No. 97-1252

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ET AL., PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, 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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QUESTION PRESENTED

Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation.

PARTIES TO THE PROCEEDINGS

The following Department of Justice officials are petitioners in this Court and were appellants in the court of appeals and defendants in the district court: Janet Reno, Attorney General; Harold Ezell; C.M. McCullough; Doris Meissner, Commissioner, Immigration and Naturalization Service (INS); Ernest E. Gustafson, personally and in his capacity as former District Director of the INS; Richard K. Rogers, District Director, personally and in his capacity as District Director of the INS; Gilbert Reeves, personally and in his capacity as an officer of the INS. The INS itself was also a defendant in the district court and an appellant in the court of appeals, and is a petitioner in this Court. The following were plaintiffs in the district court and appellees in the court of appeals, and are respondents in this Court: American-Arab Anti-Discrimination Committee; Bashar Amer, Aiad Barakat; Khader Musa Hamide; Nuangugi Julie Mungai; Amjad Obeid; Ayman Mustafa Obeid; Naim Sharif; Michel Ibrahim Shehadeh.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 119 F.3d 1367. The opinions of the district court (Pet. App. 22a-43a, 44a-76a) are unreported. Earlier opinions of the court of appeals in this case (Pet. App. 77a-128a, 166a-187a) are reported at 70 F.3d 1045 and 970 F.2d 501. An earlier opinion of the district court (Pet. App. 188a-245a) is reported at 714 F. Supp. 1060. Three other earlier opinions of the district court (Pet. App. 129a-137a, 138a-150a, 151a-165a) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 10, 1997. A petition for rehearing was denied on December 23, 1997. Pet. App. 246a-252a. The petition for a writ of certiorari was filed on January 30, 1998, and was granted on June 1, 1998, limited to the question whether the courts below had jurisdiction over this case. 118 S. Ct. 2059. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are set forth as an appendix to this brief: the First Amendment to the United States Constitution; 8 U.S.C. 1105a (1988); 8 U.S.C. 1252 (Supp. II 1996); Sections 306(c)(1) and 309(c)(1) and (4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, 3009-625 to 3009-627, as amended by the Act of October 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657; and the relevant section of the Hobbs Administrative Orders Review Act, 28 U.S.C. 2347.

STATEMENT

1. In January 1987, the Immigration and Naturalization Service (INS) charged eight aliens in Los Angeles with deportability based on their activities on behalf of the Popular Front for the Liberation of Palestine (PFLP), a Middle Eastern terrorist organization violently opposed to United States policies and interests.[1] Those aliens are respondents in this

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[1] From its founding in 1967, the PFLP has proclaimed the United States to be one of its principal enemies, along with the State of Israel and the governments of various moderate Arab

Court. Two of the respondents (Khader Hamide and Michel Shehadeh) are permanent resident aliens; the other six (Bashar Amer, Aiad Barakat, Julie Mungai, Amjad Obeid, Ayman Obeid, and Naim Sharif) were in this country under temporary visas for studying or visiting.

Evidence introduced by the government in this case showed that respondent Hamide had come to the attention of the Federal Bureau of Investigation (FBI) as a result of investigative activities conducted by a task force considering possible terrorist threats to the 1984 Los Angeles Olympic Games. C.A. E.R. 3-

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States. Among its many acts of international terrorism, the PFLP hijacked five aircraft in one weekend in 1970, killed 16 United States citizens at Israel's Lod Airport in 1972, assassinated the United States Ambassador to Lebanon in 1976, and conducted a campaign of attacks against moderate Palestinian officials during the mid-1980s, including assassinations. The organization strenuously opposed the United States in the Gulf War with Iraq. In 1991, on the eve of a comprehensive peace conference in Madrid between Israel and neighboring Arab countries, the PFLP machine-gunned a West Bank passenger bus, injuring five children and killing their mother and the bus driver. The PFLP remains one of the rejectionist terrorist groups violently opposed to the peace process sponsored by the United States in the Middle East. C.A. E.R. 216-219, 230-241.

Evidence introduced by the government in this case demonstrated the extensive nature of the PFLP's activities in the United States. Internal documents seized from the PFLP's U.S. leaders in 1983 and 1984 revealed that the group had established secret cells in this country, which had military capability and were awaiting orders from PFLP headquarters in Syria. The FBI also discovered that the PFLP has developed and controls a substantial infrastructure in the United States. A principal activity of that infrastructure is concerted fundraising for PFLP operations abroad. C.A. E.R. 13-17, 81-93, 185-190, 212.

6. Utilizing confidential sources, leads from other FBI offices, and covert surveillance, the FBI and INS established that Hamide was organizing fundraising events on behalf of the PFLP at which money was solicited for the stated purpose of supporting the organization's "fighters." *Id.* at 8-9, 22-24, 29-30. The FBI subsequently identified the other seven respondents as among those assisting in the PFLP's fundraising efforts. See *id.* at 30-39, 246-249. Based on the information provided by the FBI, INS District Counsel Elizabeth Hacker drafted the initial deportation charges against the eight respondents in December 1986. *Id.* at 251; J.A. 68-71.

2. All eight respondents were originally alleged to be deportable because of their advocacy of world communism. See 8 U.S.C. 1251(a)(6)(D), (G)(v), and (H) (1982). The six non-residents were also alleged to be deportable on the ground that they had failed to maintain student status, worked without authorization, or overstayed a visit. See Pet. App. 79a-81a. In April 1987, respondents filed suit in federal district court, seeking to have the pending deportation proceedings enjoined. Respondents claimed that the provisions basing deportability on advocacy of world communism violated the First Amendment. They also contended that they were the victims of selective enforcement based on their association with the PFLP. See *id.* at 169a-170a.

Later that month, the INS withdrew the advocacy-of-communism charges against all eight respondents, leaving only the visa violation charges pending against the six non-residents. Pet. App. 169a. The INS amended the charges against respondents Hamide and Shehadeh (the permanent resident aliens), alleging that they were deportable under

8 U.S.C. 1251(a)(6)(F)(iii) (1982) because of their meaningful membership in an organization that advocates destruction of property. See Pet. App. 81a, 169a; see also note 19, *infra*.

Respondents' second amended complaint was filed on June 15, 1988. J.A. 17-52. Respondents contended that "8 U.S.C. 1251(a)(6), on its face and as applied in the pending deportation proceedings * * * , violates the First and Fifth Amendments to the United States Constitution." J.A. 48. They also alleged that the "investigation, arrest, detention and initiation and maintenance of deportation proceedings against [respondents] is a selective and vindictive prosecution of [respondents] in violation of [respondents'] First and Fifth Amendment[ ]" rights. J.A. 49. Respondents sought declaratory and injunctive relief, including an injunction against the pending deportation proceedings. J.A. 50-51.[2]

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[2] The second amended complaint stated that the district court "ha[d] jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. §1329, 1331 and 1361 and the Declaratory Judgment Act, 28 U.S.C. §2201 *et seq*." J.A. 22. The citation to "28 U.S.C. §1329" was presumably intended as a reference to 8 U.S.C. 1329 (1988), which provided (at the time the suit was filed) that "[t]he district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter [8 U.S.C. 1151-1365]." Section 1329 was amended in 1996 to provide that "[n]othing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers." 8 U.S.C. 1329 (Supp. II 1996). That amendment does not apply, however, to suits that were pending at the time of the amendment. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 381(b), 110 Stat. 3009-650; 8 U.S.C. 1329 note (Supp. II 1996).

The district court held that it lacked jurisdiction to hear the claims of respondents Hamide and Shehadeh because those respondents had failed to exhaust their administrative remedies. Pet. App. 194a-195a. The court concluded, however, that it could properly adjudicate the claims of the other respondents—*i.e.*, the six non-resident aliens and the Arab-American Anti-Discrimination Committee (AADC). *Id.* at 195a-220a.[3] It observed that the non-resident aliens and the AADC were "not engaged in any ongoing proceedings that would allow them to challenge" the statutory provisions at issue, since the only charges then pending against the non-residents were for routine status violations. *Id.* at 217a. It held on that basis that "unlike Hamide and Shehadeh, the [non-residents] and the [AADC] do not have any administrative remedies to exhaust with respect to the" challenged statutory provisions, "and consequently do not have to forsake district court adjudication of their claims." *Ibid.* On the merits, the district court held that 8 U.S.C. 1251(a)(6)(D), (F)(iii), (G)(v), and (H) (1982) were substantially overbroad and therefore violative of the First Amendment. *Id.* at 220a-245a.

The court of appeals vacated the judgment of the district court. Pet. App. 166a-187a (*AADC I*). The

[3] The plaintiffs in the initial district court proceedings included the eight individual respondents and respondent AADC. Several other organizations, and two other individuals (Michel Bogopolsky and Darryl Meyers), were also named as plaintiffs in the second amended complaint. See J.A. 22-35. The district court held that Bogopolsky, Meyers, and the organizational plaintiffs other than AADC all lacked standing to sue. Pet. App. 214a n.9. Those plaintiffs did not appeal the district court's ruling (see *id.* at 172a) and are no longer parties to this case.

court held that respondent AADC lacked standing to sue. *Id.* at 179a-182a. It held that the non-residents' challenge to Section 1251(a)(6) was not ripe. The court noted, *inter alia*, that the non-resident respondents "are not now charged under the challenged provisions," and that "if charged and found deportable for violation of the challenged provisions, the [respondents] will have the opportunity to present their constitutional challenges to a court." Pet. App. 185a.[4]

3. On January 7, 1994, the district court preliminarily enjoined the INS from conducting further deportation proceedings against the six non-resident aliens charged with visa violations, based on those respondents' contention that they were the victims of unconstitutional selective enforcement. Pet. App. 138a-150a. For purposes of determining whether prohibited selective enforcement had occurred, the court stated, "the appropriate control group for [respondents] is: 'individuals whom the government knows to be in violation of non-ideological provisions and who associate with terrorist organizations whose views

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[4] Respondents Hamide and Shehadeh did not appeal the district court's determination that it lacked jurisdiction to entertain their constitutional challenges to Sections 1251(a)(6)(D), (F)(iii), (G)(v), and (H). See Pet. App. 171a. During the pendency of the appeal in *AADC I*, the INS added a charge that Hamide and Shehadeh were deportable under 8 U.S.C. 1251(a)(6)(F)(ii) (1988) because of their membership in an organization that advocates the unlawful assaulting or killing of government officers. See Pet. App. 81a, 175a. Following amendment of the relevant statutory provisions in 1990, Hamide and Shehadeh were further charged with having engaged in terrorist activities, defined by the Act to include "[t]he soliciting of funds or other things of value for terrorist activity or for any terrorist organization." 8 U.S.C. 1182(a)(3)(B)(iii)(IV). See Pet. App. 4a.

the government endorses or tolerates.'" *Id.* at 141a. The court authorized respondents to conduct further discovery bearing on the question whether individuals within that control group had been placed in deportation proceedings (*id.* at 143a-147a), and it entered a preliminary injunction in respondents' favor. *Id.* at 148a-150a.

The district court concluded, however, that it lacked jurisdiction to consider the selective enforcement claim advanced by respondents Hamide and Shehadeh, and it therefore granted summary judgment to the government on that claim. Pet. App. 129a-137a. The court explained that the deportation charges filed against Hamide and Shehadeh—unlike the charges filed against the nonresident respondents—were themselves based on PFLP-related activities. See *id.* at 131a-134a. Under those circumstances, the court held, "Hamide and Shehadeh's selective prosecution claim is totally subsumed within the merits of their potential facial or as applied challenges" to the statutory provisions on which the deportation charges were based. *Id.* at 131a; see also *id.* at 134a ("A selective prosecution claim is not proper when the allegations of the prosecution involve the same activity which the defendant claims is the constitutionally protected 'true reason' for the government's decision to prosecute.").

4. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 77a-128a (*AADC II*). At the time of the court of appeals' decision in *AADC II*, the Immigration and Nationality Act (INA) provided that "[t]he procedure prescribed by, and all the provisions of chapter 158 of title 28 [the Hobbs Administrative Orders Review Act], shall apply to, and shall be the sole and exclusive

procedure for, the judicial review of all final orders of deportation." 8 U.S.C. 1105a(a) (1994). The INA further provided that "[a]n order of deportation or exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right." 8 U.S.C. 1105a(c) (1994). The Hobbs Act establishes procedures for direct review of agency actions in the courts of appeals. It provides, *inter alia*, that the reviewing court may transfer a case to a district court for resolution of ancillary factual issues. 28 U.S.C. 2347(b)(3).

Notwithstanding the INA's provisions for exclusive judicial review in the courts of appeals, the court of appeals concluded that all eight respondents' selective enforcement challenges were subject to immediate judicial review in the district court, despite the absence of a final order of deportation. The court first addressed the claims of the six non-residents. Because neither the Immigration Judge (IJ) nor the Board of Immigration Appeals (BIA) was authorized to consider a claim of selective enforcement, the court "conclude[d] that selective enforcement claims are not subject to the statutory provision for exclusive review after issuance of a final deportation order." Pet. App. 87a. The court also stated that adjudication of a selective enforcement claim would require a factual inquiry that could not be conducted by a court of appeals on review of a final deportation order. The court concluded, in that regard, that a court of appeals in reviewing a final order of deportation would not be authorized to transfer a case to a district court pursuant to 28 U.S.C. 2347(b)(3) for resolution of pertinent factual issues that had not been resolved by the IJ or the BIA. Pet. App. 90a-91a.

The court of appeals also held that the district court had erred in declining to exercise jurisdiction over the selective enforcement claims advanced by respondents Hamide and Shehadeh. Pet. App. 95a-97a. The court reasoned that "[t]he selective enforcement claim necessarily imposes a different focus and requires the court to consider patterns of INS prosecutions rather than a particular application of a statute." *Id.* at 97a. The court remanded those claims for further consideration by the district court. *Ibid.*

The court of appeals then concluded that the six non-residents had established a likelihood of success on their selective-enforcement challenges to the institution of deportation proceedings. The court first upheld as not clearly erroneous the district court's selection of a "control group" comprising "aliens who have either violated non-ideological provisions or are associated with terrorist organizations whose views the government tolerates." Pet. App. 106a. The court then stated that a *citizen's* association with a disfavored group—even a foreign organization that engages in unlawful acts—may be punished only if the government can "establish a 'knowing affiliation' and a 'specific intent to further those illegal aims.'" *Id.* at 108a (quoting *Healy* v. *James*, 408 U.S. 169, 186 (1972)). The court rejected the contention that the deportation of aliens should be subject to less stringent constitutional scrutiny than is the government's criminal prosecution or other regulation of citizens (Pet. App. 107a-116a), concluding that "constitutionally protected activities that the Government cannot punish by means of a criminal statute are likewise beyond its reach in a deportation proceeding." *Id.* at 112a-113a. It held that respondents "ha[d] provided evidence of disparate impact and of imper-

missibly motivated enforcement of the immigration laws," and on that basis it affirmed the preliminary injunction entered by the district court. *Id.* at 116a.[5]

5. Following the court of appeals' ruling, the government introduced extensive evidence in the district court detailing respondents' activities on behalf of the PFLP, as well as the circumstances leading up to the filing of the deportation charges. That evidence demonstrated, *inter alia*, that the responsible INS official had drafted the initial charges based on the FBI's determination that respondents were engaged in PFLP fundraising activities. See pp. 3-4, *supra*. The district court held that "[t]he government ha[d] failed to show that any of the [respondents] had the specific intent to further the unlawful aims of the PFLP." Pet. App. 74a.[6] On that basis the court denied the

[5] The court of appeals also held that the INS could not consider classified information in ruling on applications for legalization—*i.e.*, adjustment to temporary resident status—filed by respondents Barakat and Sharif pursuant to the Immigration Reform and Control Act, Pub. L. No. 99-603, § 201(a), 100 Stat. 3394 (codified at 8 U.S.C. 1255a and discussed in *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993)). Pet. App. 116a-127a. We are informed that, without consideration of the classified evidence, respondents Barakat and Sharif were subsequently granted legalization. Those respondents consequently are no longer subject to deportation based on the original status violations.

[6] The district court found that the evidence regarding the investigative materials presented to District Counsel Hacker before she made her initial charging decision contained hearsay and possible translation errors. Pet. App. 57a. It also held that the evidence, even if taken as true, would not establish that respondents had acted with a specific intent to further the PFLP's unlawful activities, because none of the statements made at the fundraising events referred unambiguously to terrorist acts. *Id.* at 63a-64a. Because the PFLP engages in both

government's motion to dissolve the existing injunction against the deportation of the six non-resident respondents and issued a preliminary injunction against the deportation proceedings involving respondents Hamide and Shehadeh. *Id.* at 44a-76a.

6. The government appealed the district court's ruling. While that appeal was pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. IIRIRA preserves the exclusive review of deportation orders in the courts of appeals under the Hobbs Act—as specified in former 8 U.S.C. 1105a (1994) for aliens against whom administrative proceedings were commenced prior to the effective date of IIRIRA, and as specified in 8 U.S.C. 1252 (Supp. II 1996) for cases instituted thereafter. See pp. 20-21, 25-26, *infra*. Of particular relevance here, however, is 8 U.S.C. 1252(g) (Supp. II 1996) (added by IIRIRA § 306(a)), which applies to cases commenced both before and after IIRIRA's effective date. It states, *inter alia*, that

> [e]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to

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lawful and unlawful activities, the court reasoned, evidence of respondents' participation in PFLP fundraising efforts was insufficient to demonstrate such intent. *Id.* at 64a-65a. The court also suggested that the government should have "follow[ed] the trail of the money" in order to determine whether funds raised by respondents were actually used to support terrorist activities. *Id.* at 68a.

> commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

The government moved in the district court for dismissal of respondents' suit and for vacatur of the existing injunction. The government argued that the new Section 1252(g) confirms that respondents' constitutional challenge must be brought in the court of appeals if and when a final order of deportation is entered, and therefore bars the district court from exercising jurisdiction over respondents' challenge to the Attorney General's decision to "commence proceedings" against them. See J.A. 53-62.

The district court denied the motion to dismiss. Pet. App. 22a-43a. The court agreed with the government that new Section 1252(g) went into effect immediately upon the enactment of IIRIRA on September 30, 1996. Pet. App. 32a. It held, however, that application of Section 1252(g) to respondents' selective enforcement claims would deprive respondents of an "adequate" judicial remedy, both because it believed that delay in the adjudication of those claims would subject respondents to "irreparable injury" and because the facts necessary to resolve those claims would not be developed in the administrative proceedings. Pet. App. 39a-40a. The court concluded that

> [respondents'] First Amendment injuries are immediate and cannot be addressed through post-deprivation review. Congress can bar the door to these claims, and bring on a serious constitutional confrontation, only if it acts with clear purpose. No such purpose has been displayed here, and thus, this Court finds that Section [1252(g)] does

> not reach the constitutional claims at issue in this case.

Pet. App. 42a-43a. The government's appeal from that order was consolidated with its pending appeal from the preliminary injunction. See *id.* at 6a.

7. The court of appeals affirmed both the jurisdictional and merits rulings of the district court. Pet. App. 1a-21a (*AADC III*).

a. The court held that IIRIRA did not bar the district court from exercising jurisdiction over respondents' claims. It agreed with the government that the new Section 1252(g) applied to the instant case. Pet. App. 7a-8a. The court stated, however, that IIRIRA "would present serious constitutional problems" if it were construed to divest the court of jurisdiction over respondents' suit. *Id.* at 12a. It explained that the availability of other avenues of review was uncertain (see *id.* at 12a-15a), and specifically held that transfer to a district court under 28 U.S.C. 2347(b)(3) for resolution of factual issues would not be available in a deportation case. Pet. App. 12a-14a. The court also stated that in any event "*prompt* judicial review of [respondents'] claims was required because violation of [respondents'] First Amendment interests would amount to irreparable injury." *Id.* at 15a.

The court of appeals construed 8 U.S.C. 1252(f) (Supp. II 1996) (as amended by IIRIRA § 306(a)) "as permitting federal review of constitutional claims such as those at issue here, because no other avenues of meaningful federal review remain available." Pet. App. 15a. Section 1252(f) is entitled "Limit on injunctive relief" and provides that no lower court has jurisdiction to enjoin the operation of the relevant statutory provisions, "other than with respect to the

application of such provisions to an individual alien against whom proceedings under such part have been initiated." Pet. App. 9a-10a. The court asserted that "[b]ecause this case involves individual aliens against whom deportation proceedings have been initiated, subsection (f) would appear to allow federal jurisdiction over the [respondents'] claims." *Id.* at 10a.

b. The court affirmed the district court's decision not to vacate the preliminary injunction entered in favor of the six non-resident respondents. Pet. App. 17a. The court explained that, at the time that injunction was initially entered, the government had elected not to introduce available evidence regarding respondents' fundraising activities, and that the government's subsequent decision to supplement the record provided no basis for vacatur of the injunction. *Ibid.*

c. The court of appeals also affirmed the district court's entry of a preliminary injunction in favor of respondents Hamide and Shehadeh. The court stated that "the central issue is whether the government impermissibly targeted [respondents] due to their affiliation with the PFLP, and did not so target aliens affiliated with other foreign-dominated organizations advocating violence and destruction of property." Pet. App. 20a-21a. It determined that "[t]he record contains evidence of numerous other cases of permanent resident aliens who did not face deportation proceedings despite their support for international organizations advocating violence and destruction of property." *Id.* at 19a. The court construed its decision on the prior appeal as "ma[king] it clear that targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had the specific intent to pursue illegal group goals." *Id.* at 20a.

8. The court of appeals denied the government's petition for rehearing with suggestion of rehearing en banc, with three judges dissenting. Pet. App. 246a-252a. The dissenting judges concluded that IIRIRA unambiguously foreclosed all judicial review until the entry of a final order of deportation, and that the Act, so construed, created no genuine constitutional difficulty. *Id.* at 248a-250a.

9. This Court granted the government's petition for a writ of certiorari, limited to the following question: "Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation." 118 S. Ct. 2059 (1998).

SUMMARY OF ARGUMENT

1. Even before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, judicial review of the INS's decision to file deportation charges was unavailable prior to the entry of a final order of deportation. That result was implicit in former 8 U.S.C. 1105a (1994), which provided that review in the courts of appeals was the "sole and exclusive procedure" for challenging a final deportation order, and which required exhaustion of administrative remedies as a prerequisite to obtaining judicial review. That result was also consistent with the background principle that the filing of administrative charges is not a "final agency action" subject to immediate judicial review.

2. IIRIRA strengthens and makes explicit the preexisting limitations on judicial review under the INA. In particular, new 8 U.S.C. 1252(g) (Supp. II 1996)

makes clear that the judicial review provisions contained in the INA itself are the exclusive means of challenging the government's conduct of the deportation process. Although most of new Section 1252 is inapplicable to cases (like the instant one) involving deportation proceedings instituted before IIRIRA's effective date, the Act provides that Section 1252(g) "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." 8 U.S.C. 1252 note (Supp. II 1996).

Contrary to the court of appeals' determination, 8 U.S.C. 1252(f) (Supp. II 1996) does not authorize the district court to adjudicate respondents' suit. Section 1252(f) is entitled "Limit on injunctive relief" and is by its terms a *restriction* on the remedial authority of a reviewing court. The court of appeals' construction of Section 1252(f) is particularly implausible when that provision is read together with 8 U.S.C. 1252(b)(9) (Supp. II 1996), which states unambiguously that judicial review of any claim (specifically including constitutional claims) arising from the conduct of deportation proceedings is available only after the entry of a final order. There is no justification for construing Section 1252(f) to authorize what Section 1252(b)(9) expressly prohibits. The court of appeals' reliance on Section 1252(f) is especially farfetched in light of the fact that no pre-IIRIRA statutory provision authorized respondents' challenge to the filing of deportation charges.

3. Deferral of respondents' selective enforcement challenge until the entry of a final order of deportation would not violate the Constitution or raise substantial constitutional concerns. Congress has broad latitude to regulate the mode and timing of judicial

review, even where constitutional claims are involved. It is, in particular, a familiar feature of administrative law that a litigant may be required to obtain a final agency decision on all of his claims before presenting his constitutional challenge to a court. See *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). The final decision requirement avoids enmeshing the courts in constitutional litigation that might ultimately have proved to be unnecessary. It also avoids piecemeal review by ensuring that all challenges to the deportation process can be consolidated in a single judicial proceeding. Judicial refashioning of the scheme of review devised by Congress would be especially unwarranted in the field of immigration, where this Court has long recognized the primacy of the political Branches.

No decision of this Court suggests that statutory exhaustion and finality requirements must give way whenever delay in the resolution of disputed legal issues might temporarily discourage the exercise of First Amendment rights. Where (as here) Congress has stated unambiguously that judicial review should await the completion of administrative proceedings, a plaintiff whose claims arise under the First Amendment has no constitutional entitlement to immediate access to a judicial forum. In any event, postponement of the adjudication of their selective enforcement claims could not plausibly be expected to deter respondents from participating in any constitutionally protected expressive or associational activities in which they would otherwise engage.

Contrary to the court of appeals' holding, deferral of judicial review until the entry of a final order of deportation will not prevent the development of an adequate factual record. Both before and after the

enactment of IIRIRA, judicial review of a final order of deportation has been governed by the provisions of the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq*. See 8 U.S.C. 1105a(a) (1994); 8 U.S.C. 1252(a)(1) (Supp. II 1996). The Hobbs Act specifically provides that the reviewing court of appeals may transfer a case to a district court for the resolution of pertinent issues of material fact that were not resolved (and were not required to be resolved) by the agency itself. 28 U.S.C. 2347(b)(3). Nothing in the text of the Hobbs Act or the INA renders the transfer mechanism inapplicable to judicial review of final orders of deportation. Even if the relevant provisions were regarded as ambiguous on this point, use of the transfer mechanism in an appropriate case is far more consonant with the totality of the statutory scheme than is the court of appeals' decision to permit immediate judicial resolution of the selective enforcement claim outside the statutorily prescribed procedure for administrative and judicial review—a decision that is inconsistent both with the plain language of IIRIRA and with the background rule that the filing of administrative charges is not subject to immediate judicial review.

ARGUMENT

THE COURTS BELOW LACKED JURISDICTION TO CONSIDER RESPONDENTS' CONSTITUTIONAL CHALLENGE TO THE FILING OF DEPORTATION CHARGES PRIOR TO THE ENTRY OF A FINAL ORDER OF DEPORTATION

It has long been an integral feature of the Immigration and Nationality Act (INA) that judicial review of deportation proceedings is available only upon the entry of a final order of deportation, and only through

the review procedures established by the Act itself. Congress has recently amended the Act in an effort to eliminate any possible uncertainty regarding that fundamental principle. Notwithstanding the clarity of IIRIRA's jurisdictional bar, however, the court of appeals in *AADC III* permitted this long-pending and disruptive litigation to continue. The court's analysis is flatly at odds with the plain language of the pertinent statutory provisions, and it is inconsistent with the background rule that the filing of administrative charges is not subject to immediate judicial review. Contrary to the court's assertion, moreover, adherence to the directive of Congress creates no genuine constitutional difficulty.

A. Even Before The Enactment Of IIRIRA, Judicial Review Of The Filing Of Deportation Charges Was Unavailable Prior To The Entry Of A Final Order Of Deportation

Before the enactment of IIRIRA, judicial review of final orders of deportation was governed by 8 U.S.C. 1105a (1994). Former Section 1105a generally provided that review in the courts of appeals pursuant to the Hobbs Administrative Orders Review Act (28 U.S.C. 2341-2351) "shall be the sole and exclusive procedure for[] the judicial review of all final orders of deportation." 8 U.S.C. 1105a(a) (1994). The INA also stated that "[a]n order of deportation or exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right." 8 U.S.C. 1105a(c) (1994). "The fundamental purpose behind [§ 1105a(a)] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling depar-

ture by dilatory tactics in the courts." *Foti* v. *INS*, 375 U.S. 217, 224 (1963); accord *Stone* v. *INS*, 514 U.S. 386, 399 (1995).[7]

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[7] Former Section 1105a was added to the INA by the Immigration and Nationality Act Amendments of 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. Prior to 1961, an alien against whom a final order of deportation had been entered could obtain judicial review in district court either by a petition for writ of habeas corpus (see *Heikkila* v. *Barber*, 345 U.S. 229 (1953)), or by an action for declaratory and injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* (see *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955)). As the Department of Justice explained in testimony before a House subcommittee, "[t]here are several objections to the divergent methods of review. They lack uniformity. They are not mutually exclusive. They result in a delay in deporting an alien who should be deported. There is a need for expedition, orderly venue, and the avoiding of repetitious court proceedings." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 27 (1961). Congress enacted Section 1105a "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States." *Id.* at 22. As this Court observed in *Foti*, "[t]he key feature of the congressional plan directed at this problem [*i.e.*, disruptive and dilatory litigation] was the elimination of the previous initial step in obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals, subject only to the certiorari jurisdiction of this Court." 375 U.S. at 225. Congress expressly required exhaustion of administrative remedies as a prerequisite to judicial review, "[i]n an effort to curtail, if not to eliminate repetitious and unjustified appeals to courts for interference with the enforcement of deportation orders." H.R. Rep. No. 1086, *supra*, at 28.

Congress did preserve a limited role for habeas corpus in the deportation context, providing that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." See 8 U.S.C. 1105a(a)

Section 1105a defined the procedures to be employed in reviewing a final order of deportation, and it required exhaustion of administrative remedies before a challenge to a deportation order could be brought. Section 1105a did not, in so many words, bar a court from reviewing the INS's initial decision to file deportation charges. It was generally recognized, however, that an alien could not evade the requirements of Section 1105a by filing suit before the administrative proceedings had concluded. As the Third Circuit explained in *Massieu* v. *Reno*, 91 F.3d 416 (1996),

> even where an alien is attempting to prevent an exclusion or deportation proceeding from taking place in the first instance and is thus not, strictly speaking, attacking a final order of deportation or exclusion, it is well settled that judicial review is precluded if the alien has failed to avail himself of all administrative remedies, one of which is the deportation or exclusion hearing itself.

Id. at 421 (internal quotation marks omitted).[8] See also *INS* v. *Chadha*, 462 U.S. 919, 938 (1983) (holding

(10) (1994). Orders of exclusion were reviewable *only* in habeas corpus proceedings. See 8 U.S.C. 1105a(b) (1994).

[8] The plaintiff in *Massieu* asserted a constitutional challenge to the statutory provision under which he was alleged to be deportable. The court of appeals held that the INA required dismissal of the suit, explaining that "[a]lthough the immigration judge is not authorized to consider the constitutionality of the statute, this court can hear that challenge upon completion of the administrative proceedings." 91 F.3d at 424. It ordered dismissal of the alien's entire complaint, which included a claim of selective enforcement in retaliation for an exercise of First Amendment rights. See *id.* at 418, 426; *Massieu* v. *Reno*, 915 F. Supp. 681, 688 (D.N.J. 1996).

that 8 U.S.C. 1105a(a) authorized the court of appeals to entertain a constitutional challenge to a legislative veto provision then contained within the INA, even though the Attorney General could not resolve the issue, on the ground that Section 1105a "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the [deportation] hearing").

The rule recognized in *Massieu* was not unique to immigration proceedings, but was consistent with generally applicable principles of administrative law. For example, in *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232, 239-245 (1980), this Court held that an agency's issuance of an administrative complaint is not "final agency action" subject to immediate judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*[9] The Court reached that conclusion despite its evident assumption that the propriety of the initial charging decision would not be subject to further administrative review. *Id.* at 243. The Court also rejected the plaintiff's contention that it would suffer irreparable harm if judicial review were deferred, explaining that "the expense and annoyance of litigation is part of the social burden of

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[9] In *Standard Oil*, the Federal Trade Commission issued a complaint averring that it had "reason to believe" that eight major oil companies, including Standard Oil of California (Socal), were violating the Federal Trade Commission Act. 449 U.S. at 234. Socal filed suit in federal district court, "alleging that the Commission had issued its complaint without having 'reason to believe' that Socal was violating the Act." *Id.* at 235. The "gist" of Socal's suit was that "political pressure for a public explanation of the gasoline shortages of 1973 forced the Commission to issue a complaint against the major oil companies despite insufficient investigation." *Ibid.*

living under government." *Id.* at 244 (internal quotation marks omitted).[10] In light of its longstanding efforts to protect the deportation process from disruptive litigation (see note 7, *supra*), Congress cannot plausibly be thought to have intended that the filing of deportation charges would be *more* susceptible to immediate judicial scrutiny than the issuance of administrative complaints in other fields.[11]

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[10] The Court further explained that

> the effect of the judicial review sought by Socal is likely to be interference with the proper functioning of the agency and a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975). Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. *McGee* v. *United States*, 402 U.S. 479, 484 (1971); *McKart* v. *United States*, 395 U.S. 185, 195 (1969).
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> In sum, the Commission's issuance of a complaint averring reason to believe that Socal was violating the Act is not a definitive ruling or regulation. It had no legal force or practical effect upon Socal's daily business other than the disruptions that accompany any major litigation. And immediate judicial review would serve neither efficiency nor enforcement of the Act. Those pragmatic considerations counsel against the conclusion that the issuance of the complaint was "final agency action."

449 U.S. at 242-243. Those concerns are directly applicable to the deportation context.

[11] The unavailability (prior to IIRIRA) of judicial review of INS charging decisions did not rest solely on the negative implication of Section 1105a, but also reflected the fact that no statutory provision affirmatively authorizes the federal courts

B. IIRIRA Precludes Judicial Review Of Respondents' Selective Enforcement Claims Prior To The Entry Of A Final Order Of Deportation

1. IIRIRA was enacted to strengthen and make explicit the pre-existing limitations on judicial review under the INA. *Inter alia*, IIRIRA created a new 8 U.S.C. 1252 (Supp. II 1996), which is entitled "Judicial review of orders of removal." In significant respects, the new Section 1252 is consistent with former 8 U.S.C. 1105a (1994). Thus, judicial review of final orders of deportation is exclusively vested directly in the courts of appeals pursuant to the Hobbs Act's procedures, rather than in the district courts. Compare 8 U.S.C. 1252(a)(1) (Supp. II 1996) with 8 U.S.C. 1105a(a) (1994).[12] And the Act continues to

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to review an agency's decision to file an administrative charge. Respondents' second amended complaint alleged that the district court had jurisdiction under 8 U.S.C. 1329 and 28 U.S.C. 1331, 1361, and 2201. See note 2, *supra*. None of those provisions, however, creates a cause of action or authorizes adjudication of a suit against the government absent an independent waiver of sovereign immunity. Cf. *FDIC* v. *Meyer*, 510 U.S. 471, 475, 483-486 (1994); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37-38 (1992). Review in the district court under the APA was unavailable even before IIRIRA was enacted, both because the INA (as amended in 1961) established "a single, separate, statutory form of judicial review," H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22 (1961); (see note 7, *supra*), and because the filing of administrative charges is not "final agency action" in any event, see *Standard Oil*, *supra*.

[12] Indeed, even prior to IIRIRA, in Section 440(a) of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276, Congress repealed the provision in 8 U.S.C. 1105a(a)(10) (1994) for habeas corpus review for aliens held in custody pursuant to an order of deportation (see note 7, *supra*), and replaced it with a bar to

provide that review of a final order of deportation is permitted only if the alien has exhausted all available administrative remedies. Compare 8 U.S.C. 1252(d) (Supp. II 1996) with 8 U.S.C. 1105a(c) (1994).

Within the new Section 1252, two provisions in particular reflect Congress's determination to foreclose premature judicial interference with the depor-

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judicial review (even in the court of appeals) of deportation orders entered against aliens based on their commission of specified criminal offenses. Congress did not reinstate the provision for habeas corpus review of deportation orders when it enacted IIRIRA, and thereby continued to foreclose that once-available avenue for judicial review in the district courts.

Moreover, in IIRIRA Congress deleted the separate provision for judicial review of final exclusion orders by habeas corpus, see 8 U.S.C. 1105a(b) (1994); note 7, *supra*, and instead combined the separate deportation and exclusion processes under prior law into a uniform "removal" process. See 8 U.S.C. 1229a (Supp. II 1996). IIRIRA provides for judicial review of all such orders directly in the courts of appeals pursuant to 8 U.S.C. 1252 (Supp. II 1996). And to underscore its determination to eliminate delay caused by district court habeas proceedings in exclusion cases as soon as possible, Congress provided that during the transition period when administrative proceedings in exclusion cases initiated prior to the effective date of the pertinent amendments made by IIRIRA (April 1, 1997, see IIRIRA § 309(a), 110 Stat. 3009-625) were still governed by the pre-IIRIRA version of the INA (see IIRIRA § 309(c)(1), 110 Stat. 3009-625), judicial review of any final order of exclusion entered more than 30 days after the enactment of IIRIRA was to be governed by subsection (a) of 8 U.S.C. 1105a (1994) (which provided for judicial review only in the courts of appeals), not subsection (b) (which provided for judicial review of exclusion orders in habeas corpus proceedings). See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626. Thus, in both AEDPA and IIRIRA, Congress made unmistakably clear its intent to bar actions in federal district court challenging both deportation and exclusion proceedings.

tation process and to consolidate all judicial challenges in the courts of appeals following entry of a final removal order. New Section 1252(b)(9) is entitled "Consolidation of questions for judicial review" and states:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. 1252(b)(9) (Supp. II 1996). New Section 1252(g) is entitled "Exclusive jurisdiction" and states:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

8 U.S.C. 1252(g) (Supp. II 1996).

Sections 1252(b)(9) and 1252(g) serve complementary functions. Section 1252(b)(9) makes clear that the INA (as amended by IIRIRA) should not be construed to authorize judicial review of any aspect of the removal process except in the context of a challenge to a final order of removal. Section 1252(g) establishes that the judicial review provisions of the INA are exclusive—*i.e.*, a plaintiff may not invoke some more general statutory review provision as a basis for raising a claim "arising from the decision or

action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." Taken together, those provisions manifest an unmistakable congressional intent that all challenges to the government's conduct of the deportation process—including suits that involve the "interpretation and application of constitutional * * * provisions," 8 U.S.C. 1252(b)(9) (Supp. II 1996)—may be brought only under the procedures provided by the INA itself, and only after the entry of a final order of deportation.[13]

2. Application of new Section 1252 to the instant case is complicated somewhat by IIRIRA's effective date provisions. Section 309(c)(1) of IIRIRA states the "general rule" that the amendments made by IIRIRA do not apply to "an alien who is in exclusion or deportation proceedings before the [Act's] effective date." 110 Stat. 3009-625 (as amended by the Act of

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[13] In addition to new Sections 1252(b)(9) and 1252(g), IIRIRA precludes judicial review of decisions by the Attorney General regarding various forms of discretionary relief. 8 U.S.C. 1252(a)(2)(B) (Supp. II 1996). IIRIRA also precludes judicial review of orders of removal of certain classes of aliens whose orders of removal are based on the commission of specified criminal offenses. 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996). Moreover, IIRIRA imposes various timing requirements designed to expedite the process of judicial review in those cases where review is still permitted. See, *e.g.*, 8 U.S.C. 1252(b)(1) (Supp. II 1996) ("The petition for review must be filed not later than 30 days after the date of the final order of removal."); compare 8 U.S.C. 1105a(a)(1) (1994) (pre-IIRIRA version of INA allowed petition for review to be filed "not later than 90 days after the date of the issuance of the final deportation order"); 28 U.S.C. 2344 (Hobbs Act generally requires that petition for review be filed within 60 days after entry of agency's final order).

October 11, 1996, Pub. L. No. 104-302, § 2(2), 110 Stat. 3657); 8 U.S.C. 1101 note (Supp. II 1996). Section 306(c)(1) of IIRIRA, however, states an exception to that general rule. Section 306(c)(1) provides that

> the amendments made by subsections (a) and (b) [of Section 306] shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act [8 U.S.C. 1252(g)] (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

110 Stat. 3009-612 (as amended by Pub. L. No. 104-302, § 2(1), 110 Stat. 3657); 8 U.S.C. 1252 note (Supp. II 1996).[14] Thus, while the rest of new Section 1252 is

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[14] Determining whether and when Section 1252(g) became applicable to the instant case involves two subsidiary questions: (1) What is the "effective date" of Section 1252(g)? and (2) Does Section 1252(g) apply to aliens who were placed in deportation proceedings before the Act's effective date? In the district court proceedings immediately following the enactment of IIRIRA, the parties disagreed as to whether the effective date of Section 1252(g) was September 30, 1996, or April 1, 1997. See Pet. App. 29a-32a. The district court agreed with the government that the effective date of Section 1252(g) was September 30, 1996. The Seventh, Ninth, and Eleventh Circuits, by contrast, have concluded that Section 1252(g) became effective on April 1, 1997. See *Lalani* v. *Perryman*, 105 F.3d 334, 336 (1997); *Hose* v. *INS*, 141 F.3d 932, 934 (9th Cir. 1998); *Auguste* v. *Reno*, 140 F.3d 1373, 1376 (11th Cir. 1998). Because both of those dates have now passed (and had passed by the time the court of appeals rendered its decision), and because respondents were placed in deportation proceedings before either date, that question is of no continuing significance in the instant case. Rather, the current applicability of Section 1252(g) to respondents' suit depends solely on whether that

inapplicable to aliens who (like respondents) were placed in deportation proceedings before IIRIRA's effective date, Section 1252(g) is immediately applicable to such aliens (see Pet. App. 7a-8a; *Ramallo* v. *Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997), petition for cert. pending, No. 97-526; *Lalani* v. *Perryman*, 105 F.3d 334, 336 (7th Cir. 1997); but see *Auguste* v. *Reno*, 140 F.3d 1373, 1376 (11th Cir. 1998)), and precludes reliance on any judicial review provision outside the INA itself.[15]

Section applies, after it has become effective, to aliens placed in deportation proceedings before the Act's effective date.

[15] New Section 1252(g) states that judicial review of deportation proceedings is unavailable "[e]xcept as provided *in this section*." 8 U.S.C. 1252(g) (Supp. II 1996) (emphasis added). With respect to cases in which deportation charges were filed after IIRIRA's effective date (April 1, 1997, see IIRIRA § 309(a), 110 Stat. 3009-625), the italicized language clearly refers to 8 U.S.C. 1252(a) and (b) (Supp. II 1996), the provisions of new Section 1252 that authorize judicial review after the entry of a final order of removal. As the court of appeals recognized (see Pet. App. 8a-9a), however, literal application of all of the relevant provisions to persons (like respondents) who were placed in deportation proceedings before IIRIRA's effective date would create an anomalous result.

IIRIRA § 306(c)(1) makes new Section 1252(g) immediately applicable to respondents' suit, even though the "general rule" established by IIRIRA § 309(c)(1) is that the Act does not apply to aliens who were in deportation proceedings before the Act's effective date. See pp. 28-30, *supra*. If Section 1252(g) were read literally to foreclose reliance on any judicial review provision outside of the new Section 1252—and if (by virtue of IIRIRA § 309(c)(1)) new Section 1252(a) and (b) do not apply to aliens who were placed in deportation proceedings before IIRIRA's effective date—then respondents would be deprived of *all* judicial review, even after the entry of a final order.

3. Although the *AADC III* court agreed with the government that new Section 1252(g) applies to respondents' suit, it nevertheless concluded that the suit could go forward. The court based its holding on new Section 1252(f) of Title 8 (as added by IIRIRA § 306(a)). That provision is entitled "Limit on injunctive relief" and states in pertinent part:

The court of appeals sought to avoid that result by holding (despite IIRIRA § 309(c)(1)) that other provisions of the new Section 1252, including new Section 1252(f), apply to the instant case. See Pet. App. 11a-12a. For the reasons stated below, see pp. 32-34, *infra*, Section 1252(f) would not provide a basis for jurisdiction over respondents' suit even if it applied to the instant case. We believe, however, that the textual anomaly is properly resolved by holding that respondents may obtain judicial review, if and when a final order of deportation is entered against them, pursuant to the provisions of former 8 U.S.C. 1105a (1994) rather than pursuant to the new Section 1252. That reading faithfully implements IIRIRA § 309(c)(1)(B), which specifically addresses the application of IIRIRA to aliens placed in deportation proceedings before the Act's effective date and provides, with limited exceptions not relevant here, that "the proceedings (including judicial review thereof) shall continue to be conducted without regard to [the] amendments" made by IIRIRA. 110 Stat. 3009-625; 8 U.S.C. 1101 note (Supp. II 1996). Cf. *Lockheed Corp.* v. *Spink*, 116 S. Ct. 1783, 1793 (1996) ("When Congress includes a provision that specifically addresses the temporal effect of a statute, that provision trumps any general inferences that might be drawn from the substantive provisions of the statute."). The new Section 1252(g) applies to such aliens, however, and thereby expressly reinforces the rule that judicial review is available for such aliens only as provided in 8 U.S.C. 1105a itself. See pp. 27-29, *supra*.

Limit on injunctive relief

(1) In general

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter [8 U.S.C. 1221-1231], as amended by [IIRIRA], *other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.*

8 U.S.C. 1252(f) (Supp. II 1996) (emphasis added). Relying on the italicized language, the court of appeals stated that "[b]ecause this case involves individual aliens against whom deportation proceedings have been initiated, subsection (f) would appear to allow federal jurisdiction over [respondents'] claims." Pet. App. 10a. Even assuming that Section 1252(f) applies to the instant case (but see pp. 28-30 and note 15, *supra*), the court's interpretation of that provision is seriously flawed.

a. The plain text of Section 1252(f)(1) will not support the court of appeals' reading. Section 1252(f) does not vest the district courts with jurisdiction over any defined category of cases. Rather, Section 1252(f) is entitled "Limit on injunctive relief" (see *Almendarez-Torres* v. *United States*, 118 S. Ct. 1219, 1226 (1998) (heading of a section is relevant in determining its meaning)), and is by its terms a *restriction* on the remedial authority of a reviewing court. See 8 U.S.C. 1252(f)(1) (Supp. II 1996) ("no court (other than the Supreme Court) shall have jurisdiction or authority * * * "); Pet. App. 249a n.1 (O'Scannlain,

J., dissenting from denial of rehearing en banc). That Section makes clear, most obviously, that even if a court has a proper statutory basis for adjudicating a suit (*e.g.*, on review of a final order of deportation), it may not under any circumstances grant *classwide* injunctive relief against the operation of any provision contained in 8 U.S.C. 1221-1231 (Supp. II 1996). But nothing in Section 1252(f) empowers a federal court to adjudicate a suit except where some *other* statutory provision vests the court with jurisdiction and provides the plaintiff with a cause of action. There is no such statutory provision here that authorizes respondents' suit.

b. The implausibility of the court of appeals' construction of Section 1252(f)(1) is particularly clear when that provision is read in light of new Section 1252(b)(9). Section 1252(b)(9) states unambiguously that judicial review of any claim (specifically including constitutional claims) arising from the conduct of removal proceedings is available only after the entry of a final order. See p. 27, *supra*. Indeed, it is difficult to conceive of statutory language that would more clearly foreclose the district court from adjudicating respondents' suit. If Section 1252 is to be read as a coherent whole, Section 1252(f)(1) cannot be interpreted to authorize what Section 1252(b)(9) flatly prohibits. Cf., *e.g.*, *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," as where "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) ("It is well established that our task in interpreting

separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose.").

c. As we explain above, see pp. 20-24, *supra*, there was no statutory basis for respondents' suit even before IIRIRA was enacted. Sections 1252(b)(9) and 1252(g) are properly understood not as an attempt to divest the federal courts of jurisdiction they previously possessed, but as an effort to make *absolutely clear* what should have been apparent all along: that review of the INS's conduct of deportation proceedings is available only after the entry of a final order of deportation, and only under the INA provisions specifically provided for that purpose. Given IIRIRA's purpose to streamline the deportation process and safeguard it from disruptive litigation, it is especially farfetched to construe Section 1252(f)(1) as affirmatively authorizing a challenge that could not have been brought before IIRIRA was enacted.

C. Deferral Of Respondents' Selective Enforcement Challenge Until The Entry Of A Final Order Of Deportation Would Not Violate The Constitution

The government does not contend that respondents are permanently foreclosed from obtaining judicial resolution of their selective enforcement claims. Rather, our position is (and has been throughout this litigation) that such claims can be raised in the court of appeals if and when a final order of deportation is entered. There is nothing anomalous about such an approach. In other circumstances, this Court has held that the defendant in an administrative or judicial proceeding may properly be required to litigate the case to its conclusion, even where the gravamen of his claim is that the prosecution was unlawfully

brought in the first instance. See, *e.g.*, *Standard Oil*, 449 U.S. at 239-245 (discussed at pp. 23-24, *supra*); *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 268-270 (1982) (holding that criminal defendants could not immediately appeal the district court's denial of their motion to dismiss an indictment, and explaining that the defendants' claim of prosecutorial vindictiveness could adequately be reviewed on appeal from a final judgment of conviction); *Younger* v. *Harris*, 401 U.S. 37 (1971) (federal courts should ordinarily abstain from adjudicating constitutional challenge to pending state prosecution); *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("[*Younger*] and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordiary circumstances.").

Despite the availability of judicial review after the entry of a final order of deportation, the court of appeals concluded that IIRIRA "would present serious constitutional problems" if it were construed to preclude immediate judicial resolution of respondents' suit. Pet. App. 12a. The court observed that "neither the immigration judge ('IJ') nor the Board of Immigration Appeals ('BIA') has the authority to consider a selective enforcement claim during a deportation proceeding." *Ibid.* It stated that "*prompt* judicial review of [respondents'] claims [i]s required because violation of [respondents'] First Amendment interests would amount to irreparable injury." *Id.* at 15a. The court also asserted that "the factual record necessary to the adjudication of [a selective enforcement] claim would not be available to a federal court reviewing a final deportation order" (*id.* at 12a), and it specifically rejected (see *id.* at 12a-13a) the government's

contention that the proceedings on petition for review of a final deportation order could be transferred to a district court pursuant to 28 U.S.C. 2347(b)(3) if additional evidentiary proceedings were required. Contrary to the court of appeals' conclusion, judicial review of a final order of deportation provides a fully adequate mechanism for addressing respondents' constitutional claims.[16]

1. This Court has stated that a "'serious constitutional question' * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). The Court has also made clear, however,

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[16] It is a familiar canon of construction that ambiguous statutes will be interpreted in a manner to avoid "a serious doubt of constitutionality." *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 465 (1989). Because Congress has clearly and unambiguously foreclosed judicial review of respondents' claims before the entry of a final order of deportation, however, there is no basis for applying that canon in the instant case. Compare, *e.g.*, *United States* v. *Locke*, 471 U.S. 84, 96 (1985) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.") (internal quotation marks omitted). Rather, respondents can prevail only if dismissal of their suit, as required by IIRIRA, would actually violate the Constitution. It plainly would not. For the reasons stated below, the application of IIRIRA to the instant case does not even raise "serious doubt of constitutionality." Compare *Almendarez-Torres* v. *United States*, 118 S. Ct. 1219, 1228 (1998) (doctrine that ambiguous statutes should be construed to avoid serious constitutional doubts "does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious"; rather, it applies only when "the alternative is a serious likelihood that the statute will be held unconstitutional").

that Congress has substantial flexibility to regulate the mode and timing of judicial review, even where constitutional claims are involved. The Court has recognized, in particular, that a litigant can be required to obtain a final administrative resolution of all of his claims before presenting his constitutional challenge to the court charged by statute with reviewing the agency's decision. The requirement of a final agency decision may serve important purposes even when (as is typically the case, for example, with respect to a constitutional attack on an Act of Congress) the agency itself is not authorized to consider the constitutional claim.

In *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), the Court applied the foregoing principles to a situation closely analogous to the instant case. *Salfi* involved a constitutional challenge to eligibility provisions contained within the Social Security Act. See *id*. at 752-755. The Act authorized judicial review of a "final decision of the Secretary." 42 U.S.C. 405(g) (quoted in *Salfi*, 422 U.S. at 757 n.5). It further provided that decisions of the Secretary regarding the award or denial of benefits would be judicially reviewable only pursuant to the review provision contained within the Act itself. 42 U.S.C. 405(h) (quoted in *Salfi*, 422 U.S. at 757 n.4); see 422 U.S. at 756-759.

The Court held that the restriction imposed by Section 405(h) applied to constitutional claims. 422 U.S. at 761. It further held that Section 405(h), so construed, could not properly be analogized to a statutory provision that would eliminate review of constitutional claims altogether. The Court explained that

> the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions. Thus the plain words of * * * § 405(h) do not preclude constitutional challenges. They simply require that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act. The result is not only of unquestionable constitutionality, but it is also manifestly reasonable, since it assures the Secretary the opportunity prior to constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions of the Social Security Act.

422 U.S. at 762.

Postponing adjudication of respondents' selective enforcement claims until the entry of a final order of deportation serves similar purposes. Even though the IJ and BIA are not authorized to resolve claims of selective enforcement, it does not follow that respondents' participation in administrative proceedings would be "futile" (Pet. App. 92a, 94a (*AADC II*)), since respondents may be able to persuade administrative officials (or the reviewing court) that they have other grounds for avoiding deportation. Adherence to the mode of review devised by Congress ensures that judicial resolution of respondents' constitutional claims, with the attendant intrusion into the agency's internal deliberative processes they seek, will not occur unnecessarily. Deferral of respondents' selective enforcement claims until the entry of a final order of deportation also prevents "piecemeal review,"

Standard Oil, 449 U.S. at 242 (see note 10, *supra*), by ensuring that all challenges to the deportation process can be consolidated in a single judicial proceeding.[17]

2. Congress's authority to regulate the mode and timing of judicial review is especially broad in the immigration context, where this Court has long recognized the particular need for judicial deference to the political Branches. "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." *Galvan* v. *Press*, 347 U.S. 522, 531 (1954). Accord, *e.g.*, *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the

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[17] Postponement of judicial review until after the entry of a final order also ensures that consideration of the evidence bearing on the deportation charges will be undertaken by the agency in the first instance, and that the agency's factual findings will be reviewed by the court under an appropriately deferential standard. In the instant case, the district court's resolution of the selective enforcement claim was based in substantial measure on the court's own evaluation of what it regarded as the relevant evidence. See p. 11 & note 6, *supra*. That approach was erroneous. See *Cameron* v. *Johnson*, 390 U.S. 611, 621 (1968) (plaintiff could not establish bad-faith prosecution warranting injunctive relief simply by showing that the evidence would not support a conviction on the criminal charge); cf. *Waters* v. *Churchill*, 511 U.S. 661, 677-678 (1994) (plurality opinion); *id.* at 686-694 (Scalia, J., concurring in the judgment). The actual nature and extent of Hamide and Shehadeh's PFLP-related activities will of course be crucial to the ultimate disposition of the deportation charges against them. The courts have no authority, however, to resolve those issues in advance of the administrative proceedings under the rubric of adjudicating a selective enforcement claim.

President in the area of immigration and naturalization.") (footnote omitted); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (this Court's decisions "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"); *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993); *Fiallo* v. *Bell*, 430 U.S. 787, 794-795 (1977); *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767 (1972); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-590 (1952). "Over no conceivable subject is the legislative power of Congress more complete." *Flores*, 507 U.S. at 305 (brackets omitted).

The need for judicial deference is not limited to statutory provisions defining the substantive terms on which aliens will be permitted to enter and remain in this country. It extends as well to congressional decisions regarding the procedures by which individual deportation decisions are made and reviewed. Indeed, the danger that repetitive or unduly protracted litigation might disrupt the enforcement of the immigration laws has long been a subject of congressional concern. See note 7, *supra*. In light of Congress's sweeping authority over the field of immigration, IIRIRA's unambiguous requirement that challenges to the deportation process must await the entry of a final order is entitled to particular respect.

3. The fact that respondents have invoked the First Amendment does not alter the foregoing analysis. No decision of this Court suggests that statutory exhaustion and finality requirements must give way whenever a plaintiff's challenge to agency conduct includes a claim brought under the First Amendment. The court of appeals in *AADC II* relied (see

Pet. App. 93a) on *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), which held that a federal court could under certain circumstances enjoin state officials from instituting criminal prosecutions that impair the plaintiffs' exercise of First Amendment rights. See *id.* at 483-498. This Court has since made clear, however, that *Dombrowski* is properly understood to support the entry of injunctive relief only against prosecutions brought "in bad faith as harassing [plaintiffs'] exercise of protected expression *with no intention of pressing the charges or with no expectation of obtaining convictions, knowing that [plaintiffs'] conduct did not violate the statute*." *Cameron* v. *Johnson*, 390 U.S. 611, 619-620 (1968) (emphasis added). Although respondents have argued that the government's decision to bring deportation charges against them was based in part on improper considerations, they could not plausibly contend that INS officials brought those charges purely for purposes of harassment—*i.e.*, that those officials acted "with no expectation of obtaining [respondents' removal from the country], knowing that [respondents] did not violate the" immigration laws.

Dombrowski is also distinguishable from the instant case in a second, and even more fundamental, respect. *Dombrowski* dealt with the manner in which the "equitable power" of the federal courts should be exercised when Congress has not clearly defined the proper mode and timing of judicial intervention. See 380 U.S. at 484 & n.2. Indeed, the Court concluded that the plaintiffs had stated a claim under 42 U.S.C. 1983 (see 380 U.S. at 490); the question before it was whether the federal courts should withhold equitable relief despite the facial applicability of a federal cause of action. Nothing in *Dombrowski* remotely suggests

that a federal court may disregard express statutory limits on its own jurisdiction whenever delay in the resolution of disputed legal issues might temporarily discourage the exercise of First Amendment rights. Where (as here) Congress has stated unambiguously that judicial review should await the completion of administrative proceedings, *Dombrowski* does not cast doubt upon the constitutionality of that determination.[18]

In any event, postponement of the adjudication of respondents' selective enforcement claims until after the deportation charges are resolved on the merits at the administrative level could not reasonably be expected to have a significant deterrent effect upon their participation in any constitutionally protected expressive or associational activities in which they

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[18] Respondents have relied (Br. in Opp. 15 n.9) on *Younger* v. *Harris*, 401 U.S. 37 (1971), and *Freedman* v. *Maryland*, 380 U.S. 51 (1965). In *Younger* the Court relied on "equitable principles" in holding that the federal courts should generally abstain from entertaining collateral constitutional challenges to ongoing state proceedings. 401 U.S. at 54. Although the Court indicated that certain forms of bad-faith prosecution might warrant an exception to the general rule (*id*. at 48), it did not suggest that a mechanism for immediate judicial resolution of First Amendment claims is required by the Constitution. Indeed, the Court made clear that mere delay or uncertainty as to the proper resolution of First Amendment issues, and the "chilling effect" that might ensue, did not provide an adequate justification for federal intervention in ongoing state proceedings. *Id*. at 50-52. In *Freedman*, the Court held that a prompt judicial ruling was a prerequisite to any prior restraint on communicative activities. 380 U.S. at 58-59. Respondents, however, do not claim to have been the subjects of any prior restraint. Moreover, neither *Younger* nor *Freedman* implicated Congress's sweeping powers over the field of immigration. See pp. 39-40, *supra*.

would otherwise engage. Compare *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"). Respondents have offered no basis for believing that their continued association with the PFLP could be expected to affect either the adjudication of the substantive deportation charges, or the ultimate disposition of their claims that those charges were impermissibly brought based on their *past* activities on behalf of the PFLP. Moreover, the activities that allegedly would be "chilled" by the deportation proceedings—the provision of material support to the PFLP—are currently the subject of civil and criminal prohibitions under other federal laws.[19] The pendency of deportation charges is

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[19] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 302, 110 Stat. 1248, authorizes the Secretary of State to designate "foreign terrorist organization[s]." 8 U.S.C. 1189(a)(1) (Supp. II 1996). The Act prescribes criminal penalties for any person within the United States or under the jurisdiction thereof who "knowingly provides material support or resources" to any organization so designated (18 U.S.C. 2339B(a)(1) (Supp. II 1996)), and authorizes the Attorney General to seek injunctive relief to prevent violations. 18 U.S.C. 2339B(c) (Supp. II 1996). Pursuant to the Act, the Secretary of State has designated the PFLP as a foreign terrorist organization. 62 Fed. Reg. 52,650 (1997). Even before the passage of the AEDPA, financial transactions between United States residents and the PFLP (and several other Middle Eastern terrorist organizations) had been prohibited by Executive Orders issued pursuant to, *inter alia*, the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq*. See 60 Fed. Reg. 5079 (1995); see also 61 Fed. Reg. 1695 (1996) (continuing prohibition in effect); 62 Fed. Reg. 3439 (1997) (same); 63 Fed. Reg. 3445 (1998) (same).

therefore highly unlikely to impose a meaningful increment of deterrence to the type of fundraising activities in which the INS believes respondents to have engaged.

4. The court of appeals erred in concluding that respondents' inability to raise their selective enforcement claims during the administrative process would prevent the compilation of an adequate record for judicial review. See Pet. App. 12a-14a, 90a-91a. Both before and after the enactment of IIRIRA, judicial review of a final order of deportation has been governed by the provisions of the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* See 8 U.S.C. 1105a(a) (1994); 8 U.S.C. 1252(a)(1) (Supp. II 1996). The Hobbs Act specifically provides that the reviewing court of appeals may transfer a case to a district court for the resolution of pertinent issues of material fact that were not resolved (and were not required to be resolved) by the agency itself in an administrative hearing. 28 U.S.C. 2347(b)(3). If dis-

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As the petition for a writ of certiorari explains, we believe that respondents' fundraising activities are not entitled to First Amendment protection. See Pet. 20-25. The court of appeals in *AADC III* disagreed, holding that respondents could not constitutionally be "targeted" for raising funds for a foreign terrorist organization unless they acted with specific intent to further the group's unlawful aims. See Pet. App. 20a. The effect of the statute and Executive Orders described above, however, is that the district court's injunction against the pending deportation proceedings cannot insulate respondents from punishment if they continue to engage in PFLP fundraising activities. Cf. *Younger*, 401 U.S. at 50-51 (where state criminal statute was potentially subject to an acceptable limiting construction, injunction against pending prosecution would not appreciably lessen plaintiffs' fears that their conduct might eventually be subjected to criminal penalties).

position of a selective enforcement claim requires resolution of factual issues not addressed in the administrative record, transfer pursuant to Section 2347(b) (3) would facilitate resolution of those issues while respecting Congress's unambiguous determination that judicial review of deportation proceedings should await the entry of a final order.[20]

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[20] Since the enactment of IIRIRA, two courts of appeals have held that at least under some circumstances, an alien subject to a final order of deportation might obtain review of that order by petition for habeas corpus under 28 U.S.C. 2241. See *Goncalves* v. *Reno*, No. 97-1953, 1998 WL 236799, at *8-*13 (1st Cir. May 15, 1998); *Lerma de Garcia* v. *INS*, 141 F.3d 215, 217 (5th Cir. 1998). Two other courts of appeals have made similar statements, although in dicta, since neither case actually involved a petition for habeas corpus. See *Jean-Baptiste* v. *Reno*, No. 97-6062, 1998 WL 228120, at *9 (2d Cir. May 8, 1998); *Ramallo*, 114 F.3d at 1214. But see *Hose* v. *INS*, 141 F.3d 932, 935-936 (9th Cir. 1998) (new Section 1252(g) precludes habeas review). To permit an alien subject to a final order of deportation to obtain review of that order by way of habeas corpus is contrary to both the text and purpose of AEDPA and IIRIRA. As explained in note 12, *supra*, Congress, in enacting AEDPA, repealed the prior provision in 8 U.S.C. 1105a(a)(10) (1994) that created a limited habeas corpus exception to the exclusive judicial review procedure under the Hobbs Act. Moreover, the new Section 1252(g) unambiguously precludes judicial review of any aspect of the deportation process except through the review provisions of the INA itself, an integral feature of which is the routing of challenges directly to the courts of appeals so as to avoid unduly protracted litigation. The new Section 1252(b)(9) underscores that purpose. Accordingly, the government has filed suggestions of rehearing en banc in *Goncalves*, *Lerma de Garcia*, and *Jean-Baptiste*. The approach taken by the court of appeals in the instant case is disruptive of the statutory scheme in an additional way, since it permits the district court to interrupt the administrative proceedings *before* the entry of a final order of deportation.

Nothing in the text of the Hobbs Act or the INA renders the transfer mechanism in 28 U.S.C. 2347(b)(3) inapplicable to judicial review of final orders of deportation. Indeed, IIRIRA specifically prohibits the reviewing court from invoking another provision of the Hobbs Act that allows for an alternative means of resolving certain factual issues, namely by remanding the case to the agency under 28 U.S.C. 2347(c).[21]

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[21] Section 2347(c) provides for the court of appeals before which a proceeding is pending to order that additional evidence be taken by the agency if a party shows that the additional evidence is material and that there are reasonable grounds for the failure to adduce the evidence before the agency. The agency may then modify its findings and order and must then file the modified findings and evidence with the court. That provision for an interlocutory "remand" to the agency while the review proceeding remains pending in court is similar to the procedure provided for in sentence six of 42 U.S.C. 405(g), applicable in Social Security cases. See, *e.g.*, *Shalala* v. *Schaeffer*, 509 U.S. 292, 297 (1993).

Congress's express bar to that sort of remand furthers IIRIRA's overall goal of expediting judicial review by preventing an alien from delaying the resolution of judicial proceedings by proffering new evidence to the court in the first instance. The alien must instead proffer the evidence to the BIA in a motion to reopen, which does not postpone judicial review of the final order of deportation itself. See *Stone* v. *INS*, *supra*. By contrast, the court of appeals' interpretation of 8 U.S.C. 1105a (1994) and 8 U.S.C. 1252 (Supp. II 1996) as containing an implicit bar to transferring a case to the district court pursuant to 28 U.S.C. 2347(b)(3)—and for that reason allowing an independent collateral attack in district court on the mere filing of administrative charges—fundamentally undermines IIRIRA's goal of expediting administrative and judicial review and channeling all challenges (constitutional or otherwise) to the deportation process to a single proceeding instituted in the court of appeals following the entry of a final order of deportation.

See 8 U.S.C. 1252(a)(1) (Supp. II 1996). That specific prohibition under the INA confirms that Congress did not intend to bar a transfer to the district court under 28 U.S.C. 2347(b)(3).[22]

Even if the statutory scheme were regarded as ambiguous on this point, construing the INA's judicial

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[22] In concluding that transfer pursuant to 28 U.S.C. 2347(b)(3) is unavailable in deportation cases, the court of appeals relied (see Pet. App. 13a) on 8 U.S.C. 1252(b)(4)(A) (Supp. II 1996), which provides that the court in reviewing a final order of deportation "shall decide the petition only on the administrative record on which the order of removal is based." Section 1252(b)(4)(A) essentially duplicates the provision previously contained in former 8 U.S.C. 1105a(a)(4) (1994). The provision for judicial review of issues that were (or could have been) adjudicated by the IJ and the BIA on the basis of the administrative record compiled at the hearing before the IJ and BIA is in no way inconsistent with transfer to the district court pursuant to 28 U.S.C. 2347(b)(3) for resolution of any material factual issues bearing on the validity of the deportation order that were not (and could not have been) resolved in the deportation proceeding. Respondents' First Amendment selective enforcement claim would fall into the latter category to the extent respondents are able to identify genuine and substantial disputed issues of material fact in their petition for review of any final order of deportation. See note 23, *infra*.

The INA provisions requiring that judicial review be based on the administrative record—former 8 U.S.C. 1105a(a)(4) (1994) and new 8 U.S.C. 1252(b)(4)(A) (Supp. II 1996)—do not prescribe a special rule for immigration cases. It is the general rule under the Hobbs Act (as in administrative law cases generally, see 5 U.S.C. 706) that judicial review is on the basis of the administrative record. See 28 U.S.C. 2347(a); *Osaghae* v. *INS*, 942 F.2d 1160, 1161-1162 (7th Cir. 1991) (Posner, J.); *Makonnen* v. *INS*, 44 F.3d 1378, 1384-1385 (8th Cir. 1995). There is accordingly no basis for construing Sections 1105a(a)(4) and 1252(b)(4) (A) as carving out an implied exception, unique to immigration cases, to 28 U.S.C. 2347(b)(3).

review provisions to permit transfer in circumstances such as these is far more consonant with congressional intent than is the alternative proposed by respondents and adopted by the courts below. With respect to judicial oversight of the deportation process, Congress's manifest and overriding objective was to foreclose *all* judicial review until the entry of a final order of deportation. That was an integral feature of the pre-IIRIRA regime (see pp. 20-24, *supra*), and it has been made explicit in new Sections 1252(g) and 1252(b)(9) (see p. 26-27, *supra*). Any ambiguity as to the precise manner in which the review proceedings will be conducted once jurisdiction attaches should not be used to subvert that fundamental goal.

In the government's view, transfer to a district court under 28 U.S.C. 2347(b)(3) is appropriate only in the rare case where the facts necessary to resolve a substantial challenge to a final order of deportation were not and could not have been adequately developed in the course of the administrative proceedings.[23]

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[23] A court of appeals reviewing a final order of deportation should not routinely transfer a case to a district court whenever the petition for review includes a claim of selective enforcement. Rather, the alien should be required, at the time the petition for review is filed, to proffer specific evidence indicating that the decision to initiate deportation proceedings had been made for a constitutionally forbidden reason. Cf. *United States* v. *Armstrong*, 517 U.S. 456, 464-465 (1996). The government in responding to the petition for review should be afforded an opportunity to submit its explanation for the charging decision, including (if necessary) its own evidentiary materials. Transfer to the district court will be appropriate only in the very rare case where the court of appeals concludes that the alien's submission, if credited, refutes the government's explanation for the charging decision, and that disposition of the constitutional claim therefore requires resolution of

Transfer in that narrow class of cases is fully consistent with the normal course of Hobbs Act proceedings and violates no command in the INA itself. To permit respondents' suit to go forward, by contrast, is flatly at odds with the plain language of IIRIRA. It is also inconsistent both with the background rule that the filing of administrative charges is not subject to immediate judicial review (see pp. 23-24, *supra*), and with the recognition that "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Stone* v. *INS*, 514 U.S. at 400 (citation omitted). Thus, whether or not the pertinent INA provisions would otherwise be construed to permit a Section 2347(b)(3) transfer, use of the transfer mechanism is far more consonant with the totality of the statutory scheme than is the court of appeals' decision to permit a collateral challenge that Congress has expressly foreclosed, and that has no analogue in ordinary administrative practice.

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disputed questions of material fact. In determining whether that standard has been met, the court of appeals should bear in mind both that a selective-enforcement claim implicates "a 'special province' of the Executive," *Armstrong*, 517 U.S. at 464, and that the constitutional constraints applicable to other government action cannot be mechanically applied to immigration decisions, see *Flores*, 507 U.S. at 305-306; pp. 39-40, *supra*.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded with instructions that the complaint be dismissed for lack of jurisdiction.

Respectfully submitted.

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