IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

Aurelio DURAN GONZALEZ, Maria C. ESTRADA, Maria Luisa MARTINEZ DE MUNGUIA, Irma PALACIOS DE BANUELOS, Lucia MUNIZ DE ANDRADE, Karina NORIS, Adriana POUPARINA, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY and Janet NAPOLITANO[1], Secretary of the Department of Homeland Security, Defendants.	Case No. CV 06-1411-MJP *FIRST AMENDED* **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF** **CLASS ACTION**

I. PRELIMINARY STATEMENT

1. This is a class action was originally filed on behalf of people who were denied the opportunity to apply for lawful permanent resident (LPR) status as a result of Defendants' refusal to comply with the precedent decision of the Ninth Circuit in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). In *Perez-Gonzalez*, the Ninth Circuit held that individuals who had been previously deported and unlawfully reentered the United States were eligible to apply for "adjustment" to LPR status with a waiver of inadmissibility.

[1] Janet Napolitano has been substituted for her predecessor Michael Chertoff.

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2. The Department of Homeland Security (DHS), through its subcomponent, U.S. Citizenship and Immigration Services (USCIS) refused to comply with the *Perez-Gonzalez* decision. Specifically, Defendants ordered immigration officers, including those within the jurisdiction of the Ninth Circuit, to deny applications for "Permission to Reapply for Admission After Deportation or Removal" filed on form I-212 (hereinafter I-212 waiver application), because ten years had not elapsed since their last departure.

3. After briefing and oral argument, this Court granted class certification and issued a preliminary injunction on November 13, 2006 (and amended on December 19, 2006). The injunction enjoined Defendants from denying, or giving legal effect to the denials of, class members' I-212 waiver applications based on this policy. Defendants appealed to the Ninth Circuit.

4. On appeal, the Ninth Circuit vacated the preliminary injunction. Relying on the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"), the Ninth Circuit reversed its prior precedential decision in *Perez-Gonzalez v. Ashcroft*, and deferred to the decision of the Board of Immigration Appeals in *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006). *Duran-Gonzales v. Dept. of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. Nov. 30, 2007) (en banc rehearing denied Jan. 16, 2009). Specifically, the *Duran-Gonzales* Court adopted *Matter of Torres-Garcia's* conclusion that applicants for adjustment of status who had previously been deported and then unlawfully reentered the United States are inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(II) and ineligible for adjustment of status to lawful permanent residency, and that the I-212 waiver could not cure inadmissibility.

5. Plaintiffs now come before this Court seeking declaratory and injunctive relief to prevent Defendants from applying the *Duran-Gonzales* decision retroactively against class members whose

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I-212 waiver applications filed prior to *Duran-Gonzales* adoption of *Matter of Torres-Garcia* and, hence, approvable under Ninth Circuit precedent. . Plaintiffs concurrently have filed a motion to amend and redefine the class and a motion for provisional class certification, temporary restraining order, and preliminary injunction.

II. JURISDICTION AND VENUE

6. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1651, as a civil action arising under the Constitution and laws of the United States; 5 U.S.C. § 701 *et seq.*, as an action to compel agency action unlawfully withheld or unreasonably delayed; and 28 U.S.C. § 1361, as an action to compel an officer or employee of the United States to perform a duty owed to Plaintiffs. Declaratory judgment is sought pursuant to 28 U.S.C. §§ 2201-02.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (e)(1), (2), (4) because Defendants are a U.S agency and head officer of a U.S agency; Defendant has a residence in this district; because "a substantial part of the events or omissions giving rise to the claim occurred" in the jurisdiction of this district; because some Plaintiffs reside in this district; and because no real property is involved in this action.

III. PARTIES

8. Plaintiff Aurelio Duran Gonzalez is a citizen of Mexico who currently resides in Tukwila, Washington. On March 24, 2006, Mr. Duran Gonzalez filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Seattle USCIS office. To date, USCIS has not yet adjudicated Mr. Duran Gonzalez's I-212 waiver application. Pursuant to their policy and *Matter of Torres-Garcia*, as adopted by *Duran-Gonzales*, USCIS will deny his I-212 waiver application and his application for adjustment of status because ten years have

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not elapsed since the date of his last departure from the United States. Defendants will deny Mr. Gonzalez's I-212 application even though *at that time* he filed his I-212 waiver application he was not inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(II)'s permanent bar if his I-212 waiver was granted.

9. Plaintiff Maria C. Estrada is a citizen of Mexico who currently resides in Lynden, Washington. On April 1, 2005, Ms. Estrada filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Seattle USCIS office. On September 15, 2005, USCIS denied Ms. Estrada's I-212 waiver application (and adjustment of status application). The USCIS denied the I-212 waiver application, finding her ineligible for the waiver solely because ten years had not elapsed since the date of Mrs. Estrada's last departure from the United States. Pursuant to their policy and *Matter of Torres-Garcia*, as adopted by *Duran-Gonzales*, Defendants will give full legal effect to the denial and, therefore, she is at risk of summary removal without a hearing before an immigration judge, 8 U.S.C. § 1231(a)(5), or placement in removal proceedings, 8 U.S.C. § 1229a, without the possibility of adjustment of status.

10. Plaintiff Maria Luisa Martinez de Munguia is a citizen of Mexico who currently resides in Tieton, Washington. On May 5, 2006 Ms. Martinez de Munguia filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Yakima USCIS office. To date, USCIS has not yet adjudicated Ms. Martinez de Munguia's I-212 waiver application. Pursuant to their policy and *Matter of Torres-Garcia*, as adopted by *Duran-Gonzales*, USCIS will deny her I-212 waiver application and her application for adjustment of status because ten years have not elapsed since the date of her last departure from the United States. Defendants

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will deny Ms. Martinez de Munguia's I-212 application even though *at that time* she filed her I-212 waiver application she was eligible for adjustment of status pursuant to *Perez Gonzales.*

11. Plaintiff Irma Palacios de Banuelos is a citizen of Mexico who currently resides in Galt, California. On February 3, 2006, Ms. Palacios de Banuelos filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Sacramento USCIS office. On June 20, 2006, USCIS denied Ms. Palacios de Banuelos' I-212 waiver application (and adjustment of status application). The USCIS denied the I-212 waiver application, finding her ineligible for the waiver solely because ten years had not elapsed since the date of Mrs. Palacios de Banuelos' last departure from the United States. Pursuant to their policy and *Matter of Torres-Garcia*, as adopted by *Duran-Gonzales*, Defendants will give full legal effect to the denial and, therefore, she is at risk of summary removal without a hearing before an immigration judge, 8 U.S.C. § 1231(a)(5), or placement in removal proceedings, 8 U.S.C. § 1229a, without the possibility of adjustment of status.

12. Plaintiff Lucia Muniz de Andrade is a citizen of Mexico who currently resides in Stockton, California. On March 28, 2006, Ms. Muniz de Andrade filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Sacramento USCIS office. On August 15, 2006, USCIS denied Ms. Muniz de Andrade's I-212 waiver application (and adjustment of status application). The USCIS denied the I-212 waiver application, finding her ineligible for the waiver solely because ten years had not elapsed since the date of the Ms. Muniz de Andrade's last departure from the United States. Pursuant to their policy and *Matter of Torres-Garcia*, as adopted by *Duran- Gonzales*, Defendants will give full legal effect to the denial and, therefore, she is at risk of summary removal without a hearing before an immigration judge, 8

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U.S.C. § 1231(a)(5), or placement in removal proceedings, 8 U.S.C. § 1229a, without the possibility of adjustment of status.

13. Plaintiff Karina Noris is a citizen of Mexico who currently resides in San Bernardino, California. On June 15, 2005, Ms. Noris filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Los Angeles USCIS office. To date, USCIS has not yet adjudicated Ms. Noris' I-212 waiver application. Pursuant to their policy and *Matter of Torres-Garcia*, as adopted by *Duran-Gonzales*, USCIS will deny her I-212 waiver application and her application for adjustment of status because ten years have not elapsed since the date of her last departure from the United States. Defendants will deny Ms. Noris's I-212 application even though *at that time* she filed her I-212 waiver application she was eligible for adjustment of status pursuant to *Perez Gonzalez.* 14. Plaintiff Adriana Pouparina is a citizen of Mexico who currently resides in South Gate, California. On March 28, 2005, Ms. Pouparina filed an I-212 waiver application in conjunction with an application for adjustment of status under INA § 245(i) with the Los Angeles USCIS office. To date, USCIS has not yet adjudicated Ms. Pouparina's I-212 waiver application. Pursuant to their policy and *Matter of Torres-Garcia*, as adopted by *Duran-Gonzales*, USCIS will deny her I-212 waiver application and her application for adjustment of status because ten years have not elapsed since the date of her last departure from the United States. Defendants will deny Ms. Pouparina's I-212 application even though *at that time* she filed her I-212 waiver application she was eligible for adjustment of status pursuant to *Perez Gonzalez.*

15. Defendant the Department of Homeland Security is an executive agency of the United States. As of March 1, 2003, DHS is the agency responsible for implementing the Immigration and Nationality Act. Within DHS, USCIS (formerly part of the Immigration and Naturalization Service)

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is responsible for adjudicating affirmatively filed I-212 waiver applications and affirmatively filed adjustment of status applications. Within DHS, Immigration and Customs Enforcement (ICE) is responsible for initiating removal proceedings and executing removal orders.

16. Defendant Janet Napolitano is the Secretary of the Department of Homeland Security and as such is charged with responsibility for the administration and enforcement of the Immigration and Nationality Act and all other laws relating to the immigration of noncitzens. She is sued in her official capacity.

IV. LEGAL AND FACTUAL BACKGROUND

17. On August 13, 2004, the U.S. Court of Appeals for the Ninth Circuit held that § 245(i) adjustment applicants who are inadmissible under INA § 212(a)(9)(C)(i)(II), 8 U.S.C. § 1182(a)(9)(C)(i)(II) (for having reentered unlawfully after a prior deportation or removal order) are eligible to have their I-212 waiver applications adjudicated by USCIS if the application was filed before ICE reinstated their prior removal order under INA § 241(a)(5), 8 U.S.C. § 1231(a)(5). *See Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). The court held that the granting of the I-212 waiver would *nunc pro tunc* place the applicant as having lawfully entered the United States, and the applicant would therefore not be subject to INA § 212(a)(9)(C)(i)(II).

18. On January 26, 2006, the Board of Immigration Appeals ("BIA") issued its decision in *Matter of Torres-Garcia*, 23 I. & N. Dec. 866, 875 (BIA 2006). *Matter of Torres-Garcia* disagreed with the *Perez-Gonzalez* decision and held that the granting of an I-212 waiver could not cure inadmissibility under INA § 212(a)(9)(C)(i)(II). Although the BIA disagreed with *Perez-Gonzalez*,

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both the BIA and the Department of Homeland Security were required to continue to apply the Ninth's Circuit's decision in cases arising within the Ninth Circuit.

19. However, Defendants refused to comply with the *Perez Gonzalez* decision. *See* Memorandum from Michael Aytes, USCIS Acting Associate Director for Operations, and Dea Carpenter, Acting Chief Counsel, to the field, dated March 31, 2006, entitled "Effect of *Perez-Gonzalez v. Ashcroft* on adjudication of Form I-212 applications filed by aliens who are subject to reinstated removal orders under INA § 241(a)(5)," hereinafter "*Perez-Gonzalez* Memo." Specifically, USCIS instructed its officers to deny any I-212 waiver application where "10 years have not elapsed since the date of the alien's last departure from the United States" (*Perez-Gonzalez* Memo, p. 2), despite the fact that the Court in *Perez Gonzalez* did not require Mr. Perez-Gonzalez to wait ten years to filed his I-212 waiver application.

20. After Defendants willfully refused to comply with the *Perez-Gonzalez* decision, Plaintiffs filed the instant class action seeking declaratory, injunctive, and mandamus relief alleging that DHS' failure to adhere to precedent violates Ninth Circuit case law, the Immigration and Nationality Act (INA), the Administrative Procedure Act (APA), the Fifth Amendment of the United States Constitution, and binding federal regulations which govern administrative adjudication and review procedures. Plaintiffs sought an injunction ordering Defendants to comply with the decision to avoid irreparable harm to Plaintiffs.

21. After initial briefing and oral argument, this Court entered an order granting a motion for temporary restraining order on October 11, 2006. After further briefing and additional oral argument, on November 13, 2006, the Court entered an order granting Plaintiffs' Motion for Preliminary Injunction and Class Certification. The Court certified the class as:

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(a) Individuals who are inadmissible under INA § 212 (a)(9)(C)(i)(II) and have filed an I-212 waiver application within the jurisdiction of the Ninth Circuit in conjunction with their application for adjustment of status under INA § 245(i), prior to any final reinstatement of removal determination, where USCIS denied the I-212 application because 10 years had not elapsed since the date of the applicant's last departure from the United States; and

(b) Individuals who are inadmissible under INA § 212 (a)(9)(C)(i)(II) and have filed an I-212 waiver application within the jurisdiction of the Ninth Circuit in conjunction with their application for adjustment of status under INA § 245(i), prior to any final reinstatement of removal determination, where USCIS has not yet adjudicated the application but where USCIS will deny their I-212 application on the grounds that 10 years have not elapsed since the date of the applicant's last departure from the United States.

22. Defendants then filed a motion to clarify the preliminary injunction on November 19, 2006. The Court entered an order modifying the preliminary injunction on December 19, 2006. The Court enjoined Defendants from applying or enforcing the *Perez-Gonzalez* Memo against "any member of the class for the remainder of this action. Defendants therefore may not deny any *class member's* I-212 applications in the Ninth Circuit on the grounds that the applicant is inadmissible under INA § 212 (a)(9)(C)(i)(II) and ten years have not elapsed since the applicant's last departure from the United States. And defendants may not give any legal effect to any denied I-212 applications of *class members* if: (a) the *applicant's* I-212 *application was adjudicated in a USCIS District Office located within the Ninth Circuit*, (b) the application was denied between August 13, 2004 (the date *Perez-Gonzalez* was filed) and the date of this Order, and (c) the application was denied on the grounds that the applicant was inadmissible under INA § 212 (a)(9)(C)(i)(II) and ten years had not elapsed since the applicant's last departure from the United States."

23. On January 8, 2007, Defendants filed a Notice of Appeal of the District Court's order granting the preliminary injunction. Defendants did not appeal this Court's order certifying the class.

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24. On November 30, 2007, the United States Court of Appeals for the Ninth Circuit issued an order vacating the preliminary injunction issued by this Court. *Duran-Gonzales v. Dept. of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. 2007). The Ninth Circuit also reversed its prior precedential decision in *Perez-Gonzalez v. Ashcroft*, and relying on the Supreme Court's decision in *Brand X*, deferred to the BIA's decision in *Matter of Torres-Garcia*. Significantly, *Duran-Gonzales* adopted *Matter of Torres-Garcia's* conclusion that applicants for adjustment of status who had previously been deported and then unlawfully reentered the United States are inadmissible under INA § 212(a)(9)(C)(i)(II) and ineligible for adjustment of status to lawful permanent residency, and that the I-212 waiver cannot cure their inadmissibility.

25. Plaintiffs filed a petition for rehearing en banc on February 27, 2008. On January 16, 2009, the Ninth Circuit denied Plaintiffs' petition for rehearing en banc. The Ninth Circuit's mandate will issue on January 23, 2009.

V. CLASS ALLEGATIONS

26. Plaintiffs bring this action on behalf of themselves and all others who are similarly situated, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2). The amended class, as proposed, consists of:

> Individuals who are inadmissible under INA § 212(a)(9)(C)(i)(II) and whose I-212 waiver applications were filed within the jurisdiction of the Ninth Circuit in conjunction with applications for adjustment of status under INA § 245(i) and were pending at any time on or after August 13, 2004 and on or before November 30, 2007 and prior to any final reinstatement of removal decision.

27. Plaintiffs' filed a motion for class certification on September 28, 2006 and the class was certified on November 13, 2006. Plaintiffs seek to amend and redefine the class. For the reasons

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specified in the motion and order, Plaintiffs continue to otherwise meet the requirements for class certification established by Federal Rule of Civil Procedure 23. As in the prior class definition, the proposed amended class meets the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2) in that the class is so numerous that joinder of all the members is impracticable. The precise number of potential class members is not currently identifiable by Plaintiffs. However, on information and belief there are hundreds of persons with I-212 waiver applications pending at any time on or after August 13, 2004 and on or before November 30, 2007 based on the law in effect at the time.

28. There are questions of law and fact common to the proposed class that predominate over any questions affecting only the individual named Plaintiffs and class members, including: (1) whether the new rule in *Duran-Gonzales* can be retroactively applied to those I-212 waiver applications that were pending in reliance on *Perez-Gonzalez*; and (2) whether the Ninth Circuit's adoption of *Matter of Torres-Garcia* can be applied retroactively.

29. The claims of the named Plaintiffs are typical of the claims of the proposed class. The named Plaintiffs, like all class members, have had their I-212 waiver applications denied or expect to have them denied based on the retroactive application of the law announced in *Duran-Gonzales.*

30. The named Plaintiffs will fairly and adequately protect the interests of the proposed class because they seek relief on behalf of the class as a whole and have no interest antagonistic to other members of the class.

31. The named Plaintiffs also are represented by competent counsel with extensive experience in immigration law and federal court litigation and who are willing and able to protect the interests of the class.

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32. Finally, Defendants have acted or will act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Improper Retroactive Application of a Judicial Decision, *i.e. Duran-Gonzales*)

33. Plaintiffs repeat, allege, and incorporate paragraphs 1 through 32 as if fully set forth herein.

34. Defendants' cannot apply the *Duran-Gonzales* decision retroactively to the detriment of Plaintiffs and class members where, as here, the decision establishes a new principle of law, retrospective application will not advance the new holding, and retrospective application would be fundamentally unfair. *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971); *George v. Camacho*, 119 F.3d 1393, 1396 (1997); *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003); *In re Mersmann*, 505 F.3d 1033 (10th Cir. 2007). *Accord Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166 (9th Cir. 2003); *Garcia v. Ashcroft*, 368 F.3d 1157 (9th Cir. 2004); *Padilla-Padilla v. Gonzales*, 463 F.3d 972 (9th Cir. 2006).

SECOND CAUSE OF ACTION

(Improper Retroactive Application of an Administrative Adjudicatory Decision, *i.e.* the Ninth Circuit's adoption of *Matter of Torres-Garcia*)

35. Plaintiffs repeat, allege, and incorporate paragraphs 1 through 32 as if fully set forth herein.

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36. Defendants cannot apply *Matter of Torres-Garcia*, as adopted by the Ninth Circuit in *Duran-Gonzales*, to the detriment of Plaintiffs and class members where as here, (1) the issue was controlled by prior Ninth Circuit precedent; (2) *Matter of Torres-Garcia* unquestionably represents a departure from *Perez-Gonzalez*; (3) Plaintiffs and class members relied on *Perez-Gonzalez* to their detriment; (4) retroactive application would impose an immense burden on Plaintiffs and class members; and (5) there is no statutory interest served by applying the decision retroactively to deny Plaintiffs and class members permanent residency. *Montgomery Ward & Co., Inc. v. FTC,* 691 F.2d 1322 (9th Cir.1982); *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007); *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003).

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs' respectfully request that this Court:

1. Assume jurisdiction over the matter;

2. Amend and redefine the previously certified class as proposed herein;

3. Preliminarily and then permanently enjoin DHS from applying the Ninth Circuit's decision in *Duran-Gonzales v. Dept. of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. 2007) to class members whose I-212 waiver applications were pending at any time on or after the Ninth Circuit's August 13, 2004 decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) and on or before its November 30, 2007 decision in *Duran-Gonzales.*

5. Order Defendants to adjudicate I-212 waiver applications and adjustment of status applications in accordance with *Perez-Gonzalez*;

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6. Order Defendants to re-adjudicate denied I-212 waiver applications in compliance with *Perez-Gonzalez;*

7. Award reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), 5 U.S.C. § 504, or any other applicable law; and

8. Grant any and all further relief as this Court deems just and appropriate.

Dated this 21st day of January, 2009.

Respectfully submitted,

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VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE

_____/s/_____
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