United States Court of Appeals
For the First Circuit

No. 07-1819

NOLBERTA AGUILAR ET AL.,

Petitioners, Appellants,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE DEPARTMENT OF HOMELAND SECURITY ET AL.,

Respondents, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Richard G. Stearns, U.S. District Judge]

Before

Boudin, Chief Judge,
Selya, Senior Circuit Judge,
and Howard, Circuit Judge.

Bernard J. Bonn, III and Harvey Kaplan, with whom Michael Shin, Matthew M. Lyons, Dechert LLP, Kaplan, O'Sullivan & Friedman, Nancy Kelly, John Willshire, Greater Boston Legal Servs., John Reinstein, Laura Rótolo, American Civil Liberties Foundation of Mass., Iris Gomez, Mass. Law Reform Inst., Ondine Sniffin, and Catholic Social Servs. of Fall River were on brief, for petitioners.

Thomas H. Dupree, Jr., Deputy Assistant Attorney General, with whom Peter D. Keisler, Assistant Attorney General, Daniel J. Davis, Counsel to the Assistant Attorney General, David J. Kline, Principal Deputy Director, Office of Immigration Litigation, Elizabeth J. Stevens, Attorney, Office of Immigration Litigation, Michael J. Sullivan, United States Attorney, and Mark Grady, Assistant United States Attorney, were on brief, for respondents.

November 27, 2007

SELYA, Senior Circuit Judge. This appeal has its genesis in a dramatic raid on a leather goods factory in New Bedford, Massachusetts. Enforcement of the immigration laws is difficult and oftentimes controversial work. So it was here: the raid led to the detention of hundreds of undocumented aliens and put significant strains on those involved and those who wished to help. In short order, the detainees (many of whom were whisked away to distant places) brought a civil action alleging abridgement of a constellation of constitutional and statutory rights.

Confronted with a maze of issues, the district court patiently sorted through them and, in a thoughtful rescript, eventually dismissed the action for want of subject matter jurisdiction. Aguilar v. U.S. Immigr. & Customs Enf. Div. of Dep't of Homeland Sec., 490 F. Supp. 2d 42, 48 (D. Mass. 2007). The detainees (whom we sometimes shall refer to as "the petitioners") now challenge that ukase. Their appeal raises novel and important questions concerning the scope, reach, and interpretation of the immigration laws. In particular, it requires us to disentangle the Gordian knot of jurisdictional provisions created by recent amendments to the Immigration and Nationality Act (INA).

We discern no simple, one-size-fits-all answer to the questions presented by the parties. After careful perscrutation of a scumbled record, we conclude that some of the petitioners' claims are unpreserved, some are subject to a jurisdictional bar, and

others are simply not actionable. The common denominator is that none of the claims can proceed in the district court. Thus, while our reasoning differs somewhat from that of the court below — and our opinion should not be read as an unqualified endorsement of the way in which immigration officials handled the matter — we affirm the judgment of dismissal. The tale follows.

I.

We rehearse here only those facts needed to place this appeal in workable perspective. On March 6, 2007, federal officers conducted a raid as part of "Operation United Front." The raid targeted Michael Bianco, Inc., a Department of Defense contractor suspected of employing large numbers of illegal aliens. Immigration and Customs Enforcement (ICE) agents, armed with search and arrest warrants, appeared unannounced at the factory, arrested five executives on immigration-related criminal charges, and took more than 300 rank-and-file employees into custody for civil immigration infractions. The ICE agents cast a wide net and paid little attention to the detainees' individual or family circumstances.

The government's subsequent actions regarding the undocumented workers who were swept up in the net lie at the epicenter of this litigation. After releasing dozens of employees determined either to be minors or to be legally residing in the United States, ICE transported the remaining detainees to Fort

Devens (a holding facility in Ayer, Massachusetts). Citing a shortage of available bed space in Massachusetts, ICE then began transferring substantial numbers of aliens to faraway detention and removal operations centers (DROs). For example, on March 7, 90 detainees were flown to a DRO in Harlingen, Texas, and the next day 116 more were flown to a DRO in El Paso, Texas.

ICE attempted to coordinate its maneuvers with the Massachusetts Department of Social Services (DSS) to ensure the proper care of family members. It took steps to address concerns about child welfare and released several detainees for humanitarian reasons. Still, the petitioners allege (and, for present purposes, we accept) that ICE gave social welfare agencies insufficient notice of the raid, that caseworkers were denied access to detainees until after the first group had been transferred, and that various ICE actions temporarily thwarted any effective investigation into the detainees' needs. As a result, a substantial number of the detainees' minor children were left for varying periods of time without adult supervision.

With respect to the detainees themselves, the petitioners aver that ICE inhibited their exercise of the right to counsel. According to the petitioners, a squad of volunteer lawyers who had offered to provide the detainees with guidance was turned away from Fort Devens on March 7. The next day, the lawyers were allowed to meet with those detainees (some thirty in number) who had expressly

requested legal advice. The petitioners allege that, notwithstanding this largesse, some detainees were denied access to counsel after they arrived in Texas.

On the afternoon of March 8, the Guatemalan consul, acting as next friend of the detainees (many of whom were Guatemalan nationals), filed a petition for a writ of habeas corpus and a complaint for declaratory and injunctive relief in the United States District Court for the District of Massachusetts. The action sought the detainees' immediate release or, in the alternative, a temporary restraining order halting further transfers. The district court enjoined ICE from moving any of the remaining detainees out of Massachusetts pending further order of the court.

On March 13, the plaintiffs filed an amended complaint, fashioned as a class action, and withdrew their plea for immediate release. The amended complaint named ICE and various other federal agencies and actors as respondents (for ease in exposition, we sometimes refer to the defendants, collectively, as "ICE" or "the government"). In that pleading, the petitioners alleged that ICE's actions had violated certain of the petitioners' constitutional and statutory rights, including: (i) the right to be free from arbitrary, prolonged, and indefinite detention; (ii) the right to a prompt bond hearing, that is, one held in Massachusetts prior to any transfer; (iii) the right to counsel; and (iv) the right of

family integrity. The amended complaint further alleged that it was "the established policy and practice of the [government] to conduct large scale 'sweeps' or 'raids' in which large numbers of persons suspected of being unlawfully present in the United States" are held "at facilities which are some distance from the site of arrest and under conditions where access to counsel . . . is impracticable, if not impossible."

On March 16, the government filed an omnibus motion to dismiss for want of personal and subject matter jurisdiction and for failure to state any claim upon which relief might be granted. In due course, the district court allowed the motion to dismiss on the ground that it lacked subject matter jurisdiction. Aguilar, 490 F. Supp. 2d at 48. The court also dissolved the temporary restraining order that it previously had issued.

The linchpin of the lower court's decision was its conclusion that the INA, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 302, stripped it of both habeas and federal question jurisdiction to hear the petitioners' claims. Aguilar, 490 F. Supp. 2d at 46, 48 (citing 8 U.S.C. § 1252(b)(9)); id. at 47-48 (citing 8 U.S.C. § 1252(a)(2)(B)(ii)). In its rescript, the court rejected the petitioners' attempted re-characterization of their remonstrances as pattern and practice claims, that is, claims alleging a collective denial of rights collateral to removal proceedings. Id. at 48. In that regard, the

court concluded that the petitioners had failed to link these class-wide pattern and practice claims to any specific constitutional violation that might be ripe for review. Id.

The district court paid special heed to the absence of any Sixth Amendment right to counsel in removal proceedings, the absence of any constitutional right to release on bond, and the absence of any constitutional right to have a removal proceeding held in a particular venue. Id. And while acknowledging that the petitioners were entitled to the due process guarantees of the Fifth Amendment as well as to certain statutory protections, the district court concluded that those rights were personal to the petitioners and, as such, had to be exhausted administratively before the courts could become involved. Id.

This timely appeal ensued. In it, the petitioners assign error to the lower court's conclusion that it lacked subject matter jurisdiction over their claims and relatedly, to its conclusion that the petitioners are only entitled to judicial review on an individualized basis after exhausting their administrative remedies. Overall, the petitioners urge us to hold that they have stated cognizable claims that are ripe for judicial review and that their action should, therefore, be allowed to proceed in the district court.

II.

Conscious of our role as a court of limited jurisdiction, we begin our analysis with the multi-part question of whether and to what extent the district court possessed subject matter jurisdiction to hear the petitioners' claims. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88-89 (1998); Bell v. Hood, 327 U.S. 678, 682 (1946). We then turn to the surviving claims.

We review a district court's dismissal for want of subject matter jurisdiction de novo. See, e.g., Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 16 (1st Cir. 2006). For that purpose, we give weight to the well-pleaded factual averments in the operative pleading (here, the petitioners' amended complaint) and indulge every reasonable inference in the pleader's favor. See Muñiz-Rivera v. United States, 326 F.3d 8, 11 (1st Cir. 2003). Where, however, those facts are illuminated, supplemented, or even contradicted by other materials in the district court record, we need not confine our jurisdictional inquiry to the pleadings, but may consider those other materials.[1] See J.S. ex

[1]This seems an appropriate place to mention that, before oral argument in this court, the government moved to supplement the record with copies of orders from immigration judges awarding continuances, changes of venue, and other ancillary relief to several of the petitioners. We grant the motion. Although we generally limit appellate consideration to the record before the district court, this submission comes within an exception to the usual rule because we may take judicial notice of the proffered orders. See, e.g., Fornalik v. Perryman, 223 F.3d 523, 529 (7th

rel. N.S. v. Attica Cent. Sch., 386 F.3d 107, 110 (2d Cir. 2004); Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002). Our solution to the jurisdictional puzzle may be original, that is, we may affirm an order of dismissal on any ground made apparent by the record (whether or not relied upon by the lower court). See InterGen N.V. v. Grina, 344 F.3d 134, 141 (1st Cir. 2003).

A.

The petitioners contend that the district court possessed subject matter jurisdiction over their claims pursuant to the general grant of federal question jurisdiction, 28 U.S.C. § 1331, and the statutory grant of habeas corpus jurisdiction, id. § 2241. In outlining this contention, they concede that Congress, in enacting 8 U.S.C. § 1252(b)(9), attempted to direct challenges to removal through defined administrative channels. They argue, however, that their claims lie beyond the reach of this channeling statute.

Delineating the precise ambit of section 1252(b)(9) calls for an exercise in statutory construction. Thus, our starting point is the statutory text. See Richardson v. United States, 526

Cir. 2000) (taking judicial notice of INS actions); see also Fed. R. Evid. 201 advisory committee note (stating that judicial notice may be taken on appeal). As we explain later in this opinion, the orders are highly relevant to a determination of whether the petitioners have an adequate forum in which to present their claims.

U.S. 813, 816 (1999); Fed. Refin. Co. v. Klock, 352 F.3d 16, 25 (1st Cir. 2003).

Section 1252(b)(9) is entitled "Consolidation of questions for judicial review." It reads in pertinent part:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under Section 2241 of Title 28, or any other habeas corpus provision . . . or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

The Supreme Court has described this provision as a "general jurisdictional limitation" and as "an unmistakable 'zipper' clause." Reno v. Am.-Arab Anti-Discrim. Comm., 525 U.S. 471, 482-83 (1999). By its terms, the provision encompasses "all questions of law and fact" and extends to both "constitutional and statutory" challenges. Its expanse is breathtaking.

Congress's purpose in enacting section 1252(b)(9) is evident. As its text makes manifest, that proviso was designed to consolidate and channel review of all legal and factual questions that arise from the removal of an alien into the administrative process, with judicial review of those decisions vested exclusively in the courts of appeals. See 8 U.S.C. § 1252(a)(5) (ordaining that "a petition for review filed with an appropriate court of

appeals . . . shall be the sole and exclusive means for judicial review of an order of removal"). In enacting section 1252(b)(9), Congress plainly intended to put an end to the scattershot and piecemeal nature of the review process that previously had held sway in regard to removal proceedings. See H.R. Rep. No. 109-72, at 174 (2005) (Conf. Rep.), reprinted in 2005 U.S.C.C.A.N. 240, 299.

While paying lip service to the breadth and purpose of section 1252(b)(9), the petitioners endeavor to avoid its strictures by reading section 1252(b)(9) narrowly as stripping district courts of jurisdiction over challenges to ongoing removal proceedings — nothing more. On this basis, the petitioners claim that the district court's habeas jurisdiction remains intact for all legal challenges that are unaccompanied by any challenge to a particular removal proceeding. That is wishful thinking; as we explain below, such a construct belies the statute's plain meaning and runs contrary to Congress's discernible intent.

Undocumented aliens cannot escape the vise-like grip of section 1252(b)(9) by the simple expedient of banding together claims consigned by law to administrative channels, declining to raise them within the ambit of removal proceedings per se, and maintaining that those unexhausted claims do not implicate a particular removal determination. The reach of section 1252(b)(9) is not limited to challenges to singular orders of removal or to

removal proceedings simpliciter. By its terms, the provision aims to consolidate "all questions of law and fact" that "arise from" either an "action" or a "proceeding" brought in connection with the removal of an alien. See 8 U.S.C. § 1252(b)(9). Importantly, the statute channels federal court jurisdiction over "such questions of law and fact" to the courts of appeals and explicitly bars all other methods of judicial review, including habeas. Id.

The petitioners cannot skirt the statutory channel markers by lumping together a melange of claims associated with removal, each of which would be jurisdictionally barred if brought alone, and eschewing a direct challenge to any particular removal proceeding. Such claim-splitting — pursuing selected arguments in the district court and leaving others for adjudication in the immigration court — heralds an obvious loss of efficiency and bifurcation of review mechanisms. These are among the principal evils that Congress sought to avoid through the passage of section 1252(b)(9). See H.R. Rep. No. 109-72, at 174, reprinted in 2005 U.S.C.C.A.N. at 299. It is our task to enforce the statute as Congress wrote it, and we reject the petitioners' invitation to read the statute in a way that would frustrate Congress's unmistakable purpose.

In a somewhat related vein, the petitioners insist that the challenged actions occurred prior to the institution of any formal removal proceedings and, thus, are beyond the compass of the

zipper clause. Although their factual premise is unarguably correct, their conclusion is not; nothing in the statute limits its reach to claims arising from extant removal proceedings. Reading the statute to limit the exhaustion requirement to claims that arise from ongoing removal proceedings would put an undue premium on which party rushed to the courthouse first. More importantly, such a reading would render the word "action" superfluous and effectively excise it from the statute. Yet it is a familiar canon of construction that, whenever possible, every word and phrase in a statute should be given effect. See, e.g., United States v. Ven-Fuel, Inc., 758 F.2d 741, 751-52 (1st Cir. 1985). That canon demands our fidelity here.

None of this is to imply that section 1252(b)(9) is limitless in its scope. The words "arising from" do not lend themselves to precise application, see Hiroshi Motomura, Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure, 14 Geo. Immigr. L.J. 385, 424 (2000), and courts have debated their meaning in other settings, see Humphries v. Various Fed. USINS Employees, 164 F.3d 936, 943 (5th Cir. 1999) (collecting cases). One thing is clear, however: those words are not infinitely elastic. Cf. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) (famously reading the analogous term "arising under" more narrowly than plain meaning might suggest). With respect to section 1252(b)(9), these words cannot be read to

swallow all claims that might somehow touch upon, or be traced to, the government's efforts to remove an alien.

To us, Congress's choice of phrase suggests that it did not intend section 1252(b)(9) to sweep within its scope claims with only a remote or attenuated connection to the removal of an alien. Courts consistently have recognized that the term "arising from" requires more than a weak or tenuous connection to a triggering event. See, e.g., Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 465 U.S. 1, 27 n.32 (1983); Humphries, 164 F.3d at 943; Pizarro v. Hoteles Cocorde Int'l, C.A., 907 F.2d 1256, 1259 (1st Cir. 1990).

Furthermore, if Congress had intended to accomplish so far-reaching a result, it could have used broader language. Cf. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991) (suggesting that if Congress intended a certain provision of the INA to be read more expansively, it could have used more expansive language). For example, Congress would have used the term "related to" instead of "arising from." See Humphries, 164 F.3d at 943 (suggesting that "related to" signifies a somewhat looser nexus than "arising from").

Such a bounded reading of the statute is also suggested by the fact that certain claims are excluded from the sweep of section 1252(b)(9) by virtue of legislative intent and judicial precedent. To illustrate, the legislative history indicates that

Congress intended to create an exception for claims "independent" of removal. H.R. Rep. No. 109-72, at 175, as reprinted in 2005 U.S.C.C.A.N. at 300. Thus, when it passed the REAL ID Act, Congress stated unequivocally that the channeling provisions of section 1252(b)(9) should not be read to preclude "habeas review over challenges to detention." Id. (indicating that detention claims are "independent of challenges to removal orders"). In line with this prescription, we have held that district courts retain jurisdiction over challenges to the legality of detention in the immigration context. See Hernández v. Gonzales, 424 F.3d 42, 42 (1st Cir. 2005) (holding that detention claims are independent of removal proceedings and, thus, not barred by section 1252(b)(9)). This carve-out seemingly encompasses constitutional challenges regarding the availability of bail. See, e.g., Demore v. Kim, 538 U.S. 510, 516 (2003).

There is no reason to believe that section 1252(b)(9)'s exception for independent claims is restricted to those related to detention. Cf. Sissoko v. Rocha, 440 F.3d 1145, 1156-57 (9th Cir. 2006) (suggesting that the broad jurisdiction-stripping provisions of 8 U.S.C. § 1252(g) do not foreclose aliens' claims for money damages under the doctrine of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971)). After all, section 1252(b)(9) is a judicial channeling provision, not a

claim-barring one.[2] The provision, where applicable, only requires exhaustion of administrative procedures and the consolidation of claims for judicial review.

We say "where applicable" because removal proceedings are confined to determining whether a particular alien should be deported. See id. § 1229a(c)(1)(A). While legal and factual issues relating to that question can be raised in removal proceedings and eventually brought to the court of appeals for judicial review, certain claims, by reason of the nature of the right asserted, cannot be raised efficaciously within the administrative proceedings delineated in the INA. See, e.g., McNary, 498 U.S. at 496; Jupiter v. Ashcroft, 396 F.3d 487, 492 (1st Cir. 2005). Requiring the exhaustion of those claims would foreclose them from any meaningful judicial review. Given Congress's clear intention to channel, rather than bar, judicial review through the mechanism of section 1252(b)(9), reading "arising from" as used in that statute to encompass those claims would be perverse.

We thus read the words "arising from" in section 1252(b)(9) to exclude claims that are independent of, or wholly

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[2]Congress knows how to bar claims in the immigration context when it desires to do so. See, e.g., 8 U.S.C. § 1252(g)(2) (declaring that "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").

collateral to, the removal process. Among others, claims that cannot effectively be handled through the available administrative process fall within that purview. This reading, we believe, is consistent with the wise presumption that Congress legislates with knowledge of longstanding rules of statutory construction. See McNary, 498 U.S. at 496. That presumption traditionally requires that there be clear and convincing evidence of legislative intent before restricting access to judicial review entirely. See, e.g., Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967).

This holding fits comfortably with traditional legal principles. Courts long have recognized an exception to the exhaustion requirement for claims that are collateral to administrative proceedings. See, e.g., Bowen v. City of New York, 476 U.S. 467, 482-83 (1986); Mathews v. Eldridge, 424 U.S. 319, 330 (1976). In that regard, courts have been most willing to deem claims "collateral" when requiring exhaustion would "foreclose all meaningful judicial review." Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212-13 (1994); see Leedom v. Kyne, 358 U.S. 184, 190 (1958) (upholding injunction against agency action when petitioners lacked any other means to protect or enforce their rights).

As a further reflection of this same attitude, courts have demonstrated a particular hostility toward requiring exhaustion when adequate relief could not feasibly be obtained through the prescribed administrative proceedings. See, e.g.,

Mathews, 424 U.S. at 331. That hostility also manifests itself when a party would be "irreparably injured" by adherence to an exhaustion requirement. Bowen, 476 U.S. at 483.

B.

Against this backdrop, we now turn to the question of whether section 1252(b)(9) requires administrative exhaustion of some or all of the petitioners' claims. We deal sequentially with the petitioners' assertions about their constitutional right to be free from harsh and inhumane conditions of confinement, their assertions anent the right to counsel, and their assertions concerning the right to family integrity. We subsume in these discussions the petitioners' attempt to package their offerings as class-wide pattern and practice suits.

We need not linger long over the conditions-of-confinement claims. We assume, for argument's sake, that claims challenging the conditions of an alien's detention are independent of removal proceedings. Cf. Hernández, 424 F.3d at 42 (holding that the REAL ID Act does not bar claims that merely challenge the length of an alien's detention). Here, however, the conditions-of-confinement claims were not raised below. That is a significant omission. "If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal." Teamsters, Chauffeurs, Warehousemen &