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Another Limit on Federal Court Jurisdiction - Immigrant Access to Class-Wide Injunctive Relief

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ANOTHER LIMIT ON FEDERAL COURT JURISDICTION?
IMMIGRANT ACCESS TO CLASS-WIDE INJUNCTIVE RELIEF

JILL E. FAMILY¹

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I. INTRODUCTION

Congressional attempts to limit federal court jurisdiction over controversial issues are not innovative,² and the scholarly debate addressing the constitutionality of

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²For a discussion of the history of congressional proposals to limit federal court review, including proposals to limit federal court review in the areas of abortion, school prayer, school bussing, immigration and prisoners' rights, see Lloyd C. Anderson, *Congressional Control Over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise*, 39 BRANDEIS L.J. 417, 427 (2000) [hereinafter *Congressional Control*]; Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896-97 (1984); Stephan O. Kline, *Judicial*

such attempts dates back many years.³ In the past, the scholarly debate anticipated future possibilities.⁴ What if Congress were to eliminate Supreme Court review of certain claims? What if Congress were to deny access to federal courts to a particular group? One of the pieces of legislation recognized as heralding the movement of these questions from the possible to the certain is the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.⁵ IIRIRA

Independence: Rebuffing Congressional Attacks on the Third Branch, 87 KY. L.J. 679, 738-40 (1999).

³See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981); Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207 (1984) [hereinafter *The Price of Asking*]; Gunther, *supra* note 2; Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Kline, *supra* note 2; Anderson, *Congressional Control*, *supra* note 2. For articles treating this issue by focusing on immigration issues, see Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. MEM. L. REV. 295 (1999); David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481 (1998) [hereinafter *Jurisdiction and Liberty*]; Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000); M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525 (1997); Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1682 n.125 (2000) [hereinafter *Federal Courts Issues in Immigration Law*].

⁴For example, the 1980's wave of court-stripping scholarship evolved in response to proposed legislation that aimed to limit federal court jurisdiction regarding controversial issues such as abortion, school prayer and school bussing. None of these bills became law. Anderson, *Congressional Control*, *supra* note 2, at 418. In 1984, Professor Chemerinsky acknowledged the argument that "Congress, rarely, if ever, would use its power to restrict federal court jurisdiction," and prophetically wrote: "But it is not at all certain that Congress would refrain from enacting such laws." Chemerinsky, *The Price of Asking*, *supra* note 3, at 1219-20.

⁵Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208 (1996) (Division C). Other examples include the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), through which Congress eliminated the Supreme Court's appellate jurisdiction over certain habeas decisions of the courts of appeals. Pub. L. No. 104-132 (1996). Also, Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), which limited a federal court's ability to fashion relief in suits brought by prisoners. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 (1995) (Title VIII). For a discussion of these laws in the context of the debate over congressional control of federal court jurisdiction, see Anderson, *Congressional Control*, *supra* note 2, at 435-44; Cole, *Jurisdiction and Liberty*, *supra* note 3, at 2482-83; Neuman, *Federal Courts Issues in Immigration Law*, *supra* note 3, at 1661. Two other timely (but not yet enacted) examples of legislation asserting congressional control over federal court jurisdiction are two recent bills passed by the House of Representatives. One would have limited federal court jurisdiction over legal questions brought under the Defense of Marriage Act. H.R. 3313, 108th Cong. (July 22, 2004). The

contains many limits on court review,⁶ and federal courts still grapple with the boundaries and meanings of its restrictions.⁷

One restriction Congress implemented through IIRIRA that the Supreme Court has yet to interpret directly is 8 U.S.C. § 1252(f)(1). This section may limit the ability of federal courts to grant class-wide injunctive relief in immigration cases. The exact meaning and effect of the section is uncertain. Analysis of this statutory section is important because federal courts have used the class action procedural device of Federal Rule of Civil Procedure 23 to issue class-wide injunctive relief to stop unconstitutional immigration policies and practices of the federal government. Because the power to regulate immigration is a federal matter,⁸ if this statute bars federal courts from issuing class-wide injunctive relief, no court would have the power to grant that relief and the function of Rule 23 therefore would diminish.

By analyzing both the text of 8 U.S.C. § 1252(f)(1) and relevant Supreme Court precedent, this article attempts to decipher the meaning of § 1252(f)(1). If a federal court were to interpret § 1252(f)(1) to be a broad bar against class-wide injunctive relief, such an interpretation would raise constitutional concerns, as the Supreme Court has ruled that individual actions based on the administrative record of a single hearing are an ineffective means to challenge an immigration pattern or practice of the federal government.⁹ The analysis in this article leads to the conclusion that the text of § 1252(f)(1) does not, in fact, demand a broad bar against the issuance of class-wide injunctive relief. This article also considers whether habeas jurisdiction is a viable alternative method to obtain class-wide injunctive relief if § 1252(f)(1) bars such relief.

II. PREVIOUS USE OF IMMIGRATION CLASS ACTIONS

A. *To Begin, an Example*

Faced with thousands of applications for benefits to adjudicate, how can a federal agency with limited resources reduce its backlog? One strategy is to implement an accelerated processing program and to discourage the filing of new applications. If the agency spends less time adjudicating each application and intake slows, the backlog will shrink. This strategy can cause extreme human consequences, however, if, for example, the benefit sought is asylum based on an applicant's fear of returning to his or her country of origin.

other would have limited federal court jurisdiction over the content of the pledge of allegiance. H.R. 2028, 108th Cong. (September 23, 2004).

⁶IIRIRA attacks court review through three main fronts. First, IIRIRA contains provisions that restrict the issues that a court may review. Second, IIRIRA contains provisions that restrict the timing of an action. Third, the legislation also affects the permissible form of an action challenging an administrative immigration adjudication.

⁷*See infra* part III.

⁸*See Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.").

⁹*See infra* notes 35-70. This article reserves resolution of the constitutionality of the statute in favor of focusing on its meaning and effect, including how the presence of a serious constitutional problem may influence interpretation of the statute.

The immigration service,¹⁰ faced with a backlog of 6-7,000 asylum applications, followed the above approach and implemented an accelerated processing program to dispense with the backlog.¹¹ Immigration judges, administrative judges who preside over immigration hearings, held approximately eighteen individual hearings per day.¹² These judges afforded applicants ten days to compile and file a written claim for asylum.¹³ The immigration service conducted asylum interviews at a rate of forty per day and limited each interview to approximately one-half hour.¹⁴ At the rate of forty interviews per day, there was a shortage of attorneys available to represent applicants who desired counsel.¹⁵ During the accelerated program, the immigration service did not grant asylum to any applicants.¹⁶

In response to a class action lawsuit filed challenging the accelerated processing program, the Court of Appeals for the Fifth Circuit, in *Haitian Refugee Center v. Smith*, concluded that the program deprived applicants of due process of law.¹⁷ The court affirmed the district court's class-wide injunction to the extent it ordered the immigration service to reprocess the affected applications in a manner consistent with due process.¹⁸

What if federal courts had no power to issue such class-wide relief? This question is not hypothetical, as access to class-wide injunctive relief in the immigration context is uncertain after IIRIRA.

¹⁰Prior to the creation of the Department of Homeland Security in 2003, the Immigration and Naturalization Service (INS), located within the Department of Justice, administered the immigration laws of the United States. With the creation of the Department of Homeland Security, the functions of the INS were broken up into new organizations. The United States Citizenship and Immigration Service (USCIS), which administers benefit programs; Immigration and Customs Enforcement (ICE), which controls enforcement and detention issues; and United States Customs and Border Protection (CBP) are new separate entities that reside within the Department of Homeland Security. Control over the administrative appeal process remains within the Department of Justice. See Homeland Security Act of 2002, Pub. L. No. 107-296 (2002). For simplicity, this article will use the term "immigration service" to refer generally to the entities that administer the immigration laws.

¹¹*Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1029-31 (5th Cir. Unit B 1982).

¹²*Id.* at 1031. Under the accelerated processing program, the Miami district office of the immigration service processed asylum applications "at an unprecedented rate." *Id.*

¹³*Id.* The district court determined that the preparation of one asylum application required between ten to forty hours of attorney work time. *Id.* at 1032. Given the number of applicants desiring counsel and the number of available attorneys, the district court determined that a ten-day time frame was impossible. *Id.* at 1031-32.

¹⁴*Id.* at 1031.

¹⁵*Id.* The Court of Appeals for the Fifth Circuit concluded that the immigration service "had knowingly made it impossible for [applicants] and their attorneys to prepare and file asylum applications in a timely manner." *Id.* at 1031-32.

¹⁶*Id.* at 1032.

¹⁷*Id.* at 1040.

¹⁸*Id.* at 1041.

B. Why a Class Action?

Class action lawsuits filed against the immigration service over time have presented serious objections to the immigration service's administration of the immigration laws.¹⁹ As in *Haitian Refugee Center v. Smith*, immigration class action litigation can change a pattern of agency behavior, whether nationwide or across an administrative region. Immigration class actions of the past can be grouped into three major categories. The first is those actions challenging the fact of or conditions attached to immigration detention,²⁰ including the treatment of detained juveniles and adults.²¹ The second is those actions challenging the manner in which the immigration service implements immigration benefit programs demanded by Congress,²² including the asylum program.²³ The third category is composed of

¹⁹It is beyond the scope of this article to judge the behavior of the immigration service or to investigate the reasons behind its alleged deficiencies. Also, while these class actions have presented serious objections to immigration service practices and procedures, not all of these cases have found success on their merits.

²⁰The immigration service has the power to detain many classes of foreign nationals and the power to detain is not restricted to foreign nationals who have committed crimes. *See, e.g.*, 8 U.S.C. § 1225(b)(2) (mandating detention of a broad class of foreign nationals); 8 U.S.C. § 1226(a) (authorizing detention of a foreign national pending a removal decision). This is important to understand, given that immigration detention often means incarceration in a prison.

²¹*See, e.g.*, *Reno v. Flores*, 507 U.S. 292 (1993) (addressing class action challenging the detention of juveniles, the Supreme Court determined that the immigration service had not violated due process standards); *Turkmen v. Ashcroft*, No. 02-CV-2307, 2004 U.S. Dist. LEXIS 14537 (E.D.N.Y. July 29, 2004) (addressing discovery issues in a class action challenging post-September 11 detention of foreign nationals); *Kazarov v. Achim*, No. 02-C-5097, 2003 WL 22956006 (N.D. Ill. Dec. 12, 2003) (certifying class challenging detention of those ordered but not yet removed from the United States); *Fernandez-Roque v. Smith*, 91 F.R.D. 117 (N.D. Ga. 1981) (certifying class challenging detention of Mariel Cubans). Also, in 2002, a class action lawsuit was filed challenging the immigration service's detention of foreign nationals subject to a special registration program that required registration at immigration service offices within the United States. *See Elaine Monaghan, Muslims Sue US Over Mass Arrests*, THE TIMES (London), December 26, 2002.

²²*See, e.g.*, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) (determining that statute restricting judicial review of agency legalization determinations did not bar class action challenges to the administration of the 1986 legalization program); *Ngwanya v. Ashcroft*, 302 F. Supp. 2d 1076 (D. Minn. 2004) (granting partial summary judgment to class challenging immigration service procedures in adjudicating permanent residence applications of those granted asylum and also challenging the procedures used in issuing documentation of work authorization to those granted asylum); *Campos v. INS*, 32 F. Supp. 2d 1337 (S.D. Fla. 1998) (denying, in part, the government's motion to dismiss a class action complaint challenging naturalization procedures); *Phillips v. Brock*, 652 F. Supp. 1372 (D. Md. 1987), *vacated as moot sub nom.*, *Phillips v. McLaughlin*, 854 F.2d 673 (4th Cir. 1988) (certifying class contesting administrative rulings regarding the employment of foreign workers but granting summary judgment to the government).

²³*See, e.g.*, *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992) (ordering district court to dismiss class action complaint challenging interdiction at sea procedures); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982) (affirming district court's class-wide injunction to the extent it ordered the immigration service to reprocess asylum

objections to the immigration service's procedures in removing foreign nationals from the United States,²⁴ including practices used to obtain waivers of the right to a hearing,²⁵ the stop and seizure practices of the United States Border Patrol,²⁶ practices used in immigration workplace enforcement raids²⁷ and the immigration service's alleged unauthorized use of confidential information.²⁸

Scholars have discussed why class actions are preferable to individual actions to challenge these types of immigration service practices.²⁹ One advantage of the class action device is that it allows for broad systematic reform.³⁰ Due to its potentially broad nature, a class action can give relief to individuals who otherwise might not realize they are entitled to relief.³¹ The government does not provide free counsel if

applications); *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (approving settlement agreement between class of Salvadoran and Guatemalan asylum seekers and the government); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982) (certifying provisional class of Salvadorans challenging asylum practices).

²⁴Over time, federal immigration statutes have used different terminology to reflect the concepts of expulsion of a foreign national from inside the United States and of refusal to allow entry of a foreign national into the United States. IIRIRA concluded official use of the two terms deportation (referring to the act of expulsion from) and exclusion (referring to the act of refusing admittance) and replaced the two concepts with an umbrella concept called "removal."

²⁵*See, e.g., Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998) (affirming certification of class challenging the immigration service's procedures in obtaining waivers and also affirming that those procedures violated notions of due process); *Perez-Funez v. INS*, 611 F. Supp. 990 (C.D. Cal. 1984) (certifying class and granting preliminary injunction to class challenging the immigration service practice of obtaining waiver of a right to a hearing from unaccompanied minor foreign nationals).

²⁶*See, e.g., Murillo v. Musegades*, 809 F. Supp. 487 (W.D. Tex. 1992).

²⁷*See, e.g., International Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457 (N.D. Cal. 1983).

²⁸*See, e.g., Aparicio v. Blakeway*, 302 F.3d 437 (5th Cir. 2002).

²⁹*See Leti Volpp, Court-Stripping and Class-Wide Relief: A Response to Judicial Review in Immigration Cases After AADC*, 14 GEO. IMMIGR. L.J. 463, 469-71 (2000) [hereinafter *Court-Stripping and Class-Wide Relief*]; Neuman, *Federal Courts Issues in Immigration Law*, *supra* note 3, at 1680-81; Robert Pauw, *Judicial Review of "Pattern and Practice" Cases: What to Do When the INS Acts Unlawfully*, 70 WASH. L. REV. 779, 790-98 (1995); Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 576 (1997).

³⁰*See Neuman, Federal Courts Issues in Immigration Law*, *supra* note 3, at 1681 ("When classwide litigation leads to reform of systemic practices, the benefits may be shared with unrepresented aliens; when counsel prevails at the district court level in an individual case, [the immigration service] can yield for the occasion without acquiescing in the legal principle more generally."). Even if a claim is heard in an individual proceeding and a judgment against a practice of the immigration service is obtained, it is doubtful that this judgment would be of much value to other foreign nationals, given the restrictions presented by the doctrine of non-mutual offensive collateral estoppel and the expense of bringing hundreds or thousands of lawsuits addressing the same legal issue.

³¹*See Neuman, Federal Courts Issues in Immigration Law*, *supra* note 3, at 1680-81.

a foreign national facing removal cannot afford to hire his or her own.³² This fact, combined with the enormous complexity of immigration law, means that many foreign nationals with valid challenges to the practices of the immigration service may never be able to articulate, much less prosecute, those claims; they may never even realize that their claims exist.³³ Another advantage of using the class action device in the immigration context, discussed below, is that it may be impossible to develop an adequate record to establish an unlawful agency pattern or practice through the adjudication of an individual immigration proceeding.³⁴

C. The 1986 Legalization Cases

Perhaps the best-known (and longest lasting) immigration class action lawsuits are those filed in the wake of the Immigration Reform and Control Act of 1986 (IRCA), which implemented a legalization program. These cases exemplify class litigation challenging the immigration service's administration of a benefit program. Additionally, the Supreme Court's treatment of the review-limiting provisions of the legalization statute provides perspective on deciphering the meaning of the text of § 1252(f)(1) (created by IIRIRA, the 1996 act), which is also a review-limiting provision.

The Supreme Court's treatment of the legalization statute provides perspective in many ways, including the Supreme Court's concern that a broad interpretation of the statutory provision at issue would have meant that pattern and practice allegations brought against the immigration service could not have been effectively heard. As discussed in part IV, *infra*, § 1252(f)(1) raises similar concerns. Also, a ripeness issue that concerned the Supreme Court in construing the legalization statute also leads to a narrow interpretation of § 1252(f)(1).

Through IRCA, Congress created a program that allowed certain foreign nationals illegally present in the United States to legalize their immigration status.³⁵ The legalization program had two main components. The first component granted the opportunity to apply for permanent residence status³⁶ to foreign nationals who

³²8 U.S.C. § 1362 (“In any removal proceedings . . . the person concerned shall have the privilege of being represented, at no expense to the Government, by such counsel . . . as he shall choose.”).

³³See Neuman, *Federal Courts Issues in Immigration Law*, *supra* note 3, at 1680-81.

³⁴See *infra* notes 47-50. For example, in *Haitian Refugee Center v. Smith*, the district court was able to gather necessary information about the accelerated processing program effectively and efficiently by analyzing the program as a whole, beyond the treatment of a single applicant.

³⁵Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (1986). In January 2004, President George W. Bush initiated a policy discussion regarding the construction of a new temporary worker program with a legalization component. *Remarks by the President, President Bush Proposes New Temporary Worker Program* (January 7, 2004), available at www.whitehouse.gov/news/releases/2004/01/20040107-3.html. When framing any new legalization program, it is important to review the immigration service's implementation of the 1986 legalization program and also the subsequent legal challenges.

³⁶More commonly known as “green card” status, permanent residents are not citizens of the United States, but hold more privileges than other foreign nationals in the United States, including unrestricted employment authorization and potentially infinite permission to reside

had entered the United States before January 1, 1982 and who had illegally and continuously resided in the United States since that date.³⁷ The second component applied to foreign national agricultural workers who had resided in the United States for at least one year prior to May 1, 1986 and who had also performed at least 90 days of qualifying agricultural work during that same period.³⁸ Agricultural workers who qualified under the second component were deemed “special agricultural workers” (SAW) and also were permitted to apply for permanent residence.

Several class action lawsuits were filed challenging the immigration service’s administration of the 1986 legalization program.³⁹ In general, these lawsuits claimed that, in administering the legalization program, the immigration service excluded individuals from the program whom Congress intended to include. The stakes were high, as the difference between inclusion and exclusion was permission to reside legally in the United States.

The Supreme Court ultimately addressed whether federal district courts even had jurisdiction over the legalization class action complaints. *McNary v. Haitian Refugee Center, Inc.* and *Reno v. Catholic Social Services, Inc.*, both class actions, now provide the structure for determining whether a federal district court has jurisdiction over a challenge to the administration of the 1986 legalization program.

Under the general immigration judicial review statute that existed at the time of IRCA (the 1986 act), foreign nationals subject to deportation could obtain judicial review of a final deportation order only in the appropriate federal court of appeals, bypassing the district courts. Case law existed, however, that allowed district courts to hear certain claims deemed related yet collateral to a “final order” outside of the direct court of appeals review process.⁴⁰ Additionally, some courts of appeals had allowed district courts to hear challenges to immigration service practices even before the issuance of a final order.⁴¹

in the United States. For further discussion on the incidences of permanent resident status in the United States, see CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE* §§ 6.03, 6.05 (2004).

³⁷8 U.S.C. § 1255a(a)(2)(A).

³⁸8 U.S.C. § 1160(a)(1)(B).

³⁹*See, e.g.*, *Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. 43 (1993); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *Aparicio v. Blakeway*, 302 F.3d 437 (5th Cir. 2002); *Immigrant Assistance Project of the Los Angeles County Federation of Labor v. INS*, 306 F.3d 842 (9th Cir. 2002); *Ortiz v. Meissner*, 179 F.3d 718 (9th Cir. 1999); *Proyecto San Pablo v. INS*, 189 F.3d 1130 (9th Cir. 1999); *Abdullah v. INS*, 184 F.3d 158 (2d Cir. 1999); *Naranjo-Aguilera v. INS*, 30 F.3d 1106 (9th Cir. 1994); *Ayuda, Inc. v. Reno*, 7 F.3d 246 (D.C. Cir. 1993).

⁴⁰*See, e.g.*, *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968).

⁴¹*See, e.g.*, *National Ctr. for Immigrants’ Rights, Inc. v. INS*, 913 F.2d 1350, 1352 (9th Cir. 1990), *rev’d on other grounds*, 502 U.S. 183 (1991); *Jean v. Nelson*, 727 F.2d 957, 979-80 (11th Cir. 1984), *aff’d on other grounds*, 472 U.S. 846 (1985); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1033 (5th Cir. Unit B 1982). *But see* *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1336 (D.C. Cir. 1989), *vacated*, 498 U.S. 1117 (1991) (criticizing *Haitian Refugee Center v. Smith*). For further information on the pre-1996 immigration judicial review process, see Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385, 415-17 (2000) [hereinafter *Judicial Review in Immigration Cases After AADC*] (discussing the historic practice of allowing non-final

The jurisdictional debate surrounding the 1986 legalization statute stemmed from the identical special judicial review provisions applicable to both the long-term residence and SAW programs. The special provisions state that “[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status [to permanent resident] under this section [the legalization program] except in accordance with this subsection.”⁴² Additionally, the sections provide that review of a denial under either legalization program is available only “in the judicial review of an order of deportation,” and that “[s]uch judicial review shall be based solely upon the administrative record established at the time of the review by the appellate [administrative] authority.”⁴³

In *McNary*, the Supreme Court determined that the special judicial review provisions quoted above did not preclude federal district court jurisdiction “over an action alleging a pattern or practice of procedural due process violations by [the immigration service] in its administration of the SAW program.”⁴⁴

The *McNary* plaintiffs represented a class of foreign national agricultural workers “who either had been or would be injured by unlawful practices and policies adopted by [the immigration service] in its administration of the SAW program.”⁴⁵ Among other specific challenges, the plaintiff class claimed that the immigration service refused SAW applicants opportunities to challenge adverse evidence and to present witnesses, that the immigration service did not provide effective translators and that adequate transcripts of legalization interviews did not exist, thus inhibiting the effectiveness of administrative review. The government argued that the district court lacked jurisdiction over the class action complaint because the legalization special judicial review scheme allows for judicial review only to individuals after the conclusion of an individual hearing in a court of appeals.⁴⁶

order review of collateral matters). See also Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1431-34 (1997) [hereinafter *Back to the Future*]; Pauw, *supra* note 29, at 779-80.

⁴²8 U.S.C. § 1255a(f)(1) (long-term residence program); 8 U.S.C. § 1160(e)(1) (SAW program).

⁴³8 U.S.C. § 1255a(f)(4)(A)-(B); 8 U.S.C. § 1160(e)(3)(A)-(B) (the SAW provision reads “in the judicial review of an order of *exclusion or* [emphasis added] deportation;” the long-term residence equivalent does not mention “exclusion” but is otherwise the same).

⁴⁴*McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 483 (1991). Because applicants would face deportation if not for the legalization program, the legalization statute shielded applicants with a firewall prohibiting the use of information garnered in the application process to deport the applicant. 8 U.S.C. § 1255a(c)(5); 8 U.S.C. § 1160(b)(6). A decision to deny a legalization application could be administratively appealed to a legalization appeals unit. 8 U.S.C. § 1255a(f)(3); 8 U.S.C. § 1160(e)(2)(A). Because of the firewall, however, a legalization appeals unit denial did not automatically place an individual in deportation proceedings. This protection presented a Catch-22 to individuals who desired federal court review of a legalization appeals unit denial. As explained above, the legalization special review provision permitted judicial review of a decision of the legalization appeals unit “only in the judicial review of an order of deportation.” As explained by the Supreme Court, “absent initiation of a deportation proceeding against an unsuccessful applicant, judicial review of such individual determinations was completely foreclosed.” *McNary*, 498 U.S. at 486.

⁴⁵*McNary*, 498 U.S. at 487.

⁴⁶*Id.* at 491.

To the contrary, the Supreme Court held that the district court did have jurisdiction over the class action complaint. The Supreme Court interpreted the legalization judicial review scheme to apply only to “determination[s] respecting an application.” The Court determined that the *McNary* class was not challenging “a determination respecting an application,” but was instead making “general collateral challenges to unconstitutional practices and policies used by the agency in processing applications.”⁴⁷ Because of the nature of the challenge, the case fell outside the special legalization judicial review structure, and district court jurisdiction was appropriate.

The Court concluded that to deny district court review of pattern and practice collateral challenges would be the “practical equivalent of a total denial of judicial review of generic constitutional and statutory claims.”⁴⁸ Even if a foreign national were to subject himself or herself to a deportation proceeding, and then were to seek judicial review, the Court concluded that the reviewing court of appeals would be in a poor position to adjudicate constitutional pattern and practice claims based on the administrative record of an individual legalization application.⁴⁹ The Court acknowledged that a court of appeals would not have the fact-finding powers to determine whether a pattern of unlawful practice was occurring in the context of an individual case.⁵⁰ The Supreme Court also reasoned that if Congress had intended the legalization special judicial review provision to apply beyond appeal of individual determinations to pattern and practice litigation, Congress “could easily have used broader statutory language” to express that intent clearly.⁵¹

McNary became muddled, however, by the Supreme Court’s decision in *Reno v. Catholic Social Services*. Decided two and a half years after *McNary*, *Catholic Social Services* concerned the long-term illegal resident component of the 1986 legalization program. To be eligible for the program, Congress required that several conditions be met. The applicant must have entered the United States before January 1, 1982 and also must prove illegal continuous residence in the United States since at least that date.⁵² The applicant must also show continuous physical presence in the United States since November 6, 1986⁵³ and the foreign national must have also submitted a legalization application during a one-year application period.⁵⁴

⁴⁷*Id.* at 492.

⁴⁸*Id.* at 497.

⁴⁹*Id.*; see also *Tefel v. Reno*, 972 F. Supp. 608, 615 (S.D. Fla. 1997), *vacated on other grounds*, 180 F.3d 1286 (11th Cir. 1999) (following *McNary*, the court discussed the need for district court review of claims for which an adequate record is not created during the administrative process).

⁵⁰*McNary*, 498 U.S. at 497.

⁵¹*Id.* at 494. The Supreme Court provided an example of such broader language, stating that Congress could have worded the statute to block judicial review of “all causes” relating to the legalization program.

⁵²8 U.S.C. § 1255a(a)(2)(A).

⁵³8 U.S.C. § 1255a(a)(3)(A).

⁵⁴8 U.S.C. § 1255a(a)(1)(A).

The legalization statute elaborates that “brief, casual, and innocent” absences are permissible under the continuous physical presence requirement.⁵⁵ The immigration service, however, regulated that such brief, casual and innocent absences would bar the establishment of continuous physical presence if the individual had not obtained travel permission from the immigration service prior to travel.⁵⁶ Regarding the illegal continuous residence requirement, the immigration service regulated that that requirement would not be satisfied if a foreign national had left the United States and re-entered with “facially valid” documentation, despite the statute allowing for brief trips abroad.⁵⁷ To complicate matters further, the immigration service reversed its interpretation of the illegal continuous residence requirement seven months into the one-year application period.⁵⁸ In both lawsuits that were consolidated into *Catholic Social Services*, a district court judge invalidated the immigration service’s interpretation of the statutory terms and extended the one-year filing period to allow for applications by those discouraged by the immigration service’s interpretations of the statutory terms at issue.

On appeal, the government argued that the district court did not have jurisdiction due to the legalization program’s special judicial review scheme. According to the government, the immigration service’s interpretations of the illegal continuous residence and continuous physical presence requirements amounted to “determinations respecting an application” and were thus reviewable only during an individual hearing. In response to this argument, the Supreme Court reemphasized that the statutory phrase “a determination” refers to “a single act rather than a group of decisions or a practice or procedure employed in making decisions.”⁵⁹ In this sense, the Court reaffirmed *McNary* by reiterating that the special legalization judicial review provision does not bar district court review of collateral pattern and practice challenges, including actions challenging a regulation.⁶⁰

From there, however, the Supreme Court’s decision in *Catholic Social Services* diverges from *McNary*. The Supreme Court held that while the legalization statute itself would not serve as a jurisdictional bar, the *Catholic Social Services* classes could not meet the ripeness justiciability standard required of all those seeking federal court review. The Court determined that the immigration service’s publication of its illegal continuous residence and continuous physical presence interpretations alone did not create a ripe claim. The Court explained that the “claim would ripen only once [an applicant] took the affirmative steps that he could take before the [immigration service] blocked his path by applying the regulation to him.”⁶¹ Without those first affirmative steps, the Court reasoned, “one cannot know whether the challenged regulation actually makes a concrete difference to a

⁵⁵8 U.S.C. § 1255a(a)(3)(B).

⁵⁶*Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. 43, 47 (1993) (citing 8 C.F.R. § 245a.1(g)).

⁵⁷*Id.* at 50; 8 U.S.C. § 1255a(g)(2)(A).

⁵⁸*Catholic Soc. Serv., Inc.*, 509 U.S. at 50-51.

⁵⁹*Id.* at 55-56.

⁶⁰*Id.* at 56.

⁶¹*Id.* at 59.

particular alien until one knows that he will take those affirmative steps and will satisfy the other conditions.”⁶²

The Court, however, elaborated that if a challenged regulatory interpretation is applied detrimentally to an applicant and the applicant asserts his or her ripe claim, the applicant would be challenging “a determination.” Thus, the special judicial review provision is triggered and district court review is precluded. The Court explained that “Congress may well have assumed that, in the ordinary case, the courts would not hear a challenge to regulations specifying limits to eligibility before those regulations were actually applied to an individual, whose challenge to the denial of an individual application would proceed within the Reform Act’s limited scheme.”⁶³ The *Catholic Social Services* class is different from the *McNary* class, the Court reasoned, because a *Catholic Social Services* class member could challenge the immigration service’s interpretation of the statutory terms in an individual deportation hearing, while a *McNary* class member could not adequately present his or her pattern or practice challenge in the context of an individual hearing.⁶⁴

The Supreme Court left open the possibility of district court review, however, for *Catholic Social Services* class members subject to an alleged “front-desking” policy. The immigration service instructed front desk clerks to review legalization applications in the presence of the applicant. If the clerk determined based on a facial review that the applicant was ineligible under the legalization statute, the instructions directed the clerk to refuse the application for filing and return it immediately to the applicant.⁶⁵ Applicants subjected to this “front-desking” procedure held ripe claims because these applicants would have felt the application of the challenged regulations “in a particularly concrete manner.”⁶⁶ The “front-desked” applicant would also face a *McNary*-like deprivation of judicial review, according to the Court. Because “front-desking” amounted only to an informal denial, the applicant could not file an administrative appeal.⁶⁷ Therefore, the Court reasoned, blocking district court review of applications refused at the front desk would leave those applicants effectively with no meaningful review.⁶⁸

Lower courts, in applying *McNary* and *Catholic Social Services*, have found significant whether review would be available if it is not permitted in a district court

⁶²*Id.* at 59 n.20.

⁶³*Id.* at 60.

⁶⁴*Id.* at 60-61.

⁶⁵*Id.* at 61-62.

⁶⁶*Id.* at 63-64.

⁶⁷*Id.* at 64.

⁶⁸*Id.* Section 377 of IIRIRA (the 1996 act) limited jurisdiction of claims brought under the 1986 legalization act to those brought by individuals who had actually filed or had attempted to file applications, leaving those who had not even attempted to file applications (discouraged by stories of those subjected to “front-desking”) outside of the circle of jurisdiction. The Legal Immigration Family Equity Act (LIFE Act) of 2000, however, repealed this aspect of IIRIRA with regard to certain legalization class members. Pub. L. No. 106-553 § 1104 (2000) (Title XI).

in a class action format.⁶⁹ In the legalization context, lower courts have emphasized the distinction between review of a challenge to “a determination” and review of a challenge to a widely employed practice or procedure.⁷⁰

The special judicial review provisions of the legalization program represented a big challenge to the availability of class-wide relief in the immigration context. Both *McNary* and *Catholic Social Services* are important lessons in the Supreme Court’s review of immigration statutes potentially limiting the form of a federal court action under the specter of constitutional concerns. *McNary* and *Catholic Social Services*, however, concern “special” judicial review statutes that were aberrations from the norm. As explained above, at the time of *McNary*, courts had held that the “regular” judicial review scheme underlying the “special” judicial review scheme of the legalization program allowed for pattern and practice class action challenges in a district court before the issuance of an administrative final order. IIRIRA, the 1996 law, presents an even bigger issue, because IIRIRA fundamentally changed the underlying review scheme. IIRIRA raises the question whether the “regular” system still allows for class-wide injunctive relief in the immigration context. Before the connections between the legalization cases and § 1252(f)(1) can be explained, it is necessary to first engage in a brief review of the major review-limiting provisions of IIRIRA.

III. MAJOR REVIEW-LIMITING PROVISIONS OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

As described by many commentators, IIRIRA drastically remodeled the Immigration and Nationality Act.⁷¹ A major theme of IIRIRA is the curtailment of court review of administrative action in enforcing the immigration laws. IIRIRA transformed the Immigration and Nationality Act by deleting the existing review provisions and adding § 1252, “Judicial review of orders of removal.” Because IIRIRA is so complex and its review-limiting provisions are interrelated, it is

⁶⁹See, e.g., *Yi v. Murgans*, 24 F.3d 500, 505 (3d Cir. 1994) (affirming denial of class certification, among other reasons, where denial “would not foreclose all forms of meaningful judicial review”).

⁷⁰For example, the Ninth Circuit deduced two guiding principles from *McNary* and *Catholic Social Services*. The first principle is that a district court can review a legalization procedure or practice of the immigration service, collateral to substantive adjudication, provided that the claim is ripe. The second is that challenges to the immigration service’s interpretation or application of substantive criteria may only occur within the confines of the legalization program’s special judicial review structure (only during review of a final order of deportation). *Proyecto San Pablo v. INS*, 189 F.3d 1130, 1137 (9th Cir. 1999) (citing *Ortiz v. Meissner*, 179 F.3d 718, 720-23 (9th Cir. 1999)). For other lower court decisions applying *McNary* and *Catholic Social Services*, see, for example, *Aparicio v. Blakeway*, 302 F.3d 437 (5th Cir. 2002); *Immigrant Assistance Project of the Los Angeles County Federation of Labor v. INS*, 306 F.3d 842 (9th Cir. 2002); *Abdullah v. INS*, 184 F.3d 158 (2d Cir. 1999); *Naranjo-Aguilera v. INS*, 30 F.3d 1106 (9th Cir. 1994); *Ayuda, Inc. v. Reno*, 7 F.3d 246 (D.C. Cir. 1993).

⁷¹See, e.g., Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998); Benson, *Back to the Future*, *supra* note 41; Lucas Guttentag, *The Immigration Act: Federal Court Jurisdiction-Statutory Restrictions and Constitutional Rights*, 1209 PLI/CORP. 81 (2000).

necessary to describe IIRIRA's major restrictions and the Supreme Court's treatment of these restrictions so far before any discussion of a specific provision of IIRIRA.

Section 1252 carves out a wide selection of substantive matters not subject to judicial review. These matters include a decision to execute expedited removal⁷² against a foreign national,⁷³ certain decisions involving discretionary acts of government officials⁷⁴ and decisions to remove foreign nationals convicted of committing certain crimes.⁷⁵ A further substantive restriction on review contained in IIRIRA, § 1252(g), provides as follows:

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

In addition to substantive restrictions, § 1252 contains a timing restriction. Section 1252(b)(9), entitled "Consolidation of questions for judicial review," states:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the

⁷²Expedited removal is a concept added to the Immigration and Nationality Act by IIRIRA. Expedited removal permits border officers to enforce the immediate removal of certain individuals without a formal hearing. If a border officer determines that a foreign national is inadmissible into the United States due to fraud or due to a lack of appropriate documentation, the officer can order the removal of the individual "without further hearing or review." 8 U.S.C. § 1225(b)(1)(A)(i). The border officer cannot order expedited removal, however, if the individual expresses intent to apply for asylum or expresses fear of persecution and the individual passes a credible fear of persecution interview. 8 U.S.C. § 1225(b)(1)(A)(i); 8 U.S.C. § 1225(b)(1)(B)(i)-(iii). The applicant may seek administrative review of an adverse credible fear determination, but the individual may be detained while awaiting this administrative review. 8 U.S.C. § 1225(b)(1)(B)(iii)(III)-(IV). For more information about the expedited removal process, see GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, *supra* note 36, at § 64.06.

⁷³8 U.S.C. § 1252(e).

⁷⁴According to IIRIRA, "no court shall have jurisdiction to review" any decision whether to grant certain relief from removal, any decision whether to grant cancellation of removal, any decision whether to grant voluntary departure, or any decision whether to adjust an individual's status to legal permanent residence. 8 U.S.C. § 1252(a)(2)(B)(i). Additionally, IIRIRA prevents judicial review of "any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General other than the granting of relief under section 1158(a) of this title." 8 U.S.C. § 1252(a)(2)(B)(ii). Section 1158(a) refers to a decision whether to grant asylum.

⁷⁵IIRIRA prohibits judicial review of a final removal order based on the commission of a crime of moral turpitude, an aggravated felony, or a controlled substance crime, among other crimes. 8 U.S.C. § 1252(a)(2)(C). For further information on the criminal bases for removal, including what constitutes a crime of moral turpitude and an aggravated felony, see GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, *supra* note 36, at §§ 63.03, 71.05.

United States under this subchapter shall be available only in judicial review of a final order under this section.⁷⁶

There are two form-restricting provisions in § 1252 that may affect the use of multi-party litigation. Regarding expedited removal, IIRIRA provides that “no court may – certify a class under Rule 23 of the Federal Rules of Civil Procedure” in any of the narrow instances where the statute permits judicial review of expedited removal issues.⁷⁷ The second form-restricting provision, 8 U.S.C. § 1252(f)(1), falls under § 1252(f), which is entitled “Limit on injunctive relief.” Section 1252(f)(1) reads:

(1) In general.

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter,⁷⁸ as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

Over eight years since the passage of IIRIRA, federal courts still are debating the meaning and effect of many of its review-limiting provisions. The Supreme Court has addressed directly two major review-limiting issues, but the Court has not yet addressed directly the effect of the timing provision (§ 1252(b)(9)) or the form-limiting § 1252(f)(1).

The Supreme Court first considered § 1252(g). In *Reno v. American-Arab Anti-Discrimination Committee*,⁷⁹ a group of Palestinians brought a selective prosecution

⁷⁶This provision is reminiscent of the “special” judicial review provision in *McNary* and also implicates the use of pattern and practice litigation. In fact, Professor Motomura has compared *McNary* to § 1252(b)(9). Motomura, *Judicial Review in Immigration Cases After AADC*, *supra* note 41, at 434-38. He argues that the reasoning of *McNary* survives § 1252(b)(9) and that § 1252(b)(9) should be construed narrowly to allow for district court jurisdiction over pre-final order pattern and practice litigation. *Id.* at 434-38. A further potential challenge to pattern and practice litigation is § 1252(d), which requires exhaustion of administrative remedies before a court may review a “final order” of removal. Professor Motomura argues that the exhaustion requirement should not apply to pattern and practice litigation because such matters are independent from a “final order” of removal. *Id.* at 440-41.

⁷⁷8 U.S.C. § 1252(e)(1)(B). IIRIRA provides for extremely limited habeas corpus review of expedited removal decisions; also it allowed for judicial review of the constitutionality of the expedited removal program only in the District Court for the District of Columbia and only if the lawsuit challenging the program was filed no later than 60 days after the program was first implemented. 8 U.S.C. § 1252(e)(2)-(3).

⁷⁸“Part IV of this subchapter” refers to the part entitled “Inspection, Apprehension, Examination, Exclusion, and Removal” and is comprised of 8 U.S.C. §§ 1221-1231.

⁷⁹525 U.S. 471 (1999). For in-depth discussion of this litigation and issues raised in this case, see, for example, David Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of Reno v. AADC*, 14 GEO. IMMIGR. L.J. 363 (2000); Motomura, *Judicial Review in Immigration Cases After AADC*, *supra* note 41, at 393-95;

claim against the immigration service. The Court adopted a narrow interpretation of § 1252(g), determining that it restricts review of only three discrete actions, the decision or action to (1) commence proceedings; (2) adjudicate cases; or (3) execute removal orders.⁸⁰ Rejecting the immigration service's argument that § 1252(g) applies to "the universe of deportation claims," the Court explained that § 1252(g) would bar only a pre-final order⁸¹ challenge to the immigration service's exercise of discretion with respect to the three discrete acts mentioned in the statute.⁸² The Court determined that federal courts lack pre-final order jurisdiction over selective prosecution claims as the claim involves the discrete act whether to commence proceedings.⁸³

In 2001, the Supreme Court addressed whether IIRIRA's review-limiting provisions foreclosed habeas corpus actions in the federal district courts. *INS v. St. Cyr*⁸⁴ concerned a habeas petition challenging the retroactive application of IIRIRA's elimination of a type of deportation waiver. Mr. St. Cyr pled guilty to a deportable crime before IIRIRA's enactment, during the existence of a waiver that could have allowed him to remain in the United States despite his plea. IIRIRA eliminated the waiver for which Mr. St. Cyr could have been eligible.⁸⁵

The immigration service argued in *St. Cyr* that no federal court had jurisdiction to consider Mr. St. Cyr's claim that the pre-IIRIRA waiver should apply to him. The Supreme Court concluded that if it accepted the immigration service's argument, individuals like Mr. St. Cyr would be left without any judicial forum to bring challenges consisting of pure questions of law. The Court determined that "the absence of such a forum, coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions."⁸⁶ Emphasizing the historical difference between judicial review and habeas corpus review of immigration

Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment after Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313 (2000). For discussion of the role of this Supreme Court decision in the ongoing debate over congressional control of federal court jurisdiction, see Anderson, *Congressional Control*, *supra* note 2, at 436-37.

⁸⁰*American-Arab*, 525 U.S. at 482.

⁸¹*Id.* at 483. Section 1252(g) prevents review of those three acts "[e]xcept as provided in this section." Theoretically, if a foreign national is eligible for judicial review under § 1252, a court would have jurisdiction over a claim challenging any of the three acts mentioned in § 1252(g) when reviewing a final order pursuant to § 1252. The plaintiffs in *American-Arab* were seeking pre-final order review in a district court.

⁸²*American-Arab*, 525 U.S. at 482.

⁸³*Id.* at 487. The Court determined that the doctrine of constitutional doubt played no role in the case before it because "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.* at 488.

⁸⁴533 U.S. 289 (2001).

⁸⁵*Id.* at 292-93.

⁸⁶*Id.* at 314.

administrative actions,⁸⁷ the Court concluded that no part of IIRIRA “speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute.”⁸⁸ “At no point . . . does IIRIRA make express reference to § 2241.”⁸⁹ Therefore, the Court concluded that habeas jurisdiction survived IIRIRA.⁹⁰

The Supreme Court has yet to address directly the meaning and effect of § 1252(f)(1), but commentators (including the Supreme Court in dicta) have described this section as a limitation on the issuance of class-wide injunctions.⁹¹ The following part will analyze the statutory text of § 1252(f)(1) and, using *McNary* and *Catholic Social Services* as guides, attempt to parse out its effect.

IV. DECIPHERING 8 U.S.C. § 1252(f)(1)

While the Supreme Court has yet to interpret § 1252(f)(1) directly, the Court gave brief mention to the entire § 1252(f) in *American-Arab*. In that case, the Court

⁸⁷The Court explained that judicial review and habeas review are two distinct, co-existing concepts in immigration law. *Id.* at 311-13. Originally, a habeas petition was the sole method to seek federal court review of administrative immigration decisions. In 1961, Congress enacted a judicial review statute that supplemented the existing habeas review with a petition for review process calling for a petition to be filed directly in the appropriate court of appeals. See Motomura, *Judicial Review in Immigration Cases After AADC*, *supra* note 41, at 395-96. While IIRIRA revamped “judicial review” of immigration administrative actions, the Court concluded that the provisions of IIRIRA at issue in *St. Cyr* did not also revamp “habeas review.” *St. Cyr*, 533 U.S. at 313-14.

⁸⁸*St. Cyr*, 533 U.S. at 313.

⁸⁹*Id.* at 312 n.36. In his dissent, Justice Scalia argued that:

[T]he Court today finds ambiguity in the utterly clear language of a statute that forbids the district court (and all other courts) to entertain the claims of aliens such as respondent *St. Cyr*, who have been found deportable by reason of their criminal acts. It fabricates a superclear statement, ‘magic words’ requirement for the congressional expression of such an intent, unjustified in law and unparalleled in any other area of our jurisprudence.

Id. at 326-27 (Scalia, J., dissenting).

⁹⁰*Id.* at 312-14. For further discussion of *St. Cyr* and its underlying issues, see, for example, Lee Gelernt, *The 1996 Immigration Legislation and the Assault on the Courts*, 67 BROOK. L. REV. 455 (2001); Daniel Kanstroom, *St. Cyr or Insincere? The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413 (2002); David A. Martin, *Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of St. Cyr and Nguyen*, 16 GEO. IMMIGR. L.J. 313 (2002); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000).

⁹¹*Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999); *Hor v. Gonzales*, 400 F.3d 482, 483 (7th Cir. 2005) (stating in dicta that “[s]ubsection (f)(1) forbids injunctive class actions”); Benson, *Back to the Future*, *supra* note 41, at 1454; Nancy Morawetz, *Predicting the Meaning of INA § 242(b)(9)*, 14 GEO. IMMIGR. L.J. 453, 454 (2000); Motomura, *Judicial Review in Immigration Cases After AADC*, *supra* note 41, at 438; Neuman, *Federal Courts Issues in Immigration Law*, *supra* note 3, at 1679-80; Volpp, *Court-Stripping and Class-Wide Relief*, *supra* note 29, at 468. See also Mitria Wilson, Note, *Rights Without Remedies and Judgments Without Effect: The Relationship Between § 1252(f)(1) of the Immigration and Nationality Act, Class Actions, and Standing Under Article III of the Constitution*, 18 GEO. IMMIGR. L.J. 745, 752-3 (2004) [hereinafter *Rights Without Remedies*].

rejected the Court of Appeals for the Ninth Circuit's determination that § 1252(f) contains an independent, affirmative grant of jurisdiction. The Court stated:

Even respondents scarcely try to defend the Ninth Circuit's reading of § 1252(f) as a jurisdictional grant. By its plain terms, and even by its title, that provision is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases. To find in this an affirmative grant of jurisdiction is to go beyond what the language will bear.⁹²

But what, exactly, is the effect of § 1252(f)(1)? Does it indeed prohibit "federal courts from granting class-wide injunctive relief against the operation of §§ 1221-1231?" If so, what does it mean to prohibit class-wide injunctive relief "against the operation of" those statutory provisions? To answer these questions, this article will conduct a textual review of the statute itself first, then incorporate the lessons of *McNary* and *Catholic Social Services* and finally will discuss the role of the serious constitutional problem in deciphering § 1252(f)(1). It will be helpful here to review the exact language of § 1252(f)(1):

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.⁹³

A. Textual Review

The text of § 1252(f)(1) does not make obvious what the section bars. A closer intrinsic review of the text of the statutory section alone may cause the Supreme Court to backtrack from the simplicity of its dicta in *American-Arab* that the section "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231 . . ."⁹⁴ To be sure, the title of § 1252(f) ("Limit on injunctive relief") suggests some sort of limit on injunctive relief, but under what circumstances is not clear.⁹⁵

⁹²*American-Arab*, 525 U.S. at 481-82 (Scalia, J.).

⁹³8 U.S.C. § 1252(f)(1). The immigration service has not issued any regulations interpreting § 1252(f)(1).

⁹⁴525 U.S. at 481.

⁹⁵The general title of § 1252 ("Judicial review of orders of removal") only adds further uncertainty. Courts have considered whether § 1252 as a whole applies only in the context of removal proceedings, or whether its provisions also apply to review of immigration service actions that are not a part of removal proceedings. The immigration service performs many functions that do not necessarily involve the institution of removal proceedings, including the administration of benefit programs (such as adjudicating asylum applications, applications for permanent residency and applications for temporary visas). Whether § 1252 applies to review

The text of § 1252(f)(1) is self-limiting in several ways. Remember, the section states that “no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter.” The meaning of this phrase is critical in determining the scope of § 1252(f)(1). Just as “a determination” was a critical term in *McNary*, § 1252(f)(1) has its own critical terms.

For example, “operation of” is a critical term in § 1252(f)(1). What does it mean to enjoin or restrain the “operation of” the specified statutes? This issue has already received some attention. Courts have determined that to give effect to the inclusion of the term “operation of,” § 1252(f)(1) should be interpreted to mean that no court may issue class-wide injunctive relief eliminating the total function of a statute, but that a court may issue class-wide injunctive relief to remedy the way in which the immigration service is causing a statute to function.⁹⁶ In other words, to enjoin the “operation of” a statute is to foreclose completely its application in any instance, an entirely different concept than issuing an injunction preventing the immigration service from implementing a statute in an impermissible manner.⁹⁷

For example, a foreign national sought to amend his complaint to create a class action challenging the immigration service’s detention practices. The class action complaint requested injunctive relief. The district court held that § 1252(f)(1) did not affect the class action complaint because the complaint did not seek an injunction against the operation of the applicable sections, but rather sought “to enjoin alleged constitutional violations by [the immigration service] in its administration of [the statute] and/or its own regulations.”⁹⁸

Similarly, in a case that arose prior to the effective date of § 1252(f)(1), a district court speculated that § 1252(f)(1) does not apply to a situation where a class seeks to “enjoin constitutional violations and policies and practices.”⁹⁹ The court recognized

of these types of administrative actions is unsettled. *See, e.g., Spencer Enter., Inc. v. United States*, 345 F.3d 683, 692 (9th Cir. 2003) (discussing but declining to reach the issue of whether § 1252(a)(2)(B)(ii) applies outside the context of removal proceedings); *Samirah v. O’Connell*, 335 F.3d 545, 549 (7th Cir. 2003), *cert. denied sub nom.*, *Samirah v. Ashcroft*, 124 S. Ct. 2811 (2004) (concluding that § 1252(a)(2)(B)(ii) applies beyond review of orders of removal); *CDI Info. Servs., Inc. v. Reno*, 278 F.3d 616, 618-20 (6th Cir. 2002) (same); *Van Dinh v. Reno*, 197 F.3d 427, 432 (10th Cir. 1999) (same). For an example of a congressional effort to clarify the reach of § 1252, see H.R. 418, 109th Cong. (2005).

⁹⁶*See Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003), *overruled on other grounds*, *Jama v. Immigration and Customs Enforcement*, 125 S. Ct. 694 (2005); *Grimaldo v. Reno*, 187 F.R.D. 643, 648 (D. Colo. 1999). For a brief mention of the term “operation of” by the Supreme Court in the context of the Tax Injunction Act, 28 U.S.C. § 1341, see *Hibbs v. Winn*, 124 S. Ct. 2276, 2288 n.7 (2004).

⁹⁷Professors Motomura, Neuman and Volpp have also discussed this concept. *See Judicial Review in Immigration Cases After AADC*, *supra* note 41, at 439; *Federal Courts Issues in Immigration Law*, *supra* note 3, at 1682-83; *Court-Stripping and Class-Wide Relief*, *supra* note 29, at 473.

⁹⁸*Grimaldo*, 187 F.R.D. at 648.

⁹⁹*Tefel v. Reno*, 972 F. Supp. 608, 618 (S.D. Fla. 1997), *vacated on other grounds*, 180 F.3d 1286 (11th Cir. 1999).

a distinction between an injunction preventing the operation of a statute and an injunction ordering implementation of a statute “under the appropriate standard.”¹⁰⁰

The Ninth Circuit affirmed this approach in *Ali v. Ashcroft*, a case founded on a class action habeas petition seeking to enjoin the government from enforcing removal to Somalia because that country has no functioning central government.¹⁰¹ The Ninth Circuit upheld the district court’s determination that § 1252(f)(1) does not apply to class actions challenging the manner in which a statute is implemented. Giving effect to the use of the term “operation of,” the Ninth Circuit explained that § 1252(f)(1) “limits the district court’s authority to enjoin [the immigration service] from carrying out legitimate removal orders. Where, however, a petitioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated.”¹⁰²

The Court of Appeals for the District of Columbia lent support to this interpretation of § 1252(f)(1). The Court stated, “[o]ne cannot come away from reading this section [section 1252] without having the distinct impression that Congress meant to allow litigation challenging *the new system* by, and only by, aliens against whom the new procedures had been applied.”¹⁰³ Thus, challenges to the new system fall under § 1252(f)(1), but those challenges do not necessarily include challenges to the way the immigration service is implementing the new system.

The legislative history also supports the argument that “operation of” signifies that Congress meant only to block injunctive relief halting the functioning of the new system. The House Committee Report for the House of Representatives version of IIRIRA, which contains an identical version to what became § 1252(f)(1), states that the purpose of § 1252(f) is to prevent federal courts, other than the Supreme Court, from:

[E]njoin[ing] the operation of the new removal procedures established in this legislation. *These limitations do not preclude challenges to the new procedures, but the procedures will remain in force while such lawsuits are pending.* In addition, courts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights. However, single district courts or courts of appeal do

¹⁰⁰*Id.*

¹⁰¹*Ali*, 346 F.3d at 877. The Immigration and Nationality Act governs to which countries a foreign national may be removed. 8 U.S.C. § 1231(b)(2)(E). The Supreme Court determined ultimately that the Act does not prevent the government from removing a foreign national without obtaining advance consent, thus rejecting the substantive claim of this class action. *See Jama v. Immigration and Customs Enforcement*, 125 S. Ct. 694 (2005).

¹⁰²*Ali*, 346 F.3d at 886.

¹⁰³*American Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1359-60 (D.C. Cir. 2000) (emphasis added). In *American Immigration Lawyers*, the court held that organizational plaintiffs did not have standing to bring statutory or constitutional claims challenging IIRIRA’s expedited removal program. The court concluded that Congress “contemplated that lawsuits challenging its enactment would be brought, if it all, by individual aliens who—during the sixty-day period—were aggrieved by the statute’s implementation.” *Id.* at 1359.

not have authority to enjoin *procedures established by Congress* to reform the process of removing illegal aliens from the U.S.¹⁰⁴

This statement evidences the House Committee's concern that injunctions would bring the entire new system to a grinding halt. This is a different issue from whether the immigration service is implementing the system consistent with the statute and the Constitution.

Thus, giving effect to the term "operation of" leads to an interpretation where courts may not issue injunctive relief challenging the legality of the whole system of review created by IIRIRA, but may issue injunctive relief preventing the immigration service from administering the system in an inappropriate manner.

Section 1252(f)(1) is also self-limiting in that only the "operation of" *part IV* is implicated. Part IV is entitled "Inspection, Apprehension, Examination, Exclusion, and Removal," and encompasses §§ 1221 - 1231. This part contains many important provisions, including provisions governing expedited removal, arrest of foreign nationals, release pursuant to bond, detention of foreign nationals, determinations as to who is removable from the United States, the procedures to be employed during removal proceedings, cancellation of removal,¹⁰⁵ voluntary departure¹⁰⁶ and the procedures to be employed in actually removing foreign nationals from the United States (including detention pending removal). There are many important administrative functions authorized by statutes residing outside of part IV, however. If a case involves a function authorized outside of part IV, § 1252(f)(1) should not apply. In fact, plaintiffs continue to bring class actions challenging how the immigration service is administering portions of the Immigration and Nationality Act housed outside of part IV.¹⁰⁷

At times, the line between part IV and other parts is blurred, as there are cases that involve interrelated actions authorized under and outside of part IV.¹⁰⁸ This raises the issue of when a court is restraining or enjoining the operation of part IV to

¹⁰⁴H.R. REP. NO. 104-469 (I) at 161 (1996) (emphasis added).

¹⁰⁵Cancellation of removal allows for quashing of removal in very narrow circumstances. See GORDON ET AL., IMMIGRATION LAW & PROCEDURE, *supra* note 36, at § 64.04.

¹⁰⁶Voluntary departure is a procedure through which an immigration judge allows a foreign national to depart voluntarily from the United States during a specified time frame in lieu of formal removal. See *id.* at § 64.05.

¹⁰⁷See, e.g., Ngwanyia v. Ashcroft, 302 F. Supp. 2d 1076 (D. Minn. 2004) (granting, without addressing § 1252(f)(1), partial summary judgment to class challenging immigration service procedures in adjudicating permanent residence applications of those granted asylum and challenging the procedures used in issuing documentation of work authorization to those granted asylum).

¹⁰⁸For example, the Court of Appeals for the Third Circuit recently noted that § 1252(a)(2)(C) (which bars judicial review of orders against foreign nationals based on the commission of certain crimes), would bar review of the asylum application of a foreign national subject to removal under that section, despite that § 1252 generally permits judicial review of asylum determinations. In other words, the Third Circuit determined that the bar against judicial review of removal orders based on criminal conduct trumps the normal availability of judicial review of asylum determinations. Bakhtriger v. Elwood, 360 F.3d 414, 419 n.4 (3d Cir. 2004).

trigger the limitations of § 1252(f)(1). For example, the asylum benefit is authorized under part I. It is possible, however, to seek asylum during a removal proceeding governed by part IV. Similarly, adjustment of status to legal permanent resident is covered in part V, but a foreign national may seek adjustment of status during a part IV removal proceeding in certain circumstances.¹⁰⁹

The statute's specific reference to part IV, instead of referring to the entire subchapter or the entire Immigration and Nationality Act, counteracts an interpretation that § 1252(f)(1) is triggered any time part IV is implicated.¹¹⁰ Courts have implemented this reasoning. For example, a class of individuals illegally residing in the United States who prematurely had filed adjustment of status applications sought to prevent the immigration service from using information in those applications to remove them from the United States. The district court held that § 1252(f)(1) would not prevent the issuance of injunctive relief because the statute's "own terms" restricted its scope to part IV.¹¹¹ The court interpreted the class claim before it as addressing the proper procedure for handling a prematurely filed application for adjustment of status, and concluded that those procedures are not found in part IV. Similarly, the Ninth Circuit, sitting en banc, held that § 1252(f)(1) did not preclude a preliminary injunction issued under a part other than part IV.¹¹²

An intrinsic textual analysis of § 1252(f)(1) reasonably can lead to the conclusion that the statute does not block injunctions ordering the immigration service to implement the immigration laws in a permissible manner, and also that the restrictions of § 1252(f)(1), whatever they may be, only apply to the actions specified in part IV, and not to those actions that may interact with part IV. Returning to the class-wide injunction issued in *Haitian Refugee Center v. Smith* (the asylum accelerated processing program case), if a court were to adopt this interpretation of § 1252(f)(1), had § 1252(f)(1) existed at the time, it would not have affected the class-wide injunction issued in that case. First, the injunction in *Haitian Refugee Center v. Smith* did not enjoin or restrain the "operation of" a statute, rather it

¹⁰⁹See, e.g., *Padilla v. Ridge*, No. M-03-126 (S.D. Tex. March 31, 2004) (Order certifying class of foreign nationals challenging the immigration service's practices in providing documentation of permanent resident status granted in removal proceedings).

¹¹⁰Section 1252(f)(1) contrasts with other sections of IIRIRA that do not restrict their reach to only one part of the Immigration and Nationality Act. For example, § 1252(a)(2)(B)(ii) removes federal court jurisdiction over acts "the authority for which is specified *under this subchapter* to be in the discretion of the Attorney General . . ." (emphasis added).

¹¹¹*Ramos v. Ashcroft*, No. 02-C-8266, 2004 WL 161520 at *6 (N.D. Ill. Jan. 16, 2004); see also *North Jersey Media Group, Inc., v. Ashcroft*, 205 F. Supp. 2d 288, 295 (D.N.J. 2002), *rev'd on other grounds*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003) (discussing that § 1252(f)(1) does not prohibit injunctions dealing with actions collateral to part IV); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 948, 955 (E.D. Mich. 2002), *aff'd on other grounds*, 303 F.3d 681 (6th Cir. 2002) (same).

¹¹²*Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1149-50 (9th Cir. 2000) (en banc). This is the same *Catholic Social Services* class described *supra* notes 56 to 68. The original panel had held that the injunction ultimately interfered with actions related to part IV, and therefore § 1252(f)(1) barred injunctive relief. *Catholic Soc. Serv., Inc. v. INS*, 182 F.3d 1053, 1061-62 (9th Cir. 1999), *rev'd en banc*, 232 F.3d 1139 (9th Cir. 2000).

affected how the immigration service implemented a statute. Second, the injunction affected asylum procedures authorized outside of part IV, even though some of the asylum procedures took place during a part IV removal hearing.

B. Textual Review and the Connection to the Legalization Cases

The legalization cases are external sources that help to decipher the text of § 1252(f)(1). As explained above, the textual significance of the term “operation of” in § 1252(f)(1) is reminiscent of the textual significance of “a determination” in *McNary*. Also, the distinction between injunctions that foreclose the operation of a statute and injunctions that remedy the unlawful administration of a statute is analogous to the procedural/substantive distinction emphasized by lower courts in applying *McNary* and *Catholic Social Services*.¹¹³ Perhaps, however, the connection between § 1252(f)(1) and *McNary* and *Catholic Social Services* is more significant than analogy.

An intrinsic analysis of § 1252(f)(1) does not reveal any textual mention of class actions or Federal Rule of Civil Procedure 23. It seems the assumption that § 1252(f)(1) limits injunctive relief to individual actions only stems from a particular reading of the last phrase of § 1252(f)(1), which this article has not discussed yet. That last phrase reads “other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.” The reading that presumably leads to the conclusion that § 1252(f)(1) prohibits certain class-wide injunctions is that the use of the word “individual” means that no court may enjoin or restrain the operation of part IV except in the context of an individual action. But that is not the only possible reading of the section. *Catholic Social Services* reminds us that a major issue in the legalization class action litigation was whether individuals deterred by the immigration service’s regulations could seek review, despite that the challenged regulation was never specifically applied to them. The Supreme Court held in *Catholic Social Services* that individuals must feel the application of an immigration statute or regulation in some concrete way before that individual has standing to seek review. Looking through the lens of *Catholic Social Services*, it is interesting to look again at § 1252(f)(1).

Again, the relevant last phrase states that no court may enjoin or restrain “other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.” Could the aim of § 1252(f)(1) simply be to thwart the ripeness issue of *Catholic Social Services*? Perhaps § 1252(f)(1) can be satisfied, and a class-wide injunction may issue, as long as the class is comprised of individuals actually subjected to the application of a provision of part IV during removal proceedings.¹¹⁴ In other words, perhaps the

¹¹³Lower courts have recognized a distinction between challenges to the policies and procedures the immigration service used to administer the legalization program versus challenges to substantive determinations under the statute. See *supra* note 70.

¹¹⁴The language of this last phrase of § 1252(f)(1) restricting the issuance of injunctive relief unless proceedings have already been initiated makes sense in this context. This language describes the kinds of individuals who may obtain injunctive relief -- those “against whom proceedings under such part have been initiated.” This language also serves to emphasize that part IV is the only concern of the section, see *supra* notes 105-112, as the section limits injunctive relief to an individual alien in removal proceedings.

statute does not limit injunctive relief to *individual actions*, but rather aims to limit injunctive relief to *individuals who actually have felt the application of the provision at issue*. After all, § 1252(f)(1) does not explicitly limit injunctive relief to “individual actions,” but rather limits injunctive relief to individuals subjected to the application of a provision and against whom proceedings have been initiated.

This interpretation of § 1252(f)(1) coincides with the nature of class actions generally. A class action is a procedural device that allows for representative suits, relying on named plaintiffs to establish relevant statutory requirements.¹¹⁵ If an individual qualifying under § 1252(f)(1) seeks an injunction, the availability of injunctive relief should not depend on whether that individual is representing a class, unless, of course, Congress explicitly stated that it should.

The language of the section governing review of expedited removal decisions supports this interpretation that Congress did not expressly bar class-wide injunctions through the text of § 1252(f)(1).¹¹⁶ The expedited removal section instructs that “no court may—certify a class under Rule 23 of the Federal Rules of Civil Procedure” in proceedings involving the expedited removal scheme.¹¹⁷ That clearer language is evidence that Congress knows how to include clear terms to explain when it means to limit the use of the class action device. Section 1252(f)(1), however, does not even contain any variation of the term “class,” nor does it mention Rule 23 in any way.¹¹⁸ The only term that can be interpreted to limit representative action is the use of the word “individual,” but, as explained above, the use of the term “individual” could be interpreted as limiting injunctive relief to those individuals who have felt the effects of a challenged provision, and not limiting injunctive relief to individual actions.

In the social security context, the Supreme Court held that a statute must contain a clear, express intent to exempt an action from a rule of civil procedure.¹¹⁹ The Supreme Court did not find in 42 U.S.C. § 405(g) “the necessary clear expression of congressional intent” to prohibit the use of the class action device.¹²⁰ That section provided that “any individual” could obtain federal court review of certain social

¹¹⁵See ALBA CONTE & HERBERT B. NEWBERG, 1 NEWBERG ON CLASS ACTIONS, §§ 1:1, 1:2 (4th ed. 2003).

¹¹⁶Referring to § 1252(e) to determine the meaning of § 1252(f)(1) is especially appropriate given that § 1252(f)(1) was enacted at the same time as § 1252(e), as both were entirely new provisions enacted by Congress through IIRIRA.

¹¹⁷8 U.S.C. § 1252(e)(1)(B).

¹¹⁸Professor Volpp has argued that § 1252(f)(1) “nowhere addresses joinder, and only addresses relief.” *Court Stripping and Class-Wide Relief*, *supra* note 29, at 471. Professor Volpp has also argued that § 1252(f)(1) does not bar forms of relief other than injunctive. *Id.* at 473-74; see also Neuman, *Federal Courts Issues in Immigration Law*, *supra* note 3, at 1684-85. As explained by Professors Volpp and Neuman, in the context of expedited removal, Congress wrote that no court may “enter declaratory, injunctive, or other equitable relief.” *Id.* (discussing 8 U.S.C. § 1252(e)(1)(A)). For an argument that the statute does bar both injunctive and declaratory relief, see Wilson, *Rights Without Remedies*, *supra* note 91, at 757.

¹¹⁹*Califano v. Yamasaki*, 442 U.S. 682, 699-701 (1979).

¹²⁰*Id.* at 700.

security administrative actions.¹²¹ Recognizing that “a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs,” the Court determined that the use of the phrase “any individual” was not a “necessary clear expression of congressional intent.”¹²² The Court explained that “it is not unusual that [§ 405(g)] . . . speaks in terms of an individual plaintiff, since the Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”¹²³ Similar to 42 U.S.C. § 405(g), 8 U.S.C. § 1252(f)(1) refers to “an individual alien,” but contains no “necessary clear expression of congressional intent” to exempt immigration actions from Rule 23.¹²⁴

Congress’ inclusion of a broad restriction on types of relief and a specific ban on class actions in the expedited removal section stands in sharp contrast to § 1252(f)(1). If Congress meant to bar all class-wide injunctive relief, why does § 1252(f)(1) contain the ambiguous reference to “individual” and none to Rule 23? Perhaps the answer is that § 1252(f)(1) does not bar class-wide injunctive relief but would bar injunctive relief to an individual or to a class comprised of individuals not yet subjected to the application of a provision and against whom proceedings have not been initiated.

This reading of § 1252(f)(1) – that the statute is focused on a concern that individuals not yet subject to the application of a provision and not yet in proceedings would obtain injunctions against a statutory provision—receives additional support from *McNary*. In *McNary*, the Supreme Court reasoned that, if Congress had intended the legalization special judicial review provision to apply to every possible action, Congress could have used more explicit statutory language to express that intent.¹²⁵ Similarly, Congress could have used clearer language in § 1252(f)(1), as it did in the expedited removal section, to indicate that it meant to bar class-wide injunctive relief. Also, the Supreme Court in *McNary* relied on the strong presumption of judicial review of administrative action.¹²⁶ These principles support the above reading of § 1252(f)(1).

C. The Role of the Serious Constitutional Problem

Scholars have commented on the Supreme Court’s evolving habit, in the immigration context and in other contexts, to avoid deciding cases on constitutional grounds in favor of resolving cases through statutory interpretation that buries the constitutional issue.¹²⁷ This trend holds true in the context of immigration statutes

¹²¹*Id.* at 698 n.12.

¹²²*Id.* at 700.

¹²³*Id.* at 700-01.

¹²⁴The legislative history quoted above, see *supra* note 104, could be cited as evidence that Congress did intend to limit the use of the class action device through § 1252(f)(1). The excerpt from the House Report, however, also does not contain a clear statement regarding this issue.

¹²⁵*McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991).

¹²⁶*Id.* at 496.

¹²⁷See, e.g., Cole, *Jurisdiction and Liberty*, *supra* note 3, at 2506-11; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive*

purporting to limit federal court review. *McNary*, *Catholic Social Services*, *American-Arab* and *St. Cyr* are examples of this trend.¹²⁸

At first glance, this practice appears to have little effect in the context of § 1252(f)(1). In *St. Cyr*, the Court faced a proposed interpretation of a statute that would have eliminated all avenues of federal court review of constitutional claims. In the case of § 1252(f)(1), however, a broad reading is that no court (other than the Supreme Court) may issue class-wide injunctive relief regarding anything that arguably relates to part IV.¹²⁹ While this broad reading would no doubt amount to a substantial disruption of the status quo and also would eliminate an important method to challenge the behavior of the immigration service, individual injunctions would still be permitted, and the Supreme Court could still issue class-wide injunctive relief.¹³⁰ Therefore, it is appropriate to question whether the Supreme Court would base its interpretation of § 1252(f)(1) to avoid a serious constitutional problem.¹³¹

Constitutional Rights, 92 COLUM. L. REV. 1625 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). It is beyond the scope of this article to comment on the propriety of using statutory canons to interpret statutes in general or to evaluate their role in deciding cases in lieu of reaching constitutional holdings. Likewise, this article will not discuss the pros and cons of different philosophies of statutory interpretation. For discussion and analysis of such theories, see, for example, WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION*, Chapter 48A (6th ed. 2000) (collecting articles).

¹²⁸In *McNary* and *Catholic Social Services*, the Court held that the special review provisions of the legalization program allowed for certain claims to be brought in the district court rather than address the issue of whether total preclusion of those claims in the federal courts would be constitutional. Likewise, in *St. Cyr*, the Court held that IIRIRA did not preclude habeas jurisdiction, rather than address the issue of whether Congress constitutionally could have eliminated all federal court jurisdiction over certain claims. “[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.” *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted). Another recent example of this trend in the immigration context is *Zadvydas v. Davis*, 533 U.S. 678 (2001). In *Zadvydas*, the Supreme Court interpreted a statute governing post-final order detention to include an implicit reasonable time limitation. The Court interpreted the statute in such a manner because “serious constitutional concerns” would be raised if the statute permitted indefinite detention. 533 U.S. at 682.

¹²⁹For an argument advocating that the section bars class certification, an even broader reading of the section, see Wilson, *Rights Without Remedies*, *supra* note 91.

¹³⁰Professor Neuman has questioned the exact nature of the Supreme Court’s role created by § 1252(f)(1) and whether it “amount[s] to an improper exercise of original jurisdiction.” Neuman, *Federal Courts Issues in Immigration Law*, *supra* note 3, at 1686. If the Supreme Court’s ability to issue injunctive relief under § 1252(f)(1) arises under its appellate jurisdiction, Professor Neuman has questioned whether the Supreme Court could issue injunctive relief upon appellate review of a lower court’s issuance of a form of relief other than injunctive. *Id.*

¹³¹This question is related to, yet different from, the question whether the statute represents a constitutional exercise of congressional power. The question addressed here is whether anticipated constitutional issues would influence the Supreme Court’s interpretation of the meaning and effect of the statute.

It is arguable, however, that this broad reading of § 1252(f)(1) would trigger the same potential deprivation of review that concerned the Court in *McNary*.¹³² In *McNary*, the Supreme Court determined that individual actions based on the administrative record of a single hearing were an ineffective means to challenge a pattern or practice of the immigration service. If injunctive relief is available only to individuals, but individuals cannot effectively bring pattern and practice claims, can a court actually address a pattern and practice claim under this broad reading of § 1252(f)(1)?¹³³ If not, this broad reading of § 1252(f)(1) effectively would foreclose pattern and practice claims.

There are ample reasons and arguments to construe § 1252(f)(1) to allow the use of class-wide injunctive relief. Suppose, however, that § 1252(f)(1) is read to bar broadly the use of class-wide injunctive relief. As described above, *St. Cyr* cemented habeas corpus jurisdiction as a distinct method to access federal court review. In the wake of *St. Cyr*, the next part discusses whether habeas corpus jurisdiction can preserve what § 1252(f)(1) may take away.

V. HABEAS JURISDICTION AND IMMIGRATION CLASS ACTIONS

What if there existed a parallel universe where § 1252(f)(1) could be ignored?¹³⁴ If § 1252(f)(1) were interpreted to be a broad bar against class-wide injunctive relief, is there an alternative method to obtain such relief? One possible alternative method is immigration class action litigation via habeas corpus jurisdiction. As described below, however, this alternative presents its own set of roadblocks.

In *St. Cyr*, the Supreme Court based its decision that habeas corpus review survived IIRIRA on the absence of a clear statement precluding habeas review.¹³⁵

¹³²Section 1252(f)(1) could implicate other potential constitutional issues. Professor Volpp has suggested that § 1252(f) could be challenged as violating Article III of the Constitution, as well as violating notions of due process and equal protection. Volpp, *Court Stripping and Class-Wide Relief*, *supra* note 29, at 475-77. Another potential constitutional issue is whether Congress created a proper role for the Supreme Court in § 1252(f)(1). *See supra* note 130. The Court may be swayed to interpret § 1252(f)(1) to eliminate the need to reach that issue.

¹³³The potential deprivation of review is amplified if § 1252(f)(1) were interpreted to bar all types of class-wide relief. *See supra* note 118.

¹³⁴There are provisions in § 1252 other than § 1252(f)(1) that are problematic to immigration class actions, including § 1252(b)(9). Professor Motomura has argued that courts should allow pattern and practice litigation to proceed despite §§ 1252(b)(9) and 1252(f)(1). Motomura, *Judicial Review In Immigration Cases After AADC*, *supra* note 41, at 434-39; *see supra* note 76. He concludes that § 1252(b)(9) “probably does not supersede *McNary*.” *Judicial Review In Immigration Cases After AADC*, *supra* note 41, at 437. Professor Motomura’s article appeared before the Supreme Court’s opinion in *St. Cyr*. This part will analyze whether the Court’s opinion in *St. Cyr* offers another possible method to maintain an immigration class action out of the reach of § 1252.

¹³⁵*See supra* note 86. The statute could be amended to include such a statement. For example, the House of Representatives passed a bill that would amend § 1252 to include specific references to the curtailment of habeas review. H.R. 418, 109th Cong. (2005). The bill also provides that nothing in “any . . . provision of this Act which limits or eliminates judicial review shall be construed as precluding review of constitutional claims or pure questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.” Such an amendment to § 1252, if ultimately enacted, does not,

The absence of a specific mention of habeas jurisdiction is crucial, according to the Court, because “in the immigration context, ‘judicial review’ and ‘habeas corpus’ have historically distinct meanings.”¹³⁶ Because IIRIRA did not eliminate habeas jurisdiction, the Court held that a district court could hear, via the independent realm of habeas jurisdiction, claims that § 1252 otherwise would bar.¹³⁷

A. *The Reach of 8 U.S.C. § 1252 After INS v. St. Cyr*

A reasonable question following *St. Cyr* is whether § 1252 contains limits that only apply to petitions for review, but not to petitions for habeas corpus.¹³⁸ After *St. Cyr*, individual habeas actions are now permissible despite that § 1252 would bar “judicial review” of the same action. If § 1252(f)(1) were interpreted to bar class-wide relief broadly, could a court issue that same relief in the context of a habeas class action?

Because the Court in *St. Cyr* specifically examined only three provisions of § 1252 (§§ 1252(a)(1), 1252(a)(2)(C) and 1252(b)(9)), courts have analyzed, post *St. Cyr*, whether other provisions of § 1252 affect habeas review.¹³⁹ Therefore, a court might examine whether the restrictions of § 1252(f)(1) would apply to a habeas action, despite *St. Cyr*. A court determining whether the restrictions of § 1252(f)(1) would apply to a habeas action likely will analyze two issues. First, the court probably would consider whether § 1252(f)(1) itself bars habeas review. If not, it likely would consider whether the restrictions of § 1252(f)(1) apply both to judicial review and to habeas review.¹⁴⁰

however, address the problem faced by pattern and practice litigants, as the petition for review process established by § 1252 may never grant them adequate review of their claims. As explained in *McNary*, the administrative record of an individual proceeding may not be sufficient to support a pattern or practice claim. *See supra* notes 47-49.

¹³⁶*INS v. St. Cyr*, 533 U.S. 289, 311 (2001). In *St. Cyr*, the Supreme Court specifically reviewed IIRIRA §§ 1252(a)(1), 1252(a)(2)(C) and 1252(b)(9) to determine whether those sections contained a “clear and unambiguous statement of Congress’ intent to bar [habeas] petitions.” *Id.* at 308, 310-11.

¹³⁷Specifically, in *St. Cyr* the Supreme Court held that a district court could review, via a habeas petition, the legal challenges of a foreign national with a criminal history despite § 1252(a)(2)(C), which forbids judicial review of removal orders based on the commission of certain crimes.

¹³⁸If § 1252 applies only to judicial review, then a habeas class action would not be subject to any of the provisions in § 1252. This would be an important benefit of styling an action as a habeas class action. Not only would § 1252(f)(1) not apply, but also the timing provision of § 1252(b)(9), which allows for judicial review of final administrative orders only, would not apply. The practical effect of the restrictions against review of discretionary actions contained in § 1252 (§§ 1252(a)(2)(B) and 1252(g), for example), however, may independently exist in the habeas realm. Courts have held that review of discretionary actions is not permissible under habeas jurisdiction. *See infra* notes 176-184.

¹³⁹*See infra* notes 142-153.

¹⁴⁰Courts of appeals have employed this two-step analysis to determine whether § 1252(d), which requires exhaustion of administrative remedies, applies to habeas proceedings. *See infra* notes 150-153.

Regarding the first issue, similar to the specific subsections referenced in *St. Cyr*, § 1252(f)(1) also contains no clear and unambiguous statement of Congress' intent to abolish habeas review. Again, in *St. Cyr* the Court specifically required that "[f]or [the immigration service] to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of Congressional intent to repeal habeas jurisdiction."¹⁴¹ While the government may argue that the language of § 1252(f)(1) is distinct enough from the sections considered in *St. Cyr* to justify a holding that § 1252(f)(1) does bar habeas review,¹⁴² such an argument contradicts the Supreme Court's clear statement requirement established in *St. Cyr*.

The Supreme Court's recent decision in *Demore v. Kim* supports the argument that § 1252(f)(1) does not contain a clear statement eliminating habeas corpus review. Applying the clear statement principles it emphasized in *St. Cyr*, the Court held that 8 U.S.C. § 1226(e) (which governs "judicial review" of claims challenging detention during removal proceedings) did not bar habeas review.¹⁴³ The language of § 1226(e) reads as follows:

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

Justice O'Connor, joined by Justices Scalia and Thomas, argued in her dissent that the "[n]o court may set aside any action or decision" language of § 1226(e) is sufficient to repeal habeas jurisdiction, especially because the text of the statutory subsections at issue in *St. Cyr* all specifically mentioned the term "judicial review," and the provision at issue in *Demore v. Kim* does not.¹⁴⁴

¹⁴¹*St. Cyr*, 533 U.S. at 298.

¹⁴²The government has argued subsequent to *St. Cyr* that parts of § 1252, other than those specifically considered in *St. Cyr*, bar habeas review. For example, courts have applied the reasoning of *St. Cyr* to hold that § 1252(g) (which was not directly at issue in *St. Cyr*) does not bar habeas review. *See, e.g.*, *Carranza v. INS*, 277 F.3d 65, 71 (1st Cir. 2002) ("In light of *St. Cyr*, [the immigration service's] principal argument – that section 1252(g) forecloses the exercise of habeas jurisdiction . . . is a dead letter."). Similarly, at least five courts of appeals have examined the language of the statute implementing the Convention Against Torture in light of *St. Cyr* and have concluded that it also does not contain an express revocation of habeas jurisdiction. *See Cadet v. Bulger*, 377 F.3d 1173, 1182 (11th Cir. 2004); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 141 (2d Cir. 2003); *Singh v. Ashcroft*, 351 F.3d 435, 441 (9th Cir. 2003); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 209 (3d Cir. 2003). The legislation described in note 135, *supra*, would also clarify the Convention Against Torture to contain an express revocation of habeas jurisdiction. No court has addressed whether § 1252(f)(1) eliminates habeas jurisdiction.

¹⁴³*Demore v. Kim*, 538 U.S. 510, 517 (2003).

¹⁴⁴*Id.* at 534-35 (O'Connor, J., dissenting). While the title of § 1226(e) contains the term "judicial review," Justice O'Connor commented that statutory titles do not per se control the meaning of statutory text. *Id.* at 535.

The language of the text of § 1252(f)(1) also does not mention the term “judicial review” and, similar to the statute in *Demore v. Kim*, states, “[r]egardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court . . . shall have jurisdiction or authority to.” Yet, the majority of the Court remained firm in its clear statement requirement in *Demore v. Kim*, finding no “explicit provision barring habeas review” in the similar language of § 1226(e).¹⁴⁵ It seems probable that the Supreme Court would not find a statement in § 1252(f)(1) sufficient to signal the elimination of habeas jurisdiction.

The resolution of the second inquiry, whether the restrictions of § 1252(f)(1) are applicable to habeas actions, is more complicated. The historical separation of judicial review from habeas jurisdiction supports an argument that § 1252(f)(1) is of no effect in the habeas realm. Section 1252(f)(1) is a part of the judicial review program established by § 1252, and in *St. Cyr* the Court held that certain review-limiting provisions of § 1252 did not apply to habeas actions. It is uncertain, however, whether courts would adopt this argument in the context of § 1252(f)(1).

Courts are facing the challenge of balancing the autonomous nature of the habeas realm with the restrictions of § 1252. For example, the Ninth Circuit applied § 1252(f)(1) to a habeas action but did not first discuss whether § 1252(f)(1) plays any role in a habeas action.¹⁴⁶ Courts also struggle to define the proper role of § 1252(g) in a habeas action. The Court of Appeals for the Seventh Circuit determined that, even after *St. Cyr*, § 1252(g) forbids habeas review of a challenge of a decision to commence proceedings, adjudicate cases or execute removal orders.¹⁴⁷ The Ninth Circuit determined that § 1252(g) itself does not bar habeas jurisdiction (the first inquiry described above), but in doing so emphasized that the class before the court was not seeking review of a discretionary act (thus applying the substance

¹⁴⁵*Id.* at 517. Section 1252(f)(1) does contain the additional language “regardless of the nature of the action,” but this statement does not explicitly mention habeas review.

¹⁴⁶*Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003), *overruled on other grounds*, *Jama v. Immigration and Customs Enforcement*, 125 S. Ct. 694 (2005). The Ninth Circuit determined that § 1252(f)(1) did not preclude any relief because the “operation of” part IV was not challenged. *See supra* note 96.

¹⁴⁷*Sharif v. Ashcroft*, 280 F.3d 786, 787 (7th Cir. 2002) (determining that *St. Cyr* “does not disturb the holding of [*Reno v. American-Arab Anti-Discrimination Committee*] that 8 U.S.C. § 1252(g) blocks review in the district court of particular kinds of administrative decisions”); *see also* *Latu v. Ashcroft*, 375 F.3d 1012, 1019 (10th Cir. 2004) (acknowledging that § 1252(g) “does not strip the district court of § 2241 habeas jurisdiction,” but incorporating § 1252(g) into its decision that discretionary acts are not reviewable via habeas jurisdiction). The Court of Appeals for the Sixth Circuit has also applied § 1252(g) to a habeas action, but in an unpublished opinion. *Mendez v. Johnson*, No. 03-5194, 2004 WL 1088249 at *1 (6th Cir. May 12, 2004). *But see, e.g.,* *Wallace v. Reno*, 194 F.3d 279, 285 (1st Cir. 1999) (stating, in a decision that pre-dates *St. Cyr*, that the court is “unwilling to read section [1252(g)] as depriving the court of authority to issue traditional ancillary relief needed to protect its authority to issue the writ [of habeas corpus]” and that “[t]o maintain habeas in the face of section [1252(g)], but deny the ancillary relief needed to make it meaningful, would be to strain at the gnat after swallowing the camel”); *Foroglou v. Reno*, 241 F.3d 111, 114 (1st Cir. 2001) (explaining in a decision issued before the Supreme Court’s decision in *St. Cyr* that the reasoning of *Wallace* applies only when a habeas petitioner has no other available forum for judicial review).

of § 1252(g)).¹⁴⁸ Also, the Court of Appeals for the Second Circuit discussed § 1252(g) in support of its conclusion that review of discretionary acts is not cognizable under habeas jurisdiction.¹⁴⁹

Additionally, a majority of courts of appeals have held that 8 U.S.C. § 1252(d), which requires exhaustion of administrative remedies before “a court may review a final order of removal,” applies to habeas actions despite *St. Cyr*.¹⁵⁰ These courts rejected the argument that the word “review” as used in § 1252(d) refers only to “judicial review,” and does not encompass habeas review. Distinguishing § 1252(d) from the provisions of § 1252 at issue in *St. Cyr*, these courts determined that § 1252(d) does not eliminate jurisdiction wholesale and only sets a condition on jurisdiction.¹⁵¹ Because only a condition on jurisdiction is implicated, the courts reasoned, § 1252(d), as applied to habeas review, does not present a substantial constitutional question.¹⁵² According to this reasoning, the absence of a substantial constitutional question allows the term “review” in § 1252(d) to encompass both judicial review and habeas review.¹⁵³

Setting aside a discussion of the soundness of the legal analyses employed by these courts of appeals, the question arises whether courts will follow this mode of

¹⁴⁸*Ali*, 346 F.3d at 878-79. The Ninth Circuit reasoned that because a discretionary determination was not at issue, § 1252(g) would not apply, yet left open (but did not address) the possibility that § 1252(g) could bar a habeas action if a discretionary action were at issue. For similar analysis, see *Jama v. INS*, 329 F.3d 630, 632-33 (8th Cir. 2003), *aff'd on other grounds sub nom.*, *Jama v. Immigration and Customs Enforcement*, 125 S. Ct. 694 (2005). The District Court in *Ali* more definitively had stated that § 1252(g) “does not limit judicial review on a petition for a writ of habeas corpus,” and concluded that the section is not applicable to habeas actions. *Ali v. Ashcroft*, 213 F.R.D. 390, 398 (W.D. Wash. 2003).

¹⁴⁹*Liu v. INS*, 293 F.3d 36, 41 (2d Cir. 2002). An alternative approach is to base the conclusion that habeas review does not extend to review of discretionary acts solely in habeas jurisprudence, and not to use § 1252 to support the decision. *See also Latu*, 375 F.3d at 1019 (employing a similar analysis to that used in *Liu*).

¹⁵⁰*Soberanes v. Comfort*, 388 F.3d 1305, 1308-09 (10th Cir. 2004); *Sayyah v. Farquharson*, 382 F.3d 20, 26 (1st Cir. 2004); *Sun v. Ashcroft*, 370 F.3d 932, 939 (9th Cir. 2004); *Theodoropoulos v. INS*, 358 F.3d 162, 171 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 37 (2004); *Duvall v. Elwood*, 336 F.3d 228, 233-34 (3d Cir. 2003); *Sundar v. INS*, 328 F.3d 1320, 1321 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 531 (2003).

¹⁵¹*See, e.g., Sun*, 370 F.3d at 940-41; *Sundar*, 328 F.3d at 1324-25.

¹⁵²*See, e.g., Sun*, 370 F.3d at 939; *Sundar*, 328 F.3d at 1324-25.

¹⁵³Courts have also considered the effect on habeas jurisdiction of § 1252(a)(2)(B)(ii), which bars review of certain discretionary acts. *See, e.g., Jeanty v. Bulger*, 204 F. Supp. 2d 1366, 1373-74 (S.D. Fla. 2002), *aff'd sub nom.*, *Moise v. Bulger*, 321 F.3d 1336 (2003) (*per curiam*), *cert. denied*, 540 U.S. 1016 (2003) (determining that 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar habeas review); *Sierra v. INS*, 258 F.3d 1213, 1217 (10th Cir. 2001). Similarly, courts have addressed the effect of § 1252(b)(5), which addresses judicial review of nationality claims. *See, e.g., Dragenice v. Ridge*, 389 F.3d 92, 99 (4th Cir. 2004) (holding that 8 U.S.C. § 1252(b)(5) does not strip a district court of habeas jurisdiction where review via a petition for review is unavailable); *Gomez v. Bureau of Immigration and Custom Enforcement*, 315 F. Supp. 2d 630, 634 (M.D. Pa. 2004) (determining that 8 U.S.C. § 1252(b)(5) does not bar a habeas action); *Lee v. Ashcroft*, No. 01-CV-0997, 2003 WL 21310247, at *4 (E.D.N.Y. May 27, 2003) (same).

analysis with regard to § 1252(f)(1). If so, the relevant determination is whether § 1252(f)(1) is more akin to those provisions at issue in *St. Cyr* (eliminating jurisdiction) or more akin to § 1252(d) (setting a condition on jurisdiction). The answer is linked to the resolution of the issue raised earlier, whether there is a serious constitutional problem lurking in § 1252(f)(1).¹⁵⁴ A likely government argument is that § 1252(f)(1) bars only a form of relief, and therefore does not bar jurisdiction altogether. The counter-argument is that § 1252(f)(1), if interpreted broadly, could bar meaningful review of pattern and practice claims, and therefore should not apply to habeas actions.¹⁵⁵

B. Challenges Facing Habeas Class Actions

Even if the restrictions of § 1252(f)(1) do not apply in the habeas context, are habeas class actions a viable alternative to non-habeas class actions? Habeas class actions face their own set of roadblocks. To begin, a habeas class action is not necessarily governed by Federal Rule of Civil Procedure 23 and may be subject to more stringent requirements. Further, the maintenance of a habeas class action depends on a custody requirement and whether the scope of habeas review allows a court to review the challenged behavior.¹⁵⁶

While courts have adopted the class action device in habeas actions, habeas class actions are not identical to Rule 23 class actions. The Ninth Circuit recently imported Rule 23 to govern a habeas immigration class action¹⁵⁷ and courts have allowed habeas class actions in non-immigration contexts,¹⁵⁸ but courts have

¹⁵⁴See *supra* notes 127-133.

¹⁵⁵Interestingly, if § 1252(f)(1) were held to apply in the habeas realm, that circumstance could bolster the argument that § 1252(f)(1) should be interpreted so as to avoid a serious constitutional problem— the total unavailability of class-wide injunctive relief to remedy pattern and practice violations.

¹⁵⁶The relevant habeas statute is 28 U.S.C. § 2241, which provides that a writ of habeas corpus may not be granted unless a “prisoner” is “in custody,” among other requirements. For an in-depth discussion of the history of the writ of habeas corpus in the immigration context, see Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).

¹⁵⁷*Ali v. Ashcroft*, 346 F.3d 873, 890-91 (9th Cir 2003), *overruled on other grounds*, *Jama v. Immigration and Customs Enforcement*, 125 S. Ct. 694 (2005). See also *Kazarov v. Achim*, No. 02-C-5097, 2003 WL 22956006 at *7-8 (N.D. Ill. Dec. 12, 2003) (certifying, under Rule 23(b)(2), class challenging detention procedures). For pre-IIRIRA immigration habeas class actions, see, for example, *Bertrand v. Sava*, 535 F. Supp. 1020, 1024-25 (S.D.N.Y. 1982), *rev'd on other grounds*, 684 F.2d 204 (2d Cir. 1982) (approving certification of class of Haitian foreign national detainees challenging the exercise of discretionary authority with respect to release on parole). *But see Wang v. Reno*, 862 F. Supp. 801, 811 (E.D.N.Y. 1994) (declining to create habeas class of foreign nationals challenging asylum decisions because, among other things, too many individual issues were present).

¹⁵⁸See, e.g., *United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976) (affirming certification of habeas class of state prisoners); *Bijeol v. Benson*, 513 F.2d 965, 969 (7th Cir. 1975) (partially affirming certification of class of federal prisoners); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1126-27 (2d Cir. 1974) (approving of certification of habeas class of state prisoners); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973) (reversing district court conclusion that a habeas class action could never be appropriate); *see*

explained that Rule 23 does not necessarily govern habeas class actions. As the Ninth Circuit observed in *Ali v. Ashcroft*, courts have looked to Rule 23 for guidance in adjudicating habeas class actions and have even applied the provisions of Rule 23 to determine whether to certify a habeas class, but technically Rule 23 does not apply to habeas proceedings.¹⁵⁹ Courts have emphasized that a habeas class action is only a case management option available to federal courts, not a form of litigation authorized by the Federal Rules of Civil Procedure,¹⁶⁰ and that courts sitting in habeas jurisdiction may apply a tougher version of the Rule 23 requirements.¹⁶¹ Therefore, meeting the requirements of Rule 23 is not a guarantee that a federal court will agree to hear a habeas action as a class action.

If a court agrees to borrow the class action device and apply it to a habeas action, the habeas custody requirement presents a further challenge. The custody requirement raises the issues of whether the petitioner is “in custody” and the identity of the proper custodian in an immigration habeas case.

Addressing the second issue first, the identity of the proper custodian is important because the geographical scope of a putative habeas immigration class injunction is only as wide as the court’s jurisdiction over the proper custodian. A narrow view of the identity of the proper custodian could diminish the potential effectiveness of a habeas class to rectify a widely implemented practice or policy of the immigration service.¹⁶² If the proper custodian is the warden of one specific detention center where a foreign national is detained, then a district court’s reach is limited to that custodian, and any injunction could only reach those held by that specific custodian. If, however, the proper custodian were a national official, such as the Attorney General or the Secretary of Homeland Security, then a district court would have potential nationwide jurisdiction.¹⁶³

also RANDY HERTZ & JAMES S. LIEBMAN, 1-11 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.4(b) (4th ed. 2003); CONTE & NEWBERG, *supra* note 115, vol. 8 at § 25:28.

¹⁵⁹*Ali*, 346 F.3d at 890-91 (citing *Sero*, 506 F.2d at 1125 and *Bijeol*, 513 F.2d at 968).

¹⁶⁰*Sero*, 506 F.2d at 1125. According to the Second Circuit in *Sero*, while the class action device as governed by Rule 23 may not be imported directly into habeas actions, federal courts do have the power to create procedural devices in habeas actions that borrow from the Federal Rules of Civil Procedure. *Id.* In *Sero*, the Second Circuit explained that “the unusual circumstances” of the case were a “compelling justification for allowing a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure.” *Id.* See also *Bertrand*, 535 F. Supp. at 1024 (explaining that “a federal court may permit multi-party habeas actions similar to the class actions authorized by the Rules of Civil Procedure when the nature of the claim so requires”) (emphasis added).

¹⁶¹See, e.g., *Bertrand*, 535 F. Supp. at 1025 (recognizing that a more stringent form of the commonality prerequisite of Rule 23 may be applied in habeas class actions).

¹⁶²See *Yi v. Maugans*, 24 F.3d 500, 507 (3d Cir. 1994) (refusing to certify nationwide habeas class of immigrant detainees based on custodian issue); *Wang*, 862 F. Supp. at 811-12 (refusing to certify subclass based on custodian issue).

¹⁶³For further discussion of the issue of who is the proper custodian in an immigration habeas action, see Megan A. Ferstenfeld-Torres, *Who are We to Name? The Applicability of the “Immediate-Custodian-as-Respondent” Rule to Alien Habeas Claims Under 28 U.S.C. § 2241*, 17 GEO. IMMIGR. L.J. 431 (2003); Rachel E. Rosenbloom, *Is the Attorney General the Custodian of an INS Detainee? Personal Jurisdiction and the “Immediate Custodian” Rule in Immigration-Related Habeas Actions*, 27 N.Y.U. REV. L. & SOC. CHANGE 543 (2001-02);

Courts have disagreed over who is the proper custodian in an immigration habeas action.¹⁶⁴ The Supreme Court recently declined to reach the issue “whether the Attorney General is a proper respondent to a habeas petition filed by an alien detained pending deportation” in *Rumsfeld v. Padilla*.¹⁶⁵ The Court did hold that when present physical confinement is challenged, the only proper respondent is the immediate custodian and that jurisdiction lies only in the district of confinement.¹⁶⁶ The Court further explained that “a habeas petitioner who challenges a form of ‘custody’ other than present physical confinement may name as respondent the entity or person who exercises legal control with respect to the challenged ‘custody.’”¹⁶⁷ Under *Padilla*, a court would have ample reason to limit any habeas class-wide relief affecting present physical confinement to those under the control of the immediate custodian.

The first issue involves the question of who is “in custody” to satisfy the requirements of 28 U.S.C. § 2241.¹⁶⁸ The determination is inherently case-specific, but an important point is that actual physical restraint may not be required to meet the “in custody” requirement. For example, whatever exactly constitutes “in custody,” a habeas petitioner need only be “in custody” at the time the habeas petition is filed.¹⁶⁹ For example, courts have held that the physical removal of an

Brian O’Donoghue, Note, *Who’s the Boss?: Armentero, Padilla, and the Proper Respondent in Federal Habeas Corpus Law*, 22 YALE L. & POL’Y REV. 441 (2004); see also Leni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 260-63 (1998).

¹⁶⁴See, e.g., *Armentero v. INS*, 340 F.3d 1058, 1074 (9th Cir. 2003) (concluding that the Attorney General or the Secretary of the Department of Homeland Security is the proper respondent), *withdrawn*, 382 F. 3d 1153 (2004); *Chavez-Rivas v. Olsen*, 194 F. Supp. 2d 368, 376 (D.N.J. 2002) (holding that the Attorney General is a proper respondent in an immigration habeas action in the circumstance where a detainee is transferred, after the filing of a habeas action, to a facility outside the jurisdiction of the original district court). *But see Yi*, 24 F.3d at 507 (concluding that the habeas custodian is the warden of the prison where the detainee is held in the context of a putative nationwide class action of immigrant detainees); *Wang*, 862 F. Supp. at 811-12 (refusing to certify a class partially comprised of immigrant detainees housed outside of the district based on the conclusion that the warden of each specific facility is the custodian for habeas purposes); see also Rosenbloom and Ferstenfeld-Torres, *supra* note 163, for a thorough discussion of the conflict among the courts regarding this issue.

¹⁶⁵124 S. Ct. 2711, 2718 n.8 (2004). In *Rumsfeld v. Padilla*, a United States citizen challenged his custody based on his designation as an enemy combatant. *Id.* at 2715.

¹⁶⁶*Id.* at 2723. This holding led the Ninth Circuit to withdraw its decision in *Armentero*, and to grant the government’s petition for rehearing.

¹⁶⁷*Id.* at 2720.

¹⁶⁸For more in-depth discussion of this issue in the immigration context, see Peter Bibring, *Jurisdictional Issues In Post-Removal Habeas Challenges to Orders of Removal*, 17 GEO. IMMIGR. L.J. 135, 150-80 (2002); Alison Leal Parker, Note, *In Through the Out Door? Retaining Judicial Review for Deported Lawful Permanent Resident Aliens*, 101 COLUM. L. REV. 605, 633-37 (2001).

¹⁶⁹*Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Zalawadia v. Ashcroft*, 371 F.3d 292, 297 (5th Cir. 2004) (explaining that “the Supreme Court has made it clear that the ‘in custody’ determination is made at the time the habeas petition is filed”) (quoting *Spencer*, 523 U.S. at 7); *Lopez v. Heinauer*, 332 F.3d 507, 510 (8th Cir. 2003).

individual from the United States does not prevent the custody requirement from being met as long as the individual was “in custody” at the time of filing.¹⁷⁰ The Supreme Court, however, has determined that while release does not break the “in custody” requirement, every habeas case must still satisfy the case or controversy requirement of Article III, section 2 of the Constitution.¹⁷¹ Therefore, it is possible that release could moot the case underlying the habeas petition even if it does not technically break the “in custody” requirement.¹⁷²

The requirement that a habeas petitioner be “in custody” at least at the time of filing the petition limits the range of patterns and practices that could be challenged via a habeas class action. Earlier, this article discussed three major groups of immigration class actions of the past: those challenging immigration detention; those challenging the way the immigration service implements a benefit program; and those actions challenging the immigration service’s procedures employed in removing foreign nationals from the United States.¹⁷³ Of the three groups, those actions challenging immigration detention clearly face the least difficulty regarding the “in custody” requirement. The custody requirement presents a greater roadblock to the other two groups, as those actions may or may not involve actual physical custody at some point.

¹⁷⁰*See, e.g., Zalawadia*, 371 F.3d at 297; *Chong v. Dist. Dir., INS*, 264 F.3d 378, 382-83 (3d Cir. 2001); *Reyes-Sanchez v. Ashcroft*, 261 F. Supp. 2d 276, 282-83 (S.D.N.Y. 2003).

¹⁷¹*Spencer*, 523 U.S. at 7. In *Spencer*, the Supreme Court determined that a prisoner’s completion of his sentence mooted his habeas petition challenging the revocation of his parole. The Court did not recognize any actual injury likely to be addressed by the habeas action. *Id.* at 14-16.

¹⁷²*Id.*; *see also Zalawadia*, 371 F.3d at 298 (relying on *Spencer* to determine that a habeas case is not moot where the petitioner was deported but faces a bar to reentry to the United States); *Rosales-Garcia v. Holland*, 322 F.3d 386, 395-96 (6th Cir. 2003), *cert. denied sub nom.*, *Snyder v. Rosales-Garcia*, 539 U.S. 941 (2003) (acknowledging *Spencer* but determining that a live case or controversy existed where individuals with final orders of removal were released on parole pending removal); *Chong*, 264 F.3d at 383-85 (holding that deportation of habeas petitioner did not render petition moot because the petitioner’s deportation carried the collateral consequence of a bar against reentering the United States and stating that the exceptions to the general mootness doctrine apply in the habeas context). *But see Patel v. United States Attorney Gen.*, 334 F. 3d 1259, 1263 (11th Cir. 2003) (determining that restrictions on returning to the United States are not sufficient restraints to satisfy the habeas “in custody” requirement in the context of a habeas petition filed after removal). *See also Parker, supra* note 168 (discussing post-removal standing issues).

¹⁷³*See supra* notes 20-28.

Even if a court were to agree to recognize a habeas class action and the “in custody” requirement were satisfied, the class claim must also be cognizable under habeas jurisdiction. After *St. Cyr*, courts are considering what types of claims are appropriate for habeas review.¹⁷⁴

Courts have determined that the substantive scope of habeas review after *St. Cyr* does not replenish all of the review carved out by IIRIRA.¹⁷⁵ For example, the

¹⁷⁴Another post-*St. Cyr* issue is whether habeas jurisdiction is available to those who could also seek relief under § 1252. Such a scenario raises the issue of how to interpret and apply a statute previously interpreted to avoid a serious constitutional problem when subsequent application may not raise constitutional concerns, an issue recently addressed by the Supreme Court in *Clark v. Martinez*, 125 S. Ct. 716 (2005). At least three courts of appeals have held that foreign nationals may bring habeas actions even if judicial review is also available under § 1252. See *Chmakov v. Blackman*, 266 F.3d 210 (3d Cir. 2001); *Liu v. INS*, 293 F.3d 36 (2d Cir. 2002); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002). In *Chmakov*, the Third Circuit held that habeas review of an application for asylum was permissible, even though judicial review of asylum determinations is permitted under § 1252. The petitioners in *Chmakov* had failed to file a timely petition for judicial review. *Chmakov*, 266 F.3d at 212-13. The Third Circuit reasoned that while no suspension clause problem would exist if Congress had removed habeas jurisdiction for those with some other avenue of federal court review, “it is now beyond dispute” that Congress did not explicitly foreclose habeas jurisdiction in IIRIRA. *Id.* at 214. The Third Circuit rejected the immigration service’s arguments that Congress need only provide a clear statement to repeal habeas jurisdiction if a suspension clause problem is present and that IIRIRA does contain a clear statement to abolish habeas review for foreign nationals without criminal convictions. *Id.* at 214-15. The Court of Appeals for the Eighth Circuit has disagreed with *Chmakov*, holding that when judicial review under § 1252 is available, habeas review is not also available. *Lopez*, 332 F.3d at 510-11. Also in contrast with *Chmakov*, the Court of Appeals for the First Circuit affirmed the dismissal of a habeas petition where the habeas petitioner could have filed a petition for review but did not timely do so. *Rivera-Martinez v. Ashcroft*, 389 F.3d 207, 210 (1st Cir. 2004). Additionally, the Ninth Circuit has dismissed habeas petitions based on the principle of exhaustion of judicial remedies (i.e. failure to file a timely petition for review under § 1252) and has denied to rehear en banc a case where the original panel used the doctrine of issue preclusion to prevent consideration of an issue on habeas originally presented in a § 1252 petition for review. *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004) (exhaustion of judicial remedies); *Nunes v. Ashcroft*, 375 F.3d 810, 811 (9th Cir. 2004), *cert. denied sub nom.*, *Nunes v. Gonzales*, 125 S. Ct. 1395 (2005) (issue preclusion).

¹⁷⁵A further developing issue is the scope of relief available in a habeas action. While a habeas class action may avoid any restrictions on relief of § 1252(f)(1), a habeas class action is limited inherently to the relief that is available in a habeas action. The Fifth Circuit recently held that under habeas review the only relief a district court may grant is relief necessary to undo restraints on liberty. In *Zalawadia*, the government deported the habeas petitioner before the Supreme Court issued its decision in *St. Cyr*, despite that the petitioner also argued that IIRIRA should not apply retroactively. 371 F.3d at 295-96. The Supreme Court remanded Mr. Zalawadia’s case in light of *St. Cyr*. On remand, Mr. Zalawadia sought a determination, under the pre-IIRIRA standard, whether he is entitled to a deportation waiver. The Fifth Circuit refused to order the determination and concluded that the only appropriate relief is to vacate the illegal deportation order. *Id.* at 298-99. The dissent objected that that relief is inadequate because it does not remove all of the collateral effects of the illegal deportation order. According to the dissent, Mr. Zalawadia, now deported, will never be able to obtain a waiver determination under the pre-IIRIRA standard, a determination that he was entitled to at the time of his deportation proceeding. *Id.* at 303 (Wiener, J. dissenting). According to the majority, habeas “cannot be used to bootstrap other claims for relief” and “is not a tool that

First,¹⁷⁶ Second,¹⁷⁷ Third,¹⁷⁸ Fourth,¹⁷⁹ Fifth,¹⁸⁰ Ninth¹⁸¹ and Eleventh¹⁸² Circuits have determined that habeas review is available (after *St. Cyr* and IIRIRA) only to address constitutional and statutory issues, and not to challenge discretionary determinations. These courts of appeals sanction the use of habeas jurisdiction to address pure questions of law, including constitutional and statutory challenges, but have refused to allow habeas jurisdiction to encompass review of whether administrative decisions in a particular case amount to an abuse of discretion or to challenge underlying

can be broadly employed to restore the habeas petitioner to his or her *status quo ante* beyond freeing him from the restraints on liberty arising directly from the illegal order of judgment.” *Id.* at 300.

¹⁷⁶*Carranza v. INS*, 277 F.3d 65 (1st Cir. 2002). The Court of Appeals for the First Circuit held that a claim that the immigration service failed to exercise any discretion is not cognizable under habeas jurisdiction where the foreign national has no statutory right to any discretionary process. *Id.* at 72. The First Circuit distinguished Mr. Carranza’s claims from those in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), where the Supreme Court held that a foreign national could state a claim under habeas jurisdiction that the immigration service failed to implement a statutorily-granted discretionary process. *Carranza*, 277 F.3d at 68-69, 72.

¹⁷⁷*Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001) (holding that the scope of habeas review does not extend to review of the immigration service’s discretionary determinations, including whether administrative decisions lack adequate support from the record, which would involve a reconsideration of evidence).

¹⁷⁸*Bakhtiger v. Elwood*, 360 F.3d 414, 420-21 (3d Cir. 2004) (reasoning that the scope of habeas review that survived IIRIRA is no greater than the traditional scope of habeas review, which did not include review of discretionary acts).

¹⁷⁹*Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999). In this pre-*St. Cyr* decision, the Court of Appeals for the Fourth Circuit reached the conclusion ultimately reached by the Supreme Court in *St. Cyr* – that habeas jurisdiction survived IIRIRA. *Id.* at 488-89. The court further stated that the habeas jurisdiction that survived IIRIRA was not broad enough to encompass review of factual or discretionary issues. *Id.* at 490.

¹⁸⁰*Bravo v. Ashcroft*, 341 F.3d 590, 592-93 (5th Cir. 2003) (affirming the district court’s determination that habeas jurisdiction does not allow review of an immigration judge’s discretionary determination that a United States citizen child would not suffer extreme hardship if deported with his parents).

¹⁸¹*Gutierrez-Chavez v. INS*, 298 F.3d 824 (9th Cir. 2002). In *Gutierrez-Chavez*, the Ninth Circuit held that habeas review is not available to examine the “equitable balance” reached by the immigration service in determining whether a foreign national is entitled to relief from removal. *Id.* at 829. The court also stated, however, that jurisdiction could lie under 8 U.S.C. § 2241 to review a claim that an impermissible process was employed in reaching a discretionary decision. *Id.*

¹⁸²*Cadet v. Bulger*, 377 F.3d 1173, 1184 (11th Cir. 2004) (recognizing that no court of appeals has ruled that review of discretionary acts is appropriate via habeas jurisdiction, the Court of Appeals for the Eleventh Circuit held that the “scope of habeas review available in § 2241 petitions by aliens challenging removal orders (1) includes constitutional issues and errors of law, including both statutory interpretations and application of law to undisputed facts or adjudicated facts, and (2) does not include review of administrative fact findings or the exercise of discretion”).

factual determinations.¹⁸³ A few courts, however, have held that review of constitutional or statutory issues includes review of whether law was applied correctly to undisputed facts.¹⁸⁴ The restriction of habeas review to statutory and constitutional issues is probably not debilitating to pattern and practice cases, as such actions are likely to present statutory and constitutional challenges. For example, the plaintiff class in *Haitian Refugee Center v. Smith* raised constitutional challenges.

In summary, obtaining class-wide injunctive relief in a habeas class action (assuming that the class would succeed on the merits) faces many hurdles, including: (1) satisfying the “in custody” requirement; (2) obtaining a determination that the proper custodian is an official who has custody over enough foreign nationals to make any class-wide injunction effective; (3) winning the district court’s agreement that the class action device should be imported to the particular habeas case; (4) satisfying the requirements imposed by the district court judge (likely borrowed from Federal Rule of Civil Procedure 23); and (5) presenting claims reviewable in a habeas action.

VI. CONCLUSION

The availability of class-wide injunctive relief in the immigration context is uncertain. This article has addressed how the source of the uncertainty, 8 U.S.C. § 1252(f)(1), is a complex statute that needs deciphering. It contains text that is self-limiting in several ways and that may be interpreted to limit injunctive relief against the operation of limited statutory provisions, but injunctive relief may not be against the operation of those provisions if it seeks to correct the way the immigration service is implementing those provisions. Further, close review of the section with the aid of Supreme Court precedent reveals that the assumption that Congress expressly intended the section to restrict the use of the class action device in the immigration context may be incorrect. Also, the presence of a serious constitutional problem may influence the interpretation of the statute. If, however, courts interpret the statute to bar class-wide injunctive relief broadly, habeas jurisdiction provides a problematic potential alternative method to obtain that relief.

What if federal courts could not issue class-wide injunctive relief ordering the immigration service to stop or to correct unconstitutional practices or procedures? This article reserves the question of the constitutionality of § 1252(f)(1) in favor of focus on the meaning and effect of the section. What is readily apparent, however, is that the Supreme Court’s future interpretation of this specific section, especially if the Court interprets the section as broadly barring federal courts from issuing class-

¹⁸³See, e.g., *Bakhtiger*, 360 F.3d at 420 (holding that “habeas proceedings do not embrace review of the exercise of discretion, or the sufficiency of the evidence”). For an argument that habeas review properly may encompass review of discretionary acts, see Cole, *Jurisdiction and Liberty*, *supra* note 3, at 2503-05.

¹⁸⁴*Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003) (explaining that habeas review is permissible where a petitioner claims that a law is applied wrongly in an immigration administrative proceeding); *Wang v. Ashcroft*, 320 F.3d 130, 142-43 (2d Cir. 2003) (determining that the “Constitution requires habeas review to extend to claims of erroneous application or interpretation of statutes,” and holding that habeas review is proper over a claim that the immigration service wrongly applied the Convention Against Torture to the facts of a case); see also *Cadet*, 377 F.3d at 1184.

wide injunctive relief in immigration cases, is an essential element of the more general debate addressing congressional power to limit federal court jurisdiction.