95-457

No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

CESAR A. PERALES, ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reading *Reno v. Catholic Social Services*, 113 S.Ct. 2485 (1993), as announcing a new rule of administrative law that (a) categorically prohibits pre-enforcement review of government-benefit regulations, and (b) bars collateral statutory and constitutional challenges to agency procedures, even where plaintiffs satisfy traditional standing and ripeness requirements?

2. Whether Petitioners' claims that INS administration of the alien legalization program violated due process and 8 U.S.C. § 1255a(i) (requiring the agency to "broadly disseminate" the eligibility criteria for the program) are ripe, where the claimed violations have already deprived Petitioners of procedural interests Congress enacted for their particular benefit, and where there are no further administrative proceedings or remedies available, such that a finding of non-ripeness would preclude any judicial review?

3. Whether *Reno v. Catholic Social Services* should be reconsidered, given the importance of its ruling on ripeness and pre-enforcement review, the apparent inconsistency of the ruling with forty years of precedent, the confusion and uncertainty that the ruling has engendered, and the substantial scholarly criticism of the ruling and its underlying reasoning.

PARTIES TO THE PROCEEDING

The parties in this Court are as follows:

Petitioners: the Commissioner of the New York State Department of Social Services; the New York State Department of Social Services; Dennis C. Vacco, as Attorney General of the State of New York, and on behalf of the People of the State of New York; The State of New York; The City of New York; Sara Doe, Jane Roe, Anne Coe, individually and on behalf of their minor children, and on behalf of all others similarly situated and their minor children; Fran Foe, Mary Moe, Linda Loe, Susan Soe and Zelda Zoe, individually and on behalf of their minor children, and on behalf of all others similarly situated and their minor children.

Respondents: Janet Reno, as Attorney General of the United States; Terrance O'Reilly, as Assistant Commissioner of the Immigration and Naturalization Service; Edward Wildblood, as Legalization Director of the INS Eastern Regional Office; Gilbert Tabor, as INS Eastern Regional Processing Facility Director; Edward McElroy, as INS District Director of the New York District; Donna Shalala, as Secretary of Health and Human Services.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, the Commissioner of the New York State Department of Social Services, et al., respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this case on February 8, 1995.

OPINIONS BELOW

The majority opinion of a panel of the United States Court of Appeals for the Second Circuit, on remand from this Court, was entered on February 8, 1995, and is reported at 48 F.3d 1305 (2d Cir. 1995), and

reprinted in the Appendix to this Petition at page 1a ("App.1a"). The dissenting opinion is reported at 48 F.3d at 1317, App. 23a. The panel's first decision after remand from this Court is reported at 4 F.3d 99 (2d Cir. 1995), App. 32a.

This Court vacated and remanded the Second Circuit's original decision, *Perales v. Thornburgh*, 967 F.2d 798 (2d Cir. 1992), on June 28, 1993. *Reno v. Perales*, 113 S.Ct. 3027 (1993), App. 35a. The original decision of the Second Circuit is reported at 967 F.2d 798 (2d Cir. 1992), App. 36a. The opinion of the United States District Court for the Southern District of New York is reported at 762 F.Supp. 1063 (S.D.N.Y. 1991), App. 70a.

The district court's March 29, 1989 Memorandum and Order certifying a plaintiff class, allowing additional plaintiffs to intervene, and denying the parties' cross-motions for summary judgment is unreported, but may be found at 1989 WL 43657, App. 142a. The Second Circuit's *per curiam* decision affirming the district court's denial of Petitioners' motion for preliminary injunction is reported at 847 F.2d 55 (2d Cir. 1988), App. 148a. The Circuit Court's order granting a preliminary injunction pending appeal is unreported but may be found at 1988 WL 143839, App. 151a. The district court's decision denying Petitioners' application for temporary restraining order and motion for preliminary injunction is reported at 685 F.Supp. 52 (S.D.N.Y. 1988), App. 153a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1995. A timely Petition for Rehearing with Suggestion for Rehearing In Banc was denied on May 23, 1995. On July 27, 1995, Justice Ginsburg extended Petitioners' time to seek a writ of certiorari to and including September 20, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reprinted in the Appendix. They are: Administrative Procedure Act, 5 U.S.C. § 702 *et seq.* and Immigration and Nationality Act, 8 U.S.C. §§ 1255a(a) - (d); 1255a(i), App. 158a.

STATEMENT OF THE CASE

This case is one of a number of class actions across the nation that challenge the Immigration and Naturalization Service's administration of the amnesty provisions of the Immigration Reform and Control Act of 1986 ("IRCA"), codified at 8 U.S.C. § 1255a. In the aggregate these cases affect the rights of hundreds of thousands of individuals. *See Reno v. Catholic Social Services*, 113 S.Ct. 2485, 2493, n.13 (1993) ("*CSS*").

The Second Circuit originally held that INS operated the amnesty program under illegally restrictive eligibility regulations, that the agency widely publicized its unlawful eligibility restrictions, and that the agency's course of conduct wrongly

dissuaded qualified immigrants from applying for amnesty and "eviscerated the [statutory 12-month] application period" in violation of clear congressional commands. *Perales v. Thornburgh*, 967 F.2d 798, 808-14 (2d Cir. 1992), App. 54a-68a ("*Perales I*"). INS conceded these conclusions on certiorari, but sought review on its jurisdictional defenses. *See* 61 U.S.L.W. 3304 (Oct. 20, 1992). This Court vacated and remanded *Perales I* for further consideration in light of *CSS*, where the Court held 5-4 that prospective applicants for amnesty could not obtain pre-enforcement review of an eligibility regulation absent a showing that the regulation had affected them in a sufficiently concrete way to satisfy ripeness concerns.

On remand, a divided panel misread *CSS* as establishing an "overriding principle that there can be no pre-enforcement challenges to the validity of a [benefit-restricting] regulation," and held that this sweeping new principle not only bars pre-enforcement review of eligibility regulations, but also bars any other claim by class members -- even claims that satisfy all traditional standing and ripeness criteria -- where adjudication might require the court to compare a regulation with the governing statute. *Perales v. Reno*, 48 F.3d 1305, 1312 (2d Cir. 1995), App. 1a, 14a ("*Perales II*"). Applying this new rule, the majority dismissed Petitioners' claim that INS violated the Fifth Amendment and 8 U.S.C. § 1255a(i) ("the Attorney General . . . shall broadly disseminate the [eligibility standards for amnesty]") because adjudication of this claim would require a comparison of the eligibility regulations INS publicized with the eligibility standards Congress enacted.

The Amnesty Program

Congress enacted the amnesty program "to end the current exploitation of millions of aliens who live in a twilight subrosa society," compelled to accept "starvation wages" and afraid to seek legal protection. H.R.Rep. No. 682(I), 99th Cong., 2d Sess. 16, 47, 49; 132 Cong. Rec. H9712 (statement of Rep. Mazzoli) (Oct. 9, 1986). The overriding purpose of the program is "to eliminate the subclass now present in our society" by legalizing as many productive, long-term residents as possible -- not only for the benefit of those legalized, but for the benefit of the Nation as a whole. S.Rep. 99-132, 99th Cong., 1st Sess. 16. To achieve this goal, Congress created an entitlement to legalized status for long-term "illegal aliens" who meet certain statutory eligibility criteria, 8 U.S.C. § 1255a(a), and specifically directed that the program "be implemented in a liberal and generous fashion." H.R.Rep. No. 682(I) at 71-73.

Recognizing that legalization programs abroad had failed due to "lack of understanding among the undocumented population," *id.* at 73, and that the amnesty program here could succeed only if INS overcame "the fear of prosecution or deportation [that] would cause many undocumented aliens to be reluctant to come forward and disclose their illegal status," *McNary v. Haitian Refugee Center*, 498 U.S. 479, 484 (1991), Congress mandated that INS "broadly disseminate information" about the eligibility requirements for amnesty beginning no later than the first day of the program, 8 U.S.C. § 1255a(i); that INS provide qualified aliens a full 12-month application period to learn of their eligibility and apply, *id.* at § 1255a(a); and that INS certify non-federal organizations ("Qualified Designated Entities"

or "QDEs") to assist with outreach and to encourage eligible aliens to participate. *Id.* at §§ 1255a(c) & (i).

Prior Proceedings

This lawsuit was commenced on April 1, 1988 by the State of New York, the City of New York and a class of undocumented immigrants consisting primarily of working mothers with young U.S. citizen children. The basis for federal jurisdiction is 28 U.S.C. § 1331. *See Perales I*, 967 F.2d at 805-08, App. 47a-54a.

Petitioners alleged that (1) INS regulations governing the "public charge" ground of exclusion from the amnesty program illegally barred qualified class members from participation; (2) INS widely publicized its illegally restrictive public charge policy, with the result that (a) INS's QDE-agents refused to file applications for class members; and (b) class members who learned that INS policy disqualified them from amnesty refrained from filing costly applications and disclosing their identities and whereabouts to INS; (3) during the 12-month application period, INS internally altered its restrictive public charge policy, expanding entitlement to previously excluded individuals, but did not publicly disclose these internal policy reversals until after the application period had expired and it was too late for class members to apply; and (4) INS never broadly disseminated accurate eligibility information as required by IRCA.

Petitioners advanced two distinct sets of claims corresponding to the two principal duties that IRCA imposed upon the Attorney General. Petitioners' facial challenge to the substance of INS regulations rests upon IRCA's direction that the Attorney

General "shall" legalize immigrants who meet the statutory criteria. 8 U.S.C. § 1255a(a). Petitioners' independent claim that INS violated their procedural rights rests upon IRCA's command that the Attorney General "shall . . . broadly disseminate" the statutory requirements for amnesty and administer a full 12-month application period. 8 U.S.C. § 1255a(i). The procedural claims also invoke the APA and the due process clause of the Fifth Amendment.

Perales I

In *Perales I*, the Second Circuit held that INS's public charge regulations facially violated IRCA and illegally excluded class members from the amnesty program. 967 F.2d 798, App. 36a. The Court found that "INS disseminated the very aspects of the May 1, 1987 regulations that we have found unlawful," that the unlawful eligibility criteria "constituted the official agency policy as communicated to aliens in New York State," and that INS's conduct had wrongfully deterred qualified aliens from filing applications. *Id.* at 810-12, 814, App. 58a-60a; 65a-68a. The Court rejected INS's assertion that it ultimately disseminated its internal, corrected eligibility standards, finding this contention to be "convincingly rebutted" by the "record as a whole." *Id.* at 810-811, App. 58a-60a.

The Court of Appeals ruled that issuance of the unlawful regulations warranted judicial relief:

> By dissuading aliens who would otherwise have applied, the unlawful public charge regulations thus conflicted with congressional desires to integrate productive aliens and to achieve finality, both of which goals were dependent on the full 12-month application

> period. Congressional intent accordingly requires us to extend the filing deadline for such persons, so as to make effective the full twelve months.

967 F.2d at 813, 815, App. 65a-68a.

Proceedings Before this Court

INS did not seek review on the merits, but petitioned for certiorari solely on the issues of whether the district court had subject-matter jurisdiction over plaintiffs' claims and whether the judiciary had authority to award the ordered relief. *See* Petition for Certiorari, *Barr v. Perales* No. 92-451; 61 U.S.L.W. 3304 (Oct. 20, 1992). This Court granted the petition and vacated and remanded *Perales I* "for further consideration in light of [*CSS*]." *Reno v. Perales*, 113 S.Ct. 3027 (1993), App. 35a.

This Court's CSS Decision

In *CSS*, this Court held that aliens who had not formally applied for amnesty did not have a ripe facial claim against an eligibility regulation unless they could show that the challenged regulation had affected them in a particularly "concrete manner." 113 S.Ct. at 2498. The *CSS* majority regarded the challenge to INS regulations as a claim that the agency must adjudicate amnesty applications according to the statutory eligibility standards. *Id.* at 2496 n.19. The Court found this claim generally unripe as to non-filers because the possibility that the challenged regulations would result in a negative adjudication for such individuals was too remote and speculative. *Id.* at 2496 nn. 19 & 20. Nevertheless, the Court ruled that class members who were "front-desked" -- i.e., informally deemed

ineligible based on the disputed regulations, and turned away before filing -- and other class members who did not attempt to file because of INS's front-desking policy, "had felt the effect of [the challenged regulations] in a particularly concrete manner," *id.* at 2498-500, and so did have ripe challenges to the substance of the regulations.

Because the only claim in *CSS* was the facial challenge to eligibility regulations, the Court never considered the ripeness of challenges to procedural failures in the amnesty program, like the dissemination claims asserted in *Perales*. The Court did, however, distinguish the *CSS* plaintiffs' "challenge to regulations specifying limits to eligibility," *id.* at 2497 -- characterized by the Court as claims for "adjustment of status themselves," *id.* at 2496 n.19 -- from the "procedural objections" to INS's administration of IRCA which were held to be fully justiciable in *McNary*, 498 U.S. 479 (1991). 113 S.Ct. at 2497.

Proceedings on Remand: Perales II

On remand, Petitioners argued before the Second Circuit that their claims under the Fifth Amendment and 8 U.S.C. § 1255a(i) do not implicate ripeness concerns at all because those claims are not contingent on any future event, are not requests for pre-enforcement review and do not seek anticipatory relief of any kind. Rather, Petitioners maintained, these procedural claims seek redress for unlawful agency actions that have already occurred and have already inflicted injury on class members: Congress enacted certain procedural interests in favor of the amnesty program's intended beneficiaries, including the mandate that INS "broadly disseminate" accurate

eligibility information to prospective applicants. 8 U.S.C. § 1255a(i). As the Court of Appeals noted in *Perales I*, the "broad dissemination" mandate arose from Congress's concern that aliens "liv[ing] in fear" would be "afraid to come forward" and that only a vigorous outreach and information campaign coupled with a full 12-month application period could ensure the success of the amnesty program. 967 F.2d at 813, App. 64a.

This duty to disseminate accurate information and provide a "generous" application period ran directly to class members who had not yet received the information that would allow them to realize their eligibility for amnesty and apply. Petitioners argued that their specific claims to enforce these duties -- claims not advanced in *CSS* -- were ripe because INS had already breached the duties and had already inflicted injury on class members by irretrievably denying them the procedural interests Congress legislated for their particular benefit.

The *Perales II* majority divided Petitioners' dissemination claim into two components: first, a claim that INS failed to disseminate the eligibility criteria prescribed by IRCA; and second, a claim that INS failed to disseminate the agency's actual, internal eligibility policies, policies that differed radically from the published regulations. 48 F.3d at 1312, App. 14a.

The majority peremptorily dismissed the first branch of the claim, with no ripeness analysis at all, on the theory that

> [*CSS*'s] overriding principle that there can be no pre-enforcement challenges to the validity of a regulation applies with equal force to a

> dissemination claim that turns upon a determination of a regulation's validity.

Id. The first claim was barred, the majority held, because adjudication would require a comparison of the eligibility regulations INS publicized with the eligibility standards Congress enacted, and this, the majority believed, would be tantamount to pre-enforcement review of regulations, prohibited by *CSS. Id.* (It is unclear whether the majority considered the fact that the regulations at issue were withdrawn six years ago, 54 Fed. Reg. 29442 (July 12, 1989), making the fear of premature review incongruous. *Cf. Anderson v. Green*, 115 S.Ct. 1059 (1995) ("it is the situation now, rather than the situation at [an earlier stage of the litigation] that must govern" ripeness analysis. (quoting *Regional Rail Reorganization Cases*, 419 U.S. 102, 140 (1974))).

By contrast, the second branch of the dissemination claim (INS's failure to publicize its internal eligibility rules) was held to be ripe because (1) adjudication required no comparison of the publicized eligibility regulations with the statutory eligibility criteria; and (2) class members were "concretely affected" for ripeness purposes because the challenged action denied them "proper notice of the application criteria" and "prevented [them] from filing a timely application." 48 F.3d at 1312-13, App. 15a-16a.

On the merits, the majority found that INS had disseminated its actual, internal eligibility policies, 48 F.3d at 1314-16, App. 18a-22a, a finding that the Court in *Perales I* had squarely rejected -- on the very same record -- as "convincingly rebutted" by the "record as a whole." 967 F.2d at 810-11, App. 58a-

60a. The majority offered no explanation for its inconsistent adjudications. Its opinion, however, appears to proceed on the premise that *CSS* categorically barred discussion of the regulations' validity and therefore required the majority to cleanse the record of the facts -- found in *Perales I* and not challenged on appeal -- that INS's illegal regulations "constituted the official agency policy as communicated to aliens in New York State," that those regulations imposed eligibility restrictions not imposed by IRCA, that the agency failed to reveal its actual, internal eligibility policies, and that the agency's conduct wrongly dissuaded class members from filing for amnesty. *Id.* at 810-12; 814, App. 58a-60a; 65a-68a.

In a dissent sharply critical of INS's "outrageous course of conduct," Judge Cardamone asserted that INS had "violat[ed] IRCA's broad dissemination requirement" and had "effectively excluded nearly the entire plaintiff class [from the amnesty program]," in violation of congressional intent. 48 F.3d at 1318-20, App. 25a-31a. Describing the majority's disposition as "an unjust judgment. . . consigning [plaintiffs] to a marginal life and subjecting them to deportation and separation from their U.S. citizen children," Judge Cardamone voted to reinstate the relief ordered in *Perales I. Id.*

REASONS FOR GRANTING THE PETITION

The Circuit majority's decision announces an unprecedented new rule of federal administrative law that not only implicates the rights of hundreds of thousands of individuals in the amnesty cases, but also bids fair to upset the status quo in every sector of federal administration involved with government benefits. The decision below contravenes fifty years of this Court's administrative law jurisprudence by insulating a new category of agency action from the judicial review provisions of the Administrative Procedure Act and by creating a new subject-matter exception to the "strong presumption of judicial review" long enforced by this Court. The ruling threatens to create "a legal environment in which agencies have de facto discretion to issue rules that violate statutes and the Constitution," Richard Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 92-94 (1995), and will bar aggrieved parties from seeking redress for lawless agency actions, even where the agency is engaged in "an outrageous course of conduct." *Perales II*, 48 F.3d at 1318, App. 27a. Certiorari should be granted to correct the Second Circuit's far-reaching departure from precedent on this important issue of federal administrative law.

Alternatively, if this Court concludes that *CSS* sanctions the Second Circuit's abandonment of long-settled doctrine, the petition should be granted so that this fundamental change in law can be

considered on full briefs,[1] in light of the substantial scholarly criticism that *CSS* has already attracted, and after a thorough assessment of the practical and doctrinal implications.

Finally, the appropriate interpretation of *CSS* remains an open issue in amnesty class actions around the nation, most of which are now in their eighth year of litigation with the fates of several hundred thousand individuals hanging in the balance. Early and definitive resolution by this Court would provide needed guidance to the lower courts and speed the resolution of these protracted litigations.

1.a. The Circuit majority misinterpreted *CSS* and, in the process, declared a new rule of administrative law that would overturn long-settled doctrine affecting virtually every area of federal administration. For the past half century, a foundation of federal administrative law has been the strong presumption of judicial review, a presumption initiated by this Court, *see Stark v. Wickard*, 321 U.S. 288 (1944), and later "reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by

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1 The issue was not briefed or argued in *CSS* itself. *See CSS*, 113 S.Ct. at 2501 (O'Connor, J., concurring) ("The Court of Appeals did not consider the problem of ripeness and the submissions to this Court have not discussed that problem except in passing. . . Rather, certiorari was granted on two [different] questions, to which the parties rightly adhered. . . ")

agency action. . .'" *CSS*, 113 S.Ct. at 2495 (quoting *Abbott Laboratories v, Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702)); *see, e.g., McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991);*Clarke v. Securities Ind. Ass'n*, 479 U.S. 388 (1987).

Exceptions to this fundamental norm of reviewability are limited and fall into two basic categories:

> An opinion denying review may [1] rest on the proposition that judicial scrutiny as such is excluded by statute or by general considerations of impropriety . . . . [o]r [2] it may bear down on the lack of . . . "standing" of the plaintiff to secure review.

Louis L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336 (1965).

CSS is an example of the second type of ruling. Review was withheld in *CSS* not on the ground that benefit-restricting regulations deserve special insulation from judicial oversight, but rather because the record did not disclose whether any of the plaintiffs satisfied traditional ripeness requirements.

The Circuit majority, however, misconstrued *CSS* as a ruling of the first, and more drastic, type. According to the panel, *CSS* posits an "overriding principle that there can be no pre-enforcement challenges to the validity of a [benefit-restricting] regulation," and no judicial review of any other claim that may be said to "turn on the validity of a regulation," regardless of whether plaintiffs meet all traditional criteria for standing and ripeness. *Perales II*, 48 F.3d at 1312, App. 14a. The Circuit majority thus replaced *CSS*'s focus on the standing of particular

plaintiffs and the ripeness of particular claims with a new, categorical rule that benefit-restricting regulations must be shielded from judicial scrutiny.

Nothing in *CSS* even remotely suggests such a rule, and for good reason. Only rarely is review denied in deference to a category of agency action, *Bowen v. Michigan Acad. of Family Phys.*, 476 U.S. 667 at 670-73 & n.3 (1986) (*citing* Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L.J. 1487, 1489, n.11 (1983)), both because judicial oversight is regarded as "the necessary condition . . . of a system of administrative power which purports to be legitimate," Jaffe, JUDICIAL CONTROL OF ADMIN. ACTION, *supra* at 336, and because the absolute foreclosure of judicial review would engender "serious constitutional questions." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *see also Bowen*, 476 U.S. at 670-73, 681 & n. 12 (reaffirming the "strong presumption of judicial review" and tracing it to fundamental constitutional precepts).

CSS did not present an occasion for creating an exception to the usual presumption of reviewability, and the Court did not describe its ruling as such. To the contrary, the analysis prescribed by *CSS* is the traditional one: have "the effects of the administrative action challenged . . . been 'felt in a concrete way by the challenging parties.'" *CSS*, 113 S.Ct. at 2495 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. at 148-49). If so, the court is obliged to review the challenged agency action, regardless of whether the claim "turns on the validity of a regulation." *Perales II*, 48 F.3d at 1312, App. 14a.

The Circuit majority disregarded this principle. The "administrative action challenged" that affected Petitioners "in a concrete way" -- and invaded legal interests granted them by Congress (8 U.S.C. § 1255a(i)) -- was the dissemination of official misinformation wrongly telling class members that they were ineligible for amnesty. Whether the publicized eligibility restrictions were wrong because at variance with IRCA (claim 1, found by the Circuit majority to be barred by *CSS*) or wrong because at variance with INS internal policy (claim 2, held by the Circuit majority to be ripe) makes absolutely no difference *for ripeness purposes*. The impact on class members -- the "concrete effect" necessary for ripeness -- was exactly the same: in both cases, class members were (in the Circuit majority's words) "prevented from filing a timely application because they did not receive proper notice of the application criteria." *Perales II*, 48 F.3d at 1312-13, App. 16a. And in both cases, Petitioners alleged that INS had already, definitively, abridged a specific legal interest guaranteed them by 8 U.S.C. § 1255a(i). The Circuit majority's disparate treatment of the two claims thus cannot be justified as a ripeness determination.[2] It is

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[2] Indeed, the Circuit majority dismissed the "first formulation" of Petitioners' dissemination claims without any discussion of ripeness doctrine. 48 F.3d at 1312, App. 14a. Instead, the majority opined that if Petitioners' dissemination claims were allowed to proceed, "applicants of any government program would be entitled to [pre-enforcement review of eligibility regulations]," a result foreclosed by *CSS*. *Id.* This rationale does not bear scrutiny. Petitioners demonstrated the concrete personal impact requisite to a ripe case and controversy, not as generic

(footnote continued next page)

intelligible only as a ruling that benefit-restricting regulations should be insulated from judicial review, quite apart from whether plaintiffs have presented a ripe case and controversy.

The Circuit majority's creation of a new exception to the presumption of reviewability carries extreme implications because, if followed, it would deny a judicial forum for substantial federal constitutional and statutory claims, and would insulate lawless agency action from judicial correction. In *CSS*, this Court was careful to note that its holding preserved other opportunities for meaningful judicial review. 113 S.Ct. at 2497. Here, by contrast, the Circuit majority's ruling forecloses *any* possibility of *any* court *ever* reviewing the claim that INS violated 8 U.S.C. § 1255a(i) and the Fifth Amendment by failing to disseminate the statutory eligibility criteria.[3] The ruling thus conflicts with

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applicants for a government benefit, but on the strength of their particular, and relatively unusual, facts. Petitioners alleged that INS denied them a specific, congressionally-mandated procedural interest created for their particular benefit (most government programs contain no statutory mandate that eligibility criteria be broadly disseminated) and that the agency's illegal action "left [them] with no opportunity to apply for amnesty" once the application period closed, *id.*, 48 F.3d at 1313, App. 14a-15a. (Most programs do not have a limited one-time application period).

3 Petitioners' broad-based challenges to INS policies and practices can not receive meaningful judicial review through IRCA's limited scheme of application and administrative appeal. *See* 8 U.S.C. § 1255a(f). Review by that path is impossible because the record developed on an individual amnesty application would be utterly insufficient

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the APA and with core principles of due process and separation of powers, not only because it forever bars substantial constitutional claims from court, *see, e.g., Webster v. Doe*, 486 U.S. at 603, *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974), but also because it eliminates, for an entire category of cases, the judicial check ordinarily relied upon to ensure that agencies remain within delegated authority and statutory constraints. *See Bowen v. Michigan Acad. of Family Phys.*, 476 U.S. at 670-73, 681 & n.12; *Oestereich v. Selective Service Bd.*, 393 U.S. 233, 237-38 (1958).

Anticipating this difficulty, Professor Richard Pierce, Jr. recently predicted that expansive readings of *CSS* -- like the Circuit majority's -- would

> creat[e] a legal environment in which agencies have de facto discretion to issue rules that violate statutes and the Constitution because they can predict with confidence that their rules will never be subject to judicial review of any scope at any time.

Richard Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 92-94 (1995).

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to permit Circuit Court consideration of statutory and constitutional challenges to INS's dissemination practices. *See McNary*, 498 U.S. at 497; *Perales I*, 967 F.2d at 806, App. 49a-50a. In any event, the only individuals who have access to judicial review under IRCA -- those who filed timely applications for amnesty -- were, *ipso facto*, not injured by INS's violations of the broad dissemination requirement and would not have standing to challenge those actions.

The potential impact of the Circuit majority's ruling is enormous, because benefit-restricting regulations are a staple of federal administration across a range of agencies implementing programs affecting many millions of people. And the ruling itself is wrong. The principle of *CSS* is not -- as the Circuit majority believed -- that benefit-restricting regulations warrant special insulation from review, but rather, that a party seeking review must satisfy established standing and ripeness requirements.

1.b. The Circuit majority's ruling also conflicts with this Court's standing and ripeness jurisprudence. Despite some flux in these doctrines, it has always been bedrock principle that a party who alleges a fully accomplished invasion of its legal interests has a ripe claim and standing to pursue it. *See* Nichol, *Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153 (1987). The Circuit majority's misinterpretation of *CSS* discards this fundamental principle.

The dissemination claims dismissed by the Circuit majority -- nominally on ripeness grounds -- seek redress for unlawful agency actions that have already invaded legal interests accorded Petitioners by statute. "Congress placed great importance on the proper implementation of the [amnesty] application period," *Perales I*, 967 F.2d at 807, App. 53a, and therefore mandated specific procedural safeguards for the benefit of amnesty-eligible immigrants; chief among these was the direction that INS broadly disseminate timely and accurate eligibility information and administer a liberal application period. 8 U.S.C. §1255a(i). These duties ran to immigrants who had yet to receive the information that would allow them to "emerge from the

shadows" and apply. Congress imposed the nondiscretionary "broad dissemination" duty based on its legislative judgment that aliens "liv[ing] in fear" would be "afraid to come forward" and that an effective outreach and information campaign together with a full 12-month application period were essential to ensure that qualified aliens did not lose their right to obtain lawful status. *Perales I*, 967 F.2d at 813, App. 60a. *See McNary*, 498 U.S. at 484.

INS's violation of these duties immediately injured class members by denying them the procedural interests Congress enacted for their particular benefit.[4] Unlike the *CSS* plaintiffs, Petitioners here specifically claimed violation of these procedural rights conferred by IRCA and the Constitution. These claims present none of the ripeness concerns the Court identified in *CSS* because they do not seek review of an agency policy in advance of implementation and are not requests for

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[4] The procedural interests at stake here are not "abstract, self-contained, non-instrumental 'right[s]' to have the Executive observe the procedures required by law," but rather, involve procedures "designed to protect some concrete interest" of Petitioners. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 & n.8 (1992). Petitioners can therefore assert these "[procedural] right[s] without meeting all the normal standards of redressability and immediacy." *Id.* at 572, n.7. Standing is established upon a claim that the procedural interest has been invaded, even if it "cannot [be] establish[ed] with any certainty" that affording the procedures would ultimately yield a concrete benefit to Petitioners. *Id.* Petitioner class members thus need not show that they would have obtained legal status but for INS's violation of their procedural rights; the claimed violation suffices.

pre-enforcement review at all. There is nothing speculative or hypothetical here: the legal duties attached; INS breached them; and the injury has been inflicted.

1.c. The lower court's misreading of *CSS* also jettisons the basic principle that ripeness turns upon the nature of the claim asserted. *See, e.g., Pennell v. City of San Jose,* 485 U.S. 1 (1988).[5] While acknowledging that *CSS* "did not specifically address a dissemination or due process claim," the majority

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5 That different claims, seeking enforcement of different duties and alleging different injuries warrant separate ripeness analyses should come as no surprise. In a closely related context, this Court recently described APA section 702 -- granting judicial review to a "person . . . adversely affected or aggrieved by agency action within the meaning of a statute" -- as "an acknowledgment of the fact that what *constitutes* adverse effect or aggrievement varies from statute to statute." *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 115 S.Ct. 1278, 1283 (1995) (quoting 5 U.S.C. § 702). The statutory provision at issue in *CSS* was section 1255a(a) -- requiring INS to adjudicate amnesty applications in accordance with the statutory eligibility criteria. To be "aggrieved" by a alleged violation of that statute, this Court held, required that the alien have been actually or constructively denied amnesty. The statutory provision at issue here, by contrast, is section 1255a(i) -- requiring broad dissemination of timely and accurate eligibility information. Adverse effect and aggrievement under *this* statute consists not in having an amnesty application rejected, but rather in being deterred, through the denial of procedural safeguards, from filing an application in the first place. Class members have already suffered this adverse effect and therefore should have been permitted to pursue their claims.

treated these causes of action as equivalent to the facial claim against eligibility regulations held unripe in *CSS*. *Perales II*, 48 F.3d at 1312, App. 14a. This putative equivalency constituted the grounds for dismissing Petitioners' claims.

But even a casual analysis reveals that the substantive claim in *CSS* and the dissemination claims here are decisively different for ripeness purposes. The facial challenge to INS regulations in *CSS* is grounded on IRCA's command that the Attorney General "shall" legalize applicants who meet the statutory eligibility criteria. 8 U.S.C. § 1255a(a). This Court regarded the challenge in *CSS* as a claim that INS must adjudicate amnesty applications according to IRCA's eligibility standards; indeed the Court characterized the challenge as a claim for the amnesty status itself. *CSS*, 113 S.Ct. at 2496 n.19. The Court found this claim unripe as to class members who had not actually or constructively filed for amnesty because the possibility that they would be denied amnesty *because of the challenged regulations* was too remote and speculative. *Id.* at 2496 nn. 19 & 20.

Petitioners' dissemination and due process claims do not arise from 8 U.S.C. § 1255a(a), do not seek to enforce INS's duty to legalize eligible applicants, and are not claims for amnesty status itself. Like the due process claims sustained by this Court in *McNary*, Petitioners' dissemination claims challenge procedural defects in the implementation of the amnesty program, but do not seek the underlying amnesty benefit. *Cf. Perales I*, 967 F.2d at 806, App. 51a ("claim that unlawful INS procedures have deterred plaintiffs from filing applications" is not claim that "seeks to resolve the ultimate merits

of an alien's application for adjustment of status"). Rather, Petitioners' procedural claims arise from and seek to enforce INS's independent statutory duties under 8 U.S.C. § 1255a(i) to disseminate timely and accurate information and administer a full 12-month application period. These duties -- unlike the duty to legalize, at issue in *CSS* -- ran specifically to amnesty-eligible individuals who had *not* yet applied. It was precisely these individuals who were both the intended beneficiaries of Congress' broad dissemination mandate and the principal victims of INS's breach of that mandate.

To bar Petitioners' dissemination claims on the ground that class members did not file timely amnesty applications would create an incongruous Catch-22 situation: the principal harm caused by INS's procedural violations was to deter qualified individuals from applying, but the very fact of having suffered this injury would preclude a suit for redress. Nothing in *CSS* or the doctrine of ripeness sanctions such a perverse and unjust result. Its adoption by the Circuit majority marks a radical and unjustified departure from this Court's precedents.

1.d. The Circuit majority's misinterpretation of *CSS* also led it to conclude that the full factual record could not be considered in adjudicating the concededly ripe portions of Petitioners' claims. The majority proceeded on the premise that *CSS* required the court to blind itself to the *fact* that the regulations INS "communicated to aliens in New York" as the "official agency policy" imposed eligibility restrictions

not imposed by the governing statute.[6] Since, as Judge Cardamone noted in dissent, the resolution of Petitioners' dissemination claims "rest[ed] solely with a reading of the public charge regulations to determine what information they conveyed," 48 F.3d at 1318-19, App. 28a-29a, the majority dispatched those claims on a record that had been judicially purged of the central, operative fact. Nothing in *CSS* sanctions this artificial cleansing of a record. The Circuit majority's approach does violence to fundamental notions of fair, due-process adjudication.

2. Certiorari is also warranted to permit reconsideration or clarification of *CSS*. If the Circuit majority is correct, *CSS* has substantially undermined the institution of judicial review that for the past fifty years has been regarded as the "principle buttress

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6 In consequence the majority reached several bizarre conclusions, including the finding that INS "placed aliens on sufficient notice of the requirements to obtain amnesty under IRCA" by publicizing the very eligibility regulations held in *Perales I* to *violate* IRCA. *Perales II*, 48 F.3d at 1315, App. 21a. (INS conceded on certiorari that the regulations it publicized violated IRCA, and the court of appeals did not revisit the issue in *Perales II*.) This misreading of *CSS* also appears to be the cause of the outright conflict between the Court's fact finding in *Perales I* and the majority's contrary fact finding -- on the very same record -- in *Perales II*. The majority's central finding -- that INS adequately disseminated its internal eligibility policies -- was expressly rejected in *Perales I* as "convincingly rebutted" by "the record as a whole" and by specific "documentation revealing that INS disseminated the very aspects of the . . . regulations that we have found unlawful." *Perales I*, 967 F.2d at 810-11, App. 58a-60a.

for the legitimacy of the modern 'administrative state.'" Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1 (1983). Even less broadly construed, *CSS* breaks with the *Abbott Laboratories* standard that has been consistently applied since 1965, and, as Justice O'Connor demonstrated in her concurrence, the decision is inconsistent with other Supreme Court precedents stretching back forty years. *CSS*, 113 S.Ct. at 2501-04. The practical magnitude and import of *CSS* are vast, since regulations restricting eligibility for government benefits are administered by a wide array of federal agencies -- from the Federal Communications Commission to the Small Business Administration to the Department of Health and Human Services -- and affect many millions of people. And for all its doctrinal and practical significance, *CSS*'s ruling on ripeness and pre-enforcement review was issued without the benefit of briefing or oral argument. *Id.*, 113 S.Ct. at 2501.

A substantial body of scholarly opinion has already emerged, criticizing *CSS* as an unwarranted and constitutionally troubling departure from decades of settled law. These critiques are leveled by some of the nation's pre-eminent administrative law experts. Professors Kenneth Culp Davis and Richard J. Pierce, Jr. state that *CSS* unwisely discards the doctrine of *Abbott Laboratories* and replaces it with a regime that "is likely to harm large numbers of individuals":

> The Court was right in *Abbott*. Both the public and government are aided materially by a system of judicial review that authorizes a determination concerning the validity of a disputed rule at the earliest point consistent

> with the institutional capabilities of courts. By ignoring that sound reasoning, the majority in *Catholic Social Services* risks creating an administrative state in which the validity of many important rules that shape the conduct of millions of individuals will remain in doubt for many years.

Davis & Pierce, ADMINISTRATIVE LAW TREATISE § 15.14 at 383-84 (3d ed. 1994).

Professor Bernard Schwartz echoes this assessment, calling *CSS* "an aberration" that is "inconsistent" with precedent and that, if followed, will have the "unfortunate" effect of "requir[ing] an untold number of plaintiffs to make unnecessary expenditures of time and money before they can obtain decisions on the validity of rules that may directly affect them." Schwartz, *Administrative Law Cases During 1993*, 46 Admin. L. Rev. 307, 324 (1994).

Professor Pierce, in an article exploring ways to achieve efficiency in agency rulemaking, levels the most detailed and trenchant critique. After explaining that a bar on pre-enforcement review of eligibility regulations will yield little or no benefit to agencies, Professor Pierce predicts that

> After *Catholic Social Services* we can expect an increase in the incidence of agency issuance of clearly invalid eligibility rules. Moreover, agencies are likely to leave such rules in effect indefinitely, since many invalid rules will never be subject to a review petition that can withstand a motion to dismiss on ripeness grounds.

Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 91-95 (1995). Pierce concludes that the "social cost" of *CSS*'s doctrinal shift -- "de facto [agency] discretion to issue rules that violate statutes and the Constitution" -- is "too high a price to pay" for any possible benefit. *Id.* at 93.

A common strand running through the commentary on *CSS* is the criticism that the decision ignores a central reality of administration: "All eligibility rules have the effect of deterring otherwise eligible individuals from applying. That is one of their primary purposes." Davis & Pierce, *supra*, § 15.14 at 383-84. *CSS*'s refusal to "recognize that deterrent effect as an injury" inexplicably blinks this reality. *Id.*[7]

In the "particularly compelling context" of the amnesty program, *id.*, *CSS*'s ripeness ruling rests on the extraordinary premise that an illegal alien confronted with a formal agency policy declaring her ineligible for amnesty should have disregarded the government's official policy, incurred hundreds of dollars in filing fees and related costs, reported to an INS office, and disclosed her name, address and unlawful presence in the United States to the agency that could forcibly remove her from home and children; all to seek a benefit for which the government had decreed her ineligible. This premise departs so radically from reasonable

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7 *See also The Supreme Court, 1992 Term: Leading Cases*, 107 Harv. L. Rev. 303 (1993) (critique of *CSS* as exemplifying a "definitional manipulatio[n] of the injury [in standing analyses] in order selectively to deny or grant access to judicial power.")

expectations of human behavior, not to mention the behavior an agency hopes to foster by issuing eligibility regulations -- namely, inhibiting frivolous applications -- as to be untenable. *See* Pierce, *supra* at 92-93 ("it is unrealistic to expect a prospective individual applicant to determine that a rule renders her ineligible, and then to apply for the benefit with the expectation of convincing a reviewing court to hold the rule invalid" especially when "the prospective applicant takes a significant risk of serious adverse action if she applies and is determined to be ineligible. . . ")

CSS thus bears the hallmarks of a recent decision that should be reconsidered and clarified, if not overruled.[8] It is "'wholly inconsistent with earlier Supreme Court precedent,'" has "caused 'confusion,'" and marks an "'abrupt and largely unexplained departure' from precedent . . . of which

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8 In *Adarand Constructors, Inc. v. Pena* 115 S.Ct. 2097, 2114-15 (1995), this Court recently explained:

> "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision . . . when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from a previously established doctrine complete.

'[t]he great weight of scholarly opinion has been critical.'" *Adarand Constructors, Inc. v. Pena* 115 S.Ct. 2097, 2115 (1995) (quoting *U.S. v. Dixon* 113 S.Ct. 2849 (1993), *Solorio v. U.S.*, 483 U.S. 435 (1987) and *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977)). "In such a situation, 'special justification' exists to depart from the recently decided case." *Id.*, 115 S.Ct. at 2115.

CONCLUSION

For all the above reasons, Petitioners request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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