

In the Supreme Court of the United States

OCTOBER TERM, 1992

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

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

LEAGUE OF LATIN AMERICAN CITIZENS, ET AL.

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

BRIEF FOR THE PETITIONERS

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E. Virginia S. Smith, Secretary, Immigration and

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QUESTIONS PRESENTED

1. Did the district courts properly entertain these lawsuits brought by aliens seeking adjustment of status, which challenge the regulations of the Immigration and Naturalization Service (INS) articulating the bases for granting and denying that relief, notwithstanding 8 U.S.C. 1255a(f), which provides a single exclusive means of review in the courts of appeals for denials of adjustment of status?

2. Does 8 U.S.C. 1255a, which requires all applications for adjustment of status to be filed before a specified deadline, bar the district courts from ordering INS to extend that deadline?

PARTIES TO THE PROCEEDINGS

Respondents in the first case are Catholic Social Services, Inc.; National Center for Immigrant Rights, Inc.; United-California Mexican American Associations; American Federation of Labor-Congress of Industrial Organizations; United Farm Workers of America, AFL-CIO; La Comunidad de San Juan; Sara Orantes de Palacios; Mercedes Aguilar de Lopez; Maria Teresa Reyes; Jose Guerroero Saravia; Efren Gonzales; Lorenza Sanchez Benuto; Carlos Alberto Medina; Benjamin Chavez; Sergio Will; Eva Garcia de Soto; and Petra Estrada de Vasquez.

Respondents in the second case are League of United Latin-American Citizens; American G.I. Forum; Hermandad Mexicana Nacional; Los Angeles County Federaltion [*sic*] of Labor, Legalization Assistance Project (AFL-CIO); United California Mexican-American Association; International Institute (San Francisco); John Doe; Raul Berumen-Flores; Martha Berumen; Mario Villa; and Martin Nava.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 956 F.2d 914. The opinions of the district courts (Pet. App. 22a-28a, 40a-49a, 50a-60a) are unreported. A related opinion of the court of appeals in the first case is reported at 820 F.2d 289. A related opinion of the district court in the first case (J.A. 54-77) is reported at 685 F. Supp.

(1)

1149. A related unreported opinion of the court of appeals in the first case appears at J.A. 27-47. Related unreported opinions of the district court in the first case appear at J.A. 14-17, 21-25, and 48-53. A related unreported opinion of the district court in the second case appears at J.A. 211-234.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1992. The petition for a writ of certiorari was filed on May 13, 1992. This Court granted the petition on June 22, 1992. J.A. 235. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 8 U.S.C. 1255a is set forth at Pet. App. 99a-119a.
2. 5 U.S.C. 702, 703, and 704 are set forth at Pet. App. 120a-121a.
3. 8 C.F.R. Pt. 245a is set forth in the Appendix, *infra*, 1a-92a.

STATEMENT

1. Pursuant to the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, Congress provided a one-time opportunity for thousands of aliens residing illegally in the United States to acquire legal residency. See 8 U.S.C. 1255a. IRCA permitted aliens to apply to INS to adjust their status to that of an alien lawfully admitted for temporary residence. *Ibid.* The statute set out a number of detailed substantive requirements for an alien to qualify for this special relief. Generally, these requirements limited relief to aliens who could establish (1) continuous unlawful residence in the

United States since before January 1, 1982; (2) continuous physical presence in the United States since November 6, 1986 (the date IRCA was passed); (3) admissibility to the United States as an immigrant; and (4) that they filed an application during a twelve-month period designated by the Attorney General, but starting no later than 180 days after November 6, 1986.¹ 8 U.S.C. 1255a(a).

A key concern of IRCA was to ensure that the adjustment program was limited to a finite period and proceeded in an expeditious manner. Accordingly, as noted above, an express condition for eligibility, set forth in Section 1255a(a)(1), limited relief to aliens who applied in a timely manner; Section 1255a(f)(2) provides that "[n]o denial of adjustment of status * * * based on a late filing of an application * * * 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." Section 1255a(f) also established the process for judicial and administrative review of adjustment determinations based on factors other than a lack of timeliness. First, paragraph (1) of Section 1255a(f) makes the statutory procedures exclusive, by providing that there "shall be no administrative or judicial review of a determination respecting an application for adjustment of status * * * except in accordance with this subsection." Second, paragraph (3) requires the Attorney General to establish procedures for "a single level of administrative appellate review." Finally, paragraph (4) provides that judicial review will be available "only in

¹ The Attorney General extended the program as long as possible, designating the twelve-month application period to begin on the last permissible day, May 5, 1987, and to continue through May 4, 1988. 8 C.F.R. 245a.2(a)(1).

the judicial review of an order of deportation under [8 U.S.C. 1105a]."

In response to IRCA, INS adopted several regulations delineating the process of administrative review contemplated by the statute. First, INS required aliens to file an application either at one of INS's legalization offices, or with a "qualified designated entity" authorized to receive applications. 8 C.F.R. 245a.1(j), .1(r), and .2(e); see 8 U.S.C. 1255a(c)(1) and (2).² The regulations gave detailed guidance regarding the types of documentation aliens could use to prove their eligibility for relief, 8 C.F.R. 245a.2(d), and, with limited exceptions, required an immigration officer to interview each applicant. Section 245a.2(j). The initial decisions with respect to the applications were made by the directors of INS's regional processing facilities. Section 103.1(t). Those officers were required to notify the applicants of decisions in writing, explain the specific reason for denials, and advise the applicants of their right to appeal. Sections 103.3(a)(3), 245a.2(o). Finally, pursuant to Sections 103.1(f)(1) (xxvii) and 245a.2(p), applicants had thirty days to appeal the decision of the regional processing facility to the Associate Commissioner, Examinations (Administrative Appeals Unit).

Because 8 U.S.C. 1255a(f)(3) provides that there can be only "a single level of administrative appellate review," and Section 1255a(f)(4) provides that ju-

² In the case of an application filed with a qualified designated entity, the application was deemed filed with the legalization office on the date it was filed with the qualified designated entity, provided that the applicant consented to the entity's forwarding the application to the legalization office. 8 C.F.R. 245a.2(f).

judicial review will be available "only in the judicial review of an order of deportation under [8 U.S.C. 1105a]," an unsuccessful applicant can challenge the Associate Commissioner's decision only after the conclusion of administrative deportation proceedings. Under 8 U.S.C. 1105a, an applicant may appeal a final adverse decision in a deportation proceeding to the appropriate regional court of appeals, in accordance with the provisions of 28 U.S.C. 2342-2350. See 8 U.S.C. 1105a (incorporating the provisions of 28 U.S.C. 2342-2350 by reference).

The legalization programs attracted "amnesty" applications on an unprecedented scale. Over three million applications were filed, 1,763,381 of which were seeking adjustment of status under Section 1255a.³ More than 99% of those applications have been processed, with approximately 94% of the processed applications being approved.⁴

2. The matter before the Court involves two consolidated cases challenging two different INS regu-

³ Those statistics do not include filings made after the deadline by members of the respondent classes.

⁴ INS has advised us that as of June 27, 1992 it had granted relief in 1,645,862 of the 1,750,530 applications for adjustment of status that it had completed processing as of that date. These statistics reflect slightly fewer applications than the statistics the government provided to the Court at the time of *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), see Gov't Br. 4 & n.3, No. 89-1332 (Oct. Term, 1990). This decrease is attributable to the withdrawal of applications for a variety of reasons. For example, some applicants received other immigration benefits not dependent on adjustment of status, some applicants died, and some filed duplicate applications under both programs.

lations interpreting the statutory requirements for eligibility for adjustment of status.

a. The first case involves Section 1255a(a)(3), which provides that an alien generally is not eligible for adjustment under IRCA unless he has remained in this country continuously since November 6, 1986. Section 1255a(a)(3)(B) mitigates this requirement by providing that an alien should not be considered to have failed to maintain continuous physical presence in the United States solely because of "brief, casual, and innocent absences from the United States." Shortly after IRCA was passed, INS interpreted this provision to exclude any absences not authorized by INS in advance, on the theory that absent INS permission, the alien's reentry after the absence was unlawful and thus not "innocent." See 52 Fed. Reg. 16,208-16,209 (1987) (codified at 8 C.F.R. 245a.1(g)).

On November 12, 1986, respondents Catholic Social Services, Inc. and other organizations and individuals interested in INS's interpretation of the "brief, casual, and innocent absences" provision commenced an action in the United States District Court for the Eastern District of California. J.A. 1. On November 24, 1986, the district court certified a class including all persons believed by the government to be deportable who could establish a *prima facie* claim for adjustment of status. *Id.* at 14-17.⁵ On the same

⁵ The description in the text refers to the first of two subclasses certified by the court. The district court also certified a second subclass of aliens seeking relief under the Special Agricultural Worker program established by 8 U.S.C. 1160, see J.A. 15, but issues concerning those aliens are not before this Court. The district court finally resolved those claims in an August 11, 1988 order, see *id.* at 3 (docket entry 188), and neither party appealed to the court of appeals.

ay, the district court issued a temporary restraining order (*id.* at 21-25) barring INS from deporting any member of the class who would have been *prima facie* eligible for legalization under IRCA except for a "brief, innocent and casual unauthorized departure." *Id.* at 22.

The government appealed, and the court of appeals reversed. J.A. 27-47. The court noted that a temporary restraining order is not "[o]rdinarily * * * an appealable order," *id.* at 31, but concluded that "the substance of the proceeding" in the district court justified characterization of the district court's order as an appealable preliminary injunction, explaining that the order went "beyond merely preserving the status quo and impair[ed] [INS's] ability to control the borders and prevent illegal immigration." *Id.* at 32-33. On the merits, the court of appeals concluded that the district court erred in issuing the temporary restraining order because the "Attorney General has presented us with a reasonable construction of the IRCA," and "[t]he district court therefore abused its discretion by concluding CSS was likely to succeed on the merits." *Id.* at 41.⁶

After further proceedings in the district court, the district court narrowed the class certification (J.A. 48-53) to include only "persons *prima facie* eligible for legalization * * * who departed and reentered the United States without INS authorization * * * following what they assert to have been a brief, casual and innocent absence from the United States." *Id.* at 50. In May 1988, notwithstanding the court of

⁶ The court of appeals subsequently vacated this opinion, when INS withdrew the challenged regulation. 820 F.2d 289 (1987).

appeals' opinion regarding the temporary restraining order, the district court granted summary judgment to respondents and enjoined INS from enforcing its administrative interpretation. *Id.* at 54-77.

Turning to remedial issues, the court issued an opinion on June 10, 1988 (Pet. App. 22a-28a), requiring INS to identify all members of the class whose applications were denied on the basis of the challenged regulation, to "rescind such denials * * * and readjudicate such applications in a manner consistent with the court's order." *Id.* at 24a. Moreover, the court required INS, notwithstanding the statutory cutoff for acceptance of applications, to continue until November 30, 1988 to accept adjustment applications from class members who claimed that "they knew of [INS's] unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application." *Id.* at 25a.⁷

In response to this Court's June 17, 1988 decision in *INS v. Pangilinan*, 486 U.S. 875, the government filed a motion to vacate that portion of the district court's decision extending the filing deadline established by Congress.⁸ After further briefing, the dis-

⁷ The court also issued a supplemental order on August 11, 1988 requiring INS to advise individuals in its custody of any rights they might have under the district court's prior orders. Pet. App. 29a-33a.

⁸ On June 24, 1988, while it was considering the government's motion, the district court entered a stay of the government's obligation to accept and dispose of applications, requiring the government instead to refrain from deporting or otherwise removing any individuals who were members of the class. Pet. App. 34a-39a. The district court vacated the stay when it rejected the motion on August 11, 1988. See *id.* at 43a.

ct court denied the motion. Pet. App. 40a-49a. Expressing the view that it "would negate the entire purpose of equity" to require a court sitting in equity to "conform its decisions to the strictures of the statute," *id.* at 42a n.2, the court concluded that it had power to extend the statutorily imposed deadline. Although it "recognize[d] that there is dicta in [*Pangilinan*] which might suggest that the court is powerless to remedy the harm caused by [INS's] violation of the statute," it nevertheless decided to "rea[d] the holdings of *Pangilinan* narrowly and as limited by the particular factual and statutory context in which that case arose." *Id.* at 42a.

Noting the possibility that it might be incorrect in its narrow reading of *Pangilinan*, the court also entered an alternative injunction, to become "effective immediately upon the reversal of [the court's earlier] order." The alternative order effectively required petitioners to allow the challenged class members to remain in this country indefinitely. See Pet. App. 42a-43a (petitioners "will be barred from excluding deporting, or subjecting to voluntary departure any [class] members * * * and must grant such aliens work authorizations"). Paragraphs 3(a) through 3(g) of the same order establish detailed procedures for implementation of this alternative injunction. See Pet. App. 43a-49a.

b. The second case concerns 8 U.S.C. 1255a(a)(2), which provides that an alien is not eligible for relief under IRCA unless he has resided continuously in this country in an unlawful status since before January 1, 1982. INS interpreted this provision to mean that an alien who left the United States and then reentered using a facially valid nonimmigrant visa or other documentation was not eligible for re-

lief, because the use of facially valid documentation made the subsequent residence lawful for purposes of this section of IRCA. See 8 C.F.R. 245a.2(b)(8).⁹

In July 1987, respondents League of United Latin American Citizens and various individuals brought an action challenging the regulation in the United States District Court for the Central District of California. See Pet. App. 8a. Although INS withdrew the challenged regulation in October 1987,¹⁰ the suit continued, and the district court certified a class of individuals who were deemed ineligible for relief solely because of the challenged policy and, "relying upon information that they were ineligible, did not apply for legalization [on or] before the May 4, 1988 deadline." See J.A. 215-216. In July 1988 the district court held that the original INS policy had been invalid. *Id.* at 211-234.

Finally, in August 1988 the court issued a remedial order (Pet. App. 50a-60a), requiring that until November 30, 1988, INS would continue to accept applications for relief from aliens who claimed that they would have applied for relief in a timely manner but

⁹ On its face, 8 C.F.R. 245a.2(b)(8) states that an alien will remain eligible for relief as long as his reentry was "not documented on Service Form I-94, Arrival-Departure Record." This has the effect of barring relief for aliens who entered with facially valid documents, because their entry would have been documented on an I-94.

¹⁰ INS altered the regulations by issuing 8 C.F.R. 245a.2(b)(9) and (10). Subparagraph (9) provides that an alien is eligible for relief even if his entry is noted on the I-94, but subparagraph (10) conditions this on the alien's securing a waiver of the provision in 8 U.S.C. 1182(a)(19) that requires exclusion of aliens who enter the United States by fraud. See Pet. App. 8a-9a.

for INS's interpretation of the "continuous unlawful residence" provision. The district court noted that the application requirement is "a jurisdictional requirement and not simply a statute of limitations," *id.* at 52a, and thus agreed with the government that the time period could "not be equitably tolled," *id.* at 53a. The court also noted that equitable tolling would be unavailable because of respondents' failure "to demonstrate affirmative misconduct by the INS," *ibid.*, explaining that "malfeasance * * * cannot be presumed simply because the INS promulgated regulations which have been held to be invalid," *id.* at 54a. Nevertheless, the district court concluded that it had the power to extend the deadline, on the theory that the Attorney General effectively had failed to designate a twelve-month period by promulgating incorrect regulations during the designated period. *Id.* at 55a-56a.

3. Although the government determined not to challenge the two district court rulings rejecting INS's interpretations of IRCA, it nevertheless appealed both cases to the Ninth Circuit. The appeals challenged both the district courts' authority to entertain the cases and to grant relief extending the statutory cutoff for filing applications.¹¹ Pursuant to an expedited scheduling order, the court heard oral argument in the CSS case on November 18, 1988.¹²

¹¹ Because INS had ceased to enforce the challenged regulations, it did not challenge application of the district court orders to individuals who had filed timely applications, who would have been able to secure the same relief granted by the district courts on appellate review. See Gov't C.A. Br. 3, 9 n.3.

¹² After issuing three temporary stays in the CSS case, see Pet. App. 94a, 95a, 96a, the court of appeals issued an order on September 20, 1988 (*id.* at 97a-98a), partially granting the

The court of appeals held the case pending this Court's disposition of *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), and finally rendered a decision more than three years after argument, on February 13, 1992.

a. The court first rejected the government's argument that 8 U.S.C. 1255a(f) precluded district court jurisdiction over the two cases.¹³ Pet. App. 10a-15a. The court of appeals relied heavily on this Court's decision in *McNary*, which involved similar provisions of IRCA related to relief for agricultural workers. The court reasoned that *McNary* limited the effect of Section 1255a(f) to "denials of individual * * * applications," Pet. App. 12a. Because this case did not involve an individual application, but a class-wide challenge to the standards to be applied to in-

government's motion for a stay pending appeal. The order incorporated by reference the terms of a temporary stay issued by the CSS district court on June 24, 1988, see note 8, *supra*. The court subsequently consolidated the *LULAC* case with the *CSS* case and accepted briefs in the *LULAC* case without ordering further arguments.

¹³ As the court of appeals noted, the district court in the *LULAC* case did not enter a separate judgment pursuant to Fed. R. Civ. P. 58. See Pet. App. 10a n.3. This Court's decision in *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386-388 (1978), however, establishes that the separate-judgment requirement can be waived. The court of appeals correctly concluded that the requirement in fact was waived in this case, because "both parties and the district court treated the injunction as the final decision in the case, and neither party objected to the taking of an appeal." Pet. App. 10a n.3. In any event, even if this requirement had not been waived, the court of appeals still would have had jurisdiction over the appeal in the *CSS* case, which adequately presents the questions raised by the petition. Respondents did not challenge this point in their brief in opposition to the petition.

dividual applications, the court concluded that jurisdiction was available under *McNary*. *Id.* at 14a. The court acknowledged that the District of Columbia Circuit's decision in *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (1991), petition for cert. pending, No. 91-1924, had read *McNary* to give Section 1255a(f) a much more preclusive effect—barring judicial review of any issues “that go to the heart of an applicant's claim,” even if presented on a “class-wide” basis, as in this case. Pet. App. 15a (quoting *Ayuda*, 948 F.2d at 749). The court of appeals nevertheless “decline[d]” to “follow the D.C. Circuit's * * * decision.” Pet. App. 14a.

b. The court of appeals also rejected the government's argument that *Pangilinan* barred the district courts from extending the application deadline. Pet. App. 15a-19a.¹⁴ In the Ninth Circuit's view, *Pangilinan* could be distinguished on several grounds: *first*, that the remedy imposed here was not naturalization, but simply an order requiring INS to consider applications for adjustment of status, *id.* at 16a-17a; *second*, that, “in contrast to *Pangilinan*, extending the application time here effectuates, rather than frustrates, the public policy established by Congress,” *id.* at 17a¹⁵; and *third*, that *Pangilinan* had been influ-

¹⁴ Because the court of appeals upheld the district court's direct extension of the deadline, it did not consider whether to uphold the district court's alternative injunction (described at page 9, *supra*), which indirectly accomplished the same result by prohibiting INS from deporting aliens who filed untimely applications and by requiring it to grant them work authorizations. See Pet. App. 7a.

¹⁵ The court stated that the deadline at issue in *Pangilinan* had been part of the statute, and suggested that IRCA differed because “Congress did not provide a specific cutoff date for amnesty applications [in IRCA].” Pet. App. 18a.

enced by subsequent legislative developments indicating that Congress would not have approved of an extension of the deadline. The court noted contrasting circumstances in this case, where the comments of a Senator debating a subsequent bill suggested that Congress would have approved of a judicial extension of the deadline. *Id.* at 18a-19a.

c. Because the long delay in deciding the cases had allowed the initial time period set forth in the district courts' injunctions to expire, the court of appeals remanded the cases to the district courts to provide a further extension of the application period, equivalent to the periods originally ordered. Pet. App. 19a.¹⁶

SUMMARY OF ARGUMENT

1. Section 1255a(f)(1) precludes district court review of "a determination respecting an application for adjustment of status." A determination of the substantive requirements for granting an application is just such "a determination respecting an application for adjustment of status." Accordingly, Section 1255a(f)(1) bars review by the district courts of the

¹⁶ The government filed a motion (Pet. App. 61a-98a) seeking an order staying the government's obligation to continue accepting applications pending disposition of this petition, but the court of appeals instead stayed the mandate, leaving in place the existing stays, discussed in note 12, *supra*. Since this Court granted the government's petition for a writ of certiorari, the government has asked the court of appeals to issue the mandate, so that the six-month period finally can begin running. Even if the period runs before this Court resolves the case, the case will not become moot, because the decision in this case will resolve whether INS must grant relief to aliens who applied after the statutory deadline, but before the judicial deadline.

consistency of such regulations with Section 1255a. Review is available "only in the judicial review of an order of deportation under [Section 1105a]." Section 1255a(f)(4)(A).

Applying Section 1255a to bar district court review of substantive regulations is consistent with both traditional principles of administrative law and this Court's decision in *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991). Ordinarily, individuals seeking relief from administrative agencies cannot challenge the agency's views regarding the requirements for relief until they seek relief through appropriate administrative proceedings. This Court has, however, allowed direct challenges in district court when necessary to preserve some avenue for judicial review of administrative action, especially when the action is alleged to violate the Constitution. Conversely, when Congress has created an adequate opportunity for judicial review, and declared that opportunity to be exclusive, there is no need (or justification) to find alternate means of review. This is especially so when the substance of the claim is that an agency determination that would result in an incorrect denial of relief justifies the claimant's in foregoing the administrative process altogether so that he effectively can obtain judicial relief without entering the administrative process at all.

Application of these principles shows that the district courts should not have entertained these cases. As a practical matter, respondents sought a declaration that INS regulations regarding the requirements for adjustment of status were incorrect. Furthermore, the statute provides for meaningful judicial review by allowing applicants to challenge application of the regulation to their individual fact

situations in the court of appeals. Finally, because the record produced in the administrative proceeding would contain all of the information relevant to respondents' claims, there is no need for the fact-finding capacities of the district courts.

Allowing respondents to proceed in district court makes a mockery of the procedures required by Section 1255a. This judicially sanctioned bypass upsets the carefully delineated scheme for judicial review Congress set forth in IRCA. As summarized above, IRCA was designed to provide one certain path for litigation with respect to eligibility for adjustment of status. Allowing respondents to maintain these class actions in the district courts eviscerates the congressional policy enacted with clarity in Section 1255a(f) by creating a second means of judicial review that bypasses adjudication by the expert administrative agency and thus gives the individual members of the respondent classes a choice of forum inconsistent with the statute.

2. The court of appeals also erred in granting relief to individuals who did not file applications for relief in a timely manner. Section 1255a(a) establishes four substantive requirements for relief. The first is that the individual file an application before a date certain. Section 1255a(a)(1). The individual members of the respondent classes did not do so. Accordingly, even if they would have been entitled to relief had they sought adjustment of status in a timely manner, they do not, and cannot, fall within the class for whom Congress authorized adjustment of status.

Respondents cannot evade this result by suggesting that the district court order is akin to equitable tolling. The doctrine of equitable tolling does not au-

thorize a court to ignore the substantive requirements for relief enacted by Congress. Moreover, equitable tolling is not justified simply by an agency's expression of views that would lead to the denial of relief. The customary way to proceed in such a situation is to seek relief and challenge the agency's denial of relief through appropriate mechanisms for administrative and judicial review. Respondents' failure to comply with the statutory requirements for relief should not be altered by judicial order.

ARGUMENT

I. DISTRICT COURTS DO NOT HAVE THE AUTHORITY TO REVIEW A CHALLENGE TO AN INS RULE REGARDING THE BASIS FOR GRANTING ADJUSTMENT OF STATUS.

Section 1255a(f)(1) of Title 8, United States Code, provides: "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." The only provision of Section 1255a(f) providing for judicial review is Section 1255a(f)(4)(A), which allows "judicial review * * * only in the judicial review of an order of deportation under [8 U.S.C. 1105a]." Section 1105a, in turn, provides for review only in the courts of appeals. Accordingly, if respondents' claims challenge a "determination respecting an application for adjustment of status," the district courts erred in entertaining these cases.

A. A Rule Establishing the Basis for Granting Adjustment of Status Is a "[D]etermination [R]especting an [A]pplication for [A]djustment of [S]tatus" for Purposes of 8 U.S.C. 1255a(f)(1).

Contrary to the court of appeals' conclusion, a fair reading of the language of Section 1255a suggests that respondents' claims are barred by Section 1255a (f)(1). Section 1255a(g)(1)(B) required the Attorney General to "prescribe * * * such * * * regulations as may be necessary to carry out [Section 1255a]." In response to this requirement, the Attorney General adopted a number of regulations delineating the qualifications for adjustment of status. In these cases, respondents challenge the determinations reflected in two of those regulations, 8 C.F.R. 245a.1(g) and 245a.2(b)(8). A regulation concluding that relief is unwarranted in a particular fact pattern falls squarely within the normal usage of the term "determination." See, *e.g.*, *Webster's Third New International Dictionary* 616 (1986) (defining "determination" as "the act of deciding definitely and firmly esp[ecially] regarding a course of action"). Because the regulations would determine whether or not an application for relief would be granted, each of them is a determination "respecting" an application. See, *e.g.*, *id.* at 1934 (defining "respecting" as "in view of: * * * with regard or relation to").¹⁷ Accordingly, the determination that members of the re-

¹⁷ The definition suggests that "respecting" has a meaning similar to that of the phrase "relating to." As this Court has emphasized, "[t]he ordinary meaning of these words is a broad one." *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992). Compare *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (noting the broad meaning of the word "respecting" in the Establishment Clause of the First Amendment).

spondent classes are not eligible for relief is covered by Section 1255a(f)(1) and thus is not subject to challenge in the district courts.

This reading is reinforced by a comparison of the language of Section 1255a(f)(1)—which refers to a “determination respecting” an application—with the phrasing used elsewhere in Section 1255a(f). The provision granting judicial review, Section 1255a(f)(4)(A), makes a narrower reference to a “denial” of an application, as does the provision precluding judicial review for a “denial” based on late filing, Section 1255a(f)(2).¹⁸ It is natural to conclude that the broader reference to “determination” in Section 1255a(f)(1) should be applied more broadly. The result is straightforward: Section 1255a(f) provides for a single avenue of judicial review of any “determination respecting an application,” Section 1255a(f)(1), namely, a challenge to a “denial * * * in the judicial review of an order of deportation,” Section 1255a(f)(4)(A). If Congress had intended Section 1255a(f)(1) to bar nothing more than challenges to denials of applications, as the court of appeals seems to suggest, it would have used the term “denial,” as it did elsewhere in Section 1255a(f).

¹⁸ Another analogous reference appears in Section 1255a(f)(3)(A), which requires the Attorney General to establish a single level of administrative appellate review of a “determination described in [1255a(f)(1)].” As noted above, the Attorney General has provided for that review by allowing appeal to the Associate Commissioner for Examinations within 30 days of the denial of the application, which applies the regulatory determination to a particular application and thus provides a concrete dispute suitable for review.

B. Traditional Principles of Administrative Review Require Challenges to Administrative Rules Regarding Entitlement to Relief to Await an Administrative Determination on the Facts of a Particular Case, Especially When Adequate Judicial Review of That Determination Is Available.

As this Court has explained, general principles of administrative law counsel strongly against allowing individuals who disagree with the policies of government agencies to challenge those policies in district court before the policies actually have been applied to their cases. For example, considering an Administrative Procedure Act challenge to a broad government policy, this Court has explained that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until * * * some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3190 (1990); see *Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158, 164-166 (1967).

On the other hand, the Court also follows a "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888, 898 (1991); see *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). That presumption carries special weight when the claims in question rest on the Constitution. See, e.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 373-374 (1974). The Court has not, however, treated the presumption that there must be *some* form of judicial review as a license for courts to fashion whatever form of judicial review might seem most expedient from the

perspective of the claimant. On the contrary, the general rule is that "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); see 5 U.S.C. 704 (Administrative Procedure Act provides for judicial review only in cases for which "there is no other adequate remedy in a court").

The interplay among these principles is illuminated by comparing this Court's decisions in *McNary* and *Heckler v. Ringer*, 466 U.S. 602 (1984). In *Heckler*, the Court refused to allow a direct suit in federal district court by an individual who believed he was entitled to reimbursement for the costs of a certain medical procedure under Title I of the Medicare Act, 42 U.S.C. 101 *et seq.*, and instead required the individual to submit a claim through ordinary administrative procedures, even though the Secretary already had promulgated a formal ruling barring compensation for that procedure. See 466 U.S. at 620-626.¹⁹ Although *Ringer*, like the individual re-

¹⁹ *Heckler* of course involved the Medicare Act rather than IRCA, but there is no reason why this should lessen the force of its statement of general principles of administrative law. The Medicare Act creates a jurisdictional scheme similar to that of IRCA, restricting review of "any claim arising under" that Act, 42 U.S.C. 405(h), much like IRCA restricts review of any "determination respecting an application." As this Court has recognized in interpreting the even narrower language of 8 U.S.C. 1105a, which provides exclusive review for any "final order of deportation," these phrases typically are construed to include not only the final administrative order, but also earlier subsidiary determinations that bear significantly on the ultimate decision on an application. See *Foti v.*

spondents in this case, had not yet sought relief in administrative proceedings and couched his claim as a challenge to a general administrative determination, the Court concluded that Ringer's claim was "essentially one requesting the payment of benefits." *Id.* at 620. As the Court explained, a rule "allow[ing] claimants in Ringer's position to challenge in federal court the Secretary's [general determination] would be inviting them to bypass the exhaustion requirements of the Medicare Act by simply bringing declaratory judgment actions in federal court before they undergo the medical procedure in question." *Id.* at 621. In light of the express provisions for judicial review established by the Medicare Act, the Court refused to permit that result. See *id.* at 622 (holding that claimant "must pursue his claim * * * in the manner which Congress has provided").

By contrast, the Court concluded in *McNary* that an immediate action in the district court was a proper forum for resolving certain constitutional claims regarding practices followed by INS in administering claims for relief under IRCA. The Court's opinion discussed *Heckler* at length and distinguished it in two significant ways. First, the Court distinguished plaintiffs' claims in *McNary* from Ringer's claim, characterizing the *McNary* claims as "collateral," in the sense that success in the district court would not "have the effect of establishing their entitlement to [relief]." 111 S. Ct. at 898. Second, the

INS, 375 U.S. 217, 229 (1963). In any event, as discussed below, the *McNary* Court discussed *Heckler* at length, and distinguished it for the reasons explained in the text, but did not suggest that it could be distinguished on the basis of the differing phrases of the Medicare Act and IRCA. See 111 S. Ct. at 897-899.

court concluded that a contrary holding would "fore-
 use all forms of meaningful judicial review." *Ibid.*²⁰
 Accordingly, the Court concluded that "[t]he strong
 presumption in favor of judicial review of adminis-
 trative action is not overcome either by the language
 or the purpose of the relevant provisions of the Re-
 form Act." *Id.* at 899.²¹

Application of those principles to these cases demon-
 strates the error of the court of appeals' ruling. First,
 the actions in these cases did seek as a practical matter
 to establish the class members' entitlement to relief,
 by resolving in their favor the only substantive issue
 identified with respect to respondents' circumstances.²²
 Indeed, the district court's order in the CSS case
 makes this clear: INS was directed to "rescind * * *

²⁰ The Court discussed this problem at length, explaining
 that the administrative record would be inadequate to resolve
 the plaintiffs' constitutional claims regarding agency practices
 for processing applications. 111 S. Ct. at 898-899. The Court
 also supported its decision by analogy to the *Michigan Acad-*
emy case, which the Court explained as a case turning on
 "the concern that absent [district court review] there would
 be 'no review at all of substantial statutory and constitutional
 challenges.'" 111 S. Ct. at 899 (quoting *Michigan Academy*,
 476 U.S. at 680).

²¹ See 111 S. Ct. at 899 (Rehnquist, C.J., dissenting) (ex-
 plaining that the "Court, with considerable and obvious effort,
 finds a way to [allow district court review], because to apply
 the statute as written could bar judicial review of respondents'
 constitutional claims").

²² See J.A. 50 (CSS order covers "persons prima facie eligi-
 ble for legalization * * * who departed and reentered the
 United States without INS authorization * * * following what
 they assert to have been a brief, casual and innocent absence
 from the United States"), *id.* at 216 (*LULAC* class includes
 aliens "who qualified for legalization but who were deemed
 ineligible for legalization under the original policy").

and readjudicate" class members' applications in accordance with the district court's interpretation of the statute. Pet. App. 24a.²³ To be sure, with respect to the individuals who had not yet filed applications, the court's order did not in fact require INS to grant relief, but simply required it to adjudicate subsequent applications in light of the district court's declaration of the applicable legal principles. But this fact only shows that respondents' claims mirror the claims the Court rejected in *Ringer*. See *Ringer*, 466 U.S. at 620 (explaining that *Ringer* was seeking "a declaration that the formal ruling * * * [is] invalid and an injunction compelling the Secretary to conclude that [Ringer's interpretation of the statute was correct]"). The Court's comments in that case apply well here: "Although it is true that *Ringer* is not seeking the immediate payment of benefits, he is clearly seeking to establish a right to future payments should he ultimately decide to [seek benefits]. * * * [A]ny other construction would allow claimants substantially to undercut Congress' carefully crafted scheme." *Id.* at 621.

Second, the challenges to the regulations in issue here—unlike the claims in *McNary*—are subject to "meaningful judicial review" under the procedures established by IRCA. In both cases respondents' claims amount to nothing more than contentions that

²³ As noted at note 11, *supra*, the government chose not to appeal the portion of the order relating to individuals who filed timely applications. With respect to those individuals, the order as a practical matter is duplicative of relief the individuals could have received in administrative and judicial proceedings based on INS's rescission of the regulation. The redundancy of the district court's order with respect to persons who filed in a timely manner only highlights that court's usurpation of decisional power Congress placed elsewhere.

INS would have applied incorrect standards in determining whether they were entitled to relief under IRCA.²⁴ Not only are such challenges cognizable under the statute's scheme for review, see, *e.g.*, *Martinez-Montoya v. INS*, 904 F.2d 1018 (5th Cir. 1990) (court of appeals decision overturning INS decision denying adjustment of status based on an improper construction of IRCA); *Farrokhi v. INS*, 900 F.2d 697, 703-704 (4th Cir. 1990) (considering and rejecting an alien's challenge to INS decision denying adjustment of status), they in fact are among the most common types of challenges to an agency decision denying relief. See, *e.g.*, *Foti v. INS*, 375 U.S. 217, 230 (1963) ("Much of the litigation in deportation cases with respect to the setting aside of an administrative determination * * * involves disputed * * * matters of statutory construction."). Because the claim essentially turns on the agency's decision as to how the statute should be applied to a set of fact patterns, the administrative record setting forth the relevant facts of the applicant's situation would provide an adequate basis for judicial review of respondents' claim that INS has misinterpreted the criteria for eligibility. Indeed, by demonstrating the agency's application of its regulation in a specific factual setting, an administrative record in fact would aid judicial review of the claim.

In short, each member of the respondent class readily could have awaited agency proceedings and challenged INS's regulations in deportation proceedings that would have been brought against them if

²⁴ See Pet. App. 5a (CSS complaint sought "to bar the implementation of th[e challenged] regulation"), *id.* at 8a (LULAC complaint "challeng[ed] the validity of the INS's fraudulent reentry regulation²⁴).

they had been denied relief.²⁵ If INS's interpretation of the eligibility requirements were upheld and the aliens were denied adjustment of status, that ruling would have been subject to review in the court of appeals. See 8 U.S.C. 1105a(a) (incorporating by

²⁵ Respondents argue (Br. in Opp. 17-20) that it is unfair and unduly burdensome to require aliens seeking adjustment of status to await the commencement and conclusion of deportation proceedings against them, and thus that IRCA should not be interpreted to require that result. This argument gains some support from the Court's statement in *McNary* regarding the rigor of the statutory scheme for review:

[B]ecause there is no provision for direct judicial review of the denial of [relief under IRCA] unless the alien is later apprehended and deportation proceedings are initiated, most aliens denied [relief] can ensure themselves review in courts of appeals only if they voluntarily surrender themselves for deportation[, which] is tantamount to a complete denial of judicial review for most undocumented aliens.

111 S. Ct. at 898. As we pointed out in our reply brief, however (see Reply Br. 5-6), this argument proves too much, for it would establish that all aliens are entitled to district court review. There is nothing unique about the situation of respondents that makes the statutory process any more burdensome for them than for the millions of other aliens for whom Congress designed the process. Accordingly, as the D.C. Circuit explained, this portion of the *McNary* opinion cannot be extended to the holding in the case. If it were, even an individual alien could sue in federal district court at any point prior to a deportation order * * *. That would make a hash of the legislative scheme, which envisioned an alien not only coming forward (and losing anonymity) but also becoming the subject of an actual deportation order as prerequisites to judicial review."

See *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742, 752 (D.C. Cir. 1991), petition for cert. pending, No. 91-1924.

ference the procedures for appellate review described in 28 U.S.C. 2342-2350).²⁶

It should be clear beyond dispute that Section 1255a(f) would not allow an individual to seek a district court order overturning INS's denial of an application for adjustment.²⁷ Similarly, it is unreasonable to suggest that a single individual can avoid the preclusive reach of the statute by going directly to the district court without even filing an application. Accordingly, the court of appeals erred in holding that a group of similarly situated individuals can avoid the preclusive reach of the statute by going directly to the district court.²⁸ That holding affords

²⁶ It is worth noting that courts have concluded that the exclusivity of the review of deportation available under Section 1105a bars district court review not only of the final deportation order itself, but also of denials of relief that—like adjustment of status—would have the effect of barring deportation. See, e.g., *Foti v. INS*, 375 U.S. 217, 220-232 (1963) (discretionary denials of relief in deportation proceedings). Because the relief sought by respondents effectively would bar deportation, this suit would be barred by Section 1105a even in the absence of Section 1255a(f) (1).

²⁷ Compare *Melendez v. Department of Justice*, 926 F.2d 211, 216 (2d Cir. 1991) (noting that court of appeals jurisdiction under Section 1105a is exclusive avenue for review of denials of asylum); *Kashani v. Nelson*, 793 F.2d 818, 822-828 (7th Cir.) (holding that district courts have no authority to entertain actions challenging denials of asylum), cert. denied, 479 U.S. 1006 (1986). If these cases correctly interpret Section 1105a—which does not contain the express preclusion of alternate forms of review set forth in Section 1255a(f) (1)—as denying claimants a choice of forum in their pursuit of ancillary relief that would bar deportation, it would be all the more odd to conclude that unsatisfied claimants for adjustment of status enjoy such a choice.

²⁸ To be sure, the *McNary* Court suggested that the statutory reference to a determination respecting “an application”

a choice of forum inconsistent with the language and intent of Section 1255a(f). The decision of the court of appeals should be reversed.

II. IRCA PROHIBITS FEDERAL COURTS FROM GRANTING RELIEF TO ALIENS WHO DID NOT FILE TIMELY APPLICATIONS.

The relief sought by respondents was created by IRCA and thus is entirely defined by the terms of Section 201 of IRCA, 8 U.S.C. 1255a. Section 1255a(a) provides that an alien is entitled to adjustment of status "if the alien meets the following requirements." The first of these requirements, set forth in Section 1255a(a)(1), is that the alien "must apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General." The importance of this requirement is evidenced by the special treatment it receives in Section 1255a(f). That subsection generally establishes pro-

describes the denial of an individual application." 111 S. Ct. at 896. But this can hardly be read as allowing any challenge to a determination that affects multiple applications. In the first place, each individual can challenge the regulation only to the extent it "respect[s]" his own "application"; he cannot benefit from the regulation's impact on the applications of other aliens. Moreover, as the D.C. Circuit explained, under such a reading

any class of aliens with similar claims could freely choose between filing declaratory judgment actions in district court and filing individual legalization applications with the INS—or, presumably, both. This reading would transform what the Court agreed were provisions "limit[ing] review," [*McNary*, 111 S. Ct.] at 898, into provisions bestowing upon aliens a choice of forum.

Ayuda, Inc. v. Thornburgh, 948 F.2d 742, 749 n.5 (1991), petition for cert. pending, No. 91-1924.

cedures for administrative and judicial review of 1255a(f) (3) and (4), but, in a subsection headed "No review for late filings," sets out an exception barring review whenever "denial of adjustment of status [is] based on a late filing of an application for such adjustment." It is undisputed that the 12-month period designated by the Attorney General ended on May 4, 1988. See note 1, *supra*. It also is undisputed that the individual members of the respondent classes did not file applications within that period.²⁹ Accordingly, they are not eligible for relief under IRCA, and Congress has precluded judicial review of any decision denying relief on that basis.³⁰

This Court's opinion in *INS v. Pangilinan*, 486 U.S. 875 (1988), which reversed a similar action of the Ninth Circuit, demonstrates the error of the Ninth Circuit's decision extending the statutory deadline for applications. In *Pangilinan*, certain citizens of the Philippines claimed eligibility for naturalization under a special statutory program that had expired in 1946. See 486 U.S. at 877-880. The applicants in *Pangilinan* argued that the tardiness of their applications should be excused in order to remedy unlawful actions of the United States government that had prevented them from filing in a timely manner: for a certain period of time the United States

²⁹ Although some members of the respondent classes did file timely applications, the government's appeal did not challenge the relief granted those individuals. See note 11, *supra*.

³⁰ For this reason, it is not at all clear what source of authority would justify a federal court in overturning an INS decision denying relief to respondents based on their failure to file timely applications, even if this Court concluded that the district courts properly required INS to receive and process untimely applications.

had not stationed an officer in the Philippines with authority to receive applications. See *id.* at 879-880. The Ninth Circuit held that the withdrawal of authority to receive applications was unlawful and that naturalization of the applicants would be an appropriate equitable remedy. *Id.* at 882.

This Court reversed. Responding to the notion that the judicially fashioned relief represented an appropriate exercise of the federal courts' equitable powers, this Court explained that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." 486 U.S. at 883-884. More fundamentally, such a remedy was inappropriate because it violated the strict terms of the statute authorizing naturalization. The Court firmly noted: "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law." *Id.* at 883 (brackets by Court; citation omitted).

Respondents argue (Br. in Opp. 22-23) that *Pangilinan* should be limited strictly to cases in which the court's order directly requires naturalization. Such a rule, however, would eviscerate *Pangilinan*, by allowing any court to reach the same substantive result simply by recrafting the terms of its order so that they would not directly require naturalization; the *Pangilinan* court, for example, could have ordered INS to consider the Philippine applications without regard to their lack of timeliness.³¹ This case offers a ready example: the district

³¹ The suggestion that district courts would recraft their decrees solely to evade the substantive import of this Court's

courts have ordered INS to consider a group of applications identified as having a single disqualifying defect and to excuse that defect. This means, to the extent the applications set forth truthful information, that INS has been ordered to grant these applications, which in turn would entitle the applicants to lawful residency status.³² There is nothing in this Court's legal analysis that would permit such circumvention of the statutory deadline.³³

judgments is not idle. Indeed, as noted at page 9, *supra*, the district court in the CSS case did precisely that by entering an alternative injunction—effective if this Court concluded that Section 1255a barred relief to individuals who did not file applications—requiring INS to grant those individuals an apparently permanent right to work and reside in the United States. Because IRCA is the only plausible source of authority to grant such relief, if IRCA bars the district court from requiring INS to grant adjustment of status, it must bar the district court from granting this alternative relief as well.

³² Nor is it relevant that the relief offered by IRCA is lawful residency, rather than full naturalization. Congress's power to determine which aliens will be permitted lawful residence in this Nation is just as plenary as its power to determine who will be permitted to become a citizen. Moreover, a grant of temporary resident status is the first step in a statutory process designed to lead to citizenship. Under 8 U.S.C. 1255a (b) (1), aliens attaining lawful temporary resident status can become lawful permanent residents after a one-year waiting period. Lawful permanent residents in turn become eligible for citizenship after a five-year waiting period. See 8 U.S.C. 1427 (a).

³³ The Ninth Circuit suggested that this Court's decision in *McNary* supported the relief issued here, noting that the *McNary* Court stated that its ruling would allow aliens "to have their case files reopened and their applications reconsidered." Pet. App. 17a (quoting *McNary*, 111 S. Ct. at 898). The critical difference, of course, is that the order affirmed by

Respondents also argue (Br. in Opp. 23-26) that the court of appeals' decision is nothing more than a common place application of the doctrine of equitable tolling discussed in *Bowen v. City of New York*, 476 U.S. 467 (1986), and *Irwin v. Veterans Administration*, 111 S. Ct. 453 (1990). Several significant problems beplague this argument. First, and most importantly, the argument assumes that the timeliness requirement is a statute of limitations. That is not correct. As the structure of the statute makes clear, the timeliness requirement is one of the four substantive requirements for relief, set forth in the four paragraphs of Section 1255a(a). Because Congress intended to create a program of limited duration, it provided that the class of eligible aliens would include only aliens who sought relief within the designated twelve-month period. The court of appeals erred in assuming the power to ignore this requirement.³⁴

For several reasons, respondents err in relying (Br. in Opp. 25-26) on *Bowen v. City of New York*, 476 U.S. 467 (1986). As the Court noted, the statute at

this Court in *McNary* commanded INS to reconsider under proper procedures applications that had been filed in a timely manner. The Ninth Circuit's opinion orders INS to consider untimely applications in defiance of the express, statutory requirements for granting an application.

³⁴ See *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) (summarily reversing a court of appeals decision waiving an application requirement in response to allegations that the claimant failed to file based on the agency's advice that the claimant was ineligible for relief; explaining that "[a] court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits").

issue in *City of New York* expressly authorized tolling of the filing requirement by the Secretary. See 476 U.S. at 480. Because IRCA contains both a clear statutory requirement that an application be filed by a date certain and an express preclusion of judicial or administrative review of denials based on a failure to file in time, *City of New York* does not justify the relief affirmed by the court of appeals. Moreover, as the Court subsequently has noted, *City of New York* turned on the fact that the challenged policy was "a secret, internal policy," rather than a published regulation, see *Pittston Coal Group v. Sebben*, 488 U.S. 105, 123 (1988). Because the respondent classes by definition include only people who knew about the policy,³⁵ *City of New York* is inapplicable.

In any event, the facts of this case are not adequate to support equitable tolling. As the Court explained in *Irwin*, equitable tolling typically is available when "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period" or when "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 plainly did not "actively pursu[e] their remedies"; if they had filed timely applications, the matter would not have reached this Court. Nor is it fair to say that government misconduct somehow tricked them into not filing. The sole government conduct at issue is the government's promulgation of

³⁵ See Pet. App. 25a (CSS court granted extension only to individuals who "knew of [the challenged] regulation"); J.A. 216 (LULAC court granted extension only to individuals who did not apply "relying upon information that they were ineligible").

its understanding of the statutory requirements, which differed from respondents' understanding.³⁶ The government in no way misrepresented the date of the deadline or the requirements for filing. Rather, it simply advised respondents that it believed they would not be entitled to relief even if they did file. See Pet. App. 54a (*LULAC* district court's statement that respondents have failed "to demonstrate affirmative misconduct by the INS"). The clear inadequacy of this as a basis for equitable tolling is evident from the consequences of respondents' argument: if a party's expression of its belief that it would prevail in litigation were sufficient to toll a statute of limitations, there would never be a bar of limitations in any case in which the defendant disclaimed liability. Accordingly, there is no basis for application of the doctrine of equitable tolling in this context.

We wish to emphasize that nothing in our position deprives the federal courts of the power and authority to provide effective remedies for violations of federal law. The only conduct at issue is INS's allegedly improper construction of the statute. If the individual members of respondent classes had made themselves eligible for relief by filing an application within the time period established by Congress, the courts of appeals, and this Court, if necessary, would

³⁶ As this Court has recognized, incorrect statements of the law by government agencies do not justify courts in excusing applicants for public benefits from complying with the law. See, e.g., *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981); see also *Heckler v. Community Health Services, Inc.*, 467 U.S. 51, 63 (1984) (describing "the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law").

have been fully capable of ensuring that each application was evaluated in a manner consistent with the standards established by Congress. It may have been more convenient and less expensive for respondents to refrain from filing applications and proceed directly to the district court, but the inability of that court to provide a remedy does not suggest an undue limitation on the equitable powers of the federal courts; it is the necessary result of respondents' unwillingness to avail themselves of the limited opportunity for relief offered by the Nation's elected representatives.

The fundamental problem with the holding of the court of appeals is its view that the need to further its views regarding the general congressional policy behind IRCA justified it in ordering INS to ignore other provisions of the statute. Such a holding necessarily ignores the policies set forth in the provisions of the statute that limit the relief offered by Congress. As this Court explained when it rejected an earlier order by the court of appeals extending a statutory deadline in the immigration context: "Petitioner, in enforcing the cutoff date established by Congress, as well as in recognizing claims for the benefits conferred by the Act, is enforcing the public policy established by Congress." *INS v. Hibi*, 414 U.S. 5, 8 (1973). This Court should reverse the decision of the court of appeals ordering petitioners to act in contravention of the congressionally mandated policy.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1992

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NOT FOR PUBLICATION

FILED

IN THE UNITED STATES COURT OF APPEALS FEB - 5 1998
FOR THE NINTH CIRCUITCATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CATHOLIC SOCIAL SERVICES, INC.; AMERICAN)	
FEDERATION OF LABOR - CONGRESS OF)	No. 96-15495
INDUSTRIAL ORGANIZATIONS; UNITED FARM)	
WORKERS OF AMERICA, AFL-CIO; MIGUEL)	D.C. No. CV-86-01343-LKK
MORAN; KAMIEL ABUBAKR; MARIA MAGANA;)	(Eastern California)
ELIAS VELASQUEZ; MARIA VELASQUEZ;)	
FRANCISCO ARIZAGA,)	
Plaintiffs-Appellees,)	ORDER
v.)	
JANET RENO, Attorney General; DORIS)	
MEISSNER, Commissioner of Immigration)	
and Naturalization Service,)	
Defendants-Appellants.)	

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

The panel has voted unanimously to deny the Emergency Motion for Stay of Mandate Pending Petition for Certiorari.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CATHOLIC SOCIAL SERVICES, INC.;	)	
AMERICAN FEDERATION OF LABOR -	)	No. 96-15495
CONGRESS OF INDUSTRIAL ORGANIZATIONS	)	
UNITED FARM WORKERS OF AMERICA,	)	
AFL-CIO; MIGUEL MORAN; KAMIEL ABUBAKR;	)	D.C. No. CV-86-01343-LKK
MARIA MAGANA; ELIAS VELASQUEZ;	)	
MARIA VELASQUEZ; FRANCISCO ARIZAGA,	)	
	)	
Plaintiffs-Appellees,	)	ORDER
	)	
v.	)	
	)	
JANET RENO, Attorney General; DORIS	)	
MEISSNER, Commissioner of Immigration	)	
and Naturalization Service,	)	
	)	
Defendants-Appellants.	)	

Before: SCHROEDER, ALARCÓN, and O'SCANLAIN, Circuit Judges.

The court having issued our mandate vacating the district court's interlocutory orders, and having instructed the district court to dismiss this action for lack of jurisdiction, Appellant's motion for an order staying continued implementation of the district court's interim relief orders is DISMISSED as moot.