SUPREME COURT OF THE UNITED STATES

No. 97–1252

JANET RENO, ATTORNEY GENERAL, 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

[February 24, 1999]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins as to Part I, concurring in part and concurring in the judgment.

I agree with JUSTICE SCALIA that 8 U. S. C. §1252(g) (1994 ed., Supp. III) applies to this case and deprives the federal courts of jurisdiction over respondents' pre-final-order suit. Under §1252, respondents may obtain circuit court review of final orders of removal pursuant to the Hobbs Act, 28 U. S. C. §2341 *et seq.* (1994 ed. and Supp. II). See 8 U. S. C. §1252(a)(1) (1994 ed., Supp. III). I would not prejudge the question whether respondents may assert a selective enforcement objection when and if they pursue such review. It suffices to inquire whether the First Amendment necessitates *immediate* judicial consideration of their selective enforcement plea. I conclude that it does not.

I

Respondents argue that they are suffering irreparable injury to their First Amendment rights and therefore require instant review of their selective enforcement claims. We have not previously determined the circumstances under which the Constitution requires immediate judicial intervention in federal administrative proceedings

of this order. Respondents point to our cases addressing federal injunctions that stop state proceedings, in order to secure constitutional rights. They feature in this regard *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), as interpreted in *Younger* v. *Harris*, 401 U. S. 37, 47–53 (1971). Respondents also refer to *Oestereich* v. *Selective Serv. System Local Bd. No. 11*, 393 U. S. 233 (1968). Those cases provide a helpful framework.

In *Younger*, this Court declared that federal restraint of state prosecutions is permissible only if the state defendant establishes "great and immediate" irreparable injury, beyond "that incidental to every criminal proceeding brought lawfully and in good faith." 401 U. S., at 46, 47 (internal quotation marks omitted). A chilling effect, the Court cautioned, does not "by itself justify federal intervention." *Id.*, at 50. *Younger* recognized, however, the prospect of extraordinary circumstances in which immediate federal injunctive relief might be obtained. The Court referred, initially, to bad faith, harassing police and prosecutorial actions pursued without "any expectation of securing valid convictions." *Id.*, at 48 (internal quotation marks omitted).[1] Further, the Court observed that there may be other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment," for example, where a statute is "flagrantly and patently violative of express constitutional prohibitions in

[1] Specifically, the *Younger* Court noted that Dombrowski's complaint made substantial allegations that "'threats to enforce the statutes . . . [were] not made with any expectation of securing valid convictions, but rather [were] part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.'" 401 U. S., at 48 (quoting *Dombrowski* v. *Pfister*, 380 U. S. 479, 482 (1965)).

every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Id.*, at 53–54 (internal quotation marks omitted).

In *Oestereich*, the Selective Service Board had withdrawn a ministry student's statutory exemption from the draft after he engaged in an act of protest. See 393 U. S., at 234. The student brought suit to restrain his induction, and this Court allowed the suit to go forward, notwithstanding a statutory bar of preinduction judicial review. Finding the Board's action "blatantly lawless," the Court concluded that to require the student to raise his claim through habeas corpus or as a defense to a criminal prosecution would be "to construe the Act with unnecessary harshness." *Id.*, at 238.

The precedent in point suggests that interlocutory intervention in Immigration and Naturalization Service (INS) proceedings would be in order, notwithstanding a statutory bar, if the INS acts in bad faith, lawlessly, or in patent violation of constitutional rights. Resembling, but more stringent than, the evaluation made when a preliminary injunction is sought, see, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975) ("The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits."), this test would demand, as an essential element, demonstration of a strong likelihood of success on the merits. The merits of respondents' objection are too uncertain to establish that likelihood. The Attorney General argued in the court below and in the petition for certiorari that the INS may select for deportation aliens who it has reason to believe have carried out fundraising for a foreign terrorist organization. See App. to Pet. for Cert. 20a; Pet. for Cert. 21–25. Whether the INS may do so presents a complex question in an uncharted area of the law, which

we should not rush to resolve here.

Relying on *Middlesex County Ethics Comm.* v. *Garden State Bar Assn.*, 457 U. S. 423 (1982), respondents argue that their inability to raise their selective enforcement claims during the administrative proceedings, see *ante*, at 5, makes immediate judicial intervention necessary. As we explained in *Middlesex County*, *Younger* abstention is appropriate only when there is "an adequate opportunity in the state proceedings to raise constitutional challenges." 457 U. S., at 432; see *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U. S. 619, 629 (1986) (even if complainants could not raise their First Amendment objections in the administrative hearing, it sufficed that objections could be aired in state court judicial review of any administrative decision). Here, Congress has established an integrated scheme for deportation proceedings, channeling judicial review to the final order, and deferring issues outside the agency's authority until that point. Given Congress' strong interest in avoiding delay of deportation proceedings, see *ante*, at 19–20, I find the opportunity to raise a claim during the judicial review phase sufficient.

If a court of appeals reviewing final orders of removal against respondents could not consider their selective enforcement claims, the equation would be different. See *Webster* v. *Doe*, 486 U. S. 592, 603 (1988) (a "serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim" (internal quotation marks omitted)). Respondents argue that that is the case, because their claims require factfinding beyond the administrative record.

Section 1252(a)(1) authorizes judicial review of "final order[s] of removal." We have previously construed such "final order" language to authorize judicial review of "all matters on which the validity of the final order is contin-

gent, rather than only those determinations actually made at the hearing." *INS* v. *Chadha*, 462 U. S. 919, 938 (1983) (internal quotation marks omitted). Whether there is here a need for factfinding beyond the administrative record is a matter properly postponed. I note, however, the Attorney General's position that the reviewing court of appeals may transfer a case to a district court for resolution of pertinent issues of material fact, see Brief for Petitioners 44, 48–49, and n. 23,[2] and counsel's assurance at oral argument that petitioners will adhere to that position, see Tr. of Oral Arg. 5–6.[3]

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[2] The Hobbs Act authorizes a reviewing court of appeals to transfer the proceedings to a district court for the resolution of material facts when "the agency has not held a hearing before taking the action of which review is sought," 28 U. S. C. §2347(b), and "a hearing is not required by law," §2347(b)(3). Sensitive to the constitutional concerns that would be presented by complete preclusion of judicial review, the Attorney General argues that "[s]ection 2347(b)(3) on its face permits transfer to a district court, in an appropriate case, for resolution of a substantial selective enforcement challenge to a final order of deportation," because the INS is not required to hold a hearing before filing deportation charges. Reply Brief 12, 14. The Attorney General also suggests that other provisions, in particular Federal Rule of Appellate Procedure 48's authorization of special masters, might be available. See Reply Brief 12–13. Finally, the Attorney General argues that, upon a finding of constitutional necessity, a court of appeals could "fashion an appropriate mechanism– most likely a procedure similar to a Section 2347(b)(3) transfer." *Id.*, at 13. While it is best left to the courts of appeals in the first instance to determine the appropriate mechanism for factfinding necessary to the resolution of a constitutional claim, I am confident that provision for such factfinding is not beyond the courts of appeals' authority.

[3] The following exchange at oral argument so confirms:

Counsel for petitioners: ". . . [I]f there were ultimately final orders of deportation entered, and the respondents raised a constitutional challenge based on selective enforcement, and if the court of appeals then concluded that fact-finding was necessary in order to resolve the constitutional issue, it would then be required to determine whether a mechanism existed under the applicable statute.

II

The petition for certiorari asked this Court to review the merits of respondents' selective enforcement objection, but we declined to do so, granting certiorari on the jurisdictional question only. See Pet. for Cert. I, 20–30; 524 U. S. __ (1998). We thus lack full briefing on respondents' selective enforcement plea and on the viability of such objections generally. I would therefore leave the question an open one. I note, however, that there is more to "the other side of the ledger," *ante*, at 20, than the Court allows.

It is well settled that "[f]reedom of speech and of press is accorded aliens residing in this country." *Bridges* v. *Wixon*, 326 U. S. 135, 148 (1945). Under our selective prosecution doctrine, "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights." *Wayte* v. *United States*, 470 U. S. 598, 608 (1985) (internal citations and quotation marks omitted). I am not persuaded that selective enforcement of deportation laws

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"Now, we believe 28 U. S. C. 2347(b)(3) would provide that mechanism, but –

Court: "It might provide the mechanism if the issue is properly raised, but can the issue be properly raised when it would not be based on anything in the record of the proceedings at the administrative level?

Counsel for petitioners: ". . . [I]f the respondents claimed that execution of the deportation order would violate their constitutional rights because the charges were initiated on the basis of unconstitutional considerations, I think that is a claim that would properly be before the court of appeals.

Court: "So is that the Government's position, that we may rely on that representation that you have just made about the legal position that the Government would take in those circumstances?

Counsel for petitioners: "That is correct." Tr. of Oral Arg. 5–6.

should be exempt from that prescription. If the Government decides to deport an alien "for reasons forbidden by the Constitution," *United States* v. *Armstrong*, 517 U. S. 456, 463 (1996), it does not seem to me that redress for the constitutional violation should turn on the gravity of the governmental sanction. Deportation, in any event, is a grave sanction. As this Court has long recognized, "[t]hat deportation is a penalty– at times a most serious one– cannot be doubted." *Bridges*, 326 U. S., at 154; see also *ibid*. (Deportation places "the liberty of an individual . . . at stake. . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom."); G. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 162 (1996) ("Deportation has a far harsher impact on most resident aliens than many conceded 'punishment[s]' . . . . Uprooting the alien from home, friends, family, and work would be severe regardless of the country to which the alien was being returned; breaking these attachments inflicts more pain than preventing them from being made.").

* * *

In sum, were respondents to demonstrate strong likelihood of ultimate success on the merits and a chilling effect on current speech, and were we to find the agency's action flagrantly improper, precedent and sense would counsel immediate judicial intervention. But respondents have made no such demonstration. Further, were respondents to assert a colorable First Amendment claim as a now or never matter– were that claim not cognizable upon judicial review of a final order– again precedent and sense would counsel immediate resort to a judicial forum. In common with the Attorney General, however, I conclude that in the final judicial episode, factfinding, to the extent

necessary to fairly address respondents' claims, is not beyond the federal judiciary's ken.

For the reasons stated, I join in Parts I and II of the Court's opinion and concur in the judgment.