

CATHOLIC SOCIAL SERVICES, INC.;
American Federation of Labor--Congress of
Industrial Organizations; United Farm Workers
of America, AFL-CIO; Miguel
Moran; Kamel Abubakr; Maria Magana; Elias
Velasquez; Maria Velasquez;
Francisco Arizaga, Plaintiffs-Appellees,
v.
Janet RENO, Attorney General; Doris Meissner,
Commissioner of Immigration and
Naturalization Service, Defendants-Appellants.

No. 96-15495.

United States Court of Appeals,
 Ninth Circuit.

Argued and Submitted Feb. 11, 1997.

Decided April 30, 1997.

Individual applicants for legalization and immigration rights groups brought class action challenging Immigration and Naturalization Service (INS) regulations creating advance parole requirement for legalization under Immigration Reform and Control Act (IRCA). The United States District Court for the Eastern District of California, Lawrence K. Karlton, J., 685 F.Supp. 1149, invalidated advance parole requirement, and INS appealed. The Court of Appeals for the Ninth Circuit, 956 F.2d 914, affirmed, and certiorari was granted. The United States Supreme Court, Justice Souter, 509 U.S. 43, 113 S.Ct. 2485, 125 L.Ed.2d 38, vacated and remanded. On remand, the Court of Appeals, 996 F.2d 221, remanded. The District Court, Karlton, Chief Judge, certified modified class and continued interim relief, and INS appealed. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) provision of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) precluded judicial review for those who had not actually applied for legalization or had their applications rejected at front desk before they could be filed; (2) limitation on judicial review did not violate separation of powers doctrine; and (3) it did not immunize IRCA or INS policy, so as to raise due process concerns.

Vacated and remanded with instructions to dismiss.

[1] ALIENS ☞ 54.3(1)

24k54.3(1)

Provision of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) limiting judicial review of legalization claims to those who filed their application within specified period or attempted to file complete application and application fee with authorized legalization officer precluded judicial review for those who had not actually applied for legalization or had their applications rejected at front desk before they could be filed, though they were sufficiently affected by Immigration and Naturalization Service (INS) policy to maintain justiciable claim. Immigration and Nationality Act, § 245A(f), as amended, 8 U.S.C.A. § 1255a(f).

[2] ALIENS ☞ 40

24k40

Provision of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) limiting judicial review of legalization claims to those who filed application within specified period or attempted to file complete application and application fee with authorized legalization officer did not violate separation of powers doctrine, despite requiring dismissal of pending claims; Congress was changing law applicable to pending case rather than impermissibly interfering with judicial process. U.S.C.A. Const. Art. 3, § 1 et seq.; Immigration and Nationality Act, § 245A(f), as amended, 8 U.S.C.A. § 1255a(f).

[2] CONSTITUTIONAL LAW ☞ 57

92k57

Provision of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) limiting judicial review of legalization claims to those who filed application within specified period or attempted to file complete application and application fee with authorized legalization officer did not violate separation of powers doctrine, despite requiring dismissal of pending claims; Congress was changing law applicable to pending case rather than impermissibly interfering with judicial process. U.S.C.A. Const. Art. 3, § 1 et seq.; Immigration and Nationality Act, § 245A(f), as amended, 8 U.S.C.A. § 1255a(f).

[3] ALIENS ☞ 40

24k40

Provision of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) limiting judicial review of legalization claims to those who filed their application within specified period or attempted to file complete application and application fee with authorized legalization officer did not immunize Immigration Reform and Control Act (IRCA) or Immigration and Naturalization Service (INS) policy, so as to raise due process concerns; it restricted individuals who could bring claims to those directly affected by INS conduct, but did not limit issues subject to review. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 245A(f), as amended, 8 U.S.C.A. § 1255a(f).

[3] CONSTITUTIONAL LAW **274.3**

92k274.3

Provision of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) limiting judicial review of legalization claims to those who filed their application within specified period or attempted to file complete application and application fee with authorized legalization officer did not immunize Immigration Reform and Control Act (IRCA) or Immigration and Naturalization Service (INS) policy, so as to raise due process concerns; it restricted individuals who could bring claims to those directly affected by INS conduct, but did not limit issues subject to review. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 245A(f), as amended, 8 U.S.C.A. § 1255a(f).

*923 Stephen W. Funk, United States Department of Justice, Office of Immigration Litigation, Washington, DC, for defendants-appellants.

Peter A. Schey, Center for Human Rights and Constitutional Law, Los Angeles, CA, Michael Rubin, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, CA, for plaintiffs-appellees.

Appeal from the United States District Court for the Eastern District of California, Lawrence K. Karlton, Chief Judge, Presiding. D.C. No. CV-86-01343-LKK.

Before: SCHROEDER, ALARCON, and O'SCANNLAIN, Circuit Judges.

SCHROEDER, Circuit Judge:

This class action litigation challenges the lawfulness of an Immigration and Naturalization Service

("INS") policy adopted in 1986 and revised in 1987 as part of the INS' administration of the Immigration and Nationality Act of 1986, 8 U.S.C. § 1255a ("IRCA"). That statute established a legalization program under which certain aliens unlawfully present in the United States could apply for status as temporary residents, and then seek permission to reside permanently in the United States. See 8 U.S.C. *924 § 1255a(a), (b). Among other requirements, IRCA provided that to be eligible, applicants had to prove continuous physical presence in the United States since November 6, 1986. 8 U.S.C. § 1255a(a)(3)(A). The policy plaintiffs seek to challenge in this case is an INS directive interpreting the continuous physical presence requirement to mean that aliens must have obtained INS approval before leaving the United States for even the briefest of absences (the "advance parole policy").

Plaintiffs include a number of concerned organizations and individuals, referred to collectively as Catholic Social Services. They filed their original complaint in the district court in November of 1986 challenging the advance parole policy. They contended that the policy violated the statutory proviso that an alien would not fail to maintain continuous physical presence by virtue of brief, casual and innocent absences from the United States. See 8 U.S.C. § 1255a(a)(3)(B). The district court certified a broad class of all persons who had not complied with the INS advance parole policy but were otherwise eligible for naturalization, and extended the deadline for application for class members. The district court subsequently ruled that the policy was contrary to the intent of the statute and hence unenforceable. *Catholic Social Services, Inc. v. Meese*, 685 F.Supp. 1149, 1159-60 (E.D.Cal.1988).

The case is now before this court for the third time. In the first appeal from the district court's original ruling, we affirmed the district court in a consolidated appeal that also dealt with a related case challenging another INS policy. *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914 (9th Cir.1992). The Supreme Court granted certiorari and vacated our decision, holding that only those persons who had taken affirmative steps toward legalization and had their path blocked by INS representatives on account of the policy had standing to challenge the policy. *Reno v. Catholic*

Social Services, Inc., 509 U.S. 43, 58-59, 113 S.Ct. 2485, 2496, 125 L.Ed.2d 38 (1993). It remanded the case for determination of whether there were class members who satisfied such standing requirements in order to confer jurisdiction. *Id.* at 66-67, 113 S.Ct. at 2500-01. We in turn remanded to the district court for further proceedings consistent with the Court's opinion. *Catholic Social Services, Inc. v. Reno*, 996 F.2d 221 (9th Cir.1993). The district court then entered the orders presently before us, certifying a modified and narrower class in an effort to comply with the Supreme Court's decision, and continuing its prior orders providing interim relief for the class. This government appeal followed.

During the pendency of this appeal, Congress again amended the immigration laws by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Section 377 of the new Act purported to set limits on judicial review of legalization claims.

We therefore must consider the effect of this intervening legislation, which the government contends requires us to vacate the district court's orders and to direct the district court to dismiss the litigation. We conclude we must do so.

The background of the case and its procedural history are set forth in detail in this court's prior opinion, 956 F.2d at 916-18, and in the Supreme Court's opinion. 509 U.S. at 46-53, 113 S.Ct. at 2489-93. We do not elaborate further here. The Supreme Court's decision is the springboard for our legal analysis in this appeal.

In that decision, the Court rejected on ripeness grounds the district court's certification of a broad class of all those who would have qualified for legalization but for the INS' advance parole policy. Instead, the Court focused on those who had taken affirmative steps toward applying for legalization and had been somehow blocked by the INS policy.

The Court described at some length the INS' practice, known as "front desking," pursuant to which legalization assistants were instructed to review applications in the applicants' presence and to reject the applications of any aliens who were statutorily ineligible for legalization. Under this "front- desking" policy, aliens who disclosed

unapproved trips outside the United States had their applications rejected before the applications could *925 be filed. 509 U.S. at 61-62, 113 S.Ct. at 2497-98.

In addition to those persons who had actually attempted to apply for legalization and had their applications rejected at the front desk, the Supreme Court opinion referred to the possibility that there may have been other persons who had been sufficiently affected by the policy to maintain a justiciable claim, even though they had not actually been "front-desked." 509 U.S. at 66 n. 28, 113 S.Ct. at 2500 n. 28. The Supreme Court remanded for the lower courts to determine whether members of the class had been "front desked" and to thereby determine the extent of their jurisdiction over the claims of class members.

On remand, the district court modified the class definition so as to include persons who had actually been front desked and those who came within the purview of footnote 28 by being otherwise adversely affected by the practice.

It was against this background that Congress passed section 377, with a retroactive date as if it had been enacted as part of IRCA. Section 377 provides:

(a) LIMITATION ON COURT JURISDICTION.--Section 245A(f)(4) (8 U.S.C. § 1255a(f)(4)) is amended by adding at the end the following new subparagraph:

"(C) JURISDICTION OF COURTS. Notwithstanding any other provision of law, no court shall have jurisdiction of any cause of action or claim by or on behalf of any person asserting an interest under this section unless such person in fact filed an application under this section within the period specified by subsection (a)(1), or attempted to file a complete application and application fee with an authorized legalization officer of the Service but had the application and fee refused by that Officer."

(b) EFFECTIVE DATE.--The amendment made by subsection (a) shall be effective as if included in the enactment of the Immigration Reform and Control Act of 1986.

The government maintains that the new statute requires dismissal of the action because there has been no showing that any of the class members or named plaintiffs meet the requirements of Section

377, i.e., by having actually filed an application or by having attempted to tender an application and fee but having them refused by a legalization assistant, within the times originally established by the statute. Plaintiffs counter that the statute was not intended to apply to this case, and that if it was, the statute is unconstitutional as a violation of separation of powers. We discuss each issue in turn.

APPLICABILITY OF THE STATUTE

[1] Catholic Social Services contends that the new statute does not apply to this litigation because it applies only to those who have an interest under the provision it amends, 8 U.S.C. § 1255a(f). Section 1255a(f) provides for a single level of administrative appellate review of determinations regarding an adjustment of status, and limits judicial review of denials of legalization to the administrative record. [FN1] That section, plaintiffs continue, applies *926 only to those who have had applications denied, while these plaintiffs were never able to have their applications filed and accordingly could not have had them denied. Plaintiffs rely on *McNary v. Haitian Refugee Center*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991) where the Supreme Court dealt with a related provision of IRCA that included limitations on review similar to those in 8 U.S.C. § 1255a(f) before the 1996 amendment. In that case, the Supreme Court held that such a statute was a limitation only on a district court's review of individual denials of status and did not deprive the district courts of jurisdiction to consider due process challenges to the manner in which the INS administered the relevant provisions. *Id.* at 491-94, 111 S.Ct. at 895-97. The Supreme Court's holding in *McNary*, however, focused on legislative intent, and on the absence of any indication in the statute or its history that Congress intended to preclude such general constitutional attacks. *Id.* at 494, 498-99, 111 S.Ct. at 897, 899-900. In the absence of any such indication, the Supreme Court relied on the general presumption in favor of judicial review. *Id.* at 498-99, 111 S.Ct. at 899 ("The strong presumption in favor of judicial review of administrative action is not overcome either by the language or the purpose of the relevant provisions of the Reform Act."). Section 1255a(f) as amended in 1996 is a different statute from that considered in *McNary*.

FN1. 18 U.S.C. § 1255a(f) reads:

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

...

No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

...

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described [above].

...

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

...

There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title.

...

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

8 U.S.C. § 1255a(f)(1)-(4).

The statute at issue here contains an express congressional directive that review should be limited to the claims of those persons who have actually tendered or attempted to tender an application and fee. Accordingly, the statute would appear to rebut the presumption relied upon in *McNary*. Were there any doubt of congressional intent, it is resolved by the language of the conference report spelling out that intent:

[Section 377] amends INA section 245A to put an end to litigation seeking to extend the amnesty provisions of the Immigration Reform and Control Act of 1986, and to limit claims under that section to aliens who in fact filed an application for legalization under that section within the prescribed time limits, or attempted to do so but their application was refused by an immigration

officer.

H.R. Conf. Rep. No. 104-828, at 230 (1996).

Section 377 therefore applies to the claims of these class members.

CONSTITUTIONALITY OF SECTION 377

[2] Catholic Social Services alternatively argues that if Congress did intend the section to apply to claims like theirs, then Congress has violated the Constitution's separation of powers principles. They maintain that Congress has reached beyond the appropriate legislative sphere to intrude in the judicial process by dictating the result in this case. They rely on *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871).

In *Klein*, the Supreme Court held that a statute was unconstitutional because it ordered federal courts to deny the effect of presidential pardons in certain cases where the Court had already determined their effect. 80 U.S. at 145. The Court determined that by doing so, Congress had "prescribe[d] a rule for the decision of a cause in a particular way," and had not created any new circumstances by enacting the legislation other than to prescribe such a rule. *Id.* at 146-47. Catholic Social Services thus contends that here, Congress acted improperly in enacting legislation intended to require the courts to dismiss their claims.

Catholic Social Services' theory is similar to that advanced and rejected in *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992). The Court there held that a statute affecting pending cases, indeed designating them by name and number, did not offend separation of powers because Congress was changing the law applicable to those cases rather than impermissibly interfering with the judicial *927 process. *Id.* at 438-40, 112 S.Ct. at 1413-14; see also *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569-70 (9th Cir.1993) (noting high degree of judicial tolerance for Congressional act that is intended to affect litigation as long as Congress changes underlying substantive law in any detectable way).

Catholic Social Services' argument concerning Congressional intervention in a particular case is even less compelling than that presented in *Robertson*. Here, Congress has defined federal court

jurisdiction to review claims of aliens seeking benefits under a statute. Congress' authority to define federal court jurisdiction is well-recognized. See *Keene Corp. v. United States*, 508 U.S. 200, 207, 113 S.Ct. 2035, 2040, 124 L.Ed.2d 118 (1993); *Palmore v. United States*, 411 U.S. 389, 401, 93 S.Ct. 1670, 1678, 36 L.Ed.2d 342 (1973); *Duldulao v. INS*, 90 F.3d 396, 400 (9th Cir.1996), as amended. Its plenary authority with respect to immigration matters is also ingrained in our law. See *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S.Ct. 671, 676, 53 L.Ed. 1013 (1909)); see also *Carlson v. Landon*, 342 U.S. 524, 537, 72 S.Ct. 525, 532-33, 96 L.Ed. 547 (1952); *Duldulao*, 90 F.3d at 399-400. Accordingly, the statute does not violate the separation of powers. See *Fiallo*, 430 U.S. at 792, 97 S.Ct. at 1477-78; *Keene Corp.*, 508 U.S. at 207, 113 S.Ct. at 2040; *Gray*, 989 F.2d at 1568-70.

[3] Nor does the statute completely immunize IRCA or INS policy from constitutional attack so as to raise due process concerns. See *Bartlett v. Bowen*, 816 F.2d 695 (D.C.Cir.1987), upon which Catholic Social Services relies. See also *Johnson v. Robison*, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 1165-66, 39 L.Ed.2d 389 (1974) (statutory bar to court's deciding constitutionality of legislation would raise serious constitutional questions). This statute does not limit the issues courts may review; it restricts individuals who may bring claims to those who have been directly affected by INS conduct. Given Congress' sweeping power over immigration policy, we can not fault the statute on due process grounds.

Section 377 is constitutional and is applicable to the current action. Because none of the class members or named plaintiffs allege that they physically tendered an application and fee or attempted to do so but were rebuffed by a legalization assistant, they do not meet the jurisdictional requirements of the statute. Accordingly, we vacate the district court's orders and remand with instructions to dismiss this action for lack of jurisdiction.

VACATED AND REMANDED WITH
INSTRUCTIONS TO DISMISS.

CATHOLIC SOCIAL SERVICES, INC.;
American Federation of Labor--Congress of
Industrial Organizations; United Farm Workers
of America, AFL-CIO; Miguel
Moran; Kamiel Abubakr; Maria Magana; Elias
Velasquez; Maria Velasquez;
Francisco Arizaga, Plaintiffs-Appellees,
v.
Janet RENO, Attorney General; Doris Meissner,
Commissioner of Immigration and
Naturalization Service, Defendants-Appellants.

No. 96-15495.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 11, 1997.

Decided April 30, 1997.

Amended Jan. 16, 1998.

Stephen W. Funk, United States Department of
Justice, Office of Immigration Litigation,
Washington, DC, for defendants-appellants.

Peter A. Schey, Center for Human Rights and
Constitutional Law, Los Angeles, CA, for plaintiffs-
appellees.

Appeal from the United States District Court for the
Eastern District of California Lawrence K. Karlton,
Chief Judge, Presiding. D.C. No. CV-86-01343-
LKK.

Before: SCHROEDER, ALARCON, and
O'SCANNLAIN, Circuit Judges.

PER CURIAM.

*1 The opinion filed April 30, 1997 is amended as
follows:

Slip op. at 4913, delete "Opinion by Judge
Schroeder." On page 4916, change "OPINION" to
"PER CURIAM" also, on that same page, delete
"SCHROEDER, Circuit Judge:"

On page 4916, first paragraph, 3rd line from the
bottom of that paragraph, replace "to mean that"
with "of § 1255a(a)(3)(A) to mean that in order to

qualify for adjustment of status,"

Page 4916, second paragraph, second line should
read: "individuals (collectively "Catholic Social
Services")."

On page 4917, line 6, after the word "eligible", the
rest of the sentence should read: "for adjustment of
status under 8 U.S.C. § 1250a, and extended the
application deadline for class members."

Page 4917, line 8, before the word "policy," add:
"advance parole" The second paragraph, line 10 of
that same page delete, "standing to challenge the
policy," and instead add: "ripe claims." On line 11
of that same paragraph delete, "It remanded the
case," to the end of the paragraph and instead add:
"The Court held that the "front-desking" of a
particular class member is not only sufficient to
make his legal claims ripe, but necessary to do so."
Id. at 66. The Court concluded that it could not
resolve the jurisdictional question regarding ripeness
because the record did not contain evidence that
particular class members were actually subjected to
front-desking. Id. at 64-65. The Court explained
the basis for its disposition as follows: "Because
only those class members (if any) who were front-
desked have ripe claims over which the District
Courts should exercise jurisdiction, we must vacate
the judgment of the Court of Appeals, and remand
with direction to remand to the respective District
Courts for proceedings and determine which class
members were front-desked." Id. at 66-67. In
compliance with the Court's mandate, we remanded
to the district court for further proceedings
consistent with the Supreme Court's opinion.
Catholic Social Services, Inc. v. Reno, 996 F.2d
221, 222 (9th Cir.1993). The district court then
entered the orders presently before us, certifying a
modified and narrower class, and continuing its
prior orders providing interim relief for the class.
The Government filed a timely appeal from the
district court's orders."

On page 4918, second paragraph, add the word
"Reno," prior to 956 F.2d at 916-18. Also, add the
word "Reno", prior to 509 U.S. at 46-53.

On page 4918, amend the third paragraph by
substituting the following language:

"In that decision, the Court rejected the argument of the INS "that § 1255a(f)(1) precludes district court jurisdiction over an action challenging the legality of a regulation [regarding an application for legalization] without referring to or relying on the denial of any individual application." Id. at 56. The Court held that 28 U.S.C. § 1331 confers "a statutory source of jurisdiction" for class actions to review agency actions. Id." Add also the following paragraph:

*2 "The Court noted that since Catholic Social Services sought injunctive and declaratory judgment remedies, "courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." Id. at 57 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967))."

On page 4918, fourth paragraph, start the paragraph with: "In *Reno*, the" Also, change the citation at the end of the paragraph to: "Id. at 61-62."

On page 4918, fifth paragraph, line three, after the words, "front desk," add: "in a footnote," also, change the citation after the words "front- desked." to "Id. at 66 n. 28." Also, at the end of this citation, add footnote 1. Footnote 1 reads:

"Footnote 28 states as follows:

The record reveals relatively little about the application of the front- deskings policy and surrounding circumstances. Although we think it unlikely, we cannot rule out the possibility that further facts would allow class members who were not front-desked to demonstrate that the front-desking policy was nevertheless a substantial cause of their failure to apply, so that they can be said to have had the "advanced parole" or "facially valid document" regulation applied to them in a sufficiently concrete manner to satisfy ripeness concerns.

Reno, 509 U.S. 43 at 66 n. 28, 113 S.Ct. 2485, 125 L.Ed.2d 38."

Page 4918, fifth paragraph, line 7, delete starting with: "The Supreme Court remanded" to the end of that paragraph and replace with: "Because the Court could not determine from the record before it whether the district court may have exercised its discretionary jurisdiction to review the action of the

INS without first considering whether any of the named plaintiffs or class members had been front-desked, the Court remanded with directions that the district ascertain, in the first instance, whether any class members had been front- desked and therefore had ripe claims for its discretionary review. Id. at 66-67."

Page 4919, first paragraph, line three, after the word "purview" replace "of footnote 28" with "of the Court's dicta in footnote 28" Also replace the last word "practice," at the end of that first paragraph, with: "front-desking policy."

Page 4919, on line 2 of the last paragraph, change the word "the" to "this"; also on the last paragraph of page 4919, line 6, add a footnote 2 after the word "assistant," Footnote 2 will read:

We agree with the INS that the statute's requirement that a complete application form must be presented to a "legalization officer" should be broadly construed to mean presentation to anyone authorized by the INS and IRCA to receive such form.

*3 Same paragraph, line 7, change: "Plaintiffs counter" to "Catholic Social Services counters"

Page 4920, second line, after the word "powers" add "and due process."

Page 4920, first full paragraph, line one, change "the new statute" to " § 377"; on line 2 of that same paragraph, add a period after the word "litigation" and delete the rest of that sentence. After "litigation." add the following new sentence: "They argue that it applies only to aliens who come within the statute it amends, 8 U.S.C. § 1255a(f)." Change the footnote that is shown as footnote 1 to footnote 3.

Page 4920, delete, starting with the last two words on that page, "That section" and ending on page 4921 with the word "provisions" which appears on page 4921, lines 12-13. Replace with: "Catholic Social Services maintains that § 1255a(f) applies to aliens who have had applications denied. They assert that it is inapplicable to the class members because they were never able to have their applications filed and accordingly could not have had them denied. Catholic Social Services rely on *McNary v. Haitian Refugee Center*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991) to support

(Cite as: 1997 WL 817338, *3 (9th Cir.(Cal.)))

this proposition. In McNary, the Court dealt with a related provision of IRCA that included limitations on review similar to those in 8 U.S.C. § 1255a(f) before the 1996 amendment. In McNary, the Supreme Court held that such a statute was a limitation only on a district court's review of individual denials of status and did not deprive the district courts of the jurisdiction to consider class actions seeking an injunction or a declaratory judgment based on an allegation of a deprivation of due process resulting from the manner in which the INS administered the relevant provisions."

In the last line of the carry-over paragraph on page 4921, after "1996" replace the rest of the sentence with: "is distinguishable from the statute considered in McNary."

On page 4921, the first full paragraph, replace the entire paragraph which starts: "[1] The statute" with "Section 377 contains an express congressional directive that federal court jurisdiction should be limited to a review of administrative claims of persons who have tendered or attempted to tender a complete application and fee. Accordingly, the language of the statute rebuts the presumption of administrative review of agency action. Were there any doubt of Congress's intent, it is resolved by the language of the conference report:"

Page 4922, after, "H.R. Conf. Rep. No. 104-828, at 230 (1996)." delete the sentence which starts "[2] Section 377 ..." and instead add the following:

"It is also clear from the language of § 377 and the conference report that Congress intended to eliminate federal court jurisdiction over claims by aliens who were not actually subjected to front-desking but failed to file an application because of the front-desking policy. Section 377 expressly provides that federal court jurisdiction only extends to claims by those who "attempted to file a complete application and application fee with an authorized legalization officer ... but had the application and fee refused by that Officer." While the phrase "attempted to file a complete application" might be ambiguous standing alone, any uncertainty disappears when these words are read in context. In order for a legalization officer to have refused a complete application, a complete application must have been tendered. Clearly, someone who was discouraged from filling out an application or whose

request for an application was denied would not fall within the purview of § 377.

*4 A broader interpretation of § 377 would contravene Congress's clearly expressed intention to "put an end to [this] litigation." An expansive reading of § 377 would foster litigation to define the parameters of an attempt to file a complete application. Moreover, because this is a matter pertaining to alien rights, this court must "rigidly ... enforce the legislative will." *INS v. Pangilinan*, 486 U.S. 875, 884, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988) (quoting *United States v. Ginsberg*, 243 U.S. 472, 474, 37 S.Ct. 422, 61 L.Ed. 853 (1917) (internal quotation marks omitted)).

We are persuaded that § 377 solely applies to the claims of class members who actually tendered or attempted to tender a complete application and fee."

On page 4922, after the main heading, "CONSTITUTIONALITY OF SECTION 377" add the subheading:

"A. Separation of Powers"

After the subheading "A. Separation of Powers", on line 3 of the subsequent paragraph, after the word, "violated," change the rest of the sentence to read: "the principle of separation of powers." In the same paragraph on page 4922, after the word "beyond," which is the last word on line four, replace, "the appropriate legislative sphere" with, "its legislative function".

On page 4923, first full paragraph, change the first word on line 4 of that paragraph, "defined" to "expressly limited"; on line 9 of that same paragraph after "1996)" delete the ", as amended"; in that same paragraph, on line 11 through line 13, the parenthetical following the citation on Fiallo, should read:

(" '[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens

After the last sentence on page 4923, the first full paragraph, change the order of the citations as follows: "See *Keene Corp.*, 508 U.S. at 207; *Fiallo*, 430 U.S. at 792; *Gray*, 989 F.2d at 1568-70."

Delete the last paragraph on page 4923 to and

(Cite as: 1997 WL 817338, *4 (9th Cir.(Cal.)))

including the first full paragraph of the slip opinion on page 4924 and replace with the following:

"B. Due Process

Catholic Social Services contend that § 377 is unconstitutional because it deprives them of a federal court forum to vindicate a deprivation of a property interest conferred upon them by IRCA. We disagree. Simply labeling a claim as "constitutional" does not suffice to make it so. See, e.g., *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 769 (9th Cir.1986) ("A plaintiff will not be allowed to conceal the true nature of a complaint through 'artful pleading.' ") (citation omitted).

Congress has the authority to limit judicial review over the whole of Catholic Social Services' claims because those claims seek nothing more than to enforce statutory rights and interests created by IRCA. See *Lyng v. Payne*, 476 U.S. 926, 942, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986) (noting that the Court has never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause); *Atkins v. Parker*, 472 U.S. 115, 129, 105 S.Ct. 2520, 86 L.Ed.2d 81 (1985) ("The procedural component of the Due Process Clause does not 'impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.' ") (citation omitted); *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (stating that property interests are not created by the Constitution and instead stem from an independent source); *Austin v. City of Bisbee*, 855 F.2d 1429, 1436 (9th Cir.1988) ("Property rights to public benefits are defined by the statutes or customs that create the benefits. When, as here, the statute authorizing the benefits is amended or repealed, the property right disappears.") (quotation marks and citation omitted).

*5 We agree with Catholic Social Services that a statute that completely immunizes a statute from constitutional attack would raise difficult constitutional issues. See *Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C.Cir.1987). See also *Johnson v. Robison*, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) (statutory bar to court's deciding constitutionality of legislation would raise serious constitutional questions). Thankfully,

however, we need not address those issues. This statute does not purport to limit the issues that federal courts may review. Instead, it restricts individuals who may challenge the constitutionality of a statute that creates a property or liberty interest to those who have been directly affected by an administrative regulation that would deny them a benefit conferred by Congress. Given Congress's sweeping power over immigration policy, we can not fault the statute on due process grounds.

CONCLUSION

Section 377 is constitutional and is applicable to the current action. Because none of the class members or named plaintiffs have alleged that they actually tendered an application and fee or attempted to do so but were rebuffed by a legalization assistant, they do not have standing pursuant to the limited grant of federal court jurisdiction set forth in § 377.

The posture of this case differs from that presented to us the last time this case was before this court. Then, the Supreme Court had remanded to this court with instructions that there be a determination whether there were class members who satisfied the ripeness requirements for discretionary relief it had articulated in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 66-67, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). We in turn remanded to the district court for further proceedings consistent with the Supreme Court's opinion. *Catholic Social Services, Inc. v. Reno*, 996 F.2d 221, 222 (9th Cir.1993).

Catholic Social Services had over three years to amend their pleadings in response to the Court's decision in *Reno* before the enactment of § 377. They failed to do so. If the passage of time was not enough to close this window of opportunity, the enactment of § 377 did so. Section 377 did not change the requirement that class members must have been front-desked in order to have ripe claims; instead, § 377 eliminated federal court jurisdiction for aliens who were not actually front-desked but were discouraged by the policy. Moreover, § 377 was explicitly made retroactive. It was made "effective as if included in the enactment of the Immigration Reform and Control Act of 1986." IIRIRA § 377, Pub.L. No. 104-208, 110 Stat. 3009 (1996).

The result of this retroactive application of § 377 is that the district court did not have jurisdiction to

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hear Catholic Social Services' claims nor to enter any orders on their behalf. When Catholic Social Services filed this action six days after the enactment of IRCA, no facts had been alleged that any of the class members had submitted applications pursuant to § 377's requirements. See *Keene Corp. v. United States*, 508 U.S. 200, 207, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) ("[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought.") (internal quotation marks and citations omitted). Congress's ability to eliminate retroactively federal court jurisdiction in this manner is beyond question. See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.") (citations omitted).

*6 The enactment of § 377 also precludes this court from considering the class members' argument that § 377 violates the Equal Protection Clause of the Fifth Amendment. The class members before this court have not alleged facts sufficient to satisfy § 377's requirement that they were actually front-desked nor have they alleged facts sufficient to demonstrate that they were discouraged from filing an application by the front-desking policy. By enacting § 377, Congress explicitly denied the federal courts the power to review a constitutional challenge by persons who did not qualify for benefits because they had failed to present a complete application to a legalization officer within the statutory time limits.

Accordingly, we vacate the district court's interlocutory orders and remand with instructions to dismiss this action for lack of jurisdiction. See *Bruner v. United States*, 343 U.S. 112, 116-17, 72 S.Ct. 581, 96 L.Ed. 786 (1952) (dismissing an action and noting that "[t]his rule--that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law--has been adhered to consistently by this Court"). [FN4]

With the opinion so amended, the panel has voted unanimously to deny the petition for rehearing. Judges Schroeder and O'Scannlain have voted to reject the suggestion for rehearing en banc and Judge Alarcon so recommends. The full court has

been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R.App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

PER CURIAM:

This class action litigation challenges the lawfulness of an Immigration and Naturalization Service ("INS") policy adopted in 1986 and revised in 1987 as part of the INS's administration of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1255a ("IRCA"). That statute established a legalization program under which certain aliens unlawfully present in the United States could apply for status as temporary residents, and then seek permission to reside permanently in the United States. See 8 U.S.C. §§ 1255a(a), (b). Among other requirements, IRCA provided that to be eligible, applicants had to prove continuous physical presence in the United States since November 6, 1986. 8 U.S.C. § 1255a(a)(3)(A). The policy plaintiffs seek to challenge in this case is an INS directive interpreting the continuous physical presence requirement of § 1255a(a)(3)(A) to mean that in order to qualify for adjustment of status, aliens must have obtained INS approval before leaving the United States for even the briefest of absences (the "advance parole policy").

Plaintiffs include a number of concerned organizations and individuals (collectively "Catholic Social Services"). They filed their original complaint in the district court in November of 1986 challenging the advance parole policy. They contended that the policy violated the statutory proviso that an alien would not fail to maintain continuous physical presence by virtue of brief, casual and innocent absences from the United States. See 8 U.S.C. § 1255a(3)(B). The district court certified a broad class of all persons who had not complied with the INS advance parole policy but were otherwise eligible for adjustment of status under 8 U.S.C. § 1250a, and extended the application deadline for class members. The district court subsequently ruled that the advance parole policy was contrary to the intent of the statute and

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hence unenforceable. *Catholic Social Services, Inc. v. Meese*, 685 F.Supp. 1149, 1159-60 (E.D.Cal.1988).

*7 The case is now before this court for the third time. In the first appeal from the district court's original ruling, we affirmed the district court in a consolidated appeal that also dealt with a related case challenging another INS policy. *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914 (9th Cir.1992). The Supreme Court granted certiorari and vacated our decision, holding that only those persons who had taken affirmative steps toward legalization and had their path blocked by INS representatives on account of the policy had ripe claims. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 58-59, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). The Court held that "the front-desking of a particular class member is not only sufficient to make his legal claims ripe, but necessary to do so." *Id.* at 66. The Court concluded that it could not resolve the jurisdictional question regarding ripeness because the record did not contain evidence that particular class members were actually subjected to front-desking. *Id.* at 64-65. The Court explained the basis for its disposition as follows: "Because only those class members (if any) who were front-desked have ripe claims over which the District Courts should exercise jurisdiction, we must vacate the judgment of the Court of Appeals, and remand with direction to remand to the respective District Courts for proceedings and determine which class members were front- desked." *Id.* at 66-67. In compliance with the Court's mandate, we remanded to the district court for further proceedings consistent with the Supreme Court's opinion. *Catholic Social Services, Inc. v. Reno*, 996 F.2d 221, 222 (9th Cir.1993). The district court then entered the orders presently before us, certifying a modified and narrower class, and continuing its prior orders providing interim relief for the class. The Government filed a timely appeal from the district court's orders.

During the pendency of this appeal, Congress again amended the immigration laws by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Section 377 of the new Act purported to set limits on judicial review of legalization claims.

We therefore must consider the effect of this

intervening legislation, which the Government contends requires us to vacate the district court's orders and to direct the district court to dismiss the litigation. We conclude we must do so.

The background of the case and its procedural history are set forth in detail in this court's prior opinion, *Reno*, 956 F.2d at 916-18, and in the Supreme Court's opinion. *Reno*, 509 U.S. at 46-53. We do not elaborate further here. The Supreme Court's decision is the springboard for our legal analysis in this appeal.

*8 In that decision, the Court rejected the argument of the INS "that § 1255a(f)(1) precludes district court jurisdiction over an action challenging the legality of a regulation [regarding an application for legalization] without referring to or relying on the denial of any individual application." *Id.* at 56. The Court held that 28 U.S.C. § 1331 confers "a statutory source of jurisdiction" for class actions to review agency actions. *Id.*

The Court noted that since *Catholic Social Services* sought injunctive and declaratory judgment remedies, "courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." *Id.* at 57 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)).

In *Reno*, the Court described at some length the INS's practice, known as "front-desking," pursuant to which legalization assistants were instructed to review applications in the applicants' presence and to reject the applications of any aliens who were statutorily ineligible for legalization. Under this "front-desking" policy, aliens who disclosed unapproved trips outside the United States had their applications rejected before the applications could be filed. *Id.* at 61-62.

In addition to those persons who had actually attempted to apply for legalization and had their applications rejected at the front desk, in a footnote, the Supreme Court opinion referred to the possibility that there may have been other persons who had been sufficiently affected by the policy to maintain a justiciable claim, even though they had not actually been "front- desked." *Id.* at 66 n. 28. [FN1] Because the Court could not determine from the

record before it whether the district court may have exercised its discretionary jurisdiction to review the action of the INS without first considering whether any of the named plaintiffs or class members had been front-desked, the Court remanded with directions that the district ascertain, in the first instance, whether any class members had been front-desked and therefore had ripe claims for its discretionary review. *Id.* at 66-67.

On remand, the district court modified the class definition so as to include persons who had actually been front-desked and those who came within the purview of the Court's dicta in footnote 28 by being otherwise adversely affected by the front-desking policy.

It was against this background that Congress passed section 377, with a retroactive date as if it had been enacted as part of IRCA. Section 377 provides:

(a) **LIMITATION ON COURT JURISDICTION.**-Section 245A(f)(4) (8 U.S.C. § 1255a(f)(4)) is amended by adding at the end the following new subparagraph:

***9 "(C) JURISDICTION OF COURTS.**

Notwithstanding any other provision of law, no court shall have jurisdiction of any cause of action or claim by or on behalf of any person asserting an interest under this section unless such person in fact filed an application under this section within the period specified by subsection (a)(1) of this section, or attempted to file a complete application and application fee with an authorized legalization officer of the Service but had the application and fee refused by that Officer."

(b) **EFFECTIVE DATE.**-The amendment made by subsection (a) shall be effective as if included in the enactment of the Immigration Reform and Control Act of 1986.

The government maintains that the new statute requires dismissal of this action because there has been no showing that any of the class members or named plaintiffs meet the requirements of § 377, i.e., by having actually filed an application or by having attempted to tender an application and fee but having them refused by a legalization assistant, [FN2] within the times originally established by the statute. Catholic Social Services counters that the statute was not intended to apply to this case, and that if it was, the statute is unconstitutional as a violation of separation of powers and due process.

We discuss each issue in turn.

APPLICABILITY OF THE STATUTE

Catholic Social Services contend that § 377 does not apply to this litigation. They argue that it applies only to aliens who come within the statute it amends, 8 U.S.C. § 1255a(f). Section 1255a(f) provides for a single level of administrative appellate review of determinations regarding an adjustment of status, and limits judicial review of denials of legalization to the administrative record. [FN3] Catholic Social Services maintains that § 1255a(f) applies to aliens who have had applications denied. They assert that it is inapplicable to the class members because they were never able to have their applications filed and accordingly could not have had them denied. Catholic Social Services rely on *McNary v. Haitian Refugee Center*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991) to support this proposition. In *McNary*, the Court dealt with a related provision of IRCA that included limitations on review similar to those in 8 U.S.C. § 1255a(f) before the 1996 amendment. In *McNary*, the Supreme Court held that such a statute was a limitation only on a district court's review of individual denials of status and did not deprive the district courts of the jurisdiction to consider class actions seeking an injunction or a declaratory judgment based on an allegation of a deprivation of due process resulting from the manner in which the INS administered the relevant provisions. *Id.* at 491-94. The Supreme Court's holding in *McNary*, however, focused on legislative intent, and on the absence of any indication in the statute or its history that Congress intended to preclude such general constitutional attacks. *Id.* at 494, 498-99. In the absence of any such indication, the Supreme Court relied on the general presumption in favor of judicial review. *Id.* at 498-99 ("The strong presumption in favor of judicial review of administrative action is not overcome either by the language or the purpose of the relevant provisions of the Reform Act."). Section 1255a(f) as amended in 1996 is distinguishable from the statute considered in *McNary*.

***10** Section 377 contains an express congressional directive that federal court jurisdiction should be limited to a review of administrative claims of persons who have tendered or attempted to tender a complete application and fee. Accordingly, the

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language of the statute rebuts the presumption of administrative review of agency action. Were there any doubt of Congress's intent, it is resolved by the language of the conference report:

[Section 377] amends INA section 245A to put an end to litigation seeking to extend the amnesty provisions of the Immigration Reform and Control Act of 1986, and to limit claims under that section to aliens who in fact filed an application for legalization under that section within the prescribed time limits, or attempted to do so but their application was refused by an immigration officer.

H.R. Conf. Rep. No. 104-828, at 230 (1996).

It is also clear from the language of § 377 and the conference report that Congress intended to eliminate federal court jurisdiction over claims by aliens who were not actually subjected to front-desking but failed to file an application because of the front-desking policy. Section 377 expressly provides that federal court jurisdiction only extends to claims by those who "attempted to file a complete application and application fee with an authorized legalization officer ... but had the application and fee refused by that Officer." While the phrase "attempted to file a complete application" might be ambiguous standing alone, any uncertainty disappears when these words are read in context. In order for a legalization officer to have refused a complete application, a complete application must have been tendered. Clearly, someone who was discouraged from filling out an application or whose request for an application was denied would not fall within the purview of § 377.

A broader interpretation of § 377 would contravene Congress's clearly expressed intention to "put an end to [this] litigation." An expansive reading of § 377 would foster litigation to define the parameters of an attempt to file a complete application. Moreover, because this is a matter pertaining to alien rights, this court must "rigidly ... enforce the legislative will." *INS v. Pangilinan*, 486 U.S. 875, 884, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988) (quoting *United States v. Ginsberg*, 243 U.S. 472, 474, 37 S.Ct. 422, 61 L.Ed. 853 (1917) (internal quotation marks omitted)).

We are persuaded that § 377 solely applies to the claims of class members who actually tendered or attempted to tender a complete application and fee.

CONSTITUTIONALITY OF SECTION 377

A. Separation of Powers

Catholic Social Services alternatively argue that if Congress did intend the section to apply to claims like theirs, then Congress has violated the principle of separation of powers. They maintain that Congress has reached beyond its legislative function to intrude in the judicial process by dictating the result in this case. They rely on *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871).

*11 In *Klein*, the Supreme Court held that a statute was unconstitutional because it ordered federal courts to deny the effect of presidential pardons in certain cases where the Court had already determined their effect. 80 U.S. at 145. The Court determined that by doing so, Congress had "prescribe[d] a rule for the decision of a cause in a particular way," and had not created any new circumstances by enacting the legislation other than to prescribe such a rule. *Id.* at 146-47. Catholic Social Services thus contend[s] that here, Congress acted improperly in enacting legislation intended to require the courts to dismiss their claims.

Catholic Social Services' theory is similar to that advanced and rejected in *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992). The Court there held that a statute affecting pending cases, indeed designating them by name and number, did not offend separation of powers because Congress was changing the law applicable to those cases rather than impermissibly interfering with the judicial process. *Id.* at 438-40; see also *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569-70 (9th Cir.1993) (noting high degree of judicial tolerance for Congressional act that is intended to affect litigation as long as Congress changes underlying substantive law in any detectable way).

Catholic Social Services' argument concerning congressional intervention in a particular case is even less compelling than that presented in *Robertson*. Here, Congress has expressly limited federal court jurisdiction to review claims of aliens seeking benefits under a statute. Congress's authority to define federal court jurisdiction is well-recognized. See *Keene Corp. v. United States*, 508

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U.S. 200, 207, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993); *Palmore v. United States*, 411 U.S. 389, 401, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973); *Duldulao v. INS*, 90 F.3d 396, 400 (9th Cir.1996). Its plenary authority with respect to immigration matters is also ingrained in our law. See *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (" '[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S.Ct. 671, 53 L.Ed. 1013 (1909)); see also *Carlson v. Landon*, 342 U.S. 524, 537, 72 S.Ct. 525, 96 L.Ed. 547 (1952); *Duldulao*, 90 F.3d at 399-400. Accordingly, the statute does not violate the separation of powers. See *Keene Corp.*, 508 U.S. at 207; *Fiallo*, 430 U.S. at 792; *Gray*, 989 F.2d at 1568-70.

B. Due Process

*12 Catholic Social Services contend that § 377 is unconstitutional because it deprives them of a federal court forum to vindicate a deprivation of a property interest conferred upon them by IRCA. We disagree. Simply labeling a claim as "constitutional" does not suffice to make it so. See, e.g., *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 769 (9th Cir.1986) ("A plaintiff will not be allowed to conceal the true nature of a complaint through 'artful pleading.' ") (citation omitted).

Congress has the authority to limit judicial review over the whole of Catholic Social Services' claims because those claims seek nothing more than to enforce statutory rights and interests created by IRCA. See *Lyng v. Payne*, 476 U.S. 926, 942, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986) (noting that the Court has never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause); *Atkins v. Parker*, 472 U.S. 115, 129, 105 S.Ct. 2520, 86 L.Ed.2d 81 (1985) ("The procedural component of the Due Process Clause does not 'impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.' ") (citation omitted); *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (stating that property interests are not created by the Constitution and instead stem from an independent source); *Austin v. City of Bisbee*, 855 F.2d 1429,

1436 (9th Cir.1988) ("Property rights to public benefits are defined by the statutes or customs that create the benefits. When, as here, the statute authorizing the benefits is amended or repealed, the property right disappears.") (quotation marks and citation omitted).

We agree with Catholic Social Services that a statute that completely immunizes a statute from constitutional attack would raise difficult constitutional issues. See *Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C.Cir.1987). See also *Johnson v. Robison*, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) (statutory bar to court's deciding constitutionality of legislation would raise serious constitutional questions). Thankfully, however, we need not address those issues. This statute does not purport to limit the issues that federal courts may review. Instead, it restricts individuals who may challenge the constitutionality of a statute that creates a property or liberty interest to those who have been directly affected by an administrative regulation that would deny them a benefit conferred by Congress. Given Congress's sweeping power over immigration policy, we can not fault the statute on due process grounds.

CONCLUSION

Section 377 is constitutional and is applicable to the current action. Because none of the class members or named plaintiffs have alleged that they actually tendered an application and fee or attempted to do so but were rebuffed by a legalization assistant, they do not have standing pursuant to the limited grant of federal court jurisdiction set forth in § 377.

*13 The posture of this case differs from that presented to us the last time this case was before this court. Then, the Supreme Court had remanded to this court with instructions that there be a determination whether there were class members who satisfied the ripeness requirements for discretionary relief it had articulated in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 66-67, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). We in turn remanded to the district court for further proceedings consistent with the Supreme Court's opinion. *Catholic Social Services, Inc. v. Reno*, 996 F.2d 221, 222 (9th Cir.1993).

Catholic Social Services had over three years to

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amend their pleadings in response to the Court's decision in *Reno* before the enactment of § 377. They failed to do so. If the passage of time was not enough to close this window of opportunity, the enactment of § 377 did so. Section 377 did not change the requirement that class members must have been front-desked in order to have ripe claims; instead, § 377 eliminated federal court jurisdiction for aliens who were not actually front-desked but were discouraged by the policy. Moreover, § 377 was explicitly made retroactive. It was made "effective as if included in the enactment of the Immigration Reform and Control Act of 1986." IIRIRA § 377, Pub.L. No. 104-208, 110 Stat. 3009 (1996).

The result of this retroactive application of § 377 is that the district court did not have jurisdiction to hear Catholic Social Services' claims nor to enter any orders on their behalf. When Catholic Social Services filed this action six days after the enactment of IRCA, no facts had been alleged that any of the class members had submitted applications pursuant to § 377's requirements. See *Keene Corp. v. United States*, 508 U.S. 200, 207, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) ("[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought.") (internal quotation marks and citations omitted). Congress's ability to eliminate retroactively federal court jurisdiction in this manner is beyond question. See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.") (citations omitted).

The enactment of § 377 also precludes this court from considering the class members' argument that § 377 violates the Equal Protection Clause of the Fifth Amendment. The class members before this court have not alleged facts sufficient to satisfy § 377's requirement that they were actually front-desked nor have they alleged facts sufficient to demonstrate that they were discouraged from filing an application by the front-desking policy. By enacting § 377, Congress explicitly denied the federal courts the power to review a constitutional challenge by persons who did not qualify for benefits because they had failed to present a

complete application to a legalization officer within the statutory time limits.

*14 Accordingly, we vacate the district court's interlocutory orders and remand with instructions to dismiss this action for lack of jurisdiction. See *Bruner v. United States*, 343 U.S. 112, 116-17, 72 S.Ct. 581, 96 L.Ed. 786 (1952) (dismissing an action and noting that "[t]his rule--that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law--has been adhered to consistently by this Court"). [FN4]

VACATED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

SCHROEDER, Circuit Judge, Dissenting in Part:

I concur in the majority's holdings with one qualification and one exception.

First, the qualification. It is my view that under § 377, all those who actually tendered a completed form and fee, and those who went to the INS office to do so and were told it would be futile under the INS policy, have standing to have their claims adjudicated. That interpretation is consistent with the statute as read in light of the Supreme Court's decision that forms its backdrop, and which essentially held that all applicants who were blocked at the INS office by the "advance parole" policy had ripe claims. See *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 113 S.Ct. 2485, 2498-99, 125 L.Ed.2d 38 (1993). It is also consistent with equal protection. To the extent the majority opinion can be read to suggest a narrower interpretation might be appropriate, I would disagree.

Second, after reviewing the plaintiffs' petition for rehearing, I must disagree with the bottom line of the opinion which instructs the district court to dismiss the action, in favor of permitting a new complaint to be filed. We should instead remand for the district court to determine whether there are class members who satisfy the standing requirements. That is exactly what the Supreme Court told us to do the last time. See *Catholic Soc. Services*, 113 S.Ct. at 2500. We should heed its direction. Because the new statute was passed while this appeal was pending, the plaintiffs have never had the opportunity to show that the class includes

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persons who satisfy the new requirements. Dismissal of the action will no doubt cause irreparable harm to those who have legitimate claims but who may be deported before a new complaint can be filed.

I otherwise agree with the majority opinion.

FN4. Nothing we have stated in this opinion should be construed as deciding the question whether a new complaint can be filed in the district court on behalf of persons who allege that they physically tendered a complete application and fee or attempted to do so. That issue is simply not before us.

FN1. Footnote 28 states as follows:

The record reveals relatively little about the application of the front-desking policy and surrounding circumstances. Although we think it unlikely, we cannot rule out the possibility that further facts would allow class members who were not front-desked to demonstrate that the front-desking policy was nevertheless a substantial cause of their failure to apply, so that they can be said to have had the "advanced parole" or "facially valid document" regulation applied to them in a sufficiently concrete manner to satisfy ripeness concerns. *Reno*, 509 U.S. 43 at 66 n. 28, 113 S.Ct. 2485, 125 L.Ed.2d 38.

FN2. We agree with the INS that the statute's requirement that a complete application form must be presented to a "legalization officer" should be broadly construed to mean presentation to anyone authorized by the INS and IRCA to receive such form.

FN3. 8 U.S.C. § 1255a(f) reads:

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in

accordance with this subsection.

...

No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

...

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described [above]. ...

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

...

There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title.

...

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

8 U.S.C. § 1255a(f)(1)-(4).

FN4. Nothing we have stated in this opinion should be construed as deciding the question whether a new complaint can be filed in the district court on behalf of persons who allege that they physically tendered a complete application and fee or attempted to do so. That issue is simply not before us.

END OF DOCUMENT

No. 91-1326

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, RESPONDENT

vs.

Catholic Social Services, Inc., et al.

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

vs.

LIGASOY OF UNITED LATIN AMERICAN CITIZENS, et al.

ON WRIT OF HABEAS CORPUS
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1825

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
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*ON WRIT OF CERTIORARI
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1. Two themes dominate the briefs of respondents and their *amici*: the assertion that the legislative history of the Immigration Reform and Control Act of 1986 (IRCA) requires this Court to interpret IRCA "in a liberal and

generous fashion," Resp. Br. 4 (emphasis omitted); see *Cities of Chicago et al.* Br. 7-11; *Church World Service* Br. 7-13; and the contention that the Immigration and Naturalization Service (INS) implemented IRCA in a harsh and inhospitable manner, see, *e.g.*, Resp. Br. 5, 7-12. In our view, neither of those themes contributes to an appropriate analysis of the questions presented by our petition.¹

a. First, as we explained in our reply brief at the petition stage (Pet. Reply Br. 9 n.11), general statements of liberal intent extracted from IRCA's legislative history are not useful in answering the questions presented in these cases, which turn on the provisions Congress chose to enact into law. Those provisions make clear that Congress did not intend to pursue the liberal and generous purposes behind IRCA "at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525 (1987). Rather, Congress imposed a number of significant limitations on the program, two of which are relevant here: it limited judicial review to a single, expedited course; and it limited relief to aliens who applied during a brief and specified time period. Those limitations cannot be explained as the product of the "liberal and generous" motives on which respondents rely; accordingly, we do not think that those motives offer a basis for departing from the language Congress chose to use when it enacted those limitations.²

¹ Respondents also commence their brief by asserting (Resp. Br. 1) that the government's "statement of the opinions below is erroneous in several respects." Their discussion, however, does not identify any error in our statement; it simply includes a number of opinions to which our statement does not refer. They do not suggest that any of the opinions omitted from our statement contribute significantly to an understanding of the procedural background of the case or bear in any way on the questions presented by our petition.

² As this Court has explained, "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no

b. Second, the legalization program under IRCA was a great success. The estimates before Congress of the number of aliens who would be legalized under the program varied,³ but it is clear that INS's implementation of the program resulted in substantially more applications than Congress expected: 1,750,530 as of June 27, 1992. See Gov't Br. 5 n.4. Moreover, the suggestion that INS interpreted the eligibility provisions in a manner calculated to limit the availability of relief to the aliens at whom the program was directed is belied by the objective fact that INS has granted about 94% of the applications it has processed to date. See Gov't Br. 5 & n.4.⁴ Nor is it appropriate to assume, as respondents suggest (Resp. Br. 9 n.14, 14-15), that the regulations at issue in these cases clearly violated IRCA simply because the government chose not to challenge the district court orders invalidating those regulations. Given the limited effect of the regulations, which applied only to the program at issue in these cases, designed to end more than four years ago, the

account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986).

³ The Senate Report predicted 565,000 applications, S. Rep. No. 132, 99th Cong., 1st Sess. 64 (1985); the House Report predicted 1,400,000, H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. I, at 132 (1986).

⁴ Respondents also suggest (Resp. Br. 9) that INS dragged its heels in implementing provisions of IRCA (codified at 8 U.S.C. 1255a(e)(1)) that granted some protections to aliens even before the application period began. INS's response on this point was entirely reasonable. The "telex" to which respondents refer, Legalization Wire # 1, CO 1588-P (Nov. 14, 1986), was a 20-page document providing detailed instructions to INS district offices regarding proper procedures for implementing 8 U.S.C. 1255a(e)(1). INS issued this document only eight days after the President signed IRCA into law. See J.A. 183 (re-printing a portion of the document). The entire document appears in the record as an attachment to the November 24, 1986, Decl. of Peter A. Schey, Clerk's Record (CSS) item 9.

government's decision is readily understandable on other grounds.

2. On the jurisdictional question, respondents make only a passing attempt (Resp. Br. 32 n.44) to rebut our analysis of the language of Section 1255a(f), choosing to rest their argument primarily on their view that this Court's decision in *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), "broadly held" to the contrary (Resp. Br. 23-26), and on the contention that application of the statute as we understand it would be unduly harsh (Resp. Br. 28-32).⁵ None of respondents' arguments on those three points is persuasive.

a. We explained in our opening brief that 8 U.S.C. 1255a(f)(1) bars the actions before the Court because each of the individual respondents challenges a regulation delineating the qualifications for adjustment of status, because each regulation is a "determination,"⁶ and

⁵ Respondents also assert (Resp. Br. 32-34) that Congress's incorporation of 8 U.S.C. 1105a into Section 1255a(f) "shows that district court review of systemic practices and regulations is appropriate." Resp. Br. 32. As we explained in the petition (Pet. 14 n.17), Section 1105a actually supports our position, because it would be odd to conclude that exhaustion is not required under Section 1255a—with its express preclusion of alternate forms of judicial review—in circumstances (like these) where Section 1105a itself would require exhaustion. Moreover, as we pointed out in our reply brief at the petition stage, respondents' construction of Section 1105a is unsupported in the decisions of the lower courts on which respondents rely. As we explained there, all of those decisions "involve challenges to allegedly improper procedures; none involves a claim that the agency improperly interpreted the substantive requirements for relief." Pet. Reply Br. 7; see Pet. Reply Br. 7 n.8 (describing the facts of respondents' cases). Respondents have not attempted to rebut our description of those cases; indeed, their brief on the merits simply duplicates the citations contained in their brief in opposition. See Resp. Br. 33 n.45; Br. in Opp. 21 n.23.

⁶ Respondents' amicus American Bar Association (ABA) contends that our reading of the term "determination" is implausible, arguing

because, with regard to each of those aliens' claims, each regulation is a determination "respecting [that alien's] application for adjustment of status."⁷ Gov't Br. 17-19.

that Congress intended to incorporate into Section 1255a(f)(1) the distinction between a "rule" and an "adjudication" as those terms are defined in the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* ABA Br. 5-6. Section 1255a(f)(1), however, contains neither the term "rule" nor the term "adjudication"; if anything, Congress's decision not to use the well-recognized terms found in the APA suggests that it intended a different meaning.

The ABA also criticizes our reading of the term "determination" as leading to the "anomalous result that the administrative appellate authority * * * would have the power to entertain facial challenges to the regulations themselves." ABA Br. 6. That criticism is incorrect. Although the Legalization Appeals Unit (which is under the direction of the Associate Commissioner for Examinations) gives content to the regulations by construing them and determining how they apply in individual cases, it is bound by the regulations themselves, because the Attorney General has adopted them. See *Martinez-Montoya v. INS*, 904 F.2d 1018, 1023 (5th Cir. 1990) ("The INS cannot permit the LAU to deviate from the regulations. Once regulations are enacted, the INS, and even the Attorney General, who oversees and commands the Service, are required to comply with their commands."); 8 U.S.C. 1103(a) ("determination and ruling by the Attorney General with respect to all questions of law shall be controlling"); 8 C.F.R. 103.1(f) (delegation of authority to the Associate Commissioner for Examinations, which does not include authority to overturn regulations). Instead, the validity of the regulations should be tested by the regional courts of appeals on review of final orders of deportation.

⁷ We see no force in the ABA's argument (ABA Br. 6 & n.3) that the reference in Section 1255a(f)(1) to a determination "respecting" an application cannot bear the meaning customarily accorded the term "respecting," based on the ABA's view that the phrase must have the same meaning as the reference in Section 1255a(f)(3)(b) to a determination "on" an application. Because that argument rests on the premise that the two different phrases should bear identical meanings, it runs into the considerable headwind posed by the principle that courts should be reluctant to assume that Congress used different phrases to express the same concept. Moreover, the different contexts in which the phrases appear lend support to the view that the different phrases

Respondents do not directly address our interpretation of the statutory language, but instead suggest (Resp. Br. 32 n.44) that Congress considered, and rejected, our position when it failed to adopt a related Senate bill, S. 1200, 99th Cong., 1st Sess. (1985). S. 1200, however, would have barred all judicial review whatsoever with respect to any "decision or determination under [Section 1255a]." S. 1200, *supra*, § 202 (proposed 8 U.S.C. 1255a(f)(1)). The fact that Congress chose a narrower preclusion of review provision, which plainly permits judicial review of *some* INS actions under Section 1255a, does not shed a great deal of light on the question before the Court: how far did Congress go in allowing judicial review.⁸ The best guide on that question is the language of the statute Congress enacted.

should have different meanings. Paragraph (1) of 1255a(f) is the preclusion of review provision, which contains the broadest language in the entire subsection—channelling all litigation regarding any "determination" that "respect[s] an application" into one course of review. Paragraphs (3) and (4), which provide the avenues for review, logically might refer to narrower classes of determinations, reflecting a congressional decision that a "determination" should be subject to certain types of review only at certain stages in the process: paragraph (3) contemplates review of a determination "on" an application, based on the view that administrative appellate review would be applied only to determinations that have reached the stage of denial of a particular application, see 8 C.F.R. 103.1(f)(2)(xxvii), 245a.2(p) (providing for administrative review in those circumstances); and paragraph (4) contemplates review only of a "denial" of an application. See Gov't Br. 19 & n.18.

⁸ We do note, however, that some of respondents' specific comments about S. 1200 are misleading. First, we are unable to understand respondents' suggestion (Resp. Br. 32 n.44) that Section 1255a(f)(1) somehow fails to refer to regulatory determinations under Section 1255a(g) because, in respondents' view, Section 1255a(f)(1) does not refer to "this section." Section 1255a(f)(1), like the analogous provision in S. 1200, describes the type of determination as to which judicial review is precluded as a "determination * * * under this section." Because subsection (g) appears in Section 1255a—the same section that Section

b. Although respondents rely heavily on this Court's decision in *McNary*, their presentation makes it clear that they can prevail only under a reading of *McNary* that divorces that decision from the situation before the Court in that case. As respondents implicitly acknowledge, they can prevail only if *McNary* "broadly held" that individuals seeking legalization can bring any claim whatsoever directly in the district courts, provided they bring the claim in the form of a class action, challenging application of an INS policy to more than a single individual. See, e.g., Resp. Br. 24 (IRCA's preclusion provisions "apply *only* to individual challenges to those policies applied on a case-by-case basis").⁹ Hence, they must present *McNary* as a case

1255a(f) appears in—determinations under subsection (g) are covered by the statutory language.

Second, we see no substance to the argument that the preclusion provisions in Section 1255a(f) cannot apply to determinations made under Section 1255a(g), because "in the final version of IRCA" the authority to promulgate regulations appears later in the statute than the preclusion provisions in Section 1255a(f). Resp. Br. 32 n.44; see ABA Br. 7 n.3. The provisions appeared in the same order in S. 1200, which plainly contemplated preclusion of review with respect to the claims at issue in this case, by precluding all judicial review of *any* claim. See S. 1200, § 202 (proposed 8 U.S.C. 1255a(f) and (g)).

⁹ Respondents' amicus ABA argues at length (ABA Br. 16-24) that the efficiencies inherent in class actions support a ruling in respondents' favor, suggesting that our position is designed to "preclude amnesty applicants from proceeding as a class under Fed. R. Civ. P. 23." *Id.* at 16. This case presents no issue under Rule 23; whatever claims aliens are permitted to bring in district courts, they will be able to bring them as class actions if they can satisfy the requirements of Rule 23. *McNary* itself is evidence that such class actions can proceed in certain circumstances. The issue in this case, by contrast, is whether the claims respondents present are cognizable by the district courts at all. In any event, as the protracted proceedings in this case make clear, a complicated class action in the district court is not invariably the most efficient way to secure a speedy and definitive resolution of a legal question that arises out of INS's construction of IRCA. In some cases,

that “broadly held” that the preclusion provisions apply only to a challenge to the denial of a single application. *Id.* at 23. But whether one agrees with the Ninth Circuit’s decision in these cases or the D.C. Circuit’s decision in *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (1991), it is untenable to characterize *McNary*’s holding so broadly, because the facts of the case before the Court in *McNary* did not present any occasion for such a broad holding. As we explained in our opening brief (Gov’t Br. 20-23), a major focal point of the decision in *McNary* was the conclusion that denial of jurisdiction would “foreclose all forms of meaningful judicial review.” 111 S. Ct. at 898. Faced with that point, the Court concluded that “[t]he strong presumption in favor of judicial review of administrative action is not overcome either by the language or the purpose of the relevant provisions of [IRCA].” *Id.* at 899. Because that presumption is not applicable here, *McNary*—although relevant—does not control the decision of these cases.

c. As the court’s decision in *McNary* makes clear, a key factor in these cases is the availability of effective judicial review to respondents under Section 1255a(f). Although respondents argue that the system Congress created in Section 1255a(f) is inadequate (Resp. Br. 28-32), that argument rests on an inaccurate description of several aspects of the process, coupled with a fundamental disagreement with the policy choices Congress made when it enacted Section 1255a(f).

The portion of respondents’ brief that addresses the availability of judicial review makes two inaccurate statements about INS’s procedures. First, respondents contend that established INS policies barred individual

it would be swifter to follow the way designed by Congress—challenging the legalization decision directly in the court of appeals, as a defense to any deportation order the Attorney General might issue.

members of the respondent classes from filing applications for legalization. See, *e.g.*, Resp. Br. 16-17; 29. In support of that contention, respondents point out that INS's Legalization Manual required clerks to reject an application "if the applicant is statutorily ineligible." J.A. 188 (quoted at Resp. Br. 16). Although respondents suggest that the Manual reflects a draconian desire to trick eligible individuals into forfeiting their claims for relief, a fair reading suggests a much more charitable concern: in light of the significant filing fees,¹⁰ it is not at all unreasonable of INS to inform aliens of its view that their applications are deficient *before* it accepts the filing fee, so that they can make an informed choice about whether to pay the fee if they are not going to receive immediate relief. Moreover, contrary to respondents' assertions, the policy did not bar applicants from seeking relief through normal channels if they believed INS had erred; the very same page of the Legalization Manual provides: "If an applicant whose application has been rejected * * * insists on filing, the application will be routed through a fee clerk to an adjudicator with a routing slip * * * stating the noted deficiency(ies)." J.A. 188. Hence, INS procedures would have allowed members of the respondent classes to file applications if they wished to challenge INS's view that they were not entitled to relief.

Second, respondents state twice (Resp. Br. 28 n.36, 30 n.39) that an alien would not be able to secure review of an adverse legalization determination by surrendering to INS. That statement is incorrect; any alien who wishes to challenge an adverse determination on his legalization application may secure review by surrendering for

¹⁰ The fees for filing a legalization application (Form I-687) range from \$185 for an individual to \$420 for a family. 8 C.F.R. 103.7(b).

deportation at any INS district office.¹¹ The fact that respondents might avoid the initiation of deportation proceedings by the exercise of the "keen evasion skills" of which they boast (Resp. Br. 28 n.36) does not suggest that review is not effective; it suggests that respondents would rather flout the immigration laws of this country than secure a definitive legal resolution of their status. See Pet. Reply Br. 5-6.

Aside from the unduly critical characterization of INS's procedures, respondents do not argue that review is unavailable; instead, they offer a detailed outline of the review process (Resp. Br. 29-31), to support the contention that the process is so laborious that Congress could not have meant for aliens to follow such a process in order to secure relief.¹² The fact of the matter, however, is that the

¹¹ The only support respondents cite for their statement is a discussion, in a brief filed by INS in the district court, of procedures for granting a temporary stay of exclusion and a work authorization for individuals eligible for relief under the entirely separate Special Agricultural Worker program established by 8 U.S.C. 1160. The statute in question makes those benefits available only to aliens "apprehended" by INS "before the beginning of the application period." 8 U.S.C. 1160(d)(1). INS took the position that an alien was not "apprehended" under that provision if he voluntarily surrendered to INS. See Defendant's Memorandum Opposing Preliminary Injunctive Relief Respecting Work Authorization and the Admission to the United States of Special Agricultural Workers, Clerk's Record (CSS) item 40, at 42. There is no requirement that an alien be "apprehended" by INS in order to be subject to deportation. See 8 U.S.C. 1252.

¹² We note that respondents (Resp. Br. 30 & n.42) and their amicus ABA (ABA Br. 7-9, 12-13) rely heavily on the passage in *McNary* suggesting that district court review was appropriate in that case because the administrative record would be inadequate to present the claims at issue in that case. In fact, that passage in *McNary* strongly supports our position here, because the substantive claims here—that INS regulations contravene IRCA—would proceed best on an administrative record, which would provide a concrete fact situation illuminating how the regulation actually is applied, rather than

process implemented by INS is directly required by Congress. It may be, as the Court pointed out in *McNary*, 111 S. Ct. at 898, that it is quite burdensome to insist that aliens seeking to challenge denial of their legalization application must surrender for deportation if they want prompt review, but Section 1255a(f)(4)(A) required that step for aliens seeking to challenge denial of their applications. Unless the Court is prepared to say that the provision denies effective judicial review even to individual aliens who have filed applications, there is no support for respondents' contention that the provision denies them effective judicial review simply because they chose to bypass the process and refrain from filing applications in a timely manner.

Similarly, respondents criticize their statutory ineligibility for work authorizations during the period their challenges would be pending in the administrative review process, pointing out that Congress offered temporary work authorizations to aliens with a prima facie case of eligibility for legalization. See Resp. Br. 31 & n.43.¹³ But the statute reflects a congressional choice to limit work authorizations to aliens whom the Attorney General believes have a prima facie case of eligibility for relief; Congress could have granted work authorizations to any alien who chose to challenge the Attorney General's decision, but it did not, undoubtedly because of the view

hypothetical discussions about how it might have been applied if respondents had chosen to file applications.

¹³ Respondents contend (Resp. Br. 31 n.43) that the statute offers work authorization to any alien apprehended before the application period who had a "nonfrivolous case of eligibility," but the statute plainly requires a "prima facie case of eligibility." 8 U.S.C. 1255a(e)(1)(B). Respondents apparently are referring to the analogous provision in the Special Agricultural Worker program of IRCA, which does provide for a work authorization upon presentation of a "nonfrivolous application." 8 U.S.C. 1160(d)(2)(B).

that granting such work authorizations would encourage unfounded appeals and unfairly diminish job opportunities for those who are legally residing in this country. Cf. *INS v. National Center for Immigrants' Rights*, 112 S. Ct. 551, 558 (1991) (*NCIR*) (noting that "preserv[ing] jobs for American workers" is an "established concern of immigration law"). That choice places a serious burden on individuals like those in the respondent classes who took the effort to file applications before the application period expired, but it did not deprive them of an opportunity for effective judicial review. The fact is, Congress has not chosen to grant persons subject to deportation a general authorization to work during the pendency of their legal challenges. Indeed, as this Court held last year in *NCIR*, INS is entitled to detain individuals pending resolution of their deportation proceedings unless they agree that they will not work unlawfully. Respondent's discussion on this point in fact reflects nothing more than a disagreement with the policy chosen by Congress.¹⁴

The bottom line is that respondents are a group of individuals who had a different view of the legalization requirements from INS and thus believed that they were eligible for relief, but would not have been immediately successful if they had sought legalization from INS. Their desire to short-circuit the process and go directly to the district courts flies in the face of Congress's determination that litigation about INS's refusal to grant legalization applications should await the entire administrative process—including deportation proceedings—and should be channeled directly to the courts of appeals, for one final decision that would determine

¹⁴ An analogous problem for aliens challenging their deportation appears in the provision in the Immigration and Nationality Act that requires aliens in deportation proceedings to pay for their own counsel. See 8 U.S.C. 1252(b)(2) ("the alien shall have the privilege of being represented (at no expense to the Government)").

definitively whether the alien is entitled to stay in this country. The contrary decision of the court of appeals should be reversed.

3. Respondents' arguments on the remedial question are even less persuasive than their arguments on the jurisdictional question.

a. Respondents' argument focuses on their repeated assertion that these cases involve individuals from whom INS unlawfully refused to accept applications.¹⁵ That assertion is incorrect: these cases do not involve individuals from whom INS refused to accept applications; they involve individuals who did not file applications because they believed INS would deny relief. The government concedes that any individual who actually attempted to file an application (accompanied by the appropriate filing fees) during the application period, but failed because government agents refused to accept it, would be an individual who "appl[ie]d for * * * adjustment" within the meaning of 8 U.S.C. 1255a(f) (1)(A).¹⁶ Similarly, in our view, any refusal by INS to allow an individual to file an application, would constitute a "denial" of the application reviewable in the courts of appeals in

¹⁵ See, e.g., Resp. Br. 16 (stating that "INS and its QDEs refused to accept applications submitted by class members"); *id.* at 35 n.47 ("a large number of the class members actually tried to file applications with INS or its QDE agents"); *id.* at 40 (stating that "INS simply 'rejected' th[e] applications [of class members]").

¹⁶ Such a showing would require an alien to demonstrate that the government agent refused to accept the application despite INS's written procedures, which required the government to accept applications from aliens the government believed to be ineligible if the alien insisted. See pages 8-9 *supra*. As respondents acknowledge (Resp. Br. 38 n.51), INS has granted relief to individuals who can establish that they actually had attempted to file a timely application.

connection with any order of deportation entered against the alien, as provided by 8 U.S.C. 1255a(f)(4)(A).¹⁷

In any event, the question whether the district court could grant relief to an alien if INS improperly refused to accept an application is not properly before the Court. First, the classes defined by the district courts are not classes of aliens who attempted to file; they are classes of aliens who chose not to file. See Pet. App. 25a (CSS class includes aliens who "knew of [the challenged] regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application"); J.A. 216 (LULAC class includes aliens who, "relying upon information that they were ineligible, did not apply for legalization before the * * * deadline"). Second, respondents have failed to establish that any of the named class representatives in either case attempted to file applications.¹⁸ Accordingly, there is no reason for the Court to consider the proper treatment of turnaways. Cf.

¹⁷ INS regulations also allow the regional processing facility to reconsider the denial *sua sponte* if the applicant files an appeal to the Associate Commissioner; similarly the Associate Commissioner may reopen any prior decision he has made. See 8 C.F.R. 103.5(b); *In re O—*, 19 I. & N. Dec. 871, 871 (L.A.U. 1989) (reopening is proper if "manifest injustice would occur if the prior decision were permitted to stand"). Proceedings have been reopened under this regulation in several cases. See, e.g., *In re O—*, supra; *In re N—*, 19 I. & N. Dec. 760, 760 (L.A.U. 1988); *In re S—*, 19 I. & N. Dec. 851, 854 (L.A.U. 1988).

¹⁸ See First Amended Compl. ¶¶ 18-22, Clerk's Record (LULAC) item 56, at 11-15 (four class representatives filed timely applications; the fifth declined to file based on media reports and the advice of an attorney); Sixth Amended Compl. ¶¶ 18-29, Clerk's Record (CSS) item 140, at 12-25 (description of factual circumstances of class representatives; no allegation that class representatives were turned away). We note that respondents offer no record support for their allegations (see note 15, *supra*) that INS improperly refused to accept applications from members of the respondent classes.

Fed. R. Civ. P. 23(a)(3) (class representatives must have claims "typical of the claims or defenses of the class").

b. Turning to the classes of respondents before the Court, it is clear that there is no basis for the court of appeals' decision to require INS to consider their claims for relief. At bottom, respondents' argument is that INS truthfully publicized its view of the requirements for relief under IRCA, and respondents decided not to file. If respondents are correct in arguing that those circumstances are adequate to justify circumvention of statutory filing deadlines, then no party need ever seek relief from a government agency in a timely manner if it disagrees with the agency's interpretation of the requirements for relief; it instead can ignore filing deadlines and sit back waiting for a definitive legal resolution of the controversy. That result cannot be, and is not, correct.

Respondents rely (Resp. Br. 35-42) on the doctrine of equitable tolling, as enunciated by this Court in *Irwin v. Veterans Administration*, 111 S. Ct. 453 (1991), but nothing in *Irwin* supports respondents. First, *Irwin* dealt with statutes of limitations and other "statutory time limits applicable to lawsuits." *Id.* at 457. These cases, by contrast, present an argument that the Executive Branch must grant relief in the absence of one of the statutorily mandated requirements for relief, Section 1255a(a)(1). Even though equitable tolling may be available with respect to statutes of limitation, it should not be applied to contravene a specific requirement for relief, especially in a case, like this one, where Congress has precluded any administrative or judicial review of denial of an application for failure to meet that requirement, see Section 1255a(f)(2); Gov't Br. 32 & n.34.¹⁹

¹⁹ Contrary to respondents' contentions (Resp. Br. 37 n.51), INS did not grant relief to any class of individuals that failed to apply for

In any event, even if equitable tolling principles apply, they would not support relief in these cases any more than they supported relief in *Irwin*. As the Court explained

adjustment before the deadline. The first authority respondents cite was a regional notice suggesting that filing an application for registry under 8 U.S.C. 1259 before the deadline for applying for legalization would be sufficient to toll the legalization deadline. See Legalization Wire # 197, Clerk's Record (LULAC) item 65, Exh. 1. The Assistant Commissioner (Office of Legalization), referred to as "COLEG," promptly countermanded that notice, explaining in an August 8, 1988 wire: "It has been brought to the attention of COLEG that a policy wire has been issued at the regional office level [permitting extension of the deadline based on an application for registry]. At no time, repeat, at no time, has this been the INS' policy." Wire CO 1588-0, App., *infra*, 1a; see also Legalization Wire # 264 (Aug. 11, 1988), App., *infra*, 2a (expressly rescinding Legalization Wire # 197 and stating that "[a]t no time has this been Immigration and Naturalization Service policy.").

The second matter respondents cite (Resp. Br. 37 n.51) is INS's practice of dating applications from the time they were submitted to a QDE. That policy was required by the terms of IRCA, which provided that an applicant could apply not only to the Attorney General, but also to QDEs. See 8 U.S.C. 1255a(c)(1)(B).

Finally, respondents rely (Resp. Br. 38 n.51) on two decisions of the Northern Regional Processing Center. In both cases, the applicants established that they had attempted to file applications before a deadline, but were turned away. See *In re —*, (Northern Regional Processing Facility Mar. 14, 1988) (Am. Immigr. Law. Ass'n reprint No. LO688-189) (alien appeared at office before deadline but was required to make an appointment after deadline); *In re —* (Northern Regional Processing Facility June 27, 1988) (Am. Immigr. Law. Ass'n reprint No. LO988-347) (alien appeared at office before deadline with multiple applications and a single money order, rather than separate money orders for each application). Consistent with the policy we explained above (see pages 13-14, *supra*), the Legalization Appeals Unit allowed the individuals to seek relief. Respondents have represented to the government that they will lodge copies of those decisions with the Court. Those decisions, of course, are consistent with the government's present position; the applicants in those cases, unlike respondents, "appl[ied]" for relief before the deadline.

there, equitable tolling typically is available in two situations:

[1] where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or [2] where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.

111 S. Ct. at 458. Respondents, of course, did not file pleadings during the application period; if they had, INS would have granted them relief when it receded from the challenged regulations, as it did for the class members who did file timely applications.²⁰

Similarly, respondents were not tricked into allowing the deadline to pass by "misconduct"; they simply chose not to challenge the government's duly promulgated view of the requirements for relief. Respondents' reliance (Resp. Br. 38-39) on *Bowen v. City of New York*, 476 U.S. 467 (1986), to establish misconduct is unsuccessful. As the Court explained in *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988), *City of New York* turned on the fact that the challenged policy was "a secret, internal policy." *Id.* at 123. By contrast, the classes in these cases by definition include only individuals who knew about the challenged policies. See Gov't Br. 33 & n.35.²¹

²⁰ Respondents miss the point in suggesting (Resp. Br. 39) that it would be unfair to ask for "more diligence" because they filed one of these class actions only "six days after IRCA became law." Although the class actions were filed in the district courts, no members of the classes before the Court filed applications of any kind with INS during the applicable time period.

²¹ Because the classes include only respondents who knew about the challenged INS policies, respondents are not in a position to claim (see Resp. Br. 39) that INS violated its statutory obligation to publicize the relief available under IRCA, see 8 U.S.C. 1255a(i). In any event, respondents' real complaint does not seem to be that INS failed to

Even more surprisingly, respondents suggest that the extension is proper because it “is consonant with the legislative scheme.” Resp. Br. 37; see *id.* at 47 (relying on “the purpose of the 12-month application period”). Rarely will the Court decide a case in which Congress has made so clear its intent not to allow judicial intervention to extend statutory deadlines. As we have explained, paragraphs (3) and (4) of Section 1255a(f) provide generally for judicial review of INS determinations respecting applications for adjustment. But paragraph (2) imposes a clear and dispositive exception:

No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

8 U.S.C. 1255a(f)(2). Whatever purposes respondents may attempt to glean from the legislative history, Congress’s purpose with respect to the application period is clear from the statute: courts are not to extend the deadline.²²

publicize the requirements for relief; it is that INS publicized *its* view of the requirements rather than respondents’ view.

²² Respondents argue (Resp. Br. 13 n.19) that the Court should not evaluate the propriety of the district court’s “alternative” injunction, because the court of appeals did not decide that question and because it was not properly presented in our petition. We disagree. First, in our view, the propriety of the alternative injunction is fairly included in the second question in our petition, which asks whether 8 U.S.C. 1255a “bar[s] the district courts from ordering the Immigration and Naturalization Service to extend [the statutory] deadline.” Because there is no basis other than 8 U.S.C. 1255a for the district court’s order requiring INS to allow respondents a permanent right to work and reside in the United States, and because that order grants relief to individuals who did not apply before the deadline, we believe the propriety of the order is fairly included in the question presented.

Finally, respondents and their amici suggest that unless the lower courts had the power to extend the statutory deadline, the federal courts are powerless to remedy any wrong caused by INS's challenged regulations. Resp. Br. 34, 43; ACLU Br. 14-20. Not so. It may be that the federal courts are powerless to grant relief to individuals who failed to seek relief, but the courts of appeals were, and are, available to grant relief to individuals who filed timely applications that may have been denied improperly. See, e.g., *Martinez-Montoya v. INS*, 904 F.2d 1018 (5th Cir. 1990) (overturning an INS decision denying adjustment of status).²³ The inability of the district courts to grant relief is simply a facet of the statute; it does not reflect any deficiency in the general equitable powers of the federal courts.

For the foregoing reasons and those set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

KENNETH W. STARR
Solicitor General

OCTOBER 1992

We have presented the matter to the Court to offer a full view of the types of relief that the lower courts believe they can enter notwithstanding statutory deadlines. In our view, any resolution of the second question in our favor would be highly likely to require reversal of the alternative injunction as well. In light of the protracted pendency of this litigation, we thought it would be best to give the Court the flexibility to dispose of the matter finally at this time.

²³ Also, to the extent individuals raise a collateral challenge to procedures (like the claimants in *McNary* or claimants in the hypothetical situation in which INS declined to establish a twelve-month application period, posed at Resp. Br. 48 n.61), the individuals would have been able to file an action directly in the district court.

APPENDIX

TELEGRAPHIC MESSAGE

NAME OF AGENCY U.S. IMMIGRATION & NATURALIZATION SVC.	PREDENCE PRIORITY ACTION: INFO:	SECURITY CLASSIFICATION UNCLASSIFIED
ACCOUNTING CLASSIFICATION 1581217/81 CE 2211.790	DATE PREPARED AUGUST 08, 1988	FILE CO 1588-0
FOR INFORMATION CALL		
NAME TERRANCE M. O'REILLY, COLEG	PHONE NUMBER FTS 633-5309	TYPE OF MESSAGE ☒ SINGLE ☐ BOOK ☐ MULTIPLE ADDRESS
THIS SPACE FOR USE OF COMMUNICATION UNIT		
MESSAGE TO BE TRANSMITTED (Use double spacing and all capital letters)		
TO: ROCOMs: ERO, SRO, NRO, WRO; ROLECs: ETO, SRO, NRO, WRO IT HAS BEEN BROUGHT TO THE ATTENTION OF COLEG THAT A POLICY WIRE HAS BEEN ISSUED AT THE REGIONAL OFFICE LEVEL ADDRESSING THE SUBJECT OF THE REGISTRY APPLICANT'S ABILITY TO FILE FOR LEGALIZATION IF THE REGISTRY APPLICATION WAS FILED PRIOR TO MAY 4, 1988, AND SUBSEQUENTLY DENIED. THE WIRE ALSO STATES THAT THE DATE OF APPLICATION FOR LEGALIZATION WILL BE THE DATE THAT THE APPLICANT FILED FOR REGISTRY. AT NO TIME, REPEAT, AT NO TIME, HAS THIS BEEN THE INS' POLICY. IF POLICY WIRES AND/OR MEMOS ADDRESSING THIS SUBJECT HAVE BEEN ERRONEOUSLY ISSUED, THEY SHOULD IMMEDIATELY BE RESCINDED AT THE LEVEL OF ISSUE. A COPY OF THE RESCISSION SHOULD THEN BE TELEFAXED TO COLEG, ATTN: RAYMOND B. PENN, ASSISTANT COMMISSIONER, COLEG, FTS 633-3296. /S/ Raymond B. Penn RAYMOND B. PENN COLEG		ROCOM: BUR, DLS, TWC, SPD ROLEG: BUR, DLS, TWC, LAGUNA NIGUEL CA
PAGE NO. 1	NO. OF PGS 1	SECURITY CLASSIFICATION UNCLASSIFIED

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TELEGRAPHIC MESSAGE

NAME OF AGENCY SRO/INS	PREDENCE ACTION: PP INFO	SECURITY CLASSIFICATION UNCLASS
ACCOUNTING CLASSIFICATION 1581217/2211790	DATE PREPARED 8-11-88	FILE LEGALIZATION WIRE # 264
FOR INFORMATION CALL		
NAME WILLIAM E. ZIMMER REGIONAL LEGALIZATION MANAGER	PHONE NUMBER 767-7368	TYPE OF MESSAGE ☐ SINGLE ☐ BOOK ☐ MULTIPLE ADDRESS
THIS SPACE FOR USE OF COMMUNICATION UNIT		
MESSAGE TO BE TRANSMITTED (Use double spacing and all capital letters)		
TO: ALL DISTRICT DIRECTORS ATTN: ALL DISTRICT LEGALIZATION MANAGERS ALL LEGALIZATION SITE SUPERVISORS SOUTHERN REGION ALL OF REGIONAL, WIRE #197 IS HEREBY RESCINDED. AT NO TIME HAS THIS BEEN IMMIGRATION AND NATURALIZATION SERVICE POLICY. THE INSTRUCTION PERMITTING AN APPLICANT TO CARRY OVER BEYOND MAY 4, 1988, THE DATE OF AN UNSUCCESSFUL APPLICATION FOR REGISTRY IS AND WAS INCORRECT. THEREFORE UNSUCCESSFUL APPLICANTS FOR REGISTRY MAY NOT USE THE FILING DATE OF THIS APPLICATION IN APPLYING FOR ADJUSTMENT UNDER 245(a). PLEASE BE GUIDED ACCORDINGLY. /S/ <u>William E. Zimmer</u> WILLIAM E. ZIMMER REGIONAL LEGALIZATION MANAGER		
PAGE NO. 1	NO. OF PGS. 1	SECURITY CLASSIFICATION UNCLASS