Tax-Increment Financing: Urban Renewal of the 1990s
Dusting Off the Declaratory Judgment Act: A Broad Remedy for Classwide Violations of Federal Law

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For years legal services advocates representing impoverished clients harmed by government policies that violated federal law were able to enjoin those policies through federal class actions. /1/ Recently imposed statutory and regulatory restrictions, however, now prohibit legal services programs funded by the Legal Services Corporation from initiating or participating in any class action litigation even if the litigation is entirely supported by nonfederal funds. /2/

In a few states procedural mechanisms exist for obtaining broad injunctive or mandamus-type relief in state court without formally proceeding on behalf of a class. /3/ However, while state courts retain jurisdiction to adjudicate claims arising under federal law, the experience of many advocates has been unsatisfactory. /4/ Advocates find that state judges often (1) are unfamiliar with federal programs and issues; (2) accord greater deference than federal courts to the views of state and local agencies on issues of federal law; and (3) pay relatively less attention to relevant federal case law, particularly from federal courts outside the state or federal circuit where the litigation arises. /5/ Accordingly, although some state court procedures offer the opportunity to obtain relatively broad relief on federal claims, the inability to have those claims considered and resolved in a federal forum is a significant loss for poverty law advocates.

I. Introduction

The federal Declaratory Judgment Act (Act) provides a mechanism by which federal courts may enjoin ongoing violations of federal statutory or constitutional law because it enables advocates to seek broad declaratory and injunctive relief in federal court without invoking class action procedures. /6/ Pursuant to the Act, a court may render a declaration of rights that then may be used as a predicate for further relief, including an injunction. /7/ Moreover, where the challenged policies are not unlawful to plaintiff alone but to anyone to whom the policies might be applied, the court may enjoin the defendants from applying the policies to anyone, even in the absence of a class. /8/
A federal court's power to afford relief is limited generally to the parties before it and does not normally extend to others similarly situated in the absence of class certification. Some courts, however, have ruled that an injunction directed to a government official or agency who is a party defendant in the litigation is an appropriate remedy especially when it is conceded that the officials otherwise will continue to enforce the unlawful provisions against some who are not parties to the suit.\textsuperscript{9} The Act thus potentially provides a powerful equitable remedy for officially sanctioned violations of federal law, even without class action.

**II. Scope and Intent**

Enacted in 1934, the Act provides in relevant part:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such.\textsuperscript{10}

**A. History of the Act**

Significantly, section 2202 of the Act specifies that "[f]urther necessary or proper relief based upon a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."\textsuperscript{11}

One distinctive purpose of the Act was to allow prospective defendants to sue to establish their nonliability\textsuperscript{12} and to afford one threatened with liability an early adjudication without waiting until an adversary sees fit to begin an action after damage accrued.\textsuperscript{13} The declaratory form of relief created by the statute was intended to offer a milder alternative to the injunction remedy\textsuperscript{14} and to resolve pending *p114* controversies before the need for more coercive court intervention was required.\textsuperscript{15}

As a general matter, the idea that the declaratory judgment would aid citizens by eliminating intolerable uncertainties in their legal and business relations is a major theme of the legislative history of the Act.\textsuperscript{16} Given this underlying statutory intent, not surprisingly the Act from its inception has been heavily utilized by insurance companies to obtain declarations resolving disputed issues of coverage or liability before being subject to litigation initiated by their insureds.\textsuperscript{17} Inventors and manufacturers seeking declarations that their devices do not infringe existing patents have used the Act.\textsuperscript{18} The declaratory judgment also became a mechanism to test the constitutionality of state criminal statutes in federal court.\textsuperscript{19}

**B. Parameters of the Act**
The Act embraces both constitutional and prudential concern and must fulfill statutory jurisdictional prerequisites./20/

"Case or Controversy" and Jurisdictional Requirements. By the statute's own terms, a complaint seeking federal declaratory relief must present an actual controversy to meet the "case or controversy" requirement of Article III of the United States Constitution./21/ The Act was clearly not intended as a mechanism for rendering mere advisory opinions. One of the earliest cases construing the statute emphasized that the controversy must be substantial and concrete, touch the legal relations of parties having adverse interests, and be subject to specific relief through a decree of a conclusive character./22/

Whether such a substantial controversy of sufficient immediacy and reality exists in a particular case is a matter of degree and must be determined on a case-by-case basis./23/ The Supreme Court for instance recently ruled that an action seeking a declaration that a defense that the plaintiff's opponent might raise in a subsequent lawsuit was valid did not constitute a case or controversy subject to relief under the Act particularly because a declaration about the disputed issue would not resolve the entire controversy between the parties./24/

Like any federal court plaintiff, a claimant seeking relief under the Act also *p115* must meet the three requirements for "the irreducible constitutional minimum of standing."/25/ There must be an "injury in fact," an invasion of a legally protected interest that is "actual or imminent, not conjectural or hypothetical."/26/ There must be causation, that is, a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant./27/ And there must be a likelihood that the requested relief will redress the alleged injury./28/

Notably the Act does not confer an independent basis for federal jurisdiction. In enacting the legislation Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. The limited subject matters over which the federal courts have jurisdiction, therefore, were not implicitly repealed or modified./29/ Accordingly the operation of the Act often is said to be procedural only/30/ and is simply intended to place another remedial arrow in the district court's quiver./31/ Therefore any complaint seeking relief under the Act must allege an independent jurisdictional predicate (e.g., diversity of citizenship, federal question jurisdiction)./32/

Discretionary Nature of the Remedies. The Act confers on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. On its face, it allows a court to declare the rights of any interested party seeking such declaration./33/ In light of the Act's "textual commitment to discretion,"/34/ the Supreme Court emphasized that the Act gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so./35/

Although the federal courts have a "virtually unflagging obligation" to entertain and resolve disputes that fall within their jurisdiction and may abstain from exercising that jurisdiction only under "exceptional circumstances," the plain language of the Act vests
district courts with greater discretion in declaratory judgment actions than that permitted under traditional abstention doctrine. /36/ Accordingly "[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." /37/

Notwithstanding this discretion, however, as a general matter "[a] court must entertain a declaratory judgment action if it would be useful in clarifying and settling legal relations in the case, or if it would terminate the uncertainty, insecurity, and controversy that brought about the proceeding." /38/ *p116*

C. The Exercise of Discretion

Much if not most of the reported litigation under the Act involves disputes over whether the district court properly exercised its discretion in proceeding (or declining to proceed) upon a claim for relief under the Act. /39/ The federal courts are divided over whether a district court's obligation to consider the propriety of proceeding on a claim brought under the Act must be triggered affirmatively by the party seeking abstention, or whether the court should consider its exercise of discretion jurisdiction sua sponte. /40/ Once the issue has been raised, however, a district court clearly must record its reasoning for exercising jurisdiction in order to provide a meaningful basis for appellate review. /41/

A district court may not decline to entertain such an action as a matter of whim or personal disinclination. /42/ The court generally must be guided by (1) considerations of practicality and wise judicial administration; /43/ (2) the teachings and experience concerning the functions and extent of the federal judicial power; /44/ (3) traditional principles of equity, comity, and federalism, particularly as applied to pending state judicial proceedings; /45/ (4) Eleventh Amendment and other constitutional concerns; /46/ and (5) the public interest. /47/

Notwithstanding the parameters of discretion marked out by these general prudential guideposts, the vast majority of disputes over the propriety of invoking relief under the Act arise in cases where jurisdiction is founded upon diversity of citizenship, where the claims of the plaintiff arise under state law, and where parallel or related state court proceedings are pending, contemplated, or available. In such circumstances the district court's discretion is guided by the Supreme Court's 1942 decision in Brillhart v. Excess Insurance Co. of America /48/ and its considerable progeny. Brillhart was a federal diversity action in which an insurance company sought a declaration under the Act as to its state law rights under a reinsurance agreement. Its opponent subsequently initiated a related proceeding in a state court. /49/ In *p117* remanding for a determination of whether the district court should proceed on the merits or dismiss the action in favor of the state court proceeding, the Supreme Court observed:

Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided. Where a district court is presented with a claim such as was made
here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc./50/

In contrast to the situation presented in Brillhart./51/ a district court should not hesitate to entertain a declaratory judgment action brought by poverty lawyers seeking to remedy ongoing violations of federal regulatory, statutory, or constitutional law. This is because the claims at issue will arise under federal law, no parallel state court proceedings will typically exist, and the prudential/comity/efficiency concerns of Brillhart therefore will be inapplicable.

The Supreme Court recently narrowed by implication the principles set forth in Brillhart to cases "where parallel proceedings, presenting opportunity for ventilation of the same state law issues, [are] under way in state court." The Court expressly declined to delineate the outer boundaries of the district court's discretion to abstain in cases raising issues of federal law or cases without parallel state court proceedings./52/ Several federal courts have observed that, in light of its remedial purposes, the Act should be liberally construed to effectuate its statutory intent and that accordingly a court's general discretion under the Act to decline jurisdiction is "somewhat circumscribed."/53/

III. Remedies Under the Act

The Act affords advocates alternative, though not mutually exclusive, remedies

A. Declaratory Relief

The unique remedial feature of the Act is that it authorizes the courts to declare the rights and legal relations of *p118* any interested party to an actual legal controversy./54/ Such declarations have the force and effect of a final judgment/55/ and are accorded res judicata./56/ The declaratory remedy is particularly appropriate for resolution of an actual dispute about the rights and obligations of the parties in a case where the controversy may not have ripened to a point at which an affirmative remedy is needed./57/ Declaratory relief may be obtained under the Act regardless of whether other forms of relief have been sought or are available./58/

In a typical case, where a declaration of rights is sought in conjunction with a request for injunctive relief, the court has the duty to decide the appropriateness and the merits of the declaration irrespective of its conclusion as to the propriety of the issuance of an injunction./59/ The Supreme Court noted that Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction and that the express purpose of the Act was to provide a milder alternative to the injunction remedy./60/ In the Court's view, "[a]t the conclusion of a successful challenge to a state statute or local
ordinance, a district court can generally protect the interest of a federal plaintiff by entering a declaratory judgment" and thus render injunctive relief unnecessary. Accordingly a party seeking declaratory relief need not demonstrate "all of the traditional prerequisites to the issuance of an injunction," including the existence of irreparable harm and may obtain declaratory relief upon a lesser showing than that required for an injunction.

While perhaps not an ultimately coercive remedy, a declaration of rights rendered under the Act nevertheless is expected at a minimum to have a deterrent effect upon parties or officials violating (or contemplating the violation of) federal statutory or constitutional law. In fact the Supreme Court presumed that "ordinarily . . . the practical effect of [injunctive or declaratory] relief will be identical." Whether noncompliance with a declaratory judgment may be properly characterized as contempt of court, section 2202 of the Act specifically authorizes a party in whose favor a declaration has been rendered to seek further and necessary relief to aid enforcement of the judgment.

B. Injunctive Relief

Whether preliminary or permanent, the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies. Injunctions are inherently equitable and therefore discretionary remedies, and thus "a federal judge sitting as a chancellor [in equity] is not mechanically obligated to grant an injunction for every violation of the law." Whether federalism concerns might be implicated where the injunctive relief was sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments.

Notwithstanding these cautionary pronouncements, which trace their constitutional origins to the Eleventh Amendment, the injunctive sword in practice has been wielded with little hesitation by the lower federal courts to strike down continuing violations of federal constitutional and statutory law ever since Ex Parte Young was decided 90 years ago. The Supreme Court's landmark holding in Young is that "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief [against state or local officials] to prevent a continuing violation federal law." The holding gives life to the Supremacy Clause in that remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.

The Permissible Scope of Federal Injunctive Relief. As already noted, section 2202 of the Act specifically authorizes a court to grant further necessary or proper relief based upon a declaratory judgment. Such relief includes equitable or injunctive remedies, which are said to be ancillary to the enforcement of the declaratory judgment.
The potential reach of injunctive remedy ordered by a federal court is an issue that implicates the jurisdictional power of the court to bind parties and enforce its judgments. A court ordinarily does not have power to issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction. Rule 65(d) of the Federal Rules of Civil Procedure specifically defines the form and scope of injunctions and restraining orders as follows:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in actual concert with them who receive actual notice of the order by personal service or otherwise.

Disputes over the proper scope of an injunctive order typically arise in conjunction with a defendant's contention that a remedy may not inure to the benefit of persons (or a class of persons) other than the named plaintiffs unless the court has certified the case as a class action. For example, in *Zepeda v. INS*, a divided court of appeals held that a district court was not allowed to determine the rights of persons not before the court and could issue preliminary injunctive relief to affect only those persons over which it had power.

In *Zepeda* the named plaintiffs sought to represent a class of persons harmed by allegedly unconstitutional policies of the Immigration and Naturalization Service directed at persons of actual or presumed Mexican origin. Although the district court denied without prejudice the plaintiffs' motion for class certification, it entered a preliminary injunction that effectively restrained the service from applying its unlawful policies to any persons who fell within the proposed class.

Citing a line of precedent indicating that "[r]elief cannot be granted to a class before an order has been entered determining that class treatment is proper," the majority opinion for the court of appeals upheld the issuance of the preliminary injunction on its merits but directed that the scope of the order be limited to benefit only the named plaintiffs.

The Zepeda majority relied in part upon a prior Ninth Circuit opinion involving immigrants' rights; the Supreme Court subsequently vacated the opinion on other grounds, where the court of appeals declined to uphold a preliminary injunction prior to the district court's class certification determination and directed that if a class was not certified, the lower court must "limit the injunction to apply to the named plaintiffs only."

The dissenting judge in Zepeda offered a persuasive argument that

[t]he majority turns Rule 65(d) on its head when it reasons that because an injunction "is binding only upon parties to the action," it must be narrowly tailored so that it does not incidentally benefit any person not a party to the action. Rule 65(d) simply does not address the question whether an
injunction may benefit non-parties; it only provides that an injunction may not bind non-parties. Contrary to the result reached by the majority in making a quantum leap from Rule 65(d), it is well settled that injunctions are not overly broad simply because they may benefit persons who are not parties to the action. Injunctive relief typically benefits "not only the claimant but all other persons subject to the practice or rule under attack."/84/

The Zepeda dissent cited an impressive line of authority for the proposition that broad injunctive relief is appropriate in cases where "[t]he very nature of the rights [plaintiffs] seek to vindicate requires *p121* that the decree run to the benefit not only of the [plaintiffs] but also for all persons similarly situated."/85/

The dissenting judge's view in Zepeda ultimately prevailed on this issue within the Ninth Circuit. Four years after Zepeda a forestry workers' association and several individual seasonal forestry workers sought a declaratory judgment that various worker protections embodied in the Migrant and Seasonal Worker Protection Act applied to seasonal workers in the forestry industry. /86/ Plaintiffs sought also an injunction to require the Secretary of Labor to enforce generally certain provisions of the Migrant Act in their industry. The Secretary appealed, claiming that the district court's entry of a permanent injunction requiring him to enforce the disputed parts of the statute for forestry labor contractors on a nationwide basis was overbroad.

The court of appeals upheld the scope of the lower court's remedy by distinguishing its prior decision in Zepeda as limited to preliminary injunctions where "neither the trial court nor the court of appeals had ruled on substantive issues in the case, but had only determined that the plaintiff had a 'fair chance' of prevailing on the merits."/87/ The Bresgal court observed that, with respect to permanent injunctive relief, "an injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit--even if it is not a class action--if such breadth is necessary to give prevailing parties the relief to which they are entitled."/88/

Emphasizing the point forcefully raised in the Zepeda dissent, the Bresgal court reasoned that [t]he fact that forestry labor contractors are not among the parties here does not prevent the district court, or this court, from issuing an injunction directed to the Secretary requiring him to enforce the Act against [them]. The import of the rule underlying Zepeda is that an injunction cannot issue against an entity that is not a party to the suit. The injunction here was issued only against the Secretary, who is a party./89/

Neither Bresgal nor Zepeda cited a relevant decision of the Ninth Circuit issued two years before Zepeda. In Doe v. Gallinot a single plaintiff challenged the constitutionality of a state statute providing for the certification and involuntary commitment of persons alleged to be gravely disabled due to a mental disorder. The complaint sought declaratory and injunctive relief under the Act. /90/ The district court held that the statutory commitment procedure violated the plaintiff's due process rights under the Fourteenth Amendment./91/ The court declared the statutory scheme to be unconstitutional both on its face and as applied to the plaintiff pursuant to section 2201 of the Act. It then *p122*
issued a preliminary injunction that prohibited defendant state officials from proceeding with any certifications under the disputed commitment procedure.\textsuperscript{92/}

The defendants appealed, contending that the scope of the injunctive relief was overly broad in that the individual plaintiff did not have standing to assert the constitutional rights of nonparty third persons. They also contended that the district court lacked jurisdiction to enjoin the future certification of anyone other than the named plaintiff.\textsuperscript{93/} In response, the court of appeals looked to the interplay between the declaratory and injunctive remedies issued by the district court under the Act. After analyzing the merits, the court observed that the case seemed an entirely appropriate one in which to exercise the discretion to render a declaratory judgment on the constitutionality of the challenged statutory provisions.\textsuperscript{94/} Turning to the propriety of the injunctive relief, the court stated:

Having exercised that discretion [as to the issuance of declaratory relief], and having declared the statutory scheme unconstitutional on its face, the district court was empowered under 28 U.S.C. Section 2202 to grant "[f]urther necessary or proper relief" to effectuate the judgment. The challenged provisions were not unconstitutional as to Doe alone, but as to any to whom they might be applied. Under the circumstances, it was not an abuse of discretion for the district court to enjoin the defendants from applying them.\textsuperscript{95/}

Clearly addressing the same issues raised later under the rule in Zepeda and Bresgal, but without citing Rule 65(d), the court agreed with defendants that the district court had no power over those not properly before it. The court held, however, that the district court's injunction order did not purport to bind anyone other than defendants and their privies.\textsuperscript{96/}

The rationale employed by the Ninth Circuit in Gallant and Bresgal was echoed by the Second Circuit in \textit{Soto-Lopez v. New York City Civil Service Commission}. This case declared unconstitutional certain residency requirements imposed upon those who were applying for civil service positions and who were entitled to veterans' preferences.\textsuperscript{97/} The defendants argued that, because the case was not brought as a class action, the scope of the district court's injunction should have been limited to the named plaintiffs.\textsuperscript{98/} The court characterized defendants' contention as without merit and stated that, where benefits have been unlawfully denied to otherwise qualified persons within a certain class or group, the defendants have an obligation to cease denying those benefits to all qualified members of the group.\textsuperscript{99/} The court also stated that an injunction is an especially appropriate remedy when officials are conceded otherwise to continue to enforce the unlawful provisions against some who are not parties to the suit.\textsuperscript{100/}

Citing Supreme Court school desegregation precedent, the Soto-Lopez court observed that when a state statute has been ruled unconstitutional, state actors have an obligation to desist from enforcing that statute.\textsuperscript{101/} In this view the continued enforcement of an unconstitutional statute or policy as to any person, whether or not a party to the case, is nothing less than an impermissible effort to *nullify a federal court order and cannot be countenanced without rendering the Constitution a solemn mockery.*\textsuperscript{102/}
Substantial authority thus exists to support the issuance of a broad injunctive order that is
directed against a defendant government agency or official to remedy an ongoing
violation of federal law, even in the absence of a plaintiff class.\textsuperscript{103} Because such an
injunction is binding upon the defendant, it is immediately effective to relieve anyone
adversely affected by that defendant's unlawful policy or conduct, without the need to file
numerous, identical actions on behalf of other affected individuals in an effort to make
wider use of the court's legal ruling.\textsuperscript{104}

As the foregoing discussion indicates, often this issue is framed not with respect to the
propriety of the injunctive order per se but rather in the context of the district court's
denial of (or failure to rule upon) a plaintiff's motion for class certification. As an
influential opinion by Judge Friendly of the Second Circuit explained, insofar as the relief
sought is prohibitory, an action seeking declaratory or injunctive relief against state
officials on the ground of unconstitutionality of a statute or administrative policy is the
archetype of one where class action designation is largely a formality, at least for the
plaintiffs. . . . [W]hat is important for the plaintiffs or, more accurately, for their counsel,
is that the judgment run to the benefit not only of the named plaintiffs but of all others
similarly situated . . . as the judgment did here.\textsuperscript{105}

Employing this reasoning, many courts' holding is that certification of a *p124* class is
unnecessary when all class members will benefit from an injunction issued on behalf of
the named plaintiffs.\textsuperscript{106}

Although often the language in such opinions may help support an individual plaintiff's
claim for broad injunctive relief, the "necessity" approach to class certification--as a
matter of jurisprudence under Federal Rule of Civil Procedure 23--is undoubtedly suspect
and is usually accompanied by a strong indication from the court of appeals that a class
should have been certified.\textsuperscript{107} Moreover, as one court of appeals emphasized, a Rule
23(b)(2) class action under that seeks final injunctive relief or corresponding declaratory
relief with respect to the whole class should be certified almost automatically where the
litigation essentially seeks only to "define the relationship between the defendant(s) and
the world at large."\textsuperscript{108}

The only discussion from the Supreme Court on this issue is set forth briefly in Baxter v.
Palmigiano. Here the Court observed cryptically in a footnote that, because the district
court did not certify the class, the action was not properly a class action.\textsuperscript{109} The Court,
however, did not discuss how the lack of certification might affect the propriety of the
injunctive remedy, raising the issue in the context of determining whether the case was
moot.\textsuperscript{110} In its prior decisions discussing the relationship between class certification
and mootness, the Court, as the concurring and dissenting opinion pointed out, did not
deal with whether a court of appeals might treat an action as a class action in the absence
of formal certification by the district court.\textsuperscript{111}

In any event, advocates seeking broad injunctive relief in the absence of a class should be
aware that a line of appellate authority exists for the proposition that, absent certification
of a class, a district court should not grant classwide injunctive relief.\textsuperscript{112} These cases
are in opposition to the focus—in the Galvan line of cases and the reasoning set forth in decisions such as Bresgal—upon the equitable power of the courts to prevent defendants from committing continuing violations of the law.\footnote{113}{113}

The Potential Significance of Rule 71. Advocates seeking to obtain and enforce a broad injunctive remedy in the absence of a class action should be aware of the potential value of Federal Rule of Civil Procedure 71, a little known and seldom invoked procedural rule that provides: \footnote{p125}{p125}

When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if by a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.

Technically Rule 71 does not undertake to say when an injunctive order may be made in favor of or against a party. It merely provides that when this can be done non-parties have recourse to, and are subject to, process in the same measure as nonparties.\footnote{114}{114} Where an issued valid injunctive order benefits nonparties, however, those nonparties may seek to intervene in the action and compel enforcement of the order.\footnote{115}{115}

For example, in Berger v. Heckler, a non--class action challenging the validity of certain regulations under the Social Security Act, the court found that a consent decree provided for a particular construction of the social security eligibility provisions, and its terms therefore benefited innumerable applicants entitled to benefit under that construction. Accordingly Rule 71 provided authority for the intervention of nonparties even though ordinarily a consent decree is not enforceable by those who are not parties to it.\footnote{116}{116} Creative advocates should incorporate into pleadings, judgments, and consent decrees appropriate language indicating an express intent by the parties and/or the court to permit enforcement of an injunctive remedy by nonparty beneficiaries of that relief.\footnote{117}{117}

**IV. Practice Issues**

Complaints seeking declarative and injunctive relief under the Act may be appropriate to remedy continuing violations of federal law in a wide variety of substantive areas. For example, over the years advocates have successfully obtained broad relief under the Act in cases involving civil rights, welfare, social security, health care, housing, and labor issues.\footnote{118}{118} \footnote{p126}{p126} The remedies afforded by the Act may be particularly appropriate to challenge unlawful conduct by a government defendant that not only has harmed plaintiffs in the past but may reasonably be expected to harm them in the future. For example, where a local housing authority's policy violates controlling federal law with respect to such as subsidized housing inspections and rent calculations, a declaration and/or injunction invalidating the policy itself may be sought under the Act. The declaration or injunction would inure to the benefit not only of the named plaintiffs but also of all tenants potentially subject to the policy at issue.
With respect to federal policies and rules, courts typically enjoin a substantively invalid rule in its entirety and remand the issue to the appropriate agency for reconsideration.\textsuperscript{119} In such cases, broad relief may be obtained effectively even in the absence of a class because courts do not ordinarily attempt to fashion a valid regulation from the remnants of the old rule.\textsuperscript{120}

Relief under the Act may be especially effective in conjunction with challenges to the procedural validity of federal agency policies, rules, or regulations under the Administrative Procedure Act, where a finding that the rule in question was not lawfully promulgated renders the rule void and unenforceable.\textsuperscript{121}

Typically plaintiffs raising such claims may assert federal jurisdiction under 28 U.S.C. Sec. 1331 since the complaint would call into question the interpretation and/or application of the substantive federal statute at issue. Frequently such claims against state or local policies may be styled also as deprivations of federal statutory or constitutional civil rights and establish jurisdiction under 28 U.S.C. Sec. 1343 to enforce those rights as against state and local government defendants by way of 42 U.S.C. Sec. 1983.\textsuperscript{122} The complaint should describe the nature of the "actual controversy" currently existing between the parties and clearly state a claim for appropriate declaratory and injunctive relief pursuant to sections 2201 and 2202 of the Act.\textsuperscript{123}

Advocates seeking broad equitable relief under the Act by invoking the reasoning set forth in appellate decisions such as Bresgal should recall that the court expressly excluded preliminary injunctions from its rationale. Accordingly such a remedy presumably could not be issued upon a motion for a preliminary injunction.\textsuperscript{124} Advocates with clients facing immediate harm, however, should move to advance the declaratory judgment action on the court's calendar, as authorized by Federal Rule of Civil Procedure 57, and perhaps to obtain an expedited resolution of their claims for both declaratory and permanent injunctive relief.*p\textsuperscript{127}*

As a matter of proper motion practice for raising the merits of the claims, one court noted that a party seeking a declaratory judgment "may not bring a motion [under Rule 57] for declaratory relief, but rather must bring an action for a declaratory judgment."\textsuperscript{125} Accordingly the appropriate mechanism for raising the merits of the substantive claims for relief is not a motion under Rule 57 but a motion for summary judgment under Federal Rule of Civil Procedure 56.\textsuperscript{126} Obviously an early resolution of the claims will be possible only where the issues are essentially legal in nature, where little or no discovery is necessary, and where there is no genuine issue as to any material fact.\textsuperscript{127}

\textbf{A. Mootness Issues}

One of the principal advantages to the class action device is the protection it affords from the possibility that the controversy will become moot. A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.\textsuperscript{128} However, mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return
to his old ways./129/ Nevertheless, as one court of appeals recently summarized, "part or all of a case may become moot if (1) subsequent events have made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."/130/

A moot case must be dismissed "unless it was duly certified as a class action under Fed. R. Civ. P. 23, a controversy still exists between [defendant] and the still present members of the class, and the issue in controversy is such that it is capable of repetition yet evading review."/131/

Advocates bringing non--class action claims for broad equitable relief under the Act must be aware of the potential problem of mootness and should try to structure their complaint to minimize the possibility of dismissal./132/ If a controversy exists between the defendant and at least one party plaintiff, the action should not be dismissed even if other plaintiffs' claims have become moot./133/ Similarly, where one of several issues in a case become moot, the existence of any remaining live issues supplies the constitutional requirement of a case or controversy./134/

Advocates should remember that a continuing threat to a plaintiff's interest may be sufficiently real and immediate to *p128* show an existing controversy for Article III purposes./135/ In the specific context of the alleged unlawful administration of public benefits, one court held that "[t]he fact that [plaintiff's] benefits had not [yet] been terminated is of no moment; under the circumstances, it was not necessary for [him] to wait for the axe to fall on him before he brought suit."/136/

**B. Enforcement of Remedies**

As already noted, a judicial preference for issuing declaratory rather than injunctive relief under the Act is because the statute was designed in part to provide a milder alternative to the injunctive remedy./137/ Even if a district court is reluctant to issue an injunction, a formal declaration of rights by a federal judge is a potent remedy (or deterrent) and often will obviate the need for any further intervention by the court./138/ In any event, where the district court issues declaratory relief but chooses not to issue an injunction or mandamus, the declaration itself may be used later as a predicate for further relief, including an injunction./139/ Where the declaratory relief alone proves insufficient to remedy the plaintiff's injury, advocates should move to enforce relief through an injunction, as authorized by Section 2202 of the Act./140/ As already explained, advocates seeking enforcement of any relief issued under the Act should bear in mind the possible use of Federal Rule of Civil Procedure 71 to enforce the original judgment's remedy for nonparty beneficiaries./141/

**V. Conclusion**

The Act is a tool that poverty law advocates may use to seek broad equitable relief from a federal court and to remedy ongoing violations of federal law even in the absence of a
class action. In framing their federal court litigation on behalf of poor clients victimized by such violations, advocates should remember that the Act places an extremely valuable remedial arrow in the district court's quiver, an arrow that has the potential to strike down, in one blow and at the behest of a single plaintiff, illegal policies, practices, and rules that harm large numbers of persons.

Footnotes

/1/ Advocates typically sought classwide declaratory and injunctive relief under FED. R. CIV. P. 23 (b)(2).


/3/ See, e.g., CAL. CODE OF CIV. PROC. Sec. 1085 (petition for writ of mandate).


/5/ These observations are based upon our personal litigation experience and upon numerous conversations over the past 18 months with poverty law advocates across the country.


/7/ Powell v. McCormack, 395 U.S. 486, 499 (1969); see sec. II.B infra.

/8/ Doe v. Gallinot, 657 F.2d 1017, 1025 (9th Cir. 1981); see nn. 89-96 and accompanying text infra.


/10/ 28 U.S.C. Sec. 2201(a). The Declaratory Judgment Act (Act) exempts from its coverage certain federal tax and trade/tariff issues. Id.

/11/ FED R. CIV. P. 57, which was adopted pursuant to the Act, essentially repeats the substantive portions of the statute and provides in addition that (1) a jury trial is authorized, if otherwise available for the claims presented, and (2) an applicant for a declaratory judgment may seek a speedy hearing on the court's calendar.

Of course, the statute on its face makes no express reference to, and creates no special preference for, the resolution of such "anticipatory" disputes and has no requirement that a party need be a "prospective defendant" in order to bring a declaratory judgment action. Id.


WRIGHT ET AL., supra note 13, at 568. See generally United States v. Doherty, 786 F.3d 491, 498-99 (2d Cir. 1986) (Friendly, J.) (collecting cases describing the various purposes behind the statute).


Cardinal Chemical Co. v. Morton International Inc. 508 U.S. 83, 95-97 (1993) (noting criticism of practice permitting party to seek a declaration of rights "even if the patentee has not filed an infringement action"). See also Doernberg & Mushlin, supra note 16, at 570-75.

The Supreme Court has cautioned that "a federal court should, in all but the most exceptional circumstances, refuse to interfere with an ongoing state criminal proceeding" and generally should decline to issue either declaratory or injunctive relief in such cases. Doran v. Salem Inn Inc., 422 U.S. 922, 930 (1975), citing Younger v. Harris, 401 U.S. 37, 41 (1971), and Samuels v. Mackell, 401 U.S. 66, 69-73 (1971). On the other hand, an action for declaratory relief is appropriate where an allegedly unconstitutional state prosecution is imminent but not yet pending. Steffel, 415 U.S. at 461-73. See nn. 45-46 and accompanying text infra.

Dizol, 133 F.3d at 1222-23.


/28/ Id. at 1017.


/30/ Aetna Life Ins. Co., 300 U.S. at 247.


/32/ See 28 U.S.C. Secs. 1331 (actions arising under federal or constitutional law), 1332 (diversity of citizenship), 1343 (deprivations of federal or constitutional civil rights).


/34/ Id. at 286-87.


/37/ Wilton, 515 U.S. at 286, 288.

/38/ Albradco Inc. v. Bevona, 982 F.2d 82, 87 (2d Cir. 1992).

/39/ In its Wilton decision the Supreme Court resolved a conflict by holding that the Act's discretion is vested in the district courts, not the courts of appeal and that the district court's exercise of discretion is itself reviewable under the deferential "abuse of discretion" standard. Wilton, 515 U.S. at 289-90.

/40/ Compare majority opinion in Dizol, 133 F.3d at 1224 & n.4 (court of appeal is "not required, sua sponte, to decide whether a district court abused its discretion in proceeding with the action when neither party raised an objection in the district court," but observing that the appellate court retains "the power to raise the issue sua sponte . . . should the extraordinary circumstances of a case so demand"), with the dissent, 133 F.3d at 1227, 1236 (Alarcon, J., dissenting) (collecting cases in support of the position that a district court must make findings, in every instance, "supporting its decision to exercise jurisdiction in a diversity action for declaratory relief").
/41/ Dizol, 133 F.3d at 1227.

/42/ Rickover, 369 U.S at 112.

/43/ Wilton, 515 U.S. at 288.

/44/ Public Service Comm’n v. Wycoff, 344 U.S. 237, 243-47 (1952) (disapproving "anticipatory declarations as to the construction of state regulatory statutes").

/45/ Green v. Mansour, 474 U.S. 64, 72 (1984), citing Samuels, 401 U.S. at 69-73 (declining to issue relief under the Act where effect would be to interfere with an ongoing state criminal prosecution); cf. Steffel, 415 U.S. at 461-73 (declaratory relief appropriate where allegedly unconstitutional state criminal prosecution is threatened but not yet pending).

/46/ Green, 474 U.S. at 72-74 (declining to grant notice relief against state officials with respect to past violations of federal law); cf. Quern v. Jordan, 440 U.S. 332, 347-49 (1979) (notice relief which was ancillary to prospective injunctive relief previously ordered by the district court was not barred by the Eleventh Amendment); see nn. 72-75 and accompanying text infra.

/47/ Rickover, 369 U.S. at 112-13 (the court declined to issue a declaration with respect to a copyright issue of "serious public concern," where the record before the district court was "woefully lacking").


/49/ Id. at 492-93.

/50/ Id. at 495.

/51/ The courts of appeal have observed that "[t]he Brillhart factors are not exhaustive," Dizol, 133 F.3d at 1225 n.5, and have suggested other considerations, such as the relative convenience of the parties and the availability of other remedies; and whether the declaratory action is being sought for purposes of "procedural fencing," or as a means of forum shopping, or to "gain a res judicata advantage." Id. See also Continental Casualty Co. v. Robsac Industries, 947 F.2d 1367, 1371-73 (9th Cir. 1991).

/52/ Wilton, 515 U.S. at 290.


/54/ 28 U.S.C. Sec. 2201(a).
/56/ RESTATEMENT (SECOND) OF JUDGMENTS Sec. 33 (1982).

/57/ WRIGHT ET AL., supra note 13, at 568.

/58/ 28 U.S.C. Sec. 2201(a); FED. R. CIV. P. 57; Powell, 395 U.S. at 499.


/60/ Steffel, 415 U.S. at 466-67.

/61/ Doran, 422 U.S. at 931.

/62/ Steffel, 415 U.S. at 471.


/65/ Samuels, 401 U.S. at 73.

/66/ See Perez, 401 U.S. at 126 (separate opinion of Brennan, J.) (indicating that noncompliance with a declaration of rights may not constitute contempt).

/67/ Powell, 395 U.S. at 499.


/70/ Steffel, 415 U.S. at 436 (quotation omitted).


/72/ See Green, 474 U.S. at 69-74.

/73/ Ex Parte Young, 209 U.S. 123 (1908).

/74/ Green, 474 U.S. at 68, citing Young, 209 U.S. at 155-56.

/75/ Green, 474 U.S. at 68. The Eleventh Amendment does bar a federal court from awarding retrospective relief for past violations of federal law. Id. See Edelman v. Jordan, 415 U.S. 651, 666-69 (1974) (Eleventh Amendment barred injunction ordering
payment of retroactive benefits because it was effectively an award of money for past violations of federal law).

/76/ Calderon v. Ashmus, 123 F.3d 1199, 1206 (9th Cir. 1997), rev'd on other grounds, 118 S. Ct. at 1694. See also Powell, 395 U.S. at 499; Gallinot, 657 F.2d at 1025.

/77/ 11A WRIGHT ET AL., supra note 13, Sec. 2956, at 335. See Pennoyer v. Neff, 95 U.S. 714 (1877) (federal court judgments not binding upon persons not parties to the action).

/78/ FED. R. CIV. P. 65(d) (emphasis supplied).

/79/ Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1983).

/80/ Id. at 722.

/81/ Id. at 723.

/82/ Id. at 728, quoting Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974). In a remarkable footnote which spans three pages, the majority offered an extraordinarily detailed response to the contrary view set forth by the dissent; it cites numerous authorities in an effort to demonstrate that "[t]he fact that . . . broad benefits may result [from a narrowly tailored injunction] . . . does not permit plaintiffs to bootstrap their claim into one for class-wide relief as a matter of law." Id. at 728 n.1.

/83/ National Ctr. for Immigrants' Rights v. INS, 743 F.2d 1365, 1371 (9th Cir. 1984), vacated on other grounds, 481 U.S. 1009 (1987), cited in Zepeda, 753 F.2d at 727.

/84/ Zepeda, 753 F.2d at 733-34 (Norris, J., dissenting), quoting Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963), cert. denied, 376 U.S. 910 (1964).

/85/ Id... 


/87/ Bresgal, 843 F.2d at 1169, citing Zepeda, 753 F.2d at 728 n.1, and National Ctr. for Immigrants' Rights, 743 F.2d at 1371.

/88/ Bresgal, 843 F.3d at 1770, citing, inter alia, Gregory v. Litton Systems Inc., 472 F.2d 631, 633-34 (9th Cir. 1974).

/89/ Bresgal, 843 F.2d at 1770. Curiously the Bresgal court did not cite the 1996 Ninth Circuit decision in International Molders' and Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 574 (9th Cir. 1986). In Nelson the court affirmed a broad preliminary injunction requiring the defendant Immigration and Naturalization Service to take certain
actions affecting nonparty employers of the plaintiff employees and observed that Zepeda "does not limit the court's power to bind the INS when it has necessary personal and subject matter jurisdiction." 799 F.2d at 554. Though not entirely clear from the opinion, Nelson apparently was brought as a class action, thereby explaining the court's remark that the injunctive relief which affected the plaintiffs' employers was "necessary to provide effective relief" and yet "[did] not needlessly benefit nonparty plaintiffs." Id. at 554.

/Gallinot, 657 F.2d at 1019.

/Id. at 1021-24.

/Id. at 1024-25.

/Id. at 1024.

/Id. at 1025.

/Id. (emphasis supplied).

/Id. at 1024 (footnote omitted).

/Soto-Lopez, 840 F.2d at 162.

/Id. at 168.

/Id. at 168-69.

/Id.

/Id. at 168, citing Cooper v. Aaron, 358 U.S. 1, 17-18 (1958).

/Cooper, 358 U.S. at 18-19 (citation omitted).

/The Supreme Court has not spoken directly to this issue. In Doran, 422 U.S. at 928-33, the Court considered the availability of declaratory and injunctive relief in the narrow and "exceptional" context of an effort to enjoin a state criminal prosecution. The principal issue before the Court involved an analysis of the differing standards for the issuance of declaratory and injunctive relief in such cases, which in turn depended upon whether an actual state prosecution had commenced. Id. at 930-33; see nn. 19, 45-46 and accompanying text supra. The Court noted in dicta that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs. . . ." Id. at 931. However, this comment apparently arose in the context of the Court's review of the propriety of certain preliminary injunctive relief that was issued "prior to final judgment." Id. In any event, (1) the Court certainly was not considering the general power of a
federal court to issue broad injunctive relief under Rule 65, and (2) its comment may be confined to the extraordinary context of an effort to enjoin a state criminal prosecution.

Moreover, the Supreme Court held that the doctrine of "nonmutual collateral estoppel," whereby a defendant may be estopped from relitigating the identical legal issue decided against it in a prior case brought by a different plaintiff, could not be applied against a federal government defendant because the "constraints which peculiarly affect the Government [as a litigant]" required the "development of legal doctrine by allowing litigation [of the same legal issues] in multiple forums." U.S. v. Mendoza, 464 U.S. 154, 163 (1984).

Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1974), cert. denied, 417 U.S. 936 (1974), citing Patterson, 323 F.2d at 206-7, and Vulcan Society v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1974). In Vulcan, also authored by Judge Friendly, the court affirmed a district court's blanket injunction against the use of certain discriminatory municipal examination procedures, prior to certification of a class, because "[i]f the examination procedures were found unconstitutional as to the named plaintiffs, they were equally so" with respect to all others similarly situated, and "it would be unthinkable" for the defendants to apply the unlawful procedures to any others within the affected group. Id. at 399.

AACEN v. San Juan County Sheriff's Dep't, 944 F.2d 691, 700 n.12 (10th Cir. 1991). See also, e.g., Washington v. Reno, 35 F.3d 1093, 1103 (6th Cir. 1994); Dionne v. Bailey, 757 F.2d 1344, 1355-56 (1st Cir. 1985) (collecting cases); Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1136 (11th Cir. 1984); Evans v. Hartnett County Bd. of Educ., 684 F.2d 304, 306 (4th Cir. 1982); Decker v. O'Donnell, 661 F.2d 598, 616 (7th Cir. 1980); Meyer v. Brown & Root Construction Co., 661 F.2d 369, 373-74 (5th Cir. 1981); James v. Ball, 613 F.2d 180, 186 (9th Cir. 1979) (Kennedy, J.), rev'd on other grounds, 451 U.S. 355 (1981); Sandford v. R.C. Coleman Realty, 573 F.2d 173, 178 (4th Cir. 1978); Craft v. Memphis Light, Gas, & Water Div., 534 F.2d 684, 686 (6th Cir. 1976), aff'd on other grounds, 436 U.S. 1 (1979); United Farmworkers of Fla. Hous. Project v. City of Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974); Martinez v. Richardson, 472 F.2d 1121, 1127 (10th Cir. 1972). While the reasoning behind these decisions may help support a claim for broad injunctive relief in an individual case, counsel representing the named plaintiffs in a formal class action should always seek the benefits and protections of class certification, even where the nature of the relief sought might make such certification "arguably unnecessary" because of potential problems such as mootness, enforcement of the judgment, appropriate notice to class members, etc. See Dionne, 757 F.2d at 1356.

See, e.g., Vulcan, 490 F.2d at 399-400.

Baby Neal by and for Kantor v. Casey, 43 F.3d 48, 58-59 (3d Cir. 1994).

Id. at 309 n.1. See nn. 126-134 and accompanying text infra.

Id. at 325 n.1 (Brennan and Marshall, JJ., concurring and dissenting).

See, e.g., Hernandez v. Reno, 91 F.3d 776, 781 (5th Cir. 1996); Everhart v. Bowen, 853 F.2d 1532, 1539 (10th Cir. 1988), rev'd on other grounds, 494 U.S. 83 (1990). See also Zepeda, 753 F.2d at 727-29 & n.1 (collecting cases).

See nn. 85-100 and accompanying text supra.


See Berger v. Heckler, 771 F.2d 1556, 1565-67 (2d Cir. 1985).

WRIGHT ET AL., supra note 107, Sec. 3032, at 174-75, citing Berger, 771 F.2d at 1565, and Bresgal, 843 F.2d at 1163.

See King v. Zickefoose, No. 3:96CV7519 (N.D. Ohio Oct. 14, 1997) (order approving stipulation), at 8-9 ("It is the intent and agreement of the parties that all relief provided under this agreement shall also be available to and granted to any Plaintiff, Petitioner, or other person seeking appropriate relief in reference to this action under the terms of Fed. R. Civ. P. 71."). Plaintiffs in this action challenging a city's policies and actions regarding water service accounts and terminations were represented by Advocates for Basic Legal Equality Inc. and the Ohio State Legal Services Association.

See, e.g., Carter v. Stanton, 405 U.S. 669, 670-71 (1972) (complaint challenging state welfare eligibility regulation as inconsistent with federal law, and seeking relief under the Declaratory Judgment Act, appeared to present a "substantial federal question"); Harmon v. Thornburgh, 878 F.2d 484, 491-94 (D.C. Cir. 1989) (constitutional challenge to random drug tests of federal employees); Bresgal, 843 F.2d at 1164 (migrant labor issues); Berger, 771 F.2d at 1565 (social security eligibility issues); Tierney v. Schweiker, 718 F.2d 449, 456-57 (D.C. Cir. 1983) (social security and Internal Revenue Service issues); Gallinot, 657 F.2d at 1019 (constitutional challenge to state mental health involuntary commitment procedures); Davis v. Romney, 490 F.2d 1360, 1370-71 (3d Cir. 1974) (issuing declaratory relief regarding interpretation of National Housing Act and remanding for reconsideration of scope of injunctive relief); Pratt, 770 F. Supp. at 545 (issuing declaratory but not injunctive relief with respect to impingement of state budget impasse upon welfare payments); Richter v. Bowen, 669 F. Supp. 275, 278-79 (N.D. Iowa 1987) (declaratory judgment against defendant Secretary of Health and Human Services would "serve a very useful purpose by clarifying a vague section of the [Aid to Families with Dependent Children statute] which hangs like a black cloud over these proceedings"); Burrell v. Norton, 381 F. Supp. 339, 340 (D. Conn. 1974) (granting declaratory relief to individual plaintiff challenging constitutionality of certain state eligibility standards for emergency assistance welfare payments).

See, e.g., Carter, 405 U.S. at 670-71 (complaint alleging that state welfare policy deprived plaintiffs of their rights under federal law pursuant to Section 1983 appeared to present a substantial federal question). Of course, advocates may have to deal with the separate issue of whether the particular federal statutory or regulatory provision is enforceable through a private right of action under Section 1983. See Blessing v. Freestone, 117 S. Ct. 1353, 1358-59 (1997) (Clearinghouse No. 50,109); Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 509 (1990).

Both the statute and FED. R. CIV. P. 57 clearly contemplate that a party seeking a declaratory judgment must bring "an action" under the statute, and thus the request for relief under the Act must be raised in the complaint. International Bhd. of Teamsters v. Eastern Conference of Teamsters, 160 F.R.D. 452, 456 (S.D.N.Y. 1995).

Bresgal, 843 F.2d at 1169.


Id. at 456.

FED. R. CIV. P. 56(c). An expedited motion for summary judgment may be filed "at any time after the expiration of 20 days from the commencement of the action." FED. R. CIV. P. 56(a).


Norman-Bloodshaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1274 (9th Cir. 1998) (quotations and citations omitted). The Supreme Court noted that "[t]he burden of demonstrating mootness is a heavy one." Davis, 440 U.S. at 631 (quotation omitted).


E.g., a large number of individual plaintiffs could be joined in the complaint, under FED. R. CIV. P. 20 ("All persons may join in one action as plaintiffs if they assert any
right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action."). Advocates should consider also whether an association of individuals could be joined as a plaintiff; see Bresgal, 843 F.3d at 1164 (plaintiffs included a forestry worker's association). Where a potential mooting event is foreseeable once the litigation has commenced, advocates may consider the timely intervention of new plaintiffs, pursuant to FED. R. CIV. P. 24.


/134/ Powell, 395 U.S. at 498.


/136/ Berger, 771 F.2d at 1563.

/137/ Steffel, 415 U.S. at 467. See sec. II.A supra.

/138/ See Doran, 422 U.S. at 931.


/140/ See Pratt, 770 F. Supp. at 546 (granting declaratory but not injunctive relief, in light of defendants' assertion that they had ceased the unlawful practice at issue, but granting plaintiffs leave to renew their application for an injunction in the event "new circumstances" warranted it).

/141/ See nn. 112-15 and accompanying text supra.

/142/ Wilton, 515 U.S. at 288.