate late applications. They were estopping INS from enforcing the substantive eligibility requirement of a timely application by requiring INS to grant legalization to applicants who were eligible for legalization, but for the fact that they failed to file a timely application during the statutory filing period. Thus, under Pangilinan and the other equitable estoppel cases discussed above, the plaintiffs must establish the existence of "affirmative misconduct" before the courts can even consider the possibility of issuing such an order against INS.

O'Connor found that plaintiffs had failed to meet this heavy burden:

I cannot agree that a benefit-conferring agency commits 'affirmative misconduct,' sufficient to justify an equitable extension of the statutory time period for application, simply by promulgating a regulation that incorrectly specifies the eligibility criteria for the benefit. When Congress passes a benefits statute that includes a time period, it has two goals. It intends both that eligible claimants receive the benefit and that they promptly assert their claims. The broad definition of 'misconduct' that respondents propose would give the first goal absolute priority over the second, but I would not presume that Congress intends such prioritization. Rather, absent evidence to the contrary, Congress presumably intends that the two goals be harmonized as best as possible, by requiring would-be beneficiaries to make a timely application and concurrently to contest the invalid regulation. * * * The broad equitable remedy entered by the District Courts in these cases is contrary to Congress's presumptive intent in the Reform Act, and thus is error. 'Courts of equity can no more disregard statutory * * * requirements and provisions than an courts of law.'

Id. (citing Pangilinan, 486 U.S. at 883).

While the majority opinion in CSS did not explicitly reach the question of remedy in its disposition of the case, it stated on several occasions that the filing of a completed application and fee within the 12-month application period designated by the Attorney General was a substantive eligibility requirement for legalization. CSS, 113 S. Ct. at 2496-2500. In fact, in discussing Justice O'Connor's concurring opinion, the majority expressly stated that 8 U.S.C. § 1255a(f)(2) "flatly bars" any judicial review of denials "based upon the late filing of an application" and "was intended to foreclose" any litigation, such as the litigation ongoing here, over the reasons why an otherwise eligible alien failed to file a timely application. See CSS, 113

S. Ct. at 2497 n.20; see also CSS, 113 S. Ct. at 2504 (noting that the majority opinion "suggests that respondents' claim to extend the application period may well be 'flatly' barred by 8 U.S.C. § 1255a(f)(2)"); see also Ayuda, 948 F.2d at 758-59 (holding that 8 U.S.C. § 1255a(f)(2) was intended to bar the courts from extending the application period).

Furthermore, in footnote 29, the majority in CSS again acknowledged the validity of Justice O'Connor's position by explaining that the district court had the authority to grant relief to "front-desked" aliens only because such persons actually satisfied the substantive requirement of a timely application. Id. at 2500 n.29 (holding that the district court had the equitable authority to order INS to readjudicate the application of a "front-desked" alien since it was tendered to INS, along with the required fee, during the statutory application period). Accordingly, the Court should reject its prior decision and hold, as Justice O'Connor did in this case, that the district court does not have the authority to grant relief, including any interim relief, to persons who failed to file a timely application, as all of the plaintiffs failed to do.

2. The District Court Lacks The Jurisdiction Under 8 U.S.C. § 1255a(f)(2) To Hear Any Claims Regarding The Reason Why An Alien Failed To Submit A Timely Application.

As previously discussed, 8 U.S.C. § 1255a(f)(2) provides that where INS denies an application for legalization as untimely, there can be no judicial review of the agency's action. Under this provision, therefore, if plaintiffs had submitted

their application to INS, and contended, as they do here, that they failed to submit a timely application because they were wrongfully advised by INS that they were ineligible for legalization, INS still would have the statutory authority to deny the application as untimely and there could be no judicial review of this determination.

Rather than file a late application with INS and run the risk that it would be denied and that they would be unable to seek judicial review of this denial, plaintiffs have instead sought to circumvent 8 U.S.C. § 1255a(f)(2) by not submitting an application and contending in district court that they should not be denied legalization because they would have been entitled to this benefit, but for the wrongful actions of INS. The Supreme Court held in CSS, however, that an alien should not be permitted to circumvent the jurisdictional bar of 8 U.S.C. § 1255a(f)(2) simply "by suing without filing an application." Id., 113 S. Ct. at 2497, n. 20 (reading 8 U.S.C. § 1255a(f)(2) as "intended to foreclose" a plaintiff from "entangl[ing] the INS in litigation over application timing claims simply by suing without filing an application"). Thus, this Court should interpret 8 U.S.C. § 1255a(f)(2) to bar any judicial review of the claims presented here, and hold that the district court lacks the jurisdiction to grant any relief, including any interim relief, to persons who failed to submit a timely application. See, e.g., Ayuda, 948 F.2d at 758-59 (holding that 8 U.S.C. § 1255a(f)(2) deprives district courts of the jurisdiction to order INS to grant any

relief, including temporary work authorization, to persons who failed to file timely applications for legalization).

This interpretation of 8 U.S.C. § 1255a(f)(2) is consistent with congressional intent. As the D.C. Circuit explained in

Ayuda:

Congress intended aliens to come forward during the 12-month eligibility period because 'this is the first call and the last call, a one shot deal.' 132 Cong. Rec. S16,888 (daily ed. Oct. 17, 1986) (remarks of Sen[ator] Alan Simpson). If aliens did not make a legalization claim during that window period, it was lost forever. Furthermore, in late April 1988, with the deadline fast approaching, Congress refused to extend the grace period, despite well-ventilated concerns that last-minute court decisions had confused aliens. See 134 CONG.REC. 9291-96 (1988).

* * *

Plaintiffs cite Senator Grassley's comments during the 1988 debate as support for the idea of judicial power to disregard the deadline: There may very well be equitable reasons to allow these individuals to apply [after the deadline]; but there is no doubt that the courts are well equipped to evaluate equitable considerations. *Id.* at 9295. But no other senator spoke in support of this conception of judicial power, and Senator Simpson, among others, flatly rejected such a view: We asked the people to trust us and the trust was 'Here it is. It is 1 year.' . . . 'It is a one-time shot and here it is; one time only.' That is what we expressed and that is what the people of the United States know. . . . We have to have finality -- and that is what we must produce here, one way or the other -- finality in the procedures; that this is it and if you want to live the dream, here is your chance and you do it by midnight, May 4, and that is it and it will never come again. *Id.* at 9293-94.

Ayuda, 948 at 759, n.13. Accordingly, by interpreting 8 U.S.C. § 1255a(f)(2) in this manner, the Court can ensure that the intent of Congress is carried out and that the legalization program finally comes to an end.

C. Plaintiffs Cannot Demonstrate That The Balance Of Hardships Tip In Their Favor.

In Legalization Assistance Project v. INS, 114 S. Ct. 422 (1993) ("LEAP"), Justice O'Connor was presented with a question similar to the question presented here: Whether to stay an interim relief order that extended temporary work authorization, stays of deportation, and other legalization-related benefits to aliens who failed to file applications during the statutory filing period. In light of the Supreme Court's holding in CSS, Justice O'Connor granted the government's motion to stay, in large part, because she believed that INS was likely to prevail on appeal. Id. at 423-24. In addition, however, she granted the stay motion because she found that "the balance of equities" was in the government's favor. Id. at 424. Specifically, Justice O'Connor stated:

The order would impose a considerable administrative burden on the INS, and would delay the deportation of -- and require the granting of interim work authorization to -- at least those aliens who are deportable and who could not seek relief on their own behalf under CSS. Moreover, if the above analysis is correct the order is not merely an erroneous adjudication of a lawsuit between private litigants, but an improper intrusion by a federal court into the workings of a coordinate branch of the Government.

Id. at 424.

Just as in LEAP, the district court's November 3 and December 26 orders impose considerable administrative burdens that will improperly intrude on INS's ability to carry out its other statutory obligations and policy objectives. Indeed, no injury which plaintiffs may allegedly suffer can justify the far-

flung, intrusive interference with the workings of INS imposed by the district court's orders. Hardship cannot justify relief in the face of jurisdictionally defective claims on behalf of the aliens who never filed a timely application for legalization and thus are not eligible for any relief under IRCA. See Ayuda, Inc. v. Thornburgh, 919 F.2d 153, 154 (D.C. Cir. 1990) (Henderson, J., concurring in stay of interim relief); OPM v. Government Employees, 473 U.S. 1301, 1305-05 (1985) (Burger, C.J., in chambers) (absent jurisdiction over appeal, court "necessarily without authority to grant" interim relief); United States, Lyon et al. v. Huckabee, 16 Wall, 83 U.S. 414 (1872) (absent jurisdiction, affirmative relief reversed).

The courts have consistently recognized that the balance of equities weigh significantly in the government's favor where, as here, the court has been asked to enjoin an agency of a coordinate branch of government. See Heckler v. Lopez, 463 U.S. 1328, 1336 (1983) (Rehnquist, J.) (Opinion in Chambers on application for stay). In such a context, a substantial concern is the remedial orders' degree of interference "with the distribution between administrative and judicial responsibility for enforcement" of the statute. Id. at 1331; see also LEAP, 114 S. Ct. at 424. Here, where the disputed points fundamentally touch on jurisdiction and judicial power, with CSS, Naranjo, Ayuda, and Proyecto indicating a stringent limitation on judicial oversight of INS's policies and regulations and statutory eligibility requirements of a program Congress entrusted the

agency to implement, the district court's orders take on heightened significance as they fundamentally change the normal rules applicable to work authorization, deportation, and legalization. These highly significant concerns overshadow the traditional assessment of the equities and strongly weigh against the entry of interim relief.

INS has been required to undergo extraordinary hardships as a result of the district court's orders. Because the orders have obligated INS to grant temporary work authorization and stays of deportation to any person who merely alleged that they were prima facie eligible for legalization, the CSS litigation has been a magnet for aliens who lack legal immigration status in this country. As a result, even though the legalization program was originally intended to last for 12 months, INS has been required to accept over 400,000 applications over a seven-and-a-half year period from persons who allege that they are members of the class in CSS or LULAC, another legalization case that was consolidated with CSS during the appellate proceedings. See Declaration of Louis D. Crocetti, INS Associate Commissioner of Examinations, ¶ 4; Declaration of James A. Puleo, INS Executive Associate Commissioner of Programs, ¶ 3 [DN 336].²⁰ Of this number, approximately 45,000 persons have been granted CSS class

²⁰ These two declarations were submitted in support of Defendants' Motion To Modify Prior Orders, filed on April 17, 1995, in response to the instructions of the district court in its Order of March 17, 1995.

membership and currently receive the benefit of temporary work authorization and stays of deportation from INS. Id.

While many of these class membership applications have been honestly submitted, many have not. Indeed, since 1988, INS has witnessed massive third-party operations to take advantage of the low evidentiary standards set forth in the district court's orders and to obtain the benefits afforded to class members through fraudulent means. Puleo Decl. ¶ 7; Crocetti Decl. ¶ 10. To date, over fifty (50) principals have been convicted of immigration fraud in connection with class membership applications filed in the legalization cases. On average, most principals are responsible for filing approximately 500 fraudulent applications each. One group, however, was responsible for over 5,000 fraudulent applications. Puleo Decl. ¶ 7.

The legalization program was originally envisioned by Congress to be self-funded through application fees. Crocetti Decl. ¶ 3; Puleo Decl. ¶ 4. Under the district court's orders, however, aliens are not required to pay any application fees when they apply for class membership or temporary work authorization. Crocetti Decl. ¶ 4; Puleo Decl. ¶ 4. As a result, the INS has been deprived of a substantial amount of financial resources for use in dealing with applications and the demands placed on INS resources by the district court's orders have been substantial. Crocetti Dec. at ¶ 8. While it is impossible to calculate the exact costs of complying with the district court's orders, INS

estimates that the costs of processing class membership applications in the Los Angeles and New York district offices exceeded \$3,500,000 in fiscal year 1994 alone. Crocetti Decl. ¶ 7-8. Moreover, INS estimates that the costs of providing and extending employment authorization to class members exceeded \$600,000 in fiscal year 1994 as well. Crocetti Decl. ¶ 12. Such costs only frustrate INS's ability to use its resources to carry out its other statutory duties.

As a result of the district court's continuing enforcement of the stay orders entered in this case, the members of the plaintiff class have been able to obtain relief that far surpasses the relief originally provided by the district court in its 1988 permanent injunction. Indeed, even though the application period was intended by Congress to last for only one year, the members of the plaintiff class have been provided with an additional seven-and-a-half years to file an application for legalization and to obtain significant "interim" benefits that Congress never intended for them to receive. Moreover, the district court's orders have imposed tremendous hardships on INS. On account of the district court's orders, INS has been forced to divert significant funds and personnel from its other important operations in order to adjudicate the hundreds of thousands of class membership applications that have been filed and to administer the "interim" relief program on behalf of the tens of thousands of persons who have been granted class membership. As a result, the district court's orders have significantly impeded

the agency's ability to administer and to enforce the immigration laws in accordance with the will of Congress and the public interest.

* * *

Congress created the amnesty program in IRCA to provide a one-time, limited opportunity for undocumented aliens to obtain lawful permanent residence in this country. When the statutory filing period closed back on May 4, 1988, however, none of the plaintiffs had taken all of the required affirmative steps necessary to comply with the statute's eligibility requirement of a timely application. Consequently, under the express terms of IRCA and the holding of the Supreme Court, the district court does not have jurisdiction to hear plaintiffs' claims nor the equitable authority to compel INS to disregard the statute's requirements and to grant any relief, including any "interim" relief, to the members of the plaintiff class. Therefore, this Court should overturn the district court's orders and remand the case back to the district court with instructions to dismiss this long-standing civil action once and for all.

CONCLUSION

For the foregoing reasons, the government respectfully request 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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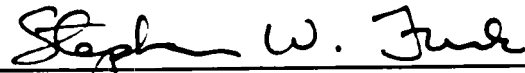


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Dated: May 7, 1996

STATEMENT OF RELATED CASES

The undersigned counsel states that this appeal involves issues that are similar to the legal issues presented in Immigration Assistance Project Of The Los Angeles County Federation of Labor (AFL-CIO), et al., v. Immigration and Naturalization Service, et al., No. 95-36295, currently on appeal from the United States District Court for the Western District of Washington. There are no other related cases.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of May, 1996, two copies of the foregoing Defendants-Appellants' Brief (which corrects and replaces the original brief filed and served on May 6, 1996) were served upon counsel for Plaintiffs-Appellees, by placing them in the Department of Justice mail room for same day mailing, addressed to:

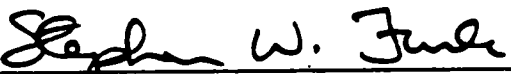
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