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## IN THE UNITED STATES DISTRICT COURT

## FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSE BAUTISTA-PEREZ, et al.,

Plaintiffs,

v.

ERIC H. HOLDER, Jr., Attorney  
General of the United States, and  
JANET NAPOLITANO, Secretary of  
Homeland Security,

Defendants.

NO. C 07-4192 TEH

ORDER DENYING  
DEFENDANT'S MOTION  
TO DISMISS

This matter came before the Court on April 6, 2009 on Defendants' Motion to Dismiss. Having carefully considered the parties' written and oral arguments, Defendants' Motion is DENIED for the reasons set forth below.

**FACTUAL AND PROCEDURAL BACKGROUND**

As this is the second motion to dismiss that this Court has considered, the following factual account is drawn from the Court's order of February 4, 2008.

The Immigration Act of 1990 established a procedure whereby the government could provide temporary protection to aliens in the U.S. who were forced to flee their homelands because of natural disaster, civil strife and armed conflict, or other extraordinary and temporary conditions. The Secretary of Homeland Security may grant "Temporary Protective Status" ("TPS") to nationals of certain countries temporarily designated under the

1 statute, 8 U.S.C. § 1254a(a)(1), 6 U.S.C. § 557, which allows those nationals to stay in the  
2 United States and obtain work authorization for the period their home country is so  
3 designated. 8 U.S.C. § 1254a(a)(1)(B).

4       Once a country is designated for TPS, nationals of that country can register for  
5 benefits during a certain period of time. To establish eligibility for TPS, an applicant must  
6 establish, among other things, that he or she is a national of the country designated for TPS,  
7 has been continuously physically present and resided in the United States since the effective  
8 date of designation, and is otherwise admissible as an immigrant (although certain grounds of  
9 inadmissibility can be waived). 8 U.S.C. § 1254a(c)(2)(A); 8 C.F.R. §§ 244.2, 244.3(a),  
10 1244.3(a). The government can deny an applicant TPS on the basis of the applicant's  
11 criminal history. 8 U.S.C. § 1254a(c)(2)(A); (c)(2)(B); 8 C.F.R. §§ 244.3(c), 244.4,  
12 1244.3(c), 1244.4.

13       The statute at issue here limits the registration fee for TPS to \$50.00. Title 8 U.S.C.  
14 § 1254a(c)(1)(B) provides:

15       Registration fee

16       The Attorney General may require **payment of a reasonable fee as a condition of**  
17 **registering an alien** under subparagraph (A)(iv) (including providing an alien with an  
18 “employment authorized” endorsement or other appropriate work permit under this  
19 section). **The amount of any such fee shall not exceed \$50.** In the case of aliens  
20 registered pursuant to a designation under this section made after July 17, 1991, **the**  
**Attorney General may impose a separate, additional fee for providing an alien**  
**with documentation of work authorization.** Notwithstanding section 3302 of Title  
21 31, all fees collected under this subparagraph shall be credited to the appropriation to  
22 be used in carrying out this section.

23 (emphasis added).<sup>1</sup>

24       However, regulations governing TPS require applicants to pay more than just a \$50.00  
25 registration fee and a work authorization fee. *See* 8 C.F.R. § 244. Homeland Security  
26 requires individuals who wish to obtain TPS to file, in addition to an application form,

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27       <sup>1</sup> The Immigration Act of 1990 originally enacted two TPS programs: Section 302  
28 created what is now the TPS program contained in 8 U.S.C. § 1254a, and Section 303 created  
a separate TPS program for El Salvador. Section 303(b)(2) placed no limit on the fees the  
Attorney General could charge, and permitted a “reasonable fee” as a condition of  
registration. Pub. L. 101-649, 104 Stat. 4978, § 303(b)(2). (The separate program for El  
Salvador expired, and now the same rules apply to all applicants for TPS).

1 extensive supporting documentation, additional materials, and an \$80.00 “biometrics services  
2 fee” for applicants over 14. 8 C.F.R. §§ 103.7(b)(1), 244.6; “Adjustment of the Immigration  
3 and Naturalization Benefit Application and Petition Fee Schedule,” 72 Fed. Reg. 29851,  
4 29873 (May 30, 2007).

5 Homeland Security charges the “biometrics services fee” for processing of  
6 fingerprints, photographs, and electronic signatures used for background and security checks  
7 and identity verification, and for storage and maintenance of the information so collected.  
8 Declaration of Barbara Velarde In Opposition to Plaintiff’s Motion for Preliminary  
9 Injunction, filed September 25, 2007, ¶¶ 7, 18; *see also* 72 Fed. Reg. 29851, *supra* at 29857  
10 (discussing uses of biometric fee).

11 Although aliens are required to re-register for TPS whenever a country is re-  
12 designated, Homeland Security collects the \$50.00 TPS registration fee only once. 8 C.F.R.  
13 § 244.17(a); 72 Fed. Reg. 46649, 46650 (August 21, 2007) (explaining fee structure for El  
14 Salvador re-registration); Velarde Decl. ¶ 13. However, aliens are required to pay a new  
15 biometrics fee (and work authorization document fee) for each re-registration. 72 Fed. Reg.  
16 46649, *supra*, at 46650; Velarde Decl. ¶ 13. Plaintiffs allege, and DHS admits, that it  
17 requires applicants to pay the biometrics fee even if Homeland Security does not need  
18 updated biometric information. Velarde Decl. ¶ 19.

19 Plaintiffs, foreign nationals from Honduras, El Salvador, and Nicaragua who currently  
20 have TPS status, claim that they have been required to remit fees totaling over \$50.00 on  
21 multiple occasions as they re-register for TPS, even though their biometric data was being  
22 reused. First Amended Complaint, ¶ 12. They claim that because 8 U.S.C. § 1254a(c)(1)(B)  
23 provides that the fee charged by DHS “as a condition of registering” for TPS is “not to  
24 exceed” \$50.00, the additional biometric services fee is unlawful. Their class action  
25 Complaint, brought on behalf of all nationals of El Salvador, Honduras, and Nicaragua who  
26 submitted applications to register for TPS and were required to pay fees of more than \$50.00,  
27 *id.* ¶¶ 26-28, seeks an order  
28

- 1 • declaring that additional fee for collecting biometric information or any combined  
2 fee over \$50.00 is unlawful under 8 U.S.C. § 1254a(c)(1)(b);  
3 • invalidating those parts of 8 C.F.R. § 244.6 that requires Plaintiffs and other class  
4 members to pay biometric service fees;  
5 • enjoining DHS from imposing fees over \$50.00;  
6 • enjoining DHS from imposing a fee when collection of biometric information is  
7 unnecessary; and  
8 • requiring the Defendants to refund all fees over \$50.00 paid by class members.

9 *Id.* Prayer for relief ¶¶ 2-7.

10 The Court denied this previous motion to dismiss, finding jurisdiction and venue to be  
11 proper. The instant motion was filed while a motion for class certification was pending; the  
12 Court continued that motion until the resolution of this one.

### 13 **LEGAL STANDARD**

14 In deciding a motion to dismiss for lack of jurisdiction as a matter of law under  
15 Federal Rule of Civil Procedure 12(b)(1), a court must assume the facts alleged in the  
16 complaint to be true unless the allegations are controverted by exhibits attached to the  
17 complaint, matters subject to judicial notice, or documents necessarily relied on by the  
18 complaint and whose authenticity no party questions. *Lee v. City of Los Angeles*, 250 F.3d  
19 668, 688-89 (9th Cir. 2001). Because Defendant does not seek to rely on any external facts,  
20 this is a facial rather than factual challenge to the court's jurisdiction. *See Wolfe v.*  
21 *Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (distinguishing between facial and factual  
22 jurisdictional attacks). Consequently, this Court applies a similar standard to Defendant's  
23 Rule 12(b)(1) motion as to a Rule 12(b)(6) motion: Dismissal is appropriate only if the  
24 complaint's allegations, which are assumed to be true, are insufficient to support a finding of  
25 jurisdiction. *Id.* When subject matter jurisdiction is challenged, Plaintiff "bears the burden  
26 of establishing subject matter jurisdiction by a preponderance of the evidence." *Reynolds v.*  
27 *Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). On a motion to dismiss  
28 for lack of proper venue pursuant to Federal Rule of Civil Procedure 12(b)(3), pleadings need

1 not be accepted as true, outside facts may be admitted, and the “court must draw all  
2 reasonable inferences and resolve all factual conflicts in favor of the non-moving party.”  
3 *Am. Home Assurance Co. v. TGL Container Lines, Ltd.*, 347 F. Supp. 2d 749, 755 (N.D. Cal.  
4 2004).

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6 **ANALYSIS**

7 **I. Jurisdictional Challenge**

8 Defendants’ challenge to this Court’s jurisdiction has three main prongs. First, they  
9 argue that the Court lacks jurisdiction because there has been no proper waiver of sovereign  
10 immunity, as the Plaintiffs have failed to plead the Little Tucker Act in their amended  
11 complaint. Second, they argue that without properly pleading the United States as  
12 defendant, there is no valid claim under the Little Tucker Act. Third, they argue that  
13 subsequent events have mooted Plaintiffs’ claim for prospective injunctive relief. The Court  
14 will address each of these arguments in turn.

15 Defendants first claim that without a proper waiver of sovereign immunity, the United  
16 States is not subject to suit. Although the Little Tucker Act contains a waiver of sovereign  
17 immunity, as Plaintiffs only plead jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361  
18 (federal question and “action in the nature of mandamus to compel an officer of the United  
19 States to perform his duty”), Defendants argue that the complaint does not assert a claim  
20 under the Little Tucker Act. They assert that sovereign immunity waivers must be narrowly  
21 construed, and that since the Plaintiffs failed to assert a claim under a statute that waives  
22 sovereign immunity, there is no jurisdiction with this Court for suit against the government.  
23 In their reply, Defendants also argue that because Plaintiffs’ opposition to the first motion to  
24 dismiss contained the assertion that they did not bring a claim under the Little Tucker Act,  
25 Defendants lack notice of the kind of claim that Plaintiffs now bring. Plaintiffs do not  
26 contend that they have pleaded the Little Tucker Act, but instead argue that under liberal  
27 pleading standards, as the Defendants are on notice of the claims, there is adequate basis to  
28 exercise jurisdiction.

1 The Little Tucker Act provides that “[t]he district courts shall have original  
2 jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny other  
3 civil action or claim against the United States, not exceeding \$10,000 in amount.” 28 U.S.C.  
4 § 1346(a)(2). As the Court determined in its order on the prior motion to dismiss in this case,  
5 this is an adequate basis for jurisdiction over these claims.

6 The question remains whether such jurisdiction has been properly asserted. In  
7 general, the Federal Rules of Civil Procedure require only notice pleading, and the Ninth  
8 Circuit has held in the context of a suit against a private defendant that failure to specify the  
9 existence of jurisdiction amounts in some cases “to no more than inartful pleading, an error  
10 that does not in itself constitute an actual defect of federal jurisdiction.” *Nationwide Mut.*  
11 *Ins. Co. v. Liberatore*, 408 F.3d 1158, 1162 (9th Cir. 2005) (internal quotation marks and  
12 citation omitted). The Ninth Circuit has made clear that “[a]lthough it is preferable that a  
13 district court require formal amendment of a defective complaint, formal amendment is not  
14 required when the reviewing court can readily recognize the existence of jurisdiction.” *Id.* at  
15 1162 n.2. However, rules for the waiver of sovereign immunity are strictly interpreted:

16 The United States is immune from suit unless it consents to waive its sovereign  
17 immunity. The terms of the United States’ consent to be sued in any court  
18 define that court’s jurisdiction to entertain the suit. The doctrine of sovereign  
19 immunity applies to federal agencies and to federal employees acting within  
their official capacities. Any waiver of immunity must be “unequivocally  
expressed,” and any limitations and conditions upon the waiver “must be  
strictly observed and exceptions thereto are not to be implied.”

20 *Hodge v. Dalton*, 107 F.3d 705, 707 (9th Cir. 1997).

21 Given Plaintiffs’ clear submission to jurisdiction under the Little Tucker Act at the  
22 hearing on this motion, and the unequivocal waiver of sovereign immunity contained in the  
23 Little Tucker Act, this Court finds no reason to mechanically require amendment of the  
24 First Amended Complaint to reflect this basis of jurisdiction. The Court finds jurisdiction  
25 under the Little Tucker Act, and considers its omission from the complaint to be “no more  
26 than inartful pleading.” *Nationwide*, 408 F.3d at 1162.

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1 Defendants' second argument against jurisdiction is that the Little Tucker Act requires  
2 that a case be brought "against the United States."<sup>2</sup> The government cites an early Supreme  
3 Court case under the Little Tucker Act, in which the Court clarified that the Court of Claims  
4 only has jurisdiction in suits against the United States, thus stating clearly that the Little  
5 Tucker Act only provides jurisdiction against the United States as well, since that Court was  
6 provided jurisdiction in the Act. *United States v. Sherwood*, 312 U.S. 584, 588 (1941). The  
7 Southern District of California has held that "[s]uits under the Tucker Act are permitted only  
8 against the United States, not its agencies." *Saints v. Winter*, 2007 WL 2481514, at \*4 (S.D.  
9 Cal. 2007).

10 However, Plaintiffs again assert that the Defendants are being excessively legalistic,  
11 and that the government knows it is being sued. The Ninth Circuit has held that failure to  
12 expressly name the United States as a defendant does not necessarily bar jurisdiction under  
13 other statutes that permit suits against "the United States", and that bringing suit against an  
14 official of the government is a suit against the United States. *Wright v. Gregg*, 685 F.2d 340,  
15 341-42 (9th Cir. 1982). The Supreme Court has reached a similar conclusion concluding that  
16 a "suit against the petitioning local officials of the Reclamation Bureau is in fact against the  
17 United States." *Dugan v. Rank*, 372 U.S. 609, 611 (1963). In so holding, the Supreme Court  
18 relied on the general rule "that a suit is against the sovereign if the judgment sought would  
19 expend itself on the public treasury or domain, or interfere with the public administration, or  
20 if the effect of the judgment would be to restrain the Government from acting, or to compel it  
21 to act." *Id.* at 620. The Third and Fourth Circuits have extended this rule to actions under  
22 the Little Tucker Act. *Chabal v. Reagan*, 822 F.2d 349, 355-56 (3d Cir. 1987) ("For  
23 purposes of the Tucker Act, we treat Chabal's claims against individual federal defendants in  
24 their official capacities as alleging claims against the United States."); *Portsmouth*  
25 *Redevelopment & Hous. Auth. v. Pierce*, 706 F.2d 471, 473 (3d Cir. 1983) ("It is not  
26 necessary that the United States be denominated as a party [in a Little Tucker Act case]. An

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28 <sup>2</sup> The Little Tucker Act reads: "The district courts shall have original jurisdiction,  
concurrent with the United States Court of Federal Claims, of . . . [a]ny other civil action or  
claim against the United States, not exceeding \$10,000 in amount." 28 U.S.C. § 1346(a)(2).

1 action against a federal agency or official will be treated as an action against the sovereign if  
2 ‘the judgment sought would expend itself on the public treasury or domain, or interfere with  
3 the public administration, or if the effect of the judgment would be to restrain the  
4 Government from acting, or compel it to act.’” (quoting *Dugan*, 372 U.S. at 620)).

5 In the absence of controlling precedent regarding the Little Tucker Act, the Court  
6 concludes that the instant action against federal officials will be treated as an action against  
7 the United States because “the judgment sought would expend itself on the public treasury  
8 [and] the effect of the judgment would be to restrain the Government from acting, or compel  
9 it to act.” *Dugan*, 372 U.S. at 620. Thus, it is not necessary that the complaint be amended  
10 to reflect the United States as a party, The Court finds the rationale of the Third and Fourth  
11 Circuits to be persuasive; to require amendment would again demonstrate an unnecessarily  
12 mechanistic devotion to precision in pleading. Although the Defendants suggested in their  
13 moving papers and reply brief that the Plaintiffs are trying to avoid the consequences of the  
14 complete application of the Little Tucker Act, the Plaintiffs conceded at oral argument that  
15 once the case is brought under the Act’s ambit, they will submit to all of the attendant effects  
16 of the Act. In case there is any remaining doubt, the Court concludes that there is jurisdiction  
17 in this matter under the Little Tucker Act, that the Court will treat this as an action against  
18 the United States, and that all consequences of Little Tucker Act jurisdiction will apply.

19 Defendants’ third argument regarding jurisdiction is that events since the Court’s prior  
20 ruling have mooted the named plaintiffs’ claims for prospective relief. The government thus  
21 argues that because named Plaintiffs have fully paid pursuant to the only existing TPS  
22 designation, and the next one has not yet been enacted, there are no fees to be enjoined.  
23 They additionally argue that since TPS is by definition a temporary designation, prospective  
24 relief is inappropriate. They therefore seek to limit the case to retrospective monetary  
25 damages. They further claim that this is not an exceptional case requiring application of the  
26 “capable of repetition yet evading review” doctrine, as to anticipate repetition is too  
27 speculative to be legally justified.  
28

1 Plaintiffs argue that Defendants have not met their burden to show mootness, and that  
2 as a result, the claims must stand. As part of this argument, Plaintiffs point out that the  
3 regulations in question have not been withdrawn, and that the government still maintains,  
4 when asked about TPS, that an \$80 biometrics fee may be required. As an initial matter, the  
5 Court has already found that it has jurisdiction over these prospective claims, either under the  
6 Little Tucker Act or the APA. *See* Order Den. Defs.’ Mot. to Dismiss at 8:11-17.

7 The legal standard for mootness presents a high bar for the party asserting the  
8 mootness to achieve. The “heavy burden of persua[ding] the court that the challenged  
9 conduct cannot reasonably be expected to start up again lies with the party asserting  
10 mootness.” *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (internal citation  
11 and quotation marks omitted, alteration in the original). Plaintiffs rightly assert that the  
12 government has presented absolutely no evidence to indicate that it intends to permit the TPS  
13 designations for Honduras, Nicaragua, and El Salvador to expire this year. On the contrary,  
14 past government behavior demonstrates that this is the pattern for TPS: the TPS registration  
15 period expires late in the year, and then is renewed the following year at some point.  
16 Without showing more, the government cannot prevail on its mootness claim because it has  
17 not met its burden under *Adarand*.

18 Even if the Court were to declare this matter technically moot, two clearly established  
19 exceptions to the application of the mootness doctrine are relevant to this matter. First, *Roe*  
20 *v. Wade*, 410 U.S. 113, 125 (1974), discussed what has come to be known as the capable of  
21 repetition yet evading review doctrine, under which recurrent injuries may be heard by the  
22 courts even if they are moot, because otherwise they would always escape review. For this  
23 doctrine to apply, two criteria must be met. First, there must be a “reasonable expectation  
24 that the same complaining party would be subjected to the same action again.” *Weinstein v.*  
25 *Bradford*, 423 U.S. 147, 149 (1975). Second, the injury must be one of limited duration that  
26 is likely to again become moot before the completion of litigation. *See Carroll v. President*  
27 *& Commrs. Of Princess Anne*, 393 U.S. 175 (1968). Here, both requirements are met. If  
28 TPS status is renewed, the named Plaintiffs are likely to be subject to the same fee again.

1 Because of the way that TPS functions, with annual renewal, the same argument of mootness  
2 could be asserted each year against complaining Plaintiffs. Thus, even if the Court were to  
3 find this case moot, this exception applies and prevents dismissal for mootness.

4 The second exception to the mootness doctrine that is applicable here is that the  
5 Supreme Court has repeatedly held that a case is not to be dismissed as moot if the defendant  
6 voluntarily ceases the challenged action but is free to recommence it at any time; dismissal  
7 for mootness is only appropriate if there is no reasonable chance of resumption of the  
8 conduct. *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 173-74, 189 (2000). Although  
9 the government urges the Court to acknowledge that TPS is by its nature temporary, it argues  
10 too much by highlighting all of the prior versions of TPS that have been repealed. In  
11 contrast, it has failed to show that the instant version has been repealed, thus demonstrating  
12 that the voluntary cessation exception applies. Unless and until the government repeals the  
13 applicable regulations, which would demonstrate that there is no reasonable chance of  
14 resumption, the government's argument is simply nonpersuasive. As a result of this law, the  
15 Court finds that this case is not moot.

16 As each of Defendants' arguments for dismissal is unavailing, the Court DENIES  
17 Defendants' Motion to Dismiss.

## 18

## 19 **II. Venue Objection**

20 As on their prior motion to dismiss, Defendants argue that even if the Court finds  
21 jurisdiction and a waiver of sovereign immunity, this Court is a proper venue only for  
22 plaintiffs residing in this district, not for a nationwide class. The applicable venue provision  
23 for claims arising under the Little Tucker Act states that:

24 "[a]ny civil action in a district court against the United States under subsection  
25 (a) of section 1346 of this title may be prosecuted only . . . in the judicial  
district where the plaintiff resides . . . ."

26 28 U.S.C. § 1402(a).

27 As on the prior motion, and consistent with this Court's holding on that motion,  
28 Plaintiffs counter that Defendants waived their venue objection by failing to raise it in

1 opposition to Plaintiffs’ motion for preliminary injunction. Fed. R. Civ. Pro. 12(h) provides  
2 that a party waives a venue defense by failing “to include it in a responsive pleading.” Rule  
3 12(h)(1)(B)(ii); Rule 12(b)(3) (motions to dismiss for improper venue). As the analysis the  
4 Court offered on that motion is equally applicable here, it warrants quotation at length:

5 A “responsive pleading” for these purposes is not solely a motion to dismiss or  
6 an answer. The Court can find waiver of a venue defense “by submission  
7 through conduct” --*Neirbo Co. v Bethlehem Shipbuilding Corp*, 308 U.S. 165,  
8 167-68 (1939), or “by implication from acts acknowledging the court’s power  
9 to adjudicate.” Schwarzer et al, *Federal Civil Procedure Before Trial*, § 9:33  
10 at 9-8 (2007); see, e.g., *Manchester Knitted Fashions, Inc. v. Amalgamated*  
11 *Cotton Garment and Allied Industries Fund*, 967 F.2d 688, 692 (1st Cir. 1992)  
12 (finding waiver where defendant filed a motion requesting a hearing on  
13 plaintiff’s motion for TRO, a motion to allow its counsel to appear appear *pro*  
14 *hac vice*, and a stipulation agreeing to expedited discovery and a hearing on a  
15 preliminary injunction motion). A party must raise objection to venue in its  
16 “first significant defensive move.” *Transaero, Inc. v. La Fuerza Aerea*  
17 *Boliviana*, 162 F.3d 724, 730 (2nd Cir. 1998), quoting 5A Charles Alan Wright  
18 & Arthur R. Miller, *Federal Practice and Procedure* § 1391.

19 *Hendricks v. Bank of America, N.A.*, 408 F.3d 1127, 1135 (9th Cir. 2005) is  
20 precisely on point, and shows that opposition to a motion for preliminary  
21 injunction can be such a “first responsive pleading” or defensive move. There,  
22 the district court issued a temporary restraining order against the defendant,  
23 together with an order to show cause why a preliminary injunction should not  
24 be entered. *Id.* at 1132. The defendant sought several extensions of time, and  
25 then opposed the request for a preliminary injunction. *Id.* at 1132, 1135. On  
26 interlocutory appeal, the Ninth Circuit found that the defendant had not waived  
27 its venue and personal jurisdictional defenses because it had raised them “in its  
28 first responsive pleading” *id.* at 1135 – that is, in response opposition to  
plaintiff’s preliminary injunction motion.

Here, in contrast, the Defendants chose to argue the merits of the case in  
opposition to Plaintiffs’ motion for preliminary injunction *without* raising a  
venue objection. See Defendant’s Opposition to Plaintiffs’ Motion for  
Preliminary Injunction, filed September 25, 2007; Defendants’ Surreply in  
Opposition to Plaintiffs’ Motion for Preliminary Injunction, filed October 4,  
2007. An officer of the USCIS even submitted an eight-page declaration on  
the merits of the case. Declaration of Barbara Velarde, Chief of Service Center  
Operations for the United States Citizenship and Immigration Services,  
Department of Homeland Security, filed September 25, 2007.

Defendants argue that *Hendricks* is distinguishable because here, venue has to  
be viewed “in light of jurisdiction” granted by the Little Tucker Act, and the  
two are inextricably intertwined. This argument is hollow; there is nothing  
specific about either the Little Tucker Act or the related grant of venue in 28  
U.S.C. § 1402(a)(1) that makes jurisdiction and venue inseparable. On the  
contrary, 28 U.S.C. § 1406(b) provides that nothing in the chapter of Title 28  
on venue – which includes the Little Tucker Act venue provision – “shall  
impair the jurisdiction of a district court over any matter involving a party who  
does not interpose a timely and sufficient objection to the venue.”

1           Allowing Defendants to raise a venue objection only after this Court found a  
2           likelihood of success on the merits would permit the forum-shopping and waste  
3           of judicial resources Rule 12(h) is designed to avoid. Rule 12(h) contemplates  
4           an implied waiver of a venue defense “by defendants who appear before a court  
5           to deny the allegations of a complaint, but who fail to make [venue] objections  
6           at the time of their appearance.” *Foster v. Arletty 3 Sarl*, 278 F.3d 409, 414  
7           (4th Cir.2002) (citation omitted). That is what Defendants have done here.  
8           Accordingly, they have waived any objection to venue in this Court.

9           Order Den. Defs.’ Mot. to Dismiss at 9-10.

10           The Court could simply set aside Defendants’ venue objection on this basis.

11           However, Defendants point to a Ninth Circuit case in which the court permitted a plaintiff  
12           class to amend, and then observed that “[a]fter such further amendment, the District Court  
13           will have to determine whether venue in the . . . District . . . is proper.” *Immigrant  
14           Assistance Project of Los Angeles County Fed’n of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842,  
15           848 (9th Cir. 2002). Because of the previously discussed dispute over the propriety of the  
16           pleadings in establishing jurisdiction, the Court will address the merits of the venue motion  
17           as well to create a complete record.

18           Defendants’ venue objection focuses on the interpretation of the Little Tucker Act’s  
19           venue provision, which provides that “[a]ny civil action in a district court against the United  
20           States under subsection (a) of section 1346 of this title may be prosecuted only . . . in the  
21           judicial district where the plaintiff resides . . . .” 28 U.S.C. § 1402(a). As the Court has  
22           brought this case within the ambit of the Little Tucker Act, venue objections pursuant to that  
23           Act are properly brought to the Court’s attention. Defendants specifically assert that venue is  
24           improper for non-resident class members in this case under this venue statute.

25           Both parties acknowledge that there is no controlling Ninth Circuit authority on this  
26           matter. Defendants offer cases from outside the jurisdiction in which the Court held that all  
27           plaintiffs in such a class must satisfy the venue requirement of the Little Tucker Act.  
28           *Favereau v. United States*, 44 F. Supp. 2d 68, 69-71 (D. Me. 1999). However, Plaintiffs urge  
          the Court to adopt Judge Alsup’s recent consideration of this issue as to a class of non-alien  
          plaintiffs:

          No appellate decisions have addressed this issue, and the few district courts  
          which have done so have reached differing results. At least one court has  
          expressly ruled that, for Rule 23 cases under the Little Tucker Act, venue is

1 proper in a district court only if all class members reside in the pertinent  
2 judicial district. *Favereau v. United States*, 44 F. Supp. 2d 68 (D. Me.1999).<sup>3</sup>  
3 Other district courts, however, have followed the traditional class-action rule  
4 and permitted Little Tucker Act claims to proceed where unnamed class  
5 members resided outside of the district. *Whittington v. United States*, 240  
6 F.R.D. 344, 348-49 (S.D. Tex. 2006); *Bywaters v. United States*, 196 F.R.D.  
7 458 (E.D. Tex. 2000).

8 After reviewing the history and purpose of the Little Tucker Act and its venue  
9 provision, *Favereau* concluded that the Act's venue provision "was  
10 deliberately drafted to carve out a narrow exception to the jurisdiction of the  
11 Court of [Federal] Claims to give persons with relatively small claims the  
12 option of bringing suit in the district where they and their witnesses reside."  
13 *Favereau*, 44 F. Supp. 2d at 70. *See also Lake Mohave Boat Owners Ass'n v.*  
14 *National Park Service*, 78 F.3d 1360, 1365 n. 4 (9th Cir.1995) (identifying  
15 substantially the same purpose for the Little Tucker Act's jurisdictional  
16 provision). The government's argument is the same-that the Little Tucker Act  
17 and its venue provision were intended as a limited exception to exclusive Court  
18 of Claims jurisdiction simply to allow plaintiffs with small claims to bring their  
19 cases in the local judicial districts.

20 This order, however, respectfully disagrees. Courts must look first and  
21 foremost not to the purpose of a statute but to its text, and this order is simply  
22 unable to derive the venue limitation urged by the government from the text of  
23 the venue provision.

24 *Briggs v. United States*, 2009 WL 113387, 5-7 (N.D. Cal. Jan. 16, 2009).

25 The rest of his discussion observes that as in normal class actions, unnamed class  
26 members are irrelevant to venue determinations, and as the Little Tucker Act itself does not  
27 bar class actions, there is no reason to deviate from the standard venue rules of class actions.  
28 *Id.* As this reasoning is eminently logical, and, in the absence of controlling Ninth Circuit  
authority, offers persuasive reasoning, the Court shall adopt Judge Alsup's rationale.

Defendants offer one additional argument against venue: they assert that TPS  
applicants, as aliens, cannot be "resident" within a Court's district. First, the Court notes that  
the Government waived this venue objection by failing to raise it in opposition to Plaintiffs'  
motion for preliminary injunction. Fed. R. Civ. Pro. 12(h). This alone is reason to deny this  
venue objection. Second, although the Defendants point to a number of cases in which

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<sup>3</sup>The government also cites *Saraco v. Hallett*, 831 F. Supp. 1154 (E.D. Pa.1993), and  
*Davila v. Weinberger*, 600 F.Supp. 599 (D. D.C. 1985). Those cases are distinguishable,  
however, because they were not Rule 23 class actions but rather actions under a collective  
right of action in the Fair Labor Standards Act. 29 U.S.C. 216(b). Unlike class actions, such  
cases are "opt-in" cases in which only plaintiffs who sign consent forms expressly opting  
into the case become party plaintiffs, arguably rendering all plaintiffs "named" plaintiffs.  
*Davila*, 600 F. Supp. at 603.

1 permanent residents have been found to lack residency for venue purposes, none of those  
2 cases involve individuals residing lawfully in the United States under TPS. *See Zhang v.*  
3 *Chertoff*, 2008 WL 5271995 (N.D. Cal. Dec. 15 2008); *Li v. Chertoff*, 2008 WL 4962992  
4 (N.D. Cal. Nov. 19, 2008); *Ou v. Chertoff*, 2008 WL 686869 (N.D. Cal. March 12, 2008).  
5 Defendants offer no controlling Ninth Circuit case that clearly demonstrates to this Court the  
6 impropriety of venue in this matter. Furthermore, Plaintiffs persuasively argue that given  
7 that the TPS statute refers to aliens who have “continuously resided in the United States,” 8  
8 U.S.C. § 1254a(c)(1)(A)(ii), it would be absurd to deny aliens venue on the basis of residence  
9 in a case interpreting a statute that requires their continuous residence; Defendants make no  
10 effort to counter this argument in their reply. Accordingly, for the foregoing reasons, the  
11 Court declines to find venue improper.

### 12 13 **CONCLUSION**

14 For the foregoing reasons, Defendants’ Motion to Dismiss is DENIED in its entirety.  
15 The Court finds that it has jurisdiction pursuant to the Little Tucker Act, and that venue is  
16 proper in this matter. The Court holds that the Little Tucker Act, and all attendant  
17 consequences, shall apply in this matter.

18  
19 **IT IS SO ORDERED.**

20  
21 Dated: May 1, 2009



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23 THELTON E. HENDERSON, JUDGE  
24 UNITED STATES DISTRICT COURT  
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