UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97- 805

CIV-MOORE

MAGISTRATE JUDGE
BROWN

ROBERTO TEFEL AND FAMILY MEMBERS, KHADIJEH AIDENEZHAD, JUAN GOUZAGA BAEZ, WILBUR BAEZ AND FAMILY MEMBERS, NORMA J. BALDIZON, ZULEMA BALLADARES, ROBERTO BARBERENA, ROBERTO R. AMAYA BAUTISTA AND FAMILY MEMBERS, JUAN BERMUDEZ AND RICARDO BERMUDEZ, ANA BORGE, RICARDO FONSECA-CHAMORRO AND FAMILY MEMBERS, ALEXANDRA CHARLES, JESUS CHOW, EDGAR ENRIQUEZ, JAIME ENRIQUEZ, MARTHA ENRIQUEZ, LORENA GARCIA AND FAMILY MEMBERS, GLORIA GUERRERO AND FAMILY MEMBERS, IGNACIO HERRERA AND FAMILY MEMBERS, JUSTINA JIRON AND FAMILY MEMBERS, ARMANDO LARGAESPADA, MANUEL MANTILLA, LEONEL MARTINEZ AND FAMILY MEMBERS, LEONTE MARTINEZ AND FAMILY MEMBERS, HERENIA MATUTE, NIDIA MERCADO AND FAMILY MEMBERS, CARLOS MORALES, SEBASTIAN MURILLO AND FAMILY MEMBERS, BOANERGES PAO, DUDLEY ROCHA-PETTERSON, LILIAM PORTILLO, FREDDY QUINTERO AND FAMILY MEMBERS, LUCRECIA RAUDES, CARLOS RIVAS AND FAMILY MEMBERS, ROBERTO RIVERA, VIRGINIA RODRIGUEZ AND FAMILY MEMBERS, ERNESTO TORRES SANDOVAL, ENRIQUE SEQUEIRA, FRANKLIN SIU AND FAMILY MEMBERS, AND SUBALECTHUMY VENGADASALAM,

Petitioners/Plaintiffs,

vs.

CLASS ACTION VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MANDATORY RELIEF AND WRIT OF HABEAS CORPUS

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JANET RENO, Attorney General
of the United States; ROBERT WALLIS,
District Director;
IMMIGRATION AND
NATURALIZATION SERVICE and
DEPARTMENT OF JUSTICE,
BOARD OF IMMIGRATION APPEALS,

Respondents/Defendants.
_______________________________/

The Petitioners/Plaintiffs, ROBERTO TEFEL AND FAMILY MEMBERS, KHADIJEH AIDENEZHAD, JUAN GOUZAGA BAEZ, WILBUR BAEZ AND FAMILY MEMBERS, NORMA J. BALDIZON, ZULEMA BALLADARES, ROBERTO BARBERENA AND FAMILY MEMBERS, ROBERTO BAUTISTA AND FAMILY MEMBERS, JUAN BERMUDEZ AND RICARDO BERMUDEZ, ANA BORGE, RICARDO FONSECA-CHAMORRO AND FAMILY MEMBERS, ALEXANDRA CHARLES, JESUS CHOW, EDGAR ENRIQUEZ, JAIME ENRIQUEZ, MARTHA ENRIQUEZ, LORENA GARCIA AND FAMILY MEMBERS, GLORIA GUERRERO AND FAMILY MEMBERS, IGNACIO HERRERA AND FAMILY MEMBERS, JUSTINA JIRON AND FAMILY MEMBERS, ARMANDO LARGAESPADA, MANUEL MANTILLA, LEONEL MARTINEZ AND FAMILY MEMBERS, LEONTE MARTINEZ AND FAMILY MEMBERS, HERENIA MATUTE, NIDIA MERCADO AND FAMILY MEMBERS, CARLOS MORALES, SEBASTIAN MURILLO AND FAMILY MEMBERS, BOANERGES PAO, DUDLEY ROCHA-PETTERSON, LILIAM PORTILLO, FREDDY QUINTERO AND FAMILY MEMBERS, LUCRECIA RAUDES, CARLOS RIVAS AND FAMILY MEMBERS, ROBERTO RIVERA, VIRGINIA RODRIGUEZ AND FAMILY MEMBERS, ERNESTO

TORRES SANDOVAL, ENRIQUE SEQUEIRA, FRANKLIN SIU AND FAMILY MEMBERS, AND SUBALECTHUMY VENGADASALAM, by and through their undersigned counsel, on behalf of themselves and all those similarly situated, sue the Respondents/Defendants, JANET RENO, Attorney General of the United States; ROBERT WALLIS, District Director; IMMIGRATION AND NATURALIZATION SERVICE; DEPARTMENT OF JUSTICE; and BOARD OF IMMIGRATION APPEALS and state as follows:

INTRODUCTION

This action seeks declaratory, injunctive and mandatory relief to end the defendants' policy of denying Plaintiffs and members of their class the right to seek suspension of deportation in the United States. Pursuant to INA sect. 244(a), 8 U.S.C. 1254(a), Plaintiffs and members of their class, who number in the thousands, filed applications for suspension of deportation. Many of these applications were submitted at the invitation of the defendants, who, in 1995, encouraged members of the class who are Nicaraguan to come forward and seek this form of relief from deportation. As a result of coming forward and applying for suspension of deportation, the defendant Immigration and Naturalization Service ("INS") received millions of dollars in application fees. After coming forward, and in many cases, winning suspension of deportation before an immigration judge, the Attorney General, through the defendant Board of Immigration Appeals, has now determined that all class members are ineligible for suspension of deportation. The defendants determination that Plaintiffs and members of their class are ineligible for suspension is based on an erroneous interpretation of the applicability of Section 309(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 to Plaintiffs and class members. This action challenges that erroneous legal interpretation which affects all Plaintiffs and class members. This action also challenges the conduct of the defendants in inducing Nicaraguan applicants to pay millions of dollars in application fees to seek suspension of deportation on the promise that their applications would be considered when, in fact, they have now rejected same, without consideration.

STATEMENT OF THE CASE

1. The Immigration and Nationality Act ("INA") provides at section 244(a), 8 USC 1254(a) that a person who is deportable from the United States may have his or her deportation suspended and may become a resident of the United States if he/she meets certain criteria. In order to obtain suspension of deportation an applicant must demonstrate that he or she: "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application,...proves that during all of such period he was and is a person of good moral character...and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. INA 244(a)(1).

2. The Petitioners/Plaintiffs and the class they represent have demonstrated or can demonstrate their eligibility to receive suspension of deportation. They meet all the criteria necessary to obtain suspension of deportation. They have all been physically present in the United States for a continuous period of time of more than seven years. They all are persons of

good moral character. And they or their US citizen or lawful permanent resident family members would suffer extreme hardship if they were deported. Many of the named plaintiffs and class members have already been granted suspension of deportation by the immigration court, but the defendants have appealed their cases.

3. In 1995 and again in 1996, the defendants encouraged and requested that Plaintiffs and class members who were Nicaraguan who had been in the United States for seven years pay application fees to reopen their immigration proceedings and to apply for suspension of deportation proceedings. The defendants by public announcements and by their actions also encouraged Nicaraguan citizens who had sought political asylum in the United States to now come forward, withdraw, in many instances, their asylum applications, and apply for suspension of deportation paying the applicable fees for such applications. See, Memo of General Counsel of INS of Nov. 14, 1995 attached as Exhibit 1; Letter of August 19, 1996 of INS Commissioner Doris Meissner attached as Exhibit 2; INS Notice to Nicaraguan citizens dated Sept 21, 1995 attached as Exhibit 3; INS Press Release with attached Fact Sheet dated May 24, 1996 attached as Exhibit 4. As a result of the defendants' actions in inducing and encouraging Plaintiffs and members of their class to come forward, apply to reopen their cases and/or apply for suspension of deportation, the defendants collected millions of dollars in application fees.

4. On September 30, 1996, the Congress passed and the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"). This Act dramatically transformed immigration proceedings in the United States. It replaces deportation and exclusion proceedings

with one unified removal proceeding for any proceedings initiated after April 1, 1997. INA 240, 8 USC 1229a. Generally, cases which were initiated before that date would continue under the old legal regime. Section 309(c)(1) of IIRIRA. Persons such as Plaintiffs and class members who applied for suspension of deportation in proceedings that were begun before April 1, 1997 would remain eligible for suspension even after April 1, 1997, notwithstanding the new law which eliminated suspension of deportation and replaced it with a more restrictive version of the relief called cancellation of removal. INA 240A, 8 USC 1229b. The new cancellation of removal added a provision which would terminate the accrual of the necessary physical presence (which is now ten years instead of seven) if a person was served with a charging document known as a notice to appear. INA 240A(d)(1), 8 USC 1229b(d)(1). Thus, if a person was served with a notice to appear on the sixth year of his entry into the United States he would be precluded from seeking cancellation of removal even if his removal hearing was not held until he was in the United States for fifteen years. Congress also enacted certain transition rules governing what would happen to persons such as Plaintiffs and class members who were in proceedings prior to April 1, 1997. Section 309(c)(1) of IIRIRA provides a "general rule that [the] new rules do not apply" to persons who were in exclusion or deportation proceedings as of April 1, 1997. In section 309(c)(5) Congress said that there would be a transitional rule regarding 240A(d)(1),(2) so that the provisions cutting off physical presence would "apply to notices to appear issued before, on, or after the date of enactment of this Act."

5. Plaintiffs and class members are persons who have applied for suspension of deportation and have been physically present in the United States for more than seven years. They have all payed substantial fees to apply for suspension. In many cases, Plaintiffs and class

members entered the United States through Southern Texas in the early 1980s, were stopped by the INS and were subsequently permitted to come to Miami to apply for political asylum. In all cases they were issued orders to show cause before they were physically present in the United States for seven years. In all cases, however, the defendants did not pursue deportation within the seven year period and they otherwise encouraged the Plaintiffs and class members to reopen their deportation cases so they could apply for suspension.

6. After the passage of IIRIRA many Plaintiffs and class members were granted suspension of deportation or had suspension cases pending on appeal by the defendants before the BIA after they had been granted suspension by the immigration judge. Other class members were in front of immigration judges awaiting a hearing or final determination on their suspension claim.

7. On Feb. 21, 1997, the BIA decided *Matter of NJB,* Int. Dec. # 3309 (BIA 1997). In a seven to five decision the BIA held that section 309(c)(5) of IIRIRA was applicable to pending suspension of deportation cases. The BIA determined that if a person had been served with an Order to Show Cause before he or she had accrued seven years of continuous physical presence in the United States then he or she was now ineligible for suspension even if the hearing on suspension had occurred many years after the seven year period and even if the case was on appeal after obtaining suspension before an immigration judge.

8. As a result of the BIA's split decision in *Matter of NJB*, *supra,* all Plaintiffs and class members are precluded from eligibility for suspension of deportation even in cases where the immigration judge had granted suspension on the merits and the Defendants did not oppose relief on the merits. The BIA has determined that such persons are pretermitted from seeking

suspension irrespective of their equities or hardship and is ordering across-the-board the mass deportation of Plaintiffs and members of their class.

JURISDICTION

9. Jurisdiction is conferred on this Court with respect to the Petition for Writ of Habeas Corpus by 28 USC § 2241. Jurisdiction is conferred with respect to the Complaint for Declaratory, Injunctive and Mandatory Relief by 28 USC § 1331 which grants original jurisdiction to the district courts for matters arising under the Constitution, laws and treaties of the United States including the Administrative Procedures Act, 5 USC § 552 *et seq*. Jurisdiction is also conferred by 28 USC § 1361, which allows for mandamus actions to compel officers and employees of the United States to perform a duty owed to Plaintiff; 28 USC §§ 2201-2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure, permitting declaratory and injunctive actions.

VENUE

10. Pursuant to 28 USC § 1391(e), venue lies in the Southern District of Florida because it is here, where the Petitioners/Plaintiffs reside, where the erroneous legal interpretation was implemented and therefore the cause of action arose, and where the Respondent/Defendant, ROBERT WALLIS resides.

THE PARTIES

Plaintiffs

11. The Plaintiff, Roberto Tefel, his wife and child pursuant to INS policy statements that Nicaraguan applicants should reopen their cases for suspension of deportation, successfully moved to reopened their cases before the BIA on November 24, 1995. They paid the defendants

substantial fees to reopen their cases and to apply for suspension of deportation. They received suspension of deportation from an immigration judge in Miami, Florida on November 19, 1996. The Service did not oppose the relief, but reserved appeal solely on the issue that section 309(c)(5) of IIRIRA precludes any consideration of the Petitioners/Plaintiffs' request for suspension. The Tefels have lived in the United States, through the actions of the defendants in not seeking their deportation, for over a decade. They own their home. One of their children, age nine, is a United States Citizen. The other child is thirteen years old and has spent most of his life in the United States. Mr. Tefel is an ordained deacon with extensive community service. His entire family resides in Miami, Florida.

12. The Plaintiff, Lucrecia Raudes, moved to reopen her case before the BIA and to apply for suspension of deportation. She paid the requisite fees. She was granted suspension of deportation on October 11, 1996. Her husband and daughter were granted suspension from the same Immigration Judge at the same time. As a result, they are now lawful permanent residents. Her case, however, was appealed because she received an OSC before attaining seven years. Ms. Raudes' entire family is here and all of them are citizens or residents. The Raudes have substantial savings, are homeowners, and engage in community activities.

13. The Plaintiff, Leonel Martinez, his wife and child sought to have their cases remanded from the BIA. They payed the requisite fees to reopen their cases and to apply for suspension of deportation. They were granted suspension of deportation on October 23, 1996. The Martinez's are medical doctors and their children - one Nicaraguan, the other American - attend magnet schools, having been classified as gifted students by the our school system. They own their own home and have a bright future as professionals in this country.

14. The Plaintiff, Manuel Mantilla, moved to reopen his case before the BIA and apply for suspension of deportation. He paid the requisite fees to reopen and for suspension. The Board rendered a decision acknowledging prima facie eligibility for suspension relief. He owns his home, is the father of two United States citizen children, and his alien son, Lucas, is a high school student with a 4.15 GPA who has been invited by a myriad of Ivy League schools to apply. He came before an Immigration Judge in February 1997 simply to hear that his case was pretermitted under Section 309(c)(5) of IIRIRA. He has appealed the decision.

15. The Plaintiff, Carlos Morales, moved to reopen and remand his case from the BIA and to apply for suspension of deportation. He paid all requisite fees to apply. He was granted suspension of deportation on February 5, 1997. His wife and daughter also were granted relief by the same Immigration Judge. His case was appealed by the Defendants. The Morales have two United States citizen daughters; own their home; and all of their children go to magnet schools. Mrs. Morales runs an important business and they are active in community activities. Most of their relatives are here and are either residents or citizens. Fourteen witnesses, included a priest, attended their hearing. The BIA based on *Matter of NJB*, *supra,* will dismiss his appeal.

16. The Plaintiffs, Jaime Enriquez, Martha Enriquez, and Edgar Enriquez, all reopened their cases before the BIA. The Service did not oppose reopening pursuant to the policy statements publicly announced by Defendants. The Enriquez' paid the requisite fees to reopen their cases and to seek suspension. The family received suspension on December 18, 1996. Edgar works for the City of Miami as an computer programmer, owns his home, has a United States citizen child who suffers from a heart condition and is fully Americanized. Similarly, Martha and Jaime each have one United States citizen child, have excellent community service

records, and a superb job history. Their entire family is here and are residents or citizens. They will now all be deported unless this Court enjoins the Defendants from enforcing *Matter of NJB, supra.*

17. The Plaintiff, Roberto Barberena, moved to reopen his case before the BIA, paid the requisite fees and was granted suspension of deportation on January 23, 1997. His wife and son Lenin were granted suspension of deportation last year. Lenin works as a banker. His other son Roberto Jr. received asylum from the INS. He has his own air conditioning business. They all live together in their own home. Mr. Barberena has commendations from the City of Miami for his community service record.

18. The Plaintiff, Lorena Garcia and her three children, filed for the reopening of their cases on January 8, 1996 to seek suspension of deportation. They paid the requisite fees. The Immigration Judge reopened their cases and on November 8, 1996 granted suspension of deportation to them. The Service appealed based on IIRIRA. The three Garcia children came at a very young age; are good students; fully assimilated to the American society; and the entire family is engaged in many community activities. Ms. Garcia, a single mother, raised her children while working at a Hialeah factory.

19. The Plaintiffs, Freddy Quintero and his wife, moved to reopen their cases and to apply for suspension of deportation. They paid the requisite fees. They were granted relief on October 18, 1996. Mr. Quintero's suspension of deportation application contained many letters from the community praising his unique community involvement ranging from cleaning streets to donating blood for the Red Cross. They own their home and have two United States citizen children. One of them suffers from a congenital renal condition.

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20. The Plaintiffs, Carlos Rivas and his family, moved to reopen their cases and to seek suspension of deportation. They paid the requisite fees. They received suspension relief on October 29, 1997. The Service did not oppose relief, but reserved on the question of whether Section 309(c)(5) of IIRIRA bars their relief. They came to the United States in 1985. They have an excellent work history in this country, and have a United States citizen child. They have relatives who are residents and citizens. They own their own home, and he is trying to validate his lawyer's license.

21. The Plaintiff, Ana Borge, moved to reopen her case and to apply for suspension of deportation. She paid the requisite fees. She was granted suspension of deportation on February 19, 1997. She came to this country at an early age, is a college student, and donated one of her kidneys to her sister. Her record is replete with community activities and recommendation letters on her behalf. Her entire family is here. The INS reserved appeal on the issue of the applicability of section 309(c)(5) of IIRIRA.

22. The Plaintiffs, Ignacio Herrera and his wife, moved to reopen their cases and to seek suspension of deportation. They paid all appropriate fees. They were granted suspension of deportation on February 19, 1997. They have one United States citizen child, an excellent work history, and a panoply of relatives here in this country. Similarly, the Service only reserved appeal on the applicability of Section 309(c)(5) of IIRIRA to their case.

23. The Plaintiff, Wilbur Baez, moved to reopen his case and to seek suspension of deportation. He paid all appropriate fees. He received suspension on February 11, 1997. He came at a very young age to this country, is a college student, and has a very good work history. His mother and brother also received suspension. The Service reserved appeal in his case on the

applicability of Section 309(c)(5) of IIRIRA to him.

24. The Plaintiff, Nidia Mercado, was granted suspension of deportation on January 8, 1997, together with her minor son. She owns her home, has qualifying relatives in this country, and her son came to this country as a toddler. She, as all of the above-named individuals, relied on the Defendants' permissive policy to reopen her case. She paid all appropriate fees pursuant to the invitation to reopen her case. The Service has appealed her case to the BIA on the applicability of Section 309(c)(5) of IIRIRA.

25. The Plaintiff, Liliam Portillo, moved to reopen her case and to apply for suspension of deportation. She paid all requisite fees. She has two United States citizen children, works for a huge international company, and is on her way to becoming a pharmacist. The immigration judge congratulated her, but terminated her suspension of deportation case, because of Section 309(c)(5) of IIRIRA finding that it precluded him from granting any relief.

26. The Plaintiffs, Sebastian Murillo and his family, moved to reopen their cases before the BIA and to apply for suspension. They paid all the requisite fees. They were granted suspension of deportation on February 12, 1997. The Murillos own their own trailer home, and their children are excellent students. He manages a restaurant and will sit for the CPA exam within the next six months. Their children teach Sunday school classes and are all going to go to college. The INS did not oppose relief, but reserved on the applicability of Section 309(c)(5) of IIRIRA.

27. The Plaintiff, Jesus Chow, moved to reopen his case and applied for suspension of deportation. He paid all requisite fees. On February 26, 1997 Mr. Chow and his wife came before the immigration court seeking suspension of deportation. The immigration judge pretermitted Mr.

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Chow's case, but his wife, Cora Chow, received relief at the same hearing. He, however, because of the erroneous interpretation of the BIA regarding Sect. 309(c)(5) of IIRIRA, left the courtroom remediless.

28. The Plaintiffs, Gloria Guerrero and her family, entered the United States in 1986. Gloria and two of her children moved to reopen their cases in April 1996 and pay all appropriate fees to seek suspension of deportation. They received suspension of deportation on October 2, 1996. Gloria has a United States citizen daughter. She also has a son who is married to a United States citizen who has an application for adjustment of status pending. The Guerrero family are all gainfully employed or attend school. They have filed tax returns every year since arriving in the United States. They currently rent their home with an option to purchase.

29. The Plaintiffs, Douglas Membreno-Murillo and Damarys Contreras, have both been in the United States for over nine years. They have sought suspension of deportation and their applications have been pretermitted. They have been married for the last seven years and have two United States citizen children. Douglas studied at night at an adult education program and has been employed with the same company for over six years. Damarys' parents were granted political asylum, her three minor siblings were derivative beneficiaries, and they are now all permanent residents. Damarys' other brother and wife are currently in suspension proceedings. They have three United States citizen children and own their own home. The sister-in-law has no family at all in Nicaragua. They have continuously paid taxes and have no history of any criminal activity. INS has filed an appeal to the BIA solely on the issue of continuous physical presence.

30. The Plaintiffs, Virginia Rodriguez and her three sons, have been in the United States for the past ten years. A motion to reopen was filed and granted on October 4, 1996. The

immigration judge granted the Rodriguez family suspension of deportation on January 17, 1997. The Service subsequently filed an appeal on February 3, 1997 claiming that the respondents were statutorily precluded from establishing the requisite time period. The three children arrived in this country at the respective ages of four, five and six years old and are fully Americanized.

31. The Plaintiff, Roberto R. Amaya Bautista, has been in the United States for ten years. His wife and two children have been in the United States for twelve years. The Amayas are Salvadoran citizens and have dutifully filed tax returns and have no criminal histories. Their daughter graduated from the University of Miami and is presently employed as an informational graphic artist for a Georgian newspaper. Their son is an honors student at Georgia Tech studying engineering and was awarded the Silver Knight award by the Miami Herald for his volunteer service. The entire family has health insurance and has never been on public assistance. Each of the parents hold down two jobs. On January 17, 1989, Roberto was interviewed on his application for asylum and withholding of deportation which included his wife and two children. On January 14, 1991, the proceedings were ordered administratively closed by written order of the Chief Immigration Judge. The Respondents subsequently applied for temporary protected status which was granted and has since received work authorization on an annual basis. The INS moved to recalendar the cases and the Amaya family was granted suspension of deportation on February 6, 1997. The Service appealed the final decision on the pretermission issue.

32. The Plaintiff, Alexandra Charles, is an orphan who came to the United States from Haiti when she was ten years old, after the military invaded her home and brutally murdered her mother in her presence. Alexandra is now eighteen years old and she is self-supporting. She holds down two jobs and attends college full-time. She is an above average student. Alexandra has over

a dozen lawful permanent resident or United States citizen relatives, including both her grandmothers and a grandfather. All her siblings reside in the United States. She has virtually no relatives in Haiti. Alexandra was served with an Order to Show Cause six and a half years after her arrival. On December 5, 1996, the immigration judge denied the INS' Motion to pretermit and granted suspension. The government appealed the denial of the motion to pretermit.

33. The Plaintiffs, Juan Bermudez and Ricardo Bermudez, eighteen and fourteen years old, have been in the United States for the past ten years, have attended public school and are fully Americanized. They reopened their cases. On January 31, 1997, they were granted suspension of deportation. The Service appealed based on § 309(c)(5) and *Matter of NJB, supra.*

34. The Plaintiff, Leonte Martinez, has been in the United States since 1986. He is married to a lawful permanent resident (granted suspension) and has three children, one a lawful permanent resident (granted suspension) and two United States citizens. Mr. Martinez's mother-in-law, a lawful permanent resident, resides with their family. Mr. Martinez was granted suspension of deportation on January 17, 1997. According to the immigration judge, his was the best case she ever had. Two priests testified in his behalf concerning extensive community service helping underprivileged youths of all nationalities in several church-sponsored programs. Mr. Martinez owns his own home and earns approximately $38,000.00 per year with medical benefits for the entire family. The INS appealed on the ground that he was pretermitted from obtaining suspension because of section 309(c)(5) of the IIRIRA.

35. The Plaintiff, Roberto Rivera, has been in the United States since 1988. He is an Assistant Pastor, Treasurer, youth school teacher and a church leader. In addition he is very active in the Seventh Day Adventist Church youth group. Mr. Rivera has one ten year old daughter who

has been in the United States since she was one and a half and whose psychological evaluation indicates she would suffer extreme hardship in Nicaragua. Mr. Rivera has one brother who is a lawful permanent resident and the other brother was granted asylum. Mr. Rivera's application for suspension of deportation was pretermitted and is currently on appeal.

36. The Plaintiff, Zulema Balladares, has been in the United States since 1986. Her husband and four children were previously granted suspension and are now lawful permanent residents. The Balladares' own their own home. Two of their children serve in the U.S. Army. Both served in Bosnia. The children's ages range from thirteen to twenty-one and have all resided in Miami for the past ten years. Mrs. Balladares' application for suspension was pretermitted and is currently on appeal.

37. The Plaintiffs, Boanerges Pao, his wife and two children have been in the United States for ten years. The Pao's own their own home, have medical coverage and significant community service. They Pao's also have one United States grandchild. Both children are attending college and high school respectively. The Pao's Motion to Reopen to apply for suspension of deportation was granted and the case was pretermitted by the immigration judge. The case is currently on appeal.

38. The Plaintiffs, Franklin Siu, his wife, and three children, ages 14, 17 and 19, entered the United States twelve years ago. The children all attend school and have good grades. The Siu's were granted suspension of deportation and the Service appealed. Mr. Siu's elderly mother is a lawful permanent resident as are his two brothers. In total the Siu's have seventeen family members that are lawful permanent residents or United States citizens. Franklin Siu's sister has three United States citizen children. Her case was pretermitted.

39. The Plaintiff, Justina Jiron, reopened her case. The case was pretermitted by the immigration judge. She has appealed. She and other family members entered the United States twelve years ago. She has two United States citizen children. The baby is in need of surgery and ongoing medical treatment as a result of a birth defect. All medical expenses are covered by insurance. This type of medical treatment is unavailable in Nicaragua and is life threatening to the child.

40. The Plaintiff, Khadijeh Aidenezhad, has been in the United States since 1985 and lives with her elderly mother who is a lawful permanent resident and suffers from several medical problems. Ms. Aidenezhad has a sister who is a lawful permanent resident, a brother who is a United States citizen and nieces and nephews that are either lawful permanent residents or citizens. Ms. Aidenezhad has a B.A., is a Board certified Phlebotomist and Ultrasound Technician, and has a solid employment history in her field. Ms. Aidenezhad has no criminal record and has performed a substantial amount of volunteer work at a variety of hospitals and medical centers. Ms. Aidenezhad has been blacklisted in Iran and would, if deported, be subjected to severe oppression, including an inability to work in her field. The INS attorney agreed that deportation would cause her extreme hardship, and that she was a person of good moral character. The immigration judge granted suspension of deportation and the INS appealed the issue of continuous physical presence under Sect. 309(c)(5) of IIRIRA.

41. The Plaintiffs, Ricardo Fonseca, his wife, daughter and grandson, were granted suspension of deportation on October 24, 1996. The immigration judge denied the INS Motion to Pretermit. The INS appealed on the limited issue of the family's eligibility based on Sect. 309(c)(5) of IIRIRA. Although an appeal is pending, the Fonseca family will be denied suspension of

deportation granted to them as a result of the BIA decision in *Matter of NJB*.

42. The Plaintiffs, Juan Gonzaga Baez and his family, have all been in the United States since 1986. Mr. Baez is employed as a deliveryman, Mrs. Baez is a housewife. Their oldest son, Juan Neftali, works as an engineer for a nation-wide engineering firm. Their son, Juan Jacobo, is a college student. Both Jacobo and Neftali financed their college educations through work and merit scholarships. Juan Rafael and his younger sister Gabriela are in school. Both are fully Americanized and are excellent students. Their eldest daughter is married to a U.S. citizen, is a lawful permanent resident and has a United States citizen child. The Baez's family moved to reopen their case in 1995. The immigration judge granted suspension of deportation on October 28, 1996. The INS has appealed the case and if this Court does not reverse *Matter of NJB, supra,* the Baez family will be left remediless.

43. The Plaintiff, Armando Largaespada, entered the United States in 1989. He is 69 years old, suffers from chronic arthritis, is on a daily regimen of a variety of medications and has never taken any public assistance. Mr. Largaespada has eight children in the United States, two of which are lawful permanent residents, and seven grandchildren. On May 24, 1996, Mr. Largaespada paid the requisite fees and filed an unopposed Motion to Reopen and for suspension of deportation. On January 14, 1997, an Immigration Judge denied the INS's Motion to Pretermit and granted suspension of deportation. The Service has appealed on the issue of § 309(c)(5) and unless this Court reverses the decision in *Matter of NJB, supra,* Mr. Largaespada will be denied the suspension he was granted.

44. The Plaintiff, Herenia Matute, has been in the United States since 1984. She is married with three children, two of which are United States citizens. After several hearings and the

withdrawal of their political asylum application, the Immigration Judge denied the INS' Motion to Pretermit and granted the Matute family suspension of deportation. The INS appealed only on the issue of the applicability of section 309(c)(5) of IIRIRA. Unless this Court enjoins the enforcement of *Matter of NJB, supra*, Mrs. Matute and her entire family will be deported from the United States.

45. The Plaintiff, Enrique Sequeira, is a 21 year old citizen of Nicaragua who entered the US on October 10, 1988 at the age of thirteen. He has maintained an outstanding academic record in the US receiving numerous academic awards. He is a member of JROTC and has been involved extensively in community work in Miami. He was granted suspension of deportation on Nov. 29, 1996. The INS has appealed the decision based upon the applicability of section 309(c)(5) of IIRIRA. Unless this Court reverses the decision in *Matter of NJB, supra*, Mr. Sequeira will be deported from the United States.

46. The Plaintiff, Subalecthumy Vengadasalam, is a native and citizen of Malaysia. On Nov. 8, 1996 she was granted suspension of deportation in light of her extensive and outstanding community service and support. The INS appealed the decision based upon the applicability of section 309(c)(5) of IIRIRA. Unless this Court reverses the decision in *Matter of NJB, supra*, Mrs. Vengadasalam will be deported from the United States.

47. The Plaintiff, Dudley Rocha-Petterson, is a twenty seven year old Nicaraguan national who entered the United States in 1987. Pursuant to the Defendants inducements to Nicaraguans to pay application fees and file motions to reopen, on Oct 27, 1995, Mr. Rocha filed a motion to reopen and an application for suspension of deportation. On Oct. 4, 1996 his wife was granted suspension of deportation because she had the requisite seven years prior to the service of an order to show cause. The Defendants in Mr. Rocha's case, however, moved to pretermit his application for

suspension based upon section 309(c)(5) of IIRIRA. Mr. Rocha's two United States born children suffer from a rare genetic disease which has occurred in only 12 documented cases in the United States. This disease can only be treated in the US and Canada and there is no readily available treatment in Central or South America. Mr. Rocha is a deacon in his church and a valued employee at a local company who has paid all of his income taxes and owns real estate. If *Matter of NJB, supra,* is applied in his case he will be deported without relief to Nicaragua. His deportation will *de facto* cause the deportation of his two U.S. citizen children.

48. The Plaintiff, Norma J. Baldizon, is a fifty one year old Nicaraguan national who entered the United States in 1987. Ms. Baldizon's application for suspension of deportation was denied by an immigration judge on August 14, 1994. Her counsel, Ernesto Varas appealed the decision to the defendant Board of Immigration Appeals. On Feb. 21, 1997, the BIA decided that Ms. Baldizon could not apply for suspension because section 309(c)(5) of IIRIRA precluded a her from applying for suspension of deportation because she was not in the United States for seven years prior to the service of an order to show cause. *Matter of NJB*, Int. Dec. 3309 (BIA 1997). Although the BIA was aware of Ms. Baldizon's counsel, her counsel was never given an opportunity to brief or argue the issue decided by the BIA in *Matter of NJB*. Although the BIA sought and permitted amicus briefs to be filed on the issue of the interpretation of section 309(c)(5), it did not permit Ms. Baldizon's lawyer to participate and argue the case on her behalf. Ms. Baldizon was therefore deprived of counsel and due process in the very case that has set the precedent for Plaintiffs and members of her class.

49. The Plaintiff, Ernesto Torres Sandoval, entered the United States in 1987 and sought political asylum in our country. Pursuant to the inducements of the Defendants, Mr. Torres filed a

Motion to Reopen and a Request for Suspension of Deportation in August of 1995. He has paid all requisite fees. His case was reopened in November. Mr. Torres is a university graduate with a degree in Electrical Engineering, who has a United States Citizen child who would suffer extreme hardship if Mr. Torres were deported from the United States. Mr. Torres has paid income taxes each year he has worked and has made contributions to his community. Notwithstanding his strong case of Suspension of Deportation, the Immigration Judge pretermitted the application on November 13, 1996. An appeal was taken from that decision and is pending before the Board of Immigration Appeals. The decision of the Board in the *Matter of NJB* forecloses the possibility of Mr. Torres receiving a hearing on his claim for suspension. Unless this Court enters injunctive relief, Mr. Torres will be deported from the United States.

Defendants

50. The Defendant, Janet Reno, Attorney General (hereinafter referred to as "RENO") is the Attorney General of the United States and in that capacity has the ultimate authority over the decisions of all other defendants in this case. In her capacity as Attorney General she encouraged and induced Nicaraguan Plaintiffs and Nicaraguan class members to pay substantial fees to apply for suspension of deportation. In the same capacity, she has permitted the Board of Immigration Appeals to enter an order that precludes the very persons she induced to pay application fees to apply for suspension from obtaining such suspension.

51. The Defendant, Robert Wallis, (hereinafter referred to as "WALLIS") is the District Director of District VI of the Immigration and Naturalization Service. District VI encompasses the State of Florida and includes the area in which Plaintiffs and class members reside. District Director WALLIS is charged with the responsibility of arresting and deporting Plaintiffs and class members

who are or will be subject to final orders of deportation.

52. The Defendant, Immigration and Naturalization Service, is the agency responsible for implementing the immigration laws of the United States and is the agency responsible for encouraging Nicaraguan Plaintiffs to pay fees and come forward while seeking to prevent their applications from being considered.

53. The Defendant, Department of Justice, (hereinafter referred to as "DOJ") is the branch of the United States government having ultimate authority over both the INS and Executive Office of Immigration Review. The Executive Office of Immigration Review has the responsibility of overseeing the Board of Immigration Appeals which has entered the order disenfranchising all Plaintiffs and class members from the possibility of obtaining suspension of deportation in the United States.

54. The Defendant, Board of Immigration Appeals ("BIA"), is the administrative appellate body governed by rules set forth at 8 CFR § 3 *et. seq*. of Title 8 of the Code of Federal Regulations. The BIA entered the order in *Matter of NJB* in a manner contrary to law, arbitrary and capricious and a violation of Plaintiff and class members constitutional rights.

(Class Action Allegations)

55. ROBERTO TEFEL, et. al., Plaintiffs/Petitioners, bring this action as a class action pursuant to Rule 23(a) and (b)(1)(A) and/or (b)(2) on behalf of himself and all others similarly situated. The class consists of the following ascertainable members, who can be ascertained from the defendants' records:

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> All individuals within the states of Georgia, Alabama and Florida who have been or will be denied suspension of deportation as a result of the BIA's decision to apply the transitional rule of § 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) retroactively to persons who have sought or are seeking suspension of deportation.
>
> This case also consists of a subclass of members within the class who are Nicaraguan nationals who paid substantial fees to reopen their cases and/or to seek suspension of deportation as a result of the defendants' inducements and promises that their applications for suspension would be considered when in fact the defendants now refuse to consider such applications.

56. The class and subclass are so numerous that joinder of all members is impracticable.

57. A community of interest exists between Tefel, et. al. and members of the class in that there are questions of law and fact which are common to all. All Plaintiffs/Petitioners seek a determination of whether the BIA, consistent with the Constitution and statutes, properly applied § 309(c)(5) of IIRIRA retroactively to preclude Plaintiffs/Petitioners from eligibility for suspension of deportation. In addition, this case raises an identical legal question for a subclass of Nicaraguans who have sought suspension of deportation regarding whether the defendants violated due process and whether they should otherwise be estopped from pretermitting Nicaraguan suspension cases in light of their inducements and promises to Nicaraguan nationals that the defendants would consider Nicaraguan suspension cases if the Nicaraguan nationals paid fees to reopen their cases and apply for suspension.

58. The claims or defenses of the representative party is typical of the claims or defenses of the class;

59. The representative parties Roberto Tefel, et. al. will fairly and adequately protect the interests of the class because they have been denied suspension of deportation which they

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would otherwise have been entitled to have, and because the BIA has not properly applied section 309(c)(5) of IIRIRA or otherwise violated the constitution. This legal outcome is identical to that which the members of the respective class have been subjected to, threatened with, or will be subjected to.

60. Individual suits by each member of the class would be impracticable because:

(1) They would create a risk of inconsistent or varying adjudications with respect to the individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(2) Defendants have acted or have threatened to act, on grounds generally applicable to each member of the class, making appropriate final declaratory and injunctive relief with respect to the class as a whole.

61. The number of individual suits would impose an undue burden on the courts. Although the exact number of class members is currently unknown, on information and belief the class numbers in the thousands.

62. Many members of the class are unaware of their rights and/or they were intentionally misled into coming forward by the Defendants.

63. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

64. Plaintiffs' counsel are experienced in class action litigation and can adequately represent the interests of class members as well as the named Plaintiff.

65. The class members have suffered a denial of a previously available right as a result of the defendants' illegal conduct.

66. As a result of Defendants' illegal and improper conduct, the members of the Plaintiff class will continue to suffer the effects of the Attorney General's interpretation of the transitional rule depriving Plaintiffs of their right to suspension of deportation. The Plaintiff class members will suffer irreparable harm for which there is no adequate remedy at law if the defendants' discriminatory practices are not enjoined as they will be deported from the United States, separated from their families, and deprived of the opportunity to present their cases to an impartial hearing officer.

67. As a result of Defendants' conduct Plaintiffs were required to retain counsel and to pay counsel a reasonable attorneys fee as well as all reasonable costs, fees, and expenses in prosecuting this case. Plaintiffs intend to seek fees under the Equal Access to Justice Act.

COUNT I

ARBITRARY AND CAPRICIOUS AGENCY ACTION

68. Petitioners/Plaintiffs incorporate by reference herein paragraphs 1 through 67 above, as if stated at length and in full herein.

69. The defendants/respondents interpretation of section 309(c)(5) of IIRIRA to apply to Plaintiffs and class members is arbitrary and capricious conduct in violation of the INA and the APA.

COUNT II

VIOLATION OF INS STATUTES, REGULATIONS AND THE CONSTITUTION

70. The Petitioners/Plaintiffs herein incorporate by reference paragraphs 1 through 67

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as if stated at length and in full herein.

71. The Defendants/Respondents' interpretation of section 309(c)(5) of IIRIRA is contrary to, inconsistent with and violates the Immigration and Nationality Act, the IIRIRA, and the due process clause of the Fifth Amendment, and the equal protection guarantees of the due process clause.

COUNT III

Estoppel by the Government

72. The Petitioners/Plaintiffs herein incorporate by reference paragraphs 1 through 67 as if set forth at length and in full herein.

73. The Respondents/Defendants' induced and lured the Plaintiffs and members of their class who are Nicaraguan nationals into paying substantial applications fees on the false promise that their applications for suspension of deportation would not be pretermitted and would be decided on the basis of the equities in each case. Despite these representations, the defendants now seek to pretermit all suspension applications of Nicaraguans who were not in the United States for seven years at the time they were served with orders to show cause. The respondents/defendants, however, never informed Nicaraguan Plaintiffs or Nicaraguan class members, when they induced them to come forward and pay substantial fees, that they would object to their applications and pretermit them.

74. The Defendants/Respondents' conduct in inducing and luring Nicaraguan Plaintiffs and class members into paying fees without providing them any right to even apply for suspension of deportation amounts to a due process violation contrary to the due process clause

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of the fifth amendment to the United States Constitution.

COUNT IV

DUE PROCESS VIOLATIONS

75. The Petitioners/Plaintiffs herein incorporate by reference paragraphs 1 through 67 as if set forth at length and in full herein.

76. The Defendants/Respondents denied Plaintiff Baldizon the right to counsel to represent her before the BIA in the very matter that affects all Plaintiffs and class members in this case. The deprivation of the right to counsel in *Matter of NJB, supra,* affects not only Ms. Baldizon, but all members of the class in that the BIA has utilized the case as a precedent decision without giving counsel the opportunity to represent his client. A deprivation of the right to counsel is a deprivation of due process. Because the deprivation occurred in the very case the Defendants seek to use to pretermit Plaintiffs and class members applications for suspension of deportation the rule arising from the case can not be permitted to stand.

WHEREFORE, **Roberto Tefel, et. al.** and the class members whom they seek to represent, pray for certification of the class and entry of judgment against the Defendants, awarding them: (I) a declaration that the Defendants/Respondents' conduct violates IIRIRA, the INA, the APA, and the due process clause of the Constitution of the United States; (ii) permanent injunctive relief against the Defendants' conduct against class members baring the use of *Matter of NJB, supra,* to preclude eligibility for relief; (iii) reasonable attorneys fees; (iv) costs and expenses of suit; and (v) all other relief this Court deems just, necessary, and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Class Action Verified Complaint for Declaratory, Injunctive and Mandatory Relief and Writ of Habeas Corpus, was mailed ~~hand-delivered~~ to: Dexter A. Lee, Esq. Assistant United States Attorney, 99 N.E. 4th Street, Miami, FL 33132, on this 28 day of March, 1997.

Respectfully submitted,

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& TETZELI, P.A.
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Telephone (305)444-0060
Facsimile (305)444-3503

By:______________________
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AND

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VERIFICATION

I, Roberto Tefel, hereby verify that to the best of my knowledge and belief all matters contained in the above Class Action Verified Complaint for Declaratory, Injunctive and Mandatory Relief and Writ of Habeas Corpus are true and correct.

By: ______________________
ROBERTO TEFEL

STATE OF FLORIDA)
)ss
COUNTY OF DADE)

The foregoing instrument was acknowledged before me this 27 day of March, 1997 by ROBERTO TEFEL, who is personally known to me or has presented __________________ as a photographic identification, and who did/did not take an oath.

OFFICIAL NOTARY SEAL
DORIS L BROCKOB
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. CC603053
MY COMMISSION EXP. NOV. 20,2000

NOTARY PUBLIC

____
Typed/Printed Name
NOTARY PUBLIC,
STATE OF FLORIDA AT LARGE

My Commission Expires:

k:\njb\appwrit.hab

ADDITIONAL

ATTACHMENTS

NOT

SCANNED

PLEASE REFER TO COURT FILE