

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

Jill E. Family

*Law Clerk to the Honorable Morton I. Greenberg,
United States Court of Appeals for the Third Circuit, September 2004- September 2005*
and
*Adjunct Professor,
Temple University Beasley School of Law, August 2004-December 2004*
(215) 731-9257
jefamily@comcast.net

*Any opinions expressed in this article are entirely my own
and are not representative of any court, judge or organization.*

I would like to thank Camille Andrews, Linda Bosniak, Melissa Jacoby, Roger Kirby, Hon. Stephen M. Orlofsky, Rayman Solomon, Beth Stephens and Bill Stock.

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

Abstract

This article examines a statute that may embody another limit on the power of the federal courts. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) implemented sweeping changes that substantially restrict federal court review of administrative immigration decisions. One provision implemented as a part of IIRIRA, 8 U.S.C. § 1252(f)(1), appears, at least at first glance, to prohibit courts from issuing class-wide injunctive relief in immigration cases. Such a restriction would be significant because federal courts have issued class-wide injunctions in the past to stop unconstitutional immigration practices and policies of the federal government. The Supreme Court has not yet directly interpreted section 1252(f)(1). Taking a closer look at the text of this provision in the context of relevant Supreme Court precedent, this article suggests that the provision may not impose a broad bar against the use of class-wide injunctive relief in the immigration context. In addition, if the Court interprets this provision to broadly restrict class-wide injunctive relief, this article examines whether habeas corpus jurisdiction may provide an alternative means to obtain such relief. Ultimately, resolution of the effect of this provision will implicate the ongoing scholarly debate over the constitutionality and propriety of congressional restrictions of federal court review.

Table of Contents

I.	Introduction	1
II.	Previous Use of Immigration Class Actions	4
	a. To Begin, an Example	4
	b. Why a Class Action?	7
	c. The 1986 Legalization Cases	12
III.	Major Review-Limiting Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996	25
IV.	Deciphering 8 U.S.C. § 1252(f)(1)	34
	a. Textual Review	35
	b. The Connection to the Legalization Cases	44
	c. The Role of the Serious Constitutional Problem	49
V.	Habeas Jurisdiction and Immigration Class Actions	53
	a. The Reach of 8 U.S.C. § 1252 After <i>INS v. St. Cyr</i>	55
	b. Challenges Facing Habeas Class Actions	63
VI.	Conclusion	76

I. Introduction

Congressional attempts to limit federal court jurisdiction over controversial issues are not innovative,¹ and the scholarly debate addressing the constitutionality of such attempts dates back many years.² In the past, the scholarly debate anticipated future

¹ For 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 prisoner's 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 Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J.679, 738 -40 (1999).

² See, 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 1; 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 1; Anderson, *Congressional Control*, *supra*,

possibilities.³ What if Congress eliminated Supreme Court review of certain claims? What if Congress denied access to federal courts to a particular group? In the 1990's, the conditional nature of these questions diminished. One of the pieces of legislation that cemented the practicality of such questions is the Illegal Immigration Reform and

note 1. 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*]; Hart, *supra*; 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, 1882 n.125 (2000) [hereinafter *Federal Courts Issues in Immigration Law*].

³ For 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 1, 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 2, at 1219-20.

Immigrant Responsibility Act (IIRIRA) of 1996.⁴ IIRIRA contains many limits on court review,⁵ and the federal courts are still grappling with the boundaries and meanings of its restrictions.⁶

One restriction implemented through IIRIRA that the Supreme Court has yet to directly interpret, 8 U.S.C. § 1252(f)(1), may limit the ability of the federal courts to grant class-wide injunctive relief in immigration cases. The exact meaning and effect of

⁴ Omnibus 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 1, at 435-44. Another timely (but not yet enacted) example of legislation

asserting Congressional control over federal court jurisdiction is a bill passed by the

House of Representatives that would limit federal court jurisdiction over legal questions

brought under the Defense of Marriage Act. H.R. 3313, 108th Congress (July 22, 2004).

⁵ IIRIRA 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.

⁶ See part III, *infra*.

the section, however, is uncertain. Analysis of this statutory section is important because federal courts have issued class-wide injunctive relief in the past to stop unconstitutional immigration policies and practices of the federal government. Because the power to regulate immigration is a federal matter,⁷ if this statute bars the federal courts from issuing class-wide injunctive relief, no court would have the power to grant that relief.

By analyzing both the text of 8 U.S.C. § 1252(f)(1) and relevant Supreme Court precedent, this article will attempt to decipher the meaning of section 1252(f)(1).⁸ This article also considers whether habeas jurisdiction is a viable alternative method to obtain class-wide injunctive relief if section 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,

⁷ 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.”)

⁸ This article reserves the question of the constitutionality of the statute in favor of first focusing on its meaning and effect.

the benefit sought is asylum based on an applicant's fear of returning to their country of origin.

The immigration service,⁹ 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.¹⁰ Immigration judges, administrative judges who preside over immigration hearings, held approximately 18 individual hearings per day.¹¹ Immigration

⁹ Prior 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 generally refer to the entities that administer the immigration laws.

¹⁰ *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1029-31 (5th Cir. Unit B 1982).

¹¹ *Haitian Refugee Ctr. v. Smith*, 676 F.2d at 1031. Under the accelerating processing program, the Miami district office of the immigration service processed asylum applications "at an unprecedented rate." *Id.* at 1031.

judges afforded applicants ten days to compile and file a written claim for asylum.¹² The immigration service conducted asylum interviews at a rate of forty per day and limited each interview to one-half hour.¹³ At the rate of forty interviews per day, there was a shortage of attorneys available to represent the applicants who desired counsel.¹⁴ During the accelerated program, the immigration service granted asylum to not one applicant.¹⁵

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 its applicants of due process of law.¹⁶ The court affirmed the district court's class-wide injunction to the extent it ordered the immigration service to re-process the applications in a manner consistent with due process.¹⁷

¹² *Haitian Refugee Ctr. v. Smith*, 676 F.2d at 1031. 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.

¹³ *Haitian Refugee Ctr. v. Smith*, 676 F.2d at 1031.

¹⁴ *Haitian Refugee Ctr. v. Smith*, 676 F.2d at 1031. 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.

¹⁵ *Haitian Refugee Ctr. v. Smith*, 676 F.2d at 1032.

¹⁶ *Haitian Refugee Ctr. v. Smith*, 676 F.2d at 1040.

¹⁷ *Haitian Refugee Ctr. v. Smith*, 676 F.2d at 1041.

What if the 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 the enactment of IIRIRA.

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.¹⁸ As in *Haitian Refugee Center v. Smith*, immigration class action litigation seeks to 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 major group is those actions challenging the fact of or conditions attached to immigration detention,¹⁹ including the treatment of detained

¹⁸ It 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.

¹⁹ The 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 state or federal prison.

juveniles and adults.²⁰ The second major group is those actions challenging the manner in which the immigration service implements immigration benefit programs demanded by Congress,²¹ including the asylum program.²² The third major category is composed of

²⁰ 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*, 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. December 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.

²¹ 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

objections to the immigration service's procedures in removing²³ foreign nationals from the United States, including practices used to obtain waivers of the right to a hearing,²⁴

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).

²² *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 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).

²³ Over 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."

²⁴ *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.*

the stop and seizure practices of the United States Border Patrol,²⁵ practices used in immigration workplace enforcement raids²⁶ and the immigration service's alleged unauthorized use of confidential information.²⁷

Scholars have discussed why class actions are preferable to individual actions to challenge these types of immigration service practices.²⁸ An advantage of the class action device is that it allows for broad systematic reform.²⁹ Due to its potentially broad

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).

²⁵ See, e.g., *Murillo v. Musegades*, 809 F. Supp. 487 (W.D. Tex. 1992).

²⁶ See, e.g., *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457 (N.D. Cal. 1983).

²⁷ See, e.g., *Aparicio v. Blakeway*, 302 F.3d 437 (5th Cir. 2002).

²⁸ 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*]; Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, *supra* note 2, 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); and Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 576 (1997).

²⁹ See Gerald L. Neuman, *Federal Courts Issues*, *supra* note 2, at 1681 (explaining "[w]hen 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

nature, a class action can give relief to individuals who otherwise might not realize they are entitled to relief.³⁰ The government does not provide free counsel if a foreign national facing removal cannot afford to hire their own.³¹ 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 those claims; they may never even realize that their claims exist.³² A further advantage of using the class action device in the immigration context, and one that will be 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.³³

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. *See Greenberg, supra* note 28, at 578.

³⁰ *See Neuman, Federal Courts Issues in Immigration Law, supra* note 2, at 1680-81.

³¹ 8 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”).

³² *See Neuman, Federal Courts Issues in Immigration Law, supra* note 2, at 1680-81.

³³ *See* notes 47-49, *infra*. For example, in *Haitian Refugee Center v. Smith*, the district court was able to effectively and efficiently gather necessary information about the

c. *The 1986 Legalization Cases*

Perhaps the best-known (and longest lasting) immigration class action lawsuits were filed in the wake of the Immigration Reform and Control Act of 1986 (IRCA). These cases are examples of class litigation challenging the immigration service's administration of a benefit program. More importantly for the purpose of this article, the Supreme Court's treatment of the review-limiting provisions of the legalization statute provide perspective on deciphering the meaning of the text of section 1252(f)(1) (created by IIRIRA, the 1996 act), which is also a review-limiting provision.

Through IRCA, Congress created a program that allowed certain foreign nationals illegally present in the United States to legalize their immigration status.³⁴ The legalization program had two main components. The first component granted the

accelerated processing program by analyzing the program as a whole, beyond the treatment of a single applicant.

³⁴ Immigration 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.

opportunity to apply for permanent residence status³⁵ to foreign nationals who had entered the United States before January 1, 1982 and who had illegally and continuously resided in the United States since that date.³⁶ 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.³⁷ 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.³⁸ In general, these lawsuits claimed that

³⁵ More 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 in the United States. For further discussion on the incidences of permanent resident status in the United States, see CHARLES GORDON, STANLEY MAILMAN AND STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE §§6.03, 6.05.

³⁶ 8 U.S.C. § 1255a(a)(2)(A).

³⁷ 8 U.S.C. § 1160(a)(1)(B).

³⁸ *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

the immigration service, in administering the legalization program, excluded individuals from the program whom Congress intended to include. The stakes were high, as the difference between inclusion and exclusion was permission to legally reside 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 *Catholic Social Services, Inc. v. Reno*, 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 only obtain judicial review of a final deportation order directly in the appropriate federal court of appeals. 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.³⁹ Some courts of appeals had allowed district courts to hear challenges to immigration service practices even before the issuance of a final order.⁴⁰

158 (2d Cir. 1999); *Naranjo-Aguilera v. USINS*, 30 F.3d 1106 (9th Cir. 1994); *Ayuda, Inc. v. Reno*, 7 F.3d 246 (D.C. Cir. 1993).

³⁹ *See, e.g.*, *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968).

⁴⁰ *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.*

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, which operated on top of the existing general rules regarding judicial review of immigration administrative actions. The special provisions both 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.”⁴¹ 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

Thornburgh, 880 F.2d 1325, 1336 (D.C. Cir 1989) (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 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 28, at 779-80.

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

shall be based solely upon the administrative record established at the time of the review by the appellate [administrative] authority.”⁴²

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.”⁴³

⁴² 8 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).

⁴³ *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 v. Haitian Refugee Ctr., Inc.*, 498 U.S. at 486.

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.”⁴⁴ 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.⁴⁵

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 only apply 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.”⁴⁶ Because of the nature of the challenge, the case fell outside of the special legalization judicial review structure, and district court jurisdiction was appropriate.

⁴⁴ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. at 487.

⁴⁵ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. at 491.

⁴⁶ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. at 492.

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.”⁴⁷ Even if a foreign national subjected themselves to a deportation proceeding, and then sought judicial review, the Court concluded 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.⁴⁸ The Court doubted that a court of appeals would have adequate fact-finding powers to determine whether a pattern of unlawful practice was occurring in the context of an individual case.⁴⁹ 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 have used broader statutory language to clearly express that intent.⁵⁰

The significance of *McNary* became muddled, however, with the Supreme Court’s decision in *Reno v. Catholic Social Services*. Decided two and a half years after

⁴⁷ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. at 497.

⁴⁸ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. at 497. *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).

⁴⁹ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. at 497.

⁵⁰ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 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.

McNary, Catholic Social Services concerned the long-term illegal resident component of the 1986 legalization program. To be eligible for the program, Congress required 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.⁵¹ The applicant must also show continuous physical presence in the United States since November 6, 1986.⁵² The foreign national must have also submitted a legalization application during a one-year application period.⁵³

The legalization statute elaborates that “brief, casual, and innocent” absences are permissible under the continuous physical presence requirement.⁵⁴ 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.⁵⁵ Regarding the illegal continuous residence requirement, the immigration service regulated that that requirement would not be satisfied if the foreign national had left the United States and re-entered by presenting “facially valid” documentation, despite that the statute allowed for brief trips abroad.⁵⁶ To further complicate matters, the immigration service reversed its interpretation of the illegal continuous residence requirement seven months into the

⁵¹ 8 U.S.C. § 1255a(a)(2)(A).

⁵² 8 U.S.C. § 1255a(a)(3)(A).

⁵³ 8 U.S.C. § 1255a(a)(1)(A).

⁵⁴ 8 U.S.C. § 1255a(a)(3)(B).

⁵⁵ *Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. 43, 47 (1993) (citing 8 C.F.R. § 245a.1(g)).

⁵⁶ *Reno v. Catholic Soc. Serv., Inc.* 509 U.S. at 50; 8 U.S.C. § 1255a(g)(2)(A).

one-year application period.⁵⁷ 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, not a group of decisions or a practice or procedure employed in making decisions.⁵⁸ 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 the legality of a regulation implementing the legalization statute.⁵⁹

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.

⁵⁷ *Reno v. Catholic Soc. Serv., Inc.* 509 U.S. at 50-51.

⁵⁸ *Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. 43, 55-6 (1993).

⁵⁹ *Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. at 56.

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 INS blocked his path by applying the regulation to him.”⁶⁰ Without those first affirmative steps, the Court reasoned, “one cannot know whether the challenged regulation actually makes a concrete difference to a particular alien until one knows that he will take those affirmative steps and will satisfy the other conditions.”⁶¹

However, the Court elaborated that if a challenged regulatory interpretation is detrimentally applied to an applicant and the applicant asserts their 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.”⁶² 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*

⁶⁰ Reno v. Catholic Soc. Serv., Inc., 509 U.S. at 59.

⁶¹ Reno v. Catholic Soc. Serv., Inc., 509 U.S. at 59 n.20.

⁶² Reno v. Catholic Soc. Serv., Inc., 509 U.S. at 60.

class member could not adequately present their pattern or practice challenge in the context of an individual hearing.⁶³

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 applications in the presence of the applicant. If the clerk determined based on a facial review that the applicant is ineligible under the legalization statute, the instructions directed the clerk to refuse the application for filing and return it immediately to the applicant.⁶⁴ Applicants subjected to this “front-desking” procedure held ripe claims because “front-desked” applicants would have felt the application of the challenged regulations “in a particularly concrete manner.”⁶⁵ 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. Therefore, the Court reasoned, blocking district court review of applications refused at the front desk would effectively leave those applicants with no meaningful review.⁶⁶ In *Catholic Social Services*, the Court left open the possibility that “front-desked” applicants could maintain a class action in a district court.⁶⁷

⁶³ *Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. at 60-61.

⁶⁴ *Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. at 61-62.

⁶⁵ *Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. at 63-64.

⁶⁶ *Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. at 64.

⁶⁷ 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

Lower courts, in applying *McNary* and *Catholic Social Services*, have considered whether review would be available if it is not permitted in a district court.⁶⁸ Lower courts have also emphasized the distinction between review of a challenge to “a determination” and review of a challenge to a widely employed practice or procedure.⁶⁹

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. However, the Legal Immigration Family Equity Act (LIFE Act) of 2000 repealed section 377 of IIRIRA with regard to certain legalization class members. Pub. L. No. 106-553, § 1104 (2000) (Title XI).

⁶⁸ See, e.g., *Yi v. Maugans*, 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”).

⁶⁹ For 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) (quoting *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 of Labor v. INS*, 306 F.3d 842 (9th Cir.

Still relying on the framework of *McNary* and *Catholic Social Services*, some of the class action cases challenging the administration of the 1986 legalization program settled in 2004. For example, on January 21, 2004, a district court entered an order approving a settlement between the *Catholic Social Services* travel permission class (challenging the continuous residence requirement) and the immigration service.⁷⁰ According to the agreement, the immigration service will provide a new one-year application period for those individuals who appeared to apply for legalization but were told that they were ineligible because they had traveled abroad without obtaining advance permission from the immigration service.⁷¹

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. *McNary* and *Catholic Social Services*, however, concerned "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

2002); *Abdullah v. INS*, 184 F.3d 158 (2d Cir. 1999); *Naranjo-Aguilera v. U. S. INS*, 30 F.3d 1106 (9th Cir. 1994); *Ayuda, Inc. v., Reno*, 7 F.3d 246 (D.C. Cir. 1993).

⁷⁰ *Catholic Soc. Serv., Inc. v. Ridge*, No. S-86-1343 (E.D. Ca. January 23, 2004) (Order Approving Settlement of Class Action).

⁷¹ *Catholic Soc. Serv., Inc. v. Ridge*, No. S-86-1343 (E.D. Ca. January 23, 2004) (Joint Stipulation Regarding Settlement at ¶ 4, attached to Order Approving Settlement of Class Action).

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 challenge, 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.

III. Major Review-Limiting Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

As described by many commentators, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) drastically remodeled the Immigration and Nationality Act.⁷² 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 section 1252, “Judicial review of orders of removal.” Because IIRIRA is so complex, and its review-limiting provisions are interrelated, it is 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.

⁷² See, e.g., Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1988); Benson, *Back to the Future*, *supra* note 40; Lucas Guttentag, *The Immigration Act: Federal Court Jurisdiction-Statutory Restrictions and Constitutional Rights*, 1209 PLI/CORP 81, 81-98 (2000).

Section 1252 carves out a wide selection of substantive matters not subject to judicial review. These matters include a decision to execute expedited removal⁷³ against a foreign national,⁷⁴ certain decisions involving discretionary acts of government officials⁷⁵ and decisions to remove foreign nationals convicted of committing certain

⁷³Expedited 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. 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 border officer determines that the individual possesses a credible fear of persecution. 8 U.S.C. § 1225(b)(1)(A)(i); 8 U.S.C. § 1225(b)(1)(B)(iii)(I). The applicant may seek administrative review of an adverse credible fear determination, but the individual is 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 CHARLES GORDON, STANLEY MAILMAN AND STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 64.06.

⁷⁴ 8 U.S.C. § 1252(e).

⁷⁵ According to IIRIRA, “no court shall have jurisdiction to review” any decision whether to grant a waiver of statutory provisions demanding removal of certain foreign nationals with criminal histories, 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).

crimes.⁷⁶ A further substantive restriction on review contained in IIRIRA is section 1252(g), which provides: “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, section 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

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.

⁷⁶ IIRIRA 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 criminal bases for removal, including what constitutes a crime of moral turpitude and an aggravated felony, see CHARLES GORDON, STANLEY MAILMAN AND STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE §§ 63.03, 71.05.

brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.”⁷⁷

There are two form-restricting provisions in section 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.⁷⁸

⁷⁷ This 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 section 1252(b)(9). *Judicial Review in Immigration Cases After AADC*, *supra* note 40, at 434-38. He argues that the reasoning of McNary survives section 1252(b)(9) and that section 1252(b)(9) should be narrowly construed to allow for district court jurisdiction over pre-final order pattern and practice litigation. *Judicial Review After AADC*, *supra* note 40, at 434-38. A further potential challenge to pattern and practice litigation is section 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. *Judicial Review in Immigration Cases After AADC*, *supra* note 40, at 440-41.

⁷⁸ 8 U.S.C. § 1252(e)(1)(B). IIRIRA provides for extremely limited habeas corpus review of expedited removal decisions, and IIRIRA 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)(3).

The second form-restricting provision is 8 U.S.C. § 1252(f)(1), which is entitled “Limit on injunctive relief.” The section 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,⁷⁹ 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 are still debating the meaning and effect of many of its review-limiting provisions. The Supreme Court has directly addressed two major review-limiting issues, but the Court has not yet directly addressed the effect of the timing provision (section 1252(b)(9)) or the form-limiting section 1252(f)(1).

The Supreme Court first considered section 1252(g). In *Reno v. American-Arab Anti-Discrimination Committee*,⁸⁰ a group of Palestinians brought a selective prosecution

⁷⁹ “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.

⁸⁰ *Reno v. American-Arab Anti-Discrimination Comm.*, 525 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*

claim against the immigration service. The Court adopted a narrow interpretation of section 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.⁸¹ 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 order⁸² challenge to the immigration service’s exercise of discretion with respect to the three discrete acts mentioned in the statute.⁸³ The Court determined that federal

in Immigration Cases After AADC, supra note 40, at 393-95; 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 1, at 436-37.

⁸¹ *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. at 482.

⁸² *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 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 section 1252, a court would have jurisdiction over a claim challenging any of the three acts mentioned in section 1252(g) when reviewing a final order pursuant to section 1252. The plaintiffs in *American-Arab* were seeking pre-final order review in a district court.

⁸³ *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. at 482.

courts lack pre-final order jurisdiction over selective prosecution claims as the claim involves the discrete act whether to commence proceedings.⁸⁴

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*⁸⁵ 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 would have allowed him to remain in the United States despite his plea. IIRIRA eliminated the waiver for which Mr. St. Cyr would have been eligible.⁸⁶

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

⁸⁴ *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 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 (1999).

⁸⁵ *INS v. St. Cyr*, 533 U.S. 289 (2001).

⁸⁶ *INS v. St. Cyr*, 533 U.S. at 292-93.

serious constitutional questions.”⁸⁷ Emphasizing the historical difference between judicial review and habeas corpus review of immigration administrative actions,⁸⁸ the Court concluded that no part of IIRIRA “speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute.”⁸⁹ “At no point . . . does IIRIRA make express reference to § 2241.”⁹⁰ Therefore, the Court concluded that habeas jurisdiction survived IIRIRA.⁹¹

⁸⁷ INS v. St. Cyr, 533 U.S. at 314.

⁸⁸ The Court explained that judicial review and habeas review are two distinct, co-existing concepts in immigration law. INS v. St. Cyr, 533 U.S. 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 with a petition directly filed in the appropriate court of appeals. See Motomura, *Judicial Review in Immigration Cases After AADC*, *supra* note 40, 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.” INS v. St. Cyr, 533 U.S. at 313-14.

⁸⁹ INS v. St. Cyr, 533 U.S. at 312-13.

⁹⁰ INS v. St. Cyr, 533 U.S. 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.” INS v. St. Cyr, 533 U.S. at 326-27 (Scalia, J., dissenting).

The Supreme Court has yet to directly address the meaning and effect of section 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.⁹² The next section will analyze the statutory text of section 1252(f)(1), and using *McNary*, *Catholic Social Services* and *St. Cyr* as guides, attempt to parse out its effect.

IV. Deciphering 8 U.S.C. § 1252(f)(1)

While the Supreme Court has yet to directly interpret section 1252(f)(1), the Court gave brief mention to the entire section 1252(f) in *American-Arab*. In that case, the Court rejected the Court of Appeals for the Ninth Circuit's determination that section

⁹¹ *INS v. St. Cyr*, 533 U.S. at 312-14. For further discussion of *St. Cyr* and its underlying issues, see, e.g., 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).

⁹² *Reno v. American Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999); Benson, *Back to the Future*, *supra* note 40, at 1454; Nancy Morawetz, *Predicting the Meaning of INA § 242(b)(9)*, 14 *GEO. IMMIGR. L.J.* 453, 454 (2000); Neuman, *Federal Courts Issues in Immigration Law*, *supra* note 2, at 1679; Volpp, *Court-Stripping and Class-Wide Relief*, *supra* note 28, at 468.

1252(f) contains an independent, affirmative grant of jurisdiction. The Court stated in dicta:

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 class-wide 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.⁹³

But what, exactly, is the effect of section 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? It will be helpful here to review the exact language of section 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

⁹³ Reno v. American Arab Anti-Discrimination Comm., 525 U.S. at 481-82 (1999) (Scalia, J.).

individual alien against whom proceedings under such part have been initiated.⁹⁴

a. Textual Review

Reading the text of section 1252(f)(1) itself, it is not obvious what the section bars. A closer intrinsic review of the statutory section alone may cause the Supreme Court to backtrack from its dicta in *American-Arab* that the section “prohibits federal courts from granting class-wide injunctive relief against the operation of §§ 1221-1231.”⁹⁵ To be sure, the title of section 1252(f) (“Limit on injunctive relief”) suggests some sort of limit on injunctive relief, but under what circumstances is not clear.⁹⁶

⁹⁴ The immigration service has not issued any regulations interpreting section 1252(f)(1).

⁹⁵ *Reno v. American Arab Anti-Discrimination Comm.*, 525 U.S. at 481.

⁹⁶ The general title of section 1252 (“Judicial review of orders of removal”) only adds further uncertainty. Courts have struggled with the question whether section 1252 as a whole applies only in the context of removal proceedings, or whether its provisions also apply to 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 section 1252 applies to review of these types of administrative actions is unsettled. *See, e.g.*, *Spencer Enterprises, Inc. v. U.S.*, 345 F.3d 683, 692 (9th Cir. 2003) (discussing but declining to reach the issue of whether section 1252(a)(2)(B)(ii) applies outside the context of removal proceedings); *CDI Information Serv., Inc. v. Reno*, 278 F.3d 616, 618-20 (6th Cir. 2002) (concluding that

The text of section 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” (emphasis added). The meaning of this italicized phrase is critical in determining the scope of section 1252(f)(1). Just as “a determination” was a critical term in *McNary*, section 1252(f)(1) has its own critical terms.

For example, “operation of” is a critical term in section 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,” section 1252(f)(1) should be interpreted to mean that no court may issue class-wide injunctive relief eliminating the 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.⁹⁷ In other words, to enjoin the “operation of” a statute is to completely foreclose its application in any instance, which is

section 1252(a)(2)(B)(ii) applies beyond review of orders of removal); *Samirah v. O’Connell*, 335 F.3d 545, 549 (7th Cir. 2003), *cert. denied sub. nom.*, *Samirah v. Ashcroft*, ___ U.S. ___, 124 S. Ct. 2811 (2004) (same); *Van Dinh v. Reno*, 197 F.3d 427, 432 (10th Cir. 1999) (same).

⁹⁷ *Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003); *Grimaldo v. Reno*, 187 F.R.D. 643, 648 (D. Colo. 1999).

an entirely different concept than issuing an injunction preventing the immigration service from implementing a statute in an impermissible manner.⁹⁸

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 section 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."⁹⁹

Similarly, in a case that arose prior to the effective date of IIRIRA, a district court speculated that section 1252(f)(1) does not apply to a situation where a class seeks to "enjoin constitutional violations and policies and practices."¹⁰⁰ The court recognized a distinction between an injunction preventing the operation of a statute and an injunction ordering implementation of a statute "under the appropriate standard."¹⁰¹

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

⁹⁸ Professors Motomura, Neuman and Volpp have also discussed this concept. See *Judicial Review In Immigration Cases After AADC*, *supra* note 40, at 439; *Federal Courts Issues in Immigration Law*, *supra* note 2, at 1682-83; *Court-Stripping and Class-Wide Relief*, *supra* note 28, at 473.

⁹⁹ *Grimaldo v. Reno*, 187 F.R.D. at 648.

¹⁰⁰ *Tefel v. Reno*, 972 F. Supp. 608, 618 (S.D. Fla. 1997).

¹⁰¹ *Tefel v. Reno*, 972 F. Supp. at 618.

Somalia because that country has no functioning central government.¹⁰² The Ninth Circuit upheld the district court’s determination that section 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.”¹⁰³

The Court of Appeals for the District of Columbia, perhaps inadvertently, lent support to this interpretation of section 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.”¹⁰⁴ Thus, challenges to the new

¹⁰² *Ali v. Ashcroft*, 346 F.3d 873, 877 (9th Cir. 2003). 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 has granted certiorari to determine “whether the Attorney General can remove an alien to one of the countries designated in [the governing section] without obtaining that country’s acceptance of the alien prior to removal.” *Jama v. INS*, 329 F.3d 630 (8th Cir. 2003), *cert. granted*, 124 S. Ct. 1407 (2004).

¹⁰³ *Ali v. Ashcroft*, 346 F.3d at 886.

¹⁰⁴ *American Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1359-60 (D.C. Cir. 2000) (emphasis added). In *American Immigration Lawyers Association v. Reno*, the

system fall under section 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 of what became section 1252(f)(1), states that the purpose of section 1252(f) is to prevent single district courts or courts of appeals, but not the Supreme Court, from enjoining “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.”¹⁰⁵ This statement evidences that the House Committee was concerned that class-wide 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.

court held that organizational plaintiffs did not have standing to bring statutory or constitutional claims challenging the operation of 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.

¹⁰⁵ H.R. REP. NO. 104-469 (I) at 161 (1996).

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 sections 1221 through 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,¹⁰⁶ voluntary departure,¹⁰⁷ 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, section 1252(f)(1) should not apply. In fact, plaintiffs

¹⁰⁶ Cancellation of removal allows for waiver of removal in very narrow circumstances.

For further discussion of cancellation of removal, see CHARLES GORDON, STANLEY MAILMAN AND STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 64.04.

¹⁰⁷ Voluntary departure is a procedure through which an immigration judge allows a foreign national ordered removed to voluntarily depart from the United States during a specified time frame. For further discussion of voluntary departure, see CHARLES GORDON, STANLEY MAILMAN AND STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 64.05.

continue to bring class actions challenging how the immigration service is administering portions of the Immigration and Nationality Act housed outside of part IV.¹⁰⁸

At times, the line between part IV and other parts is not bright, as there are cases that involve interrelated actions authorized under and outside of part IV.¹⁰⁹ This raises the issue of when a court is restraining or enjoining the operation of *part IV* to trigger the limitations of section 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,

¹⁰⁸ See, e.g., *Ngwanyia v. Ashcroft*, 302 F. Supp.2d 1076 (D. Minn. 2004) (granting, without addressing section 1252(f)(1), partial summary judgment to class challenging immigration service procedures in adjudicating permanent residence applications of those granted asylum and challenging procedures used in issuing documentation of work authorization to those granted asylum).

¹⁰⁹ For example, the Court of Appeals for the Third Circuit recently noted that section 1252(a)(2)(C) (which bars judicial review of orders against foreign nationals who have committed certain crimes), would bar review of the asylum application of a foreign national subject to removal, despite that section 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).

but a foreign national may seek adjustment of status during a part IV removal proceeding in certain circumstances.¹¹⁰

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.¹¹¹ Courts have implemented this reasoning. For example, a class of individuals illegally residing in the United States who had prematurely 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 section 1252(f)(1) would not prevent the issuance of injunctive relief because the statute's "own terms" restricted its scope to part IV. 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 of subchapter II.¹¹² Similarly, the Ninth Circuit

¹¹⁰ See, 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).

¹¹¹ Section 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, section 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).

¹¹² *Ramos v. Ashcroft*, No. 02-C-8266, 2004 WL 161520 at *6 (N.D. Ill. January 16, 2004); see also *North Jersey Media Group Inc., v. Ashcroft*, 205 F. Supp.2d 288, 295

(en banc) held that section 1252(f)(1) did not preclude a preliminary injunction issued under a part other than part IV, even if the injunction affects an action arising under part IV.¹¹³

So far, the textual analysis of section 1252(f)(1) can reasonably lead to the conclusion that the statute does not block injunctions ordering the immigration service to implement the immigration laws in a different way, and also that the restrictions of section 1252(f)(1), whatever they may be, only narrowly 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 in *Haitian Refugee Center v. Smith*, if courts adopt this interpretation of section 1252(f)(1), section 1252(f)(1), had it existed at the time, 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 affected how the immigration service implemented a statute). Second, the injunction affected

(D.N.J. 2002), *rev'd on other grounds*, 308 F.3d 198 (3d Cir. 2002) (discussing that section 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).

¹¹³ *Catholic Soc. Serv., Inc. v. INS*, 232 F.3d 1139, 1149-50 (9th Cir. 2000) (en banc). Yes, this is the same Catholic Social Services class described supra notes 55 to 66. The original panel had held that the injunction ultimately interfered with actions related to part IV, and therefore section 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).

asylum procedures authorized outside of part IV (even though some of the asylum procedures took place during a part IV removal hearing).

b. The Connection to the Legalization Cases

The legalization cases help to decipher the text of section 1252(f)(1). As explained above, the textual significance of the term “operation of” in section 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*.¹¹⁴ Perhaps, however, the connection between section 1252(f)(1) and *McNary* and *Catholic Social Services* is more significant than analogy.

So far, the analysis of section 1252(f)(1) has not revealed any textual mention of class actions or Federal Rule of Civil Procedure 23. It seems the assumption that section 1252(f)(1) limits injunctive relief to individual actions only stems from a particular reading of the last phrase of section 1252(f)(1), which this article has not yet discussed. 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 section 1252(f)(1) prohibits certain class-wide injunctions is that this phrase 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

¹¹⁴ Lower courts 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 69.

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 re look at section 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 section 1252(f)(1) simply be to thwart the ripeness issue of *Catholic Social Services*? Perhaps section 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.¹¹⁵ In other words, perhaps the statute does not limit injunctive relief to individual *actions*, but rather aims to limit injunctive relief to

¹¹⁵ The language of this last phrase of section 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 aim of the section, see *supra* notes 106-108, as the section limits injunctive relief to an individual alien in removal proceedings.

individuals who have actually felt the application of the provision at issue. After all, section 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 section 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.¹¹⁶ If an individual qualifying under section 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 an interpretation that Congress did not expressly bar class-wide injunctions through the text of section 1252(f)(1).¹¹⁷ 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.¹¹⁸ That clearer language is evidence that Congress knows how to include clear terms to eliminate the use of the class action device. Section 1252(f)(1), however, does not even contain any variation of the

¹¹⁶ See ALBA CONTE AND HERBERT B. NEWBERG, 1 NEWBERG ON CLASS ACTIONS, §§1:1, 1:2 (4th Ed. 2003).

¹¹⁷ Referring to section 1252(e) to determine the meaning of section 1252(f)(1) is especially appropriate given that section 1252(f)(1) was enacted at the same time as section 1252(e), as both were entirely new subsections enacted by IIRIRA.

¹¹⁸ 8 U.S.C. § 1252(e)(1)(B).

term “class,” nor does it mention Rule 23 in any way.¹¹⁹ The only term that can be interpreted to limit multi-party 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 the challenged provision, and not limiting injunctive relief to individual actions only.

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.¹²⁰ The Supreme Court did not find “the necessary clear expression of congressional intent” to prohibit the use of the class action device in 42 U.S.C. § 405(g).¹²¹ That section provided that “any individual” could obtain federal court review of certain social security administrative

¹¹⁹ If Congress intended the foreclosure of all class-wide relief, surely section 1252(f)(1) would contain language at least as comprehensive as section 1252(e). Professor Volpp has argued that section 1252(f)(1) “nowhere addresses joinder, and only address relief.” *Court Stripping and Class Wide Relief*, *supra* note 28, at 471. Professor Volpp has also argued that section 1252(f)(1) does not bar forms of relief other than injunctive. *Court Stripping and Class-Wide Relief*, *supra* note 28, at 473-74; *see also* Neuman, *Federal Courts Issues in Immigration Law*, *supra* note 2 at 1684-85. In the context of expedited removal, Congress wrote that no court may “enter declaratory, injunctive, or other equitable relief.” 8 U.S.C. § 1252(e)(1)(A). This specific listing of various types of relief emphasizes that section 1252(f)(1) only limits injunctive relief, and does not limit other types of relief.

¹²⁰ *Califano v. Yamasaki*, 442 U.S. 682, 699-701 (1979).

¹²¹ *Califano v. Yamasaki*, 442 U.S. at 700.

actions.¹²² 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.”¹²³ 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.”¹²⁴ Similar to section 405(g), section 1252(f)(1) refers to “an individual alien,” but contains no “necessary clear expression of congressional intent” to exempt immigration actions from Rule 23.

Congress’ inclusion of a broad restriction on types of relief and specific ban on Federal Rule of Civil Procedure 23 actions in the expedited removal section stands in sharp contrast to section 1252(f)(1). If Congress meant to bar all class-wide injunctive relief, why does section 1252(f)(1) contain the ambiguous reference to “individual” and contain no reference to Rule 23? Perhaps the answer is that section 1252(f)(1) only bars injunctive relief to a class comprised of members with unripe claims.

This reading of section 1252(f)(1)—that the statute does not block the issuance of class-wide injunctive relief if the class claims are ripe—receives additional support from the Supreme Court’s legalization opinions. 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

¹²² *Califano v. Yamasaki*, 442 U.S. at 699 n.12.

¹²³ *Califano v. Yamasaki*, 442 U.S. at 700.

¹²⁴ *Califano v. Yamasaki*, 442 U.S. at 700-01.

express that intent.¹²⁵ Similarly, Congress could have used clearer language in section 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 section 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

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

¹²⁶ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. at 496.

¹²⁷ See, e.g., Cole, *Jurisdiction and Liberty*, *supra* note 2, at 2506-11; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive 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,

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

At first glance, this trend appears to have little effect in the context of section 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)

STATUTES AND STATUTORY CONSTRUCTION, Chapter 48A (6th Ed. 2000) (collecting articles).

¹²⁸ In *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 could have constitutionally 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. *Zadvydas v. Davis*, 533 U.S. at 682.

may issue class-wide injunctive relief regarding anything that arguably relates to part IV. While this broad reading would no doubt amount to a substantial disruption of the status quo and would also 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.¹²⁹ Therefore, it is appropriate to question whether the Supreme Court would base its interpretation of section 1252(f)(1) to avoid a lurking serious constitutional problem.¹³⁰

It is possible, however, that a broad reading of section 1252(f)(1) could trigger the potential deprivation of review that concerned the Court in *McNary*.¹³¹ In *McNary*, the

¹²⁹ Professor Neuman has questioned the exact nature of the Supreme Court's role created by section 1252(f)(1) and whether it "amount[s] to an improper exercise of original jurisdiction." Neuman, *Federal Courts Issues in Immigration Law*, *supra* note 2, at 1686. If the Supreme Court's ability to issue injunctive relief under section 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. Neuman, *Federal Courts Issues in Immigration Law*, *supra* note 2, at 1686.

¹³⁰ This 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.

¹³¹ Section 1252(f)(1) could implicate other potential constitutional issues. Professor Volpp has suggested that section 1252(f) could be challenged as violating Article III of

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 only available to individuals, but it is also impossible for individuals to effectively bring pattern and practice claims, can a court effectively address a pattern and practice claim under a broad reading of section 1252(f)(1)?¹³²

There are ample reasons to construe section 1252(f)(1) not to constrain the use of the class action device unless the class is comprised of individuals with unripe claims.¹³³ Suppose, however, that a broad reading of section 1252(f)(1) is adopted. 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 section discusses whether habeas corpus jurisdiction can preserve what section 1252(f)(1) may take away.

V. Habeas Jurisdiction and Immigration Class Actions

the Constitution, as well as violating notions of due process and equal protection. *Volpp, Court Stripping and Class Wide Relief, supra* note 28, at 475-77. Another potential constitutional issue is whether Congress created a proper role for the Supreme Court in section 1252(f)(1). *See supra* note 129. The Court may be swayed to interpret section 1252(f)(1) to eliminate the need to reach that issue.

¹³² The potential deprivation of review is amplified if section 1252(f)(1) is interpreted to bar all types of class-wide relief.

¹³³ Of course, this class issue is relevant only if the “operation of” part IV is implicated. *See supra* notes 106-113.

What if there existed a parallel universe where section 1252(f)(1) could be ignored?¹³⁴ If section 1252(f)(1) proves 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 is 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 The

¹³⁴ It is important to remember that there are provisions in section 1252 other than section 1252(f)(1) that are problematic to immigration class actions, including section 1252(b)(9). Professor Motomura has argued that courts should allow pattern and practice litigation to proceed despite sections 1252(b)(9) and 1252(f)(1). Motomura, *Judicial Review In Immigration Cases After AADC*, *supra* note 40, at 434-39; *see supra* note 77. He concludes that section 1252(b)(9) “probably does not supersede McNary.” *Judicial Review In Immigration Cases After AADC*, *supra* note 40 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 section 1252.

¹³⁵ *See supra* note 87. Senator Orrin Hatch recently introduced a bill, the “Fairness in Immigration Litigation Act,” that proposes to amend section 1252 to specify that every reference to the elimination or curtailment of judicial review in section 1252 also eliminates or curtails habeas review. Fairness in Immigration Litigation Act, S. 2443, 108th Cong. (2004). The Hatch bill contains language that section 1252(a)(2) should not “be construed as precluding consideration by the circuit courts of appeals of

absence of 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 section 1252 would otherwise bar.¹³⁷

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

constitutional claims or pure questions of law raised upon petitions for review filed in accordance with this section.” S. 2443 at §2(a)(1)(A). The Hatch bill also provides that petitions for review filed under section 1252 “shall be the sole and exclusive means of raising any and all claims with respect to orders of removal.” S. 2443 at § 2(a)(1)(B). This bill does not, however, address the problem faced by pattern and practice litigants, as the petition for review process established by section 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 sections 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.” *INS v. St. Cyr*, 533 U.S. at 308, 310-11.

¹³⁷ Specifically, 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 section 1252 (a)(2)(C), which forbids judicial review of the removal orders of certain foreign nationals with criminal histories.

A reasonable question following *St. Cyr* is whether section 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 section 1252 would bar judicial review of the same action. If section 1252(f)(1) is interpreted to broadly bar class-wide relief, 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 section 1252 (sections 1252(a)(1), 1252(a)(2)(C), and 1252(b)(9)), courts have analyzed, post *St. Cyr*, whether other provisions of section 1252 affect habeas review.¹³⁹ Therefore, a court might examine whether the restrictions of section 1252(f)(1) would apply to a habeas action, despite *St. Cyr*. A court determining whether the restrictions of section 1252(f)(1) would apply to a habeas action will likely analyze two issues. First, the court will likely consider whether section 1252(f)(1) itself bars habeas review. If not, it would

¹³⁸ If section 1252 applies only to judicial review, then a habeas class action would not be subject to any of the provisions in section 1252. This would be an important benefit of styling an action as a habeas class action. Not only would section 1252(f)(1) not apply, but also the timing provision of section 1252(b)(9), which allows for judicial review of final administrative orders only, would not apply. However, the practical effect of the restrictions against review of discretionary actions contained in section 1252 (§§ 1252(a)(2)(B) and 1252(g), for example) may independently exist in the habeas realm. As described *infra* notes 175-183, courts have held that review of discretionary actions is not permissible under habeas jurisdiction.

¹³⁹ See *infra* notes 142-153.

likely consider whether the restrictions of section 1252(f)(1) apply both to judicial review and to habeas actions.¹⁴⁰

Regarding the first issue, similar to the specific subsections referenced in *St. Cyr*, section 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 section 1252(f)(1) is distinct enough from the sections considered in *St. Cyr* to justify a holding that section 1252(f)(1) does bar habeas review,¹⁴² such an argument contradicts the Supreme Court's clear statement requirement established in *St. Cyr*.

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

¹⁴¹ *INS v. St. Cyr*, 533 U.S. at 298.

¹⁴² The government has argued, subsequent to *St. Cyr*, that parts of section 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 section 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, five courts of appeal have examined the language of the statute implementing

The Supreme Court's recent decision in *Demore v. Kim* further supports the argument that section 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 section 1226(e) reads: "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 section 1226(e) is sufficient to repeal habeas jurisdiction, especially because the text of the statutory subsections at

the Convention Against Torture in light of *St. Cyr* and have concluded that it also does not contain an express revocation of habeas jurisdiction. *Cadet v. Bulger*, ___ F.3d ___, No. 03-14565, 2004 WL 1615619 at *6-7 (11th Cir. July 20, 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). No court has addressed whether section 1252(f)(1) eliminates habeas jurisdiction.

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

issue in *St. Cyr* all specifically mentioned the term “judicial review,” and the provision at issue in *Demore v. Kim* does not.¹⁴⁴

The language of the text of section 1252(f)(1) also does not mention the term “judicial review” and, similar to the statute in *Demore v. Kim*, states, “Regardless 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 section 1226(e).¹⁴⁵ It seems likely that the Supreme Court will not find a clear statement in section 1252(f)(1) sufficient to signal the elimination of habeas jurisdiction.

The resolution of the second inquiry, whether the restrictions of section 1252(f)(1) are applicable to habeas actions, is more complicated. The historical separation of judicial review from habeas jurisdiction supports an argument that section 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 section 1252, and in *St. Cyr* the Court held that review-limiting provisions of section 1252 did not apply to habeas actions. It is uncertain, however, whether courts will directly adopt this argument in the context of section 1252(f)(1).

¹⁴⁴ *Demore v. Kim*, 538 U.S. at 534-35 (2003) (O’Conner, J., dissenting). While the title of section 1226(e) contains the term “judicial review,” Justice O’Conner commented that statutory titles do not per se control the meaning of statutory text. *Id.* at 535.

¹⁴⁵ *Demore v. Kim*, 538 U.S. 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.

Courts are currently facing the challenge of balancing the autonomous nature of the habeas realm with the restrictions of section 1252. For example, the Ninth Circuit applied section 1252(f)(1) to a habeas action but did not first discuss whether section 1252(f)(1) plays any role in a habeas action.¹⁴⁶ Also, courts have struggled to define the proper role of section 1252(g) in a habeas action. The Court of Appeals for the Seventh Circuit determined that, even after *St. Cyr*, section 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 section 1252(g) itself does not bar habeas

¹⁴⁶ *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003). The Ninth Circuit determined that section 1252(f)(1) did not preclude any relief because the “operation of” part IV was not challenged. *See supra* note 97.

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*, ___ F.3d ___, No. 03-1215, 2004 WL 1551593 at *5 (10th Cir. July 12, 2004) (acknowledging that section 1252(g) “does not strip the district court of § 2241 habeas jurisdiction,” but incorporating section 1252(g) into its decision that discretionary acts are not reviewable via habeas jurisdiction). The Court of Appeals for the Sixth Circuit has also concluded that section 1252(g) applies 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

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

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).

¹⁴⁸ *Ali v. Ashcroft*, 346 F.3d 873, 878-79 (9th Cir. 2003). The Ninth Circuit reasoned that because a discretionary determination was not at issue, section 1252(g) would not apply, yet left open (but did not address) the possibility that section 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), *cert granted*, ___ U.S. ___, 124 S.Ct. 1407 (2004).

The District Court in *Ali* had more definitively stated that section 1252(g) “does not limit judicial review on a petition for 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 section 1252 to support the decision. *See also* *Latu v. Ashcroft*, 2004 WL 1551593 at *5 (employing similar analysis to that used in *Liu*).

Additionally, at least four courts of appeals have held that section 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 section 1252(d) refers only to “judicial review,” and does not encompass habeas review. Distinguishing section 1252(d) from the provisions of section 1252 at issue in *St. Cyr*, these courts determined that section 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, section 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 section 1252(d) to encompass both judicial review and habeas review.¹⁵³

¹⁵⁰ *Sun v. Ashcroft*, 370 F.3d 932, 939 (9th Cir. 2004); *Theodoropoulos v. INS*, 358 F.3d 162, 171 (2d Cir. 2004) (petition for cert. filed); *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*, ___ U.S. ___, 124 S. Ct. 531 (2003).

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

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

¹⁵³ Courts have also considered the effect of section 1252(a)(2)(B)(ii) (which bars review of certain discretionary acts) on habeas jurisdiction. *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*, ___ U.S. ___, 124 S. Ct. 562 (2003) (determining that 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar habeas review); *Sierra v. INS*, 258 F.3d 1213,

Setting aside a discussion of the soundness of the legal analysis employed by these courts of appeals, the question arises whether courts will follow this mode of analysis with regard to section 1252(f)(1). If so, the relevant determination is whether section 1252(f)(1) is more akin to those provisions at issue in *St. Cyr* (eliminating jurisdiction) or more akin to section 1252(d) (setting a condition on jurisdiction). The answer is most likely linked to the resolution of the issue raised earlier, whether there is a serious constitutional problem lurking in section 1252(f)(1).¹⁵⁴ A likely government argument is that section 1252(f)(1) bars only a form of relief, and therefore does not bar jurisdiction altogether. The counter-argument is that section 1252(f)(1), if interpreted broadly, could bar meaningful review of pattern and practice claims, and therefore should not apply to habeas actions.

b. Challenges Facing Habeas Class Actions

Even if the restrictions of section 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. For example, a habeas class action is not identical to a Federal Rule of Civil Procedure 23 class action and may be subject to more

1217 (10th Cir. 2001) (same). Similarly, courts have addressed the effect of section 1252(b)(5) (which addresses judicial review of nationality claims). *See, e.g., Lee v. Ashcroft*, No. 01-CV-0997, 2003 WL 21310247 at *4 (E.D.N.Y. May 27, 2003) (determining that 8 U.S.C. § 1252(b)(5) does not bar a habeas action); *Gomez v. Bureau of Immigration and Custom Enforcement*, 315 F. Supp.2d 630, 634 (M.D. Pa. 2004) (same).

¹⁵⁴ *See supra* notes 127-132.

stringent requirements. Further, the maintenance of a habeas class action depends on a custody requirement.¹⁵⁵ Other issues are whether the scope of habeas review allows a court to review the challenged behavior and whether habeas review allows a court to grant the requested relief.

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 approved the use of Rule 23 to govern a habeas immigration class action,¹⁵⁶ and courts have allowed

¹⁵⁵ The 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).

¹⁵⁶ *Ali v. Ashcroft*, 346 F.3d 873, 890-91 (9th Cir. 2003). *See also Kazarov v. Achim*, No. 02-C-5097, 2003 WL 22956006 at *7-8 (N.D. Ill. December 12, 2003) (certifying, under Rule 23(b)(2), class challenging detention procedures). For pre-IIRIRA immigration habeas class actions, see, for example, *Bertrand v. Vigile*, 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, for example, *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).

habeas class actions in non-immigration contexts.¹⁵⁷ Courts have explained, however, that Rule 23 does not strictly 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.¹⁵⁸ 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.¹⁵⁹ Also, courts sitting in habeas jurisdiction may apply a tougher version of

¹⁵⁷ See, e.g., *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); *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 also RANDY HERTZ AND JAMES S. LIEBMAN, 1-11 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §11.4(b) (4th Ed. 2003); ALBA CONTE AND HERBERT B. NEWBERG, 8 NEWBERG ON CLASS ACTIONS §25:28 (4th Ed. 2003).

¹⁵⁸ *Ali v. Ashcroft*, 346 F.3d 873, 890-91 (9th Cir. 2003) (citing *Sero*, 506 F.2d at 1125 and *Bijeol*, 513 F.2d at 968).

¹⁵⁹ *Sero v. Preiser*, 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 directly imported 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.* at 1125. In *Sero*, the Second

the Rule 23 requirements.¹⁶⁰ 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 class action, the habeas custody requirement presents a further challenge. One issue is whether the named plaintiff is “in custody.” Another issue is who is 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.¹⁶¹ If

Circuit explained that “the unusual circumstance” of the case was a “compelling justification for allowing a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure.” *Id.* at 1125. *See also* *Bertrand v. Vigile*, 535 F. Supp. 1020, 1024 (S.D.N.Y. 1982) (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).

¹⁶⁰ *See, e.g.*, *Bertrand v. Vigile*, 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).

¹⁶¹ *See* *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 v. Reno*, 862 F. Supp. 801, 811-12 (E.D.N.Y. 1994) (refusing to certify subclass based on custodian issue).

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, then a district court would have potential nationwide jurisdiction over all those class members under the custody of the Attorney General.¹⁶²

Courts have disagreed over who is the proper custodian in an immigration habeas action.¹⁶³ The Supreme Court recently declined to reach the issue “whether the Attorney

¹⁶² For 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 (2001/2002); Brian O’Donoghue, *Who’s the Boss?: Armentero, Padilla, and the Proper Respondent in Federal Habeas Corpus Law*, 22 YALE L. & POL’Y REV. 441 (2004) (student note). See also Lenni B. Benson, *The New World of Judicial Review of Immigration Proceedings*, 12 GEO. IMMIGR. L.J. 233, 260-63 (1998).

¹⁶³ See, e.g. *Ali v. Ashcroft*, 346 F.3d 873, 887-888 (2003) (determining that the Attorney General is the proper custodian due to his unique role in immigration proceedings and also because of the “legal reality” of control of immigration detainees (that they are frequently transferred all over the country)); *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

General is a proper respondent to a habeas petition filed by an alien detained pending deportation” in *Rumsfeld v. Padilla*.¹⁶⁴ 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.¹⁶⁵ 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.’”¹⁶⁶ 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.

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, e.g., Yi v. Maugans*, 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 v. Reno*, 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 162, for a thorough discussion of the conflict among the courts regarding this issue.

¹⁶⁴ ___ U.S. ___, 124 S. Ct. 2711 n.8 (2004). In *Rumsfeld v. Padilla*, a United States citizen challenged his custody based on his designation as an enemy combatant. ___ U.S. ___, 124 S. Ct. at 2715.

¹⁶⁵ ___ U.S. ___, 124 S. Ct. at 2723.

¹⁶⁶ ___ U.S. ___, 124 S. Ct. at 2720.

The first issue involves the question of who is “in custody” to satisfy the requirements of 28 U.S.C. § 2241.¹⁶⁷ 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.¹⁶⁸ For example, courts have held that the physical removal of an 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.¹⁶⁹ However, the Supreme Court 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

¹⁶⁷ For 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, *In Through the Out Door? Retaining Judicial Review for Deported Lawful Permanent Resident Aliens*, 101 COLUM. L. REV. 605, 633-37 (2001) (student note).

¹⁶⁸ *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 v. Kemna*, 523 U.S. at 7); *Lopez v. Heinauer*, 332 F.3d 507, 510 (8th Cir. 2003).

¹⁶⁹ *See, e.g., Zalawadia v. Ashcroft*, 371 F.3d at 297; *Chong v. District Director, 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).

Constitution.¹⁷⁰ 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.¹⁷¹

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

¹⁷⁰ *Spencer v. Kemna*, 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.

¹⁷¹ *Spencer v. Kemna*, 523 U.S. 1. *See Zalawadia v. Ashcroft*, 371 F.3d at 292 (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 (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 v. District Director*, 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. US Attorney General*, 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 167 (discussing post-removal standing issues).

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.¹⁷² 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.

Even if a court agrees to recognize a habeas class action and the "in custody" requirement is satisfied, the class claim must be cognizable under habeas jurisdiction. After *St. Cyr*, courts are presently considering what types of claims are appropriate for habeas review.¹⁷³

¹⁷² See *supra* notes 19-27.

¹⁷³ Another post-*St. Cyr* issue is whether habeas jurisdiction is available to those who could also seek relief under section 1252. At least three courts of appeals have held that foreign nationals may bring habeas actions even if judicial review is also available under section 1252. *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 specifically held that habeas review of an application for asylum was permissible, even though judicial review of asylum determinations is permitted under section 1252. The petitioners in *Chmakov* had failed to file a timely petition for judicial review. *Chmakov v. Blackman*, 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

Courts have determined that the substantive scope of habeas review after *St. Cyr* does not replenish all of the review carved out by IIRIRA.¹⁷⁴ For example, the First,¹⁷⁵

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 the Chmakov reasoning, holding that when judicial review under section 1252 is available, habeas review is not also available. *Lopez v. Heinauer*, 332 F.3d 507, 510-11 (8th Cir. 2003). Also, 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 section 1252), and has denied to re-hear 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 section 1252 petition for review. *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004) (exhaustion of judicial remedies); *Acevedo-Carranza v. Ashcroft*, 371 F.3d 539, 542 (9th Cir. 2004) (same); *Nunes v. Ashcroft*, ___ F.3d ___, No. 02-55613, 2004 WL 1516777 at *1 (9th Cir. July 8, 2004) (issue preclusion).

¹⁷⁴ Another developing issue is the scope of relief available in a habeas action. While a habeas class action may avoid the restrictions on relief of section 1252(f)(1), a habeas class action is inherently limited 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. *Zalawadia v. Ashcroft*, 371 F.3d 292 (5th Cir. 2004). 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. *Id.* 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 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.

¹⁷⁵ *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 71. 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 v. INS*, 277 F.3d at 68-69.

Second,¹⁷⁶ Third,¹⁷⁷ Fourth,¹⁷⁸ Fifth,¹⁷⁹ Ninth¹⁸⁰ and Eleventh¹⁸¹ Circuits have all determined that habeas review is available (after *St. Cyr* and IIRIRA) only to address

¹⁷⁶ *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).

¹⁷⁷ *Bakhtriger 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).

¹⁷⁸ *Bowrin v. US 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.

¹⁷⁹ *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).

¹⁸⁰ *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.* at 829.

constitutional and statutory issues, and not to challenge discretionary determinations. These courts of appeals have sanctioned 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 factual determinations.¹⁸² A few courts, however, have held that review of constitutional or

¹⁸¹ *Cadet v. Bulger*, ___ F.3d ___, No. 03-14565, 2004 WL 1615619 at *8 (11th Cir. July 20, 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 or adjudicated facts, and (2) does not include review of administrative fact findings or the exercise of discretion”).

¹⁸² *See, e.g., Bakhtriger v. Elwood*, 360 F.3d 414, 420 (3d Cir. 2004) (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 may properly encompass review of discretionary acts, see *Cole, Jurisdiction and Liberty*, *supra* note 2, at 2503-05. A related issue is whether habeas jurisdiction is appropriate to review a discretionary act that is guided by a statutory framework. For example, in an unpublished opinion, the Third Circuit determined that habeas jurisdiction allows review an immigration-related discretionary act subject to statutory limits. *Togbah v. Ashcroft*, No. 03-1753, 2004 WL 1530494 at *1 n.1 (3d Cir. July 8, 2004) (citing *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 690 (9th Cir. 2003)).

statutory issues includes review of whether law was applied correctly to undisputed facts.¹⁸³ 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, of course, that section 1252(f)(1) bars such relief in a non-habeas action and also assuming that the class succeeds 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.

¹⁸³ *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 wrongly applied 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 Board of Immigration Appeals wrongly applied the Convention Against Torture to the facts of a case); *see also* *Cadet v. Bulger*, 2004 WL 1615619 at *8.

VI. Conclusion

As the above illustrates, the availability of class-wide injunctive relief in the immigration context is currently uncertain. The source of the uncertainty, 8 U.S.C. § 1252(f)(1), upon close review, is self-limiting in several ways. Courts may fairly interpret the statute to limit injunctive relief against the operation of limited statutory provisions, but injunctive relief is not against the operation of those provisions if it seeks to correct the way the immigration service is implementing those provisions. Close review of the section also 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. If, however, the statute is interpreted to broadly bar class-wide injunctive relief, habeas jurisdiction is a problematic alternative method to obtain that relief.

Remembering the injunction issued in response to the experience of the asylum applicants in *Haitian Refugee Center v. Smith*, this article ends with the question posed earlier: What if the federal courts had no power to issue such class-wide relief? What if the 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 section 1252(f)(1) in favor of focusing on the meaning and effect of the section. The Supreme Court's future interpretation of this specific section, especially if the Court interprets the section as broadly barring the federal courts from issuing class-wide injunctive relief in immigration cases, may re-ignite the more general debate addressing congressional power to limit federal court jurisdiction. The resolution of the meaning and effect of section 1252(f)(1) will certainly establish precedent that will permanently affect that debate.