ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., Petitioners v. CATHOLIC SOCIAL SERVICES, INC., ET AL.

CASE NO: 91-1826

PLACE: Washington, D.C.

DATE: Monday, January 11, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM P. BARR, ATTORNEY :

GENERAL, ET AL., :

Petitioners :

v. : No. 91-1826

CATHOLIC SOCIAL SERVICES, :

INC., ET AL. :

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Washington, D.C.

Monday, January 11, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

RONALD J. MANN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

RALPH S. ABASCAL, ESQ., San Francisco, California; on behalf of the Respondents.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in number 91-1826, William P. Barr, Attorney General, v. Catholic Social Services. Mr. Mann, you may proceed.

ORAL ARGUMENT OF RONALD J. MANN

ON BEHALF OF THE PETITIONERS

MR. MANN: Thank you, Mr. Chief Justice, and may it please the Court:

This case arises out of the provisions of the Immigration Reform and Control Act of 1986 that granted amnesty to certain longstanding illegal aliens. The case presents two class actions challenging regulations the attorney general promulgated to interpret eligibility requirements under the act.

In one case a regulation interpreting a proviso that allowed an alien to gain relief even if he had brief, casual, and innocent absences from the United States, in the other a regulation interpreting the requirement that the aliens' immigration status have been continuously unlawful since 1982.

In each case a class of aliens filed suit in a Federal district court in California and secured a ruling holding the challenged regulations invalid. Both of the district courts then proceeded to require INS to grant the

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benefit of the ruling not only to aliens who filed applications before the program expired, but also to aliens who applied after the deadline in May 1988.

The Government appealed and the Ninth Circuit affirmed. Those orders have continued in effect while the case has been pending and INS has been obligated to continue accepting applications for the more than 4-1/2 years since May 1988. It has accepted about 300,000 so far.

In our view the decision of the court of appeals is wrong for two separate reasons. First, the district court did not have jurisdiction to review INS determinations regarding whether or not members of the respondent class were eligible for relief under the act. And second, even if it did have jurisdiction it was improper for the district courts to grant relief to aliens who failed to apply before the program expired in May of 1988.

On the first question the key factor is the framework for judicial and administrative review set forth in section 1255a(f). On its face that framework bars any immediate judicial review of a decision denying an application. Rather, an alien can seek relief from a court only after deportation proceedings have been instituted and completed and the alien is subject to a

final order of deportation.

Thus although the statute allowed aliens to seek relief from the agency while retaining their confidentiality and anonymity, they could not obtain judicial review of an adverse agency decision without giving up their fugitive status, either by surrendering --

QUESTION: Well, now did the -- did INS, in your view, have authority to determine that the regulations were invalid in a -- in an ordinary proceeding brought by an alien?

MR. MANN: No. INS is bound by regulations that are issued by the attorney general.

QUESTION: Right.

MR. MANN: And so if an alien had filed an application for relief, and many aliens in this situation did, the application would have been denied and undoubtedly the denial would have been affirmed by the legalization appeals unit if the regulation remained valid at the time the appeal was taken. The regulations were withdrawn before the -- just before the application period expired, so some of the adjudications would not yet have been determined by the legalization appeals unit. But what that would do is that would place that alien in exactly the same situation as any alien whose application was denied.

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For example, if the INS determined as a fact that the alien first entered the United States in 1983 his application would be denied. The LAU, if it agreed that the evidence in the record supported that, would deny the -- would deny the appeal and the alien could do nothing.

If the alien wanted to challenge that, he would have to give himself up and submit to our immigration laws and then challenge it in the court of appeals after deportation proceedings.

QUESTION: Well, didn't we have a virtually identical provision before us in McNary against the Haitian refugees?

MR. MANN: Yes, in -- in -- in the relevant respects we believe the jurisdictional provisions in McNary were the same as these, and the difference is that this case involves a different type of claim. The claims at issue in McNary were claims that could not have been reviewed in the court of appeals on the administrative record, but the fundamental claim was that INS was deciding -- denying applications on the basis of evidence that was not in the record.

And so if the court of appeals had reviewed the administrative record it could not have ascertained whether or not the claim was correct and would not have

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been able to evaluate it. And if that was the only remedy that the aliens had, they really would not have had effective judicial review.

By contrast, the claims here are that INS would have improperly denied applications for legalization, and the only thing that the court of appeals needs to know to evaluate that claim is the core information that's required to determine whether he's statutorily eligible. And that information would be in the administrative record. That's the information that's put on the form I-687, the application that the alien files.

He would file the application. It would be denied, probably denied by the LAU. The court of appeals would have that application and it would be perfectly capable of making its own decision as to whether or not those facts were sufficient to justify relief under the act.

QUESTION: Well, I guess the operative language in section 1255 (a)(f) is a determination respecting an application.

MR. MANN: Yes, ma'am.

QUESTION: And it certainly is arguable, anyway, that that means a determination that the INS itself could make.

MR. MANN: That's correct, and in our view the

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determination in this -- the determination in this case is the regulation which INS made. INS determined that certain things had to be true for an alien to be entitled to relief. The determination relates to an application of a member of the respondent class because the only claim that the respondents can make is that if they filed an application it would have been denied, or that they did file an application and that they expected that it would be denied.

So because they're challenging its effect on them it's a determination respecting each of their individual applications, and that's how we read the statutory language to apply.

QUESTION: Mr. Mann, is there a -- is there a different problem with impossibility as a result of the INS's practice -- I think it was called front desking, that is to say simply not accepting the applications of those that they were satisfied under the regs would fail? So that as a matter fact, given the front desking procedure, there is -- there was no way that a given applicant could get his application to the point of a final determination, subject to review.

MR. MANN: Now that goes to the second question, the remedial question, but --

QUESTION: It does go to that.

MR. MANN: Yes.

QUESTION: Doesn't it also go to the question of the appropriateness of applying McNary here on -- in effect on an impossibility of review theory otherwise?

MR. MANN: No, we don't really think it does. In our view the jurisdictional question is -- this case was filed in November of 1986 several months before the application period started. The district court is presented with a complaint and the question is whether it has jurisdiction over that complaint.

Now, at that time there were 18 months, more or less, maybe 17 months left before the application period was going to expire. And we don't think that there's any way that the district court could have determined at that time that there was no way these people could file, particularly if you look at the -- so I don't think that's really relevant to the jurisdictional question.

The jurisdictional question, it seems to me, turns on whether this is a -- whether the determination they challenged, which is the regulation, is a determination respecting an application in light of the way that this Court interpreted that phrase in McNary. Now --

QUESTION: With respect to the possible application or, in your view, extension of McNary, in

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McNary what if the -- what if the -- what if the action in this case had been filed after the 1-year period began and the period -- and the practice of front desking was known and, in fact, was -- was pleaded, would that affect the appropriateness of a McNary kind of jurisdictional determination?

MR. MANN: Well if you're -- if you're filing a suit challenging INS's practices of accepting applications -- for example, if the complaint isn't that INS has an improper regulation for determining whether you are eligible for relief, but instead that INS -- INS officers are refusing to accept applications, it seems to me that that is a -- that is a type of claim that arguably might be covered by McNary, but that's not the claim that's before the Court in this case.

The only people with respect to whom INS appealed in this case are people who did not apply for relief under the act. I mean if you look at -- and if you look in the record you can see where the district courts defined the groups to whom they extended relief. But we didn't appeal with respect to the people who applied for relief.

And it's our position, INS's position, that if you went into an INS office and if you attempted to apply for relief and they refused to accept your application --

which, as we mentioned in our reply brief, would have violated INS's policies as set forth in the legalization manual -- if you did that, we believe that you have, in fact, applied.

The statute doesn't say that in order to meet the statutory time deadline you have to force INS to accept your application and put a stamp on it. What the statute says is that you have to apply.

QUESTION: Okay.

MR. MANN: And it's our view that if you walk into INS's offices and you attempt to apply, it's one thing if they say we don't think you're going to get relief and so you shouldn't waste the money. But if they say no, we refuse to accept your application, we will not take it, you have applied.

And there are cases that are cited in both parties' briefs in which INS did similar things and INS has granted relief to those people. For example a person --

MR. MANN: On the second question, which is what I was talking about with Justice Souter, whether or not it was proper for the district courts to accept jurisdiction over these cases in the first place, it certainly was improper for them to grant relief to individuals who did not satisfy the requirements for relief that Congress

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articulated in the statute.

The first of the four statutory requirements for relief is set forth in section 1255a(a)(1), and that requirement is that the alien have filed an application during a specified 12-month period. Because the Government did not appeal the district court's judgments with respect to aliens who filed applications, as I just mentioned, none of the respondents before this Court satisfied that requirement and thus they are not eligible for relief because of section 1255a(a)(1).

The provision that they're seeking to avoid is not a statute of limitations. This is not an individualized filing requirement that can be subject to equitable tolling. What they're seeking to evade is one of a series of statutory deadlines that Congress put in the statute to determine exactly which group of illegal aliens were going to get relief.

The first requirement was that the alien have been here since 1982 and that his status had been unlawful. The second requirement was that the alien --

QUESTION: Mr. Mann, could I just ask one -- the statute's kind of long and I forget one point in it. I know the statute provides that this timely application -- the attorney general shall adjust the statute if there's an application filed within a year and so forth and so on.

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Does it ever say that he shall not adjust the statute -- the status if an application is not timely filed?

MR. MANN: It does not expressly say that, but it's our view --

QUESTION: It's a negative application.

MR. MANN: -- That the only -- the only basis that INS would -- all of the people in the class are, by definition, people who are illegally here.

QUESTION: There's no statutory -- at least no express statutory prohibition against the attorney general granting an extension of time.

MR. MANN: I don't -- I don't think the attorney general views it that way. The problem is that the only basis that the attorney general has for allowing these people to have any lawful status in this country is if they meet each of the four requirements in 1255a(a). If they don't meet those requirements, he -- he doesn't really have a basis for allowing them to stay here lawfully.

He has -- as I mentioned to Justice Souter, if -- if for example, there's a case where a person came in on the last day and attempted to apply and the person said no, come back tomorrow, you don't have an appointment, he determined that that person had applied and -- and granted relief to that person because they came

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in and did everything they did and an INS person wrongfully --

QUESTION: Well, where does he get the authority to do that?

MR. MANN: Because the statute requires a person to apply, and the attorney general has interpreted the word apply to include a person who comes into the office and attempts --

QUESTION: But you think he has no statutory authority to simply say we will -- we will -- because our offices are crowded and overloaded and everything, we will grant a 30-day grace period or something like that.

MR. MANN: I don't think the attorney general would have had the authority to do that. I think he would have just --

QUESTION: But there's no statutory prohibition against that, though.

MR. MANN: There's no express statutory prohibition on that.

QUESTION: Mr. Mann, can you tell me if the provisions of the regulations that are under challenge here could have been adopted, instead of by regulation, through adjudication?

That is to say could -- could the -- the INS, instead of having a regulation that said when you leave

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the country, you know, it breaks the chain of your -- of your residence, could the INS simply have decided in the first case that came before it involving that, that indeed, this individual did not have proper residence and -- and then could have continued to apply that precedent in later cases. Could it have done it that way instead of by regulation?

MR. MANN: Yes, we think he could have. I would -- I would say the attorney general was obligated under section 1255 (a)(g) to implement -- to pass regulations and he did that before the application period commenced. But obviously some cases, no matter what the -- how specific the regulations are, are going to arise and it will raise legal questions that are not explicitly discussed in the regulations. And what would happen in those cases is the application would be decided by the legalization appeals unit.

QUESTION: Right. And I gather that if this hadn't been included in the -- if this detail had not been included in the regulations and had been decided in adjudication, there'd be no doubt that this provision of the statute did not cover it. So whether the -- you know, whether the statute covers it or not, on the -- on the respondents' theory, depends upon whether it was adopted by rule or by adjudication.

MR. MANN: I believe that respondents would probably take the same position even if this was adopted by a legalization appeals unit decision.

QUESTION: Is that right? Then -- then what conceivably would the statute not cover?

MR. MANN: I believe that their view is the only thing the statute does not cover is if an individual -- particular individual files an application and it is denied, on I'm not sure what particular basis. I guess if it's denied on the basis of something that -- that would not deny anybody else's application. A -- a --

QUESTION: It's hard to think of something that would.

MR. MANN: Well, in most cases I believe that's true because the requirements for relief are fairly generalized; you have to be here since 1982 unlawfully and you have to have not left since 1986. The brief, casual and innocent absence actually is one of the most soft provisions in the statute, because there obviously is some play in that particular phrase could mean, but being here since 1982 is a clear provision.

But there are a lot of things that -- legal questions that arose under the act and some of them -- most of them were decided by regulations, but some of them were decided by the LAU.

Talking about the second question again, as I mentioned the statute has three different time deadlines that aliens have to meet to fall within the class of aliens who are eligible for relief. They have to have been here continuously and unlawfully since 1982, they have to have been here continuously since the act was passed in 1986, and they have to have sought relief within the first 18 months after the act was passed in 1986.

Now, under that scheme respondents' failure to seek relief before the statute expired cannot be justified on the basis of their individual circumstances. They just didn't make themselves eligible for relief, any more than a person who didn't come to the United States until 1983 would be eligible for relief.

The seriousness with which Congress viewed this particular requirement, the timely filing requirement, is particularly clear from section 1255a(f)(2). Although subdivisions (3) and (4) of 1255a(f) require judicial review and a level of administrative appellate review generally for determinations about eligibility, they expressly bar any judicial or even any administrative review with respect to an application that's denied as being untimely.

Now in light of that, we think it's particularly inappropriate for a court to believe that it's empowered

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to extend the deadline, when Congress has attempted to put the -- that particular question beyond judicial review entirely.

QUESTION: Well, Mr. Mann, I guess we said in Irwin that at least there is a rebuttable presumption that statutory time limits incorporate principles of equitable tolling.

MR. MANN: Yes, Justice O'Connor, that's correct. But we don't believe that Irwin substantially changed this Court's jurisprudence on that issue. What -- what Irwin says is that generally Congress believes that statutory filing deadlines should be equitably tolled. Now, there are clearly certain types --

QUESTION: Well, do you think this is a time limit that could be equitably tolled?

MR. MANN: In our view this is not the type of time limit that this Court was talking about in Irwin, and I'd like to address that for a moment. There's a distinction to us between an individual filing deadline and a statute of limitations, for example, which will say you have to file for relief within 6 years after your cause of action arises.

And that type of deadline turns on an individual's fact circumstances; when did the cause of action arise? And that's the type of deadline that we

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believe is at issue in Irwin. Now sometimes it may be a statute of limitations, sometimes it may be called something else, but that's one type of statutes to which we think equitable tolling generally applies.

This case and Pangilinan, however, involve something different. In these cases Congress has established a program and says the program is over. The program in the Pangilinan case ended shortly after World War II. The program in this case ended on May 4th, 1988. And we don't think that that type of deadline should be subject to tolling, because it's -- it's a requirement for relief.

Now, even if it is subject to equitable tolling, it seems to us that the -- that this is not remotely the type of case as to which equitable tolling would be appropriate. What -- what INS and the attorney general did that is offered as a justification for equitable tolling is that INS issued regulations explaining the circumstances under which it believed people would be eligible for relief.

It said if you were gone from the United States without advance permission, you're not eligible. Now, whether that was right or wrong, that's just a regulation explaining the circumstances in which you may or may not be eligible for relief. And what respondents should have

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done and what anybody who wants a benefit that's offered by the United States Government should do, is you apply for the benefit and if you don't agree with the agency's interpretation you challenge it.

And these people had exactly the same opportunity for judicial review as everybody else under the act, and they chose not to apply and so they're not eligible for relief. I would point out that quite a number of the people who were in this situation did apply for relief and they've already gotten relief.

And even if this suit had not been filed in the district court, they would have gotten relief when the injunction -- when the regulations were withdrawn, because INS would have had to given the relief sooner or later. When the person got to the court of appeals they could not have deported them because the court of appeals would have ruled that they were entitled to legalization based on the fact that INS had withdrawn the regulation.

The real reason respondents are unable to secure relief is that they declined to take advantage of the 12-month opportunity Congress offered them. You have to remember this was an extraordinary statute. Congress was faced with a huge problem involving a very large number of undocumented aliens, all of whom were illegally here in violation of our immigration laws.

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And we had -- Congress had tried for years to deal with the problem, and they decided that the best way to deal with it was to enact a program that was going to allow these people in a -- for a short time period to seek relief, come forward, become lawful members of our community, and join this country's polity.

And they -- in order to get people to apply they took the extraordinary step of allowing them to apply for relief without giving up their right to remain here as anonymous fugitives if the agency denied them relief. They could apply for relief, and under the confidentiality provisions INS could not use that information to deport them. And the information on the legalization application, if it was sufficient for relief, would almost certainly make them deportable because, by definition, they had to be here illegally.

And they allowed you to apply to the agency anonymously and then you'd get a level of administrative review, appellate review within the agency, but they stopped short of allowing you judicial review while you remained a fugitive. If you wanted to go to court and burden the Federal courts, which have plenty of things to do at the district court level, you had to make a choice.

And the choice was that you thought you were entitled to legalization and you wanted to come forward,

submit to this country's laws, and join its citizenry and see how -- whether the courts believed you were eligible. And if they said that you were eligible, you would win. There'd be one judicial proceeding and you would win and you would get to stay here lawfully. And if you lost, you would have to leave.

And that's the scheme that Congress enacted. It is a strict limitation on judicial review, but it's a strict limitation on judicial review that's coupled with a remarkably generous program granting amnesty to a very large class of unlawful residents.

And the suggestion that INS implemented the program very harshly really isn't borne out by the historical facts. If you look, INS went with their publicity programs. They received many more applications than Congress anticipated; under this program alone more than 1.7 million -- and about 3 million under the two programs together, the SAW program at issue in McNary. And then they granted 94 percent of the applications they received. That's more than 1,600,000 people have already received lawful temporary resident status under this particular provision.

And I think that although the administration of the program did have some problems, it's not fair to say that INS went about this with an eye towards granting

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relief to the smallest number of people that it possibly could.

QUESTION: Certainly the proposed regulations would indicate as much.

MR. MANN: I -- I --

QUESTION: They're a little counterintuitive. To say that an alien who is here by presenting false documents is to be presumed legally here is a bit counterintuitive, isn't it?

MR. MANN: Well, actually, if you compare that provision of the -- of IRCA with a corollary provision about exclusion, I think the regulation actually comes pretty close to -- to being correct. What you have to remember is that if the person entered with a false -- with false documents in that manner it would be fair to say the person entered by fraud, and a person who enters by fraud is excludable unless he can secure a waiver from the attorney general.

And so what the regulation effectively did is by saying that the people can't come in at all, it should have said the person is ineligible for relief unless he can secure a waiver for the fraud from the attorney general. And that regulation was overbroad.

Now, I would also point out that the regulations had to be drafted with some haste and INS made some

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mistakes. But the fact that INS made some mistakes in the regulation does not excuse individuals from seeking relief and making themselves eligible.

In our view that's just like Schweiker v. Hansen. In that case, you'll recall, a disabled individual went into an HHS office and said, I would like to get disability benefits. And the person said, you're not eligible for relief. Incorrectly -- it was conceded that that advice was incorrect, and the person, relying solely on that advice, didn't apply for relief.

About a year later they discovered it was incorrect and they went back and applied. And because they had not applied -- there was a substantive requirement that you apply -- they had forever lost -- forever lost the monetary disability benefits that they could have gotten if they had applied initially, and they could not get that money back. It was -- it was forever lost to them because they failed to apply at the right time, and their sole basis for failing to apply was that a Government person misinterpreted the eligibility requirements.

That's very much like this case, in our view, and that's why we believe it's a fundamental principle of administrative law that you can't just accept a Government agent telling you that you're not eligible for relief and

then decline to make yourself eligible.

It would be like if INS had told these people they weren't eligible and so they decided, well, we'll leave after 1986 and go to Mexico for 6 months since we can't get legalization, then when the regulation is invalid come back. It's certainly clear that a court would not order INS to grant relief to such a person, and we really don't see any difference between that case and this one.

If there are no further questions, I'd like to reserve the rest of my time.

QUESTION: Very well, Mr. Mann. Mr. Abascal, we'll hear from you.

ORAL ARGUMENT OF RALPH S. ABASCAL

ON BEHALF OF THE RESPONDENTS

MR. ABASCAL: Chief Justice Rehnquist, and may it please the Court:

Like in McNary, there is no dispute in this case. The regulations adopted by INS violated the two respective statutes. The merits of those regulations are not before the Court. The merits of the regulations and the order invalidating them were not appealed to the court of appeal.

QUESTION: Do you think the Government concedes that they were invalid? I didn't think so.

MR. ABASCAL: The argument that was being made earlier by Mr. Mann attempting to justify at least the LULAC regulation suggests that they have an argument to make to justify that regulation. But that argument was not made to the court of appeal.

QUESTION: Well, I know, but they don't concede the invalidity.

MR. ABASCAL: No. But the issue --

QUESTION: That is all I wanted to know.

MR. ABASCAL: No. The issue is not before the Court.

Similarly with respect to jurisdiction, jurisdiction was not raised in the court of appeal by the Government. The court of appeal itself, sua sponte, raised jurisdiction after oral argument and then withdrew submission of the case when it learned of the grant of certiorari in McNary. After McNary came down the Government conceded jurisdiction.

It is not disputed either that IRCA provided very --

QUESTION: Excuse me. That's not something that can be conceded, of course.

MR. ABASCAL: No, no. I'm not suggesting that the Government tried to concede jurisdiction. They tried, they attempted to concede --

QUESTION: And now decided that they were wrong.

MR. ABASCAL: Yes. It is not disputed that IRCA provided very very important benefits, beginning with, at the foundation of it, an extensive education and outreach program mandated by Congress so that aliens could learn the requirements to obtain legalization through the program.

Also, Congress provided for a stay of deportation and work authorization pending the determination made in the administrative process on an application, a very important provision because at the same time Congress enacted a prohibition on the employment of undocumented aliens, so work authorization was particularly important.

And it's not disputed that legalization is a very important benefit to this class. With legalization they would no longer need fear reporting crime when they were crime victims. They would no longer need fear reporting violations of labor laws and a myriad of other things that we take for granted in the United States, because contacting Government would no longer have that fear of deportation.

And ultimately the most priceless benefit that was to be provided through legalization is U.S. citizenship, because after a period of time as temporary

resident aliens they could acquire the opportunity to ultimately become citizens of the United States.

Now, the Government said that 300,000 applications have been filed. That is not precisely correct. The stay orders that have been issued have allowed, in essence, people who believe that they're class members to opt in and demonstrate under the particular standards that they are class members. INS has agreed that 78,000 of the 300,000 plus who have sought class membership are preliminarily class members, and have granted them work authorization and a temporary stay of deportation pending the outcome of appellate review.

Let me turn first to jurisdiction. The issue in this case involves precisely the same text involving judicial review, a determination respecting an application, that was involved in McNary. Thus it raises the same narrow question that was raised in McNary, whether Congress intended to preclude truly meaningful judicial review and truly meaningful judicial relief in these two class actions, raising generic, statutory, and constitutional claims for which an abuse of discretion standard of review that is in (f)(4) is particularly inappropriate, as this Court held in McNary.

Secondly, as in McNary, the holding that special review applies only to judicial review of individual

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denials of applications is the second issue in this case. It applies with full force here. These cases did not seek judicial review of individual applications, nor did the aliens in these cases seek orders granting them legalization or that would entitle them to legalization. They only sought to have corrected one -- in each particular case to have corrected one standard among a myriad of standards that would be applied to their applications.

QUESTION: Well, Mr. Abascal, I guess there is the difference here that whether the regulations are valid or not presents just a question of law --

MR. ABASCAL: Yes.

QUESTION: -- that at some level a court, a district court or a court of appeals, could address and decide without the necessity of a factual record of some kind.

MR. ABASCAL: But there were -- there were important, if you will, corollary issues in this case. The manner in which the regulation was utilized in the application process -- there were also -- discovery was very valuable in this particular case, and also, in addition to discovery, the value of having the opportunity to introduce evidence from people other than the applicants, the nature and the manner in which the

application -- excuse me, the regulations were utilized, was very very important to us in the litigation of this case.

So that the same issue --

QUESTION: Well, can you --

MR. ABASCAL: -- that arose in McNary, the limitation, the type of evidence that could be introduced in the administrative application process, existed here with full force.

QUESTION: At the time you began this suit what were some of the details of the manner -- as you put it, the manner in which the regulations were applied that was significant in stating your claim for relief?

MR. ABASCAL: One case, the first case -- Catholic Social Services is a bit more complicated than the other, and it began earlier. It began very early after Congress enacted the statute because aliens were being apprehended on a daily basis. The very important benefit that existed prior to the application process was a stay of deportation and work authorization for prima facie eligible individuals.

Now the statute was enacted November 6th. At the same time --

QUESTION: Of what year, Mr. Abascal?

MR. ABASCAL: 1986, Your Honor. At the same

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time, simultaneous with the adoption of the legalization program, was adopted the prohibition on the employment of undocumented aliens. So at that moment it was crucially necessary for potential applicants to obtain a stay of deportation and work authorization, because they were subject to deportation unless they could show prima facie eligibility.

8 days after the enactment of the statute we sought, initially in this case, to compel INS to adopt some standards defining prima facie eligibility so that stays of deportation and work authorization could be sought.

QUESTION: Well, couldn't -- couldn't the issues that you thereby wished, really, to short circuit, have been raised in the course of a given application and the litigation of that application when the time came, when the 1-year period began to run?

MR. ABASCAL: Well --

QUESTION: In other words, I can understand your -- your desire to -- the convenience, indeed, and the utility from your standpoint of raising it this way. But were you precluded from raising these kinds of issues in the normal course of application, adjudication, denial, or grant?

MR. ABASCAL: Justice Souter, the application

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period didn't begin for 7 months.

QUESTION: Well, that's right. And I -- I realize that you couldn't -- you couldn't thereby raise the issue until the attorney general designated the -- the point at which the 1-year period began. But when it began, is there any reason that you could not have raised these issues in the course of an application proceeding by a given individual applicant?

MR. ABASCAL: In subsection (e)(1) of the statute, that statute --

QUESTION: Well, I don't want to be short with you but I may get lost in the forest here. What's the answer, yes or no, and then tell me -- tell me why -- if the answer is no, why you couldn't have raised it in the normal course.

MR. ABASCAL: An individual could have raised the question in the application process.

QUESTION: Okay.

MR. ABASCAL: The answer is yes, I'm sorry. But in subsection (e)(1) the statute provided for stays of deportation and work authorization for prima facie eligible individuals. And if they were apprehended, then they were to apply within 30 days after the beginning of the application process.

So if they were apprehended the -- in the

Catholic Social Services case the bureaucratic terminology is advance parole. A brief, casual, and innocent absence was defined initially in a telegram as an absence that had INS prior authorization.

That is to say that an undocumented alien who wished to depart from the country and return should first go to INS and seek permission to do so, an interpretation that was substantially contrary to a -- to the doctrine of brief, casual, and innocent absences that had evolved over a 20-year period that was struck down in 1984 in INS v. Phinpathya. But then the Congress overruled that decision with respect to the statute that decision applied to, and then utilized the same terminology in this particular provision of IRCA.

So that if a person was apprehended without prior permission to leave the country, then they were subject to deportation and ouster from the country if they did not have advance permission from INS to depart the country. That standard, that criterion and that requirement was embodied in a telegram, in a telegram only.

QUESTION: Mr. Abascal, I have a little difficulty hearing you.

MR. ABASCAL: I'm sorry.

QUESTION: Perhaps if you could raise the mike a

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little, or perhaps keep your head a little closer to it.

MR. ABASCAL: I'm sorry, Your Honor.

The case suffers a bit from the fact that the merits are not before the Court. The merits of these regulations, the validity of the regulations and an understanding of how they operated were raised in the merits, so that it was important -- that was the initial -- the initial objective in Catholic Social Services.

When the telegram issued, then, containing the interpretation of brief, casual, and innocent that it did, the complaint was amended and that was challenged. The district court issued a temporary restraining order 18 days after the statute became effective, a nationwide TRO that was appealed by INS to the Ninth Circuit.

And then 6 months later the Ninth Circuit vacated its opinion so that it precluded litigation in the district court for that period of time that the case was before the Ninth Circuit.

QUESTION: What did the Ninth Circuit determine with respect to the appeal of the TRO?

MR. ABASCAL: The -- the Ninth Circuit held that the district court had abused its discretion in issuing the TRO. Its conclusion was that INS had good arguments on its side and that -- that we, the plaintiffs, had good

arguments on our side, and therefore it was abuse of discretion to have issued the TRO. The TRO was stayed throughout the period of appeal.

McNary's holding that special review applies only to judicial review of individual denials -- excuse me, I made that point earlier.

This case, just as in McNary, is a case in which Congress had readily at hand far broader language of section 1331 preclusion that it could have used. McNary gave examples of preclusive language that would have precluded a challenge to a regulation, as this was. McNary -- McNary involved policies and practices that was -- that were engaged in by INS.

I believe that the argument that INS is making in this case is that the distinction between McNary and this case is that there was a regulation that was promulgated through the process of notice and comment rulemaking, as opposed to the policy and practice. That is, the principal distinction between the policies and practices that were -- not the substance of them, but the policies and practices that were engaged in McNary were nationwide policies and practices but they were not formalized into a regulation.

The Government's argument is that a regulation is a determination. That is the key -- the key to their

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argument, that it is a determination. But this Court held in McNary, in the United Auto Workers v. Brock, in Bowen v. Michigan Academy of Family Physicians, that a determination is the application of a rule to a set of facts.

It is like two versus -- two times five equals ten. Ten is the determination; it's the application of rule to fact.

QUESTION: So if -- if -- what would your answer be to the question that I asked Mr. Mann earlier? Suppose this particular rule had been adopted not by regulation but by adjudication, so that the INS --

MR. ABASCAL: Well --

QUESTION: -- regularly -- regularly applied this rule, but -- but did not adopt it by regulation; that would make no difference to you?

MR. ABASCAL: Well, if the rule were in the form of instructions to field offices --

QUESTION: No, no, no. There are no instructions to field offices, just -- just the first case that's decided applies the principle that if you leave the country it breaks the chain.

MR. ABASCAL: Well --

QUESTION: And then all the later cases simply follow the same rule.

MR. ABASCAL: There's a practical problem with respect to the question in that there was only a 12-month application period and the form of judicial review occurred pursuant to an order of deportation, so that the first case that would arise, if there was no regulation, would be some time after -- or some time after --

QUESTION: I'm not talking about a court case. I'm talking about the administrative case. The first administrative officer to be confronted with this adjudicates in a certain fashion, gets -- it gets -- there is one appeal within -- within the INS.

MR. ABASCAL: Within the INS, yes. There was something --

QUESTION: Okay, so that is -- that case is appealed within the INS. The appellate officer says, no, it was rightly decided, and all of the lower officers follow that -- follow that adjudicative ruling. Now what would that be under your --

MR. ABASCAL: Well, part of the practical problem with that is that there's a 12-month application process. If -- if there was no regulation which operated to discourage applications and if the entire class here had not confronted statements at INS offices or at their agents; there was a group, 980-some-odd organizations that contracted with INS to perform the application - they

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could process it.

QUESTION: No, they -- they would confront those statements because the INS would say look it, we -- you know, we don't have a rule on the subject, but I'll have to tell you our adjudicative precedent is, and we follow it, that -- that if you've left the country it -- it breaks the term of your residence in the country.

MR. ABASCAL: Well, I think if that decision arose after the 12-month period of time, then the problems would be much less -- if that decision arose --

QUESTION: Within the 12-month time you treat this --

MR. ABASCAL: Within the 12-month period of time.

QUESTION: Yeah. Never mind all the practical difficulties. Assume it's there; how do you treat it under your theory? Is it the same as a regulate -- it is a determination with respect to a case or not?

If you say it isn't, then all this is going on just so the INS should -- should have done it by adjudication instead of by rule, which --

MR. ABASCAL: But it is hard -- I'm sorry. I don't mean to avoid your question. It is hard for me to avoid the question, though, other than in practical terms. If -- if I may respond with a question -- or not a

question, but a hypothetical or two.

If the LAU, the legalization appeals unit, arrived at that decision, let's say 6 months after the application period began, and then applicants who came to INS thereafter were told you're not eligible, we are rejecting your application. We're not accepting your application and then denying it; that is critical to an understanding of this case. They did not accept all applications, but rather they had a standard that existed in an unpublished manual.

QUESTION: Was this, by the way, clear at the time you began -- at the time the litigation began, or is this a fact that -- that emerged later during the 12-month period?

MR. ABASCAL: Your Honor, we did not learn of the existence of the legalization manual until just weeks before the application period closed.

QUESTION: So that this was --

MR. ABASCAL: We did not know it existed.

QUESTION: So that the Government was correct that this is no part of your case.

MR. ABASCAL: The -- the manual is particularly important in the practice that was followed pursuant to that manual with respect to relief.

QUESTION: No. What -- all I'm getting at is at

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the time these two proceedings were begun, you did not allege, because you did not know, that as a result of a so-called front desk policy you would not either be allowed to or you would be deterred from litigating in the normal course. You didn't know that and you didn't allege it; isn't that correct?

MR. ABASCAL: No, we didn't. No, but what -- my response is the knowledge of the manual itself. The policy we knew of, but the -- what is relied upon by the Government in the manual is that a rejection should have been met by an insistence to file. The very first telegram, it's called legalization wire number 1 --

QUESTION: All right, may I interrupt you --

MR. ABASCAL: Yes.

QUESTION: -- and just go back to one thing that bothers me? Did you so allege and was this part of your claim, that you had no effective means of litigating these issues in the normal course of individual determinations because of the front desk policy?

MR. ABASCAL: But the front desk policy -- front -- there's a close relationship between the --

QUESTION: No, whatever the relationship is, did you know of this and did you so allege it at the -- when you began?

MR. ABASCAL: We knew of the policy of rejecting

applications very early on. The very first --

QUESTION: Did you allege that in -- in your petition?

MR. ABASCAL: In LULAC, the second case -- the second case was filed midway through the application period, and the second cause of action directly addressed the policy of deterring and discouraging applications.

QUESTION: So you alleged that as the means -- as the reason that you could not litigate individual -- these issues on individual determinations.

MR. ABASCAL: We alleged that as the basis for rejecting applications, turning applicants away before they filed an application.

QUESTION: Okay, but you did not allege that, I take it -- or the applicants did not allege that in the first action.

MR. ABASCAL: They alleged it, but the court did not reach that question. That was in another cause of action the court -- that case is still pending. The court only reached two questions --

QUESTION: Okay.

MR. ABASCAL: -- of four -- four claims.

QUESTION: Can I come back to my question --

MR. ABASCAL: Yes.

QUESTION: -- which I don't think you've gotten

to the answer of yet. Well, why -- I don't see any relationship whatever between front desking and the issue of whether what you have when there's an adjudication is a determination -- or whether what you have when there's a rule, for that matter, is a determination respecting an application for adjustment of status. Front desking has nothing to do with that. It -- it simply has to do with the issue of whether you have an effective means of challenging it, that's all.

MR. ABASCAL: No. The very first --

QUESTION: It is not converted from a determination --

MR. ABASCAL: The very first --

QUESTION: -- respecting an application into not a determination respecting an application simply because of front desking.

MR. ABASCAL: In Catholic Social Services the telegram that was issued to all offices 8 days after the enactment of the statute interpreted brief, casual, and innocent as requiring a request for authorization to depart the country. That was invalidated. That -- that was later incorporated into a promulgated regulation pursuant to the APA, but the policy existed in that telegram.

In addition, the telegram said that persons who

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have not had advance parole, prior permission to depart the country, are deemed to be ineligible to apply. And because they are deemed ineligible to apply, then the front desking policy followed from that.

Moreover, the regulations that were adopted finally, or the policy finally incorporated into regulations that were public, the preamble defining those eligible classes began, and it said: The following categories of aliens are eligible to apply -- eligible to apply. And the negative inference is that if you do not fit into the categories that follow, you're not eligible to apply. That regulation is section 245(a).2(b).

The very first subparagraph that began after that described these two classes. The following categories are eligible to apply: those who have continuous residence between November 1st, 1982 and the enactment date of the statute.

The regulation interpreted that statute in the manner suggested by Justice O'Connor earlier, that if a person came through with fraudulently obtained documents, that the facial validity of their entry then converted their residence into lawful residence and it broke the continued period of unlawful residence.

The second parenthetical phrase in that particular subsection said people who have continuous

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physical presence within the United States. Other regulations interpreted continuous physical presence as -- and the only requirement -- as obtaining advance parole, permission to leave. So therefore the very beginning of the eligibility section says that these aliens are not eligible to apply.

Now, when they went to either an INS office or, as a matter of law, the agents of INS, the QDE's, the qualified designated entities, the non --

QUESTION: But you say when they went. The Government has already conceded that anybody that went is home free.

MR. ABASCAL: Well, the Government's position --

QUESTION: They are not challenging anybody --

MR. ABASCAL: -- is a very important concession.

QUESTION: -- who presented themselves.

MR. ABASCAL: It's a very -- no, no, the Government's position is that a person -- I believe, my understanding from their brief, is that a person must submit an application, a written document, submit that application, be told that it will not be accepted because they are statutorily ineligible because the facts of their particular case give rise to those two regulations. And then --

QUESTION: I didn't understand him to say that

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this morning. I -- I don't recollect precisely how they said it in their brief --

MR. ABASCAL: Well, I --

QUESTION: -- but they certainly didn't say that this morning.

MR. ABASCAL: Frankly, Justice Scalia, I'm very very confused by the extent of their concession. I think it is a critical concession with respect to remedy. I think it is a critical concession. It is first made in the reply brief.

Let me turn to what I understand to be the Government's position, or -- excuse me, complaint -- that a person must submit a written application, have it rejected, and then insist upon its acceptance. The insistence rule, again, is contained in this manual that is under the front desk.

We, counsel in the case, did not become aware of that manual; the insistence policy, we were very aware of. Excuse me -- we were very aware of the policy of deeming the classes to be ineligible. That's the way we pleaded the case. We did not know that there was some insistence policy whereby a person who tried could, at the final stage of a plank, insist that they not be shoved off, and under those circumstances they would accept the application.

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QUESTION: Don't -- haven't you asserted in this complaint that even people who never presented themselves are entitled to the relief you've requested? Isn't that what you've asserted? People who never went to the INS offices at all; they never got near that desk.

MR. ABASCAL: We do. And we think --

QUESTION: That's what I thought.

MR. ABASCAL: We do, and let me explain the difference between that. Now, the -- the Government's concession is that, as I understand it, someone must fill out a piece of paper with all of the evidence necessary, with medical examinations, must tender a -- the Government says in their brief, must tender the application fee -- between $185 and $420 -- must tender that fee, and then when they refuse to accept it, insist that it be filed.

I believe that the appropriate -- that the appropriate standard to apply is that if someone contacts INS or the thousand agencies with which they contracted, indicates their desire to apply, are told that it's futile because this regulation will mean that you will be denied, that that is an application.

The necessity for paper ought to be -- under these circumstances 90 percent -- by the Government's own statistics, 90 percent of the applicant pool was not

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represented by counsel. This is not a population that is familiar with either judicial review and its requirements, nor is it familiar with the institutions of Government in the United States. If they go to what appears to be an authoritative source -- I want to apply, you're not eligible -- for the Government to insist, then, that they persist in the filing of all the necessary documents, pay and offer the money, it seems very difficult to accept that as a reasonable view of reality.

This Court -- this Court in Teamsters v. the United States in 1977, a title VII case, defined discouragees. They said: If an employer --

QUESTION: Discouragees?

MR. ABASCAL: Discouragees, yes, sir.

QUESTION: Defined that -- that is a word.

MR. ABASCAL: They -- I'm not sure that they used discouragees. Let me explain the context of that. This Court said in 1977 in Teamster v. the United States that if an employer hangs a sign on the front gate, no blacks need apply, no Irish need apply, if the policy is well-known, that it is not necessary for a title VII claimant to actually go to the personnel office and seek a job. That the failure to go to the personnel office and seek a job is not necessary to raise a claim under title VII.

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That, I think is a --

QUESTION: Your time has expired, Mr. Abascal.

MR. ABASCAL: Thank you.

QUESTION: Mr. Mann, you have 6 minutes remaining.

REBUTTAL ARGUMENT OF RONALD J. MANN

ON BEHALF OF THE PETITIONERS

MR. MANN: Thank you, Mr. Chief Justice. I'd like to clarify -- I didn't really realize there was much that needed to be clarified -- what our position is on the so-called front desking. There are several points about this.

The first is I don't really think that has anything to do with the jurisdictional question. The district courts in this case concluded that they had jurisdiction over claims that certain INS regulations regarding eligibility requirements were invalid. We believe that is incorrect and that's what the first question in this case is.

The second question in this case is even if we're wrong on that, was it proper for the district courts to grant relief to people who did not file in a timely manner? Now, it's our understanding that the front desking argument is relevant to that, on the idea that that establishes some sort of affirmative INS misconduct

that might justify equitable tolling. As I mentioned earlier, we don't believe equitable tolling applies to this type of statute, but even if it does we don't believe this is the right type of conduct.

What -- what we have conceded, though, is -- we did not appeal from the district court with respect to people who applied for relief largely because they were going to get relief sooner or later anyway, so there's no reason for us to appeal. If we withdrew the regulations the people would eventually secure legalization, and so there's no reason for us to continue to litigate about it.

It is our view that there are -- there are some sets of fact patterns where the person did not force INS to accept his application that will constitute applying for relief under the act. People who never went to an INS office, in our view, cannot conceivably fall into that fact situation.

QUESTION: Well, what's your response to his definition of discouragee? Why is it different from hanging the sign on, no blacks allowed?

MR. MANN: Well, for one thing, because I think that title VII is violated by a discriminatory practice that the -- is violated by discriminatory practice that poses a considerable headwind to blacks getting employment.

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QUESTION: But this is a discriminatory practice that imposed considerable headwinds to these people applying for the relief under the statute. What's the difference?

MR. MANN: But I don't believe -- I don't believe that title VII contains a provision saying -- that says that you have to apply for a job in order to have standing under the act, and that if you don't courts cannot -- have no jurisdiction over the case.

QUESTION: But neither does this statute.

MR. MANN: Excuse me?

QUESTION: Neither does this statute.

MR. MANN: Well --

QUESTION: It specifies a period in which you may apply, but it doesn't have the other language in it either.

MR. MANN: But the only people --

QUESTION: It's a fair reading that you must, because -- but it's also a fair reading that if you're going to seek relief for being denied a job, you ought to apply for the job. That's a -- that would be your normal view.

MR. MANN: I think that's quite a different case involving title VII as a remedial statute directed at private employers.

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QUESTION: Is this a remedial statute?

MR. MANN: This is a statute giving a very important immigration benefit to private individuals from the Government, and in light of the customary requirements that people apply for relief from the Government --

QUESTION: What if you did have a sign up that -- on the site that said don't apply unless such and such, apply, and then they didn't apply. Would then -- would they then be discouraged or would they have to come in and file the application?

MR. MANN: I think if the -- if the sign said we will not accept applications from people who are in the following fact situations, period, I believe that would be different. But I think if --

QUESTION: Then you'd apply the same rule as in title VII.

MR. MANN: No. I think that if the person -- I think that if the person in that case came into -- if the person came in and the sign was there and the person refused to file because of that sign, they would have applied. I'd like to point out, though --

QUESTION: They would or would not have applied?

MR. MANN: They would have applied.

QUESTION: Okay.

MR. MANN: But what -- what's going on in this

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case is, if you look at the legalization manual and last -- we've lodged with the Court the entire part of the legalization manual that's at issue here.

If you go into an INS office it costs you $420 to apply for a family. Most of these people are not dramatically wealthy, and that is quite a bit of money to them. That if they come into INS's offices and the person looks at the application and they're statutorily ineligible, the clerk says you're not going to get relief. If the person still wants to pay the $420, the manual is quite clear that the person can and should take the application. It's very clear about this, that the person is supposed to take the application.

QUESTION: And I take it there's no finding that this policy was violated.

MR. MANN: There is no finding --

QUESTION: I take it there's no finding that applicants were -- that applications were rejected.

MR. MANN: There is no finding that this policy was violated. With all candor, I would be willing to suspect that there are members of the respondent class with respect to whom the policy was violated. These were not highly trained people and some of them may have made mistakes.

But I can say that INS does not know of a

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specific named individual that has been identified to us respondents with respect to which that is the case, but there were a lot of people and INS may have made mistakes. That's why you have administrative appellate review, so that INS can correct its mistakes.

A few other things I wanted to mention. One of the most important things, I think, from the argument of respondents is that he -- he agreed that there was really no reason he could not have raised these claims in the administrative process. In connection with that he talked about the telegram that the Government issued as if this is some short, casual statement. This was a 20-page, very detailed document setting forth all of the criteria to get the program going, and INS got that out only 8 days after the statute was passed.

I also wanted to mention that it appears that it is not in the record at the place we discussed in our brief. If anyone wishes to look at it, it's attached to an affidavit of Joseph Brandon, which is at docket entry 7 of the record in the Catholic Social Services case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mann. The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)

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William P. Barr, Attorney General, et al., Petitioners v. Catholic

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BY Ann Marie Federico

(REPORTER)