

No. 09-35174

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**AURELIO DURAN GONZALEZ; *et al.*,
Plaintiffs - Appellants,**

v.

**U.S. DEPARTMENT OF HOMELAND SECURITY; *et al.*,
Defendants - Appellees.**

**APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON (SEATTLE)
2:06-CV-01411-MJP**

BRIEF FOR DEFENDANTS-APPELLEES

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BRIEF FOR DEFENDANTS-APPELLEES

INTRODUCTION

Plaintiffs-Appellants (“Plaintiffs”) challenge the final Order of the United States District Court for the Western District of Washington, denying their two motions, the first for leave to file an amended complaint and the second for leave to amend and redefine a certified class, and granting judgment to Defendants, United States Department of Homeland Security (“DHS”), and Janet Napolitano,

Secretary of the DHS (collectively “Defendants”). Plaintiffs originally brought this action in district court, where the district court certified a class, with Plaintiffs named as class representatives, and issued a preliminary injunction. *See* Defendants’ Supplemental Excerpts of Record (“S.E.R.”) 9-25, 92, 106 (“*Duran Gonzales I*”). Defendants appealed the district court’s decision to this Court, which vacated the injunction and remanded the case to the district court for further action commensurate with its decision. *Duran Gonzales v. DHS*, 508 F.3d 1227, 1237-39, 1243 (9th Cir. 2007) (“*Duran Gonzales II*”). In *Duran Gonzales II*, this Court held that the *Duran Gonzales I* plaintiffs are ineligible for I-212 waivers, based on their illegal return to the United States without admission, after a prior removal, because 10 years have not have not elapsed since the date of their last departure from the United States. *Duran Gonzales II*, 508 F.3d at 1242-43. On remand, the district court denied Plaintiffs’ motions to file an amended complaint and to amend the class definition. *Duran Gonzales III*, Plaintiff-Appellants’ Excerpts of Record (“E.R.”) 3-9. The district court found that such amendments would be futile, as *Duran Gonzales II* was not impermissibly applied to the Plaintiffs or to the class they represented. E.R. 8, 16, 17. Moreover, *Duran Gonzales II* found that Plaintiffs are at this time definitively ineligible for the relief they seek: permission to apply for readmission. *Duran Gonzales II*, 508 F.3d at

1242-43. In denying the motions at issue in this appeal, the district court concluded that amendment of the complaint or the class definition would be futile because Plaintiffs are ineligible to adjust their immigration status. E.R. 8, 16, 17.

Plaintiffs now challenge the district court's determination that amending their complaint and the certified class would be futile. The sole issue for the Court is whether the district court abused its discretion when it determined that the *Duran Gonzales II* decision binds the named Plaintiffs and the certified class they represent. This Court should find, as the district court found, that *Duran Gonzales II* is binding on the whole class certified by the district court in *Duran Gonzales I*. E.R. 8, 16, 17. This conclusion is compelled by the fact that the named Plaintiffs in the proposed amended complaint are identical to the named plaintiffs in *Duran Gonzales I*. S.E.R. 68, 106. Moreover, the class representatives for the class certified in *Duran Gonzales I* are identical to the proposed class representatives in the instant appeal. S.E.R. 68. As such, *Duran Gonzales II* is not impermissibly retroactive as applied to the proposed amended class definition, and the district court did not abuse its discretion in denying Plaintiffs' motions to amend.

STATEMENT OF JURISDICTION AND TIMELINESS

This Court's appellate jurisdiction arises under 28 U.S.C. § 1291. The notice of appeal was timely filed on March 5, 2009, within 60 days of the district court's February 27, 2009, order. Fed. R. App. P. 4(a)(1)(B); E.R. 1. Plaintiffs asserted jurisdiction under 28 U.S.C. §§ 1331, 1361, 1651, 2201-02; and 5 U.S.C. § 701 *et seq.*

COUNTER-STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The sole issue before the Court is whether the district court abused its discretion when it determined that granting leave to amend the complaint, and to amend and redefine the certified class, would be futile due to the proper application of *Duran Gonzales II*.

I. STATEMENT OF THE CASE

On January 21, 2009, Plaintiffs filed motions to amend their district court complaint and certified class. E.R. 19-24, S.E.R. 39-67, 68-90. Plaintiffs' proposed amendments sought to add challenges based on retroactivity, and to reduce their certified class to a narrower subset of the original class. *Id.* The district court denied Plaintiffs' requests, on the grounds that such amendments and modifications would be futile. E.R. 3-9. The district court determined that because judicial decisions are presumptively retroactive, they are presumed to

apply to the parties who are before the court and seeking a decision, such as Plaintiffs. *Id.* In a nutshell, Plaintiffs' appeal challenges whether *Duran Gonzales II* is binding on them, the named plaintiffs in *Duran Gonzales I* and the named Appellees in *Duran Gonzales II*.

II. STATEMENT OF THE FACTS

A. Appellants' Immigration Proceedings.

Plaintiffs, Aurelio Duran Gonzalez, Irma Palacios de Banuelos, Lucia Muniz de Andrade, Adriana Pouparina, Maria Luisa Martinez de Munguia, Irma Palacios de Banuelos, and Karina Noris, are seven aliens residing within the jurisdiction of the Ninth Circuit Court of Appeals, who represent a certified class of similarly-situated aliens. Plaintiffs' Brf. at 12-13, n.5. Each of the Plaintiffs illegally returned to the United States without admission, after having been previously removed. *See id* at 8; Each of them, accordingly, is inadmissible, and ineligible for adjustment of status. *See id.* at 8 U.S.C. §§ 1182(a)(9)(C)(i)(II) (inadmissibility ground) and 1245(a)(2) (inadmissible alien ineligible for adjustment). Aliens who are inadmissible under 8 U.S.C. § 1182(a)(9)(C) may obtain relief from this inadmissibility by applying for and obtaining consent to reapply for admission. 8 U.S.C. § 1182 (a)(9)(C)(ii). By the clear statutory language, however, they must obtain consent to reapply prior to "reembarkation

from a place outside the United States” and only if they are “seeking admission more than 10 years after the date of the . . . last departure from the United States.” 8 U.S.C. § 1182(a)(9)(C)(ii). USCIS Form I-212 is the form used to apply for this consent to reapply for admission.¹ Plaintiffs filed I-212 applications from within the United States in conjunction with applications for adjustment of status under 8 U.S.C. § 1255(i), during the time period between 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 II*. The United States Citizenship and Immigration Services (“USCIS”) has not yet adjudicated Plaintiffs’ pending applications. Plaintiffs assert that application of the holdings in *Duran Gonzales II* to them would be impermissibly retroactive, and would result in undue hardship and manifest injustice. Plaintiffs’ Brf. at 2, 17, 18, 21, 24-41.

B. The Applicable Statute And Court Decisions

Since passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. 104-208, Div. C, 110 Stat.

¹ USCIS Form I-212 is also used to apply for consent to reapply under a separate provision, 8 U.S.C. § 1182(a)(9)(A)(iii), that applies to aliens who have been removed, but who have not returned to the United States unlawfully by returning without being admitted, 8 U.S.C. § 1182(a)(9)(A)(i) and (ii). Consent to reapply under 8 U.S.C. § 1182(a)(9)(A)(iii) does not relieve an alien from inadmissibility under § 1182(a)(9)(C)(i). See *Matter of Torres-Garcia*, 23 I. & N. Dec. 866, 876 (BIA 2006).

3009-546 (1996), Defendants' position has always been that, by statute, an alien who is deported or removed from the United States, and then returns illegally to the United States without admission, renders himself or herself inadmissible. 8 U.S.C. § 1182(a)(9)(C)(i)(II). As this Court noted in *Perez-Gonzales v. Ashcroft*, 379 F.3d 783, 792-93 (9th Cir. 2004), the Defendants' position has also been that an alien who is inadmissible under § 1182(a)(9)(C)(i)(II) may not seek adjustment of status under 8 U.S.C. § 1245(i). An alien must be admissible to obtain adjustment of status. 8 U.S.C. § 1245(i)(2)(A). Thus, the Defendants' position has been that § 1182(a)(9)(C)(i)(II) inadmissibility precludes adjustment under § 1245(i). *Perez-Gonzales*, 379 F.3d at 793, citing *Memorandum by Louis D. Crocetti, Jr., INS Associate Commissioner* (May 1, 1997), reprinted in 2 *Benders Immigration Bulletin* 450, 453 (June 1, 1997).

Perez-Gonzalez involved an alien who had been deported, returned to the United States without being admitted, and then filed an application for adjustment of status based on his marriage to a United States citizen. *Perez-Gonzalez v. Ashcroft*, 379 F.3d at 785. The alien also filed an I-212 application for permission to reapply for admission after a prior deportation. *Id.* DHS denied his I-212 application and his adjustment application because he was inadmissible on several grounds. *Id.* at 785-86.

On appeal, this Court held that an alien who returned illegally without admission after having been removed retains eligibility to seek adjustment of status under 8 U.S.C. § 1255(i), notwithstanding 8 U.S.C § 1231(a)(5) and 8 U.S.C. § 1182(a)(9)(C)(i). With respect to the reinstatement provision, 8 U.S.C. § 1231(a)(5), the Court viewed that provision to be inapplicable to an alien who files for an I-212 application before his previous order of removal is reinstated. *Perez-Gonzalez*, 379 F.3d at 788. With respect to the admissibility bars in 8 U.S.C. § 1182(a)(9), the court reasoned that the provision did not bar an alien from applying for and receiving relief under Section 1255(i). *Perez-Gonzalez*, 379 F.3d at 792-795. In so doing, the Court declined to accord *Chevron*² deference to the Government's position as set forth in an internal guidance memorandum, but indicated that deference would be owed to a formal agency interpretation under *Chevron*. *Perez-Gonzalez*, 379 F.3d at 793.

On January 26, 2006, the Board of Immigration Appeals (“BIA”) issued a precedential opinion, *In re Torres-Garcia*, 23 I. & N. Dec. 866, 876 (BIA 2006). Directly addressing and disagreeing with the Ninth Circuit's opinion in *Perez-Gonzales*, the BIA concluded that an alien who has illegally returned to the

² *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

United States without admission, after a prior removal, is inadmissible by virtue of 8 U.S.C. § 1182(a)(9)(C)(i), and therefore, to gain eligibility to apply for adjustment of status under 8 U.S.C. § 1255(i), the alien must obtain permission to reapply for admission from outside of the United States, and must be seeking admission no earlier than 10 years from the most recent departure. *Id.* at 876-77, citing *Perez-Gonzales*, 379 F.3d 783. Subsequently, on March 31, 2006, USCIS issued a formal memorandum to USCIS field offices that adopted the approach set forth in the BIA's decision in *Matter of Torres-Garcia*, to the extent it was consistent with this Court's decision in *Perez-Gonzales*. The memorandum states in relevant part:

In light of *Perez-Gonzalez*, in any case where (1) an alien is inadmissible under section 212(a)(9)(C)(i) of the INA; (2) 10 years have elapsed since the date of the alien's last departure from the United States; and (3) the alien filed the Form I-212 before ICE had reinstated the removal order, pursuant to section 241(a)(5) of the INA, USCIS should adjudicate the form I-212, even if ICE reinstates the order while the Form I-212 is still pending.

E.R. 56.

C. The District Court Proceedings

On September 28, 2006, Plaintiffs filed a complaint in the United States District Court for the Western District of Washington, seeking to enjoin future I-212 denials based on *Matter of Torres-Garcia*, and to prohibit Defendants from

giving legal effect to existing denials. S.E.R. 106-120. On October 5, 2006, the district court orally granted Plaintiffs' motion for a temporary restraining order, followed by a written opinion on October 11, 2006. S.E.R. 1-8 (Docket No. 22). After a full round of briefing and oral argument, the district court granted class certification to:

(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.

S.E.R. 9-25. The current Plaintiffs were named as class representatives. *See id.* at 9, 101. The district court also issued a class-wide preliminary injunction on November 13, 2006, enjoining future I-212 denials based on *Matter of Torres-Garcia* and prohibiting Defendants from giving legal effect to existing denials. S.E.R. 9-25. Later, the district court granted Defendants' motion to clarify the text of the injunction on December 19, 2006. S.E.R. 26-27. Defendants

filed a timely notice of appeal of the injunction on January 8, 2007, but did not appeal the order certifying the class.

D. The Court's Decision in *Duran Gonzales II*

After complete briefing by both parties on appeal, the Court held oral argument on August 6, 2007. On November 30, 2007, this Court issued a published decision, which stated:

[W]e vacate the district court's order because we hold today that we are bound by the BIA's interpretation of the applicable statutes in *In re Torres-Garcia*, even though that interpretation differs from our prior interpretation in *Perez-Gonzalez*. Pursuant to *In re Torres-Garcia*, plaintiffs as a matter of law are not eligible to adjust their status because they are ineligible to receive I-212 waivers. Accordingly, the plaintiffs have no likelihood of success on the merits of their suit, and the preliminary injunction is vacated. The case is remanded for further proceedings consistent with this opinion.

Duran-Gonzales II, 508 F.3d at 1242-43. Under the Supreme Court's analysis in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("*Brand X*"), the Court deferred to the BIA's reasonable statutory interpretation in *Matter of Torres-Garcia*, 23 I. & N. Dec. 866, "even though that interpretation differs from [the Court's] prior interpretation in *Perez-Gonzalez*." *Duran Gonzales II*, 508 F.3d at 1242. The Court concluded that the BIA's holding in *Matter of Torres-Garcia* "is clearly reasonable," and upheld the BIA's interpretation of the statute. *Id.*

Plaintiffs filed a motion for rehearing and rehearing *en banc*. After briefing on the motion by Plaintiffs, Defendants, and *amicus curiae*, the Ninth Circuit denied rehearing and rehearing *en banc*, on January 16, 2009. *See* S.E.R. 38.

E. The District Court’s Decisions After Remand

On January 21, 2009, Plaintiffs requested temporary injunctive relief from the prospective January 23, 2009, issuance of the mandate in *Duran-Gonzales II*. S.E.R. 39-67. As part of their request for temporary injunctive relief, Plaintiffs requested that the Court “amend and redefine the previously certified class” in the district court action to consist “of applicants for adjustment of status within the Ninth Circuit who filed their I-212 waivers in reliance on the Ninth Circuit’s decision in *Perez-Gonzalez*.” E.R. 19-24. Specifically, Plaintiffs would have defined the proposed amended class as:

[i]ndividuals 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.

Id. In effect, Plaintiffs requested that the previously certified class be amended and provisionally re-certified to include only a narrower subset: class members who filed I-212 applications on or after the Ninth Circuit’s August 13, 2004, decision in *Perez-Gonzalez*, and on or before its November 30, 2007 decision in

Duran-Gonzalez II. All of the individuals in the requested amended class definition are included within the class definition already certified. S.E.R. 39, 92, 106. Further, the proposed class representatives are identical to those already acting as class representatives. *Id.*

After the mandate issued in *Duran-Gonzalez II*, the district court granted Plaintiffs' motion for a temporary restraining order, finding that if the motion were not granted, certain members of the class could be at risk of deportation before the district court could decide the merits of the proposed injunction. E.R. 70. The district court continued the hearing for further argument on the merits to February 3, 2009. *Id.* On February 6, 2009, the district court denied Plaintiffs' motion for a preliminary injunction, on the grounds that "the Ninth Circuit's silence on the retroactivity of its decision requires this Court to assume that it carries full retrospective effect" and "precludes Plaintiffs from challenging its retrospective application." E.R. 16, 17. The district court reserved the issue of class modification for decision after full briefing by the parties. E.R. 18. Plaintiffs never filed a motion to stay the mandate with the Ninth Circuit. *See* S.E.R. 38. On February 27, 2009, after full briefing by the parties, the district court denied Plaintiffs' motions for leave to file an amended complaint and to amend and

redefine the class, and entered judgment for Defendants, concluding that there were no remaining factual or legal issues. E.R. 10-18. This appeal followed.

SUMMARY OF THE ARGUMENT

The Court should affirm the district court's order denying the motion for leave to file an amended complaint and leave to amend and redefine the class. As a threshold matter, judicial decisions are presumptively retroactive. *Harper v. Virginia Dept. Of Taxation*, 509 U.S. 86, 97 (1993). When a court of appeals applies a rule of law to the parties before it, that rule becomes the controlling interpretation of federal law in the circuit, and must be given full retroactive effect in all pending cases. *See id.* Plaintiffs were the named plaintiffs in *Duran-Gonzales I*, and represented the entire plaintiff class in the appeal. Plaintiffs cannot void the effects of the Court's decision by reformulating their class definition solely in response to their adverse decision. As a result, the district court did not abuse its discretion in denying the motions to amend.

Defendants' position has always been that, by statute, aliens who return to the United States illegally without admission after deportation or removal are inadmissible, 8 U.S.C. § 1182(a)(9)(C)(i)(II); *see USCIS Policy Memorandum*, E.R. 46-48. Therefore, the cases cited by Plaintiffs concerning the retroactive application of "a new rule announced by [an] agency," are distinguishable and

inapplicable to the facts here, where Defendants' position has never changed. Plaintiffs' Brf. at 24. Accordingly, because *Duran-Gonzales II* is not impermissibly retroactive as applied to Plaintiffs, the district court did not abuse its discretion in finding Plaintiffs' claims to be futile.

STANDARD OF REVIEW

The district court's denial of Plaintiffs' motion to amend their complaint, and amend and modify their certified class, is reviewed for an abuse of discretion. *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (citing *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1038 (9th Cir. 2002)). Granting a motion to amend a pleading is disfavored "where the amendment would be futile." *Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009). "When a proposed amendment would be futile, there is no need to prolong the litigation by permitting further amendment." *Id.*, citing *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1088 (9th Cir. 2002). This Court looks unfavorably on "late amendments to assert new theories . . . when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986) (denying motion to amend where purpose was to avoid adverse judgment), citing *M/V*

American Queen, 708 F.2d 1483, 1492 (9th Cir. 1983); *Stein v. United Artists Corp.*, 691 F.2d 885, 898 (9th Cir. 1982).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PLAINTIFFS' MOTIONS AS FUTILE.

The district court determined that all of the plaintiffs in *Duran-Gonzales I* are bound by this Court's judgment in *Duran-Gonzales II*, and so are foreclosed from relief by the Court's decision in *Duran-Gonzales II*. This Court in *Duran Gonzales II* held that all of the *Duran Gonzales I* plaintiffs are ineligible for I-212 grants, and are therefore ineligible to adjust their immigration status, based on their illegal reentry into the United States without admission less than 10 years after their last departure from the United States subject to a removal order.

Duran-Gonzales II, 508 F.3d at 1242-43. Because the plaintiffs cannot obtain relief under § 1182(a)(9)(C)(ii), they are ineligible to adjust their immigration status. *Id.* The Court deferred to the BIA's reasonable interpretation of the applicable statutes in *Matter of Torres-Garcia*, 23 I. & N. Dec. at 876, even though that interpretation differed from the Ninth Circuit's prior interpretation in *Perez-Gonzales*, 379 F.3d 783. Because the Court's holding in *Duran Gonzales II* applies to all of the Plaintiffs, the holding forecloses the relief that Plaintiffs seek.

It follows that the district court properly determined that amending the complaint and redefining the class would be futile.

A. The District Court Properly Denied Plaintiffs' Motion For Leave To Amend Their Complaint.

Rule 15(a) of the Federal Rules of Civil Procedure allows a Court to grant leave to amend a pleading “when justice so requires.” Fed. R. Civ. P. 15(a). Where “any amendment would be futile,” however, the request to amend a complaint is properly denied. *See Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008).

Plaintiffs' proposed Amended Complaint sought “declaratory and injunctive relief to prevent Defendants from applying the *Duran-Gonzales [II]* decision retroactively against class members whose I-212 waiver applications [were] filed prior to *Duran-Gonzales'* adoption of *Matter of Torres-Garcia.*” S.E.R. 39-67. Such relief is foreclosed by the Court's decision and subsequent mandate in *Duran-Gonzales II*, which issued on November 30, 2007, and January 23, 2009, respectively, which Plaintiffs never challenged. S.E.R. 38, 39, 91.

Plaintiffs' newly asserted retroactivity claims are at odds with the clear language of *Duran-Gonzales II* that “plaintiffs as a matter of law are not eligible to adjust their status because they are ineligible to receive I-212 waivers.” Plaintiffs' Brf. at 20; *Duran-Gonzales II*, 508 F.3d at 1242-43. Plaintiffs' retroactivity

claims are also at odds with the clear language of the district court's decision denying Plaintiffs' request for a preliminary injunction. E.R. 10-18. There, citing the Supreme Court's decision in *Harper*, 509 U.S. at 97, the district court properly determined that "judicial decisions have a presumptively retroactive effect." E.R. 8. Therefore, permitting Plaintiffs to file an amended complaint would have been futile, as Plaintiffs' claims are clearly foreclosed. "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

In sum, because Plaintiffs' motion failed to satisfy Fed. R. Civ. P. 15(a), the district court did not abuse its discretion when it denied their motion for leave to file an amended complaint. As Plaintiffs are foreclosed from relief, granting leave to amend their complaint would have prolonged the case, wasted the Court's and the parties' time, and would not have changed the ultimate outcome. The legal issues raised in both the original complaint and the proposed First Amended Complaint have been definitively decided, and no material facts are at issue. Thus, the district court did not abuse its discretion in denying Plaintiffs' motion for leave to amend their complaint.

B. The District Court Did Not Abuse Its Discretion When It Denied Plaintiffs' Motion For Leave To Amend and Redefine The Certified Class.

As the party seeking to amend class certification, Plaintiffs bore the burden of establishing, pursuant to Rule 23(a), that they have met all four requirements in Rule 23(a) and at least one of the requirements of Rule 23(b). *Alchem Prods. Inc. v. Windsor*, 521 U.S. 591, 631 (1997).

To obtain class certification under Rule 23(a), the following four factors must be met: “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). These four requirements are commonly referred to as numerosity, commonality, typicality, and adequacy. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 (9th Cir. 2007).

The four basic requirements of Rule 23(a) are “designed to effectively limit class claims to those ‘fairly encompassed’ by the named plaintiffs’ individual claims.” *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982). Rule 23(a) is designed to ensure that the common bond between the claims of the

representatives and those of the class is strong enough that their fortunes will rise and fall together. *Cooper v. Southern Co.*, 390 F.3d 695, 713 (11th Cir. 2004).

1. Plaintiffs' Proposed Amended Class Is A Subset of the Class Certified in *Duran-Gonzales I*.

The class certified in *Duran Gonzales I* included all aliens with cases that were pending at the time of the *Perez-Gonzalez* decision, as well as those with future cases. Here, Plaintiffs sought to amend the certified class based on a theory that the decision in *Duran Gonzales II* is impermissibly retroactive. E.R. 22. The new class proposed by Plaintiffs is a narrower subset of the *Duran Gonzales I* class. Instead of including aliens with future cases *ad infinitum*, it would include only those class members who filed their I-212 and adjustment of status applications during the time period between the issuance of the *Perez-Gonzalez* decision and the issuance of *Duran-Gonzalez II*. *Id.* Thus, amending the class would have served no purpose, because the law of the case applies to all members of the *Duran-Gonzalez I* class, and thus to all members of the newly proposed class.

2. Plaintiffs Failed To Meet Their Burden For Certification Of An Amended Class.

Plaintiffs' motion to amend the class definition failed to address the legal requirements for class certification for the proposed new class definition. The

motion merely stated: “[t]he motion for class certification that Plaintiffs filed on September 28, 2006 continues to satisfy the requirements for class certification established by Federal Rule of Civil Procedure 23.” E.R. 22. The motion did not provide any detailed analysis of how the newly proposed class definition met the Rule 23 requirements. E.R. 19-24. Mere legal conclusions rarely carry the day. *Cf. Liberty Financial Services v. U.S.*, 778 F.2d 1390, 1392 (9th Cir. 1985).

Accordingly, the district court did not abuse its discretion in denying the motion to amend.

3. Amending and Redefining The *Duran Gonzales I* Certified Class Would Have Been Futile.

The district court considered Plaintiffs’ request to amend the class and denied it, on the ground that it was foreclosed by *Duran Gonzales II*. E.R. 7. The district court recognized that the *Duran Gonzalez II* opinion vacated an injunction directed at the entire class as certified. E.R. 5. In using the word “plaintiffs,” the *Duran Gonzalez II* Court did not distinguish between the named plaintiffs and the entire class as a whole. It was not an abuse of discretion for the district court to determine that the sentence in *Duran Gonzales II* stating “plaintiffs as a matter of law are not eligible to adjust their status because they are ineligible to receive I-212 waivers” applies to the entire class. E.R. 8.

Plaintiffs argue that the Court adopted the BIA’s interpretation and applied it to two “very different groups of individuals” within the certified class, and that it would be *unfair* to apply the *Duran Gonzales II* opinion to them. Plaintiffs’ Brf. at 21, 43. (emphasis added). In any litigation, there is a risk of an adverse ruling, particularly where the law is unclear. That is part of the benefit and part of the pitfall in litigating in the class action structure: any decision binds the entire class, whether it is favorable to the class or not. The fact that Plaintiffs experienced an adverse ruling does not make that ruling less binding. As the Supreme Court explained, “[t]he essence of judicial decisionmaking – applying general rules to particular situations – necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation.” *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312 (1994). To rule otherwise would mean a court could never apply a statutory holding of first impression in a pending case to the person or persons standing before the court.

Plaintiffs’ argument – that the *Duran Gonzales II* opinion is somehow less binding on them because it relies upon *Brand X* – lacks merit. In *Brand X*, the Supreme Court determined that “courts must apply *Chevron* deference to an agency’s interpretation of a statute ‘regardless of a circuit court’s prior precedent,

provided that the court's earlier precedent was an interpretation of statutory ambiguity." *Duran Gonzales II*, 508 F.3d at 1235-36, citing *Brand X*, 545 U.S. at 980-82.

This Court should reject Plaintiff's suggestion that *Duran Gonzales II* should not bind the parties to the case, and should apply only in future cases. Plaintiffs' Brf. at 17, 18. There is no language in *Duran Gonzales II* supporting such a construction. Moreover, to treat *Duran Gonzales II* in this manner would render it an impermissible advisory opinion. In fact, *Duran Gonzales II* clearly indicates that none of the members of the class certified in *Duran Gonzales I* is eligible for the relief originally sought on behalf of the class. By the definition of the class, *supra* p. 9, no members of that class would have applied for an I-212 waiver (more accurately, consent to reapply for admission) after ten years had elapsed since their last departure. *See Duran Gonzales II*, 508 F.3d at 1242. The district court determined that because the members of the proposed amended class are all members of the current class, they "as a matter of law are ineligible to adjust their status." E.R. 8.

Moreover, in denying Plaintiffs' request for a preliminary injunction, the district court found that because *Duran Gonzales II* did not expressly address or reserve the question of retroactivity in its decision, the district court was required

“to assume that it carries full retrospective effect” and that Plaintiffs were precluded “from challenging its retrospective application.” E.R. 16, 17.

Accordingly, since the sole purpose put forth by Plaintiffs in their motion to amend the class definition was to challenge the retrospective application of *Duran Gonzales II*, E.R. 22, the district court properly denied Plaintiffs’ motion as futile. The district court concluded that Plaintiffs’ retroactivity claim is refuted by Supreme Court precedent requiring courts to apply a judicial decision interpreting a federal statute to all civil cases raising that issue pending on appeal. E.R. 8; 17. Because the *Duran Gonzales II* decision binds all class members, it precludes the class members, including the Plaintiff class representatives, from being eligible for adjustment of status, because they do not qualify for I-212 grants. E.R. 8. As the “ultimate relief” of adjustment of status is precluded by *Duran Gonzales II*, there was no abuse of discretion in denying Plaintiffs’ motions to amend.

II. DURAN GONZALES II APPLIES TO ALL PARTIES WHO WERE BEFORE THE COURT, INCLUDING PLAINTIFFS.

There is no dispute that Plaintiffs are subject to the bar at 8 U.S.C. § 1182(a)(9)(C)(i)(II), based on their prior deportation and subsequent illegal return without admission. Instead, the question is whether they are statutorily eligible to apply for an I-212 grant under 8 U.S.C. § 1182(a)(9)(C)(ii). Despite Plaintiffs’ allegations to the contrary, Plaintiffs’ Brf. at 22, this is precisely the

issue that *Duran Gonzales II* addressed. The Court found it appropriate to defer to the BIA's position that an alien is not eligible for an I-212 grant until after ten years from the date of the alien's departure from the United States. *Duran Gonzales II*, 508 F.3d at 1242.

Duran Gonzales II did more than just dissolve a temporary injunction. The *Duran Gonzales II* Court made a determination regarding the legal issue that is now before this Court: "plaintiffs are as a matter of law are not eligible to adjust their status because they are ineligible to receive I-212 waivers." *Id.* at 1242-43. This sentence makes clear that the Ninth Circuit applied a rule of law to the *Duran Gonzales I* plaintiffs before it – the same plaintiffs who have brought this appeal. As the district court correctly determined, when the *Duran Gonzales II* Court applied this rule of law to the *Duran Gonzales I* plaintiffs, that rule became the controlling interpretation of federal law in the Circuit. E.R. 8, 15-18. As such, it became the law of the case and must be given full retroactive effect in all cases pending both before the federal courts and in administrative proceedings.

Plaintiffs' attempt to carve out a portion of the class certified in *Duran Gonzales I*, for purposes of partial non-retroactivity, must fail. To hold otherwise would violate *Harper*, 509 U.S. at 97. In *Harper*, the Supreme Court explained:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper, 509 U.S. at 97 (emphasis added). Again, in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991), and in *Harper*, the Supreme Court stated:

We can scarcely permit the substantive law to shift and spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule.

Harper, 509 U.S. at 97; *Beam*, 501 U.S. at 543. The Ninth Circuit clearly applied its decision to the parties before it, the class certified by the district court.

Plaintiffs' retroactivity challenge seeks to do exactly what *Harper* and *Beam* expressly prohibited, shifting and springing, applying the Court's holding to some parties and not to others, according to claims of reliance on the old rules.

Plaintiffs' Brf. at 17, 18. Because such a carve-out would violate the Supreme Court's holding in *Harper*, the district court did not abuse its discretion when it denied Plaintiffs' motion to amend the class and to amend the complaint.

A. The *Duran-Gonzales II* Court Clearly Intended for Plaintiffs to Be Bound by its Decision.

After *Duran Gonzales II* held that "plaintiffs as a matter of law are not eligible to adjust their status because they are ineligible to receive I-212 waivers,"

Duran Gonzales II, 508 F.3d at 1242, the Court remanded the case to the district court “for further proceedings consistent with its opinion.” *Id.* at 1242-43. When a case has been decided by an appellate court and remanded, the court to which it is remanded “must proceed in accordance with the mandate and such law of the case as was established by the appellate court.” *Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1337 (9th Cir. 1984) (denying party leave to amend its pleadings on remand) (citation omitted). On remand, a trial court cannot consider issues “decided explicitly or by necessary implication” by the appellate court. *Id.* (citations omitted). Although an amendment of pleadings following remand may be permissible, such amendments cannot be used to reach a result inconsistent with the appellate court’s ruling because “[a]t some point, there must be finality.” *Id.* at 1337-38.

Plaintiffs, despite being the same as the named Plaintiffs-Appellees in *Duran Gonzales II*, now seek to avoid the application of the law of the case to them. Plaintiffs argue that it would be unfair to apply the law of the case to them because such application would be “retroactive.” Plaintiffs’ Brf. at 41-42, citing *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971). But *Chevron Oil* is no longer good law. *See Harper*, 509 U.S. at 97-98; *see also Ditto v. McCurdy*, 510 F.3d 1070, 1077,

n. 5 (9th Cir. 2007) (recognizing that *Chevron Oil* was “effectively overruled” by *Harper*).

Once a court announces “any rule of federal law” with respect to litigants before that court, “no court may refuse to apply that rule retroactively.” *Harper*, 509 U.S. at 96. Consequently, because *Duran Gonzales II* does not specifically limit its holding only to future cases, it applies as a matter of law to all pending cases. *See id.*

Plaintiffs assert that the purported class members should be shielded from retroactive application of *Duran Gonzales II*, but even the narrowest reading and application of the law announced in *Duran-Gonzalez II* demonstrates that it encompasses the named Plaintiffs in the case. What other plaintiffs could the *Duran Gonzales II* Court have been referring to, other than the Plaintiffs-Appellees before them? Because the Ninth Circuit clearly intended for the entire certified class of *Duran Gonzalez I* plaintiffs to be bound by its decision, and because Plaintiffs are the named representatives of the *Duran Gonzalez I* class, Plaintiffs are bound by the *Duran-Gonzalez II* decision. Moreover, under *Harper*, all pending cases – both those pending before the federal courts and before the agency – are affected by the mandate of the Ninth Circuit in *Duran Gonzalez II*. *Harper*, 509 U.S. at 96. Accordingly, anyone who was included in the *Duran Gonzalez I*

class of plaintiffs has “no likelihood of success on the merits of their suit.” *Duran Gonzalez II*, 508 F.3d at 1242.

Plaintiffs claim they will suffer manifest injustice if they lose the “rights” that they had enjoyed due to the preliminary injunction previously issued. Plaintiffs’ Brf. at 17. The *Harper* Court, however, rejected the contention that the reliance of a party upon an “old rule” can preclude the application of a judicial decision to that party. *Harper*, 509 U.S. at 96. The Court noted that it could “scarcely permit the substantive law to shift and spring according to the particular equities of individual parties’ claims of actual reliance upon an old rule and of harm from a retroactive application of the new rule.” *Id.* (citations omitted). Courts simply cannot treat similarly-situated litigants differently based on purported reliance. *Id.* Moreover, Plaintiffs’ claimed harm is not significant since Plaintiffs’ entitlement to any of these benefits was never settled “law.” Plaintiffs can hardly claim manifest injustice would result from a decision of this Court arising from the lawsuit that they filed.

Additionally, Plaintiffs were disqualified from enjoying these benefits prior to litigation as a result of their own actions. Where a harm is self-inflicted, that harm cannot be a basis for injunctive relief. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995). Here, it was Plaintiffs’

own illegal return without admission after earlier deportation or removal – entry at a time when they were, in fact not eligible for benefits – that deprived them of eligibility for the discretionary benefits they now seek. Thus, Plaintiffs’ claimed harms are not new liabilities, but rather the loss of discretionary benefits to which they have no entitlement. Plaintiffs are in no worse position than they were in prior to litigation, awaiting decisions on their applications for lawful permanent residency.

B. Plaintiffs’ Retroactivity Analysis Fails Because *Duran-Gonzales II* Rules On Statutory Interpretation.

Plaintiffs rely heavily on the Court’s decisions in *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007), and *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982), to support their retroactivity argument. Plaintiffs’ Brf. at 17, 34-38. This reliance is misplaced because these decisions addressed the question of whether to apply a new agency decision rather than a judicial decision to prior conduct. The case before us is distinguishable, however, because it does not concern an announcement of a new statute by Congress or a new rule, policy or procedural process by an administrative agency, in which there are very specific retroactive analyses. Instead, it concerns the agency’s interpretation of IIRIRA, enacted in 1997, well before *Duran Gonzalez II* was decided. Under Defendants’ interpretation of the statute, which has always

remained consistent, Plaintiffs and class members are not entitled to permanent residency. 8 U.S.C. § 1182(a)(9)(C); E.R. 46-48. The fact that Plaintiffs acknowledge that Defendants' interpretation was known by the parties prior to the commencement of litigation in September 2006, and was the reason for commencing litigation, S.E.R. 106, is evidence that *Duran Gonzalez II* does not establish a new principle of law. Thus, the cases cited by the Plaintiffs are distinguishable, inapplicable, and inapposite.

C. Defendants' Interpretation of the Statute Has Never Changed.

Since passage of IIRIRA, Defendants' position has always been that, by statute, aliens who return to the United States illegally without admission, after a prior deportation or removal are inadmissible. 8 U.S.C. § 1182(a)(9)(C)(i)(II); *see USCIS Policy Memorandum*, E.R. 46-48. After such aliens have remained outside the United States for at least ten years, they may apply for consent to reapply for admission but, as is clearly stated in the statute, such application must be made prior to "reembarkation from a place outside the United States" or, for an alien seeking admission from Canada or Mexico, prior to their "attempt to be readmitted." 8 U.S.C. § 1182(a)(9)(C)(ii). Therefore, the analysis set forth in the cases cited by Plaintiff, including *Miguel-Miguel*, *Montgomery Ward*, and *Landgraf v. USI Film Products*, 511 U.S.244, 267-268 (1994), is inapplicable

because this case does not raise the issue of whether a new agency rule or new statute may be applied retroactively.

Miguel-Miguel concerned whether the alien had been convicted of a “particularly serious crime” that would make him ineligible for a benefit. *Miguel-Miguel*, 500 F.3d at 950-53. At the time the alien pled guilty to his criminal offense, the agency considered a number of factors in determining whether a crime was particularly serious - factors that were not mandated by the statute but guided the discretion granted to the agency by the statute. *Id.* at 951. It was in this context that the Court invoked the *Montgomery Ward* five-factor balancing test to determine if the Attorney General’s new rule could apply to the alien in that case. This Court held that the rule in *Miguel-Miguel* had an impermissibly retroactive effect given that, under the law in effect in 1999 (the year *Miguel-Miguel* pled guilty), there was a “realistic chance” that the BIA might have found *Miguel-Miguel’s* crime not to be particularly serious, and that *Miguel-Miguel* might have relied on that law in pleading guilty to his criminal charges. 500 F.3d at 952. The Court concluded that when the agency changed the rule, it could not apply the new rule to *Miguel-Miguel* because it created an impermissibly retroactive effect. *Id.* at 951-53.

This case is fundamentally different from *Miguel-Miguel* because *Matter of Torres-Garcia* addresses an issue of pure statutory interpretation rather than setting forth a new rule or law. Thus, in *Matter of Torres-Garcia*, the BIA issued “an authoritative statement of what [8 U.S.C. § 1182(a)(9)(C)(ii)] meant before as well as after the decision of the case giving rise to that construction.” *See Rivers*, 511 U.S. at 312-13; *see also City of Tacoma, Wash.*, 332 F.3d 574, 580-81 (9th Cir. 2003) (“The theory of a judicial interpretation of a statute is that the interpretation gives the meaning of the statute from its inception, and does not merely give an interpretation to be used from the date of the decision.”). The relevant consideration is whether the issue involves one of statutory interpretation, as it did in *Rivers* and does here, or whether it involves application of a new rule set forth by the agency, as in *Miguel-Miguel*. The *Rivers* Court rejected Plaintiffs’ premise in the strongest terms:

[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. In statutory cases the Court has no authority to depart from the congressional command setting the effective date of a law that it has enacted. Thus, it is not accurate to say that the Court’s decision in *Patterson* “changed” the law that previously prevailed in the Sixth Circuit when this case was filed. Rather, given the structure of our judicial system, the *Patterson* opinion finally decided what § 1981 had always meant

Rivers, 511 U.S. at 313, n.12.

Similarly, “it is not accurate to say” that the BIA’s decision in *Torres-Garcia*, and this Court’s affirmance of that decision in *Duran Gonzales II*, “changed the law.” *See id.* Plaintiffs’ position amounts to arguing that they have a protected expectation in continued adherence to an incorrect interpretation of a statute. That contention is meritless. *See Harper*, 509 U.S. at 97 (“the Court has no more constitutional authority in civil cases than in criminal cases to disregard the current law”) (internal quotation omitted).

Even assuming, *arguendo*, the five-factor test in *Miguel-Miguel* was relevant here, Plaintiffs’ argument that *Torres-Garcia* should not be applied is foreclosed by *Duran Gonzales II* itself. The opinion conclusively states that the BIA’s interpretation of the statute applies to the *Duran Gonzales I* plaintiffs. 508 F.3d at 1242 (“[W]e hold today that we are bound by the BIA’s interpretation of the applicable statutes in *In re Torres-Garcia* . . .”); *see also id.* (“Pursuant to *In re Torres-Garcia*, plaintiffs as a matter of law are not eligible to adjust their status because they are ineligible to receive I-212 waivers.”).

First, Plaintiffs are incorrect that *Torres-Garcia* was not an issue of first impression. *See* Plaintiffs’ Brf. at 30. Unlike in *Miguel-Miguel*, where the BIA had previously addressed the particularly serious crime question prior to adopting a new rule, here the BIA had not previously interpreted how 8 U.S.C.

§ 1182(a)(9)(C)(ii) affects an alien who illegally returned without admission, and then sought consent to reapply from within the United States less than ten years after his prior departure. Accordingly, this is not a case where the agency has shifted its position as in *Miguel-Miguel*. For similar reasons, Plaintiffs cannot credibly argue that *Torres-Garcia* is an “abrupt departure” from a prior BIA rule or precedent. *See* Plaintiffs’ Brf. at 17. This is not a situation where the agency has long followed ““one view of the law,”” and subsequently changed the rules of the game. *Miguel-Miguel*, 500 F.3d at 952 (quoting *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 (D.C. Cir. 1987) (*en banc*)).

Most significantly, Plaintiffs cannot satisfy the third or fourth factors of the *Miguel-Miguel* test, which consider the extent to which they relied on the former rule and the burden the new rule would impose on them. Plaintiffs cannot show any reliance because there was no change in BIA precedent. When the BIA addressed the issue as a matter of first impression, it adopted the position that the Government had taken from the start. Thus, retrospective application would advance the new holding, and would not be fundamentally unfair because Plaintiffs have benefitted from entitlements, including American jobs, that they were ineligible to receive under the plain language of the statute. Thus, the loss of these benefits which Congress never intended them to receive in the first place, and to

which aliens in similar situations who reside in other Circuits are not entitled, cannot support a finding of manifest injustice. *See e.g. Sampson v. Murray*, 415 U.S. 61, 85-86 (1974) (the loss of a job opportunity generally does not amount to irreparable harm).

Finally, the fifth factor also favors Defendants. As the Supreme Court recently reiterated, the government has an especially strong interest in enforcing the immigration laws by removing aliens, like Plaintiffs, who are clearly in violation of those laws. *Nken v. Holder*, 129 S. Ct. 1749, 1762 (2009) (“There is always a public interest in prompt execution of removal orders.”); *see also Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (government has a weighty interest in the “efficient administration of the immigration laws at the border”); *United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1078 (9th Cir. 1998) (“[T]here is a strong societal interest in controlling immigration and in effectively policing our borders.”) (quoting *United States v. Cupa-Guillen*, 34 F.3d 860, 863 (9th Cir. 1994)). This is especially so in this case, where Plaintiffs have abused the immigration laws repeatedly, are ineligible for any relief, and have had extensive opportunity for judicial review of their claims, which an *en banc* panel of this Court adjudicated and rejected.

Section 1182(a)(9)(C)(i)(II) does not apply to all aliens who were previously deported, but only to those who illegally reenter or attempt to reenter without admission after a prior deportation. That is, section 1182(a)(9)(C)(i)(II) applies to aliens who violate the immigration laws again after being removed. Because “the conduct proscribed by Section 1182(a)(9)(C)(i) is both different from and more culpable than the conduct of a one-time illegal alien,” it was perfectly rational for Congress to assign more severe consequences for such conduct. *Mortera-Cruz v. Gonzales*, 409 F.3d 246, 255-56 (5th Cir. 2005). Indeed, in IIRIRA, through which 8 U.S.C. § 1182(a)(9)(C) was enacted, Congress attempted to address the problem of illegal entry, and particularly to deter repeated illegal reentry by aliens who have already been removed. *See* H. Jud. Comm. Rep., No. 104-469(I) at 155, 104th Cong., 2d Sess. (1996) (1996 WL 168955 at 459) (“the ability to cross into the United States over and over with no consequences undermines the credibility of our efforts to secure the border”); *id.* at 113-14 (1996 WL 168955 at 373) (“One seemingly intractable problem is repeat border-crossings . . . add[ing] to the enforcement burdens of the INS.”). Congress has expressed its disapproval of the unwarranted delays that sometimes exist in the effort to expeditiously remove aliens. “Existing procedures to deny entry to and remove illegal aliens from the United States are cumbersome and duplicative. Removal of aliens who enter the

United States illegally, even those who are ordered deported after a full due process hearing, is an all-too-rare event.” H. R. Rep. No. 104-469(I), at 107 (1996), 1996 WL 168955. As a result, Congress has stated its desire that “[a]liens who violate U.S. immigration law should be removed from this country as soon as possible. Exceptions should be provided only in extraordinary cases specified in the statute and approved by the Attorney General.” S. Rep. No. 104-249, at 7 (1996), 1996 WL 180026.

Indeed, any carve-out that enjoins the Government from enforcing statutes enacted by the duly elected representatives of the people weighs heavily against the entry of injunctive relief. *See Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *INS v. Miranda*, 459 U.S. 14, 19 (1982) (noting the “increasingly important interest, implicating matters of broad public concern [that] is involved in cases of this kind [that involve] [e]nforcing the immigration laws and the conditions of residency in this country” and thus refusing to estop the government). This is especially so in this case as Plaintiffs have illegally entered the country on more than one occasion, and are ineligible for any relief. Congress consequently considers Plaintiffs’ conduct more culpable than the conduct of a one-time illegal alien.

Here, Plaintiffs seek to prevent removal again through a grant of adjustment of status. They have no lawful status, and are not eligible for the right of permanent residency under the statute. In a sense, Plaintiffs' case is like the one presented to Justice O'Connor, sitting as a Circuit Justice, when she was asked for an order granting a stay in *INS v. Legalization Assistance Project*, 510 U.S. 1301 (1993). Plaintiffs in that case argued that the INS was "violating the law of the land," and they "ask[ed] the federal courts to stop this." *Id.* at 424. Justice O'Connor refused, writing that the "broad power to 'take Care that the Laws be faithfully executed' is conspicuously not granted to [the courts] by the Constitution. Rather, it is given to the President of the United States . . . along with the power to supervise the conduct of the Executive Branch," *id.*, which includes the Department of Homeland Security.

As support for their position, Plaintiffs also cite to *George v. Camacho*, 119 F.3d 1391 (9th Cir. 1997) (*en banc*). Even in that case, however, the Ninth Circuit specifically noted that if the new rule is applied in the case in which it was announced, it must be applied to all pending cases. Thus Plaintiffs are all, as the district court correctly determined, ineligible for I-212 waivers. No further retroactivity analysis based on reliance applies, because the rule applies to the *Duran Gonzales I* class representatives, and the plaintiff class that they represented

before the Ninth Circuit. Contrary to Plaintiffs' assertion, the Ninth Circuit was very much aware of retroactivity and prospectivity issues, as they addressed the topic in their discussion of the retroactivity and prospectivity of the BIA decision.

CONCLUSION

For the reasons set forth above, the Court should affirm the district court's denial of Plaintiffs' motions for leave to file an amended complaint and to modify and redefine the certified class, and denial of Plaintiffs' motion for a preliminary injunction.

July 20, 2009

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I hereby certify that Counsel for Appellees is aware of the following related case:

Morales-Izquierdo v. Department of Homeland Security, et al., No. 08-35965.

July 20, 2009

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Defendant-Appellees' Brief:

- (1) was prepared using 14-point Times New Roman font;
- (2) is proportionally spaced; and
- (3) **contains 9,601 words.**

July 20, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2009, I electronically filed the foregoing **Brief for Appellees** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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