**01-56266; 01-56379**

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U.S. COURT OF APPEALS

In the United States Court of Appeals

of the Ninth Circuit

**Wen-Wan CHANG, et. al.**
Plaintiffs/Appellants/Cross-Appellees

**v.**

**United States of America**
Defendant/Appellee/Cross-Appellant

Cross Appeal

On Cross Appeal from the United States District Court for the Central District of California
Case No.: CV 99-10518-GHK(AJWx)

# PLAINTIFFS/APPELLANTS/CROSS APPELLEES' THIRD CROSS APPEAL (REPLY) BRIEF

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## JURISDICTIONAL STATEMENT

The district court's subject matter jurisdiction over this action is predicated on 28 U.S.C. § 1331, 28 U.S.C. § 2201, and 28 U.S.C. § 1346. This Court has subject matter jurisdiction over the Plaintiffs/Appellants/Cross Appellees' appeal pursuant to 28 U.S.C. § 1291. This Court, however, does not have subject matter jurisdiction over the Defendant/Appellee/Cross Appellant's appeal to the extent that it challenges a non-final order to remand as discussed *infra*.

The district court's order [Docket Entry ("DE") 58], granting in part and denying in part the Defendant's motion to dismiss the first amended complaint and for judgment on the pleadings, was entered on May 3, 2001. Judgment was entered on May 7, 2001. [DE 59]. Both the Plaintiffs and Defendant filed cross motions to reconsider this judgment. [DE 61, 63]. Both of these motions were denied in orders entered on June 14, 2001. [DE 70, 71].

The Plaintiffs filed their notice of appeal on July 2, 2001. [DE 72]. The Defendant filed a cross notice of appeal on July 24, 2001. [DE 73]. The Plaintiffs' notice of appeal is timely pursuant to Federal Rule of Appellate Procedure 4(1)(B).

## ISSUES PRESENTED FOR REVIEW ON THE GOVERNMENT'S CROSS-APPEAL

**I.** Whether the district court properly exercised subject matter jurisdiction over Plaintiff Chiang's I-829 denial where (a) the agency had entered a final and non-appealable order with immediate, concrete, and deleterious effect that was not rendered inoperative pending review; (b) Congress has not expressed in clear mandatory language that exhaustion of intra-agency remedies was required or that the district court had no jurisdiction to consider the matter; and (c) the purported statutory review mechanism is wholly inadequate to remedy the investors' constitutional, Administrative Procedures Act (APA), and equitable claims.

**II.** Whether this Court has subject matter jurisdiction over the district court's order to remand Plaintiff Chiang's I-829 denial to the agency for further consideration when orders to remand are generally not final and appealable orders.

**III.** Whether the district court properly determined that this Circuit's retroactivity jurisprudence was relevant to the INS decision to apply the new criteria announced in *Izumii* in the adjudication of the investors' I-829 petitions.

## SUMMARY OF ARGUMENT

The denial of the investors' I-829 petitions to remove the conditions of their residency is a final and non-appealable administrative action that results in an immediate and concrete injury to the Plaintiffs (hereinafter "investors"). 8 C.F.R. § 216.6(d)(2). Congress has neither mandated the exhaustion of further administrative remedies nor made the deleterious consequences inoperative if an investor chooses to pursue an optional limited intra-agency review proceeding. *Darby v. Cisneros*, 509 U.S. 137 (1993); *Young v. Reno*, 114 F.3d 879 (9th Cir. 1997).

The government has pointed to no clear congressional intent to expressly preclude the district court's review of the investors' claims and to no statute that mandates that the investors seek review of their I-829 denial in a removal proceeding which would then be channeled to the Court of Appeals.

Here, requiring the individuals to resort to initial review in removal proceedings is inadequate and would effectively foreclose meaningful review. *See, e.g., McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991). Indeed, the investors' constitutional, equitable, and statutory challenges are wholly outside of the narrow purpose and scope of removal proceedings. As such, immediate, full, and adequate judicial review is appropriate in the district court.

This Court lacks jurisdiction over the government's appeal of the district court's extremely deferential order remanding Plaintiff Chiang's I-829 denial to the INS for consideration in light of *Montgomery Ward v. FTC*, 691 F.2d 1322 (9th Cir. 1982). This order to remand is not final and appealable, particularly where the district court has not dictated a particular result and the agency has the authority to engage in such considerations. *See Eluska v. Andrus*, 587 F.2d 996 (9th Cir. 1978); *United States v. Louisiana-Pacific*, 846 F.2d 43, 44 (9th Cir. 1988); *see also Williams v. Unum Life Insurance*, 160 F.3d 1247, 1249-51 (9th Cir. 1998).

If this Court does find that it has jurisdiction, it should determine that *Montgomery Ward* is properly applicable. Indeed, this Court has a long standing tradition of refusing to uphold an administrative agency's application of new rules or policies retroactively to the detriment of a regulated entity. The government's challenge to the district court's determination that *Montgomery Ward* is relevant is predicated on several fundamental misunderstandings about the doctrine. First, the retroactivity analysis is relevant to any type of agency rule, not just legislative rules that are subject to notice and comment rule making. Second, the government's conduct in this case does constitute a retroactive application of law. Third, the application of the *Montgomery Ward* analysis is not a "hardship" waiver, but rather a legal analysis to determine if a new rule of law is being *impermissibly* retroactively applied.

The investors and class members whose I-829s have not yet been denied have ripe claims because under this Court's test it can be firmly predicted that their petitions will be denied on improper grounds. *Freedom to Travel v. Newcomb*, 82 F.3d 1431 (9th Cir. 1994). The government has made no real effort to distinguish or seriously challenge the investors' argument that it can be firmly predicted that all of their I-829 petitions will be denied on grounds based on the new criteria. Instead, it responds with pure abstract speculation that is insufficient to overcome all favorable inferences entitled to the investors at the pleading stage.

The district court also should have certified the investors class action in order to efficiently prosecute this case. The government's assertion that their class lacks commonality is based on a fundamental misunderstanding of the nature of their claims. The investors are not challenging the substantive results in their case, but rather the government's unlawful conduct in promulgating new criteria without notice and comment, and retroactively applying it to their petitions.

The investors have properly alleged affirmative misconduct under the appropriate analysis utilized by this Court (en banc). *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989). The investors have likewise fully demonstrated that they have a strong reliance interest in their own approved I-526 petitions. *Id.*; *Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982); *Cort v. Crabtree*, 113 F.3d 1081 (9th Cir. 1997); *Gestuvo v. District Director, INS*, 337 F. Supp.

1093, 1094 (C.D. Cal. 1971). The government has failed to address the argument the investors actually made on appeal supported by this very clear precedent. Instead, it mischaracterizes their arguments and frames them as the ones made by the litigants in *R.L. Investment v. INS*, 278 F.3d 874 (9th Cir. 2001), *adopting*, 86 F. Supp. 2d 1014 (D. Haw. 2000), without acknowledging the distinct factual context of each case.

The district court also erred in dismissing the investors' APA claims asserting a violation of the notice and comment requirements. The precedent decisions in fact do amend and add new criteria to the regulations, statute, and/or the INS' longtime consistent policy and practice.

The government assertion that all of the investors' APA notice and comment claims are foreclosed by *R.L. Investment* is without merit. First, in contrast to *R.L. Investment,* the investors in this case do not assert that INS contravened a rule of law represented only by other investors' unpublished opinions and general counsel memoranda. Here, the investors principally rely on the rule of law that was applied in their case. It is well settled in this circuit that an individual has strong reliance interest in their own official determinations. Thus, the investors' challenge in this case fits squarely within this line of cases represented by: *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996); *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009-10 (9th Cir. 1981); *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442,

449 (9th Cir. 1994); *Patel v. INS*, 638 F.2d 1199, 1203-05 (9th Cir.1980); *Ruangswang v. INS*, 591 F.2d 39, 44 (9th Cir.1978). Second, *R.L. Investment* did not foreclose the necessity of notice and comment where an agency contravenes a longstanding policy or practice. Rather, based on the limited facts in that case, the Court was unable to discern a policy. Here, however, the investors' complaint alleges that a policy was formed over seven years in thousands of approvals.

Moreover, in the government's attempt to refute the clear legislative change to the scope of the I-829 proceedings, the government points this Court to and relies exclusively on a so-called "catchall termination" provision. INA § 216A(b)(1)(C), 8 U.S.C. § 1186b(b)(1)(C). The provision that the government cites is not part of, nor applicable to, the adjudication of the investors' I-829 petitions. As such, its contentions should be rejected.

## ARGUMENT

### *Response to Arguments Raised by the Government on Appeal*

### I. THE DISTRICT COURT PROPERLY EXERCISED SUBJECT MATTER JURISDICTION OVER PLAINTIFF CHIANG'S CLAIMS

In an attempt to overcome the strong presumption of prompt and adequate review, the government has advanced the argument that 5 U.S.C. §§703 and 704 bar jurisdiction in the district court. These provisions prove illusory in support of the government's argument that "the correct test is whether Section 216A and related provisions of the INS provide adequate judicial review. If so, APA jurisdiction does not arise." Government's Cross Appeal Brief at 21. Indeed, the Supreme Court has interpreted the preclusive language in these APA provisions very narrowly and has determined that they are no more than a codification of the traditional finality and exhaustion requirements.

Even if the government is correct and the APA limits direct district court review, these provisions only channel review to the purported special statutory scheme if it is adequate to redress the claims at issue. Both the Supreme Court and this Court have not hesitated to allow immediate access to the district court where a special statutory review procedure proves inadequate to address or fully develop a particular claim. Here, the proposed procedure is wholly inadequate to address the investors' claims and, as such, direct review remains available in the district court.

### A. The Standard Of Review Is *De Novo*

This Court reviews assesses questions of subject matter jurisdiction *de novo*. *Ma v. Reno*, 114 F.3d 128, 130 (9th Cir.1997). The question of whether administrative remedies must be exhausted is likewise a matter of law that is reviewed *de novo*. *Rumbles v. Hill*, 182 F.3d 1064, 1067 (9th Cir. 1999).

### B. There Is A Strong Presumption In Favor Of Prompt, Full, and Adequate Judicial Review

The Supreme Court has repeatedly affirmed the strong presumption that Congress intends adequate judicial review of administrative action. *See, e.g., McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). Indeed, a "right of review" has been codified in the APA. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof").

The right to review is not simply a right to *some* review, but rather to full, effective, meaningful, and prompt review. While Congress has a measure of authority to limit review, precondition access to judicial review (i.e. require prior exhaustion of administrative remedies), and to channel review to a special statutory proceeding, this authority is deemed exceptional, and prompt access to full and

effective remedies is presumed absent very clear evidence of a contrary congressional intent. *See Barlow v. Collins*, 397 U.S. 159, 166-67 (1970) (Judicial review "is the rule, and non-reviewability an exception which must be demonstrated"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (non-reviewability must be demonstrated by "clear and convincing evidence of a contrary legislative intent"); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962).

Notably, where either administrative or other special statutory review provisions threaten to afford less than full and adequate review, the Supreme Court and this Court have not hesitated to uphold an aggrieved party's prompt access to the district court which would afford greater redress and a broader opportunity to develop a claim than would not otherwise be available in the more limited statutory scheme. *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Bowen v. Massachusetts*, 487 U.S. 879 (1988); *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999); *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998).

### C. The District Court Properly Exercised Subject Matter Jurisdiction Because Congress Has Not Required The Investors To Seek Review Of Their Claims In A Removal Proceeding

Absent very clear and plain language foreclosing immediate judicial review, the district court's subject matter jurisdiction is unaffected by the availability of a non-mandatory, alternative, and speculative administrative procedure. *See, e.g.,*

*Darby v. Cisneros*, 509 U.S. 137 (1993); *Young v. Reno*, 114 F.3d 879 (9th Cir. 1997).

It is well established that "an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *See Darby v. Cisneros*, 509 U.S. at 153 (emphasis in original).

The Supreme Court's decision in *Darby* is very clear. Exhaustion of administrative remedies is only required where it is mandated by the statute or administrative rule. *Darby*, 509 U.S. at 146 ("When an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is 'final for purposes of this section' and therefore 'subject to judicial review'"). The Court further stated that "it would be inconsistent with the plain language of [5 U.S.C. § 704] for courts to require litigants to exhaust optional appeals as well." *Id.* at 147.

The government can point to no language in the Immigrant Investor Law that either mandates or requires an investor to seek further administrative review once the district director has denied an I-829 petition. Rather, the regulations and statute indicate that the decision is final, non-appealable, and provides only for collateral review in immigration proceedings. Indeed, the plain language of the

applicable statute provides in pertinent part that "any alien whose permanent residence status is terminated under subparagraph (c) may request a review . . . in a proceeding to remove the alien." 8 U.S.C. § 1186b(c)(3)(D) (emphasis added). The relevant regulation states:

> If, after initial review or after the interview, the director denies the petition, he or she shall provide written notice to the alien of the decision and the reason(s) therefore . . . No appeal shall lie from this decision; the alien may seek review of the decision in deportation proceedings.

8 C.F.R. § 216.6(d)(2) (emphasis added).

The fact that an investor "may" seek review in a removal proceeding, certainly does not mean "must." *Darby*, 509 U.S. at 150 ("nothing persuades us that 'may' means must") (internal quotations omitted); ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT 104 (1947) ("However, under a statute which merely confers upon parties the right to apply for rehearing, it is now clear that an application for such reconsideration need not precede judicial review").

This Court has held that similar language in the text of 8 C.F.R. § 205.2 stating that a visa petitioner "may appeal the decision" to the Board of Immigration Appeals (BIA) did not require the plaintiff to first seek BIA review prior to filing an action in the district court. *See Young v. Reno*, 114 F.3d 879, 881-82 (9th Cir. 1997) ("[W]e conclude that, because the regulations do not explicitly require a

petitioner to appeal to the BIA prior to seeking judicial review, such intra-agency review is optional"); *see also Castro-Cortez v. INS*, 239 F.3d 1037, 1045 (9th Cir. 2001); *Jaa v. U.S. INS*, 779 F.2d 569 (9th Cir. 1986); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1023 (9th Cir. 1992).

The district court correctly juxtaposed this permissive language against the mandatory language utilized in 8 U.S.C. § 1160(e)(1) ("there shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection"); 8 U.S.C. § 1160(e)(3) (expressly limiting judicial review to an order of deportation or exclusion). Clearly, had Congress desired that investors seek initial review in a removal proceeding, it certainly could have utilized different language.[1] *Haitian Refugee Center*, 498 U.S. at 496 ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction, and given our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action").

Furthermore, a denial of an I-829 petition is a final and non-appealable agency action with very immediate concrete injuries:

[1] It should be noted that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); *Russello v. United States*, 464 U.S. 16, 23 (1983); *see General Motors Corp. v. United States*, 496 U.S. 530, 541 (1990).

> The alien's lawful permanent residence shall be terminated as of the date of the director's written decision. The alien shall also be instructed to surrender any Permanent Resident Card issued by the Service.

8 C.F.R. § 216.6(d)(2).[2] The fact that neither the regulation nor the statute render the harsh consequences of a denial inoperative pending review is further evidence that exhaustion is not required. *See Darby*, 509 U.S. at 137 ("an appeal . . . is a prerequisite to judicial review only when . . . the administrative action is made inoperative pending that review").

### D. The Government Cannot Circumvent the Holding Of *Darby* Which Affords Immediate Access Simply By Characterizing A Removal Proceeding As A Special Statutory Proceeding

The government contends that the district court has no jurisdiction over the INS' final agency action – which causes immediate and concrete injuries – simply because the government opines that Congress has specified a special statutory review proceeding in the form of review in a removal hearing followed by a petition for review.

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[2] With the termination of lawful residence, an investor and his or her family members lose their lawful status in the United States and their right to live and work in this country. Without lawful status, they begin to accrue unlawful presence that will be used to prevent them from returning to the United States for a period of either three to ten years or seeking further immigration benefits if they remain.

To support its novel theory, the government invokes 5 U.S.C. §§ 703[3] and 704.[4] The government essentially contends that these provisions foreclose immediate access to district court review if there is adequate review available in a "special statutory proceeding." Of course, the government asserts that a removal proceeding followed by a petition for review is the "special statutory provision" envisioned by §§ 703 and 704 and thus is the exclusive route for the immigrant to seek review. This argument is essentially an attempt to breathe new life into the government's contention that the investors should further exhaust administrative remedies. The government's repackaged exhaustion argument too must fail.

Initially, the government's analysis of 5 U.S.C. §§ 703 and 704 fails to take account that the preclusive nature of these provisions must be narrowly construed. *See Bowen v. Massachusetts*, 487 U.S. at 903-904 ("the exception that was intended to avoid duplication should not be construed to defeat the central purpose

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[3] 5 U.S.C. § 703 states in pertinent part that "the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction."

[4] 5 U.S.C. § 704 states in pertinent part that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." The reference to "court" in this provision references "special statutory review proceeding." § 703. *See* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE'S ACT 101 (1947) ("Furthermore, this provision does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures. See the first clause of section 10 (b)") (note that 10(b) refers to § 703).

of providing a broad spectrum of judicial review of agency action") (emphasis added); *Abbott Laboratories*, 387 U.S. at 140-41 ("this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation"). Indeed, the Court in *Bowen v. Massachusetts* further explained that "a restrictive interpretation of § 704 would unquestionably . . . run counter to §10 and §12 of the Administrative Procedures Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes." *Bowen v. Massachusetts*, 487 U.S. at 904, *quoting Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955). The narrow construction that courts must give to "preclusive" nature of these provisions is particularly relevant here where the government cannot point to a single express intention of Congress to mandate exhaustion of removal proceedings and to only review the denial of an I-829 petition in the Court of Appeals.

When properly narrowly construing these provisions and broadly presuming prompt and immediate access to judicial review, the government's argument clearly fails. There is no clear and express Congressional intent that the investors are even required to exhaust review in a removal proceeding or to only seek review on a petition for review.[5]

[5] *See Cheng Fan Kwok v. INS*, 392 U.S. 206, 214 (1968) (if Congress had wanted the judicial preclusion statute to embrace "all determinations directly affecting the execution of a final deportation order . . . it would have known how to say so").

The special judicial section of the Act narrowly excepts district court jurisdiction and instead channels review to the Court of Appeals for one form of final agency action only - a final order of removal. *See* INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) ("Judicial review of a final order of removal . . . is governed only by chapter 158 of Title 28") (emphasis added).[6]

The government is essentially trying to use §§ 703 and 704 to read language into the judicial review provisions of the Immigration and Nationality Act that just simply is not there. The INA's judicial review provision is not all inclusive and does not state that review of other otherwise final agency action, such as the denial of an I-829 petition, should be brought in a petition for review. Indeed, this provision has been repeatedly narrowly construed, and does not preclude district court jurisdiction of other final agency acts. *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) ("district courts have jurisdiction over final orders of the INS that

[6] Moreover, judicial review in the district court is not foreclosed by INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) ("judicial review . . . arising from action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review under this section") (emphasis added). The promulgation and retroactive application of new retroactive criteria under the Immigrant Investor Law and the denial of I-829 petitions are events that occur outside of the removal hearing process and as such are not precluded under this narrowly construed provision. *See Baharona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999); *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998). Indeed, in light of the investors' constitutional, equitable, and APA notice and comment claims, meaningful judicial review would be precluded, as discussed *infra*, if they were required to exhaust these futile proceedings. *See Haitian Refugee Center*, 498 U.S. at 496.

do not involve deportation itself"); *Young v. Reno*, 114 F.3d 879 (9th Cir. 1997) (revocation of visa petition); *Wong v. Department of State*, 789 F.2d 1380, 1384 (9th Cir. 1986) (L-2 visa revocation); *Nyaga v. Ashcroft*, 186 F. Supp. 2d 1244, 1250 (N.D. Ga. 2002) (§ 1252 "refers only to removal proceedings and not to visa petitions or any other procedures outside the scope of removal proceedings"), *citing* H.R. Rep. No. 104-469 at 359, 473.

The cases cited by the government are inapposite and reflect its unprecedented reading of the statute. Indeed, each of its cases involved very different situations where the agency judicial review provision, itself, expressly envisioned and afforded judicial review for the particular agency final act at issue.[7]

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[7] For example the relevant judicial review provision in *United States v. Southern Ry. Co.* 364 F.2d 86 (5th Cir. 1966) was very clear that review could only be brought after the exhaustion of administrative remedies and was clearly limited to a three judge court. *Id.* at 93 ("Again, we point to the language of the legislation before us providing for first, administrative review, and, second, judicial review before a three-judge court 'but not otherwise.' 'Otherwise' has a well defined meaning")(emphasis added). In *Rhode v. City of West Lafayette*, 850 F. Supp. 753 (N.D. Ind. 1993), the relevant judicial review provision, itself, likewise expressly envisioned review in the court of appeals. *Id.* at 42, 46 ("The Solid Waste Disposal Act addresses employee protection remedies by providing that an "order issued by the Secretary of Labor under this subparagraph shall be subject to judicial review in the same manner as orders and decisions of the Administrator or subject to judicial review under this chapter. . . . '[r]eview of the Administrator's action ... may be had by any interested person in the Circuit Court of Appeals of the United States'") (emphasis added) (internal citation omitted); *See also Pinkney v. Ohio Environmental Protection Agency*, 375 F.Supp. 305, 307-08 (N.D. Ohio 1974) (very clear judicial review statute that creates review mechanism in the district court and the court of appeals); *City of Rochester v. Bond*, 603 F.2d 927, 932 (D.C. Cir. 1979) ("any . . . person who is aggrieved or whose interests are

In those cases, the language in §§ 703 and 704, as well as the adequacy of the proceedings, was used simply to bolster the intention that Congress intended to channel review to those proceedings.

This Court should not be seduced by the simplicity of the government's novel submission. Here, we are faced with a very different statutory scenario: (1) an optional administrative review procedure that only suggests that the investors "may" seek additional and collateral review in a removal proceeding of their otherwise final agency action; and (2) a judicial review provision that has been narrowly construed to channel only final agency action in the form of a final order of removal to the Court of Appeals.

The government's first mistake is that it presumes that removal proceedings are a part of judicial review. A removal proceeding is not considered part of the "special statutory review proceedings." A special statutory review proceedings, as referenced in § 703, refers to courts.[8]

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adversely affected" by an FCC order granting or denying an application for a construction permit may appeal to this court. Similarly, § 1006 of the Federal Aviation Act provides that '(a)ny order . . . issued by the (FAA) . . . shall be subject to review' in this court or in another appropriate court of appeals at the instance of 'any person disclosing a substantial interest' therein'") (internal citations and footnotes omitted).

[8] *See* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 97 (1947)("many regulatory statutes provide for judicial review of agency action by requiring the complaining party to file with a circuit court of appeals (or with a district court) a written petition..."). *Id.* at 101 ("Furthermore, this provision does not provide additional judicial remedies in situations where the Congress has

A removal proceeding is simply one of several administrative remedies provided for in the INA which an aggrieved party may or may not be required to exhaust before seeking judicial review in the "special statutory proceeding." In the Immigrant Investor Law, a removal proceeding is simply a suggested avenue for reconsideration, and limited by statute to factual disputes, not the constitutional, statutory, and equitable challenges to the INS' administration of the Immigrant Investor Law that are at issue in this case.[9]

Second, it is simply incongruous with the APA to infer that removal proceedings must be exhausted or are a part of the "special statutory proceedings" where there is no mandatory intent that review be sought in them. Indeed, the purpose of the APA is to provide prompt and adequate review of individuals who are aggrieved by agency action. Therefore, it belies logic to infer that Congress intended investors and their families who are already suffering an immediate injury, as a result of the termination of their residency, to submit to further injury

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provided special and adequate review procedures. See the first clause of section 10 (b). Thus, the Customs Court and the Court of Customs and Patent Appeals retain their present exclusive jurisdictions").

[9] The relevant statutory provision belies the INS' contention that the investors are entitled to raise all applicable legal and factual challenges to the INS' action in the removal proceeding. Indeed, 8 U.S.C. § 1186b(3)(D), INA § 216A(3)(D) refers only to assessing the truth of facts described in the petition: "In such a proceeding, the burden of proof shall be on the Attorney General to establish, by a preponderance of the evidence, that the facts and information described in section (d)(1) of this section and alleged in the petition are not true with respect to the qualifying commercial enterprise." (Emphasis added).

(i.e. a final order of removal)[10] before they finally have a chance to seek review of the first injury in an Article III court. *See Haitian Refugee Center*, 498 U.S. at 497 (rejecting that aggrieved aliens with statutory and constitutional challenges were required to await judicial review after a deportation hearing); s*ee also Pedreiro*, 349 U.S. at 53 (rejected "additional burden" on alien of naming the INS commissioner, because the "basic policy of the Administrative Procedure Act to facilitate court review of such administrative action").

Third, it must be remembered that the INS retains unfettered and unreviewable discretion to place individuals in removal proceedings.[11] Thus, under the government's view, access to an Article III court would be wholly conditioned on a non-reviewable exercise of discretion. It would be highly doubtful that Congress would intend such a result.[12] In any event, this would make meaningful

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[10] A final order of removal results in an additional ten year bar from receiving any immigration benefits. INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii).

[11] *See generally Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999). This is the case even though the regulations indicate that the director "shall issue an order to show cause why the alien should not be deported from the United States." 8 C.F.R. § 216.6(d)(2). Indeed, the INS still retains discretion as to the timing of when a notice to appear will be issued and when it will be filed with the immigration court which is what triggers the removal proceeding.

[12] *See United States v. Nourse*, 34 U.S. 8, 28-29 (1835)(Marshall, C.J.)("It would excite some surprise if, in a government of laws and principle, furnished with a department whose appropriated duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion issue this powerful process . . . leaving to the debtor no remedy, no appeal to the laws of this country, if he should believe the claim to

judicial review purely speculative and wholly inadequate. In such situations, the Supreme Court has clearly held that there is immediate access in the district court. *See Haitian Refugee Center*, 498 U.S. at 496.

### E. The District Court Properly Exercised Subject Matter Jurisdiction Because Any Possible Existing Special Statutory Review Proceeding Is Inadequate To Address And Fully Develop The Investors Constitutional, Statutory, and Equitable Claims

Where a special review proceeding is inadequate to address the particular claim at issue, an aggrieved party may seek declaratory or injunctive relief in the district court. *Bowen v. Massachusetts,* 487 U.S. at 901 ("The Secretary's novel submission that the entire action is barred by § 704 must be rejected because the doubtful and limited relief available in the Claims Court is not adequate substitute for review in the District Court"); *Haitian Refugee Center*, 498 U.S. at 497 (direct access in district court available because tying review to deportation proceedings was "tantamount to a complete denial of judicial review"); 5 U.S.C. §§ 703, 704.

It is simply futile for the investors to utilize a removal proceeding in order to develop an adequate record for judicial review. Congress intended removal proceedings to resolve narrow disputes concerning the truth of the facts and information alleged in the petition. *See* in INA § 216A(3)(D), 8 U.S.C. 1186b(3)(D) ("the burden of proof shall be on the Attorney General to establish . . .

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be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States").

that the facts and information . . . alleged in the petition are not true. . ."). The investors however are not challenging the INS' assessment of the truth of the facts in their petition. They are prosecuting constitutional, APA notice and comment, and equitable claims challenging the very rule of law that was applied in their case and the government's unlawful conduct in administering the Immigrant Investor Law.[13] Moreover, they are seeking to estop the INS from denying their I-829 petitions in light of the INS' affirmative misconduct in adjudicating their petitions.

The nature of the Plaintiffs' claims takes them wholly outside of the authority of immigration judges and Board. Initially, the Board may not consider estoppel against the service. *Matter of Hernandez-Puente*, 20 I. & N. Dec. 335, 338-39 (BIA 1991)("Board itself and the immigration judges are without authority to apply the doctrine of equitable estoppel against the Service . . . ").

Likewise, the investors could not bring their APA notice and comment claims:

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[13] The investors are not challenging the correctness of the holdings of the precedent decisions, rather the INS' decision to apply them retroactively to their petitions. Thus, the government's suggestion that the investors are free to challenge the holding in removal proceedings is of limited utility. Likewise, the nature of the investors' claims render inapplicable the government's reference to *Kashani v. Nelson*, 793 F.2d 818 (7th Cir. 1986). In *Kashani*, the aggrieved asylum applicant was seeking review of the merits of his underlying application in the district court. He was not challenging a violation of constitutional, statutory, or equitable rights, as here. Indeed, the *Kashani* Court recognized that the district court would have jurisdiction to review certain violation of constitutional and statutory rights. *Id.* at 823.

> [T]his Board has never before purported to undertake the responsibility of assessing regulatory compliance with the APA, and I believe it unwise even to begin a practice of making observations in this area where we lack expertise. We ourselves are exclusively a creature of the Attorney General's regulations, and we have properly left it to the courts to resolve questions of APA compliance. Aside from our lack of authority and expertise on APA questions, I find little value in our offering speculation on this subject.

*Matter of Hector Ponce De Leon-Ruiz*, 21 I. & N. Dec. 154, 165 (BIA 1996)(emphasis added).

In addition, the investors simply cannot obtain review of their constitutional claims in a removal hearing. *See Matter of Cenatice, Et Al.*, 16 I. & N. Dec. 162, 166 (BIA 1977) ("It is clear, however, that it is not within the province of this Board to pass upon the constitutionality of the statutes it administers, but rather is solely within the power and capacity of the United States courts to declare them unconstitutional"); *see also Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("constitutional questions are unsuited to resolution in administrative hearing procedures and, therefore, access to courts is essential to the decision of such questions").

In addition, if the investors claims are wholly irrelevant to the purpose and scope of the proceedings, an inadequate record will certainly result. Thus, when an investor is finally allowed access to an Article III court, no meaningful review will be available because the courts of appeal will be forced to adjudicate on the inadequate record. 8 U.S.C. § 1252(b)(4)(A)("The court of appeals shall decide

the petition only on the administrative record on which the order of removal is based"). Indeed, the courts of appeal are strictly constrained in their ability to independently develop a factual record on the issues relevant to the investors' complaint, particularly so in the context of immigration. 8 U.S.C. § 1252(a)(1)(the [court of appeals] may not order the taking of additional evidence under section 2347(c) of Title 28"). Where aggrieved parties raise constitutional or other claims requiring factual development outside of the scope of removal proceedings, this Court has traditionally held that the action must be brought in the district court. *See, e.g., Mohammadi-Motlagh v. INS*, 727 F.2d 1450, 1453 (9th Cir. 1984)("The BIA lacked authority to hear and determine these factual issues and did not do so. We are therefore without jurisdiction to consider these claims. They must be raised in the first instance in the district court"); *See also Ghorbani v. INS*, 686 F.2d 784 (9th Cir. 1982); *Abedi-Tajrishi v. INS*, 752 F.2d 441 (9th Cir. 1985).

## II. THIS COURT HAS NO JURISDICTION OVER THE GOVERNMENT'S APPEAL BECAUSE THE DISTRICT COURT'S DECISION TO REMAND PLAINTIFF CHIANG'S RETROACTIVITY CLAIMS TO THE INS IS NOT A FINAL AND APPEALABLE ORDER

### A. The Standard Of Review Is *De Novo*

Where exhaustion is not required, the decision of a district court to require or not to require exhaustion is reviewed for an abuse of discretion. *See Pension*

*Benefit Guarantee Corp. v. Carter and Tillery Enters.*, 133 F.3d 1183, 1187 (9th Cir. 1998); *Baharona-Gomez*, 167 F.3d 1228; *Walters*, 145 F.3d 1032.

### B. This Court Has No Jurisdiction Over The Government's Challenge To The District Court's Order Concerning Retroactivity As An Order to Remand Is Not A Final And Appealable Order

The district court properly determined that this Court's retroactivity analysis[14] was appropriate in this case because the INS had applied one standard to the adjudication of the investor's initial I-526 petitions, afterwards promulgated new criteria, and then applied the new changed criteria to the adjudication of the Plaintiffs' I-829 petition to their detriment. [Excerpt of Record ("ER") at 139]. Rather than apply the retroactivity analysis in the first instance, the district court in an extreme gesture of deference vacated and remanded Plaintiff Chiang's I-829 petition so that the INS could "consider [the retroactivity analysis] and compile an administrative record." [ER at 139].[15]

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[14] The applicable test for determining whether an agency may apply a new rule in an adjudication is well settled: (1) whether the particular case is one of first impression; (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law; (3) the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of burden which a retroactive order imposes on a party; and (5) the statutory interest in applying the new rule despite the reliance of a party on the old standard. *Montgomery Ward v. FTC*, 691 F.2d at 1333.

[15] The Investors certainly find it curious that the district court exercised such extreme deference to the INS rather than apply *Montgomery Ward* in the first instance. Indeed, this Court generally accords no deference to an agency's assessment of whether to retroactively apply new rules, but rather reviews such a

The government on appeal has challenged the district court's order vacating and remanding Plaintiff Chiang's I-829 petition. This appeal is improper. This Court does not have jurisdiction over a district court's order remanding a cause to an administrative agency because it is not a final and appealable order. *See Eluska v. Andrus*, 587 F.2d 996 (9th Cir. 1978); *United States v. Louisiana-Pacific*, 846 F.2d 43, 44 (9th Cir. 1988); *see also Williams v. Unum Life Insurance*, 160 F.3d 1247, 1249-51 (9th Cir. 1998).

Indeed, as the *Eluska* Court stated:

> An order remanding the case for additional or supplementary evidence, without a review by the court of the administrative record... is without a doubt an interlocutory order and is not appealable. Likewise, an order *sua sponte* by the court for the taking of additional evidence is not appealable")(emphasis added).

*Eluska*, 587 F.2d at 1000.

The district court has simply requested that the INS give "due consideration" to the *Montgomery Ward* test in order to give the government an

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decisions *de novo*. *Oil, Chemical Atomic Workers International Union v. NLRB*, 842 F.2d 1141, 1144 n.2 (9th Cir 1988)("the question of whether new standards should be applied retroactively is one of law, which [the court should] review under the *de novo* standard"); *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141, 148-51 (9th Cir. 1952) (decision of retroactive application not one within agency's special competence, therefore not subject to deference). *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999). Thus, it is not the INS' role to make an assessment regarding these legal grounds, but rather for the district court to do so. Nonetheless, the district court's order appears to be within its discretion to remand Plaintiff Chiang's denial to the INS for due consideration and the compilation of an administrative record, as discussed above.

opportunity to consider the factors raised in *Montgomery Ward* prior to the district court's adjudication of the matter. In *Louisiana Pacific*, this court held that the district court's remand of a question of whether a consent decree should be reopened, altered, or amended to an administrative agency was proper and not a final order because it did not dictate the result of the agency's reconsideration. 846 F.2d at 44. This district court has likewise not dictated a particular result upon the INS consideration.

The government's argument that INS is without authority to consider evidence relevant to the *Montgomery Ward* factors is without merit. Indeed, the district court properly ruled "that Congress has not precluded Defendant's consideration of these factors." [ER at 139]. The government's appeal, which simply challenges a non-final order to remand, should be summarily dismissed for lack of jurisdiction.

### C. The District Court Correctly Determined That The *Montgomery Ward* Retroactivity Analysis Is Relevant

If this Court does determine that it has jurisdiction over the government's appeal, it should still be dismissed because the district court properly determined that the *Montgomery Ward* retroactivity analysis is relevant. This Court has been firm in refusing to uphold an administrative agency's application of new rules or

policies retroactively to the detriment of a regulated party.[16] This is especially true where the regulated party not only relied on a practice or policy, but had received some form of official "approval" of the conduct that was later deemed non-conforming. *See, e.g., Cort v. Crabtree*, 113 F.3d 1081 (9th Cir. 1997); *Maceren v. District Director, INS*, 509 F.2d 934 (9th Cir. 1975); *Arizona Grocery*, 68 F.2d 601 (9th Cir. 1934). Indeed, this Court starts with the presumption that such an application is disfavored. *See George v. Camacho*, 119 F.3d 1393, 1396-97 (9th Cir. 1997).

The government's challenge to the district court's determination that *Montgomery Ward* is relevant is predicated on several fundamental misunderstandings about the doctrine. First, the retroactivity analysis is relevant to any type of agency rule, not just legislative rules that are subject to notice and comment rule making. Second, the government's conduct in this case does constitute a retroactive application of law. Third, the application of the *Montgomery Ward* analysis is not a "hardship" waiver, but rather a legal analysis to determine if a new rule of law is being *impermissibly* retroactively applied.

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[16] *See, e.g., Pfaff v. U.S. Department of Housing and Urban Development*, 88 F.3d 739 (9th Cir. 1996); *Oil, Chemical and Atomic Workers*, 842 F.2d 1141 (9th Cir. 1988); *Montgomery Ward Co. v. FTC*, 691 F.2d 1322 (9th Cir. 1982); *Ford Motor Company v. FTC*, 673 F.2d 1008 (9th Cir. 1008); *Patel v. INS*, 638 F.2d 1199 (9th Cir. 1981); *Ruangswang v. INS*, 591 F.2d 39 (9th Cir. 1978); *Maceren v. District Director, INS*, 509 F.2d 934 (9th Cir. 1975); *NLRB v. Guy Atkinson*, 195 F.2d 141 (9th Cir. 1952); *Arizona Wholesale Grocery Co. v. Southern Pacific*, 68 F.2d 601 (9th Cir. 1934).

### 1. This Court's Retroactivity Analysis Is Appropriate Where There Is A Retroactive Application of Any Type Of Agency Rule, Not Simply Legislative Rules Subject To Notice And Comment

The government first argues that *Montgomery Ward*'s retroactivity analysis is not applicable to the instant case because this Court in *R.L. Investment,* 278 F.3d 874 (9th Cir. 2001), characterized them as interpretive rules. Government's Cross-Appeal at 30. This argument has no merit and is belied by this Court's own holding in *Montgomery Ward.*

In *Montgomery Ward,* this Court explained that there are circumstances where agency action does not require notice and comment, but nonetheless is impermissibly retroactive. *See Montgomery Ward*, 691 F.2d at 1334 (noting that interpretation does not require notice and comment, but cease and desist order that invokes penalties for conduct completed before the interpretation is vacated as impermissibly retroactive).

In applying the *Montgomery Ward* analysis, the relevant question is simply whether there is a retroactive impact resulting from agency action. The government's suggestion that a statute, regulation, or published opinion must somehow be contravened has little to no place in whether an agency action is retroactive. The *Montgomery Ward* decision is particularly illustrative of this point because in that case the Court determined that the first three factors did not weigh heavily in Ward's favor. *Montgomery Ward*, 691 F.2d at 1333-34. These three

factors notably included the three factors most aligned with the government's argument (i.e. issue of first impression, abrupt departure from consistent practice, and reliance). *Id.* Notwithstanding, this Court still found that the application of a "cease and desist order" had an impermissible retroactive impact because it imposed a fine for conduct that was completed prior to the clarification of the governing standard.

Moreover, the retroactivity analysis is still relevant even if the agency action at issue is simply a clarification of an uncertain area of law - as the government suggests is the case in this litigation.[17] *See Montgomery Ward*, 691 F.2d at 1328 ("when a new problem is presented to an administrative agency, the agency may act through adjudication to clarify an uncertain area of law, so long as the retroactive impact of the clarification is not excessive or unwarranted") (emphasis added).[18]

### 2. The INS Application Of The Precedent Decisions To the Investors' I-829 Petitions Involves A Retroactive Application Of Law

[17] *See* Government's Cross Appeal at 30 where the government—inconsistent with the above quoted passage and holding of *Montgomery Ward*—argues that *Montgomery Ward* is not applicable to clarifications.

[18] The fact that the precedent decisions were issued in an adjudication versus notice and comment rulemaking is likewise irrelevant. *See* Government's Cross Appeal at 27. The irrelevance of the setting is clearly illustrated by *Oil, Chemical and Atomic Workers*, which involved the propriety of retroactively applying a rule announced in adjudication. *Oil, Chemical and Atomic Workers*, 842 F.2d at 1144-45 (refusing to retroactively apply a new rule which simply shifted a party's burden of proof before the agency).

The government next argues that the *Montgomery Ward* doctrine is not applicable because there has not been a retroactive application of the law.[19] The government contends that Immigrant Investor Law provides for a "two-stage process" that requires two petitions to undergo entirely separate and independent adjudications. Government's Cross-Appeal at 30. As such, the government argues that the investors must demonstrate compliance with the statutory standards again. *Id.* at 31. The government's argument is unpersuasive and must be rejected. It does not matter that there are two separate proceedings. The application of the precedent decisions in I-829 proceedings has a retroactive effect because it "attaches a new disability, in respect to transactions or considerations already past." *INS v. St. Cyr*, 533 U.S. 281, 321 (2001), *quoting Landsgraf v. USI Film Products*, 511 U.S. 244, 269 (1995).

First, the government minimizes the correlation between an I-526 and an I-829 adjudication. Indeed, while there are two steps, it is still essentially one process. The adjudication of the I-526 is to determine whether in the INS' opinion the proposed investment comports with the statutory and regulatory requirements. The I-829 adjudication then determines whether or not the investor in fact in good

[19] The government also contends that *Montgomery Ward* is only applicable where the individual challenging the new criteria was a party to adjudication issuing the new rule. This is plainly inconsistent with *Oil, Chemical and Atomic Workers, supra*, where the union successfully challenged the retroactive application of a new NLRB decision to which it was not a party.

faith, substantially complied with terms of the investment as approved by the INS in the I-526 petition. In other words, whether it complied with the statutory requirements.

This is clearly contemplated by the statutory and regulatory framework that narrowly focuses on whether the investor "maintained" the proper investment throughout the alien's conditional residence. *See* INA § 216A(d)(1)(C), 8 U.S.C. § 1186b(d)(1)(C); 8 C.F.R. § 216(1)(c)(iii). Indeed, the relevant regulation governing the adjudication of I-829 petitions states, in pertinent part:

> In adjudicating the [I-829] petition, the director shall determine: . . .
> (iii) The alien sustained the actions described in paragraphs (c)(1)(i) and (c)(1)(ii) of this section *throughout the period of the alien's residence in the United States.* The alien will be considered to have sustained the actions required for removal of conditions if he or she has in good faith, substantially met the capital investment requirement of the statute and *continuously maintained his or her capital investment over the two years of conditional residence.*

8 C.F.R. § 216.6(c)(1)(emphasis added); *see also* INA §216A(d)(1)(C), 8 U.S.C. § 1186b(d)(1)(C) ("Each petition. . . shall contain facts and information demonstrating . . .(C) the alien *sustained* the actions described in subparagraphs (A) and (B) *throughout the period of the alien's residence* in the United States").

The use of language such as "sustained," "continuously maintained," and "over two years of conditional residence" undermines the Defendant's argument. This text affirms that the process of approving the qualifying investment is a continuing one, which evaluates the investment first for appropriateness at the I-

526 stage and then evaluates under a far more narrow inquiry the Investor's efforts to "sustain" the approved plan at the I-829 stage.

This Court's decision in *Cort v. Crabtree*, 113 F.3d 1081, 1084-86 (9th Cir. 1997) refutes the government's contention that the two-step nature of the process somehow eliminated the retroactive effect. In that case, the Bureau of Prisons redefined the term "crimes of violence." This modified definition had the effect of rendering several prisoners who had previously been approved as *eligible* for sentence reduction if they complied with a drug and alcohol program, suddenly *ineligible* upon the completion of their on-going 500 hour program. Even though compliance with the program was assessed again at the end, the Court held that newly applied definition could not be applied when making the second determination.

The government's conduct is retroactive here because it impairs rights that the investors possessed when they were admitted as conditional residents, increases their liability for their past conduct in making an investment, and imposes new burdens with respect to transactions already completed.

The investors are entitled to rely on the official action taken by the INS in reviewing and approving their initial petitions. At the I-526 stage, the INS must conclude, based on a review of the exhaustive evidence required that the structure and nature of his business and investment plan, that the investor: (a) met the

definition of an active investment; (b) satisfied the capital requirement; (c) met the definition of a new commercial enterprise; and (d) would satisfy the job requirement. The application of the precedent decisions to the investors' I-829 petitions essentially unsettles a number of these adjudicated facts, such as whether a new commercial enterprise was formed, the fair market value of his initial capital contribution, and the terms of his promissory note. Indeed, these are elements that fall outside of the scope of an I-829 proceeding that looks at whether the previously approved investment was substantially "sustained."

### 3. The *Montgomery Ward* Analysis Determines The Proper Rule Of Law To Be Applied By Determining Whether A Retroactive Application Of Law Is Permissible - It Is Not A Waiver As The Government Asserts

The government's final challenge to the application of the *Montgomery Ward* factors is the odd assertion that the district court somehow imposed a "hardship" waiver into the Immigrant Investor Law. This argument should be disposed of quickly, as it is based on a fundamental misunderstanding of the purpose of a retroactivity analysis.

First, the *Montgomery Ward* analysis does not waive compliance with the requirements of the Immigrant Investor Law. It simply is used to determine if the retroactively imposed criteria should be allowed to stand or whether it should be invalidated in favor of the prior standard in a given circumstance. If an investor is successful in establishing that a criteria is impermissibly retroactive, the petition is

simply given a fresh review, untainted by the impermissible criteria. In other words, the INS is still free to deny the investors' petitions if it determines that they did not in good faith substantially comply under the old criteria.[20]

Second, the government's misconception concerning the purpose of the *Montgomery Ward* analysis likely stems from its confusion of "burden" with "hardship." Defendant's Cross-Appeal at 33. Indeed, burden is a distinct legal concept. This Court's precedent demonstrates that a regulated party is impermissibly burdened where a showing is made that the party will be subjected to a disadvantage or penalty simply because it did not have proper notice of the need to conform its conduct to the new standard by which it would be judged. The Court does not need to inquire into the regulated entity's ability to "shoulder" the disadvantage or penalty, but simply whether the unforeseen consequence is now unavoidable. *Montgomery Ward,* 691 F.2d at 1322; *Oil, Chemical and Atomic Workers*, 842 F.2d at 1145 (emphasis added). In other words, the Ninth Circuit looks to see if there is a true retroactive effect which creates some harm.[21]

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[20] The INS' ability to deny the Investors' I-829 petitions is of course somewhat limited if the Investors' succeed on their estoppel count.

[21] In *Oil, Chemical and Atomic Workers*, this Circuit determined that the application of new precedent shifting the parties' burden of proof with respect to a sympathy strike provision in a contract was a retroactive application of law and in and of itself a sufficient impermissible burden to the union to prevent the retroactive application of the new criteria. The court stated that "the retroactive shifting of the presumption not only ignores the parties' intent at the time the contract was made, it *burdens* the Union with an interpretation of a clause which is

Third, the government also misunderstands what the district court did. The district court could have (and perhaps should have) conducted the *Montgomery Ward* analysis itself. Instead, in an effort directed at agency deference, it allowed the INS to gather evidence and conduct the retroactivity analysis. In the end the INS' efforts are not directed at determining whether to grant a waiver, but rather to decide whether its precedent should be retroactively applied to these investors. If it decides against retroactive application, it is still not compelled to grant the petition.

***Reply to Arguments Raised In Opposition To The Investors' Arguments***

## III. THE GOVERNMENT HAS NOT DISTINGUISHED THE "FIRM PREDICTION" RULE AND ONLY SPECULATES THAT THE I-829 PETITIONS COULD BE DENIED ON OTHER GROUNDS

The government has made no real effort to distinguish or seriously challenge the investors' argument that their claims are ripe because it can be firmly predicted that all of their I-829 petitions will be denied on grounds based on the new criteria. *Freedom to Travel v. Newcomb*, 82 F.3d 1431, 1436 (9th Cir. 1994) (distinguishing *Reno v. Catholic Social Svcs, Inc.* 509 U.S. 43 (1993) and expressly adopting Justice O'Connor's "firm prediction" rule). Instead, it responds with pure abstract

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exactly the opposite of the NLRB's interpretation at the time." *Oil, Chemical and Atomic Workers*, 842 F.2d at 1145 (emphasis added). Thus, the union now had the burden of proving that it did not waive a sympathy strike. The Court stated that "this burden was significant, as the Union might have continued to bargain for the express exclusion of sympathy strikes, had it known it would be required to prove intent."

speculation: "Although the INS may deny the plaintiffs' I-829 petitions based on the precedent decisions, the INS may alternatively base a denial on different grounds." Government's Cross-Appeal at 38.

The INS offers no possible alternative grounds, nor does it foreclose that these alternative grounds are linked to the precedent decisions. In light of the procedural posture of this case, which is still almost exclusively on the pleadings, the government must offer more than baseless speculation. Indeed, all of the investors allegations concerning the certainty of the INS denial of their I-829 petitions based exclusively on the precedent decisions must be taken as true at this stage.[22]

## IV. THE INVESTORS' CLASS IS SUFFICIENTLY COMMON AND WOULD SERVE THE INTERESTS OF JUDICIAL ECONOMY

### A. The Investors' Class Action Challenges The INS' Policy Of Retroactively Applying New Law To Their Cases, Not The *Application of* that Law

[22] *See Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002)("Where, as here, the district court receives only written submissions, the plaintiff need only make a prima facie showing of jurisdiction to avoid the defendant's motion to dismiss"); *see also Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. . . We need not, and do not, speculate as to the plausibility of [plaintiff's] allegations . . . A plaintiff needs only to plead general factual allegations of injury in order to survive a motion to dismiss, for 'we presume that general allegations embrace those specific facts that are necessary to support the claim") (internal citations omitted).

The government's challenge of the investors' argument that class action status is appropriate reflects a fundamental misunderstanding of the Plaintiffs' arguments.[23] The government erroneously characterizes this suit as "[a challenge to] the substantive holdings of the precedent decisions 'as applied' to individual plaintiffs and the financing structures of their investment agreements." Government's Cross Appeal at 41. The investors and their families are not challenging the holdings of the precedent decisions nor substantively challenging the denial on the merits of the petition. Rather, they challenge the INS' retroactive application of new criteria without notice and comment and in violation of *Montgomery Ward*, the constitution, and equitable principles. They assert that the INS is equitably estopped from applying the decisions and denying the applications. The focus of the lawsuit, and its common elements, are thus on the government's generally applicable conduct. Such a suit is proper, even if there is minor factual variance in the ultimate application.[24]

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[23] The government's allusion to the investors' class certification motion as untimely is somewhat misleading. First the motion for class certification was not denied based on timeliness, but rather directly linked with the district court's erroneous ruling on justiciability. The district court never even intimated that it was untimely or that this would be a factor in its decision. Indeed, the investors' filed a concurrent motion to enlarge the time for filing. [DE 21].

[24] The standards under Federal Rule of Civil Procedure 23(a)(2) do not require that every issue of fact and law be identical. *See Hanlon v. Chrysler*, 150 F.3d 1011, 1019 (9th Cir. 1998); *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998); *see also Stewart v. Abraham*, 275 F.3d 220, 227-28 (3d Cir. 2001) (plaintiffs

Numerous cases permit challenges, similar to the investors, where a class challenges an agency's unlawful or unconstitutional practice or policy that may in the end have minor factual variances in application. *See, e.g., Walters v. Reno*, 145 F.3d 1032, 1045 (9th Cir. 1998) (class certified where challenge is to general policy of providing notice to aliens, despite the fact that some of Defendant's offices provided more extensive notice); *Guckenberger v. Boston University*, 957 F. Supp. 306 (D. Mass. 1997) (Proposed class of learning-disabled students at university satisfied typicality and commonality requirements of class action rule in challenge to university's policies for accommodation of learning disabilities, though university alleged that class members had various learning disabilities, giving rise to different statutory rights and modes of accommodation); *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705 (D. Ariz. 1993) (Proposed class consisting of individuals who lived, worked or went to school in areas exposed to contaminated groundwater satisfied commonality element of class action rule, as liability of defendant under CERCLA and various state laws relative to disposal of hazardous material were legal issues common to entire class, and factual commonality existed in that each proposed class member was exposed to contaminated water; moreover, variables such as amount of water used, TCE concentration, water distribution patterns, or defendant's change in conduct over

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challenging the same unlawful conduct and sharing at least one question of fact or law satisfy commonality and typicality requirements).

the years did not defeat common nucleus of facts indicating defendant as source of contamination); *Crisci v. Shalala*, 169 F.R.D. 563 (S.D.N.Y.1996) (Commonality requirement for class certification was satisfied with respect to class of claimants whose cases had been or would be assigned to specified administrative law judge alleged to be predisposed to deny every capital Medicare Part B claim; common questions was whether such alleged bias deprived or would deprive both class members of their right to full and fair hearing was question of law common to class); *Rodriguez v. Carlson*, 166 F.R.D. 465 (E.D. Wash. 1996) (question of whether employers complied with proper procedure concerning housing inspection under Migrant and Seasonal Agricultural Worker Protection Act was common question though there could be some variances among proposed class members regarding their particular housing conditions).

Even if the nature of the investors' class required the district court eventually to undertake an individualized factual review of a particular element of the investors' claims, class certification is still warranted.[25]

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[25] Indeed, this Courts will uphold a properly certified class even if at a later stage an individualized factual inquiry is necessary. *See Walters v. Reno*, 145 F.3d at 1046 ("the need for subsequent individual proceedings, *even complex ones*, 'does not supply a basis for concluding that [the named plaintiff] has not met the commonality requirement'")(emphasis added), *quoting Forbush v. J.C. Penny Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993); *see also Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001)(need for additional proof as to eligibility to receive damages is

### B. Judicial Economy Is Served By Permitting A Class Action

The government also asserts that the investors' class should not be certified because it would not deprive the investors of access to judicial review. This argument misses the point of a class action, which is intended to efficiently deal jointly with claims involving multiple litigants seeking, identical relief, based on identical asserted wrongful conduct. *Cf. American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 550 (1974) ("A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions").

The government's argument encourages an inefficient waste of judicial resources. Indeed, the investors' class contains well over 250 investors. Under the government's view it is more prudent to hold 250 removal proceedings involving over 600 total family members. These proceedings, as described above, are inadequate to address the investors' constitutional, APA, and equitable claims, and thus would be futile and a waste of resources for both the government and the investors. Then, the government would prefer some 250 separate petitions for review to be filed in the courts of appeal on an inadequate record. This, of course, is a colossal waste, when all of these investors' legal challenges can be brought in one unified and simplified proceeding in the district court.

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insufficient with respect to whether challenge to underlying conduct should be certified).

## V. THE INVESTORS HAVE PROPERLY AVERRED AFFIRMATIVE MISCONDUCT

The government's principal error in attempting to respond to the investors' appeal is that it does not actually respond to the arguments raised by the investors. Instead, it attempts to recast the investors' arguments - which are well supported by controlling precedent in this Circuit—and present them as those made and rejected in *R.L. Investment*. The investors' arguments, however, as pointed out below, are quite different than those raised by the litigants in *R.L. Investment*, in particular because of the unique procedural posture at the time the precedent decisions were issued.

### A. Affirmative Misconduct Does Not Require Proof Of An Improper Purpose

At the outset, the government argues that the investors' estoppel claim must be rejected because "there is no allegation that the INS applied or will apply the precedent decision to plaintiffs for an improper purpose or has acted willfully or recklessly to deprive plaintiffs of any rights." Government's Cross-Appeal at 44.

The government clearly misunderstands the concept of affirmative misconduct and is in reality merging this prong of the estoppel analysis with a separate consideration: serious injustice. The investors are not arguing that it is affirmative misconduct to issue precedent decisions or to apply them to the investors' petitions. Rather, these are the acts that the investors seek to estop

because of the government's affirmative misconduct. As fully discussed in the investors' opening brief, it was affirmative misconduct for the government to: (a) approve the individual Plaintiffs' "non-approvable" immigrant petitions and admitt them to begin new lives in this country; (b) misinform the Plaintiffs that any changes to the Immigrant Investor Law would be made in a prospective manner through notice and comment rule making; and (c) conceal from the Plaintiffs the Defendant's true intent to retroactively apply the new criteria to the Plaintiffs' previously approved investments.

This Court clearly illustrated the proper method for determining affirmative misconduct in *Watkins v. U.S. Army*, 875 F.2d 699, 707-08 (1988) (en banc):

> Here, the Army affirmatively misrepresented in its official records throughout Watkins' fourteen-year military career that he was qualified for reenlistment. On the one occasion when the record was unclear, Watkins sought clarification and his classification was immediately changed from "unknown" to "eligible for reentry on active duty." . . . Thus, the Army affirmatively acted in violation of its own regulations when it repeatedly represented that Watkins was eligible to reenlist, as well as when it reenlisted him time after time.

*Watkins*, 875 F.2d at 707-08 (emphasis added). Indeed, the Army had no improper purpose for re-enlisting Watkins. What made the action affirmative misconduct is that it enlisted him in violation of agency rule.

Moreover, the government's reliance on *R.L. Investment* for the proposition that there is no injustice is simply misplaced. The distinctions between the investor in *R.L. Investment* and the investors and their families in this case are

legion. For example, in *R.L. Investment*, the investor had not yet been admitted to the United States as a conditional resident, and he had only placed his money in escrow pending approval of his first petition. Thus, he was not subject to any loss of immigration status or the loss of his money.[26]

In stark contrast, the investors and their families in this case are subject to deportation and all of its inherent harms.[27] Furthermore, as each of the investors' did receive approvals, they have all committed their funds to their investments. They stand to lose the life they have built in this country, the right to work, travel, and learn in this country.[28] They are subject to being barred from returning to this country if ordered deported or if they accrue sufficient unlawful presence

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[26] *See R.L. Investment*, 86 F. Supp. 2d at 1027 ("Zou still has his $500,000 investment. That money was put in an escrow account to be released on condition that has visa petition was approved"); *Id.* at 1027 n.2 (noting that the investment agreement in the record allowed for the return). There is no similar facts in this case as all investor placed their money into their investments and executed duly enforceable and negotiable promissory notes. And, more importantly, almost all have completely changed their lives—uprooting themselves from their homes and lives in their countries, moving to the U.S., establishing lives and friends and homes here—based on the INS' actions and representations.

[27] *Sun Il Yoo v. INS*, 534 F.2d 1325, 1329 (9th Cir. 1976) (deportation viewed as a profound and unconscionable injury; *Patel v. INS*, 638 F.2d 1199, 1205 (9th Cir. 1981); *Maceren v. District Director, INS*, 509 F.2d 934, 940 (9th Cir. 1975); *cf. Johnson v. Williford*, 682 F.2d 868, 871-72 (9th Cir. 1982) (revocation of parole after 15 months serious injustice).

[28] The government simply has no factual basis for asserting that there is no harm in this case because the investors can seek the return of their money, since *R.L.* Investment characterized the arrangement in that case as a debt. Government's Cross Appeal at 32. The fact that *R.L. Investment* determined that the distinct investment in that case constituted a debt arrangement does not mean the investors' have a debt arrangement here where the investments are completely different.

challenging the INS' action, which will prevent them from returning even as tourists to see the friends and families in their communities. In other words, whereas the investors in *R.L. Investment* could simply get their money back and reapply, these investors stand to lose the last five years of their lives and perhaps, much more.[29] The injustice in this case is manifest.

### B. The Investors Estoppel Claim Is Based On Their Reliance Interest In Their Own I-526 Approvals, Not Reliance On Other Investors' I-829 Petitions

This Court's precedent recognizes that the investors may justifiably rely on their own I-526 approvals.[30] *Watkins*, 875 F.2d 699 (strong reliance interest in eligibility determination to re-enlist even where the determination is inconsistent with law); *Johnson v. Williford*, 682 F.2d 868, 872 (9th Cir. 1982) (prisoner had right to believe that he was eligible for parole when he was repeatedly told he was eligible, even though statute forbid parole); *Cort v. Crabtree*, 113 F.3d 1081 (9th Cir. 1997) (prisoner issued eligibility determination indicating possibility for early

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[29] *Johnson*, 682 F.2d at 872 (serious injustice to revoke parole after 15 months of successful reintegration); *United States v. Wharton*, 514 F.2d 406, 412 (9th Cir. 1975) ("Governmental conduct would work a serious injustice if this family were divested of the home in which they have invested so much of themselves").

[30] The support the government enlists in "unpublished opinion" jurisprudence has little vitality where the individual asserting the reliance interest on the unpublished opinion or decision is actually a party to the decisions. Indeed, unpublished opinions and orders, while not binding to third parties, are certainly binding and enforceable against the parties to the proceeding resulting in the order. *Cf.* 9th Cir. Rule 36-3(a)("unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrines of law of the case, res judicata, and collateral estoppel") (emphasis added).

release had reliance interest in that determination even if it was based on potentially erroneous reading of law); *Gestuvo v. District Director, INS,* 337 F. Supp. 1093, 1102 (C.D. Cal. 1971) ("Gestuvo had a right to believe that the Service intended its [approval of the labor certification] to be acted upon").

The government simply ignores the very clear precedent of this Court holding that individuals are entitled to rely on their own approvals, and instead mischaracterizes the investors as relying only on other approved I-829 petitions and general counsel memoranda. This is simply an effort to cast this case as *R.L. Investment* when it is clearly factually distinct.

### C. The Mistake Defense Is Not Applicable Where An Individual Relies On Her Own Official Approval *As Opposed To Another Individual's Decision*

The government's attempt to defend their misconduct by characterizing it as a mistake that they should be allowed to correct is without merit or legal support. *See* Government's Cross Appeal at 46, 54-55. The government simply ignores the clear law in this Court that holds that an individual will acquire a "settled expectation" when they receive their own official agency determination. *Cort v. Crabtree*, 113 F.3d 1081 (9th Cir. 1997). Notably, the government makes no attempt to distinguish *Cort* – let alone mention it even in a footnote. Rather, the government's only response is its reliance on the *apologia* in *R.L. Investment v.*

*INS*, 86 F. Supp. 2d 1014, 1024 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) that administrative agencies make mistakes.

There is a very clear and important distinction between this Court's rejection of the "agency mistake defense" in *Cort*, which controls in this case, and its tacit approval of it in *R.L. Investment.* The first important distinction concerns who is attempting to rely on the approval or the decision that the agency says is mistaken: the actual individual who received the decision or a third party.

In *Cort,* the Ninth Circuit held in quite strong terms that prisoners had a settled expectation in their own eligibility determination for a program that might lead to early release. In *Cort*, the Court held that once an eligibility determination had been made for an individual to participate in a program, that individual had a "settled expectation" in continued eligibility notwithstanding an intervening program revision that would have made the person ineligible. Indeed, the Ninth Circuit used very strong language rejecting the "mistake" defense when asserted against an individual who himself had received an official decision. In rejecting the Agency's "mistake" defense, the court characterized the argument as "confusing," "unique," and "novel." *Cort,* 113 F.3d at 1085-86.

The situation in *R.L. Investment,* however, is very different. In that case, the court acknowledged the relevance of the mistake defense where an individual was seeking to rely on the eligibility decision of other individuals, as opposed to his

own decision. There, the investor was petitioning for an initial eligibility determination (I-526) of immigrant investor status. Indeed, in contrast to *Cort* and this litigation, the investor in *R.L. Investment* was not protesting a decision to reverse his personal previously granted eligibility determination. The *R.L.* investor had never himself received any form of approval. Thus, the court did not find a sufficient interest to preclude the application of the new standard to his new petition. *R.L. Investment*, 86 F. Supp. 2d at 1024.

Thus, in looking at both *Cort* and *R.L. Investment*, it becomes clear that this Court has drawn a careful and important line between who is asserting the reliance interest. Clearly, under *Cort*, if an individual has his own formal approval, then there is a settled expectation. However, if—as in *R.L. Investment*—the individual asserts only the approvals of four other investors, then the "mistake" defense may have some applicability.

As such, *R.L. Investments*' agency *apologia* has no applicability to the instant case. Here, the investors are asserting a settled expectation based first and foremost upon their own individually and previously approved investment plans (I-526). The government's overwhelming reliance on *R.L. Investment* fails to account for the clear difference between the reliance interest in *R.L. Investment* and the instant case. The investor in *R.L. Investment* was making an I-526 application for INS initial approval of his investment program. He further was attempting to

rely on four other approved I-526 petitions. *R.L. Investment*, 86 F. Supp. 2d at 1026. In other words, the investor in *R.L. Investment* had never himself received an approval from the INS.

In this case, the investors are in a very different posture than the investor in *R.L. Investment*. Each of the Plaintiffs in this case was provided his own official determinations that his investment was valid under the Immigrant Investor Law. Just like in *Cort*, the Plaintiffs have a "settled expectation" in their own official determinations—even if the initial reasoning is later rejected. Thus, this is not a case of non-mutual collateral estoppel as the Defendant intimates. The Plaintiffs are seeking primarily to rely on their own approvals, which are simply buttressed by other overt manifestations of the Defendant including its consistent practice of adjudications.

Furthermore, the Defendant also notably fails to contradict the fact that even the *Izumii* precedent decision indicates that an individual's own approved I-526 petition gives rise to a justifiable expectation. *See Matter of Izumii,* Int. Dec. No. 3360 at 36, 22 I. & N. Dec. 201, ___ (BIA 1998) (recognizing that a reliance interest arises from the adjudication of petitioner's application).

## VI. THE INVESTORS' APA NOTICE AND COMMENT CHALLENGE IS NOT CONTROLLED BY *R.L. INVESTMENT* BECAUSE IT ARISES IN AN ENTIRELY DIFFERENT PROCEDURAL CONTEXT INVOLVING THE APPLICATION OF A DISTINCT SET OF REGULATIONS AND INTERESTS FROM THOSE THAT WERE AT ISSUE IN THAT CASE

### A. The Investors' APA Claims Are Not Controlled By *R.L. Investment*

The government asserts that all of the investors' APA notice and comment claims are foreclosed by *R.L. Investment*. Such a broad and sweeping conclusion is simple hyperbole. Indeed, *R.L. Investment* is limited by its facts and the very different procedural posture its litigants found themselves in terms of seeking permanent residency. It must be remembered that the investors and their families in this case have all received the official imprimatur of the government on their investment and therefore have very different expectations with respect to the laws that are applied in their case.

First, in contrast to *R.L. Investment,* the investors in this case do not assert that INS contravened a rule of law represented only by other investors' unpublished opinions and general counsel memoranda. Here, the investors principally rely on the rule of law that was applied in their own case. It is well settled in this circuit that an individual has strong reliance interest in their own official determinations.[31] Thus, the investors' challenge in this case fits squarely

[31] *See United States v. Utah Construction and Mining*, 384 U.S. 394, 421-22 (1966); *see also Safir v. Gibson*, 432 F.2d 137, 142-43 (2d Cir. 1970) (Friendly, J.) (applying principles of *res judicata* to both issues of fact and law decided by one agency in a subsequent administrative proceedings before another agency); *Cort v. Crabtree*, 113 F.3d 1081; *Watkins*, 875 F.2d 699; *Johnson*, 682 F.2d at 872. Indeed, the Associate Commissioner in *Izumii* has already indicated that an

within this line of cases represented by: *Pfaff*, 88 F.3d at 748; *Ford Motor Co*, 673 F.2d at 1009-10; *Patel*, 638 F.2d at 1203-05; *Ruangswang*, 591 F.2d at 44; *Yesler*, 37 F.3d 442, 449 (9th Cir. 1994). These cases stand for the proposition, applicable here, that where an individual conforms his conduct to a given regulation or statute, an agency may not subsequently in an adjudication, without prior notice, unsettle a legitimate expectation that the individuals have based on their good faith attempt to comply with the legislative rule.[32]

Second, *R.L. Investment* did not foreclose the necessity of notice and comment where an agency contravenes a longstanding policy or practice. *See R.L. Investment*, 86 F. Supp. 2d at 1024 ("A rule that effects a change in existing law or policy is legislative")(emphasis added)(citation omitted). Rather, based on the limited facts in that case, the Court was unable to discern a policy. *Id.* ("The four RLILP investor petitions are insufficient evidence of an INS' "policy"). Here, however, the investors' complaint alleges that a policy was formed over seven years in thousands of approvals. [E.R. at 61, §§96(h), 97]. Indeed, the investor class itself involves nearly 250 of those approvals. Thus, if allowed to fully develop their claims, the investors may demonstrate that the precedent decisions

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approved I-526 petition gives rise to "reasonable" and "justifiable" reliance. *Izumii*, I. & N. Dec. at 197.

[32] This Court was especially troubled in *Pfaff* that HUD, like the INS here, had made "inconsistent and misleading representations to those regulated . . . and, in so doing, has led them down the garden path." *Id.* at 747.

contravened a longstanding policy or practice necessitating notice and comment. *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C.Cir. 1999); *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001); *Pfaff*, 88 F.3d at 748.

### B. The Government Relies Exclusively On An Inapplicable Statute To Refute The Investors' Claim That The Retroactive Application of The Precedent Decisions Amended The Narrow Scope Of The I-829 Proceedings

The investors argued that the application of the precedent decisions to the Investors' I-829 petitions effectively amended the rules and statute because it significantly broadened the narrow scope of review that is to be undertaken at the I-829 stage. Indeed, the I-829 adjudication is not designed to second guess the first adjudication. It is intended simply to narrowly determine if the investor "in good faith, substantially" "maintained" and "sustained" the qualifying investment throughout the alien's conditional residence. INA §216A(d)(1)(C), 8 U.S.C. § 1186b(d)(1)(C); 8 C.F.R. § 216(c)(1)(iii). If the facts in the petition are deemed to be "true," the INS is supposed to remove the conditions. INA § 216A(3)(B), 8 U.S.C. § 1186b(3)(B).

In its attempt to refute this argument, the government again attempts to assert that the I-526 petition and I-829 proceedings are two separate proceedings allowing a *full reassessment* at each juncture. In support of its proposition that the I-829 proceeding is just as broad as the I-526 proceeding, the government points this Court to a so-called "catchall termination" provision. INA § 216A(b)(1)(C), 8

U.S.C. § 1186b(b)(1)(C). This reference is disingenuous and belies the government's argument.

The provision that the government cites is not applicable to the adjudication of the investors' I-829 petitions. Instead, the section pertains only to the rescission of the I-526 during a statutory two-year period that has passed for the investors in this case. Congress granted this authority to the INS during the first two years (only) to reexamine the investment for any basis under the act in rescission proceedings. This express authority is notably not part of the I-829 proceedings. *Compare* INA § 216A(b)(1)(A)-(C), 8 U.S.C. § 1186b(b)(1)(A)-(C), *with* INA 216A(d)(1)(A)-(C), 8 U.S.C. § 1186b(d)(1)(A)-(C); 8 C.F.R. § 216.6(c). None of the investors have been issued a notice under this broader provision, and it is well passed the period where full reconsideration is allowed by law. Thus, the government's efforts to apply INA 216A(b)(1)(C) to I-829 petitions is misplaced. Congress has foreclosed this broader power in the adjudication of I-829 petitions.

Indeed, the very fact that Congress created a separate temporally limited provision to rescind improvidently granted I-526 petition separate and apart from the I-829 proceedings simply reinforces the investors' argument that the INS has improperly amended the regulations and statute by expanding the inquiry to be undertaken during an I-829 proceeding. The INS has clearly amended its rules to circumvent the two-year limit on rescinding I-526 approvals and has

fundamentally broadened the scope of the I-829 proceedings to permit an *ultra vires* re-examination of the issues that are supposed to be settled in the I-526 adjudication. Such an amendment—at a minimum—compels notice and comment rulemaking.

## CONCLUSION

WHEREFORE, the Plaintiffs/Appellants/Cross-Appellees respectfully request that this Honorable Court dismiss the government's appeal and reverse in part the judgment of the district court and remand with instructions to reinstate all named individual Plaintiffs and to permit them to seek class wide injunctive and declaratory relief on their APA, retroactivity, constitutional, and estoppel claims.

**DATE:** August 29, 2002

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 00-15627

I certify that: **(check appropriate option(s))**

X 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

X Proportionately spaced, has a typeface of 14 points or more and contains **13,717** words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14, 000 words; reply briefs must not exceed 7, 000 words),

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__ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

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**August 29, 2002**
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## PROOF OF SERVICE

I, Ira J. Kurzban, the undersigned, say:

I am over the age of eighteen years and not a party to the within action or proceedings; my business address is: KURZBAN, KURZBAN, WEINGER & TETZELI, P.A., 2650 SW 27th Avenue, 2nd Floor, Miami, Florida 33133.

On August 27, 2002 I served the within via United States Express Mail:

**PLAINTIFFS/APPELLANTS/CROSS APPELLEES' THIRD CROSS APPEAL (REPLY) BRIEF**

on the Office of Immigration Litigation by depositing two true copies, thereof, enclosed in a sealed envelope with postage fully pre-paid, in a mailbox regularly maintained by the Government of the United States to each person listed below addressed as follows:

Heather Phillips, Esq.
Office of Immigration Litigation
Department of Justice/Civil Division
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Executed on August 29, 2002, at Miami, Florida. I declare under penalty of perjury that the foregoing is true and correct.

Ira J. Kurzban, Esq.
Declarant