IN THE SUPREME COURT OF FLORIDA

Case No. 75,553

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Petitioner

v.

LUISA SOLIS,

Respondent.

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

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REHABILITATIVE SERVICES,

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QUESTION PRESENTED

Whether an alien who has applied for asylum in the United States but whose application is still pending is per se to be deemed "permanently residing in the United States under color of law" and thus entitled to Aid to Families with Dependent Children (AFDC) benefits.

INTEREST OF THE UNITED STATES AS AMICUS CURIAE

This case presents an issue that is of great concern to the United States, namely the degree to which aliens whose applications for asylum in the United States remain pending may

obtain Aid to Families with Dependent Children (AFDC) benefits. In order to qualify for federal financial participation in a state's AFDC program, the state's plan must provide that an alien is eligible for benefits only if the alien is a lawful permanent resident or is "permanently residing in the United States under color of law" ("PRUCOL"). 42 U.S.C. 602(a)(33). Other federal-state joint benefits programs, such as Medicaid, also use this PRUCOL test. This Court's interpretation of the PRUCOL test, as it was implemented by Florida, could thus have a potentially large financial impact on the United States, which shares in the expense of these benefits by reimbursing the states. 42 U.S.C. 603(a). Moreover, since the PRUCOL test is mandated by federal law, the United States has a significant interest in assuring that that law remains uniform. The Court's resolution of the issue could also have an impact on immigration, both by affecting the Immigration and Naturalization Service's decisionmaking process on pending asylum applications and by creating or eliminating yet another incentive for illegal immigration. If this Court upholds the district court of appeals and adopts a broad rule for PRUCOL, particularly a blanket rule like the court below did, difficult precedent will be established for a state with a large number of aliens, many of whom have pending asylum applications. Our participation as amicus will thus be useful to this Court, by allowing us to inform the Court of our views on this important issue.

STATEMENT

1. Statutory Scheme. The AFDC program is a cooperative federal/state effort authorized under Title IV-A of the Social Security Act, 42 U.S.C. 601 et seq., to enable states to furnish financial assistance to certain needy families with dependent children. In order to participate in the AFDC program, a state must submit a plan for administering the program that meets the requirements of Title IV-A and the regulations promulgated thereunder. Once the Secretary approves the plan, the state becomes eligible for federal financial participation for expenses the state incurs according to its plan, including a significant portion of the costs of the benefits themselves. 42 U.S.C. 602(b), 603(a). The state must designate a single agency to be responsible for the administration of the plan, including the processing of individual applications for AFDC. 42 U.S.C. 602(a)(3), (10). For Florida, the state agency responsible for administering the AFDC plan is the Department of Health and Rehabilitative Services.

Under the AFDC program, benefits are generally provided to needy children when at least one parent is absent, is physically or mentally incapacitated, or in the state's discretion, when one parent is unemployed. To qualify as a dependent child, a caretaker relative, or any other person whose needs are taken into account for determining eligibility, federal law requires that each state AFDC plan must provide that:

> such individual must be either (A) a citizen or (B) an alien lawfully admitted for

> permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 1157(c) of Title 8 (or of section 1153(a)(7) of Title 8 prior to April 1, 1980), or as a result of the application of the provisions of section 1158 or 1182(d)(5) of Title 8);

42 U.S.C. 602(a)(33) (emphasis added). In compliance with this requirement, Florida has adopted a provision for its AFDC program that tracks the above language of §602(a)(33) (although omitting the parenthetical list of immigration statutes "includ[ed]" within the provision). §409.026(1), Florida Statutes.

The federal statute thus permits benefits for any alien who is either lawfully admitted for permanent residence or who meets the general test of "permanently residing in the United States under color of law" or "PRUCOL". The statute does not define PRUCOL, but it does expressly provide that the term "includ[es] any alien who is lawfully present in the United States" under several listed immigration statutes. These expressly listed categories of aliens thus clearly qualify for AFDC benefits, but other persons can still qualify for benefits by meeting the general PRUCOL standard. The first of the expressly mentioned categories is for aliens who are "lawfully admitted for permanent residence," which is defined in the Immigration and Nationality Act as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). Principally, these are aliens

who have been granted immigrant visas, which are subject to numerical and other restrictions. See 8 U.S.C. 1153.[1]

Three of the four listed provisions that are "includ[ed]" in the term PRUCOL deal with refugees (or the substantial equivalent of refugees prior to 1980). Refugee is defined in the Refugee Act of 1980 as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside of any country in which such person habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of <u>persecution or a well-founded fear of persecution</u> on account of race, religion, nationality, membership in a particular social group, or political opinion * * *.

8 U.S.C. 1101(a)(42)(A) (emphasis added). An alien who meets this definition can be given lawful status in the U.S. in two ways, each of which is covered by a statutory provision listed in the PRUCOL statute, §602(a)(33). First, the Attorney General may in his discretion admit an refugee who is outside of the United States on a case-by-case basis if the alien "is determined to be of special humanitarian concern to the United States;" these admissions are subject to annual numerical limits. 8 U.S.C.

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[1] Other classes of aliens may become lawfully admitted for permanent residence through other routes. See 8 U.S.C. 1159(b) (refugees may apply for immigrant status after one year waiting period); 8 U.S.C. 1259 (aliens entering prior to January 1, 1972, with continuous residence in U.S. since that date).

1157(c).[2] A different provision, 8 U.S.C. 1158, allows the Attorney General to grant asylum to a refugee who is already physically present in the United States (such as by entering the United States without inspection, or under a temporary visitor's visa, which he or she may have then violated by remaining after its expiration), or to an alien who has appeared at the border and requested asylum. The third provision mentioned in §602(a)(33) as being included in PRUCOL is 8 U.S.C. 1153(a)(7) as it was in effect prior to the enactment of the Refugee Act in 1980. Under that former provision, the Attorney General could allow persons outside the U.S. to enter the country as conditional entrants, again subject to a numerical limitation, if they were fleeing Communist or Middle Eastern countries due to persecution or fear of persecution on account of race, religion or political opinion, or if they were uprooted by a catastrophic natural calamity.

The fourth provision specifically mentioned in §602(a)(33) as included in PRUCOL is 8 U.S.C. 1182(d)(5), under which "[t]he Attorney General may * * * in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission * * *." Under the 1980 Refugee Act, the Attorney General may grant this

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[2] The President, under authority delegated in 8 U.S.C. 1157(a) and (b), determined to set the ceiling for fiscal year 1990 at 150,000 such refugees. The determination is reproduced in the U.S.C.A. as a note to §1157.

temporary parole status to a refugee only for "compelling reasons in the public interest * * *." 8 U.S.C. 1182(d)(5)(B).

With these four specifically mentioned provisions as a guideline, the U.S. Secretary of Health and Human Services (HHS) has developed a broader interpretation of PRUCOL for purposes of the AFDC program, and has issued instructions to the state AFDC agencies embodying that interpretation.[3] Under these instructions, an alien is PRUCOL if there has been an official determination by the INS that the alien is legitimately present in this country and a determination that the alien is legitimately present for an indefinite period of time (App. 1).

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[3] Three HHS memoranda to the state agencies on PRUCOL are reproduced in the appendix to the state's brief in this Court (App. 1-4, 5-7, 8-9). Because these memoranda have been published by HHS for the guidance of the state agencies, and because they state HHS's currently applicable general policy, this Court needs to consider their contents in order to understand fully the issues presented in this case. On the eve of our filing this brief, we received respondent's motion to strike these portions of the appendix on the ground that these memoranda were not in the record below. The motion to strike is without merit. Under the Florida Evidence Code, "[a] court may take judicial notice of * * * (5) Official actions of the legislative, executive, and judicial departments of the United States * * *." §90.202, Fla.Stat. Moreover, appellate courts are permitted "to judicially notice matters when a lower court has not done so." Law Revision Council Note to §90.207, Fla.Stat. (1976), citing Storch v. Allgood, 184 So.2d 170 (Fla. 1966); Peterson v. Paoli, 44 So.2d 639 (Fla. 1950). Cf. Aurora Enterprises, Inc. v. State, 395 So.2d 604, 606 n.7 (3d DCA 1981). Respondent suggests no reason why this Court should not take judicial notice of these memoranda, other than vague and generalized notions of their need to search for contrary materials to place into evidence (Motion at 3). But respondent makes no attempt to present or describe any such evidence, despite having almost a month since the state filed its brief in which to locate such evidence. At any rate, there is not the slightest reason to doubt the authenticity of these memoranda or that they state HHS's current policy.

HHS's instructions include illustrative categories of aliens that the state may determine are PRUCOL (App. 2-3). The categories are provided only "as a guide and should not be construed as the sole evidence for determining eligibility under PRUCOL" (App. 4). Among the categories listed in the guidelines but not specifically mentioned in §602(a)(33) are certain "Cuban/Haitian entrants;" aliens under an Order of Supervision whose deportations are not being enforced due to factors such as humanitarian concerns; aliens granted an indefinite stay of deportation, also for humanitarian reasons; and aliens granted an indefinite voluntary departure (or a voluntary departure with a fixed date, if the date is one year or more) (App. 2-3).

In addition, the memorandum includes the special category of aliens who were granted temporary resident status under §§201 or 302 of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1255a, 1160. These are the aliens who entered the U.S. prior to January 1, 1982 and who were made eligible for the amnesty program by IRCA, as well as the special agricultural workers temporarily allowed into the U.S. under the same Act. IRCA provides that an alien who is granted lawful temporary resident alien status under either of these provisions of IRCA will not be eligible for AFDC benefits (or for a number of other benefits, including most services under Medicaid) for five years from the date he or she is granted the new status. 8 U.S.C. 1160(f), 1255a(h). HHS's 1988 instructions to the state agencies note this five-year limit (App. 3). See also 45 C.F.R.

233.50(c). The 1988 instructions exclude from PRUCOL "[a]liens without a current alien status who are initially applying for a status, or aliens applying for an adjustment of status and currently in possession of a non-PRUCOL status" (App. 3).

State agencies that administer one of the joint federal-state benefits programs determine whether an alien fits within these categories by requesting the alien to provide any relevant documentation of his or her status. The state then must verify the alien's status with the INS under the Systematic Alien Verification for Entitlements program (SAVE), which was initiated by INS and is now mandated by statute, 42 U.S.C. 1320b-7(d). Usually, this simply requires INS to verify the authenticity of the alien's claim that he or she has been granted one of the statuses that are clearly PRUCOL (such as a grant of asylum). The INS procedure also provides, however, that even if the alien has not been granted one of the listed immigration statuses, the state can still request a determination from INS as to whether the alien might fit into a broader category. The state accomplishes this by including certain detailed information about the alien with its formal request for INS to make a SAVE determination. The INS will then review all of the information available in each case and make a determination for that particular alien as to whether "INS actively pursues" or "is not actively pursuing the expulsion of an alien in this class/category" (see, for example, respondent's SAVE form at App. 11, questions 17 and 18). If INS determines that it "is not

actively pursuing the expulsion of an alien in this class/category," HHS instructs the state agencies that this determination "satisfies the requirement for individualized official determination by INS" for purposes of the state's decision on whether the alien is PRUCOL (App. 7).

HHS issued new instructions to state agencies in 1989 that briefly set forth substantive criteria for meeting the test of whether the INS actively pursues the expulsion of an alien in the applicant's category, as guidance to the state agencies on what kinds of information to provide to the INS (App. 5-7). A March 30, 1989 INS memorandum that is cited in the HHS memorandum gives more detail on those criteria.[4] They include, most importantly, the "likelihood that the alien will be able to qualify for some form of relief which would prevent or indefinitely delay deportation" (App. 6). This means that, for someone whose application for asylum (or some other PRUCOL status) remains pending, INS will attempt to predict the likelihood of success of that application. The memoranda also call on INS to examine other factors in each case that might eventually result in granting or denying a status to that person that is clearly PRUCOL, such as age or ill health, or prudential factors that would affect INS's discretionary decision to press a case (for example if the alien is a high priority target for deportation,

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[4] For the Court's information and convenience, we reproduce this INS memorandum in the addendum to this brief. This Court should take judicial notice of this memorandum for the same reasons we set forth supra (at page 7, n.3) to support its consideration of the HHS memoranda in Florida's appendix.

such as a drug dealer or smuggler of illegal aliens) or not to press a case (for example, if there are unusually sympathetic facts that could create bad law if challenged in court) (App. 6; INS Memo. at 2-3, Add. 2a-3a). HHS has determined that because INS as part of this process makes "a case specific evaluation based on research of applicable records and [which] often involves a determination of alien status," then INS's response on the SAVE program form that it is not actively pursuing expulsion of that class of aliens "constitutes evidence of an official determination by INS that the alien is legitimately present in this country for an indefinite period of time" (App. 8). The alien would thus be PRUCOL, HHS explained (ibid.).[5]

2. **Facts and Proceedings Below.** Luisa Solis and her five minor children entered the United States on June 27, 1985 from their native Nicaragua. Their I-94 identification cards from the INS indicate that they were placed "under docket control." In September of 1985, they applied for asylum under 8 U.S.C. 1158. Shortly thereafter, the INS granted work authorization to Solis and her children. Hearing Officer Decision at 2, App. 18.

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[5] While these memoranda post-date the administrative decision below, they are still relevant to this case, contrary to respondent's objection (Motion to Strike at 5 n.6). The memoranda are interpretive, not prescriptive in nature. They should thus apply retroactively to any case still pending, such as respondent's. At any rate, this Court will be answering an important question as certified by the district court of appeals, and thereby establishing a state-wide precedent. It thus needs to make its decision with full understanding of the current policy and practice, no matter what its applicability may be to the specific individual before the Court.

Solis's asylum application remains pending before the INS.[6] In 1988, Solis applied for AFDC benefits from the state of Florida. Solis contended before the Florida Hearings Officer that she fit within the definition of PRUCOL on the basis of her pending application for asylum. The Hearing Officer denied benefits under a Florida regulation expressly providing that a person whose application for asylum has not yet been granted is not PRUCOL (App. 18). On appeal from this decision, the District Court of Appeal of Florida, Third District, reversed, holding that under prior precedent of that court, applicants for asylum are PRUCOL because the INS allows them to remain in the U.S., and even gives them work permits, while their applications remain pending. Solis v. Department of Health and Rehabilitative Services, 546 So.2d 1073 (Fla. 3d DCA 1989) (App. 20). The court, however, certified the question to the Florida Supreme Court (id. at 1075, App. 22).

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[6] Respondent has filed, as an addendum to her motion to strike portions of Florida's brief, a copy of an application filed by Joel Martinez to adjust Ms. Solis's status to lawful permanent resident, as the wife of Mr. Martinez, a lawful permanent resident alien from Cuba. INS informs us that this application was filed on March 20, 1990. Because of Ms. Solis's marriage to Mr. Martinez on December 17, 1988, as revealed in the application, she may have become disqualified for AFDC benefits as of that date. At any rate, she concedes that she became ineligible for benefits as of December, 1989 (Motion to Strike at 4 n.3). This case may not be moot, however, since Ms. Solis is requesting back benefits from February of 1988. Similarly, if Ms. Solis's applications either for asylum or adjustment to lawful permanent resident status are eventually granted or denied, the back benefit request would appear to prevent this case from becoming moot.

In March of 1990, Florida sent a SAVE program request to INS, asking for a determination of whether Solis is PRUCOL (App. 10-11). INS responded that it "actively pursues the expulsion of an alien in this class/category" (App. 11).[7]

SUMMARY OF ARGUMENT

The U.S. Department of Health and Human Services, in conjunction with the Immigration and Naturalization Service, has determined that an alien is not "permanently residing in the United States under color of law" (PRUCOL) unless the INS has made some kind of official determination that the alien is legitimately present in the United States and will remain so present for an indefinite period of time. This Court must defer to that interpretation. First of all, although the applicant for

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[7] Respondent also seeks to strike the SAVE form dealing with her case, known as a G-845 form. This form, as submitted by HRS to the INS and completed by INS, is also subject to judicial notice by this Court as an "[o]fficial action[] of [an] * * * executive * * * department of the United States," §90.202(5), Fla.Stat., and can be considered for the first time on appeal, for the reasons that we explained supra (at page 7 n.3). Respondent argues that the form is irrelevant, incorrectly prepared and not probative because it does not reflect her husband's application to adjust her status (see page 11 n.5, supra). But she did not file the application for adjustment until March 20, 1990. Because this was virtually simultaneous with the SAVE request, HRS cannot be faulted for not being aware of this development, nor can INS be faulted for apparently not taking it into account. At any rate, since she concedes that she became ineligible for AFDC benefits as of December 1989 (Motion to Strike at 4 n.3), the March 1990 application is irrelevant to whether she was PRUCOL prior to December of 1989. She also argues that the SAVE determination is not relevant because it was made after certain recent developments in Nicaragua. That effect is entirely speculative. At any rate, it would go only to the probative weight of the SAVE determination as it relates to the earlier time period, not whether INS actually made the determination. It is thus not a ground to strike or disregard the G-845 form.

AFDC benefits deals directly with the state of Florida, which administers the program, Florida's program must conform to the federal AFDC statute, which contains the PRUCOL requirement at 42 U.S.C. 602(a)(33). Thus, this case raises only a question of federal law. Moreover, a long line of decisions from the U.S. Supreme Court establish that the interpretation of a federal statute by the federal agency that is entrusted with the administration of that statute is entitled to considerable deference and should be upheld by the courts if reasonable, even if the court itself would interpret the statute differently.

HHS's interpretation more than satisfies this deferential standard. The term "permanently residing in the United States under color of law" has no precise meaning. The first half of this test, "permanently residing in the United States," as read in conjunction with the definition of "permanent" in the immigration law and with consideration of the four statutes mentioned in §602(a)(33) as being "includ[ed]" in PRUCOL, suggests that while an alien need not be in a status forever, he or she must at least be able to remain indefinitely until that status changes. An applicant for asylum, by contrast, is merely in the midst of a process that creates the possibility of some future authorization to remain here indefinitely. Similarly, while "under color of law" does not necessarily require final action by the INS, it does suggest that the INS must have taken some kind of official action. An alien who has merely filed an

application for asylum upon which the INS has yet to act does not fit the test.

Under new procedures, an alien can still be found to be PRUCOL while his or her application for asylum remains pending. The state AFDC agencies are required to verify the immigration status of an alien seeking benefits, and as part of that process will submit detailed information about the alien to the INS along with a request for a PRUCOL determination. INS will then attempt to predict the likelihood that the alien will eventually be granted the asylum he or she has requested, or some other status that is also PRUCOL. There is thus no need to adopt a blanket rule, like the court below adopted, under which any applicant is PRUCOL. Nor are applicants for asylum PRUCOL merely because INS has a policy of not seeking to deport them while their applications remain pending. That policy avoids the unduly harsh results if INS acted prematurely to deport someone with a pending claim for asylum. INS thus merely tolerates their temporary presence; it does not affirmatively legitimate it.

Any rule that automatically recognized an applicant for asylum as PRUCOL would disrupt Congress's carefully designed immigration policy by adding a powerful incentive for additional illegal immigration. Such a result would be particularly ironic in the wake of the 1986 Immigration Reform and Control Act, which attempted to discourage illegal immigration. It would also create a glaring anomaly by treating new illegal immigrants who have merely filed an application for asylum better than the pre-

1982 entrants, who were permitted to obtain lawful temporary resident status on condition that they may not obtain AFDC benefits (and other types of benefits) for five years after that status is granted.

ARGUMENT

AN ALIEN WHOSE APPLICATION FOR ASYLUM IS STILL PENDING IS NOT PER SE PRUCOL FOR PURPOSES OF AFDC BUT RATHER WILL BE FOUND TO BE PRUCOL ONLY ON A CASE-BY-CASE BASIS

The federal government, in cooperation with the states, has provided for a program of assistance to needy families. Congress decided that this AFDC program will allow the award of benefits not only to U.S. citizens, but also to at least some aliens. But Congress did not allow benefits for all aliens physically present in the United States. Rather, it limited the right to benefits to those aliens who have some form of a legal claim of right to remain in the United States. The decision of the district court of appeals, if upheld by this Court, would all but eliminate this limitation, which may force Florida, with the reimbursement of the United States, to provide AFDC benefits to a large class of aliens whose only claim of a right to remain in the United States is that, after illegally entering or remaining in the country, they have asked for, but not yet received, asylum. Under recently adopted procedures of the Department of Health and Human Services and of the Immigration and Naturalization Service, such applicants may still receive AFDC (and other types of benefits), after a case-by-case preliminary review of the facts of each case. But when INS has determined after that preliminary review

that the alien is likely not to be allowed to remain in the U.S., the alien should not be required to be awarded benefits.

a. This Court Must Defer To The Federal Agencies' Interpretation Of PRUCOL.

1. While this case arises through the state court system, pursuant to Solis's request for judicial review of the action of the Florida Department of Health and Rehabilitative Services to deny her application for AFDC benefits, it presents solely an issue of federal law, not state law. Under the AFDC program, the states have only a limited role. Individuals apply to the state for their benefits, and the state makes the determination of their eligibility. Moreover, the states have "broad discretion in determining both the standard of need and the level of benefits." Shea v. Vialpando, 416 U.S. 251, 253 (1974).[8] But the federal statute controls the specific criteria for eligibility under the program. "[T]he state must administer its assistance program pursuant to a state plan that conforms to applicable federal statutes and regulations." Heckler v. Turner, 470 U.S. 184, 189 (1985). See also Bowen v. Gilliard, 483 U.S. 587, 589 (1987); Townsend v. Swank, 404 U.S. 282, 286 (1971); King v. Smith, 392 U.S. 309 (1968).

One of those federally-imposed requirements is the provision of the federal AFDC statute that requires that an alien shall

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[8] The "standard of need" that a state is empowered to set "is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." Shea, 416 U.S. at 253. Eligibility is determined by comparing the amount of the claimant's income to this standard of need figure. Ibid.

receive AFDC benefits if he or she is a lawful permanent resident or is "permanently residing in the United States under color of law," 42 U.S.C. 602(a)(33). As a result, any alien who meets this test must be included in the state plan, and any alien who does not meet the test does not qualify for benefits under the AFDC program. It is not simply coincidence that the state statute, §409.026(1), Fla.Stat., tracks the language of the federal statute's PRUCOL provision. Rather, it does so because Florida's rule must conform to the federal rule to qualify under the AFDC program.[9] Thus, this Court is not free to interpret the Florida statute in any way contrary to federal law, nor may it otherwise adopt any other rules of law to govern this case that are peculiar to Florida. It must apply federal law.

2. The United States Supreme Court has repeatedly held that a federal agency's interpretation of a complex statute that Congress has entrusted it to administer is entitled to considerable deference. In Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), a unanimous Supreme Court explained that the first inquiry is "whether Congress has directly spoken to the precise question at issue." Id. at 842. Where Congress has not spoken to the "precise

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[9] Nor can it be said that Florida intended to provide welfare benefits, solely at its own expense, to a somewhat larger class of persons than are covered by the federal AFDC program. Such a notion is belied by the fact that Florida used the same language in its statute as the federal PRUCOL provision, as well as by the absence of any other evidence suggesting any such intent. Nor would there appear to be any mechanism for isolating these extra persons to avoid having them fall within the federally-subsidized general AFDC program.

question," or where its intent is unclear, the Supreme Court held, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Id. at 843 n.11, citing FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Train v. Natural Resources Defense Council, 421 U.S. 60, 75 (1975); Udall v. Tallman, 380 U.S. 1, 16 (1965); Unemployment Compensation Comm'n. v. Aragon, 329 U.S. 143, 153 (1946). The Supreme Court "ha[s] long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Id. at 844, citing, inter alia, Blum v. Bacon, 457 U.S. 132, 141 (1982); Investment Company Institute v. Camp, 401 U.S. 617, 626-627 (1971); Unemployment Compensation Comm'n. v. Aragon, supra. To uphold the federal government's interpretation of the PRUCOL provision, this Court need only determine that its interpretation of the statute is "sufficiently reasonable" to be acceptable. FEC v. Democratic Senatorial Campaign Comm., 454 U.S. at 39.

b. The Federal Agencies' Construction of PRUCOL is Proper.

The interpretation of the PRUCOL provision adopted by the U.S. Department of HHS and by the INS more than satisfies the

highly deferential standard for judicial review of an agency's interpretation of its statute that we have just set forth. Congress has not "directly spoken to the precise question," Chevron, 467 U.S. at 842. Rather, the term used in the statute, "permanently residing in the United States under color of law," employs broad language without a precise meaning. HHS has long interpreted this broad term as requiring that an alien qualifies for AFDC benefits only by obtaining an official determination from the INS that the alien is legitimately present in the United States, and that he or she is legitimately present for an indefinite period of time. See Sudomir v. McMahon, 767 F.2d 1456, 1459-60 (9th Cir. 1985). This is a reasonable interpretation of PRUCOL, and must be upheld. Under that interpretation, Solis is not PRUCOL. Her application for asylum does not automatically make her fit within PRUCOL, because she has not obtained a final determination from INS granting the application. Moreover, when INS was asked for a written opinion on her likelihood of eventual deportation, INS replied that it actively pursues expulsion of persons in her situation (App. 10-11). Thus, INS has determined that she is not legitimately present in the U.S. for an indefinite period of time. She must therefore be denied AFDC benefits.

1. The federal courts have long agreed that "permanently" cannot be read literally to mean that the alien's status is forever settled. The Second Circuit in Holley v. Lavine, 553

F.2d 845, 849 (2d Cir. 1977), concluded that the term "permanently residing" in the AFDC PRUCOL provision

> may properly be construed with an eye to 8 U.S.C. § 1101(a)(31) which provides that in the immigration law "The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual in accordance with law."

Later federal courts of appeals interpreting PRUCOL have agreed that they should look to the definition of permanent in 8 U.S.C. 1101(a)(31). See Berger v. Heckler, 771 F.2d 1556, 1571-72 (2d Cir. 1985); Sudomir, 767 F.2d at 1461-62. Holley went on to look at the statutes that Congress specifically mentioned in §602(a)(33) as being "includ[ed]" in PRUCOL. At the time, the statute mentioned only two of the four provisions currently included in the statue. Those two, temporary parole for emergent reasons under 8 U.S.C. 1182(d)(5) and conditional entry under 8 U.S.C. 1153(a)(7) (see pages 6-7, supra), Holley concluded, are "instances where the alien is permitted to stay in the United States not necessarily forever, but only so long as he is in a particular condition." 553 F.2d at 851. Amendments to the PRUCOL provision since Holley was decided add two additional immigration statutes that are "includ[ed]" in PRUCOL (see pages 5-6, supra). These provisions both deal with refugees, i.e., persons who have left their country of nationality or habitual residence due to "persecution or a well-founded fear of persecution," 8 U.S.C. 1101(a)(42)(A). The two provisions allow

the Attorney General to admit a refugee to the U.S., 8 U.S.C. 1157(c), or to grant asylum to a refugee already present in the U.S. or appearing at the border, 8 U.S.C. 1158(a). These statuses likewise do not last forever; the Attorney General may terminate asylum if circumstances change in the country from which the refugee fled. 8 U.S.C. 1158(b).

Even when all of these provisions of the immigration law are read in conjunction with the PRUCOL provision of the AFDC law, it is not possible to draw a bright-line test directly from the statute that will clearly answer whether and under what circumstances an applicant for asylum whose application remains pending is "permanently residing in the United States." Nevertheless, it is possible to draw at least some distinctions among types of aliens from this language, and HHS and the INS have drawn the proper distinctions. The Ninth Circuit agreed with Holley that while on the one hand "'permanently' does not mean 'forever,'" see Holley, 553 F.2d at 851, on the other hand, "it does not embrace transitory, inchoate, or temporary relationships." Sudomir, 767 F.2d at 1462. It thus held that HHS was reasonable when it determined that an alien whose application for asylum remains pending does not thereby automatically qualify as "permanently residing" in the U.S. The court concluded that "[a]liens who have official authorization to remain indefinitely until their status changes reside permanently; asylum applicants who merely participate in a process that gives rise to the possibility of such an authoriza-

tion reside temporarily." Ibid. This distinction is a reasonable interpretation of the PRUCOL requirement, and this Court should thus defer to it.

2. A similar process, with a similar result, applies to interpreting the second part of the PRUCOL test: "under color of law." Just as "permanently residing" does not mean forever, "under color of law" does not mean that the alien actually must fit within one of the categories established by the immigration laws, only that the INS, in applying these categories, has determined that the alien may remain in the United States "by virtue of [its] power, as well as what [it] does by virtue of right." Holley, 553 F.2d at 849. This, too, is confirmed by examining the statutes that Congress listed as included in PRUCOL, each of which embraces varying degrees of discretion on the part of the Attorney General. But, again, despite this degree of flexibility, the term "under color of law" still has some content. HHS interprets it to require at least some official act by the INS that recognizes the alien's right to reside permanently in the United States. That requirement is a reasonable interpretation of the "under color of law" requirement and this Court should likewise defer to it.

Under that standard, there is no question that when the INS determines that an alien should be granted one of the immigration statuses that allow him or her to remain in the United States indefinitely, that final determination makes the alien's residence in the U.S. "under color of law." But an alien who

entered this country without following established procedures (Solis concedes that she entered the U.S. from Nicaragua without inspection) and who then merely files an application for asylum does not thereby automatically reside in the U.S. under color of law while that application remains pending. The INS has not officially acted to recognize such an alien's right to remain here. The alien is thus not PRUCOL just because she filed the application.

3. Aliens need not await final action from INS on their applications for asylum or other immigration statuses before they can become PRUCOL and thus qualify for AFDC benefits. Some aliens can be found to be PRUCOL even if their applications remain pending. Under recently adopted procedures, aliens now have a new route for obtaining an official determination from the INS on their immigration status prior to that final action. As we explained earlier (see pages 8-10, supra), state agencies that administer AFDC programs must verify the status of an alien who requests benefits. If INS has finally determined to grant to the alien one of the recognized statuses such as asylum, it will immediate confirm this and the alien will be PRUCOL. But if it has not yet acted, such as when an alien's application for asylum remains pending, the state needs to request a more searching inquiry by INS under the "SAVE" program. The state will assemble as much relevant information on the alien as it can and submit it to INS with a request for a PRUCOL determination. INS will evaluate this information and reach a preliminary conclusion as

to the likelihood that it will eventually seek to deport that particular alien. This process will include evaluation of the "likelihood that the alien will be able to qualify for some form of relief which would prevent or indefinitely delay deportation" as well as consideration of prudential and discretionary factors that might likewise lead INS to decide to delay deportation indefinitely (App. 6; see also Add., infra, at 2a-3a). INS then will indicate whether or not it actively seeks to exclude persons in the alien's category. If an applicant for asylum has made out a strong case for the eventual granting of that application, or if he or she presents a situation that is likely to lead to the granting of some other, less-favored status which is nevertheless also PRUCOL, then INS will give a favorable response and HHS will then consider the alien to be PRUCOL (see App. 5-7, 8-9).

This new procedure gives an alien the chance to be found PRUCOL even while his or her final status remains uncertain. Because it was not available at the time that Sudomir was decided, an applicant for asylum at that time could only obtain "an official determination by the INS that [the] alien is legitimately present in the country * * * for an indefinite period of time," as HHS requires, see 767 F.2d at 1459-60, by waiting for INS's final action. Now, HHS agrees, INS's preliminary determination under the SAVE program is sufficient to meet the PRUCOL standard.

The new procedure is consistent with, and indeed is in response to, the Second Circuit's decision in Berger. That

decision held that a large number of immigration categories qualify as PRUCOL, and it listed those categories. See 771 F.2d at 1576-77 n.33. HHS has instructed the states that a very similar list of immigration categories qualifies as PRUCOL (see App. 2-3). Significantly, Berger does not require that a mere applicant for asylum be automatically considered PRUCOL. It rejected the government's criticism that the listed categories include mere applicants by noting that those categories are "limited to those aliens 'whose departure the INS does not contemplate enforcing.'" 771 F.2d at 1577 n.34 (emphasis in original). The new SAVE program requires that INS make a judgment on whether it contemplates enforcing the departure of the alien, after a case-by-case evaluation of the facts (see App. 11). INS did so in Ms. Solis's case and determined that it does contemplate expelling persons in her situation.

4. Because procedures now exist that can allow some applicants for asylum to be found to be PRUCOL, based on a case-by-case review of the likelihood of their eventual deportation, there is no need for the broad-brush per se rule adopted by the district court of appeals, under which an applicant is always PRUCOL, no matter how unlikely he or she is to succeed in the application for asylum. The court below, following its earlier decision in Alfred v. Florida Department of Labor and Employment Security, 487 So.2d 355 (3d DCA 1986), concluded that an applicant for asylum is automatically PRUCOL and will remain PRUCOL, "until a final determination of deportability is made

following a hearing * * *." Solis, 546 So.2d at 1074 n.6, quoting Alfred, 487 So.2d at 357 (App. 21). Both decisions also find it significant that Solis and the aliens in Alfred, while potentially deportable in the future, "have, nevertheless, been given alien identification cards and authorizations to work, by or with the approval of INS * * *." Solis, 546 So.2d at 1074-75 n.6, quoting Alfred, 487 So.2d at 358-59 (App. 20-21). This turns the PRUCOL standard on its head. It would essentially exclude from PRUCOL only those aliens who have not come forward to the INS, and those who are awaiting execution of a deportation order. Virtually all others would be entitled to AFDC benefits and other valuable benefits. The failure of INS to actively seek to deport someone whose asylum application is pending, and its grant of a work permit while the application is in process, are not enough to make an individual PRUCOL.

INS delays seeking deportation while an asylum application is pending[10] because to do otherwise would be unduly harsh and would interfere with the ability of the INS to handle such applications in an orderly and careful manner. The United States would not want to deport someone, particularly to a country where

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[10] Solis filed in the record below an excerpt from a deposition given by an INS official in the Liberal case, in which he agreed with the proposition, as stated by the alien's counsel, that "[w]hile a person's asylum application is pending and has not yet been decided, that person is allowed to remain in the United States" (Deposition of Virgil Salois, at 103). The Ninth Circuit in Sudomir also noted that the applicants for asylum in that case "have been informed that they may remain in the United States until a final decision is reached or until the INS decides otherwise." 767 F.2d at 1461.

the alien alleges that he or she will suffer from persecution, until the INS has had a chance to fully evaluate the claim of persecution. Granting a work permit while the asylum application is pending, see 8 C.F.R. 274a.12(c)(8), similarly avoids a harsh result by giving the alien some means of support while awaiting the decision. Neither of these actions mean that such aliens are "permanently residing in the United States under color of law." "Their presence is tolerated during the period necessary to process their applications; it has not been legitimated by any affirmative act." Sudomir, 767 F.2d at 1462.

5. Any blanket rule that gives automatic PRUCOL status, and therefore automatic AFDC benefits, to anyone who files an application for asylum, would have a potentially destructive effect on our efforts to control illegal immigration. Congress, in the Immigration Reform and Control Act of 1986 (IRCA), adopted a number of measures, including sanctions for employers who hire illegal aliens, in order to "discourage illegal immigration into the United States and to make it difficult for undocumented aliens to remain in the country." Ayuda v. Thornburgh, 880 F.2d 1325, 1326 (D.C. Cir. 1989). The ironic effect of a rule automatically giving AFDC benefits to anyone who applies for asylum could be to encourage many aliens to illegally enter the U.S. and file an asylum application in order to obtain those valuable benefits, even though they are aware that their claim for asylum is weak and will likely be denied. INS cannot rush its evaluation of these asylum applications to minimize this

harmful effect. Rather, it must carefully consider each one, since many of them turn on individualized fact patterns and difficult political judgments. An automatic right to AFDC benefits, by encouraging many more asylum applications, can only slow that process further. AFDC benefits for asylum applicants should thus be limited to those who INS determines through the SAVE program are likely to succeed in obtaining asylum (or another PRUCOL status).

Moreover, allowing automatic AFDC benefits for all applicants for asylum would create a glaring anomaly. The IRCA creates a new immigration category, lawful temporary resident aliens, which applies to certain persons who entered the U.S. prior to January 1, 1982 and otherwise meet the criteria for legalization (the so-called amnesty program), as well as to certain temporary agricultural workers. See 8 U.S.C. 1160, 1255a. Out of concern for the potentially high cost of providing these persons with AFDC and other benefits, Congress expressly provided that they could not receive such benefits (except for certain limited Medicaid benefits) for five years after obtaining temporary lawful resident status. See 8 U.S.C. 1160(f), 1255a(h). Yet the blanket rule of the court below would treat more favorably than these aliens anyone who merely files an application for asylum, no matter how unlikely it will be that the application will be granted. That would upset the careful judgment made by Congress as part of its comprehensive immigration reform. Such a result should not be permitted.

CONCLUSION

For the reasons stated above, this Court should hold in answer to the certified question that an alien with a pending application for asylum is not per se entitled to AFDC benefits as one "permanently residing in the United States under color of law." This Court should thus quash the decision of the district court of appeals and reinstate the administrative final order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 1990, I served the foregoing brief upon counsel of record by causing copies to be mailed, postage prepaid to:

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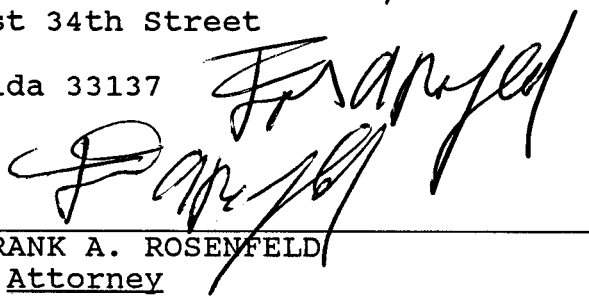

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