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16 UNITED STATES DISTRICT COURT
 17 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 18 WESTERN DIVISION

19 CROSBY WILFREDO)
 ORANTES-HERNANDEZ, et al.,) No. CV 82-1107KN
 20 Plaintiffs,)
 21 v.)
 22)
 23 ALBERTO R. GONZALES,)
 Attorney General of the) Date: December 12, 2005
 United States, et al.,)
 24 Defendants.)
 25)

Time: 10:00 a.m.

- 26 1) NOTICE OF MOTION AND MOTION TO DISSOLVE PERMANENT
 27 INJUNCTION; and
 28 2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO DISSOLVE PERMANENT INJUNCTION

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1 NOTICE OF MOTION AND MOTION TO DISSOLVE PERMANENT INJUNCTION

2 NOTICE IS HEREBY GIVEN that Defendants, by and through
3 the undersigned counsel, will bring on for hearing on
4 December 12, 2005 at 10:00 a.m., or as soon thereafter as
5 counsel may be heard, this Motion to Dissolve Permanent
6 Injunction, before the assigned U.S. District Judge,¹ in the
7 assigned Courtroom.

8 Defendants hereby move this Court to dissolve the
9 permanent injunction known as the Orantes Injunction. This
10 motion is based upon this Notice, the accompanying Memorandum
11 of Points and Authorities and exhibits, and upon such other
12 matter as may be presented to the Court at the time of the
13 hearing.

14 Compliance with Local Rule 7-3

15 This motion is made following the conference of counsel
16 pursuant to L.R. 7-3, in which undersigned counsel wrote to
17 Mr. Linton Joaquin, Esq., on May 11, 2005, requesting his
18 consent to a motion seeking dissolution of the Orantes

19 //
20 //
21 //
22 //
23 //
24 //
25 //

27 ¹ On information and belief, the previous judge assigned to
28 this case, the Honorable David V. Kenyon, retired from service
in 1997, so defendants pray that the clerk reassign this
matter to a new judge.

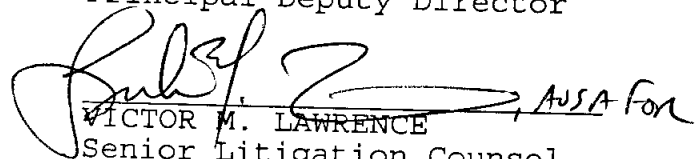
1 Injunction. Mr. Joaquin advised in subsequent correspondence
2 that he did not so consent.

3 Respectfully submitted,

4 DATED: November 17, 2005.

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1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
2 DISSOLVE PERMANENT INJUNCTION

3 INTRODUCTION AND SUMMARY OF ARGUMENT

4 This motion seeks the dissolution of an outdated
5 nationwide injunction that protects Salvadorans from a civil
6 war that has long since ended, and from Immigration and
7 Naturalization Service ("INS") violations that no longer
8 occur.¹ Because conditions have changed, and because the
9 injunction undermines the Government's efforts to control
10 illegal immigration, to protect our border, and to apply a
11 congressionally enacted program for the expeditious removal of
12 aliens lacking documentation,² the Attorney General
13 respectfully moves this Court to dissolve the injunction.

14 * * *

15 In the 17-and-one-half years since the entry of the
16 injunction, the facts and law upon which it was predicated
17

18
19 ¹ The injunction (Orantes-Hernandez v. Meese, 685 F. Supp. 1488
20 (C.D. Cal. 1988)), was superseded by a modified permanent
21 injunction on July 2, 1991, which is attached as Exhibit A,
22 and referred to herein as the Orantes Injunction. The Orantes
23 Injunction enjoins "defendants, their agents and successors in
24 office." Ex. A at 1. Thus, it is reasonable to assume that a
25 court may find the injunction binding on the INS successor,
26 the Department of Homeland Security ("DHS"), and its
27 subcomponents, Immigration and Customs Enforcement ("ICE") and
28 Customs and Border Protection ("CBP"), who now collectively
move to dissolve the injunction.

² See The Illegal Immigration Reform and Immigrant
Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208,
110 Stat. 3009 (Sept. 30, 1996), enacting section 235(b)(1) of
the Immigration and Nationality Act ("INA"), 8 U.S.C.
§ 1225(b)(1).

1 have changed significantly. First, the civil war in El
2 Salvador has ended, and the country is now internationally
3 recognized as a multiparty democracy with a healthy
4 constitution and a general respect for the human rights of
5 its citizens. The torture, massacres, and repression that
6 once justified the injunction no longer occur - and no longer
7 warrant singling out Salvadorans for favored and unique
8 immigration treatment.

9 Second, the concerns of INS abuse that gave rise to the
10 injunction are no longer well-founded. Since the entry of the
11 injunction almost two decades ago, the INS and DHS have
12 reviewed and reevaluated their immigration policies, and have
13 reformed the way that they process, detain, and remove illegal
14 aliens. Indeed, in many cases, the INS and DHS have used the
15 safeguards prescribed by the Orantes Injunction for
16 Salvadorans as a model for changing and improving the
17 processing, detention, and removal of all aliens, regardless
18 of their nationality.

19 Third, and perhaps most importantly, in 1996, Congress
20 created an efficient process for removing illegal aliens who
21 lack proper documentation and any viable claim to relief from
22 removal ("Expedited Removal") - a process that is inconsistent
23 with the Orantes Injunction. Every year, hundreds of
24 thousands of illegal aliens attempt to cross our Southern
25 border without documentation and without any fear of
26 persecution in their home countries. For these
27 straightforward cases, Congress decided that DHS need not
28 invoke the typical time-consuming, resource-intensive

1 mechanism normally used for removing illegal aliens, and could
2 instead expeditiously remove them through a fair and effective
3 procedure, which has since been upheld in federal court. See
4 American Immigration Lawyer's Assoc. v. Reno, 18 F.Supp.2d 38
5 (D.D.C. 1998) aff'd American Immigration Lawyer's Assoc. v.
6 Reno, 199 F.3d 1352 (D.C. Cir. 2000). As a result, DHS has
7 been able to remove hundreds of thousands of illegal aliens
8 and to reduce the incentives for further illegal crossings by
9 criminals, non-criminals, and terrorists alike.

10 The Orantes Injunction has precluded DHS from fully
11 implementing this congressional mandate. One provision of the
12 injunction enjoins the United States from "transferring"
13 unrepresented Salvadorans from the district of their
14 apprehension in less than 7 days. See Ex. A at ¶ 11.
15 Consequently, DHS has had to exempt Salvadorans from Expedited
16 Removal, undermining the will of Congress and impeding the
17 Government's efforts to obtain operational control of the
18 Southern border.

19 "For reasons long recognized as valid, the responsibility
20 for regulating the relationship between the United States and
21 our alien visitors has been committed to the political
22 branches of the Federal Government." See Matthews v. Diaz,
23 426 U.S. 67, 81 (1976). Indeed, "over no conceivable subject
24 is the legislative power of Congress more complete." Fiallo
25 v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Steam
26 Navigation Co. v. Stranaham, 214 U.S. 320, 339 (1909)).
27 Because the Orantes Injunction infringes on the power of
28 Congress and the Executive in setting and carrying out

1 immigration policy, the Government respectfully moves to
2 dissolve the Injunction.

3
4 **STATEMENT OF FACTS**

5 I. History of the Litigation

6 A. The Court's June 2, 1982 Preliminary Injunction

7 The full history of this case spans several decades. In
8 the early 1980s, Judge David Kenyon (formerly of this Court)
9 certified a class of 19 natives and citizens of El Salvador
10 who had been taken into custody by the INS. Orantes-Hernandez
11 v. Smith, 541 F. Supp. 351, 355 (C.D. Cal. 1982). These
12 plaintiffs brought suit on behalf of themselves and "all
13 citizens and nationals of El Salvador eligible to apply for
14 political asylum . . . who have been or will be taken into
15 custody . . . by agents of the [INS]; or . . . subsequent to
16 June 2, 1980, requested or will in the future request,
17 political asylum within the United States whose claims have
18 not yet been presented or adjudicated." Id.

19 The plaintiffs alleged that they would face irreparable
20 injury if the Court did not enjoin certain INS practices and
21 procedures then in use for processing Salvadorans. Id.
22 Namely, the plaintiffs feared they would be removed to El
23 Salvador which then was in the midst of a violent civil war.
24 Id. The Court reviewed several accounts of the plaintiffs who
25 fled from El Salvador, including accounts of
26 military-sanctioned torture on civilians, massacres of
27 hundreds of people, body mutilations, unexplained
28 disappearances, random violence, and arbitrary arrests and
imprisonment. Id. at 356-58. These accounts led the Court to

1 take "judicial notice" of El Salvador's civil war, its
2 consequences on the population, and the widespread human
3 rights abuses prevalent in the country at that time. Id. at
4 358.

5 The Court examined the testimony of those plaintiffs who
6 had been arrested and detained by INS agents, id. at 358-64,
7 and was displeased with the manner in which INS processed
8 Salvadorans. Id. at 359. Judge Kenyon found that INS agents
9 coerced Salvadorans to consent to voluntary departure and did
10 not provide sufficient information about U.S. asylum law to
11 allow them to make an informed choice as to whether to pursue
12 political asylum. Id. at 359-60. Judge Kenyon determined
13 that the INS officers did not provide class members with
14 sufficient information about their rights and unfairly
15 obtained alien consent to voluntary departure. Id. at 360.
16 Judge Kenyon also found that the INS did not provide
17 Salvadorans with appropriate access to legal counsel, and that
18 INS agents were not forthright when providing advice to
19 Salvadorans regarding their legal rights. Id. at 361-62. The
20 Court concluded that "this practice, coupled with the other
21 coercive tactics . . ., understandably can lead Salvadorans to
22 believe that they have no alternative but to depart
23 'voluntarily.'" Id. at 363.

24 The Court also considered the plaintiffs' evidence of
25 conditions at INS detention facilities within the Central and
26 Southern Districts of California. Id. at 363-64. The Court
27 criticized INS practices of prohibiting receipt and possession
28 of written materials, the limited hours for visitation, the

1 lack of public telephones, the inability of paralegals working
2 under supervision of counsel to interview detainees, and the
3 manner in which some plaintiffs were placed in solitary
4 confinement "without notice or the opportunity to be heard."

5 Id. The Court found that all of these practices resulted in
6 "poor treatment and continued denial of legal information."

7 Id. at 363. The Court proceeded to rule in plaintiffs' favor
8 finding that preliminary injunctive relief was justified. Id.
9 at 372-80.

10 The provisions of the preliminary injunction contained
11 several requirements designed to ensure that apprehended and
12 detained Salvadoran immigrants would be aware of their rights
13 to apply for political asylum, have sufficient access to
14 counsel, and be able to make an informed and uncoerced choice
15 of whether to proceed with applications for political asylum
16 or voluntary departure. Id. at 386. One method imposed by
17 the Court to ensure that Salvadorans were notified of their
18 rights was to require INS officers to deliver what became
19 known as the "Orantes advisals," which explicitly informed
20 apprehended and detained Salvadorans of their rights to be
21 represented by an attorney, to have a deportation hearing, and
22 to apply for political asylum or to request voluntary
23 departure. Id. at 387-88. In addition, the preliminary
24 injunction contained several requirements designed to ensure
25 that detained Salvadorans in facilities within the Central and
26 Southern Districts of California could receive and possess
27 legal materials on U.S. immigration law, have access to
28 telephones and counsel, and be given advance notices and a

1 hearing in the event that the Government required a detained
2 Salvadoran to be placed in solitary confinement. Id. at
3 386-87.

4 B. Entry of the Permanent Injunction on April 29, 1988

5 As the litigation progressed, plaintiffs obtained
6 additional facts and, over defendants' objection, sought the
7 Court's approval of a permanent injunction tailored to cover
8 many of the same issues raised in the preliminary injunction.
9 Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal.
10 1988). Once again, the Court prefaced its opinion with a
11 detailed account of the conditions in El Salvador and Central
12 America in the 1980s. Id. at 1491-93. The Court noted
13 widespread human rights abuses and persecution "primarily" by
14 Salvadoran military and security forces. Id. at 1492. The
15 Court found that the Salvadoran judicial system "completely
16 fails to investigate and punish violations of human rights,"
17 and that a "substantial number of Salvadorans" flee from
18 persecution because of the Salvadoran Government's poor
19 protection of its citizens. Id.

20 The Court also reviewed evidence regarding the INS's
21 processing of detained Salvadorans. Id. at 1493-97. The
22 Court found that "the vast majority of Salvadorans apprehended
23 sign voluntary departure agreements," and that such acceptance
24 of voluntary departure "is due in large part to the coercive
25 effects of the practices and procedures employed by INS and
26 the unfamiliarity of most Salvadorans with their rights under
27 United States immigration laws." Id. at 1494. Judge Kenyon
28 found that the INS's practices both before and after the

1 issuance of the preliminary injunction "discouraged"
2 Salvadorans from asserting their rights to political asylum.
3 Id. at 1494-95. The Court determined that INS's "practices
4 and procedures [did not] adapt[] sufficiently in response to
5 the preliminary injunction to preclude the necessity for
6 permanent injunctive relief." Id.

7 Judge Kenyon also criticized what he referred to as INS's
8 "transfer policy" in which he found that the INS engaged in a
9 "general practice of transferring detained class members from
10 the place of arrest to detention centers located in remote and
11 isolated areas." Id. at 1500. Judge Kenyon found that the
12 INS's isolated detention facilities made it more difficult for
13 Salvadorans to obtain counsel, reduce bonds, and otherwise
14 prepare their cases for hearing. Id.

15 In addition, Judge Kenyon expanded his view of the scope
16 of problem areas from the initial area designated in the
17 preliminary injunction (detention facilities within the
18 Central and Southern Districts of California) to nationwide.
19 Id. at 1500-01. Judge Kenyon generally criticized INS
20 detention facilities' lack of legal rights materials in
21 Spanish and lack of comprehensive law libraries either in
22 Spanish or English. Id. at 1501-02. He also criticized the
23 lack of writing materials available at several detention
24 facilities, the lack of detainee access to functioning
25 telephones, and the solitary confinement procedures for those
26 detainees who faced discipline. Id. at 1502.

27 In considering whether plaintiffs deserved injunctive
28 relief, Judge Kenyon stated that such relief was necessary, in

1 part, because of the "irreparable injury" that would occur if
2 Salvadorans were removed without being afforded the
3 opportunity to exercise their rights to political asylum and
4 other relief. Id. at 1504. Judge Kenyon, relying on the
5 political climate in El Salvador in the 1980s, found that:
6 "Removal to a country overrun with civil war, violence, and
7 government-sanctioned terrorist organizations may lead to the
8 most serious of deprivations." Id.

9 Judge Kenyon determined that the evidence before him
10 demonstrated that injunctive relief was necessary to correct
11 INS procedures, to prevent the deprivation of rights, and to
12 ensure that Salvadorans were aware of their option to apply
13 for political asylum. Id. at 1507-09. Judge Kenyon proceeded
14 to permanently enjoin the Government, imposing specific
15 safeguards and procedures in the manner the INS processes,
16 detains, and transfers Salvadoran immigrants.³

17
18
19 ³ The terms and provisions of the original permanent injunction
20 entered by Judge Kenyon may be found at Orantes-Hernandez v.
21 Meese, 685 F. Supp. at 1511-13. The modified permanent
22 injunction attached as Exhibit A is substantially similar to
23 paragraphs 1-11 of the original injunction, and adds four
24 additional paragraphs which apply solely to the Port Isabel
25 Service Processing Center in Port Isabel, Texas. These
26 additional changes developed when plaintiffs unsuccessfully
27 brought a contempt action against the Government. See Ex. B,
28 Orantes-Hernandez v. Thornburgh, CV 82-1107 KN, slip. op.,
Memorandum Opinion; Findings of Fact and Conclusions of Law Re
Contempt Proceedings, September 28, 1989. Although the Court
declined to find the Government in contempt, the Court sought
to ensure future compliance by adding these requirements for
the Texas facility. The Government appealed, but the parties
settled (See Ex. A), and the appeal was voluntarily dismissed.

1 For the last 16 years, the injunction has remained in
2 effect without any lawsuits successfully challenging the
3 Government's compliance with its terms.⁴

4 II. Significant Changes in El Salvador

5 Since the 1980s, there have been significant changes in
6 El Salvador. Unlike the days of government and
7 military-sanctioned torture, massacres, body mutilations,
8 general violence, and repression that persisted in El Salvador
9 in the 1980s,⁵ the U.S. Department of State now recognizes El
10 Salvador as a constitutional, multiparty democracy which
11 generally respects the human rights of its citizens. See Ex.
12 E, El Salvador Country Reports on Human Rights Practices, U.S.
13 Department of State Bureau of Democracy, Human Rights, and
14 Labor (February 28, 2005) at 1 (hereinafter referred to as
15 "2005 Country Reports"); Ex. F, U.S. Department of State
16 Background Note: El Salvador (February 2005) at 3-4

18 ⁴ The parties clarified the terms of the injunction in 2004 to
19 eliminate the possibility that the Office of Refugee
20 Resettlement ("ORR"), an agency responsible for the care of
21 unaccompanied alien children who are in federal custody due to
22 immigration status, could be somehow held in violation of the
23 Orantes Injunction. See Ex. C, September 28, 2004 Stipulation
24 and Order at 2. At the time of seeking this clarification,
25 counsel for the United States specifically advised Orantes
26 counsel that defendants believed there were significant
27 changes in facts which warranted dissolution of the entire
28 injunction. See Ex. D, July 6, 2004 Letter to Counsel.

26 ⁵ Judge Kenyon described the persecutory atmosphere in El
27 Salvador in the 1980s as a preface to entering the permanent
28 injunction, and as a preface to entering the preliminary
injunction. Orantes-Hernandez v. Meese, 685 F. Supp. at 1491-
94; Orantes-Hernandez v. Smith, 541 F. Supp. at 355-58.

1 (hereinafter referred to as "2005 Background Note"). The
2 2005 Country Reports reveal that there were no politically
3 motivated killings or disappearances in the prior year, and
4 that the country's constitution provides for an independent
5 judiciary. See Ex. E at 1-2, 5. In addition, the country's
6 constitution prohibits cruel, inhuman, or degrading treatment
7 or punishment, and complaints regarding violations by police
8 officers are extremely low in number. Id. at 3. Likewise, El
9 Salvador's constitution prohibits arbitrary interference with
10 privacy, family, home, or correspondence, and the 2005 Country
11 Reports state that the Government generally respected these
12 prohibitions in practice. Id. at 6. The 2005 Country Reports
13 also show that there were no reports of political prisoners in
14 the prior year, and that the El Salvador government generally
15 respects the constitutional rights of freedom of speech,
16 freedom of the press, freedom of religion, and the freedom of
17 association. Id. at 6-10.

18 In addition, aside from its demonstrated improvement in
19 accepting the political opinions of its citizens, El
20 Salvador's constitution protects against many of the other
21 bases upon which aliens typically assert asylum claims. For
22 instance, El Salvador's constitution states that all persons
23 are equal before the law, and prohibits discrimination based
24 on nationality, race, or sex. Id. at 9. Unlike the 1980s, El
25 Salvador now has an investigative and monitoring body to
26 ensure that human rights are protected in the country. Id. at
27 11.
28 //

1 III. Significant Changes in the United States

2 In addition to the significant changes in conditions in
3 El Salvador, there have also been profound changes in the
4 United States Government's processing, detention, and removal
5 of aliens. Since the 1980s, the INS and DHS have reviewed and
6 reevaluated their immigration policies, and have reformed
7 their practices, protecting the rights of all aliens,
8 regardless of nationality. Moreover, in 1996, Congress created
9 an efficient mechanism for removing illegal aliens who lack
10 proper documentation and any viable claim for asylum or
11 protection from removal. This mechanism, Expedited Removal,
12 is indispensable to the government's ability to obtain
13 operational control of its Southern border - and it has not
14 been fully implemented because of the Orantes Injunction.

15 A. Procedures for Aliens Not Subject to Expedited
16 Removal

17 Since the time of the Orantes Injunction, the INS and DHS
18 have incorporated most provisions of the injunction into the
19 standard (non-expedited) procedures for processing all aliens,
20 without regard to nationality.

21 1. Advisal of Rights and Processing of Aliens

22 First, INS created Form I-826, "Notice of Rights and
23 Request for Disposition," which is given to aliens not subject
24 to Expedited Removal, without regard to nationality.⁶ See Ex.

25
26 ⁶ Some apprehended aliens are not eligible for voluntary
27 departure under current law. These include aliens convicted
28 of an aggravated felony and certain aliens previously granted
voluntary departure. See 8 U.S.C. § 1229c(a)(1), 1229c(c).
These aliens may at times be subject to alternate procedures.

1 G. The I-848 (currently given to all Salvadorans) and the
2 I-826 (currently given to all other nationalities) contain
3 substantially the same information: Both forms are signed
4 acknowledgments that the alien has been advised of the right
5 to contact an attorney, the right to consular communication,
6 the possibility of release on bond, the right to pursue relief
7 in a hearing if the alien believes he or she will face harm in
8 the country of their native country, and the possibility of
9 requesting voluntary departure and waiving a hearing before an
10 immigration judge. Cf. Ex. G and Ex. H.

11 In addition, for aliens not subject to Expedited Removal,
12 DHS routinely completes a certification of service at the
13 alien's processing to indicate whether the alien read the form
14 on his own, or whether the officer read the form to the alien,
15 and, if read to the alien, the language the officer used. Id.
16 Thus, DHS is currently providing advisals, without regard to
17 nationality, that are substantially similar to the ones that
18 Judge Kenyon mandated for Salvadorans.

19 Moreover, upon processing, aliens of all nationalities
20 who are not subject to Expedited Removal and who are placed in
21 standard removal proceedings before an immigration judge
22 (under section 240 of the INA) receive a Notice to Appear
23 wherein DHS explains why it believes the alien is removable
24 from the United States, and sets forth the charges against the
25 alien. See 8 U.S.C. § 1229(a)(1); Ex. I, Form I-862 Notice to
26 Appear. The Notice to Appear also contains information on the
27 alien's privilege to obtain representation, the conduct of the
28 hearing, and the consequences of failing to appear. See 8

1 U.S.C. § 1229(a)(1)(E); Ex. I, Form I-862, p. 2. As the form
2 explains, "A list of qualified attorneys and organizations who
3 may be available to represent you at no cost will be provided
4 with this Notice." See Ex. I, Form I-862, p. 2. Thus, for
5 aliens placed in removal proceedings before an immigration
6 judge, DHS voluntarily provides legal service provider lists -
7 in the manner that Judge Kenyon required for Salvadoran aliens
8 - to aliens of all nationalities.

9 2. Detention Standards

10 Additionally, in 2000, INS published detention standards
11 (referred to herein as "ICE Detention Standards") applicable
12 to detention facilities where aliens are detained.⁷ See Exs.
13 J-O, ICE Detention Standards (selected chapters). The
14 standards contain many of the safeguards imposed by the
15 Court's injunction for Salvadorans, but apply these same
16 standards to all nationality groups. Id. For instance, as
17 explained below, the detention standards incorporate those
18 requirements of Paragraphs 7(c), (d), and (e), as well as
19 Paragraphs 8, 9 and 10 of the Orantes Injunction for
20 Salvadorans, and apply the standards to all nationalities.

21 Paragraph 7(c) of the Orantes Injunction requires
22

23 ⁷ The standards published by INS in 2000 were developed, in
24 part, from an earlier set of standards published in 1998, and
25 were the result of negotiations between the American Bar
26 Association, the Department of Justice, the INS, and other
27 organizations involved in pro bono representation and advocacy
28 for immigration detainees. U.S. Immigration and Customs
Enforcement ("ICE") is the subcomponent of DHS which in large
part has taken over the former INS's responsibilities for,
among other things, the detention of adult aliens.

1 defendants to allow paralegal assistants working under the
2 supervision of counsel to have access to class members. See
3 Ex. A, ¶ 7(c). ICE's Detention Standard on visitation
4 mandates visits with current or prospective legal
5 representatives and their legal assistants. See Ex. J,
6 Detention Standard: Visitation, p. 7. Paragraph 7(d) of the
7 Orantes Injunction requires each detention facility to provide
8 Salvadoran aliens reasonable access to paralegals and counsel
9 during most non-nocturnal hours. See Ex. A, ¶ 7(d). ICE's
10 visitation standard requires each detention facility to permit
11 legal visitation for aliens of all nationalities seven days a
12 week, including holidays, for a minimum of eight hours per day
13 on regular business days. See Ex. J, Detention Standard:
14 Visitation, p. 7.

15 Paragraph 7(e) of the Orantes Injunction requires that
16 facilities provide at least one telephone per twenty-five
17 detainees at detention centers, and for the telephones to be
18 sufficiently private to enable confidentiality for
19 attorney-client discussions. See Ex. A, ¶ 7(e). ICE's
20 telephone access standard requires each facility to provide
21 "at least one telephone for detainee use for every 25 held,"
22 and permit detainees to make direct calls to legal service
23 providers, and mandates that the "facility shall ensure
24 privacy for detainees' telephone calls regarding legal
25 matters." See Ex. K, Detention Standard: Telephone Access,
26 pp. 1-2, 4. This detention standard is applicable to aliens
27 of all nationalities, not just Salvadorans.

28 Paragraph 8 of the Orantes Injunction requires detention

1 facilities to permit detained class members to receive and
2 possess legal materials explaining U.S. immigration law and
3 procedure, and to make available any writing materials (pens,
4 paper, etc.) that do not pose a risk to institutional
5 security. See Ex. A, ¶ 8(e). ICE's detention standard on
6 Access to Legal Materials goes far beyond what the injunction
7 requires for Salvadorans by requiring facilities to make
8 available to aliens of all nationalities a law library stocked
9 with various materials to help detainees prepare documents for
10 legal proceedings. See generally, Ex. L, Detention Standard:
11 Access to Legal Material. The standard states:

12 Policy: Facilities holding INS detainees
13 shall permit detainees access to a law
14 library, and provide legal materials,
15 facilities, equipment and document copying
16 privileges, and the opportunity to prepare
17 legal documents.

18 A. Law Library

19 The facility shall provide a law library in
20 a designated room with sufficient space to
21 facilitate detainees' legal research and
22 writing. The law library shall be large
23 enough to provide reasonable access to all
24 detainees who request its use. It shall
25 contain a sufficient number of tables and
26 chairs in a well-lit room, reasonably
27 isolated from noisy areas.

28 Id. at 1.

The standard carefully details the necessary equipment
that libraries should provide in detention centers for all
nationalities:

B. Equipment

The law library shall provide an adequate
number of typewriters and/or computers,
writing implements, paper, and office
supplies to enable detainees to prepare

1 documents for legal proceedings.

2 The facility shall designate an employee
3 with responsibility to inspect the
4 equipment at least weekly to ensure that it
is in good working order, and to stock
sufficient supplies.

5 Id.

6 Moreover, the standard explicitly instructs detention centers
7 to permit the retention of legal materials:

8 Personal Legal Materials

9 The facility shall permit detainees to
10 retain all personal legal material
upon admittance to the general
11 population or segregation, unless such
material creates a safety, security,
12 and-or sanitation hazard. The
facility may require detainees with a
13 large amount of personal legal
material to place some of the material
14 in a personal property storage area,
with access permitted during
15 designated hours. The facility shall
grant requests for access to such
16 stored legal material as soon as
possible, but not later than 24 hours
17 after receipt of the detainee request,
unless documented security concerns
18 preclude action within this time
frame.

19 Id. at 5.

20 Paragraph 9 of the Orantes Injunction requires the
21 government to provide detained Salvadorans with legal
22 materials in both English and Spanish, and to make detention
23 center law libraries sufficiently accessible to detainees.

24 See Ex. A, ¶ 9. Once again, the ICE Detention Standards
25 exceed what is required by the injunction by providing such
26 assistance to detainees of all nationalities:

27 Assistance to Illiterate and Non-English
28 Speaking Detainees

1 Unrepresented illiterate or non-English
2 speaking detainees who wish to pursue a
3 legal claim related to their immigration
4 proceedings or detention and indicate
5 difficulty with the legal materials must be
6 provided with more than access to a set of
7 English-language law books.

8 Facilities shall establish procedures to
9 meet this obligation, such as:

10 1. helping the detainee obtain assistance
11 in using the law library and drafting legal
12 documents from detainees with appropriate
13 language and reading-writing abilities; and

14 2. assisting in contacting pro bono
15 legal-assistance organizations from the
16 INS-provided list.

17 If such methods prove unsuccessful in
18 providing a particular non-English-speaking
19 or illiterate detainee with sufficient
20 assistance, the facility shall contact the
21 INS to determine appropriate further
22 action.

23 See Ex. L, pp. 4-5.

24 Paragraph 10 of the Orantes Injunction enjoins the
25 Government from placing any Salvadoran in solitary confinement
26 for a period of more than 24 hours unless good cause is shown
27 and other due process protections are provided to the
28 detainee. See Ex. A, ¶ 10. ICE's Detention Standards exceed
the requirement of this provision regarding disciplinary
segregation for Salvadorans by creating standards and due
process requirements applicable to aliens of all
nationalities. See generally, Ex. M, Detention Standards:
Special Management Unit (Disciplinary Segregation and
Administrative Segregation).

Paragraphs 12 through 15 of the Orantes Injunction apply
only to the Port Isabel Service Processing Center in Port

1 Isabel, Texas, to ensure, inter alia, that detainees in this
2 center receive "group legal rights presentations," and that
3 adequate procedures are in place for appropriate detainee
4 access to legal counsel and legal rights materials.⁸ See Ex.
5 A, ¶¶ 12-15. ICE's Detention Standards go above and beyond
6 these provisions of the Orantes Injunction by ensuring group
7 legal rights presentations, access to legal counsel, and legal
8 rights materials at all service processing facilities for
9 aliens of all nationalities. See generally, Ex. N, Detention
10 Standard: Group Legal Rights Presentations, Ex. L, Detention
11 Standard: Access to Legal Materials.

12 To ensure that detention facilities are in compliance
13 with the ICE Detention Standards, ICE officials interview
14 detainees to hear their concerns. The Staff-Detainee
15 Communication Standard requires that the appropriate ICE
16 Deportation Officer, on a weekly basis, review the conditions
17 under which ICE detainees are being held. See Ex. O,
18 Detention Standard: Staff-Detainee Communication. In
19 addition, ICE has an annual monitoring program in which ICE
20 headquarters employees monitor each detention facilities'
21 adherence to all the policies in the Standards, and provide
22 remarks to the facilities. See, e.g., Ex. J, pp. 24-28; Ex.
23 K, pp. 7-11; Ex. L, pp. 16-20; Ex. M, pp. 13-18; Ex. N, pp.
24 12-16. Hence, the self-monitoring of detention facilities for
25

26 ⁸ Defendants do not concede that the Central District of
27 California had jurisdiction to narrowly enjoin the
28 Government's policies and practices applicable to a facility
in Port Isabel, Texas.

1 compliance with standards, applicable to aliens without regard
2 to nationality, goes beyond the oversight a court may be able
3 to provide for only Salvadorans.

4 3. Grants of Temporary Protected Status

5 Furthermore, in 1990, after the permanent injunction was
6 entered, Congress established a procedure by which the
7 Attorney General (now the Secretary of DHS) may provide
8 Temporary Protected Status ("TPS") to aliens in the United
9 States who are temporarily unable to return safely to their
10 home country because of the temporary effects of an
11 environmental disaster, ongoing armed conflict, or other
12 extraordinary and temporary conditions. See 8 U.S.C. § 1254a.
13 During the period for which a country has been designated
14 under the TPS program, TPS beneficiaries may remain in the
15 United States without being removed, and may obtain work
16 authorization. Id. at 8 U.S.C. § 1254a(1)(B). The United
17 States has made Temporary Protected Status available to
18 Salvadorans numerous times in the last 15 years, allowing
19 additional avenues for Salvadorans to remain in the country.
20 See U.S. Citizenship and Immigration Services Fact Sheet
21 Regarding Temporary Protected Status for El Salvador at
22 Exhibit P. All designations of TPS status and extensions of
23 the program for Salvadorans in the last nine years have been
24 solely as a result of environmental disasters: two
25 earthquakes in early 2001 which damaged the country's economic
26 infrastructure, and associated conditions which temporarily
27 put a strain on the country's ability to handle the return of
28 its nationals. See 70 Fed. Reg. 1450 (Jan. 7, 2005); 68 Fed.

1 Reg. 42071 (July 16, 2003); 67 Fed. Reg. 46000 (July 11,
2 2002); 66 Fed. Reg. 14214 (Mar. 9, 2001). The recent
3 designations had nothing to do with the civil war or its
4 aftermath, and the grants and extensions were available only
5 to Salvadorans who, among other criteria, had been
6 "continuously physically present" in the United States since
7 March 9, 2001. Id.

8 B. Implementation of Expedited Removal

9 1. Congress's Effort to Control Illegal Immigration

10 Perhaps most importantly, since the entry of the Orantes
11 Injunction, Congress created a mechanism for the expeditious
12 removal of certain inadmissible aliens. See section 235(b)(1)
13 of the INA, 8 U.S.C. § 1225(b)(1). Congress recognized that
14 hundreds of thousands of illegal aliens were passing into our
15 country without proper documentation and without any viable
16 claim for asylum or protection from removal. If the
17 Government had to provide these aliens with the typical time-
18 consuming, resource-intensive process that is normally
19 available for more complicated cases, the Government would be
20 unable to keep pace with the growing floodtide of illegal
21 immigration. Accordingly, for straightforward cases in which
22 the alien lacks proper documentation and any viable claim for
23 relief, Congress permitted the Government to employ a
24 streamlined and sufficient process for removal.

25 Initially, Expedited Removal applied only to certain
26 "arriving" aliens coming to a port of entry. INA §
27 235(b)(1)(A)(i), (b)(1)(F); 8 C.F.R. § 235.3(b)(1)(i) (2004).
28 However, Congress authorized the Attorney General (now the

1 Secretary of DHS), in the exercise of discretion, to expand
2 the coverage of Expedited Removal by designating additional
3 categories of aliens subject to the procedure. See 8 U.S.C. §
4 1225(b)(1)(A)(iii)(I). Designations of expanded application
5 are effective upon publication of a notice in the Federal
6 Register. 8 C.F.R. § 235.3(b)(1)(ii) (2004).

7 Two subsequent expansions of Expedited Removal greatly
8 altered immigration enforcement in this country. On August
9 11, 2004, the U.S. Customs and Border Protection, a component
10 within DHS, published a Notice in the Federal Register
11 expanding the application of Expedited Removal.⁹ The aliens
12 covered by this Notice include those who lack proper
13 documentation, are present in the United States without having
14 been admitted or paroled, and "are encountered by an
15 immigration officer within 100 air miles of any U.S.
16 international land border, and who have not established to the
17 satisfaction of an immigration officer that they have been
18 physically present in the U.S. continuously for the 14-day
19 period immediately prior to the date of encounter."
20

21 ⁹ The former INS expanded Expedited Removal in 2002 to include
22 the operation of expedited removal procedures to cover all
23 aliens (other than Cubans) inadmissible under INA
24 § 212(a)(6)(C) or (a)(7) "who arrive in the United States [at
25 places other than ports of entry] by sea, either by boat or
26 other means, who are not admitted or paroled, and who have not
27 been physically present in the United States continuously for
28 the two-year period prior to a determination of
inadmissibility by a Service officer." "Notice Designating
Aliens Subject to Expedited Removal Under Section
235(b)(1)(A)(iii) of the Immigration and Nationality Act," 67
Fed. Reg. 68924, 68925 (Nov. 13, 2002).

1 "Designating Aliens For Expedited Removal," 69 Fed. Reg.
2 48877, 48880 (Aug. 11, 2004). The purpose of the expansion
3 was to deter illegal entries and accelerate removals, to
4 "enhance DHS's ability to oversee the border, . . . to focus
5 its resources on threats to public safety and to national
6 security," to "interfere with human trafficking and alien
7 smuggling operations," and to "ultimately reduce the number of
8 aliens who risk injury or death attempting to enter the U.S.
9 through difficult mountainous and desert terrain." Id. at
10 48879. Nevertheless, in the exercise of discretion, DHS
11 initially implemented the expanded authority in only a few
12 regions along the Southwest border, and specifically excluded
13 Salvadorans from Expedited Removal procedures.¹⁰

14 On September 14, 2005, DHS Secretary Chertoff extended
15 implementation of the August 11, 2004 designation to the
16 entire Southwest border of the United States. As Secretary
17 Chertoff explained when making the announcement:

18 Expanding Expedited Removal gives Border
19 Patrol agents the ability to break the
20 cycle of illegal migration. The use of
21 this authority will allow DHS the ability
22 to gain greater control of our borders and
23 to protect our country against the
terrorist threat. The Expedited Removal
process will rapidly return illegal aliens
in the United States to their country of
origin while giving those seeking

24 ¹⁰ The Government does not concede that application of
25 Expedited Removal to Salvadorans would violate the Court's
26 injunction. Nevertheless, in the Secretary's discretion, the
27 Government has, to this date, refrained from applying
28 Expedited Removal to Salvadorans apprehended between ports of
entry so as to avoid any appearance of violating the
injunction.

1 protection the judicial process to pursue
2 their claim before an immigration judge.

3 See Ex. Q, September 14, 2005 Press Release.

4 2. Expedited Removal Procedures

5 The Expedited Removal process is replete with safeguards
6 to ensure that an alien who asserts an intention to apply for
7 asylum, or otherwise expresses a fear of persecution or
8 torture if he returns to their native country, is given the
9 opportunity to pursue his claim. Generally, if an inspecting
10 officer determines that an alien is inadmissible for lack of
11 proper documentation, see INA § 212(a)(6)(C) or § 212(a)(7),
12 and otherwise eligible for Expedited Removal, the officer will
13 order the alien removed from the United States without further
14 hearing or review. However, if that alien indicates an
15 intention to apply for asylum, or otherwise expresses a fear
16 of persecution or torture if he returns to the alien's native
17 country, the officer does not proceed any further with removal
18 of the alien. Instead, the alien is referred for a "credible
19 fear" interview by a trained asylum officer. INA §
20 235(b)(1)(A)(i), (C); 8 C.F.R. § 235.3(b)(4) (2004).¹¹

21 In every case in which the expedited removal provisions
22 are applied, and prior to the removal of an alien from the
23 United States, the inspecting officer creates a "Record of
24 Sworn Statement" using Form I-867A. See Ex. R. The officer

25
26 ¹¹ The alien may also obtain further review by claiming the
27 "status" of being a United States citizen, a lawful permanent
28 resident alien, or an alien previously granted refugee status
or asylum. INA § 235(b)(1)(A)(i), (C); 8 C.F.R. § 235.3(b)(5)
(2004).

1 explains to the alien, in a language the alien understands,
2 the nature of a removal proceeding and reads to the alien a
3 statement of rights and consequences which is set forth on the
4 I-867A. Id. The inspecting officer then takes a sworn
5 statement from the alien, recording the alien's responses to
6 questions dealing with identity, alienage, reason for coming
7 to the United States, and any fear of persecution, and records
8 the answers on Form I-867B, and provides the alien an
9 opportunity to make any necessary corrections before having
10 the alien sign the statement.¹² Id.

11 During the taking of the sworn statement, the inspecting
12 officer provides the alien with a narrative description of the
13 charges against him or her on Form I-860, "Notice and Order of
14 Expedited Removal." See Ex. S. The alien is given an
15 opportunity to respond to these charges in the sworn
16 statement. 8 C.F.R. § 235.3(b)(2)(i) (2004). As a safeguard,
17 an Expedited Removal order entered by an immigration officer
18 does not become final until a supervisor has reviewed and
19 approved it. 8 C.F.R. § 235.3(b)(7) (2004).

20 Aliens have ample opportunity to express their reasons
21 for fearing return to their countries. The Record of Sworn
22 Statement, Form I-867A, warns all aliens in expedited removal
23 proceedings of the need to express any fear of persecution or
24 torture. It states:

25 U.S. law provides protection to certain
26 persons who face persecution, harm or

27 ¹² Interpretive assistance is used if necessary to communicate
28 with the alien. 8 C.F.R. § 235.3(b)(2)(i) (2004).

1 torture upon return to their home country.
2 If you fear or have a concern about being
3 removed from the United States or about
4 being sent home, you should tell me so
5 during this interview because you may not
6 have another chance. You will have the
7 opportunity to speak privately and
8 confidentially to another officer about
9 your fear or concern. That officer will
10 determine if you should remain in the
11 United States and not be removed because of
12 that fear.

13 In addition, form I-867B contains a series of questions, to be
14 asked by the inspecting officer, that are designed to elicit
15 information relating to a fear of persecution or torture. See
16 Ex. R. Among these questions are: "Do you have any fear or
17 concern about being returned to your home country or being
18 removed from the United States?," and "Would you be harmed if
19 you are returned to your home country or country of last
20 residence?". Id.

21 If the alien indicates an intention to apply for asylum
22 or expresses a fear of persecution or torture, or a fear of
23 return to his or her country, the inspecting officer may not
24 proceed further with removal until the alien has received a
25 "credible fear" interview from an asylum officer. INA §
26 235(b)(1)(B)(i); 8 C.F.R. § 235.3(b)(4) (2004). If the
27 inspecting officer refers the alien for a credible fear
28 interview, the officer provides the alien with Form M-444,
"Information About Credible Fear Interview." See Ex. T; 8
C.F.R. § 235.3(b)(4)(i) (2004). Form M-444 discusses, inter
alia, the alien's statutory rights to consultation and to
immigration judge review, and the consequences of failure to
establish a credible fear of persecution or torture. 8 C.F.R.

1 § 235.3(b)(4)(i) (2004). An alien referred for a credible
2 fear interview is also given a list of legal service providers
3 whom he or she may contact, along with access to a telephone.
4 62 Fed. Reg. 10312, 10320 (Mar. 6, 1997). Importantly, any
5 alien subject to Expedited Removal receives substantial
6 process in an equitable system that ensures the preservation
7 of rights for aliens who establish a credible fear of
8 persecution or torture to apply for asylum.¹³

9 C. Creation of the Department of Homeland Security

10 Finally, as a result of the terrorist attacks of
11 September 11, 2001, the United States Government restructured
12 several agencies within the Executive Branch, creating the
13 Department of Homeland Security. See Homeland Security Act of
14 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002). As
15 part of its restructuring, the INS was abolished and its
16 functions were transferred from the U.S. Department of Justice
17 to the new DHS.¹⁴

18 //

19 _____
20 ¹³ Courts have rejected constitutional due process challenges
21 to the Government's Expedited Removal procedure. See, e.g.,
22 American Immigration Lawyer's Assoc. v. Reno, 18 F.Supp.2d 38,
23 58 (D.D.C. 1998) (finding that aliens who were not permanent
24 residents who had no "substantial connections" to the United
25 States enjoyed no due process rights with regard to their
26 request for admission and thus, the Expedited Removal
27 procedure could not have deprived them of due process) aff'd
28 American Immigration Lawyer's Assoc. v. Reno, 199 F.3d 1352
(D.C. Cir. 2000).

¹⁴ Pursuant to the Homeland Security Act, all authority
exercised by the Commissioner of the INS, on behalf of the
Attorney General, was transferred to the Secretary of DHS.

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ARGUMENT

SIGNIFICANT CHANGES IN THE UNITED STATES AND EL SALVADOR
WARRANT DISSOLUTION OF THE ORANTES INJUNCTION.

"For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." See Matthews v. Diaz, 426 U.S. 67, 81 (1976). Indeed, "over no conceivable subject is the legislative power of Congress more complete." Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Steam Navigation Co. V. Stranaham, 214 U.S. 320, 339 (1909)). Yet, in this case, the injunction entered by the Court in 1988 infringes on the power of the Congress and the Executive in setting and carrying out immigration policy.

At one time, over seventeen years ago, conditions might have justified this infringement. But the civil war in El Salvador ended long ago, the concerns of INS violations are no longer well-founded, and Congress has mandated an efficient process for removing aliens that is inconsistent with the Orantes Injunction. Accordingly, the Attorney General respectfully moves this Court to dissolve the injunction.

A. Standard for Dissolving a Permanent Injunction

A court has the power to vacate, modify, or dissolve an injunction it entered when significant changes in fact or law warrant revision or dissolution of the injunction. See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383-84 (1992); Sharp v. Weston, 233 F.3d 1166, 1170 (9th Cir. 2000). This is because "[a] continuing decree of injunction directed

1 to events to come is subject always to adaptation as events
2 may shape the need." United States v. Swift, 286 U.S. 106,
3 114 (1932).

4 "A party seeking modification or dissolution of an
5 injunction bears the burden of establishing that a significant
6 change in facts or law warrants revision or dissolution of the
7 injunction." Sharp, 233 F.3d at 1170; Bellvue Manor Assoc. v.
8 United States, 165 F.3d 1249, 1255 (9th Cir. 1999). A party
9 may show that it is no longer equitable that a judgment should
10 have prospective application, that modification of an
11 injunction may be warranted when changed factual conditions
12 make compliance with the injunction substantially more
13 onerous, or that a party may show that the injunction is no
14 longer workable because of unforeseen obstacles. Sharp, 233
15 F.3d at 1170; Rufo, 502 U.S. 367, 383-84. The Ninth Circuit
16 also has held that the purpose of "injunctive relief is . . .
17 to deter future misdeeds, not to punish past misconduct."
18 Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 564 (9th Cir.
19 1990).

20 B. Significant Changes in the United States
21 Warrant Dissolution of the Orantes Injunction

22 Under this standard, this Court should dissolve the
23 Orantes Injunction. Since its issuance seventeen-and-a-half
24 years ago, there have been three significant changes in the
25 United States and El Salvador, which confirm that the
26 injunction is outdated, is unduly burdensome, and no longer
27 serves its original purpose. First, in 1996, Congress enacted
28 Expedited Removal which has been indispensable in seeking to

1 obtain control of our borders and in preserving national
2 security. The Orantes Injunction is inconsistent with and has
3 burdened Expedited Removal. Second, the concerns of INS abuse
4 that gave rise to the injunction are no longer well-founded.
5 The Government has reformed its practices and has, on its own
6 initiative, voluntarily extended aspects of the injunction
7 that were once imposed on it for Salvadorans, and applied them
8 to all nationalities. Finally, the civil war in El Salvador
9 has ended, and the country is now internationally recognized
10 as a multiparty democracy with a healthy constitution and a
11 general respect for the human rights of its citizens. Given
12 the changed circumstances in El Salvador, there is simply no
13 justification for Salvadorans to receive special treatment in
14 the removal process as compared to illegal entrants of all
15 other nationalities.

16 1. Implementation of Expedited Removal and
17 Increased Border Security

18 The enactment and implementation of Expedited Removal
19 constitute a substantial change in law justifying dissolution
20 of the Orantes Injunction. Judge Kenyon could not possibly
21 have foreseen this change when he drafted the provisions of
22 the Orantes Injunction over 17 years ago. Moreover, Expedited
23 Removal represents an express policy choice by Congress that
24 supercedes any prior determination that Judge Kenyon made.
25 Accordingly, to the extent that this Court believes that the
26 Orantes Injunction would prohibit application of Expedited
27 Removal to Salvadorans, the Court must modify or dissolve the
28 injunction.

1 In addition, the United States submits that the increased
2 national interest in border security since the 2001 terrorist
3 attacks affords additional justification for dissolving the
4 injunction. As Secretary Chertoff said upon the recent
5 expansion of Expedited Removal along the Southwest border,
6 "[t]he use of [Expedited Removal] authority will allow DHS the
7 ability to gain greater control of our borders and to protect
8 our country against the terrorist threat." See Ex. Q,
9 September 14, 2005 Press Release. Without Expedited Removal,
10 the Government will be unable to keep pace with the growing
11 floodtide of illegal immigration, and will be greatly
12 undermined in its ability to deter future unlawful crossings
13 by criminals, non-criminals, and terrorists alike.

14 The Orantes Injunction imposes a significant burden on
15 the United States by interfering with its ability to apply
16 Expedited Removal procedures to Salvadorans. Specifically,
17 paragraph 11 of the injunction precludes defendants from
18 transferring unrepresented Salvadorans from the district of
19 their apprehension for at least 7 days.¹⁵ See Ex. A, ¶ 11.
20 The burden caused by this provision is best exemplified by
21 examining data of apprehended aliens in the Tucson Border
22 Patrol Sector in Arizona. Guatemalans, Salvadorans,
23 Hondurans, and Brazilians make up the four largest groups of
24

25
26 ¹⁵ The injunction's provisions requiring the Orantes advisals
27 also conflicts with Expedited Removal. This is because the
28 advisals are based on the presumption that all Salvadorans
will be placed in removal proceedings which contain procedures
not necessarily applicable to aliens in Expedited Removal.

1 "Other than Mexican (OTM)" aliens who are apprehended in that
2 region. See Ex. U, Declaration of Arturo Guajardo.
3 Generally, when aliens are apprehended in this region, the
4 Department of Homeland Security seeks to detain them in the
5 same region. See Ex. V, Declaration of David A. Kollus, ¶ 4.
6 But detention space is at a premium in Arizona (and
7 particularly for females), and if none exists in the State,
8 DHS contacts offices in California or Texas to see if space
9 can be used in those regions so that aliens who require
10 detention may be transferred. Id. at ¶¶ 3-6. The injunction
11 arguably prevents DHS from making these transfers with respect
12 to apprehended Salvadorans for at least 7 days.

13 As a result, DHS is often forced to release Salvadorans
14 who are supposed to be detained under the INA. If the
15 facility in Florence, Arizona has no available detention bed
16 space, it must advise Customs and Border Protection to release
17 the alien on his own recognizance, because transfer is not an
18 option. Id. More than 25% of Salvadorans apprehended in the
19 Tucson Border Patrol Sector between May 1, 2004 and April 30,
20 2005, were released for this reason.¹⁶ Id. And even if
21

22 ¹⁶ As required by Section 605 of the Enhanced Border Security
23 and Visa Entry Reform Act of 2002, ICE conducted a study for
24 Fiscal Year 2004 to determine the rate of aliens who were
25 released on their own recognizance who later failed to appear
26 at their immigration hearing. See Ex. W, ICE Report to
27 Congress, "Aliens Who Fail to Appear After Release on Their
28 Own Recognizance." Approximately 75% of all aliens released
on their own recognizance fail to appear at their immigration
hearings. Id. These aliens, for the most part, remain
illegally in the United States and attempt to avoid detection
by DHS.

1 Florence has available bedspace, and Salvadorans are detained
2 there, Florence may ultimately have to release them within
3 seven days to create additional bedspace for other aliens.¹⁷

4 Id.

5 Furthermore, the injunction and its 7-day transfer
6 prohibition can needlessly cause aliens to remain detained in
7 the United States when they would rather be removed to El
8 Salvador. For instance, detained Salvadorans frequently
9 choose to proceed pro se and request an immediate hearing
10 before an immigration judge rather than engage in the more
11 lengthy judicial process. Id. at ¶ 9. In these
12 circumstances, the alien could receive a final order of
13 removal within two days of his apprehension. Id. Despite the
14 immediate removability of the alien, Florence feels restrained
15 from returning Salvadorans to El Salvador because of the
16 transfer prohibition. Id. This needless extended detention
17 may be further lengthened due to the limited availability of
18 Justice Prisoner and Alien Transportation System (JPATS)
19 flights. Id. JPATS flights to El Salvador are available only
20 one day per week. Id.

21 Absent the Orantes Injunction, Florence could more
22 effectively coordinate the detention of Salvadorans
23 apprehended in Arizona and thereby reduce the large numbers of
24

25 ¹⁷ The data collected for the year from May 1, 1004 to April
26 30, 2005 shows that Salvadorans are released on their own
27 recognizance at a far greater rate than the top four OTM
28 nationalities that are apprehended in the Tucson Sector. See
Ex. U, Declaration of Arturo Guajardo at ¶¶ 3-8.

1 Salvadorans who are released on their own recognizance. 'Id.
2 at ¶ 10. Moreover, dissolution of the injunction would enable
3 DHS to execute final removal orders more efficiently and to
4 avoid needless detention. Id.

5 2. Revised Processing in Non-Expedited Removal
6 Cases

7 In addition, for aliens not subject to Expedited Removal
8 (i.e., aliens who are in INA § 240 removal proceedings), new
9 procedures and policies that DHS has in place without regard
10 to nationality supersede the need for an injunction applicable
11 only to Salvadorans. A prime example is DHS's willingness to
12 adopt Judge Kenyon's requirements for Salvadorans, and apply
13 those requirements to other aliens, regardless of nationality.
14 Through a combination of rights recitals, written forms, and
15 signed acknowledgments of receipt of rights, the Government
16 ensures that aliens of all nationalities (not just
17 Salvadorans) are aware of their rights upon apprehension in
18 this country. The Orantes Advisal, once applicable only to
19 Salvadorans, is substantially reproduced in Form I-826, and
20 provided to apprehended aliens without regard to nationality.
21 Cf. Exs. G and H. Also, legal service provider lists are
22 disseminated upon apprehension along with a Notice to Appear,
23 which further reminds aliens of their opportunity to be
24 represented by counsel at immigration hearings.

25 Moreover, the ICE Detention Standards are internal
26 operating procedures that the INS willingly and voluntarily
27 drafted, and which enhance the protections that Judge Kenyon
28 mandated for Salvadorans. DHS now provides those protections

1 to aliens of all nationalities. See Exs. J-O. In doing so,
2 DHS ensures that all aliens, not just Salvadorans, have access
3 to counsel, access to telephones, access to legal materials,
4 and access to appropriate due process procedures if the need
5 arises for administrative segregation. For most provisions of
6 the injunction that once applied only to Salvadorans, INS and
7 DHS, on their own accord, made the safeguards and protections
8 available to aliens of all nationalities.

9 In addition, Salvadorans cannot claim unfairness with
10 respect to the United States' treatment of them in recent
11 years, or that the Government is trying to remove them as
12 quickly as possible without legal recourse. To the contrary,
13 the United States has made Temporary Protected Status
14 available to Salvadorans numerous times in the last 15 years,
15 allowing additional avenues for Salvadorans to remain in the
16 country. See U.S. Citizenship and Immigration Services Fact
17 Sheet Regarding Temporary Protected Status for El Salvador at
18 Exhibit P. These significant changes warrant dissolution of
19 the Orantes Injunction.

20 3. Significant Changes in El Salvador Remove the
21 Threat of Irreparable Injury to Aliens who
Return

22 Finally, conditions in El Salvador have drastically
23 changed since the entry of the injunction over seventeen years
24 ago. The entire theory underpinning the need for the
25 injunction was that Salvadoran aliens who might never be aware
26 of their right to apply for asylum would voluntarily return to
27 a country where persecution of its citizens was the norm.

28 Orantes-Hernandez v. Smith, 541 F. Supp. 351, 355-58 (C.D.

1 Cal. 1982); Orantes-Hernandez v. Meese, 685 F. Supp. 1488,
2 1491-93, 1504 (C.D. Cal. 1988) ("Removal to a country overrun
3 with civil war, violence, and government-sanctioned terrorist
4 organizations may lead to the most serious of deprivations.").
5 The 2005 Country Reports reveal that El Salvador has made
6 tremendous strides since its 12-year civil war ended in 1992,
7 including the establishment of an investigative and monitoring
8 body to ensure that human rights are protected throughout the
9 country. See Ex. E at 11.

10 Indeed, El Salvador now has a constitution which
11 prohibits the very persecution that was rampant throughout the
12 country at the time the Court entered the Orantes Injunction.
13 Id. at 3. El Salvador, like the United States, now has
14 constitutional rights of freedom of speech, freedom of the
15 press, freedom of religion, and freedom of association. Id.
16 at 6-7. The constitution also protects against discrimination
17 on the basis of race, sex, or nationality. Id. at 9. Thus,
18 while the country's human rights record is not unblemished,
19 the fear that Salvadorans will be returned to probable
20 persecution - the probable persecution that Judge Kenyon used
21 to justify "irreparable injury" mandating imposition of the
22 injunction - is no longer present.

23 The Government's position is underscored by the State
24 Department's most recent Profile of Asylum Claims and Country
25 Conditions for El Salvador. See Ex. X. This report
26 demonstrates the difference between the conditions in El
27 Salvador years ago, and the conditions in El Salvador today:

28 Since the demobilization of the last

1 guerrilla combat units in December 1992
2 brought to a successful conclusion the
3 demilitarization phase of the U.N.-brokered
4 peace accords, all claims from Salvadoran
5 applicants should be reviewed in light of
6 the sweeping changes which have taken place
7 in that country.

8 Id. at 5.

9 The Report goes on to state that there has not been a
10 politically motivated crime in years, that there has not been
11 an issue of forced recruitment by the Salvadoran military
12 and/or leftist guerrillas in "more than 11 years," and that,
13 since the "peace process has eliminated political warfare,"
14 any such claims of asylum would not be well-founded. Id. at
15 5-6. The Report also states that, in the year prior to its
16 publication, there were no "confirmed cases of political
17 killings," no "alleged or verified cases of
18 politically-motivated forced disappearances," that asylum
19 claims from El Salvador based on race and religion were "very
20 rare," and that no claims were received on the basis of
21 nationality. Id. at 6-10.

22 Analyzing the possibility of politically motivated
23 mistreatment, the Report notes that, "[s]ince the 1992 peace
24 accords . . . recent mistreatment with political motivation
25 would seem unlikely in most cases." Id. at 13. Accordingly,
26 the Government submits that significant changes in El
27 Salvador's human rights record support the dissolution of the
28 Orantes Injunction because Salvadorans no longer face
"irreparable injury" if returned to El Salvador. There is
simply no justification based on the current country

1 conditions in El Salvador for precluding the Government from
2 treating Salvadorans like all other nationalities who are
3 subject to Expedited Removal.

4 **CONCLUSION**

5 The Orantes Injunction is an anachronism that frustrates
6 the will of the Congress and the Executive, burdens the
7 Government's enhanced immigration enforcement efforts, and
8 provides special treatment to Salvadorans where no
9 justification for special treatment exists. The Government
10 respectfully moves the Court to dissolve the Orantes
11 Injunction as it is no longer equitable for this injunction to
12 have prospective application.

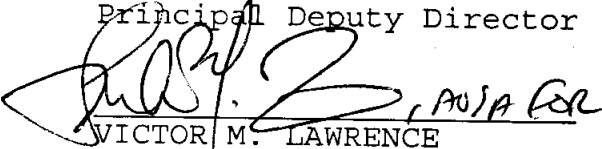
13 DATED: November 17, 2005.

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