No. 96-36304
DC# CV-94-01204-JCC

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA WALTERS, et al.,
Plaintiffs/Appellees

v.

JANET RENO, et al.,
Defendants/Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

COUNTER-STATEMENT OF THE ISSUES

1. Whether the district court properly found, based on the undisputed facts, that the notice the Immigration and Naturalization Service (INS) provides to noncitizens charged with document fraud under Section 274C of the Immigration and Nationality Act (INA) violates due process, where the notice: (a) uses unduly complex and legalistic language; (b) fails to plainly communicate the drastic immigration consequences at stake; (c) does not inform respondents that a 274C hearing must be requested separately and in addition to a deportation hearing; and (d) is provided only in English to Spanish-speaking respondents.

2. Whether the adequacy of INS's 274C notice procedures may properly be challenged in a nationwide class action, where that notice is based on standardized forms.

3. Whether the court's injunction requiring revision of two INS forms, which have resulted in 93% of noncitizen respondents losing their right to a hearing, was based upon an adequate showing of harm, and was within the court's authority.

4. Whether the scope of the injunction was properly tailored to remedy the due process violations, where the court did no more than attempt to place class members in the position they would have been absent the violations.

5. Whether the court correctly declined to resolve issues where material facts were in dispute and summary judgment provided full relief to plaintiffs.

STATEMENT OF JURISDICTION

Plaintiffs agree with defendants' statement of jurisdiction.

ATTORNEYS' FEES

Plaintiffs will seek attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

STATEMENT OF THE CASE

Plaintiffs in this action challenged the procedures and nationally standardized forms used by the INS to implement INA § 274C (8 U.S.C. § 1324c). The district court found that these procedures and forms are confusing and misleading and deprive individuals of their statutory and constitutional right to meaningful notice and a hearing. Accordingly, the court certified a nationwide class, granted summary judgment, and issued a permanent injunction.

STATEMENT OF FACTS

A. Statutory Framework

Section 274C, enacted in 1990, makes it unlawful to knowingly engage in certain types of immigration-related document fraud. Before a 274C final order may be issued, the Attorney General must furnish the individual ("the respondent") with notice and the opportunity to request a hearing. INA § 274C(d)(2). If a hearing is requested and the INS files a formal complaint, the hearing is held before an administrative law judge (ALJ), and must be conducted in accordance with the Administrative Procedure Act. See § 274C(d)(2)(B). The INS bears the burden of establishing a violation by a preponderance

of evidence. INA § 274C(d)(2)(C). If the respondent fails to request a hearing, a 274C final order automatically issues. INA § 274C(d)(2)(B).

An individual against whom a 274C final order is issued is subject to a monetary fine and a cease-and-desist order. In addition, a 274C order has extremely serious immigration consequences. Noncitizens are rendered deportable and are ineligible for most forms of relief from deportation. A 274C order is also a permanent ground of inadmissibility, forever barring return to the United States except in extremely limited situations where a waiver of the bar may be available. INA § 212(a)(6)(F). Throughout the two years of this litigation, defendants were able to identify only two instances where noncitizens with 274C orders obtained relief from deportation. ER 1152-53.[1]

B. INS Implementation of § 274C

The INS has developed two nationally-standardized forms to

[1] Relief from deportation may be available to individuals eligible for certain very limited forms of discretionary relief. See INA § 212(c) (lawful permanent residents (LPRs) for at least 7 years); INA § 208 (asylum). Even for respondents eligible for relief, INS may oppose the discretionary grant of relief because of the 274C order. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) created an additional, limited waiver of deportation, but it is only available to LPRs who establish that document fraud was committed "solely to assist, aid, or support the alien's spouse or child (and not another individual)." INA § 237(a)(3)(C)(ii). IIRIRA also added a waiver of the ground of inadmissibility for LPRs, or certain applicants for permanent residence, who establish that the violation was committed solely to assist the alien's spouse or child. INA § 212(d)(12).

provide notice in 274C cases, the Notice of Intent to Fine (NIF) and the Notice of Rights/Waiver (NOR/W). ER 597-600, 767. The NIF, which is provided only in English, is a one-page double-sided form with additional pages attached setting forth the specific charges, one page for each count. The NIF makes no reference to the immigration consequences of a 274C order, but states in three places that a fine and cease-and-desist order may result. ER 597-98.

The NOR/W is a dense, one-page document divided into two sections. The top section concerns the respondent's rights. At the bottom of this top section, the form states:

> If you are not a citizen of the United States, you are further advised that, as an alien subject to a Final Order for a violation of Section 274C of the Act, you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act.

This legalistic sentence is the only statement in either the NIF or NOR/W concerning the statute's immigration consequences.

The bottom half of the NOR/W provides a signature line allowing respondents to waive their right to a hearing, but there is no signature line to request a hearing, and the INS does not provide respondents with any 274C hearing request form. Although not mandated by the statute, the INS requires that requests for a hearing be submitted in writing, either in English or with an attached English translation. 8 C.F.R. § 270.2(b). The request must either be mailed or delivered in person to a designated INS office.

Respondents who fail to submit a written request for a

hearing within 60 days automatically receive a 274C final order, rendering them deportable and excludable. Id. Likewise, respondents who sign the waiver on the NOR/W at the time they are served with the forms receive a 274C final order. The INS routinely obtains waivers from unrepresented respondents within hours of when they are charged, and almost always while they are in INS custody. ER 1059-62. These waivers are immediately effective and irrevocable. ER 1056-57.

Once a 274C final order is issued, whether as a result of a waiver or the failure to submit a written request for a hearing, the INS will not entertain a motion to reopen the 274C case, even where respondents allege they did not receive notice. Defs.' Br. at 57-58.

Nearly all 274C respondents are also served with deportation-related forms at the time they are served with the NIF and NOR/W. ER 1069-71, 1074. The deportation-related forms are served where INS believes the 274C respondent has committed a deportable offense in addition to the 274C charge. The deportation-related processing occurs in two phases, with respondents first receiving a "notice of rights" in English and Spanish explaining the options of requesting voluntary departure or a deportation hearing. ER 631-33. Approximately 60% of 274C noncitizen respondents requested and were granted voluntary departure, a benefit that allows them to depart the United States without being subject to the five-year bar to their return that would result from a formal order of deportation. INA §

212(a)(6)(B); ER 1069-71. The remaining 40% of respondents are processed for deportation hearings, and in the second phase of processing are served with an Order to Show Cause ("OSC"), written in English and Spanish. Id. Individuals who are processed for deportation hearings receive a total of at least 10 pages of information in addition to the 274C forms. ER 602-613. None of the Spanish deportation-related forms provides any warning that the English-language 274C forms contain critical information that has not been translated, and or that the 274C proceedings involve a distinct charge. Nor do the forms explain that a respondent who requests a deportation hearing must make a separate request for a 274C hearing. Id.

Over 98% of the persons charged with 274C violations are noncitizens. ER 986-88. The overwhelming majority of noncitizen respondents -- 4,166 of 4,483, or 93% -- have lost the right to a 274C hearing, by either signing a waiver or failing to submit a timely request for a hearing. ER 988. More than twice as many noncitizens signed immediate waivers of 274C hearings as requested hearings. ER 1055A-1056 (915 waivers, 317 hearings requested). Given the drastic immigration consequences of a 274C order, these results belie common sense, and differ strikingly from INS's own expectations. When INS began the task of implementing the statute, senior agency officials anticipated that most noncitizens would not waive 274C hearings because it is not in their interest. ER 858-59, 1065. Some INS agents and supervisors candidly admitted that obtaining a waiver of a 274C

hearing is a "common mistake" of processing because "[a]ny alien who waives his/her rights in a 274C case probably doesn't fully understand the implications of his/her actions," and there is "no advantage" for noncitizens to waive their hearings. Id.

Many of the respondents who lost the right to a hearing have substantial ties to the United States, including citizen or permanent resident spouses and children. ER 1079-80, 1084-85, 1089, 1100, 1107-08, 1109F-G, 1115, 1123-24, 1136, 1146. These individuals plainly did not want to leave the country unless required to do so, and indeed sought to contest their removal at deportation hearings. ER 1076B, 1081B-C, 1094, 1105, 1109C, 1113, 1116, 1119-20, 1129-30, 1139. Indeed, many of these individuals were processed for deportation hearings on the same day they received 274C forms. ER 1081B-C, 1094, 1109C, 1113, 1116, 1119-20, 1129-30, 1139. As the district court noted, "a non-citizen who understood the consequences" of a 274C order would not simultaneously request a deportation hearing but waive a 274C hearing, given that "the failure to request a hearing... on the 274C charges rendered their deportation hearing requests completely futile, because they were subject to final orders on the 274C charges," making them automatically deportable. ER 485-86.

C. Procedural History

The named plaintiffs received 274C final orders without a hearing, either because they failed to submit a written request within 60 days or signed the waiver on the NOR/W form. They

filed this case as a class action on August 16, 1994. ER 1. On October 17, 1994, defendants filed a motion to dismiss, arguing that the NIF and NOR/W satisfy due process and fulfill the statute's notice requirement. CR 6-8. The motion was denied on February 15, 1995. ER 29-41.

The parties thereafter engaged in extensive discovery, including more than 40 depositions in 12 cities and production of thousands of pages of documents. The parties also engaged in unsuccessful settlement discussions. On November 30, 1995, plaintiffs moved for class certification and preliminary injunctive relief. While these motions were pending, the parties filed cross motions for summary judgment. CR 93-99.

Plaintiffs requested the court to grant relief on four principal points: (1) simplify and translate the 274C forms into Spanish; (2) require INS to treat requests for deportation hearings as requests for 274C hearings, given the confusion caused by simultaneous service of these forms; (3) prohibit INS from obtaining on-the-spot waivers, to allow respondents the full 60 days to request a hearing; and (4) require INS to provide a reopening procedure for respondents who demonstrate that they did not receive adequate notice.

On March 13, 1996, the court certified a nationwide class and granted summary judgment to plaintiffs, holding that the 274C notice forms violated due process and must be revised. The court declined, however, to require INS to treat requests for deportation hearings as simultaneous requests for 274C hearings,

but ruled that the revised forms should make clear the need for two separate hearing requests. The court also declined to prohibit INS from obtaining waivers, stating that INS's practice of doing so seemed unnecessary as a matter of policy but did not necessarily violate due process. The court rejected defendants' claim that the statute bars reopening of 274C cases, and found that defendants must afford a reopening procedure to class members who were not provided adequate notice. ER 458-95.

The court directed the parties to attempt to agree on the terms of the injunction. ER 494-95. After the parties failed to reach agreement, they submitted briefing, and on October 2, 1996, the court issued a permanent injunction and entered judgment.

The court enjoined defendants from using the current 274C notice forms, but declined to adopt the forms proposed by plaintiffs, leaving the agency discretion to develop revised and translated forms, subject to court approval should plaintiffs file objections. The court also required INS to provide class members who received the defective forms with an opportunity to request a hearing, but rejected plaintiffs' proposal that class members be given actual notice of the reopening procedure. Instead, the court ordered notice by mail and a publicity campaign. The court enjoined INS from deporting class members, or enforcing or taking any action in reliance on 274C final orders entered without a hearing, until class members are provided an opportunity to reopen their final orders and any reopened proceedings are resolved. ER 508-515.

On October 17, 1996, the defendants moved to amend or alter the judgment under Fed.R.Civ.P. Rule 59(e), based primarily on the enactment of IIRIRA. On December 11, 1996, the court denied the motion, modifying one provision to clarify that the injunction does not prohibit deportation of class members who are deportable on grounds unrelated to and unaffected by the challenged 274C order. ER 542-51, 555-56.[2]

SUMMARY OF ARGUMENT

The district court's grant of summary judgment was based on undisputed facts. The court's conclusion that due process requires simplification and Spanish translation of defendants' 274C forms was properly based on the specific circumstances surrounding 274C proceedings, the high likelihood that respondents will fail to understand and exercise their rights, and the minimal burden to the government of providing improved forms and procedures. Section I. The court's treatment of the case as a nationwide class action was proper given that the forms are nationally standardized. Section II. The injunctive relief ordered by the court was based on a showing of irreparable harm, Section III, and was narrowly and properly tailored to remedy the violations that were established, Section IV. The court also properly declined to rule on disputed issues that did not need to be resolved to afford full relief to plaintiffs. Section V.

[2] The court also stayed, pending appeal, the provisions regarding notice and publicity of the reopening procedures, and the provisions regarding parole or other arrangements for class members to return to the U.S. to pursue reopened cases. ER 551-55, 556-57.

ARGUMENT

I. THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT FOR PLAINTIFFS WAS PROPER.

On a motion for summary judgment, the moving party has the burden of showing that no genuine issues of material fact exist. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). The opposing party must present specific facts showing the existence of a material factual dispute, British Airways Bd. v. Boeing Co., 585 F.2d 946, 950-51 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979), and "may not rest upon the mere allegations or denials of his pleading." Fed.R.Civ.P. Rule 56(e). See Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The district court properly applied this standard.

A. The District Court's Finding That Defendants' 274C Notice Forms Violate Due Process Was Supported by the Undisputed Facts.

As the court found, and defendants conceded, the INS's 274C notice procedures must comport with due process and must satisfy the three-factor balancing test set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). These factors are (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or alternative procedural safeguards; and (3) the government's interest in maintaining the current procedures. ER 480.

1. The Private Interests At Stake Are Substantial.

The district court found the private interest at stake here to be great, noting that given the limited availability of

waivers, aliens who are issued 274C orders without a hearing face "essentially automatic deportation and permanent exclusion." ER 480-81. This finding is consistent with longstanding precedent that deportation implicates fundamental liberty interests of the highest moment. See, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950) (deportation involves "issues basic to human liberty and happiness"); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("the liberty of an individual is at stake"); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (deportation may "result... in loss of both property and life, or of all that makes life worth living"); Padilla-Agustin v. INS, 21 F.3d 970, 978 (9th Cir. 1994) ("when an alien faces the threat of deportation the stakes are high").

Defendants argue that the court erred in characterizing the interest at stake, and that the court's ruling erroneously implies a substantive due process right not to be deported. Defs.' Br. at 27. That is incorrect. In evaluating the interest at stake, the court correctly focussed on the consequences of having a 274C order "issued without a hearing." ER 480-81.

Defendants also claim that the court erred in characterizing deportation as "essentially automatic" because possible relief from deportation may be available. Defs.' Br. at 20-21. However, the court explicitly recognized that some discretionary relief from deportation may be available, but noted the very limited availability of this relief. ER 481; 550-51 (limited new waivers enacted in IIRIRA do not warrant modification of the

injunction). Indeed, a senior INS official responsible for 274C implementation admitted that noncitizen 274C respondents should be informed of the "seriousness" of the charges, and conceded that there are "not very many waivers available." ER 1181. In fact, defendants were able to identify only two instances nationwide where noncitizens with 274C orders obtained relief from deportation. ER 1152-53. There can be no serious dispute, therefore, that a noncitizen has an enormous stake in being properly informed of the right to request a hearing and the consequences of failing to do so.

2. Defendants' 274C Notice Forms Are Highly Likely To Result In Erroneous Deprivation Of Rights, And Improved Forms Would Significantly Reduce This Risk.

For a right to a hearing to be meaningful, there must be adequate notice of the right. Goldberg v. Kelly, 397 U.S. 254, 267-69 (1970). The means of notice "must be tailored to the capacities and circumstances of those who are to be heard" (id. at 268-69)(emphasis added) and "must be such as one desirous of actually informing the [person] might reasonably adopt to accomplish it." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950). Thus, the factual context of the notice to be provided, including the characteristics of the intended audience, must be considered in determining whether notice is adequate.

The district court found that the notice forms the INS uses in 274C proceedings are inadequate and likely to result in erroneous deprivation of rights for several reasons: the forms

(1) are unnecessarily legalistic and technical, (2) fail to adequately state the statute's drastic immigration consequences, (3) fail to advise noncitizens of the need to request a 274C hearing in addition to a deportation hearing, and (4) are served only in English. ER 482-89. There is no genuine dispute concerning the material facts supporting these findings.

a. Complexity of the Forms

There is no factual dispute that the NIF and the NOR/W are the only two forms used to provide notice of 274C proceedings, and that they are standardized nationwide. ER 990, 993, 1027.

Nor is there a genuine factual dispute concerning the relevant characteristics of the forms' audience. Defendants concede that nearly all individual respondents -- at least 98 percent -- are immigrants, ER 986-88, and that 274C respondents include individuals who have not completed high school or even elementary school. ER 1199-1200 (high school completion rare), 1081-81A (3rd grade), 1081G (grade school), 1091 (9th grade), 1103 (junior high), 1111 (4th grade), 1125A, 1148 (6th grade). Defendants offered no evidence to dispute the obvious inference that these respondents are likely to be unfamiliar with the U.S. legal system. Defendants also concede that "the native language of most respondents charged with violating 274C is Spanish," and that "[i]n some areas of the country the overwhelming number of respondents speak Spanish as their native language." ER 1018-

19.[3]

In light of these characteristics, the court properly found that the 274C forms are overly complicated and technical, and unnecessarily replete with legal terminology and citations. ER 483-84. Professor John Gomperz, a linguistics expert, reached the same conclusions, and defendants offered no expert testimony to refute this evidence: the NIF "is written in a relatively complex legal style such that uneducated immigrants whose English may be less than perfect and who do not have a secondary school education cannot be expected to understand." ER 588. Moreover, as defendants conceded and the court found, several INS agents and supervisors were themselves unable to explain references on the forms. ER 1030-43, 1050-55, 484.[4]

Defendants admit that they made no effort to evaluate or test the comprehensibility of the 274C forms prior to their implementation. ER 1173-74. Far from being tailored to the capacities and circumstances of 274C respondents, defendants

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[3] The examples to which defendants point of respondents who understood some English words (Defs.' Br. at 10, n.6) in no way contravenes the court's finding that the primary language of most respondents is Spanish. ER 488. Nor do these examples remotely suggest that these individuals understood English sufficiently well to comprehend complex forms. Indeed, in Dallas, where more than one-fourth of all NIFs have been issued, INS supervisors admitted that the agency "frequently" encounters aliens that "don't speak English." ER 704; see also 657, 841, 1081, 1084A, 1091, 1109, 1110.

[4] Among the terms contained on the forms are: "excludable," "deportable," "cease and desist," "allegation," "pursuant to," "deemed," "issuance," "discovery," "evidentiary hearing," "judicial review," "unappealable," and "execute." ER 597-600.

concede that the NIF is "almost identical" to the form the INS uses to provide notice to employers in employer sanctions cases under INA § 274A. ER 1150. While employers reasonably may be expected to be U.S. citizens, to speak English, and to understand U.S. legal procedures or have access to counsel, this is clearly not the case for 274C respondents. Additionally, in 274A cases the INS does not solicit waivers, and employers always have the full time period to consult with counsel and decide whether to request a hearing.[5]

The unnecessarily complicated and legalistic nature of the NIF and NOR/W is easily seen when contrasted with the simpler English-Spanish notices that INS provides to individuals processed for deportation hearings or voluntary departure. See ER 631-34.[6] The court correctly found that INS could have used

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[5] Defendants' reliance on Kirk v. INS, 927 F.2d 1106 (9th Cir. 1991), Defs.' Br. at 21-22, is thus misplaced, given that Kirk involved 274A proceedings. Moreover, in Kirk there was no issue of whether the employer understood the NIF. Rather, the employer requested a hearing, but failed to file a timely answer to the complaint. Kirk at 1107-08.

[6] The following passages are examples of the simpler, more narrative sentences used in the deportation-related notices:

"You have been arrested because immigration officers believe that you are illegally in the United States. In the United States, you have rights when you are arrested. This notice will explain those rights."

"If you do not want to return to your country, you have a right to a hearing before an immigration judge, who will determine whether you can remain in the United States." ... "[I]f you are married to a citizen of the United States or a permanent resident of the United States, or have lived in the United States for seven years or longer, and have not been convicted of any major crime, it may be that you will not have to be deported." ER 631-34.

simpler language on the 274C forms to convey the same information with greater clarity, ER 37, 489, and defendants conceded that the forms could have been written with different terminology. ER 998-99, 1001. As this Court has noted in finding due process deficiencies regarding another INS form, "[p]articularly when the alien is representing himself and has language difficulties, as is so often the case... a high degree of clarity should be a part of the process afforded." Padilla-Agustin v. INS, 21 F.3d at 976.

b. The forms fail to explain the severe immigration consequences of 274C orders.

As the district court found, the 274C forms fail to explain adequately the most serious consequences of a 274C order. ER 483-84. Nowhere does the NIF (Notice of Intent to Fine) even mention that a § 274C violation has immigration consequences. Indeed, it repeatedly refers only to the civil fine when discussing the penalties for a 274C violation. ER 597-98.[7] The NOR/W refers to the statute's immigration consequences only in one unemphasized, technical sentence buried in the "notice of rights" section of the form: "you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act." ER 600. Not only is this sentence so dense and legalistic as to be unintelligible to most

[7] Even though fewer than 2% of individual respondents are U.S. citizens, the INS has rejected including a warning regarding the immigration consequences of a 274C final order in the NIF because it would be "confusing to non-alien respondents." 57 Fed.Reg. 33,864 (July 31, 1992). ER 865.

respondents, but the lack of any reference to immigration consequences in the NIF is affirmatively misleading. Noncitizen respondents cannot reasonably be expected to decipher these forms to determine the statute's immigration consequences or the procedures for contesting the charges.

Testimony of INS supervisors and agents showed that they did not understand the immigration consequences of a 274C order, and significantly, that they could not obtain this information from the NIF and the NOR/W. ER 1038-47, 1050-54.[8] Defendants claim that the court "ignored conflicting evidence... suggesting that agents typically know" these consequences. Defs.' Br. at 11. But defendants' assertion that agents "typically" understand the immigration consequences does not contradict the court's findings that some agents "who testified were unable to explain the hearing process or the proper procedure for a hearing," and that "some of the agents did not themselves realize that there are severe immigration consequences from a final order." ER 484. The court correctly found that the inability of these agents to understand the 274C process strongly supports the conclusion that the forms are not adequate to inform immigrants, who unlike INS

[8] For example, an agent in Texas who processed approximately 50 cases for 274C violations, and obtained a waiver in every case, did not understand that a respondent who executed the waiver form forever lost the right to contest the civil document fraud charges. ER 1066-67. An agent in Alaska who has processed many respondents erroneously stated that a 274C final order "has no effect whatsoever" on an alien's eligibility for adjustment of status or suspension of deportation. ER 849. Another agent in New Orleans testified that paying the fine is similar to a traffic ticket and may avoid the statute's immigration consequences. ER 655.

agents, have not received training regarding the statute. Id.

The experiences of plaintiffs and class members fully supports the court's conclusion that the forms do not plainly warn respondents of the statute's immigration consequences. Plaintiffs and class members who signed waivers or failed to request 274C hearings within 60 days testified uniformly that they did not understand the immigration consequences of 274C charges until it was too late. ER 1081D-81E, 1081H, 1083, 1084B-84C, 1090D-90E, 1096-97J, 1121, 1131-32. It is uncontested that these class members did not understand the statute's immigration consequences, that they did not request a hearing, that many had substantial equities in this country, and that not requesting a hearing was directly contrary to their interests.[9]

Indeed, some of defendants' own supervisors and agents have admitted that there is little reason to believe that any noncitizen would knowingly waive his or her right to a 274C hearing. Michael Cronin, Assistant Commissioner of Inspections, stated in a 1991 memorandum that it "may be advantageous to a citizen on occasion to waive the hearing, but it is of no advantage to most aliens." ER 859. INS's Chicago office offered a similar assessment in a 1994 memorandum, stating flatly that "any alien who waives his/her rights in a 274C case probably

[9] Defendants do not place these facts in genuine dispute by arguing that only the respondent "knows for certain what [they] understood," (ER 1083), or that the respondent received forms or was told about the consequences. ER 1121.

doesn't understand the implications of his/her actions." ER 858.

Defendants argue, however, that even if the forms do not adequately explain the immigration consequences of a 274C order, the language of the statute itself provides sufficient notice and noncitizens should simply consult the U.S. Code. Defs.' Br. at 20. However, the cases on which defendants rely concern a kind of "notice" completely different from that at issue here -- not notice of the right to request a hearing and the consequences of not doing so, but rather whether individuals who committed a crime may avoid punishment because they received inaccurate notice of the crime's possible sentence. See also 2/15/95 Order, ER 34.

Defendants' attempt to avoid providing an accurate advisal of the statute's immigration consequences by characterizing these consequences as "collateral" is also erroneous. Defs.' Br. at 18-19. These consequences were included in the same enactment that created § 274C -- the Immigration Act of 1990. Indeed, the INS's own regulations acknowledged the necessity to advise respondents of the immigration consequences of a 274C order. 57 Fed.Reg. 33864 (July 31, 1992), ER 865.[10] Unlike in criminal

[10] Responding to commentators who opposed the use of a waiver procedure for unrepresented respondents because they "would not be advised properly of the adverse effects a Final Order may have in future immigration proceedings," INS stated that "[t]he Service recognizes that a waiver, in order to be given effect, must be made voluntarily and with full knowledge of the consequences. Accordingly, the INS intends to fully advise respondents (including detainees) of their rights under section 274C prior to the acceptance of a waiver." 57 Fed.Reg. 33864 (July 31, 1992)(emphasis added). ER 865.

cases, here the same agency is responsible for enforcing 274C and deportation, and none of the factors that have led courts to find immigration consequences collateral to criminal proceedings apply in this case. See Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976), cert. denied, 429 U.S. 895 (1976). Finally, defendants contend that the court required the INS to inform respondents that deportation is "automatic," and that such an advisal would be misleading. Defs.' Br. at 20. But the court imposed no such requirement. As the court explained in denying defendants' motion to amend the decision based on IIRIRA's new 274C waiver provisions:

> after a section 274C final order is entered deportation is automatic unless the alien qualifies for one of several narrow exceptions, and ... there are few waivers to inadmissibility. Because the results of a section 274C final order are still severe, the government must still provide new charging and notice forms that are written in English and Spanish and "simply and plainly communicate the nature and consequences of the section 274C charges and the procedures for contesting them."

ER 551. Thus, the court recognized that some relief from deportation may be available to a few respondents, and did not order INS to provide an advisal that deportation is "automatic." Rather the court required a clear and plain warning that the immigration consequences are severe, leaving defendants discretion to fashion the precise language of the advisal. ER at 504.

c. Service of 274C Notices in Conjunction With Deportation-Related Forms Contributes To The Risk Of Erroneous Deprivation.

At the time 274C respondents receive the NIF and NOR/W,

almost all are also served with the initial deportation-related forms allowing them to choose voluntary departure or a deportation hearing. ER 1069-71, 1074. They receive a multitude of Spanish-language and bilingual forms as part of this processing. ER 1074, 601-613. None of these Spanish forms provide any warning that the English-language 274C forms contain critically important information that has not been translated. ER 601-613, 631-34. As the court found, the service of both 274C forms and deportation-related forms at or near the same time creates confusion and misunderstanding both for individuals who accept voluntary departure and for individuals who request deportation hearings. ER 484-86.

Voluntary departure allows individuals to depart the country without being subject to the five-year bar on returning that results from a formal deportation order. INA § 212(a)(6)(B); ER 486; Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 553-54 (9th Cir. 1990). Yet unless the forms clearly advise persons processed for voluntary departure that the 274C charges involve not only a fine but also carry permanent immigration consequences, they are unlikely to request 274C hearings from outside the country and consequently will be permanently barred from returning to this country.[11]

[11] If these individuals are not clearly warned that more than a fine is at stake, they may reasonably conclude that there is no point in requesting a hearing and trying to return to the U.S. to contest the fine. This is especially so when the cost of returning to the United States for the hearing may exceed the fine and they are not provided any information as to how, or if, they would be allowed to return for a hearing. INS agents and

In some INS offices, it is a standard practice to place respondents on buses and return them to Mexico on the same day they are served with 274C forms. ER 686-87, 728-29. While defendants have argued that these respondents may still request a 274C hearing from abroad, the reality is that the forms do not plainly indicate the importance of doing so. In Dallas alone, where a large majority of respondents are processed for voluntary departure and 274C on the same day, only 27 out of 1331 respondents requested 274C hearings. ER 989.

For individuals who do not accept voluntary departure and request a deportation hearing, the language of the deportation-related forms leads them to believe that they have already taken all necessary steps to contest their removal from the country, when in fact they have not done so because defendants' 274C procedures require a separate hearing request. The initial form that respondents sign to request a deportation hearing states: "I request a hearing before an immigration judge to determine whether or not I may remain in the United States." ER 633. Nothing on the deportation-related form advises them of the requirement to separately request a 274C hearing, nor do the 274C forms advise them that two separate requests must be made.

In addition, once they request a deportation hearing, respondents are served with an OSC, which advises them in English and Spanish, that they will be mailed a notice with the date and

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supervisors themselves could not explain how respondents who have left the United States pursuant to voluntary departure could defend themselves against 274C charges. ER 1075-76.

time of the hearing. ER 606. Nowhere in the OSC is the respondent advised that this hearing is a completely separate proceeding from the § 274C proceeding. ER 604-608. Only after it is too late do respondents learn that they were required to make a separate written request for the 274C hearing, and that their failure to do so rendered them deportable and permanently excludable.[12]

As the district court noted, many class members sought to contest their removal from the country at a deportation hearing, yet failed to request a 274C hearing.[13] The fact that each of these class members wished to remain in the United States and to contest their deportation cannot be disputed. As previously noted, many of them had substantial equities in this country, including citizen and LPR spouses and children, and giving up the right to a 274C hearing was clearly contrary to their interests.[14] As the court noted, their failure to request a 274C hearing is completely inconsistent with their requests for deportation hearings and "forecloses any serious argument that

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[12] Jill Arndt, an INS official responsible for the initial implementation of § 274C, admitted that in these circumstances "if the agent serving the papers isn't careful, the alien could be confused." ER 1197.

[13] See, e.g., ER 1076B, 1081B-81C, 1094, 1105, 1109C, 1113, 1116, 1119-20, 1129-30, 1139.

[14] See, e.g., ER 1079-80, 1084-85, 1089, 1100, 1107-08, 1109F-09G, 1115, 1123-24, 1136, 1146.

they have been adequately apprised of their rights." ER 485.[15]

The evidence fully supports the court's finding that service of 274C forms in conjunction with deportation-related forms increases the risk of erroneous deprivation, and the court's conclusion that the forms must apprise respondents of the need to request two separate hearings. ER 489-90.

d. Use Of English Forms Increases Risk of Erroneous Deprivation.

The court found that INS's use of English forms to give notice of 274C proceedings to respondents contributes to the risk of erroneous deprivation of rights. ER 482-83, 488-90. Defendants' principal objection to this common-sense conclusion is that as a matter of law notice in English is sufficient. Defs.' Br. at 22-23. However, as the court noted, due process is a flexible concept, and notice must be "reasonably calculated, under all the circumstances, to apprise interested parties," (Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1, 13 (1978), and "tailored to the capacities and circumstances of the intended recipient." Goldberg v. Kelly, 397 U.S. at 268-69; ER 482. Defendants have cited no authority for the proposition that due process never requires translation into other languages, and even the cases cited by defendants reflect a consideration of

[15] Defendants speculate that individuals who request deportation hearings might sign 274C waivers in order to expedite their case, leave the country, and return illegally. Defs.' Br. at 14. However, this speculative suggestion is unsupported by any evidence, and does not apply to the experiences of the class members cited above. Moreover, any individual who simply wished to depart and immediately return illegally plainly would not request a deportation hearing.

specific factual settings, rather than the immutable principle suggested by defendants.[16]

The district court properly based its ruling on the specific factual circumstances of 274C proceedings. The court properly considered that Spanish is the native language of the overwhelming majority of 274C respondents, and that there are especially drastic consequences for noncitizens who fail to request a hearing. The court also found that the use of English 274C forms in conjunction with Spanish rights advisals concerning deportation proceedings was affirmatively misleading and presented a unique circumstance requiring translation. ER 482-83, 488-90. Defendants have offered no basis for overturning the court's conclusion that use of English-only 274C forms is "simply unacceptable, particularly where, as here, the consequences are grave and the situation in which the forms are provided suggests either that a different hearing will address the charges, or that the consequences of a final order are minimal." ER 488-89.

Defendants have conceded that "it would be beneficial for Spanish-speaking respondents to receive a Spanish version of the NOR/W," ER 1023, and agents testified that Spanish-language forms

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[16] For example, in Soberal-Perez v. Heckler, 717 F.2d 36, 43 (2nd Cir. 1983), cert. denied, 466 U.S. 929 (1984), on which defendants rely (Defs.' Br. at 23-24), the court found only that English notice was sufficient for social security claimants and that all plaintiffs were accorded a reasonable opportunity to be heard and actually received a full evidentiary hearing with a translator and counsel present. Id. at 44. The court expressly stated that "[w]hether due process would ever, under any circumstances, mandate particular documents or particular services in a language other than English is a question not before us." Id.

makes their job easier. ER 739, 799, 813, 1168. In fact, several local INS offices on their own initiative have developed and use Spanish translations of the 274C forms. ER 1010. The actions of these offices strongly underscore the perceived need for Spanish forms, and also refute any claim that use of translated forms would be burdensome.

Defendants' argument against translation rests principally on the claim that the English forms are sufficient to put non-English-speaking respondents on notice that they must seek assistance. Defs.' Br. at 23. Here, however, many respondents sign waivers on the day of processing, which defendants concede is "usually" the case when the waiver is signed. ER 1059. Once signed, the waiver is treated as immediately effective and irrevocable. ER 1056-57. Indeed, defendants have stated that they will not reexamine a 274C waiver under any circumstances, even to ensure that the respondent received proper notice. ER 1057-58, Defs.' Br. at 57-58. Respondents in this situation have no opportunity to seek translation of the forms.

Even where respondents do not sign the waiver form, the use of English 274C forms does not effectively put respondents on notice that they must seek assistance because typically INS serves the 274C forms at the same time as the Spanish-language deportation-related forms. As the court noted, service of the 274C forms in English along with other forms that are in Spanish creates the false impression that the English forms are

inconsequential. ER 486.[17]

Defendants also claim that the court's order is undermined by the enactment of IIRIRA § 304, which eliminated the statutory requirement that OSCs be written in Spanish. Defs.' Br. at 25. However, the statute does not prohibit translation and in any event, the OSC is not the only deportation-related document given to 274C respondents in Spanish. Even before the statute required that OSCs be written in English and Spanish, the INS was required by due process to provide Spanish notices of rights to individuals in order to explain the option of requesting a deportation hearing or accepting voluntary departure. Orantes-Hernandez v. Smith, 541 F.Supp. 351, 387 (C.D. Cal. 1982); Orantes-Hernandez v. Meese,, 685 F.Supp. 1488, 1499 (C.D.Cal. 1988), aff'd sub nom Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990); Lopez v. INS, C.D.Cal. No. CV 78-1912 WMB (August 20, 1992). Moreover, the court's order requiring Spanish translation of 274C forms was not based only on the use of Spanish OSCs, but also on consideration of the totality of the circumstances, including the lack of any real burden to INS in

[17] Defendants argue that no witness specifically identified this problem as the precise reason why they did not request a 274C hearing. Defs.' Br. at 12. But class members did testify that they understood and asserted their right to a deportation hearing, yet completely failed to understand the 274C forms. Indeed, several class members testified that the one form that they clearly understood during the processing was the Spanish advisal (I-827A), which in simplified, nontechnical language explains the difference between a deportation hearing and voluntary departure. See, e.g., ER 918A-18C, 922-23. The court's common-sense conclusion that service of the 274C forms in English effectively detracted from their importance is amply supported by this evidence.

translating the forms. See 12/11/96 Order, ER 549-50.

In sum, the court properly rejected defendants' claim that due process can never require translation, and found that the particular "confluence of factors" present in this case warranted translation of the NIF and NOR/W into Spanish. ER 466.

3. Any Burden To The Government Entailed By The Revision Of Two Forms Is Negligible And Easily Outweighed By The Benefits.

The revision of two forms entails minimal burden to the government. The one-time cost to the government of simplifying the forms is far outweighed by the private interest involved and the potential benefits. The INS itself has recognized that the forms should be revised and assigned the process to a working group at INS Headquarters more than two years ago, although the agency apparently has yet to complete this task. ER 1002-03, 781, 784.

Similarly, providing Spanish-language forms does not constitute a significant burden to the government and plainly would be beneficial for respondents. As noted, INS agents testified that Spanish-language forms make their jobs easier and are a benefit to respondents. ER 1015, 739, 799, 813, 1168. The fact that local INS offices have developed their own Spanish versions of the NOR/W forms demonstrates that it does not constitute a burden. As this Court stated in finding another INS form to be deficient under the Mathews analysis, "the government could implement the needed changes without suffering any significant fiscal or administrative burden." Padilla-Agustin v.

INS, 21 F.3d at 977. In this case local INS offices have demonstrated this fact, and as the district court found, the burden to the government is "relatively slight." ER 489-90, 550. Thus, the third prong of the Mathews test strongly supports the use of simplified and translated 274C notice forms.

B. The Possibility That Individual INS Agents May Provide An Oral Advisal Does Not Cure Defendants' Constitutionally Deficient Notice Forms.

Defendants argue that even if the forms are deficient, the court erred in granting summary judgment because the deficiencies might be cured by oral explanations and translations provided by some INS agents. Defs.' Br. at 25. Yet defendants concede that a respondent is entitled only to written notice and that there is no policy requiring agents to provide respondents with an oral explanation of their rights or to orally translate the forms. ER 1178-79, 705, 1025-28. While some agents may attempt on their own initiative to provide an oral advisal or to respond to questions from respondents, it is undisputed that not all agents do so. ER 1025-26. Thus, the possibility that an individual will receive an oral advisal depends entirely on the particular practices of individual agents.

Moreover, many agents are not fluent in Spanish and lack basic knowledge of the 274C process, even were they inclined to attempt to interpret or explain the forms. ER 1020-23, 1030-43, 1050-55. And defendants concede that there is no "guideline or national implementation manual instructing agents on how to explain" the forms in the event that an individual agent wished

to do so. Rather, agents may explain the forms in the manner they individually deem appropriate. ER 1029.

Given INS's refusal to require oral advisals, the inability of some agents to explain the 274C process, and the ad hoc manner in which such advisals may be given, defendants cannot reasonably contend that their written forms need not be constitutionally sufficient. The district court properly rejected that argument and refused to permit the continued use of deficient forms based on the possibility that individual agents on their own initiative may attempt to supplement the forms.[18]

II. THE DISTRICT COURT'S CERTIFICATION OF THE CLASS WAS APPROPRIATE.

The district court certified the following class:

> All non-citizens who have or will become subject to a final order under Section 274C of the Immigration and Naturalization Act because they received notice forms that did not adequately advise them of their rights, of the consequences of waiving their rights or of the consequences of failing to request a hearing.

ER 475. Defendants do not challenge this definition, but rather contend that no class should have been certified. Defendants argue that each class member's case raises distinct factual and legal issues that must be resolved in individual proceedings, contending plaintiffs failed to satisfy both the "commonality"

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[18] Indeed, unless the forms themselves provide constitutionally sufficient notice, there would be constant litigation in future individual cases regarding the adequacy of the notice, since there would be no assurance that any agent even attempted to provide oral notice, much less did so accurately. Such disputes would be inevitable given defendants' refusal to require oral advisals in every case or to provide agents with uniform guidelines on how to explain the forms.

requirement of Rule 23(a)(2) and the requirement that defendants acted on "generally applicable" grounds under Rule 23(b)(2). Defs.' Br. at 32-37. Defendants also argue that the named plaintiffs are not adequate class representatives under subsection (a)(4). Neither argument is correct and the court plainly did not abuse its discretion in certifying a class where plaintiffs challenged nationally standardized forms.

A. Plaintiffs' Challenge to Nationally Standardized Forms Raises Common Issues Regarding Generally Applicable Conduct.

1. Commonality

To satisfy the commonality requirement of Rule 23(a), all questions of law and fact need not be common. Jordan v. County of Los Angeles, 669 F.2d 1311, 1320 (9th Cir. 1982), vacated on other grounds, 459 U.S. 810 (1982), on remand, 713 F.2d 503 (1983). The presence of unique issues does not defeat class certification as long as there are common questions of law or fact that are more efficiently resolved in one proceeding. Blackie v. Barrack, 524 F.2d 891, 904 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976). "The commonality requirement is satisfied 'where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.'" Jordan, 669 F.2d at 1320 (citations omitted).

Here, there were numerous common questions of law and fact, including: whether the 274C forms satisfy due process; whether the forms must advise respondents of the immigration consequences of a final order; whether due process permits INS to obtain on-

the-spot waivers from unrepresented noncitizens; and whether there must be a procedure for 274C respondents to reopen their cases where notice was defective.[19] Moreover, the "overriding" question of law in this case was common to the entire class: whether defendants' standardized forms violate due process. ER 470.[20]

2. Defendants Acted On Generally Applicable Grounds.

To satisfy Rule 23(b)(2), defendants' conduct must be "generally applicable" to the class, making injunctive relief as to the class appropriate. This case is a prototypical example of a proper case for certification under Rule 23(b)(2) because plaintiffs challenge standardized forms. The alternative would be thousands of individual actions raising the identical issue regarding the forms' validity. Defendants cannot explain why

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[19] The court stated that Rule 23 "may" be satisfied by the presence of one common question. ER 468. However, this case involves more than one common question and, in any event, the court did not find that only one common question was presented. See ER 469 (finding "common issues of law, including the adequacy of English-only... forms and the adequacy of notice" when respondents receive multiple forms (emphasis added)). Nor, moreover, is there a firm rule that certification is never proper where there is only one question in common. See Blackie, 524 F.2d at 904; Yassini v. Crosland, 613 F.2d 219, 220 (9th Cir. 1980) ("a common question of fact or law")(emphasis added).

[20] Defendants suggest that the court found that there were no factual questions in common. The court did not make such a finding, but stated only that not all the class members' cases had the same "factual basis." ER 469. There are numerous common factual issues, including whether under-educated immigrants would understand the technical language of the forms, and whether simultaneous service of 274C forms and deportation-related forms mistakenly leads respondents to waive their 274C hearings. In any event, the court correctly found common questions of law so that it was unnecessary to find common factual questions.

that would be preferable to class certification. Thus, far from abusing its discretion, the court properly recognized that this case is best resolved as a (b)(2) class action.[21]

Defendants argue that under the court's order there will be individual hearings and that because the court's order did not eliminate the need for further individualized proceedings, certification was improper. Yet, the fact that the case will not dispose of every issue affecting class members is no basis for denying class certification to resolve threshold procedural issues. In a procedural due process case, the merits of each individual's case must always be resolved in individual proceedings. See, e.g., Buckhanon v. Percy, 533 F.Supp. 822, 829 (E.D.Wis. 1982), modified on other grounds, 708 F.2d 1209 (7th Cir. 1983), cert. denied 104 S.Ct. 1281 (1984) (certifying class of persons whose benefits were reduced although class members were in three different programs, since plaintiffs challenged same notice form); Ortiz v. Eichler, 616 F.Supp. 1046, 1058-59, 1061-63 (D.Del. 1985)(same).

Moreover, the injunction greatly streamlines the resolution of any notice issues for class members. Defendants argue that the court's order will result in many individual hearings before ALJs where INS will contend that the respondent received proper notice despite the defective forms. Yet, even were defendants

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[21] Although the court found it unnecessary to rule on plaintiffs' request for certification under (b)(1), that would also have been an appropriate basis for certifying the class, given that individual courts could have ruled differently on the validity of the forms.

correct in their contention that such hearings will be numerous, certification would nonetheless have been proper because the court resolved the threshold issue common to all class members: the adequacy of the standardized forms. Moreover, defendants' expectation of numerous individual hearings regarding notice is plainly inconsistent with the court's order. Given that there is no requirement that agents supplement the notice forms with any oral advisals (see Section I.B., supra), the district court did not envision that the INS would be permitted to re-litigate the notice issue in every case. As the court stated:

> the Court did not intend to require each individual to reprove the inadequacy of his or her notice. That would eviscerate the Court's broader holding that the general forms and procedures... were constitutionally deficient."

ER 499. Rather, defendants may litigate the notice issue before an ALJ only where there are "unique circumstances" demonstrating that a class member received adequate notice despite the deficient forms. ER 499-500.

B. The Named Plaintiffs Adequately Represent The Class.

Defendants claim that the court should have found the named plaintiffs inadequate to represent the class because they are subject to "unique defenses" on the merits. Defs.' Br. at 37. The court properly found, however, that the named plaintiffs are interested in obtaining relief, and do not have interests antagonistic to those of the class, which is all that is required. ER 472. Indeed, the interests of the named plaintiffs are identical to those of the class members -- to establish that defendants' notice procedures were unconstitutional and that they

are entitled to a hearing. The fact that they may have unique defenses on the merits has no bearing on their adequacy to litigate the threshold procedural issues common to the class.

In sum, this case was solely about defendants' notice procedures, not the merits of individual 274C cases. It would have made little sense not to resolve the adequacy of the nationally standardized forms in a single action. The court's certification was thus a proper exercise of discretion.

III. INJUNCTIVE RELIEF WAS APPROPRIATE TO REMEDY THE VIOLATIONS THAT WERE ESTABLISHED.

A. There Are No Adequate Legal Remedies

Defendants argue for the first time on appeal that the injunction should be overturned because plaintiffs did not establish that they have no adequate legal remedies. Defs.' Br. at 40. Yet, there is plainly no legal remedy for the loss of a 274C hearing, nor have defendants even indicated a legal remedy that would adequately redress the loss of a hearing.

B. The District Court Properly Found That The Named Plaintiffs Were Prejudiced By The Loss Of A Hearing.

To establish prejudice, individuals need not demonstrate that they definitely would have prevailed absent a due process violation. Instead, it is sufficient to show that the violation occurred "in a manner so as potentially to affect the outcome of the proceedings." Hartooni v. INS, 21 F.3d 336, 340 (9th Cir. 1994); U.S. v. Cerda-Pena, 799 F.2d 1374, 1379 (9th Cir. 1986). The court correctly applied this legal standard, analyzed the cases of two of the named plaintiffs, and specifically found that

Ms. Adames and Mr. Santana Alvarez suffered prejudice because the outcome of their cases could potentially have been different. 3/13/96 Order, ER 477-78. The court also found that plaintiffs may have suffered prejudice because they were precluded from obtaining discretionary relief available only to individuals who request hearings. ER 478-80.

1. Adames

Plaintiff Adames testified that the only time that she presented documents to obtain employment was at Jack Brown Cleaners, prior to the effective date of § 274C. She testified that she did not present documents to obtain employment at the National Linen Co. after the effective date of § 274C, when National Linen became the successor to Jack Brown. ER 981-83. These facts, if accepted by an ALJ, would establish that she did not violate § 274C.[22]

The government notes that Ms. Adames signed a statement that conflicts with this testimony,[23] and contends that the "district court improperly resolved this conflicting evidence in plaintiffs' favor" in finding that Adames suffered potential prejudice. Defs.' Br. at 44. That is incorrect. Rather, the court found that this dispute must be resolved in the first instance by an ALJ and that if the dispute were resolved in Ms.

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[22] This testimony was supported by the I-9 form Ms. Adames submitted to National Linen, which indicated she did not present false documents at the time she became employed. ER 1166.

[23] Ms. Adames contends that the statement was a mistake, and that it was taken by an agent who spoke broken Spanish while she was in custody and unrepresented. ER 1154, 1157-58.

Adames' favor, the "outcome of her case might have been different." ER 478; Hartooni, 21 F.3d at 440.[24]

2. Santana Alvarez

Plaintiff Santana Alvarez was charged with falsely making an I-9 employer verification form, and not with the use of false documents. As the district court noted, the conduct with which Santana Alvarez was charged did not constitute a violation of § 274C. United States v. Remileh, 5 OCAHO 724 (1995), aff'd on other grounds, Remileh v. INS, 101 F.3d 66, 67 (8th Cir. 1996)(false information on I-9 does not constitute "falsely making" a document under § 274C).[25]

Defendants argue that Santana Alvarez cannot show prejudice because IIRIRA § 212 has now amended § 274C to make providing false information on an I-9 form a 274C violation. However, this provision did not take effect until September 30, 1996, and there has been no ruling on its proper application. In the absence of a binding interpretation of the effect of the new law, it cannot be held that Santana Alvarez and similarly situated individuals could not "potentially" prevail before an ALJ and that they are not entitled to the opportunity to argue their case. Hartooni,

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[24] The government also argues that there was conflicting testimony regarding Ms. Adames's confusion over the forms and her motivation for signing the forms. Defs.' Br. at 44-45. Again, that is a dispute that is properly resolved in the first instance by an ALJ.

[25] Other class members also have this defense. See ER 614-30.

21 F.3d at 340.[26]

3. Policy To Not Charge Where Substantial Equities Present

The court noted that plaintiffs may be prejudiced by having lost the opportunity for favorable treatment under an INS policy not to proceed with 274C charges under certain circumstances. ER 479. Defendants objected to discovery regarding this policy, and given the resolution of the case, the court found it unnecessary to resolve the discovery dispute. The court noted, however, that on "the record before the Court" there was no reason to believe that INS did not exercise equitable discretion regarding whether or not to pursue individual 274C cases. ER 479. The government concedes that this discretion is not generally available to respondents who do not request a hearing. ER 1076A.[27]

Defendants do not dispute that the agency's exercise of discretion could "potentially affect the outcome" of a case, but argue that such discretion would be judicially "unreviewable" and therefore an improper "basis for finding prejudice." Defs.' Br.

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[26] Defendants also contend that Santana Alvarez suffered no prejudice because had he received a hearing the INS "could have" amended the charge to include use of false documents. Defs.' Br. at 43. However, there is no certainty that this would have happened, or that the ALJ would have permitted INS to do so. Plaintiffs need not show a defense to all charges that might have been brought.

[27] An implementation memorandum from then-Commissioner NcNary stated that in "those cases in which the respondent submits a timely request for a hearing," local INS "attorneys may decline to file a complaint... for just cause or in the interest of justice." ER 639. Data logs obtained through partial discovery on this issue reveal that cases are in fact dismissed on this basis. See, e.g., ER 870-74 (log from Buffalo INS office indicating cases dismissed in the interest of justice).

at 45, n.21. However, even assuming that the agency's exercise of discretion would not be judicially reviewable, this has no bearing on whether plaintiffs were prejudiced in a concrete way by the loss of a hearing. To show prejudice, an individual "is not required to prove that he would have received discretionary relief," but rather "only needs to show that he has plausible grounds for relief." U.S. v. Jimenez-Marmolejo, ___ F.3d ___, No. 95-10262, 1996 U.S.App. LEXIS 30000 (9th Cir. Nov. 15, 1996).

C. Balance of Harms and Public Interest Support Injunction.

Defendants claim that injunctive relief should be denied because of the importance of enforcing § 274C. Defs.' Br. at 45-46. However, the injunction does not bar enforcement of § 274C, but rather serves simply to give proper effect to the statute's requirements of notice and the opportunity to have a hearing. For this reason, the public interest strongly supports the relief ordered by the court. See Orantes-Hernandez v. Meese, 685 F.Supp. at 1499 ("It is in the government's interest that class members meaningfully understand their rights and make knowing, intelligent and voluntary choices"); Perez-Funez v. District Director, INS, 619 F.Supp. 656, 666 (C.D.Cal. 1985)("INS has an interest in ensuring that class members make knowing and voluntary decisions").[28]

[28] Defendants note that the current 274C case load is light and that providing hearings to the class will substantially increase the number of cases. The case load is light, however, because defendants have failed to provide proper notice and 93% of respondents have lost their right to a hearing. Defendants cannot appropriately complain about providing hearings to respondents charged with 274C violations since Congress has

IV. THE SCOPE OF THE INJUNCTION WAS NARROWLY TAILORED AND APPROPRIATE.

This Court reviews a district court's grant of permanent injunctive relief "for an abuse of discretion or application of erroneous legal principles." Premier Comm. Network v. Fuentes, 880 F.2d 1096, 1100 (9th Cir. 1987). "Once plaintiffs establish they are entitled to injunctive relief, the district court has broad discretion in fashioning a remedy." Orantes-Hernandez v. Thornburgh, 919 F.2d at 558. The injunction in this case was carefully tailored, and its provisions are necessary to remedy the violations that were established.

A. The Injunction's Reopening Procedure is Appropriate and Properly Does Not Require Every Class Member to Demonstrate Prejudice to the INS.

Defendants argue that class members should not be permitted to reopen their proceedings unless they first demonstrate to INS's satisfaction that they were prejudiced. Defendants contend that the court's failure to require this procedure was an abuse of discretion and inconsistent with existing administrative practice. Defs.' Br. at 52. However, the court properly rejected defendants' proposal to allow INS, rather than ALJs, to resolve the merits of individual 274C cases. The injunction is fully consistent with administrative practice, and in any event, the court plainly had discretion to devise its own remedy for the systemic violation of constitutional rights.

First, the court's decision not to require class members to

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provided that right and plaintiffs have never had a hearing.

set out their defenses to 274C charges in advance of reopening is fully consistent with longstanding administrative immigration practice. The standard for motions to reopen on which defendants rely, as articulated in Caruncho v. INS, 68 F.3d 356, 360-61 (9th Cir. 1995), requires that the alien present new facts and make a prima facie showing of eligibility. But where, as here, the alien has had no hearing whatsoever, the alien need not show prejudice. Matter of Haim, 19 I&N Dec. 641 (BIA 1988); Matter of Ruiz, Int.Dec. 3116 (BIA 1989). The Board of Immigration Appeals (BIA) reasons that where the alien never received a hearing, "the underlying relief being sought" is "the opportunity to present the applications for relief at a full evidentiary hearing." The "new facts" that the motion to reopen must set forth are thus the facts to establish the reason for the failure to appear at the hearing -- and not the merits of the individual's case. Matter of Ruiz at 2-3. The Board has stated:

> [t]o require (the applicant) to establish prima facie eligibility... in conjunction with his motion to reopen, before he is given the opportunity for a hearing... would violate his statutory right to such a hearing.

Id. at 3.[29] The relief ordered by the court is thus consistent

[29] The BIA's decisions concern reopening deportation or exclusion orders issued without a hearing, but their reasoning applies generally to the situation where an alien has lost any statutory right to a hearing. Notably, a provision of the INA enacted after these decisions codifies the principle that an alien is not required to show prejudice where he or she never received a hearing at all. INA § 242(B)(c)(3) and INA § 240(b)(5)(C)(effective April 1, 1997); see also Matter of Grijalva-Barrera, Int.Dec. 3284 at 3 n.2 (BIA 1996); Matter of Rivera-Claros, Int.Dec. 3296 at n.1 (BIA 1996). See also Gomez-Vigil v. INS, 990 F.2d 1111, 1124-25 (9th Cir. 1993)(Fletcher, J., concurring).

with the BIA's standard for motions to reopen where no hearing was ever held.[30]

Moreover, the court had discretion to fashion an appropriate remedy for the class, and was not strictly limited to the BIA's procedures. The court's injunction simply places class members in the position in which they would have been absent the due process violation. To require class members to establish a defense to the charges before they can obtain an initial hearing would reverse the burden of proof under the statute. The INS should not be placed in a better position than if it had never violated the Constitution.

The relief ordered by the court is a simple and economical manner of redressing the violations that were established. Those class members who aver that they failed to request a hearing because of lack of notice generally should have their cases reopened. However, if the INS chooses to proceed with charges against the class member and the class member in fact has no defense, no hearing need be held because the case can be resolved under a summary adjudication procedure. See Villegas-Valenzuela v. INS, 103 F.3d 805 (9th Cir. 1996).

The alternative procedure defendants appear to support would allow INS unilateral discretion to deny a hearing to any class member who could not prove to the agency's satisfaction that he

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[30] Thus, although the district court made findings of prejudice with respect to named plaintiffs, even that was not necessary because this case involves the complete loss of a hearing.

or she had a viable defense -- a proposal that the court properly rejected. Moreover, even if such prejudice determinations would be reviewable and not wholly subject to INS discretion, that would necessitate an additional round of adjudications. The court's remedy is simpler, more efficient, and more consistent with the statutory scheme and burden of proof under § 274C.[31]

Defendants also exaggerate the burden likely to result from this relief, implying that it could result in "thousands" of hearings being held for class members who have little or no chance of prevailing. Defs.' Br. at 52. In the first place, the court did not accept plaintiffs' proposal that would have provided class members with actual notice of the opportunity to seek reopening. Consequently, only those class members who learn of the remedy and come forward will be able to seek relief. Moreover, the size of the class is the direct result of defendants' refusal to revise the 274C forms at an earlier date, particularly after the court denied their motion to dismiss in February 1995, stating that "the INS could easily convey the same information with greater clarity by using simpler terms." ER 37. Had defendants revised the forms in early 1995, the class would

[31] Unlike the situation in an individual due process challenge, it would not have been manageable for the court in this case to attempt to determine whether each class member was prejudiced and entitled to relief. The court properly left this determination to the ALJs. While defendants argue that this resolution may require the INS to evaluate the claims and proceed with complaints in some cases where class members ultimately will be found not to have suffered prejudice, they have proposed no better remedy to the problem caused by their persistence in using constitutionally deficient notice forms.

be less than one-half its current size.[32]

B. The Injunction Was Based On Systemwide Injury To Thousands Of Class Members Who Lost Their Right To A Hearing.

Relying on Lewis v. Casey, 116 S.Ct. 2174 (1996), defendants argue that the district court identified only two instances of actual injury where class members were prejudiced and that such limited harm did not justify a "systemwide" injunction. Defs.' Br. at 46-47. Defendants' argument is based on a misreading of Lewis and the constitutional right at stake here, and ignores the full record evidence.

In Lewis, the Court overturned an injunction ordering Arizona prisons throughout the state to improve their law libraries, holding that the scope of the injunction was overbroad. The Court stressed that the trial court had found systemwide injury only because it erroneously assumed that prisoners had a constitutional "right to a law library," rather than a "right of access to the courts." Lewis, 116 S.Ct. at 2179 (emphasis in original). Thus, to establish a constitutional violation, it was necessary to show failure to gain access to the courts; otherwise no constitutional violation had occurred. As properly defined, the Court found that there had been only two constitutional violations; although many prisoners may not have

[32] Defendants' claim of burden also directly contradicts their position throughout this litigation that class members who did not request hearings understood their rights and simply chose not to request a hearing. If defendants are correct that respondents understood their rights and did not want hearings, there is no reason to believe that the number of requests for new hearings will be unmanageable.

had use of complete law libraries, only two prisoners were actually denied "access" to the courts to file legal papers. The Court therefore concluded that the injunction was overbroad because violations had occurred in only two of the state's prisons and involved only the special problems faced by "illiterate" prisoners. Id. at 2183.

Here, the constitutional right at stake is the due process right to notice. The evidence establishes that thousands of class members suffered a constitutional violation because they received deficient notice forms and lost their right to a hearing. ER 465-467; ER 988. See Section I, supra.

This Court has held that an individual must show both a violation of due process and prejudice in order to obtain a new hearing. But, even assuming that prejudice is required where the respondent never had an initial hearing (as opposed to alleging a defect in the hearing), prejudice is not a component of initially establishing the due process violation. Rather, it is a factor the court must take into account in determining whether to remand to the agency for another hearing after a due process violation has been found. See United States v. Leon-Leon, 35 F.3d 1428, 1431-32 (9th Cir. 1994) ("due process violation," but petitioner failed to show any prejudice). The prejudice consideration goes only to whether the court should decline to grant relief "in spite of any violation of... due process." Leon-Leon, 35 F.3d at 1431-32.

Having found a due process violation in this case, the court left it to the ALJs to resolve the merits of each class member's case. As noted, it would have been inefficient and unworkable for the court itself to have determined whether each class member suffered prejudice. Nor was it appropriate to leave defendants with that task, or efficient to create a whole separate administrative process for this purpose. The court's injunction properly leaves the determination of the merits to the ALJs, and fully ensures that only class members who were prejudiced by the loss of a hearing will be able to obtain ultimate relief. See Section IV.A., supra.

In short, there were systemwide constitutional violations because thousands of class members received the defective forms and lost the right to a hearing. Whether or not these violations were harmless relates only to the proper form of relief. The court did not abuse its discretion in allowing ALJs to determine whether class members have viable defenses on the merits.[33]

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[33] In any event, defendants' claim that only two plaintiffs in this case may have been prejudiced by the loss of a hearing is erroneous. Although the court specifically discussed only the cases of two named plaintiffs, many other class members have defenses to the 274C charges. Examples of such defenses include that the conduct occurred prior to the effective date of § 274C (ER 942, 830, 833-834, 981-983, 1166), that class members did not "knowingly" use false documents, as required by § 274C (ER 951-961), and that 274C charges were improperly based on falsely making an I-9 application (ER 614-630). Other plaintiffs and class members could have benefitted from defendants' policy not to proceed against respondents with strong equities. See Section III.B.3, supra.

B. The Publicity Campaign Ordered By The Court Is Appropriate.

Defendants claim that the injunction is unduly burdensome in requiring the INS to publicize the opportunity for class members to reopen 274C proceedings. Yet defendants themselves urged the court to order such a publicity campaign in lieu of the personal service urged by plaintiffs. See ER 1202 (proposing publicity campaign including "issuance of a news release nationwide to every news organization in the country via the news wire"). The only difference between the publicity campaign proposed by defendants and that ordered by the court is that the court also directed defendants to distribute the news release via news wires to news organizations in Central and South America. This entails no significant additional burden and constitutes a reasonable method of affording notice to class members outside the country who will not likely receive mailed notice.

C. Prohibition of Deportation and Reliance on Defective 274C Final Orders.

Defendants argue that the district court abused its discretion by temporarily enjoining INS from taking action in reliance on 274C final orders entered without a hearing until class members have the opportunity to pursue the reopening procedure ordered by the court. However, the court narrowly tailored the prohibition of deportation to apply only to class members whose deportation orders were based on a 274C violation or whose deportation cases could have been affected by the existence of a 274C order (i.e., by not being eligible for relief

from deportation). ER 555-57.[34]

Defendants also argue that the new INA § 242(g) created by § 306(a) of the IIRIRA deprives the court of jurisdiction to enjoin temporarily the removal of class members. Defs.' Br. at 50. That provision provides:

> (g) EXCLUSIVE JURISDICTION. - Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

See IIRIRA § 306(a), creating new INA § 242(g).[35]

This provision simply provides that an alien wishing to challenge some aspect of his or her deportation (now termed "removal") proceedings must do so according to the procedures set forth in the new INA § 242 (review precluded "except as provided in this section"). It does not apply to this case, which was not a challenge to any aspect of class members' deportation proceedings, but rather to the procedures used by the INS to bring charges and obtain final orders of civil document fraud under INA § 274C. See generally, Complaint at ER 23-24 (due

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[34] As the court recognized, even where offenses other than the 274C order are the basis for deportation, the existence of the 274C order in the alien's file has adverse effects, as the individual may have been eligible for discretionary relief from deportation but for 274C order.

[35] As the district court found, section 242(g) does not take effect until April 1, 1997. See Lalani v. Perryman, ___ F.3d ___, No. 96-2498, US App LEXIS 1003 (7th Cir. Jan. 23, 1997)(§ 242(g) not in effect until April 1, 1997). However, since that date is now rapidly approaching, plaintiffs do not address this issue.

process and statutory claims challenging implementation of INA § 274C). By its terms, § 242(g) only applies to a "cause or claim" that "aris[es] from the decision or action" to commence, adjudicate, or execute a "removal" order.[36] It does not apply to claims such as plaintiffs' that are completely distinct from deportation proceedings, and that the government has consistently maintained may not be considered in deportation proceedings.[37]

D. Parole Or Alternative Arrangements To Afford Class Members Reopening.

The court's order requiring INS to parole or make other arrangements for class members outside the U.S. to pursue reopened proceedings was necessary to afford meaningful relief to class members. ER 502-03, 513. While defendants attempt to distinguish the factual circumstances that were present in Mendez v. INS, 563 F.2d 956, 958-59 (9th Cir. 1977) (Defs.' Br. at 48), that case plainly supports the court's authority to order such relief where necessary and appropriate.

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[36] See also IIRIRA § 306(c)(1) (stating that § 242(g) applies "to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings" (emphasis added)).

[37] The plain language of § 242(g) is confirmed by the purpose of the provision. Like the "sole and exclusive" language of its predecessor provision, INA § 106(a), 8 U.S.C. § 1105(a), section 242(g) does not eliminate judicial review of deportation orders, but rather places that review in the courts of appeal. Here, however, the government is contending that class members can be deported before they can seek relief under the injunction, and they contend that no court can prevent that from occurring.

Defendants also argue that § 602 of the IIRIRA invalidates the court's order. Defs.' Br. at 49. However, § 602 simply revises the standard governing the Attorney General's decision to grant humanitarian parole; it does not eliminate parole authority. Authority to grant such parole "for emergent reasons or for reasons deemed strictly in the public interest" is replaced by authority to grant parole "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." This new standard in no way prevents the Attorney General from paroling individuals to remedy constitutional violations found by a federal court. Nor does the amendment prevent the Attorney General from making "alternative arrangements" to comply with the injunction. The INS has broad authority under other statutory provisions to admit class members, and nothing in the IIRIRA prevents a federal court from remedying the constitutional violations that have been established in this case.[38]

There is also no merit to defendants' claim that this provision of the court's order is unduly burdensome. Class members should not be denied relief because INS has already deported them, or because they accepted voluntary departure in ignorance of their rights under § 274C. Moreover, defendants' claim of burden sharply contrasts with the INS's routine practice of serving NIFs on individuals who requested voluntary departure.

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[38] See, e.g., INA §§ 212(d)(3) and (4), 8 U.S.C. §§ 1182(d)(3) and (4).

Throughout this litigation defendants have contended that it is not improper to serve 274C forms immediately before respondents are given voluntary departure because individuals can request 274C hearings from outside the U.S., and the government would arrange for t to attend the hearings. ER 1075-76. Yet now defendants contend that making such arrangements would be unduly burdensome.

V. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE REMAINING ISSUES.

Plaintiffs' complaint included allegations that INS agents engaged in misrepresentations and coercion in obtaining waivers of 274C hearings. Plaintiffs did not seek summary judgment regarding these claims, as the court would have had to resolve factual issues surrounding the processing of individual 274C cases, including determining precisely what was said in each case. Defendants themselves candidly acknowledged the existence of "conflicting" evidence regarding whether "INS agents have misrepresented the effects of a final order and threatened additional penalties unless individuals waive their right to a hearing." ER 979. The court's grant of summary judgment afforded full relief to plaintiffs, obviating the need to resolve these issues, and making dismissal without prejudice appropriate. ER 507.

The same disposition was appropriate for plaintiffs' claim that INS must serve the NIF on counsel where a respondent is represented. Again, there were factual disputes, and the plaintiff who raised this claim, Ms. Cruz Garcia, received full relief from the court's order.

The court also acted properly in similarly treating plaintiffs' claim regarding translation into other "major languages." Complaint, ER 26. Plaintiffs expressly modified their claim after discovery revealed that Spanish is the native language of the great majority of respondents, and the court granted judgment on this claim. The court properly found no reason to rule on the original claim. ER 507.

Finally, the court properly rejected defendants' claim that the statutory language that a 274C order is "final and unappealable" means that it cannot be reopened even where the respondent did not recieve notice. ER 492-93. Defendants nonetheless contend that the court should have granted them summary judgment on this issue as to 274C orders issued in the future, arguing that while the court established a reopening procedure for class members issued 274C orders pursuant to the defective notice procedures, it did not establish a permanent reopening procedure for the future. Defs.' Br. at 57. However, in ordering reopening for the 274C orders issued to date, the court fully resolved the issues before it, and had no need to determine what reopening procedures may be needed under the revised notice procedures in the future.[39]

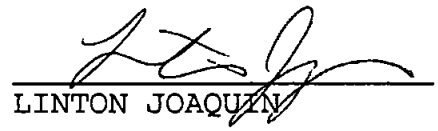
[39] There is, however, no basis for holding that 274C default orders in the future could never be reopened for lack of notice, and if anything, the reasoning of the court's decision resolves this issue in favor of reopening. ER 492-93.

CONCLUSION

For the reasons stated above, the district court should be affirmed.

Dated: February 18, 1997

Respectfully submitted,



LINTON JOAQUIN

On behalf of attorneys for Appellees.

CERTIFICATE OF COMPLIANCE WITH BRIEF FORMAT

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that appellees' brief is monospaced, has 10.5 or less characters per inch, and contains 13,435 words.

Dated: February 18, 1997.

LINTON JOAQUIN

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellees identify the following cases (also identified by appellants) as cases that are related to this appeal:

Corona-Alvarez v. INS, No. 94-70218

Cruz-Garcia v. INS, No. 94-70464

Bravo-Lopez v. INS, No. 95-70110

Dated: February 18, 1997.

LINTON JOAQUIN

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action. I am employed at 1102 S. Crenshaw Boulevard, Suite 101, Los Angeles, California 90019.

On this date I caused the attached BRIEF FOR APPELLEES to be served on the defendants by fax to defendants' counsel Karen Fletcher Torstenson at (202) 616-9777, and by placing 2 copies in the U.S. mail for first class delivery, addressed to defendants' counsel as follows:

Karen Fletcher Torstenson
Office of Immigration Litigation
Civil Division
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

I declare under penalty of perjury that the foregoing is true and correct. Executed in Los Angeles, California on February 18, 1997.