No. 97-1252

In The

Supreme Court of the United States

October Term, 1997

JANET RENO, ATTORNEY GENERAL, *et al.*,

Petitioners,

vs.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF RESPONDENTS

BURT NEUBORNE
Counsel of Record
E. JOSHUA ROSENKRANZ
MARTA NELSON
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW
Attorneys for Amicus Curiae
161 Avenue of the Americas
5th Floor
New York, New York 10013
(212) 998-6730

148523

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Interest of *Amicus Curiae* 1

Introduction and Summary of Argument 2

Argument 6

I. The Commencement Of Pretextual Deportation Proceedings Against The Targeted Aliens Constitutes Administrative Action Designed To Punish And Deter Activity Protected By The First Amendment. 6

II. The First Amendment Requires Timely Access To Judicial Review Whenever Law Enforcement Officials Act To Punish And Deter Protected First Amendment Activity. 9

III. The Court Of Appeals Was Correct In Reading The Relevant Statutory Language To Permit Timely Access To Judicial Review. 16

Conclusion 20

TABLE OF CITED AUTHORITES

Page

Cases Cited:

Bantam Books v. Sullivan, 372 U.S. 58 (1963) 6, 10

Blount v. Rizzi, 400 U.S. 410 (1971) 5

Board of Airport Comm'rs v. Jews for Jesus, *Inc.,* 482 U.S. 569 (1987) 6

Brandenburg v. Ohio, 395 U.S. 444 (1969) 10

Bridges v. Wixon, 326 U.S. 135 (1945) 3

Carey v. Brown, 100 S. Ct. 455 (1980) 12

Chicago Police Department v. Mosely, 408 U.S. 92 (1972) 12

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 5, 7, 12

Cohen v. California, 403 U.S. 15 (1971) 10

Elrod v. Burns, 427 U.S. 347 (1976) 5

Forsyth County v. The Nationalist Movement, 505 U.S. 123 (1992) 5

Freedman v. Maryland, 380 U.S. 51 (1965) 5, 11

F.T.C. v. Standard Oil Co. of California, 449 U.S. 232 (1980) 15

Table of Cited Authorities

Page

FW/PBS Inc. v. Dallas, 493 U.S. 215 (1990) 11

Grayned v. City of Rockford, 408 U.S. 104 (1972) 6

Heller v. New York, 413 U.S. 483 (1973) 5

In re Asbestos School Litigation, 46 F.3d 1284 (3rd Cir. 1994) 8

INS v. Chadha, 462 U.S. 919 (1983) 16

Lopez-Telles v. INS, 564 F.2d 1302 (9th Cir. 1977) 4

Marcus v. Search Warrant, 367 U.S. 717 (1961) 5, 12, 13

National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969) 19

Oestereich v. Selective Serv. System Local Bd. No. 11, 393 U.S. 233 (1968) 19

Reno v. American Civil Liberties Union, __ U.S. __, 117 S. Ct. 2329 (1997) 6, 12

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 12

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 5, 11

Smith v. Goguen, 415 U.S. 566 (1974) 6

Page

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 5, 11

Texas v. Johnson, 491 U.S. 397 (1989) 10

United States v. Eichman, 496 U.S. 310 (1990) 10

United States v. Hollywood Motor Car Co., 449 U.S. 263 (1982) 15

United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) 5,12,13

Weinberger v. Salfi, 422 U.S. 749 (1975) 15

Wolff v. Selective Serv. System Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967) 19

Statutes Cited:

8 U.S.C. § 1252(b)(4)(A) (Supp. II 1996) 4

8 U.S.C. § 1252(b)(9) (Supp. II 1996) 18

8 U.S.C. § 1252(f) (Supp. II 1996) 3,7,17,18

8 U.S.C. § 1252(g) (Supp. II 1996) 3, 7

28 U.S.C. § 2347(b)(3) 17

Page

United States Constitution Cited:

U.S. Const.: Amend. I . . . . *passim*

Art. I, § 8, cl. 4 16

Rule Cited:

Supreme Court Rule 37.6 1

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice at New York University School of Law ("the Brennan Center") is a partnership between and among the family and friends of Justice William J. Brennan, Jr., many of his law clerks, and the faculty of New York University School of Law, designed to honor Justice Brennan's extraordinary contribution to American law.[1] The Brennan Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice Brennan. Before giving his approval to the enterprise, Justice Brennan obtained a promise that the Brennan Center would function as a non-partisan, independent center of thought, paying no special deference to his views or to the opinions that he authored.

The Brennan Center's Judicial Independence Project addresses the critical role that an independent judiciary plays in our self-consciously divided system of government. The Center submits this brief *amicus curiae* in support of respondents because the historic role of the judiciary in safeguarding individual rights is threatened by the jurisdictional position asserted in this case by petitioners, the Immigration and Naturalization Service (INS). The INS argues that judicial review of an alien's claim that he was targeted for lengthy

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1. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus*, contributed monetarily to the

deportation proceedings because of his political beliefs must await the issuance of a final order of deportation. But the courts' ability to protect an alien's right to engage in controversial political speech is utterly dependent upon the ability to review claims of First Amendment violations in a timely manner. Otherwise the political speech rights sought to be protected — both of those aliens facing deportation proceedings and other aliens similarly situated — will be lost, chilled by the initiation of a pretextual deportation proceeding that is immune from judicial scrutiny for many years.

Amicus submits this brief with the written consent of the parties. The consents have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents are aliens living in the United States ("the targeted aliens") who have been singled out for deportation by the INS because of their controversial political beliefs and associations. Were the INS openly to threaten to deport aliens because of their First Amendment activity, extremely important First Amendment issues would be raised mandating timely judicial review.[2] Indeed, pre-enforcement review of a threatened deportation is available under the statute at issue here, the Illegal

preparation and submission of this brief.

2. By "First Amendment activity" *amicus* means activity that objectively can be said to raise First Amendment concerns. The determination of whether the aliens have in fact engaged in First Amendment activity must be made in a judicial proceeding.

This Court declined to grant certiorari on the scope of the First Amendment protections enjoyed by aliens. For the purpose of considering the jurisdictional question before the Court, the parties must

(Cont'd)

Immigration Reform and Immigrant Responsibility Act (IIRIRA). *See* 8 U.S.C. §§ 1252(g) and 1252(f) (Supp. II 1996) (Before the Attorney General has commenced proceedings against an alien, federal jurisdiction is not limited, except for 1252(f)'s possible restriction of pre-enforcement relief to declaratory relief only). In an apparent attempt to evade those important constitutional issues, and to postpone judicial review, the INS has disguised the deportation proceedings against the targeted aliens as "garden-variety" prosecutions for the violation of technical aspects of immigration laws having nothing to do with politics. But the INS has publicly conceded that these "garden variety" immigration proceedings would never have been commenced but for the protected political activities of the targeted aliens. J.A. 93-94. The deportation proceedings here are, therefore, nothing more than pretextual[3] efforts to punish the targeted aliens for controversial political behavior.

(Cont'd)
accept, as stated in the Complaint, that aliens living in the United States have full First Amendment rights. J.A. 47, 48, 54. The words of the First Amendment — "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble" — do not distinguish between citizens and others; indeed, the only reference to the intended beneficiaries of the Amendment is to the "people" who may peaceably assemble. Recognizing the textual mandate of inclusion, this Court has explicitly stated that "freedom of speech and of the press is accorded aliens residing in this country." *Bridges v. Wixon*, 326 U.S. 135, 148 (1945).

3. At least two types of pretextual deportation proceedings may exist. One form of pretextual proceeding involves "bad faith" allegations of immigration law violations that the INS does not believe to have actually occurred. A second type of pretextual proceeding involves plausible allegations that technical violations of law have occurred, but where the proceeding is not motivated by a desire to enforce the technical

The Court of Appeals ruled that timely judicial review of the targeted aliens' claims that the INS sought to punish them because of their First Amendment activities was available in the district court. Pet. App. 15a. Absent such timely review, the Court of Appeals recognized that the INS would have *de facto* power to punish and deter activity protected by the First Amendment, without any possibility of judicial oversight for extended periods of time.

The INS argues, however, that by disguising the deportation proceedings as "garden variety" prosecutions having nothing to do with politics, it can escape timely judicial review of its attempt to use the administrative process as an *in terrorem* device to deter the targeted aliens (and those similarly situated) from engaging in protected controversial political activities. But the INS's attempt to shield its sophisticated exercise in political censorship from judicial review runs headlong into this Court's uniform recognition that efforts by law enforcement authorities to punish or deter First Amendment activity must, as a matter of First Amendment law, be subject to timely and effective judicial review.

The targeted aliens argue persuasively that unless district court jurisdiction is recognized, it will be impossible to secure judicial review of the government's decision to single them out for pretextual deportation proceedings as a punishment for First Amendment activity. The administrative hearing officer lacks statutory authority to develop a record regarding selective prosecution. Petitioner's Brief at 38 (hereinafter "Pet. B."); *See also Lopez-Telles v. INS*, 564 F.2d 1302, 1304 (9th Cir. 1977) ("The immigration judge is not empowered to review the wisdom of the INS in instituting the proceedings."). Yet under IIRIRA, the court of appeals, in its review of the aliens' case after a final order of deportation, would be tethered to this inadequate administrative record. *See* 8 U.S.C. § 1252(b)(4)(A) (Supp. II 1996).

Even if, however, a modicum of judicial review might be available at some date far in the future, *amicus* contends that our system of free expression requires *timely* judicial review of actions by law enforcement officials that are openly designed to punish and deter the exercise of First Amendment rights. Indeed, *amicus* knows of no case in which claims that the government commenced prosecutions or civil proceedings in order to punish or deter individuals engaged in protected First Amendment activity were denied timely judicial review.

The First Amendment rule could not be otherwise. This Court has repeatedly recognized that where fragile First Amendment rights are at stake, extended delay prior to judicial review of executive officials' alleged censorship gives the executive branch *de facto* power to determine the real-world meaning of the First Amendment. That is why this Court has held that a denial of First Amendment rights even for extremely short periods of time constitutes "irreparable injury" authorizing immediate injunctive relief against executive acts of censorship. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Whether the issue has been censorship of alleged indecent material by administrative agencies,[4] seizure of First Amendment material by law enforcement officials,[5] standardless executive permit and licensing systems for First Amendment activity,[6] unduly

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violations, but to use the proceeding as a device to punish the targets for something else, in this case the exercise of First Amendment activity. *Amicus* uses the term pretextual in the latter sense.

4. *E.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965).

5. *E.g., United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *See also Heller*

vague statutes granting too much power to executive officials,[7] or overbroad statutes inviting abuse by law enforcement officials,[8] this Court has recognized that timely judicial review of executive action is critical to the continued enjoyment of First Amendment rights.

It would, therefore, constitute a dangerous departure from years of settled jurisprudence for this Court to permit law enforcement officials to punish persons for First Amendment activity without an opportunity for timely judicial review. Indeed, it would be a blueprint for executive censorship across the spectrum of First Amendment activity.

ARGUMENT

I.

THE COMMENCEMENT OF PRETEXTUAL DEPORTATION PROCEEDINGS AGAINST THE TARGETED ALIENS CONSTITUTES ADMINISTRATIVE ACTION DESIGNED TO PUNISH AND DETER ACTIVITY PROTECTED BY THE FIRST AMENDMENT.

If an INS official had telephoned each of the targeted aliens and threatened him with deportation for engaging in activity protected by the First Amendment, the targets would undoubtedly have been entitled to timely judicial review of the government's effort to intimidate them into political submission. *See Bantam Books v. Sullivan*, 372 U.S. 58 (1963)

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v. New York, 413 U.S. 483 (1973).

6. *E.g.*, *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

7. *E.g.*, *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

8. *E.g., Reno v. American Civil Liberties Union,* __ U.S. __, 117 S. Ct. 2329 (1997); *Board of Airport Comm'rs v. Jews for Jesus*, *Inc.,* 482 U.S. 569 (1987).

(credible threats of prosecution for selling controversial books are subject to immediate judicial review). Indeed, such review is not precluded by IIRIRA. *See* 8 U.S.C. 1252(g) and (f). Instead of sending a threatening message by telephone, the INS sent a far more frightening message to any alien considering controversial political activity. The message is simple: engage in such political activity, and you will be subject to deportation for technical violations of the immigration laws that are tolerated when committed by those who remain silent or who support favored political causes.

Such a message has an obvious impact on an alien's willingness to engage in First Amendment activities. This Court has recognized that persons confronted with an overbroad or a vague statute that imposes criminal sanctions for violations are likely to steer clear of the prohibited zone, even if the deterred activities are fully protected by the First Amendment. *City of Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750, 757-58 (1988). So, too, would vulnerable aliens confronted with the prospect of a retaliatory deportation proceeding steer clear of controversial political activities.

The punitive effect of this pretextual deportation proceeding on the aliens' First Amendment rights is demonstrated by contrasting such a proceeding with an ordinary, good faith deportation proceeding. In an ordinary deportation proceeding, the issues actually driving the prosecution can be addressed conclusively within the administrative process. INS hearing officers are authorized to handle these matters, with judicial review available at the end of the administrative proceeding. Where, however, the INS has targeted an alien for a pretextual deportation proceeding because of his political speech, the INS has conceded that a challenge to the pretextual prosecution cannot be raised in the deportation proceeding. Pet. B. at 38. The INS' concession is correct, since it would be impossible for an INS hearing officer to sit in judgment over the motivations of his superiors. Without access

to judicial review, a targeted alien will be forced to spend years defending himself against technical violations of the immigration statutes, while the real motivation for the prosecution — a desire to punish him for controversial political beliefs and associations — remains tantalizingly beyond the scope of the administrative proceeding.

During those years, the targeted alien suffers continuing harm, as do all similarly situated members of the alien community. The harm takes many forms. The most immediately apparent is the psychological and monetary cost of defending oneself in a lengthy deportation proceeding that should never have taken place. But an alien's injury is not merely that he is forced to endure several year long trial, and the accompanying inconvenience, expense, anxiety, and, if detained, loss of liberty. There is an ongoing injury to the alien's First Amendment rights *during* the trial. Quite simply, the alien will be fearful of engaging in controversial political activities during the proceeding. He will refrain from political activity and speech, because the INS can, and most likely will, take into account an alien's continuing political activity in determining how it treats the alien during the proceedings, and in deciding whether to continue a lengthy proceeding against him. *See In re Asbestos School Litigation,* 46 F.3d 1284, 1295 (3rd Cir. 1994) (permitting interlocutory review of a district court's finding that defendant Pfizer, Inc.'s association with a business group subjected it to a civil conspiracy claim in an asbestos liability lawsuit, because if Pfizer had to wait until the close of proceedings to obtain appellate review of this finding, it would be chilled from associating with the business association throughout the long litigation. "The harm in the present case goes well beyond the mere expense and inconvenience of litigation. Failure to issue a writ in this case would subject Pfizer to a continuing impairment of its First Amendment freedoms.")

Further, and perhaps most importantly, the fact of the trial constitutes an ongoing injury to the First Amendment rights of the many other aliens who may also be in default of technical provisions of the immigration laws. These aliens would observe the plight of those on trial, and conclude that they also dare not engage in controversial political activity, lest they also be met with a pretextual deportation proceeding. The trial, thus, has a ripple effect, starting with the accused and dispersing throughout their political community. Without a timely challenge in the courts, the perception of the outside world is that certain speakers may be subject to deportation proceedings, and confronted with a final self-executing order of deportation, because of the content of their speech. The possibility that the speakers may be able to challenge the order years later matters not; at that point the damage is done. Other aliens, learning from example, will remain silent.

In a real sense, therefore, the very commencement of a pretextual deportation proceeding, not merely its eventual outcome on the merits, is a fully completed action by law enforcement officials that intentionally punishes and deters the exercise of First Amendment activity. As such, as the Court of Appeals understood, and, as *amicus* contends in Point II, it must be subject to timely judicial review.

II.

THE FIRST AMENDMENT REQUIRES TIMELY ACCESS TO JUDICIAL REVIEW WHENEVER LAW ENFORCEMENT OFFICIALS ACT TO PUNISH AND DETER PROTECTED FIRST AMENDMENT ACTIVITY.

A commitment to a robust First Amendment entails two parallel lines of protection. First, the Court has struggled to define the substantive contours of First Amendment protection,

developing complex and elaborate formulae to define the sphere of protected First Amendment activity. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990); *Cohen v. California*, 403 U.S. 15 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Equally importantly, the Court has recognized that the substantive definition of First Amendment rights must be accompanied by a set of procedural protections designed to assure that a commitment to free speech is not eroded by procedures that ensure free speech protection in theory, but not in practice. Accordingly, the Court has enunciated at least four areas of First Amendment procedural protection: (1) a ban on most prior restraints, especially prior restraints issued by law enforcement officials; (2) a refusal to countenance unduly vague or overbroad statutes, especially in settings involving regulation of speech; (3) a rigorous equal access principle that requires all persons to be treated equally whenever government purports to regulate speech; and (4) a strict requirement of procedural fairness in any setting where officials seek to regulate speech.

The thread that unites all four areas of procedural protection is this Court's recognition that institutional devices vesting law enforcement officials with the *de facto* ability to decide who may speak and who must remain silent pose an intolerable risk to a system of free expression. Accordingly, such devices must be subject to prompt judicial review.

The virtually absolute ban on prior restraints issued by law enforcement officials is a classic recognition that the executive branch may never be vested with unilateral power to suppress speech. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), for example, a government commission distributed lists of objectionable books, informed bookstores of its intent to recommend obscenity prosecutions, and distributed the lists to the local police. The Court condemned the system as an

administrative prior restraint because it shifted *de facto* power over speech from courts to law enforcement officials. Similarly, in *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court condemned an administrative licensing scheme for motion pictures because it had two fatal errors: it was too long (4-6 months) and it vested too much power in the hands of the executive.

> Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court — part of an independent branch of government — to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

380 U.S. at 57-58. *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (unreviewable administrative decision to ban the musical "Hair" from municipal auditorium violates First Amendment); *FW/PBS Inc. v. Dallas*, 493 U.S. 215, 228 (1990) (broad licensing scheme upheld because there was "the possibility of prompt judicial review in the event that the license is erroneously denied."). Similarly, when permits are required for marches or demonstrations there must be prompt judicial review of executive officials' decisions on such permits, because of the inherent possibility that the executive may deny march permits based on their disagreement with the views sought to be expressed. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) ("[T]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly if it is to be considered at all.").

Overbroad and vague statutes raise similar concerns for two reasons. First, because the statues cast so wide a net, they invite law enforcement officials to use improper criteria in choosing which of the persons "caught" by the statute shall be prosecuted. The officials may decide whom to prosecute by evaluating a transgressor's speech, manner, or looks. *See City of Lakewood v. Plain Dealer*, 486 U.S. at 758. Second, because it is not clear on the face of the statute what speech is restrained and what is not, many people will engage in self-censorship, for fear of stepping over an ill-defined line. *Id.* at 757-58; *Reno v. American Civil Liberties Union,* __ U.S. __, 117 S. Ct. 2329, 2344-45. Prompt judicial review combats both concerns. Executive and administrative officials will be far less likely to engage in discriminatory prosecutions if they know their actions will be quickly reviewed by an independent judiciary. Similarly, if the public may bring timely challenges to overbroad or vague statutes, they can obtain either a narrowing construction or a ruling of unconstitutionality, allowing them again to speak freely after a short period of time. *City of Lakewood v. Plain Dealer*, 486 U.S. at 759.

The Court's rigorous requirement of equal treatment of all putative speakers attempting to speak in public places also demonstrates a concern with the exercise of undue power over speech by administrative officials. *Chicago Police Department v. Mosely,* 408 U.S. 92 (1972); *see also Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829-830 (1995); *Carey v. Brown*, 100 S. Ct. 455, 461-62, 471 (1980). The equal treatment principle is self-consciously designed to eliminate unreviewable discretion by law enforcement and other administrative officials over who may speak in public forums and who must remain silent. *Rosenberger*, 515 U.S. at 844-45.

Finally, the First Amendment "due process" cases, exemplified by *Marcus v. Search Warrant,* 367 U.S. 717 (1961), and *United States v. Thirty-Seven Photographs*, 402 U.S. 363

(1971), are explicit efforts to assure effective judicial control over law enforcement decisions to suppress colorably protected speech. In *Marcus*, the Court invalidated a procedure that allowed law enforcement officers to seize allegedly obscene materials without judicial scrutiny. In *Thirty-Seven Photographs,* the Court construed a statute providing for the seizure of allegedly obscene materials coming into the United States to require judicial review of such seizure within 14 days, and a final decision by the district court within 60 days. In both cases, the Court determined that timely judicial review must be available to those whose speech the government is attempting to restrict.

Amicus does not contend that the INS's deportation proceedings against the targeted activists precisely fit into any of these categories, but therein lies its danger. The government is free to argue, as it has, that because this is not a prior restraint (or an overbroad statute, or an attempt to seize protected material, etc.), the targeted aliens have no right to a prompt judicial forum to air their First Amendment claims. Pet B. at 42, n.18. *Amicus* urges this Court to look beyond the formal categories that have thus far been established and to recognize that the *effects* of the INS's action here are identical to the cases described above. The effect of a prior restraint is to chill speech by those who do not wish to cross the line marked in the sand and subject themselves to a criminal proceeding. The effect of the deportation proceeding here is the same: aliens will not engage in political speech. The effect of overbroad or vague statutes is to allow law enforcement to selectively enforce them against those whose politics displease them. The effect of delayed judicial review here is the same. The effect of treating people differently in terms of access to speak in public forums is to chill the speech of those who wish to continue to use such public facilities. The effect of the INS proceeding is the same: aliens will not support controversial activity in order

to continue to enjoy the benefits of residence in the United States (except, of course, for the benefit of free speech). The effect of a lack of procedural fairness when officials seek to seize books or other tangible speech because of its content is to stop people from creating work of "questionable" content. The effect of the INS proceeding is the same: aliens will stop supporting political causes that are "questionable" to the prevailing government.

Indeed, what the INS is seeking here is this Court's approval of an extended "dead space" between law enforcement activity designed to punish and deter First Amendment rights and judicial review of such action. As *amicus* has detailed, the Court has consistently refused to permit the existence of such "dead space." If the government is successful in establishing judicially unreviewable law enforcement power over controversial speech by aliens, the use of the same technique to insulate executive assaults on other forms of controversial speech is fair game. Congress could insulate the Federal Election Commission from effective judicial review if it commenced pretextual proceedings against disfavored candidates, by forbidding judicial review until after a final FEC determination. Congress could insulate the Federal Communications Commission from judicial review if that agency commenced pretextual license revocation proceedings against broadcasters broadcasting messages in support of candidates of the "wrong" political party, by limiting judicial review to some time after the license had been revoked and the broadcaster was out of business.

The cases chosen by the INS to support its argument as to the constitutionality of delayed review are inapposite. The differences between the cases it cites and the case presented here demonstrate that the INS's action here is indeed unprecedented. *Weinberger v. Salfi*, 422 U.S. 749 (1975) held that a class of widows was required to exhaust administrative

remedies before gaining judicial review of their claim that Social Security Act provisions requiring them to have been married to their husband for at least nine months in order to collect survivors' benefits were unconstitutional. In *United States v. Hollywood Motor Car Co.*, 449 U.S. 263 (1982) the Court required a criminal defendant to go forward to trial without interlocutory appellate review after the district court denied his claim for vindictive prosecution based on the defendants' motion for a change of venue. Finally, *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232 (1980) held that a company who claimed that the FTC had filed antitrust charges against it without reason to believe that it had in fact violated FTC regulations could not get immediate judicial review after the FTC denied its motion to dismiss. None of these cases involve First Amendment rights in any context, much less the context of an executive action commenced to deter First Amendment activity. None raise the issue of irreparable harm from the suppression of the defendants speech, and the speech of the community, during the pendency of the administrative or criminal proceedings. In fact, *Standard Oil Co.* noted that "Socal does not contend that the issuance of the [FTC's] complaint had any [ ] legal or practical effect, except to impose upon Socal the burden of responding to the charges made against it." 449 U.S. at 242. In short, these cases do not deal with the central question raised here — whether Congress may preclude timely judicial review of administrative proceedings when such proceedings allegedly violate the targets' First Amendment rights — and thus they provide no support for the INS's position.

That the persons prosecuted here are aliens living in the United States, and the Congress has plenary power over such aliens, is no answer. Pet. B. at 39-40. As noted above, since this Court did not grant certiorari on the question of whether aliens living in this country enjoy the same First Amendment rights as citizens, such aliens must be presumed to have such rights for the purpose of

deciding the jurisdictional question. Further, Congress' plenary power over immigration is not absolute. While Art. I, § 8, cl. 4 of the Constitution gives Congress power over immigration, the grant does not occur without regard to the rest of the Constitution.

> The plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power.

INS v. Chadha, 462 U.S. 919, 941 (1983). Congress must be concerned with how its immigration enactments affect the First Amendment rights of aliens, and must chose a method of enforcing its enactments that does not offend these rights.

III.

THE COURT OF APPEALS WAS CORRECT IN READING THE RELEVANT STATUTORY LANGUAGE TO PERMIT TIMELY ACCESS TO JUDICIAL REVIEW.

The parties have offered competing constructions of IIRIRA that would permit judicial review of alleged violations of First Amendment rights. Yet only the one proffered by respondents and adopted by the Court of Appeals allows for *timely* review of such First Amendment claims. The construction proffered by the INS will not grant review until after the conclusion of those very events alleged to violate the aliens' First Amendment rights: namely, the bringing of deportation charges, and the undertaking of a lengthy and disruptive deportation hearing, followed by an order of deportation, all because of the activists' speech in favor of a political cause disfavored by the government. Accordingly, the Court should adopt the construction adopted by the Court of Appeals. If it chooses not to do so, *amicus* contends that it must hold the statute

unconstitutional.

The reading of the IIRIRA proposed by the INS involves grafting 28 U.S.C. § 2347(b)(3) onto IIRIRA's jurisdictional sections. Pet. B. at 44-49. 28 U.S.C. § 2347(b)(3) permits a court of appeals reviewing a final order of an administrative court to remand matters to the district court for a hearing when a hearing was not required in the administrative proceedings "as of law." The government's invocation of 28 U.S.C. § 2347(b)(3) to provide district court jurisdiction at the end of the day, however, results in precisely the deferred and cumbersome judicial review repeatedly condemned by the cases above. The targeted aliens would be forced to endure a lengthy pretexual deportation proceeding to its conclusion. Only then would the matter be reviewed by the Court of Appeals, where it would be remanded to a district court to develop a record on the selective prosecution claim. Such deferred review is simply not the timely and efficient review of First Amendment claims mandated by this Court's decisions.

The Court of Appeals, on the other hand, offers a plausible reading of IIRIRA that provides for judicial review and, if necessary, injunctive relief against the application of the deportation laws against a specific individual. Pet. App. 9a-15a. 8 U.S.C. § 1252(f) (Supp. II 1996) reads:

> No court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operations of part IV of this subchapter [which includes the provisions on deportation at 8 U.S.C. § 1227 (Supp. II 1996)] *other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated*. (Emphasis added).

Where, as here, proceedings have been brought against an "individual alien," the literal language of this section vests federal courts with jurisdiction to engage in both factual and legal review of the aliens' claims of pretextual deportation. The INS, nonetheless, fears that reading 8 U.S.C. § 1252(f) to permit district courts to enjoin ongoing proceeding against an alien would allow this "limitation" on jurisdiction to swallow the rule of deferred judicial review of deportation proceedings. *See* 8 U.S.C. § 1252(b)(9) (Supp. II 1996). This fear ignores the Court of Appeals' explicit limitation on the use of 8 U.S.C. § 1252(f) to claims raising a constitutional question that cannot be addressed in the course of the deportation proceeding itself. Pet. App. 11a. ("Under subsection (f), individual aliens would appear to be able to seek judicial review of constitutional claims *such as those at issue here.*") (Emphasis added).

This jurisdictional controversy echoes a similar governmental attempt, thirty years ago, to silence dissent by commencing non-reviewable pretextual administrative proceedings designed to punish controversial exercises of First Amendment activity. As opposition mounted to the Vietnam War, mass anti-war demonstrations were held at Selective Service offices throughout the United States. In response to the demonstrations, which occasionally involved unprotected attempts to block access to induction centers, or refusals to carry draft cards, the Selective Service announced that anti-war demonstrators with otherwise valid draft deferments would be subject to reclassification to active duty eligibility as a punishment for interfering with the Selective Service Act. Since the Act did not grant federal courts jurisdiction over pre-induction review of punitive draft re-classifications, the net effect of the Service's edict was to force anti-war demonstrators to choose between giving up their speech, or challenging the Service's action via a writ of habeas corpus after they had already been inducted into the Army.

Two lower courts, confronted with this combination of the Service's action to punish First Amendment activity and Congress' withdrawal of jurisdiction to exercise timely judicial review over the administrative proceedings, held that the courts nonetheless had jurisdiction to hear claims of First Amendment violations. *Wolff v. Selective Serv. System Local Bd. No. 16*, 372 F.2d 817, 826 (2d Cir. 1967); *National Student Ass'n v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969). In *Oestereich v. Selective Serv. System Local Bd. No. 11*, 393 U.S. 233, 242 (1968), the Supreme Court, aided by a courageous confession of error by then-Solicitor General Erwin Griswold, ruled that Congress simply could not have intended to strip the courts of power to review such lawless draft reclassifications. Accordingly, this Court read the seemingly absolute congressional language as containing an implied exception for federal jurisdiction needed to protect against lawless punitive reclassifications. 393 U.S. at 238.

As the Court of Appeals has demonstrated, a plausible reading of IIRIRA exists in this case that is far less heroic than the reading of the Selective Service Act adopted by this Court in *Oestereich*. Just as this Court used its power to construe Congress's jurisdictional provisions in *Oestereich* to permit jurisdiction required by the First Amendment, so a similar, far less difficult reading should be adopted in this case to preserve the timely access to judicial review that is a hallmark of the modern First Amendment.

CONCLUSION

For the reasons stated above, the decision below should be affirmed. In the alternative, this Court should hold unconstitutional that portion of IIRIRA that deprives an alien's claim of First Amendment violations in a deportation

proceeding a timely judicial forum.

Respectfully submitted,

BURT NEUBORNE
Counsel of Record
E. JOSHUA ROSENKRANZ
MARTA NELSON
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW
Attorneys for Amicus Curiae
161 Avenue of the Americas
5th Floor
New York, New York 10013
(212) 998-6730

September 11, 1998