

Immigration Law—Enforcing Administrative Exhaustion Requirements for Pattern-and-Practice Claims Concerning Due Process Violations During Immigration Raids—*Aguilar v. United States Immigration and Customs Enforcement*, 510 F.3d 1 (1st Cir. 2007) (no pet. for cert.)

Immigration statutes have traditionally contained provisions that limit federal district court jurisdiction over administrative appeals and require individuals to exhaust administrative remedies before seeking judicial review of immigration claims.¹ As in other areas of administrative law, courts have considered such provisions and determined the circumstances in which the court should waive exhaustion requirements and extend judicial review.² The REAL ID Act of 2005, one of the most recent immigration statutes, requires administrative exhaustion and significantly limits judicial review of claims “arising” from immigration removal proceedings.³ In *Aguilar v. United States Immigration and Customs Enforcement*,⁴ the United States Court of Appeals for the First Circuit addressed class-wide claims that Immigration and Customs Enforcement (ICE) has a pattern and practice of violating aliens’ due process right to counsel during large scale immigration raids.⁵ The First Circuit considered whether such pattern-and-practice claims “arise” from removal proceedings, thus triggering the REAL ID Act’s provisions, and whether enforcing the provisions would foreclose the opportunity for meaningful judicial review.⁶ The court held that although framed as a pattern-and-practice action, the underlying right-to-counsel claims “arose” from removal, and that the court could enforce the REAL ID Act without foreclosing meaningful judicial review of those claims.⁷

1. See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(d)(1) (1996) (amended 2005) (requiring exhaustion of administrative remedies before judicial review); 8 U.S.C. § 1160(e)(3)(A) (1986) (amended 1996) (barring judicial review of agricultural immigration-status legalization applications unless exclusion or deportation order); 8 U.S.C. § 1105a(c) (1970) (repealed 2006) (precluding judicial review of deportation decisions unless alien exhausts all administrative remedies).

2. See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994) (noting court may waive exhaustion requirement if compliance with requirement forecloses meaningful judicial review); *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976) (dispensing exhaustion requirement where adequate administrative relief not available).

3. See 8 U.S.C. § 1252(a)(5) (2006) (granting federal circuit courts exclusive judicial review over final removal orders); *id.* § 1252(b)(9) (revoking federal district courts’ habeas corpus jurisdiction over claims arising from removal); *id.* § 1252(d)(1) (requiring administrative exhaustion before judicial review).

4. 510 F.3d 1 (1st Cir. 2007).

5. *Id.* at 5-7 (discussing alleged constitutional and statutory violations during raid in New Bedford, Massachusetts).

6. *Id.* at 5-6, 10 (noting pattern-and-practice issue raises novel and important questions concerning Act’s jurisdiction scheme).

7. See *id.* at 9, 18 (concluding although fashioned as class action, procedural due process claims arose

On March 6, 2007, ICE officials executed an immigration enforcement raid at a leather factory in New Bedford, Massachusetts where they detained several hundred undocumented aliens and held them at Ft. Devens immigration holding facility in Ayer, Massachusetts.⁸ The petitioners claimed that following the raid, ICE denied access to several volunteer attorneys who arrived at the holding facility to offer legal services.⁹ They also claimed that two days later, ICE transferred several aliens to detention facilities in Texas, where they had no opportunity for legal advice.¹⁰ According to the petitioners, ICE's actions during the raid were part of a systematic tactic to interfere with exiting attorney-client relationships and to hinder their ability to retain lawyers.¹¹ The petitioners alleged that ICE's tactics violated their due process right to counsel.¹²

The petitioners initially filed a habeas corpus petition in the United States District Court for the District of Massachusetts.¹³ Shortly thereafter, they withdrew their habeas petition and filed an amended complaint, structured as a class-wide claim, alleging that ICE had a pattern and practice of violating due process during large-scale immigration raids.¹⁴ In response, ICE argued that the claims arose from removal and that pursuant to the REAL ID Act, the district court lacked jurisdiction over the claims and the petitioners must exhaust administrative remedies before seeking review by the circuit court.¹⁵

from removal).

8. *Aguilar v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 2d 42, 43 (D. Mass. 2007) (explaining raid targeted Michael Bianco, Department of Defense subcontractor who employed undocumented aliens), *aff'd*, 510 F.3d 1 (1st Cir. 2007); *id.* at 43 n.3 (noting ICE immediately released some workers for humanitarian reasons).

9. *Aguilar v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 2d 42, 44 n.4 (D. Mass. 2007) (noting ICE later let attorneys visit thirty detainees), *aff'd*, 510 F.3d 1 (1st Cir. 2007).

10. See Michael R. Triplett, *First Circuit Chides ICE, But Sees No Basis for Examining Post-Raid Detention Claims*, 229 Daily Lab. Rep. (BNA), at AA-1 (Nov. 29, 2007) (suggesting ICE prevented access to counsel).

11. *Aguilar v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 2d 42, 44 (D. Mass. 2007) (alleging ICE's deliberate strategy to defeat jurisdiction), *aff'd*, 510 F.3d 1 (1st Cir. 2007). Petitioners argued that ICE transferred detainees to Texas because, given the greater difficulty in demonstrating community ties in a foreign jurisdiction, petitioners may be less likely to obtain bond. *Id.* at 48; see also Yvonne Abraham, *Immigrants' Bond Hearings Can Proceed: Lawyers Argue over Jurisdiction*, BOSTON GLOBE, Mar. 22, 2007, at 2B (discussing ICE's motive in transferring detainees and opining harsher treatment in Texas courts).

12. See *Aguilar v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 2d 42, 43-44 (D. Mass. 2007) (asserting ICE also violated substantive due process by failing to ensure minor children supervised post-raid), *aff'd*, 510 F.3d 1 (1st Cir. 2007).

13. *Aguilar v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 2d 42, 44 (D. Mass. 2007) (noting district court enjoined ICE from transferring additional detainees pending court order), *aff'd*, 510 F.3d 1 (1st Cir. 2007).

14. *Aguilar v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 2d 42, 47 (D. Mass. 2007) (reviewing petitioners' alleged collective denial of rights), *aff'd*, 510 F.3d 1 (1st Cir. 2007); see also Becky W. Evans, *Court Critical of Feds in Bianco Raid*, SOUTHCOASTTODAY.COM, Nov. 28, 2007, <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20071128/NEWS/711280360/-1/SPECIAL21> (suggesting case expanded to consider ICE's treatment of individuals during raids).

15. *Aguilar v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 2d 42, 43, 46 (D. Mass. 2007)

The petitioners, however, maintained that the REAL ID Act did not apply to their claims because rather than challenging an individual removal order, their complaint concerned ICE's systematic tactics during immigration raids.¹⁶ Rejecting the petitioners' argument, the district court held that although fashioned as a class-wide complaint, the claims did arise from removal and were subject to the REAL ID Act's exhaustion requirements.¹⁷ The First Circuit agreed that the claims arose from removal and held that enforcing exhaustion would not foreclose the petitioners' opportunity for meaningful judicial review.¹⁸

Immigration statutes typically limit judicial review of claims associated with removal, including appeals from the decisions of both immigration judges (IJs) and the Board of Immigration Appeals (BIA).¹⁹ Many of these statutes also require administrative exhaustion; however, as in other administrative law contexts, courts have waived exhaustion requirements in certain situations.²⁰ Courts have held that "collateral claims"—claims that are beyond the adjudicating agency's authority or expertise—should not be subject to administrative exhaustion because exhaustion would foreclose meaningful judicial review of those claims.²¹ For example, because agencies generally lack

(discussing ICE's motion to dismiss), *aff'd*, 510 F.3d 1 (1st Cir. 2007).

16. *Aguilar v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 2d 42, 47-48 (D. Mass. 2007) (arguing pattern-and-practice claims do not arise from removal and exhaustion forecloses meaningful review), *aff'd*, 510 F.3d 1 (1st Cir. 2007).

17. 510 F.3d at 7, 13 (deeming right-to-counsel claims inextricably intertwined with removal proceedings); *see* *Aguilar v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 2d 42, 48 (D. Mass. 2007) (inferring REAL ID Act restricts district court's jurisdiction over claims), *aff'd*, 510 F.3d 1 (1st Cir. 2007).

18. *See* 510 F.3d at 10 (affirming district court's decision); *see also* *Aguilar v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 2d 42, 48 (D. Mass. 2007) (noting no Sixth Amendment right to counsel in removal proceedings), *aff'd*, 510 F.3d 1 (1st Cir. 2007). The district court clarified that the REAL ID Act does not preclude jurisdiction over *all* pattern-and-practice claims. *Aguilar v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 2d 42, 47-48 (D. Mass. 2007), *aff'd*, 510 F.3d 1 (1st Cir. 2007). It held, however, that in the present case, petitioners failed to link the alleged systematic violations with any constitutional or statutory rights typically bestowed on aliens during immigration proceedings. *Id.* at 48. *But see* Beth J. Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 398 (2000) (pointing out Supreme Court recognizes some Fifth Amendment due process rights during deportation proceedings).

19. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1252(g) (1996) (amended 2005) (prohibiting judicial review of Attorney General's decision to execute removal orders).

20. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1252(d)(1) (1996) (amended 2005) (requiring administrative exhaustion); *infra* note 21 and accompanying text (discussing cases considering propriety of waiver).

21. *See* *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212-13 (1994) (considering whether exhaustion preserves meaningful judicial review); *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976) (waiving exhaustion requirement for claims entirely collateral to underlying substantive claim); *see also* *Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999) (waiving exhaustion where agency lacked adjudicatory power over claim); *Vargas v. U.S. Dep't of Immigration and Naturalization*, 831 F.2d 906, 908 (9th Cir. 1987) (noting BIA lacks power to address constitutional issues).

authority to review constitutional claims, courts often hold that such claims are collateral and should not be subject to administrative exhaustion.²² Mindful of this loophole, petitioners often seek to avoid exhaustion by raising constitutional due process claims in district court; however, courts are wary of this tactic and their rulings hinge on whether the particular due process claim is cognizable within the administrative process.²³

Courts have also considered whether class-wide claims that the government systematically violated due process are collateral to administrative proceedings such that enforcing exhaustion would foreclose meaningful judicial review.²⁴ After determining whether an exhaustion provision applies, courts must consider whether enforcing the exhaustion requirement forecloses meaningful judicial review.²⁵ Some courts hold that class-wide claims should not be subject to exhaustion because a single administrative record cannot effectively encapsulate the scope of a broad-based unlawful practice.²⁶ Other courts, while recognizing such procedural difficulties, simply consider whether the

22. See *supra* note 21 (citing instances where agencies lack authority to adjudicate claims); see also *Ravindran v. INS*, 976 F.2d 754, 762 (1st Cir. 1992) (claiming procedural error regarding translation collateral to asylum hearing).

23. See *Jupiter v. Ashcroft*, 396 F.3d 487, 492 (1st Cir. 2005) (pointing out due process claims rarely exempt from exhaustion); *Ravindran v. INS*, 976 F.2d 754, 762 (1st Cir. 1992) (noting act of raising due process claim does not have talismanic effect of waiving exhaustion). Compare *Bowen v. City of New York*, 476 U.S. 467, 476 (1986) (holding claim against agency's internal policy collateral to underlying substantive claim for disability benefits), and *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976) (holding demand for hearing collateral to substantive claim for benefits), with *Bernal-Vallejo v. INS*, 195 F.3d 56, 60 (1st Cir. 1999) (concluding ineffective-assistance-of-counsel claim not collateral to removal because BIA may address claim), and *Ravindran v. INS*, 976 F.2d 754, 762 (1st Cir. 1992) (holding claim of inadequate translation during hearing not collateral because claim not does not challenge law's constitutionality).

24. See *infra* note 26 and accompanying text (discussing pattern-and-practice cases); see also Jill E. Family, *Another Limit on Federal Court Jurisdiction? Immigrant Access to Class-Wide Injunctive Relief*, 53 CLEV. ST. L. REV. 11, 15-16 (2005-06) (noting class-wide immigration claims often concern practices during enforcement raids). Class-wide actions may prevent the government from exercising unconstitutional systematic practices. See Family, *supra*, at 13 (explaining halting class action would foreclose use of Fed. R. Civ. P. 23 against unconstitutional actions); Robert Pauw, *Judicial Review of "Pattern and Practice" Cases: What to Do When the INS Acts Unlawfully*, 70 WASH. L. REV. 779, 780, 780 n.8 (1995) (defining type of class action and stating district court's jurisdiction over pattern and practice unclear).

25. Pauw, *supra* note 24, at 780 (stating exception to exhaustion rare and not universally applied).

26. See *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 484, 487-88 (1991) (allowing district court review of pattern-and-practice class-action claim). Under the 1986 IRCA, aliens could apply for Special Agricultural Worker (SAW) status; however, during the application review process, INS refused to let applicants challenge adverse evidence and failed to provide translators and to transcribe verbatim recordings of SAW interviews. *Id.* Moreover, the relevant IRCA provision limited judicial review of SAW determinations. *Id.* at 488. The Supreme Court noted that review of administrative decisions is usually confined to the record made at the "initial decision-making level." *Id.* at 496. It reasoned that because of INS procedures, the administrative record would be flawed and inadequate and would prevent individuals from proving an unlawful systematic pattern and practice. *Id.* at 497. The Court held that given the circumstances, depriving individuals of district courts' fact-finding and record-developing capabilities would foreclose meaningful judicial review. *Id.*; accord *Naranjo-Aguilera v. INS*, 30 F.3d 1106, 1113 (9th Cir. 1994) (permitting district court jurisdiction over INS class action given importance of discovery); *Jean v. Nelson*, 727 F.2d 957, 980 (11th Cir. 1984) (holding exhaustion provisions inapplicable to class action alleging INS's systematic abuse).

underlying nature of the pattern and practice claim is cognizable within the administrative process.²⁷ These courts are often wary of attempts to bypass exhaustion by artfully framing pleadings as class-wide complaints.²⁸

Courts have recently revisited this issue with respect to the REAL ID Act's jurisdiction-limiting provisions and administrative exhaustion requirements for claims arising from removal.²⁹ While previous immigration laws similarly restricted judicial review, the REAL ID Act is unique in that it expansively covers "all questions of law and fact including interpretation and application of constitutional and statutory provisions."³⁰ Mindful of the REAL ID Act's sweeping language, courts struggle to construe the precise meaning of the phrase "arising from" and, as in other administrative contexts, generally hold that the phrase means something more than a weak or tenuous connection to the event at issue.³¹ For example, in construing the REAL ID Act's "arising from" language, courts have held that detention-condition complaints and challenges to termination of asylum status do *not* arise from removal.³² In contrast, courts have held that challenges to mandatory detention pending expedited removal,

27. See *Kai Wu Chan v. Reno*, 916 F. Supp. 1289, 1307 (S.D.N.Y. 1996) (declining to extend *McNary* to all pattern-and-practice cases). The *Chan* court held that although framed as a pattern-and-practice claim alleging that INS systematically discriminated against Chinese nationals in processing status-adjustment applications, it was cognizable within the administrative process because the BIA could review aliens' equal-protection claims during individual administrative hearings. *Id.* (holding each individual could allege equal-protection claims in individual hearings without demonstrating class-wide discrimination); see also *Family*, *supra* note 24, at 13 (distinguishing individual from class-wide action where plaintiff challenges individual determination rather than established policy).

28. See *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 501 (1991) (Rehnquist, J., dissenting) (criticizing attempts to bypass judicial review restrictions by attacking general policies rather than individual results); *Swan v. Stoneman*, 635 F.2d 97, 105 n.9 (2d Cir. 1980) (advising district court to consider whether class claim added solely to avoid exhaustion).

29. See AM. BAR ASS'N, COMM'N ON IMMIGRATION, REPORT 107C TO THE HOUSE OF DELEGATES 6-9 (2006) (discussing scope of judicial review under REAL ID Act).

30. See *supra* note 3 (presenting text of REAL ID Act's judicial-review scheme). Compare IIRIRA, 8 U.S.C. § 1252(d)(1) (1996) (amended 2005) (barring judicial review of claims "arising from" removal orders), and 8 U.S.C. § 1160(e)(3)(A) (1986) (repealed 1996) (barring judicial review of "an application for adjustment of status"), with REAL ID Act of 2005, 8 U.S.C. § 1252(b)(9) (2006) (addressing claims arising from removal "including interpretation and application of constitutional and statutory provisions"). See generally *Fiallo v. Bell*, 430 U.S. 787, 792-94 (1977) (acknowledging Congress's plenary power over immigration affairs and noting immigration statutes entitled to great deference).

31. See *Humphries v. Various Fed. USINS Employees*, 164 F.3d 936, 942-43 (5th Cir. 1999) (holding IIRIRA's "arising from" language requires tighter nexus than "related to" language). According to the Fifth Circuit, the spectrum of "arising from" claims ranges from those with a weak connection to those directly connected with removal. *Id.* at 943.

32. See *Madu v. U.S. Att'y. Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006) (holding REAL ID Act inapplicable where alien claiming not "subject to" removal order). The *Madu* petitioner argued that he was never subject to a removal order because he departed the United States prior to his voluntary-departure deadline. *Id.* The Eleventh Circuit held that the REAL ID Act applies to challenges to final removal orders, but not to claims that no such order ever existed. *Id.*; *Hernandez v. Gonzales*, 424 F.3d 42, 42-43 (1st Cir. 2005) (affirming district court's habeas corpus jurisdiction over detention claims independent of removal); *Singh v. Chertoff*, No. C05-1454 MHP, 2005 WL 2043044, at *3 (N.D. Cal. Aug. 24, 2005) (holding asylum status termination proceeding not part of removal proceeding and, therefore, REAL ID Act inapplicable).

complaints regarding ineffective assistance of counsel during removal hearings, and claims concerning IJs' discretionary findings that impact removal *do* arise from removal and therefore require exhaustion.³³ Most recently, courts have considered whether claims that the government systematically violated due process rights during immigration raids arise from removal thus triggering the REAL ID Act's restrictive provisions.³⁴

In *Aguilar v. United States Immigration and Customs Enforcement*, one of the first cases to examine ICE's tactics during workplace raids, the First Circuit held that the petitioners' right-to-counsel claims arose from removal and that despite the class-wide format, it could enforce the REAL ID Act's exhaustion requirements while preserving meaningful judicial review.³⁵ Noting that right-to-counsel claims are common in removal proceedings, the First Circuit reasoned that the petitioners' claims were not tenuous, but were "inextricably intertwined" with and therefore arose from removal.³⁶ After determining that the REAL ID Act applied, the court held that enforcing administrative exhaustion would not foreclose meaningful judicial review of the right-to-counsel claims because the administrative process could effectively address and remedy those claims.³⁷ The court reasoned that because IJs administer oaths,

33. See *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007) (holding claim concerning mandatory detention pending expedited removal proceeding under 8 C.F.R. § 235.3(b)(4) arises from removal); *Feldman v. Gonzales*, No. 04-3784, slip op. at 6 (6th Cir. Nov. 21, 2005) (holding ineffective-assistance-of-counsel claim in removal proceeding arises from removal); *Ginters v. Cangemi*, 419 F. Supp. 2d 1124, 1131 (D. Minn. 2006) (holding challenge to sham-marriage finding indirectly arises from removal because impacts removal order's validity).

34. Cf. Complaint for Declaratory and Injunctive Relief at 4, *Nat'l Lawyers Guild v. Chertoff*, No. 2:08-CV-01000 (C.D. Cal. Feb. 14, 2008), 2008 WL 887582 (alleging ICE inhibited access to counsel during post-raid detention); Complaint at 23-24, *Barrera v. Boughton*, No. 3:07-CV-01436 (D. Conn. Nov. 26, 2007), 2007 WL 4462095 (claiming transfer inhibited access to counsel); Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief and Damages at 24-25, *Arias v. U.S. Customs and Immigration Enforcement*, No. 0:07-CV-01959 (D. Minn. July 27, 2007), 2007 WL 2973013 (raising right-to-counsel violations); Joint and Separate Answer of Defendants at 8, *Arias v. U.S. Immigration and Customs Enforcement*, No. 0:07-CV-01959 (D. Minn. Sept. 10, 2007), 2007 WL 4637327 (arguing REAL ID Act stripped district court of jurisdiction over case).

35. See 510 F.3d at 13-14 (holding court lacks jurisdiction because claims arose from removal and claims cognizable within administrative process); Triplett, *supra* note 10, at AA-1 (suggesting few cases address ICE tactics during raids).

36. See 510 F.3d at 10-11 (noting Congress did not intend to bar all claims or those faintly traced to removal). As the First Circuit recognized, the REAL ID ACT does not apply to claims that are wholly collateral to removal. *Id.* at 13, 18. The court explained, however, that the petitioners' claims were part and parcel of the removal proceeding itself and were cognizable within the administrative process. *Id.* The court also acknowledged that the REAL ID Act is far more expansive than prior immigration statutes and that a broader range of claims may "arise" from removal under the REAL ID Act. *Id.* at 9. See generally Nancy Morawetz, *Back to Back to the Future? Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113, 124 (2006-07) (explaining REAL ID Act aims to overhaul previous immigration laws governing judicial review).

37. See 510 F.3d at 14, 18 (holding no irreparable harm in enforcing exhaustion). The court reasoned that IJs and the BIA possess the fact-finding and evidentiary capacities to properly evaluate right to counsel claims. *Id.* at 14. The court also noted that IJs can provide remedies to protect an individual's access to counsel and can grant continuances and order changes of venue. *Id.* Further, if an individual is dissatisfied with an IJ's

receive evidence, issue subpoenas, call witnesses, and allow for cross-examination, supplemental district court fact-finding was unnecessary and the administrative record could provide a sufficient basis for further administrative and judicial review.³⁸

The First Circuit then addressed the claims' pattern and practice aspect and held that despite the class-wide format, the underlying right-to-counsel claims arise from removal and that enforcing exhaustion of class-wide claims does not foreclose meaningful judicial review.³⁹ Considering substance over form, the court reasoned that whether structured as an individual or pattern-and-practice case, right-to-counsel claims are cognizable within the administrative review process.⁴⁰ Accordingly, the record developed during an individual administrative adjudication would sufficiently allow a reviewing circuit court to determine whether ICE's pre- and post-raid practices violate due process.⁴¹ The court also remarked that in their complaint, the petitioners did not truly address ICE's *systematic* patterns and practices; rather, they simply conglomerated their individual due process claims in an attempt to bypass administrative exhaustion.⁴² Rather than challenging the manner in which ICE implemented the removal program *at large*, the petitioners' right-to-counsel claims concerned only one *aspect* of the removal process.⁴³ The First Circuit reasoned that ultimately, given its sweeping language and expansive scope, the REAL ID Act *may* extend to pattern-and-practices cases where the underlying claims "arise" from removal; as long as there is an opportunity for meaningful judicial review, claimants must adhere to the statutorily prescribed review process.⁴⁴

ruling, he or she can appeal to the BIA and then to the circuit courts. *Id.* The First Circuit concluded, however, that until petitioners exhaust administrative remedies, the court lacks jurisdiction over their claims. *Id.* at 13, 18.

38. *Id.* at 15 (holding, unlike in *McNary*, exhaustion requirement in present case preserves meaningful judicial review).

39. *Id.* at 14-15 (forbidding petitioners from bypassing exhaustion requirements by strategically framing claims as pattern-and-practice).

40. *Id.* at 16-17 (emphasizing claim's nature, not structural format).

41. *See* 510 F.3d at 14-15 (distinguishing *McNary*, stating IJs' "record-developing capabilities" ensure meaningful review by BIA and reviewing court). In *McNary*, INS's regular practices precluded the development of an adequate administrative record; as a result, without the trial court's supplemental fact-finding and record development, an individual could not possibly prove INS's unlawful patterns and practices. *See id.* at 15. In contrast, the present administrative scheme provides sufficient administrative fact-finding and record development; thus, the *Aguilar* petitioners are less dependent on judicial fact-finding to assert their claims. *Id.*

42. *See id.* at 16 (suggesting petitioners simply draped together individual due process claims); *see also supra* notes 39-40 and accompanying text (noting courts wary of individuals attempting to bypass exhaustion through class actions).

43. *See* 510 F.3d at 15-17 (distinguishing *McNary*, which challenged nationwide implementation of entire SAW program).

44. *See id.* at 15 (comparing REAL ID Act's expansive language with narrower statute in *McNary*). The statute at issue in *McNary* restricted "judicial review of a determination respecting an application . . ." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991). The *McNary* Court held that because the

In construing the most recent, and perhaps most sweeping judicial-review scheme in the immigration context, the First Circuit properly realized that the REAL ID Act extends to a wide range of claims associated with removal and that the petitioners' due process claims clearly fell within the Act's purview.⁴⁵ The court also properly observed that despite the claims' constitutional nature, enforcing administrative exhaustion would not foreclose meaningful judicial review.⁴⁶ Most significantly, by identifying the true nature of the petitioners' claims, the court wisely discerned between bona fide pattern-and-practice cases and mere conglomerations of similar but purely individual claims.⁴⁷ Indeed, by focusing on ICE's actions during one isolated event—the New Bedford raid—the petitioners failed to demonstrate the systematic nature of ICE's tactics and thus the need for district court review.⁴⁸

The First Circuit correctly realized that in the present case, the petitioners' artfully conglomerated claims did not truly constitute a pattern-and-practice action; in future cases, however, courts may mistakenly interpret *Aguilar's* broad yet nuanced holding to restrict district court review of *all* pattern-and-practice claims—even those that truly concern ICE's systematic tactics.⁴⁹ If the *Aguilar* holding were to extend not only to artfully conglomerated claims but to

judicial-review provision referred to “an application,” it applied only to claims concerning *individual* applications and not to class-wide pattern-and-practice claims alleging systematic due process violations. *Id.* The Court explained that if Congress intended to preclude judicial review of pattern-and-practice claims, it would have used broader language such as “all questions of law and fact.” *Id.* at 494. As the First Circuit noted in *Aguilar*, the REAL ID Act specifically refers to “all questions of law and fact.” 510 F.3d at 15.

45. See *supra* note 3 (stating REAL ID Act text); *supra* notes 36, 44 and accompanying text (discussing REAL ID Act's sweeping language). Because the language of § 1252(b)(9) is far more expansive than that in previous legislation, under the REAL ID Act more claims, including petitioners' right-to-counsel claims, may “arise” from removal. See *supra* note 33 and accompanying text (listing various claims deemed arising from removal); *supra* note 44 (comparing IRCA with REAL ID Act). While IRCA's jurisdiction-stripping provision—the provision at issue in *McNary*—merely barred judicial review of SAW determinations, the REAL ID Act extends to *all* questions of law and fact arising from removal and includes constitutional and statutory claims. See 510 F.3d at 15.

46. See *supra* note 27 and accompanying text (noting right-to-counsel claims cognizable in administrative process). Compare *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (stating INS tactics themselves limited evidentiary and record-developing needs), with 510 F.3d at 14 (noting IJ and BIA can adjudicate due process violations).

47. See 510 F.3d at 16 (stating class-wide complaint does not warrant waiving exhaustion).

48. See *id.* at 16 (discussing attempt to bypass exhaustion by framing individual claims as class-wide). The petitioners' complaint merely concerned one underlying incident—ICE's actions during and after the New Bedford raid—and failed to convincingly argue that ICE uses these tactics in *all* raids. See *id.*; cf. *Evans*, *supra* note 14 (noting 361 workers detained during New Bedford raid). In fact, it is possible that petitioners' sole basis for calling themselves a “class” rests on the fact that in any large-scale raid, ICE's actions may affect many individuals. See 510 F.3d at 16.

49. See *supra* notes 41, 43-44 and accompanying text (suggesting unclear whether *Aguilar* holding turned on underlying claim arising from removal or conglomeration factor). The First Circuit did not clearly state whether it was the underlying cognizable due process claim or the conglomerated rather than systematic structure that made administrative exhaustion appropriate. See 510 F.3d at 15-18 (outlining various rationales for holding). As a result, courts might apply the holding to bona fide systematic challenges simply because the underlying individual claims are cognizable. But see *id.* at 17 (stating while Act does not strip district court jurisdiction over *all* such cases, jurisdiction depends on underlying claim).

class-wide actions that truly concern ICE's systematic tactics, it would effectively preclude review of ICE's policies, practices, and approaches in carrying out its mandate.⁵⁰ As a result, while an individual petitioner may vindicate his personal claims through the administrative process, there would be limited means of monitoring ICE's overall practices to ensure that they comport with due process.⁵¹

Possibly, by altering their litigation approach, the petitioners could have enlightened the court as to the ramifications of restricting review of class-wide claims while also strengthening their own case.⁵² Because their pattern-and-practice claims concerned ICE's actions during one isolated raid, their complaint resembled an artfully framed pleading rather than a bona fide attack on ICE's systematic practices.⁵³ Rather than focusing their claims on events surrounding one particular immigration raid, the petitioners could have expanded their class to include aliens detained during raids in other states who similarly alleged due process violations; specifically, the petitioners could have cited the recent raids in Connecticut, California, and Minnesota, where undocumented aliens similarly alleged that ICE transferred them to distant holding facilities or otherwise obstructed their access to counsel.⁵⁴ By showing that ICE used similar tactics in several other immigration raids, the petitioners

50. See Family, *supra* note 24, at 16, 16 n.30 (stating class-wide litigation furthers broad systematic reform).

51. See *supra* notes 25-27 and accompanying text (discussing exhaustion appropriate in individual, but not class-wide cases). The administrative record produced in an individual removal proceeding may not be sufficient to establish an agency's unlawful patterns and practices. Family, *supra* note 24, at 17, 37 (noting individual cannot easily raise pattern-and-practice claim in administrative hearing). Moreover, even if an administrative proceeding can provide individual relief, without judicial review, it may be difficult to force ICE to change its harsh tactics. *Id.*

52. See Pauw, *supra* note 24, at 788, 791 (arguing pattern-and-practice claims best addressed in class-wide format using district court's efficient fact-finding); cf. Jean v. Nelson, 727 F.2d 957, 980 (11th Cir. 1984) (noting inefficiency of postponing judicial review of claims affecting large classes until individuals exhaust remedies).

53. See *supra* notes 47-48 and accompanying text (discussing flaws in petitioners' pattern-and-practice complaint).

54. See Complaint for Declaratory and Injunctive Relief, Nat'l Lawyers Guild v. Chertoff at 4, No. 2:08-CV-01000 (C.D. Cal. Feb. 14, 2008), 2008 WL 887582 (claiming ICE prohibited consultations with legal service providers during post-raid detention); Complaint at 20-24, Barrera v. Boughton, No. 3:07-CV-01436 *82-149 (D. Conn. Sept. 26, 2007), 2007 WL 4462095 (alleging questionable actions by ICE following day-labor group raid). The Barrera petitioners claimed that two days after a Connecticut raid, ICE transferred aliens to a Massachusetts detention facility and that for several days or weeks, ICE prohibited aliens from phoning their lawyers. Complaint at 20-24, Barrera v. Boughton, No. 3:07-CV-01436 (D. Conn. Sept. 26, 2007), 2007 WL 4462095; see also Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief and Damages at 24, Arias v. U.S. Immigration and Customs Enforcement, No. 0:07-CV-01959 (D. Minn. Sept. 27, 2007), 2007 WL 2973013 (raising right-to-counsel violations and seeking injunction enjoining ICE from further illegal actions); Joint and Separate Answer of Defendants at 8, Arias v. U.S. Immigration and Customs Enforcement, No. 0:07-CV-01959 (D. Minn. Sept. 10, 2007), 2007 WL 4637327 (counterarguing REAL ID Act revoked district court jurisdiction over claims); cf. Naranjo-Aguilera v. INS, 30 F.3d 1106, 1113 (9th Cir. 1994) (holding class-wide lawsuit in district court most appropriate method of challenging INS's nationwide practices).

may have convinced the court that their claims truly concerned ICE's systematic practices and were therefore beyond the REAL ID Act's purview.⁵⁵ More importantly, by framing the complaint to reveal ICE's nationwide tactics, the petitioners may have enabled the court to realize that applying the REAL ID Act to class-wide claims could effectively shield ICE from all review and scrutiny of its systematic, and perhaps strategic, tactics.⁵⁶ Even if this would not have changed *Aguilar*'s outcome, it may have prompted the First Circuit to address this nuance and to provide useful reasoning on the issue.⁵⁷

The REAL ID Act has already restricted court oversight by eradicating habeas corpus review in removal cases.⁵⁸ Now, by construing the REAL ID Act to restrict judicial review of pattern-and-practice claims, the First Circuit has created yet another barrier to reviewing ICE's actions.⁵⁹ The court's increasing deference to ICE not only limits review of ICE's practices, but may inhibit comprehensive change in ICE's potentially unlawful tactics.⁶⁰ Whether or not limiting review of ICE's actions is wise from a policy perspective, however, Congress retains plenary power over immigration affairs and ultimately has extensive authority to prescribe a judicial-review scheme.⁶¹ Accordingly, despite the potentially harmful ramifications of the *Aguilar* decision, the First Circuit properly applied the standard set forth by the REAL ID Act's judicial-review provisions.⁶²

55. See *supra* note 43 and accompanying text (discussing *McNary* and challenges to nation-wide practices).

56. See *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 487-88 (1991) (implying INS's actions widespread where INS violated due process in reviewing several different SAW applications). Cf. Morawetz, *supra* note 36, at 128-29 (discussing potentially dangerous applications of REAL ID Act's exhaustion and jurisdiction-stripping provisions).

57. See *supra* notes 42-44 and accompanying text (explaining First Circuit enforced exhaustion requirement for various reasons and suggesting main basis unclear). The First Circuit's reasoning was two-fold: first, it noted the petitioners' failure to identify any systematic tactics on the part of ICE and, second, the petitioners' attempt to simply conglomerate individual due process claims. See 510 F.3d at 16-17. The *Aguilar* holding also turned, however, on the fact that the underlying right-to-counsel claims were cognizable within the administrative process. See *id.* at 17-18. While citing other immigration raids may have been helpful, it may not have changed the outcome because even if the petitioners established ICE's systematic tactics, the underlying right-to-counsel claims were still administratively cognizable. See *id.* at 18; see also *supra* notes 42-44 and accompanying text. Nevertheless, by raising *truly* systematic acts, the petitioners may have prompted the court to clarify the main basis for its holding and to explain which pattern-and-practice claims warrant district court review. See *supra* notes 42-44 and accompanying text.

58. 8 U.S.C. § 1252(b)(9) (2006) (eradicating federal district courts' habeas corpus jurisdiction over claims arising from removal).

59. Cf. Morawetz, *supra* note 36, at 128 (discussing ramifications of restricting judicial review).

60. See *supra* notes 50 and accompanying text (discussing ability to review systematic tactics). *But cf.* Triplett, *supra* note 10, at 2 (noting New Bedford raid incidents prompted ICE to evaluate its own practices). Following the New Bedford raid, ICE acknowledged some mistakes and, on November 16, 2007, issued "best practices" guidelines to follow during future raids. *Id.* It appears, however, that the best-practices guidelines address substantive, rather than procedural, due process issues. See *id.*

61. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (recognizing Congress's broad authority over immigration matters).

62. See *supra* note 47 and accompanying text (arguing First Circuit properly applied REAL ID Act).

Immigration statutes have historically prescribed judicial-review schemes, and courts have struggled to define the scope of such schemes and whether they extend to pattern-and-practice cases. At first glance, the REAL ID Act seems distinct from prior statutes, and its specific and sweeping language seems to clarify its scope. As evidenced in *Aguilar*, however, the REAL ID Act is just as nuanced as previous statutes. Courts continue to struggle with determining its breadth and applying its provisions in a way that preserves due process. Given the emerging trend of enforcing immigration laws through large-scale workplace raids, courts will likely encounter this issue in the future. Ultimately, courts will be forced to consider whether the REAL ID Act adequately preserves procedural due process.

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