IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60460

STEFANY VEGA DURON, a Minor, and; BRITTANY ELIZABETH VEGA DURON, a Minor, by and Through Their Father and Next Friend; MARTIN DURON ESPARZA, and by and Through Their Next Friends; TROY BROWN; CHRIS BROWN,

Plaintiffs - Appellants

v.

RON JOHNSON, Individually, and in His Official Capacity as Director of the Mississippi Field Office of the United States Immigration and Custom Enforcement Division of the United States Department of Homeland Security; and; DERRICK MCCLUNG, an Immigration Officer of the Mississippi Field Office of the United States Immigration and Custom Enforcement Division of the United States Department of Homeland Security,

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Mississippi

(Filed Aug. 6, 2018)

Before REAVLEY, GRAVES, and COSTA, Circuit Judges.

REAVLEY, Circuit Judge:

This case tells a story of America's treatment of immigrants but presents to this court only a question of jurisdiction. Children brought suit to halt the deportation of their father—a 20-year resident of this country, married father of five (four of whom are U.S. citizens), taxpayer with no criminal record, and valued member of his Mississippi community. The district court held that it lacked subject-matter jurisdiction and dismissed the suit. We affirm.

I.

Martin Duron Esparza is a citizen of Mexico and resident of Mississippi. In 2011, Martin filed an application for cancellation of removal under 8 U.S.C. § 1229(b)(1), which requires proof of: (1) continuous physical presence for 10 years immediately preceding the date of application; (2) good moral character; (3) lack of certain criminal convictions; and (4) that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. § 1229b(1).

An immigration judge found Martin satisfied the latter three prongs but not the continuous-presence prong. The immigration judge thus denied Martin's application for cancellation of removal and ordered him removed to Mexico. Martin appealed to the Board of

Immigration Appeals (BIA), but the BIA dismissed the appeal in 2013.

For several years, United States Immigration and Customs Enforcement (ICE) permitted Martin to remain in the country under an Order of Supervision. In 2017, Martin applied to ICE for a stay of removal. ICE denied Martin's request, and on May 30, 2017, Martin received a formal notice to leave the country by June 1, 2017.

In short order, two of Martin's minor children, Brittany and Stefany, filed suit against certain ICE officials in federal district court, requesting a temporary restraining order enjoining the removal of their father. The children, U.S. citizens, alleged two basic constitutional wrongs: (1) Martin's deportation was arbitrary and violates his children's rights to familial association under the First and Fifth Amendments and (2) selective removal of Martin because of his Hispanic origin violates the equal-protection aspect of the Fifth Amendment.

Given Martin's impending removal deadline, the district court worked expeditiously to hold a hearing on May 31, 2017 and issue a same-day order dismissing the lawsuit for lack of subject-matter jurisdiction. This appeal followed.

II.

Judicial review in the removal context is heavily circumscribed by 8 U.S.C. § 1252, two provisions of

which resolve this lawsuit. The first is section 1252(b)(9):

> 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 under this subchapter 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 . . . to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9). Section 1252(b)(9) operates as an "unmistakable 'zipper' clause," *Reno v. Am.-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S. 471, 483 (1999), designed to "consolidate and channel review of *all* legal and factual questions that arise from the removal of an alien" through the preordained administrative process. *Aguilar v. I.C.E.*, 510 F.3d 1, 9 (1st Cir. 2007). Section 1252(b)(9) does not, however, "sweep within its scope claims with only a remote or attenuated connection to the removal of an alien." *Id.* at 10. Nor does it preclude review of claims that "cannot be raised efficaciously within the administrative proceedings" already available. *Id.* at 10.

The children's familial-association claim raises a legal question squarely within section 1252(b)(9). That is, the claim questions the validity (indeed, the constitutionality) of Martin's deportation: an issue that emanates directly from Martin's removal order. The very

relief the children seek is that the defendants be "enjoined from removing [Martin] from the United States." And, importantly, the children's claim is one that can percolate through the administrative process just fine; courts routinely consider such constitutional claims when they arrive from the BIA on petition for review. *See, e.g.*, *Payne-Barahona v. Gonzáles*, 474 F.3d 1, 2 (1st Cir, 2007) (holding that an alien parent had standing to assert his child's constitutional rights). Therefore, because the familial-association question reached the courts outside the prescribed administrative process, we have no jurisdiction to consider it. 8 U.S.C. § 1252(b)(9).

The children's selective-enforcement claim, though, could not arise in the initial removal proceedings; it concerns instead how the Government chooses to enforce already-issued removal orders. To "give some measure of protection to [these] 'no deferred action' decisions and similar discretionary determinations," *AADC*, 525 U.S. at 485, Congress enacted section 1252(g):

> 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.

8 U.S.C. § 1252(g). Because selective-enforcement claims like the children's "aris[e] from" a decision to "execute removal orders," section 1252(g) generally bars judicial

review of such claims—unless, as the Supreme Court explained, the claim qualifies as the "rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations [about prosecutorial discretion] can be overcome." 525 U.S. at 491.

But the children say section 1252(g) does not apply to their selective-enforcement claim because it is not brought "by or on behalf of any alien" but rather by U.S. citizens. They point to a Sixth Circuit opinion that addressed the "by or on behalf of" language and determined that section 1252(g) does not cover "a complaint by a U.S. citizen child who asserts his or her own distinct constitutional rights and separate injury." *Hamdi v. Napolitano*, 620 F.3d 615, 623 (6th Cir. 2010).

Assuming here that *Hamdi*'s rule is correct, we nevertheless conclude the children have not asserted their "own distinct constitutional rights" with respect to the selective-enforcement claim. To be sure, their motion for a temporary restraining order classifies the alleged discriminatory enforcement as violative of "their rights" under the Fifth Amendment. But, when dealing with jurisdictional directives, "we must look through such easy evasions as creative labeling and consider the fundamental nature of the claims asserted." *Aguilar*, 510 F.3d at 17. Fundamentally, the children complain of discrimination against their *father* based on his national origin, and as a consequence, they rely necessarily on their *father's* right to be free from such discrimination. Thus, under *Hamdi*'s rubric, the children brought their selective-enforcement claim "on behalf of" their father. 620 F.3d at 623. Were we to

conclude otherwise, removable aliens could evade section 1252(g)'s jurisdictional bar by repackaging their own selective-enforcement claims into the vehicle of a child-plaintiff lawsuit. That would subvert Congress's decision that such claims "not be made the bases for separate rounds of judicial intervention." *AADC*, 525 U.S. at 486.

Because the children's selective-enforcement claim is "on behalf of an alien, arises from the decision to "execute a removal order," and is not sufficiently "outrageous" to constitute *AADC's* rare exception, it is subject to section 1252(g)'s jurisdictional bar. *See id.* at 482, 491. The district court was correct to dismiss the children's suit for want of jurisdiction.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

STEFANY VEGA DURON, a Minor, and BRITTANY ELIZABETH VEGA DURON, a Minor, by and Through Their Father and Next Friend, MARTIN DURON ESPARZA, and by and Through Their Next Friends, TROY BROWN and CHRIS BROWN — **PLAINTIFFS**

vs. — **No. 4:17cv73-MPM-JMV**

RON JOHNSON, Individually, and in His Official Capacity as Director of the Mississippi Field Office of the United States Immigration and Custom Enforcement Division of the United States Department of Homeland Security; and DERRICK McCLUNG, an Immigration Officer of the Mississippi Field Office of the United States Immigration and Custom Enforcement Division of the United States Department of Homeland Security — **DEFENDANTS**

ORDER

(Filed May 31, 2017)

On May 30, 2017, the two minor plaintiffs in this case filed a complaint seeking for this court to enter an order enjoining defendants from removing their father Martin Duron Esparza, a citizen of Mexico, from the United States.[1] In their complaint, plaintiffs assert that their father has been provided with written notice that he has until June 1, 2017, i.e. tomorrow, to leave this county. Plaintiffs' complaint describes the severe personal hardships that the deportation of their father would have upon their lives, and this court is certainly sympathetic to their plight. Nevertheless, having considered plaintiffs' arguments in their motion for Temporary Restraining Order, and at an emergency hearing held today to consider that motion, this court concludes that they have failed to submit precedent indicating that this court has authority to decide this matter.

Indeed, the government submitted authority at the hearing held this afternoon which appears to suggest that this court does not even have *jurisdiction* to decide this matter. In particular, the government cites Fifth Circuit case law which clearly held that:

> A United States citizen child's constitutional rights are not implicated by the deportation of a parent, even where a de facto deportation

[1] Thus, this court has had less than a day to consider plaintiffs' motion and the arguments raised therein.

> of the child would surely occur. *Gonzalez–Cuevas v. INS*, 515 F.2d 1222, 1224 (5th Cir.1975); *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir.1969). Chavez's conclusional and unsupported allegations are insufficient to present a colorable constitutional or legal question. *Cf. Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir.1990). Therefore, we lack jurisdiction to consider this claim in the instant petition for review. *See* § 1252(a)(2)(B)(i); *Falek v. Gonzales*, 475 F.3d 285, 289 n. 2 (5th Cir. 2007).

De Chavez v. Holder, 514 F. App'x 449, 451 (5th Cir. 2013). The Fifth Circuit's precedent in this context involves an application of 8 U.S.C. §1252(a)(2)(B), which provides in pertinent part that:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, 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.

This court has had a very short period of time to consider the government's arguments and authority, but it does appear to indicate that it lacks jurisdiction to hear this matter.

This court therefore concludes that it does, in fact, lack jurisdiction to consider this matter, and it will

accordingly not issue a formal ruling on the motion for TRO. Nevertheless, this court has sufficient uncertainty about whether the rule stated above is a truly categorical bar,[2] that it will briefly note its impression that, even assuming that it has jurisdiction to decide this case, there are serious weaknesses in plaintiff's [sic] request for a TRO which would likely preclude it from being granted on its merits.

Indeed, even assuming for the sake of argument that a U.S. district judge might, in an appropriate case, enjoin an immigration removal in a procedural context similar to the one here, plaintiffs' motion fails to cite any cases in which district courts have actually done so, based upon the sort of constitutional claims which they assert in their complaint.[3] Before a temporary

---

[2] In so stating, this court notes that it is aware of certain cases such as the *Ortiz* decision discussed below, in which the merits of TRO motions were considered in contexts similar to this one.

[3] This court is aware of a recent decision in which a Hawaii district court refused to grant a TRO staying a Mexican citizen's removal from the United States. *Ortiz v. Sessions*, 2017 WL 2234176 (D. Hawaii May 22, 2017). In that decision, U.S. District Judge Leslie Kobayashi found that the petitioner had failed to demonstrate irreparable injury, noting that "the United States Supreme Court has recognized that '[a]lthough removal is a serious burden for many aliens, it is not categorically irreparable.' Thus, 'the burden of removal alone cannot constitute the requisite irreparable injury.'" *Ortiz*, 2017 WL 2234176 at 4, *citing Nken v. Holder*, 556 U.S. 418, 435 (2009). However, in this matter, the government appeared to assume in oral arguments that the facts of this case would suffice to show irreparable injury.

This court notes that, in *Ortiz*, the case against removal was arguably stronger than the one here, since the petitioner in that

restraining order or preliminary injunction can be entered, the plaintiffs must clearly demonstrate: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from an injunction; and (4) that the injunction will not undermine the interest of the public. *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). It appears to this court that there are serious weaknesses in plaintiffs' case with regard to the first of these four prongs.

This court concludes that, in order to demonstrate a substantial likelihood of success on the merits, it would be incumbent upon plaintiffs to provide it with authority arising from cases at least reasonably analogous to this one. In their motion, plaintiffs rely instead upon generalized constitutional principles, asserted in legal contexts very different from this one, which are of questionable relevance to this case. For example,

---

case was being removed in spite of the fact that the United States Citizenship and Immigration Services ("USCIS") had yet to process a petition filed by a relative which would have allowed him to stay. *Id.* at 1. The petitioner in *Ortiz* alleged that the petition had been pending "beyond normal processing times," *id*, and this appears to have at least given him an argument that some procedural irregularity existed which justified a stay of removal. In this case, by contrast, plaintiffs concede that "Duran filed an application for stay of removal on May 10, 2017" and that "[t]his application for stay of removal was denied on May 12, 2017." [Complaint at 4]. Plaintiffs thus concede that their father has exhausted his legal remedies, and they are forced to rely instead upon arguments that have either already been rejected in immigration court or which are unsupported by authority.

plaintiffs rely heavily upon *Plyler v. Doe*, 457 U.S. 202, 220 (1982), which involved the right of children in this country to receive a public education, regardless of the immigration status of their parents. Plaintiffs also cite decisions which broadly support the importance of familial relationships and the rights of parents to rear their children as they see fit. *See e.g. Crowe v. County of San Diego*, 608 F.3d 406, 441 (9th Cir. 2010). However, none of these cases are factually similar to this one, involving an application of immigration laws passed by Congress.

It further appears to this court that prior litigation involving Duron Esparza's immigration status would be a very serious obstacle to plaintiffs' claim in this case, were it to consider those claims on their merits. Indeed, in their complaint, plaintiffs make clear that their father had an opportunity to raise his personal hardship arguments before U.S. immigration judges but that he did not succeed in obtaining an order barring his removal. Specifically, plaintiffs allege that:

> Duron has made multiple attempts to obtain legal status in the United States, all of which have been futile. Of significance to this case, Duron made an application for cancellation of removal under the Immigration and Documentation Act. An immigration judge denied the application on the grounds of his (incorrect) finding that Duron had exceeded the allowable time for visits to Mexico.
>
> In the same opinion, however, the immigration judge found that Plaintiff Brittany Duron,

> due to "acute asthma," would suffer hardship by Duran's being deported to Mexico. (*See* Oral Decision of the Immigration Judge, attached hereto as Exhibit "A.") An affirmance of the immigration judge's opinion was issued on August 7, 2013. (*See* Decision of the Board of Immigration Appeals, attached hereto as Exhibit "B.")

[Complaint at 3-4]. Based upon this procedural history, plaintiffs acknowledge that their father "has exhausted all legal remedies available to him to avoid deportation," and yet this court has no authority to order anything other than legal remedies.

Thus, even assuming that this court has jurisdiction to hear this case, basic principles of *res judicata* and collateral estoppel would seem to preclude it from essentially overturning factual findings and legal rulings made by other judges, over whom it has no appellate authority. Plaintiffs argue that it would be arbitrary and capricious to order the removal of their father from the United States, and yet an immigration judge and the Board of Immigration Appeals have already determined that such is legally warranted. This court would be strongly disinclined to declare those judges' application of the law to be arbitrary and capricious, even assuming that it has the jurisdiction and authority to do so (which, it concludes, it does not).

This court has reviewed the Immigration Judge's order, which involved an application of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1182. That Act provides in pertinent part that:

> (1) IN GENERAL.-The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-
>
> > (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> >
> > (B) has been a person of good moral character during such period;
> >
> > (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3), subject to paragraph (5) 2a/ 5/ ; and
> >
> > (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

INA section § 240A(b)(1).

Thus, a showing of "exceptional and extremely unusual hardship to the alien's spouse, parent, or child" is but one of four legal showings required to support cancellation of a removal decision under the NA. In his ruling, U.S. Immigration Judge Charles E. Pazar agreed that the burden imposed by Mr. Duran Esparza's

removal upon his daughter Britney [sic] (who has asthma) sufficed to establish the requisite degree of personal hardship under § 240A(b)(1), and he found that the second and third factors supported cancellation of removal as well. [Order at 13-14]. Judge Pazar nevertheless found, however, that Duran Esparza had not been "physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application" and that he therefore lacked a legal basis to order cancellation of removal. [Order at 14].

As quoted above, plaintiffs argue that Judge Pazar incorrectly found that their father had exceeded the allowable time for visits to Mexico, but the appellate immigration board found otherwise. In its order affirming Judge Pazar's ruling, the Board wrote that "[w]e agree with the Immigration Judge's determination that the respondent did not satisfy the continuous physical presence requirement for cancellation of removal." [Appellate order at 1]. In light of this appellate ruling, it was incumbent upon Duron Esparza to file whatever further appeals he had available to him, but it appears that he failed to do so. Once again, plaintiffs concede that they have exhausted their "legal remedies" in this regard, and it therefore appears that this court lacks the legal authority to grant the relief which they seek, even assuming that it has *jurisdiction* to do so (which, it concludes, it does not). Given the facts of this case, this court would certainly urge that the government consider it a proper one for prosecutorial discretion, but it concludes that it lacks the legal authority to do

more than make this request. Indeed, this court agrees with the government that it lacks jurisdiction to decide this matter, and it will therefore issue no formal ruling on the TRO and simply dismiss this case.

It is therefore ordered that this case is dismissed.

A separate judgment will be entered this date, pursuant to Fed. R. Civ. P. 58.

So ordered, this, the 31st day of May, 2017.

/s/ Michael P. Mills
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

STEFANY VEGA DURON, a Minor, and BRITTANY ELIZABETH VEGA DURON, a Minor, by and Through Their Father and Next Friend, MARTIN DURON ESPARZA, and by and Through Their Next Friends, TROY BROWN and CHRIS BROWN **PLAINTIFFS**

vs. **No. 4:17cv73-MPM-JMV**

RON JOHNSON, Individually, and in His Official Capacity as Director of the Mississippi Field Office of the United States Immigration and Custom Enforcement Division of the United States Department of Homeland Security; and DERRICK McCLUNG, an Immigration Officer of the Mississippi Field Office of the United States Immigration and Custom Enforcement Division of the United States Department of Homeland Security **DEFENDANTS**

JUDGMENT

(Filed May 31, 2017)

For the reasons given in the court's order issued this date, it is hereby ordered and adjudged that this case is dismissed.

So ordered, this, the 31st day of May, 2017.

/s/ Michael P. Mills
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF MISSISSIPPI

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60460

STEFANY VEGA DURON, a Minor, and; BRITTANY ELIZABETH VEGA DURON, a Minor, by and Through Their Father and Next Friend; MARTIN DURON ESPARZA, and by and Through Their Next Friends; TROY BROWN; CHRIS BROWN,

Plaintiffs - Appellants

v.

RON JOHNSON, Individually, and in His Official Capacity as Director of the Mississippi Field Office of the United States Immigration and Custom Enforcement Division of the United States Department of Homeland Security; and; DERRICK MCCLUNG, an Immigration Officer of the Mississippi Field Office of the United States Immigration and Custom Enforcement Division of the United States Department of Homeland Security,

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Mississippi

ON PETITION FOR REHEARING

(Filed Sep. 5, 2018)

Before REAVLEY, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is [denied.]

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
UNITED STATES CIRCUIT JUDGE

U.S. Department of Homeland Security

Notice of Action—Voluntary Departure

Please refer to this file number:

To: (Enter full name and mailing address alien)
MARTIN ESPARZA-DURON
1010 ELZY AVE Apt 9
GREEENWOOD MISSISSIPPI
38930

File: 200 682 896
Event No.: JAK1404000031
Date: 5/30/17

Please note: the blocks checked below relate to action taken in your case.

☐ You have violated the terms of your admission as a nonimmigrant. Consequently, the permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.

☒ In accordance with a decision made in your case, you are required to depart from the United States at your own expense on or before June 1, 2017.

☐ Your request for an extension of time in which to depart from the United States has been _____.
(Granted/Denied)
You are required to depart on or before _____.

☐ The amount of time that you have been granted to depart voluntarily is the maximum allowable under the law in your situation. You are, therefore, prohibited from applying for or being granted any further voluntary departure.

☐ Your request for voluntary departure has been denied since you were previously granted voluntary departure and failed to depart.

☐ You are ineligible for voluntary departure because you were previously permitted to depart voluntarily after you were found inadmissible as an alien who was present without having been admitted or paroled.

☐ You must notify this office on or before _____ of the arrangements you have made to effect your departure, including the date, place and manner. Use the enclosed self-addressed card to notify the Department regarding departure arrangements. Postage is not required. At the time of your departure, you must surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

NOTICE: Failure to deport on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your removal. Failure to depart on or before the specified date may also subject you to a possible civil penalty of not less than $1,000 and not more than $5,000, and render you ineligible for a period of 10 years for any further authorization for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Immigration and Nationality Act.

If there is a bond outstanding in your case, you are warned that, to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

Sincerely,

/s/ [Illegible]
[Illegible]

FOR DEPARTMENT OF
HOMELAND SECURITY USE ONLY

Departed: Port _____ Date _____

☐ I-94 stamped ☐ I-530 submitted

To _____ Via _____

☐ DACS Updated