UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, ET AL., *Petitioners-Appellees*, *v.* REBECCA ADDUCCI, ET AL., *Respondents-Appellants*.	Nos. 17-2171/18-1233

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:17-cv-11910—Mark A. Goldsmith, District Judge.

Argued: April 25, 2018

Decided and Filed: December 20, 2018

Before: BATCHELDER, SUTTON, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Scott G. Stewart, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Lee Gelernt, AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT, New York, New York, Margo Schlanger, Ann Arbor, Michigan, for Appellees. **ON BRIEF:** Scott G. Stewart, Michael A. Celone, William C. Silvis, Sarah Stevens Wilson, UNITED STATES DEPARTMENT OF JUSTICE, Washington,

D.C., for Appellants. Lee Gelernt, Judy Rabinovitz, AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT, New York, New York, Margo Schlanger, Samuel R. Bagenstos, Ann Arbor, Michigan, Michael J. Steinberg, Miriam J. Aukerman, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, Nadine Yousif, Nora Youkhana, CODE LEGAL AID INC., Madison Heights, Michigan, Kimberly L. Scott, Wendolyn Wrosch Richards, MILLER, CANFIELD, PADDOCK & STONE, PLC, Ann Arbor, Michigan, William W. Swor, WILLIAM W. SWOR & ASSOCIATES, Detroit, Michigan, for Appellees. Cynthia M. Nunez, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, Washington, D.C., Carl M. Levin, Gabriel E. Bedoya, HONIGMAN MILLER SCHWARTZ AND COHN LLP, Detroit, Michigan, Elisa J. Lintemuth, DYKEMA GOSSETT PLLC, Grand Rapids, Michigan, Jason P. Steed, KILPATRICK TOWNSEND & STOCKTON LLP, Dallas, Texas, Amy G. Doehring, MCDERMOTT WILL & EMERY LLP, Chicago, Illinois, Noah A. Levine, Jamie S. Dycus, WILMER CUTLER PICKERING HALE AND DORR LLP, New York, New York, for Amici Curiae in 17-2171. Gabriel E. Bedoya, HONIGMAN MILLER SCHWARTZ AND COHN LLP, Detroit, Michigan, Jill M. Wheaton, DYKEMA GOSSETT PLLC, Ann Arbor, Michigan, Nareeneh Sohbatian, WINSTON & STRAWN LLP, Los Angeles, California, for Amici Curiae in 18-1233.

BATCHELDER, J., delivered the opinion of the court in which SUTTON, J., joined. WHITE, J. (pp. 16–26), delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, Circuit Judge. These consolidated appeals arise from the government's efforts to execute long-standing final removal orders of Iraqi nationals that the United States had, for many years, been unable to execute. The district court entered two preliminary injunctions: one to halt the removal of Iraqi nationals (removal-based claims) and one to order bond hearings for those Iraqi nationals who continued to be detained after the district court halted their removals (detention-based claims). Because we find the district court lacked the jurisdiction to enter both the removal-based and the detention-based claims, we **VACATE** the preliminary injunctions for both the removal-based and the detention-based claims, and we **REMAND** with directions to dismiss the removal-based claims for lack of jurisdiction, and for further proceedings consistent with this opinion.[1]

[1] Petitioners have filed a Motion for Judicial Notice, requesting that we take judicial notice of "certain adjudicated outcomes in Petitioners' individual immigration cases," as compiled by Ms. Margo Schlanger, counsel for Petitioners. We DENY the motion. Federal Rule of Evidence 201(b) permits a court to take judicial notice of facts "not subject to reasonable dispute." In *United States v. Bonds*, 12 F.3d 540, 553 (6th Cir. 1993), we refused to take judicial notice of a National Research Committee report because there was considerable dispute over the significance of its contents. Similarly here, there are questions about whether the declaration, which is a compilation of data that has been selected and then analyzed by class counsel, "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

I.

A.

Petitioners-Appellees ("Petitioners") are Iraqi nationals, the vast majority of whom were ordered removed to Iraq years (and some decades) ago because of criminal offenses they committed in the United States. For many years Iraq refused to repatriate Iraqi nationals who, like Petitioners, had been ordered removed from the United States.[2] Because the United States was unable to execute the removal of Iraqi nationals to Iraq, Petitioners remained in the United States under orders of supervision by United States Immigration and Customs Enforcement ("ICE"). Their removal orders remained final and active.

Things changed in 2017. Iraq began to cooperate with repatriation efforts and the removal of Iraqi nationals to Iraq quickly resumed. Iraqi nationals such as Petitioners, with final orders of removal that had been long-stalled, were faced with an unpleasant reality—their removals were now imminent. Though many of these Iraqi nationals had come to expect that the execution of their removals would never materialize, they had been living in the United States on borrowed time. Iraq's agreement to cooperate with repatriation efforts meant that time was up.

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[2] Iraq declined to issue requisite travel documents to aid the United States in repatriating Iraqi citizens and would accept only Iraqi nationals with final orders of removal who had unexpired passports and were returning on commercial flights.

The reality of Iraq's resuming cooperation in repatriating its nationals hit in April 2017 when ICE conducted its first removal by charter flight to Iraq since 2010, removing eight Iraqi nationals and scheduling a second charter for late June 2017. In preparation for the second charter, ICE arrested and held in custody more than 200 Iraqi nationals in mid-June 2017.[3] These arrests prompted the cases now before us.

B.

On June 15, 2017, Petitioners filed a putative class action habeas petition in the United States District Court for the Eastern District of Michigan on behalf of "all Iraqi nationals in the United States with final orders of removal, who have been, or will be, arrested and detained by ICE as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal." Petitioners also filed a motion for a temporary restraining order and/or stay of removal, asking the district court to halt their removal to Iraq and to hear the Petitioners' arguments of allegedly changed country conditions.

Petitioners' choice to file this action before the district court was undoubtedly outside the norm for removal proceedings, over which immigration courts hold exclusive jurisdiction. *See* 8 U.S.C. § 1252(g)

[3] The vast majority of arrests took place in Detroit. ICE arrested approximately 114 Detroit-based Iraqi nationals and transferred them to federal facilities in Michigan, Ohio, Louisiana, and Arizona to await removal to Iraq. ICE also arrested and detained approximately 85 Iraqi nationals from Tennessee, New Mexico, and California, who were subsequently transferred to facilities in Alabama, Louisiana, Tennessee, and Texas.

("[N]o 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 . . . ."). So before making any determination on the preliminary injunction, the district court had to determine whether it had jurisdiction to hear Petitioners' case. Pending its jurisdictional decision, the district court stayed the purported class's final removal orders—first in the Eastern District of Michigan and then nationwide.

The district court eventually concluded that it had jurisdiction to hear Petitioners' claims. Acknowledging that "8 U.S.C. §1252(g) applies to divest this Court of subject-matter jurisdiction," the district court found that the circumstances in the case presented an as-applied constitutional violation of the Suspension Clause, allowing it to exercise jurisdiction.

Specifically, the district court explained that "[t]he mechanism provided by [Congress through] the REAL ID Act for judicial review of removal orders—filing motions to reopen proceedings in immigration courts and subsequent review in the courts of appeals—does not take into account the compelling confluence of grave real-world circumstances present in [this] case." The district court, in July 2017, granted Petitioners a nationwide preliminary injunction preventing the government from enforcing final removal orders against Iraqi nationals and requiring the government to produce extensive discovery. The government appealed the preliminary injunction on September 21, 2017. That appeal is before us as Case No. 17-2171.

The second appeal stems from Petitioners' continued detention during the pendency of these cases. The government has kept Petitioners detained, as relevant to the appeal before us, under the authority provided in two statutes. The first grants authority to detain aliens who are subject to final removal orders because they have not moved to reopen their immigration proceedings or have not prevailed in a motion to reopen their proceedings. *See* 8 U.S.C. § 1231(a)(6). The second grants authority to detain certain aliens who have succeeded in having their removal orders reopened (and are not subject to a final removal order and detention authority under § 1231) but have criminal convictions or qualifying terrorist activities that render them subject to mandatory detention pending a decision on removal. *See* 8 U.S.C. § 1226(c)(1).[4]

In October 2017, nearly three months after the district court granted Petitioners' removal- based preliminary injunction, Petitioners amended their habeas petition and class action complaint to add claims challenging their continued detentions under 8 U.S.C. §§ 1231 and 1226(c) while the courts resolve their removal-based claims based on due process principles and the Immigration and Nationality Act, 8 U.S.C. § 1101, et seq.[5] Petitioners moved for a

[4] The government notes that this detention is a direct result of the district court's stay of removal of Petitioners. Without the stay, Petitioners would have been removed to Iraq.

[5] Petitioners added count four: "prohibition on immigration detention where removal is not significantly likely in the reasonably foreseeable future"; count five: "prohibition on immigration detention without an individualized hearing on danger and flight risk"; count six: "unlawful application of mandatory detention to class members whose motions to reopen have been granted"; and count seven: "relief for class members

preliminary injunction seeking relief on these detention-based claims, which the district court granted, ordering an injunction requiring bond hearings on a class-wide basis. The government appealed the district court's preliminary injunction on March 2, 2018. That appeal is before us as Case No. 18-1233.

II.

We review de novo the district court's determination of subject-matter jurisdiction. *Pak v. Reno*, 196 F.3d 666, 669 (6th Cir. 1999).

A.

We begin with the removal-based claims. "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress . . . ." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-80 (1803)). Congress enacted 8 U.S.C. § 1252(g) to limit the jurisdiction of federal courts. Section 1252(g)[6]

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who have been deprived of timely access to the files needed to file their motions to reopen."

[6] Congress amended § 1252(g) in 2005 to its current form with the enactment of the REAL ID Act. The Act, among other things, "sought to channel judicial review of an alien's claims related to his or her final order of removal through a petition for review at the court of appeals." *Elgharib v. Napolitano*, 600 F.3d 597, 600 (6th Cir. 2010); *see also Almuhtaseb v. Gonzales*, 453 F.3d 743, 747 (6th Cir. 2006) ("The REAL ID Act renders petitions for review the exclusive means for judicial review for all orders of removal, except for limited habeas review of expedited removal orders.").

provides, in full:

> (g) Exclusive jurisdiction
>
> 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.

8 U.S.C. § 1252(g). This provision applies "to three discrete actions that the Attorney General may take: [the] 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

The district court found that the "natural reading of § 1252(g)" and "the Sixth Circuit's straightforward view expressed in *Elgharib [v. Napolitano*, 600 F.3d 597 (6th Cir. 2010)]," divested it of subject-matter jurisdiction, unless to do so would violate the Constitution. The government argues that the district court got this right; Petitioners assert that the district court erred by finding that § 1252(g) divested it of jurisdiction.

Under a plain reading of the text of the statute, the Attorney General's enforcement of long-standing removal orders falls squarely under the Attorney General's decision to execute removal

orders and is not subject to judicial review. *See Reno*, 525 U.S. at 483; *Elgharib*, 600 F.3d at 601-03; *cf. Silva v. United States*, 866 F.3d 938, 941 (8th Cir. 2017) (finding no jurisdiction over tort claims stemming from mistaken execution of a removal order during a stay of removal because "[t]he limitation on jurisdiction . . . applies to 'any cause or claim by or on behalf of any alien' that arises from a decision to execute a removal order") (citation omitted). The district court did not err by finding that § 1252(g) divested it of subject-matter jurisdiction.

But our agreement with the district court's reasoning ends there. After correctly concluding that § 1252(g) divested it of jurisdiction as a matter of federal statutory law, the court then erred by finding that it could still exercise jurisdiction because "extraordinary circumstances" created an as-applied constitutional violation of the Suspension Clause. This is a broad, novel, and incorrect application of the Suspension Clause.

There are at least two reasons why § 1252(g)'s jurisdictional limitations do not violate the Suspension Clause. First, because Petitioners are not seeking habeas relief in the first instance. And second, because even if they were, Congress's petition-for-review process provides an adequate alternative to an action in habeas as applied to Petitioners.

To begin with, the type of relief Petitioners seek is not protected by the Suspension Clause. The Clause states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety

may require it." U.S. Const. art. I, § 9, cl. 2. "At its historical core," the writ "served as a means of reviewing the legality of Executive detention." *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001); *see also Munaf v. Geren*, 553 U.S. 674, 693 (2008). The traditional remedy provided by habeas is "removing the injury of unjust and illegal confinement." 3 William Blackstone, *Commentaries on the Laws of England* 137 (1768); *see also Munaf*, 553 U.S. at 693 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he traditional function of the writ is to secure release from illegal custody.")).

The government argues that because Petitioners' removal-based claims fail to seek relief that is traditionally cognizable in habeas, the Suspension Clause is not triggered. We agree. As the government states, "[t]he claims and relief requested here are fundamentally different from a traditional habeas claim." Petitioners' removal-based claims did not challenge any detention and did not seek release from custody. Rather, they sought "a stay of removal until they . . . had a reasonable period of time to locate immigration counsel, file a motion to reopen in the appropriate administrative immigration forum, and have that motion adjudicated to completion in the administrative system, with time to file a petition for review and request a stay of removal in a federal court of appeals." "[T]he nature of the relief sought by the habeas petitioners suggests that habeas is not appropriate in these cases" because "the last thing petitioners want is simple release" but instead a "court order requiring the United States to shelter them." *Munaf*, 553 U.S. at 693-94. And the relief ordered by the district court—a stay of removal—did not result in Petitioners' release from

custody.[7] Because the common-law writ could not have granted Petitioners' requested relief, the Suspension Clause is not triggered here.

The dissent claims we misrepresent *St. Cyr* because *St. Cyr* requires some "judicial intervention in deportation cases." 533 U.S. at 300. True enough, the Supreme Court invoked the Suspension Clause in the face of a removal-based challenge in *St. Cyr*. *See* 533 U.S. at 304– 05. But the relief St. Cyr sought is qualitatively different from what Petitioners seek here. St. Cyr sought cancellation of removal, which would have entitled him to be *released* into and remain in the United States. *See id.* at 297, 314–15; Immigration and Nationality Act of 1952, ch. 477, § 212(c), 66 Stat. 182, 187 (repealed 1996); 8 U.S.C. § 1229b. Petitioners here seek withholding of removal, which would entitle them *not* to be released into Iraq. A petitioner who succeeds in showing that he may suffer torture in the receiving country has no right to stay in the United States; the government may remove him to some other (safe) place. *See* 8 C.F.R. § 208.16(c)(4), (f).

That difference means this case is less like *St. Cyr* and more like *Munaf*, which concerned American citizens seized in Iraq and held in U.S. custody there. *Munaf*, 553 U.S. at 680–85. The Supreme Court concluded that those petitioners failed to state a

[7] As the government notes, other aspects of Petitioners' request for injunctive relief and the district court's preliminary injunction underscore the unconventional nature of Petitioners' purported habeas claims. Petitioners have not exhausted available remedies; Petitioners' claim is based on allegedly changed factual circumstances, which is not a core use of habeas; and Petitioners seek class-wide relief, which falls outside the traditional use of habeas.

claim for habeas relief because they were seeking only to avoid release into Iraq. *Id.* at 692. The dissent states that *Munaf* is inapposite because, unlike in *Munaf*, in the instant case Petitioners are not subject to an extradition request and are not seeking habeas to shelter them from government prosecution. But the reasoning in *Munaf* was not restricted to the particular relief those petitioners were seeking. The Court reviewed the history of habeas, noted it "is at its core a remedy for unlawful executive detention," and because what petitioners were seeking did not fit into the "core remedy," determined the remedy those petitioners' claimed was not cognizable in habeas. 553 U.S at 693. Similarly, Petitioners are not seeking relief that fits in the "core remedy" of habeas.

Even if the relief Petitioners seek was available under the common-law writ, Petitioners' Suspension Clause claim would fail for the independent reason that Congress has provided an adequate alternative as applied to them. Congress does not suspend the writ when it strips the courts of habeas jurisdiction so long as it provides a substitute that is adequate and effective to test the legality of a person's detention. *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *see also Felker v. Turpin*, 518 U.S. 651, 664-65 (1996). When Congress stripped the courts of jurisdiction to grant habeas relief in § 1252(g), it provided aliens with an alternative method to challenge the legality of removal orders: a motion to reopen followed by a petition for review filed in a court of appeals. *See* 8 U.S.C. § 1252(a)(5), (2)(D). Because this process provides an alien with the same scope of relief as habeas, the REAL ID Act does not violate the Suspension Clause. *Muka v. Baker*, 559 F.3d 480, 485 (6th Cir. 2009); *see also Luna v.*

Holder, 637 F.3d 85, 95 (2d Cir. 2011); *Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007); *Puri v. Gonzales*, 464 F.3d 1038, 1042 (9th Cir. 2006); *Alexandre v. U.S. Attorney Gen.*, 452 F.3d 1204, 1205–06 (11th Cir. 2006).

Petitioners respond that, while the petition-for-review process may be a facially adequate alternative to habeas, a confluence of circumstances made that alternative constitutionally inadequate as applied to them. They are wrong. Petitioners had years to file their motions to reopen; they cannot now argue that the system gave them too little time. The administrative scheme established by Congress even provided multiple avenues to stay removal while pursuing relief. Petitioners have not shown any constitutional inadequacy in this process.

The district court did not have jurisdiction over Petitioners' removal-based claims, and we therefore vacate the injunction.

B.

We proceed now to the detention-based claims. The government and Petitioners agree that the district court had jurisdiction over the detention-based claims and that this jurisdiction is an independent consideration that is not tied to whether the district court has jurisdiction over the removal-based claims. We agree the district court's jurisdiction over the detention-based claims is independent of its jurisdiction over the removal-based claims. Nevertheless, we find that 8 U.S.C. § 1252(f)(1) bars the district court from entering class-wide injunctive relief for the detention-based claims. Section 1252(f)(1) reads:

> (f) Limit on injunctive relief
>
> (1) In general
>
> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221-31] . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

Interpreting this statute in *Reno*, the Supreme Court held that, "By its plain terms, and even by its title, that provision is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-31, but specifies that this ban does not extend to individual cases." 525 U.S. at 481-82. In our view, *Reno* unambiguously strips federal courts of jurisdiction to enter class-wide injunctive relief for the detention-based claims. Petitioners disagree and raise three objections. We address each of these objections below.

Objection #1: The plain text of the statute does not bar class actions. According to Petitioners, "§ 1252(f)'s language bars injunctions that purport to protect persons *not yet in immigration proceedings*" (emphasis added). Petitioners come to this conclusion by focusing on the language in § 1252(f)(1) that reads "other than . . . an . . . alien . . . against whom *proceedings under such part have been initiated*"

(emphasis added). According to Petitioners, § 1252(f)(1) *is* a bar on injunctions *but* there is a carveout for those aliens who are already in immigration proceedings. Since everyone in the current litigation is currently in immigration proceedings, Petitioners argue that § 1252(f)(1) is inapplicable to the current class action litigation.

This argument does violence to the text of the statute. The only way Petitioners can come to the conclusion they do is by reading out the word "individual" before "alien" in the last sentence of the statute. In other words, they argue that a class action is not barred by this statute because all the members of the proposed subclasses are already in immigration proceedings. But although Petitioners are correct that the statute provides a carveout for those already in immigration proceedings, that carveout applies only to an "individual." There is no way to square the concept of a class action lawsuit with the wording "individual" in the statute. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). The only way to permit a class action or class-based lawsuit without running awry of § 1252(f)(1) would be if the statute, instead of using the phrase "an individual alien," used a phrase such as "aliens" or "any alien." By giving no meaning to the word "individual," Petitioners are arguing for a version of the statute that Congress simply did not write.

Indeed, elsewhere in the statute Congress made it very clear that it knew how to distinguish

when it wanted a statute to apply not to "individual" aliens, but rather to "any alien." For example, the phrase "any alien" appears in the very next subsection of the statute— "Notwithstanding any other provision of law, no court shall enjoin the removal of *any alien* . . ." § 1252(f)(2) (emphasis added)—as well as in other subsections of the statute. *See, e.g.,* § 1252(e)(4)(B) ("*Any alien* who is provided a hearing . . .") (emphasis added); § 1252(g) ("[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of *any alien* . . . or execute removal orders against *any alien* under this chapter.") (emphasis added).

Petitioners argue that if Congress had wanted to ban class certification under Rule 23 it would have just said that. In fact, it did elsewhere in the statute. *See* § 1252(e)(1)(B) ("[N]o court may . . . certify a class under Rule 23 . . . ."). But there is a big difference between barring the certification of a class under Rule 23 and barring all injunctive relief. The former bars a *class action* regarding *anything*; the latter only bars *injunctive relief* for anyone other than *individuals*.

Petitioners next argue that "[t]he use of the term 'individual alien' does not withdraw a court's power to grant class relief." In support of their position, Petitioners cite *Califano v. Yamasaki*, 442 U.S. 682 (1979), which says, "The fact that the statute speaks in terms of an action brought by 'any individual' or that it contemplates case-by-case adjudication does not indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action otherwise is permissible. Indeed, a wide variety of federal jurisdictional provisions speak in terms of

individual plaintiffs, but class relief has never been thought to be unavailable under them." *Id.* at 700. But *Yamasaki* was about an entirely different statute. And although the rule laid out in *Yamasaki* may be true as a general rule, it does not stop the Court from looking at a particular statute that uses the word "individual" and determining that, even if the use of "individual" does not always bar class actions, it does bar them in the particular statute at issue. And that is exactly what the Court found in *Reno*. Additionally, in *Nken v. Holder*, 556 U.S. 418 (2009), the Court interpreted the statute the exact same way. *Id.* at 431 (describing § 1252(f)(1) as "a provision prohibiting classwide injunctions against the operation of removal provisions"). It is telling that Petitioners choose not to engage with *Reno*, other than to dismiss it as "dictum."

We are not alone in our interpretation of § 1252(f)(1). Other courts, following *Reno*'s guidance, have determined that they do not have jurisdiction under § 1252(f)(1) to issue class- based injunctive relief against the removal and detention statutes. *See Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999) ("§ 1252(f) forecloses jurisdiction to grant class-wide injunctive relief to restrain operation of §§ 1221–31 by any court other than the Supreme Court."); *Pimentel v. Holder,* 2011 WL 1496756, at *2 (D.N.J. Apr. 18, 2011) (explaining § 1252(f)(1) bars courts from exercising jurisdiction over class claims for injunctive relief); *Belgrave v. Greene*, 2000 WL 35526417, at *4 (D. Colo. Dec. 5, 2000) (explaining that § 1252(f)(1) does not bar detainees from seeking habeas relief from detention, but it does "require[] that those challenges be brought on a case-by-case basis").

Objection #2: § 1252(f)(1) does not apply to habeas. Petitioners argue that "Congress made no specific reference to habeas corpus, which therefore remains intact." Petitioners cite *St. Cyr*, which says that "[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." 533 U.S. at 299. Petitioners go on to point out that the lack of reference to habeas jurisdiction in § 1252(f)(1) is especially notable given that in other parts of § 1252, Congress chose to specifically mention habeas using the phrase: "Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision." *See* §§ 1252(a)(2)(A), (B), (C), 1252(a)(4), (5), 1252(g).

But Petitioners' argument fails because there is nothing in § 1252(f)(1) that suspends the writ of habeas corpus. It is true that habeas is barred as to *injunctive relief* for *class actions*, but there is nothing barring a class from seeking a traditional writ of habeas corpus (which is distinct from injunctive relief, *see Jennings*, 138 S. Ct. at 858 (Thomas, J., concurring in part and concurring in the judgment)), or an individual from seeking habeas relief, whether injunctive or otherwise. There was therefore no reason for Congress to explicitly call attention to habeas jurisdiction in § 1252(f)(1). Additionally, *St. Cyr* is not properly invoked by Petitioners because the animating principle behind *St. Cyr* was that courts needed to tread carefully when interpreting a statute that "invokes the outer limits of Congress' power." *St. Cyr*, 533 U.S. at 299. In such cases, "we expect a clear indication that Congress intended that

result." *Id.* But delineating the jurisdiction of Article III courts is soundly within the powers of Congress. *See Bender*, 475 U.S. at 541 ("Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress . . . .").

Argument #3: As to their statutory claims, Petitioners do not seek "to enjoin or restrain the operation of the [referenced] provisions" of the INA. Petitioners claim that "the district court was not enjoining or restraining the statutes, but rather interpreting them to ensure they are correctly enforced." There are two problems with this argument. First, *Jennings* foreclosed any statutory interpretation that would lead to what Petitioners want. The *Jennings* Court chastised the Ninth Circuit for "erroneously conclud[ing] that periodic bond hearings are required under the immigration provisions at issue here," a conclusion the Ninth Circuit came to by "adopt[ing] implausible constructions of the . . . immigration provisions at issue." *Jennings,* 138 S. Ct. at 850, 836. Similarly, Petitioners' argument here cannot succeed to the extent that Petitioners are arguing the district court was *interpreting* the statute to find a statutory basis for the injunction.

Second, the claim that "the district court was not enjoining or restraining the statutes" is implausible on its face. The district court, among other things, ordered release of detainees held "for six months or more, unless a bond hearing for any such detainee is conducted"; created out of thin air a requirement for bond hearings that does not exist in the statute; and adopted new standards that the

government must meet at the bond hearings ("shall release . . . unless the immigration judge finds, by clear and convincing evidence, that the detainee is either a flight risk or a public safety risk"). If these limitations on what the government can and cannot do under the removal and detention provisions are not "restraints," it is not at all clear what would qualify as a restraint.

The district court did not have jurisdiction to enter class-wide injunctive relief on Petitioners' detention-based claims.[8]

III.

The district court lacked jurisdiction to enter its preliminary injunction both with regard to the

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[8] The dissent claims *Jennings* leaves open the possibility that constitutional claims may survive § 1252(f)(1)'s removal of jurisdiction. We recognize that the Court in *Jennings* did not rule on whether a court may issue class-wide injunctive relief on the basis of constitutional claims. *See* 138 S.Ct. at 851. However, in declining to rule on this issue, *Jennings* leaves in place the holding from *Reno* that § 1252(f)(1) bars injunctive relief—period. Absent an explicit holding otherwise, we see no way to interpret *Reno* to allow injunctive relief on *any* basis.

The dissent claims also that § 1252(f)(1) does not bar declaratory relief. Be that as it may, both parties agree in their letter briefs that the issue of declaratory relief is not before us. Even if it were before us, we are skeptical Petitioners would prevail. It is true that "declaratory relief will not always be the functional equivalent of injunctive relief." *Alli v. Decker*, 650 F.3d 1007, 1014 (3d Cir. 2011). But in this case, it is the functional equivalent. The practical effect of a grant of declaratory relief as to Petitioners' detention would be a class-wide injunction against the detention provisions, which is barred by § 1252(f)(1).

removal-based and the detention-based claims. It lacked jurisdiction over the removal- based claims because § 1252(g) plainly reserves for the Attorney General the authority to execute removal orders. These orders are not subject to judicial review. There is no Suspension Clause violation because the Suspension Clause can only be triggered when a petitioner is requesting release from custody. That is not what Petitioners request in the instant case. Instead, they seek additional time to have their petitions heard in the immigration courts. Additionally, the district court lacked jurisdiction over the detention-based claims because § 1252(f)(1) unambiguously strips federal courts of the authority to enter class-wide injunctive relief, as the district court did in this case. We accordingly **VACATE** the preliminary injunctions for both the removal-based and the detention-based claims, and we **REMAND** with directions to dismiss the removal-based claims for lack of jurisdiction, and for further proceedings consistent with this opinion.

DISSENT

HELENE N. WHITE, Circuit Judge, dissenting.

I respectfully dissent.

The majority vacates the preliminary injunctions relative to both types of claims—the removal-based claims and the detention-based claims—on the basis that the district court lacked jurisdiction to enter the injunctions. The removal-based relief must be vacated, says the majority, because the Suspension Clause, on which the district

court relied, "can only be triggered when a petitioner is requesting relief from custody" (Maj. Op. at 14–15), and, in any event, Congress's petition-for-review procedure provides an adequate substitute for habeas as applied to Petitioners (Maj. Op. at 9). The detention-based relief must be vacated, according to the majority, because "§ 1252(f)(1) unambiguously strips federal courts of the authority to enter class-wide injunctive relief." (Maj. Op. at 15.) Although the majority remands for further proceedings, it rejects the avenues left open by *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), which was decided after the injunctions were entered.

Although I agree with the majority that *Jennings* forecloses Petitioners' argument that the district court did not enjoin the operation of the provisions, but rather enforced them after interpreting them to require bond hearings, I disagree with the remainder of the majority's conclusions. Regarding the removal-based claims, protection against the executive action of removal is within the recognized scope of habeas, and the petition-for-review procedure provides an inadequate substitute for habeas under the circumstances presented here. Thus, the district court properly exercised jurisdiction over that claim. Regarding the detention-based claims, the district court had jurisdiction under § 2241, and § 1252(f)(1) does not purport to bar class-wide declaratory relief or individual injunctive relief.

I. Removal-Based Claims

I dissent from the majority's determination that the district court lacked jurisdiction to enter the preliminary injunction staying removal until

Petitioners have the opportunity to file motions to reopen and pursue their available avenues for administrative relief and judicial review. Petitioners do not challenge the orders of removal; they claim that country conditions have changed since those orders were entered and that they face persecution, torture, and possibly death if removed to Iraq. They do not ask the courts to make this determination in the first instance; they seek only to pursue their statutory rights to reopen their cases and make the requisite showing before the administrative agency. In short, they seek time to pursue Congress's mandated avenues for relief before they are deported, which, they plausibly assert, will render any relief granted pursuant to those procedures meaningless. The district court determined that Congress's withdrawal of habeas jurisdiction under these circumstances constitutes an as-applied violation of the Suspension Clause. I agree.

Scope of Habeas and the Suspension Clause

The United States Constitution states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. Known as the "Suspension Clause," this provision establishes that suspension of the common-law writ of habeas corpus is a constitutional violation. *See Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (reciting history of the Suspension Clause and explaining its modern-day application).

The relief available under habeas corpus is not nearly as narrow as the majority holds. In its order

granting the preliminary injunction, the district court considered the relevant case law and correctly noted that "in none of the many cases cited by the parties and by the Court regarding habeas jurisdiction in immigration cases has a court refused to consider a petitioner's argument on the grounds that the challenge to the removal order was not cognizable for failure to challenge detention." (R. 87, PID 2336-37 (collecting cases).)

The majority opinion sweeps broadly, finding that the Suspension Clause only protects the "core" remedy of release from detention and that protection from removal is not included. In support of this argument, the majority cites *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core," the writ "served as a means of reviewing the legality of Executive detention."), and *Munaf v. Geren*, 553 U.S. 674, 693 (2008) ("[T]he traditional function of the writ is to secure release from illegal custody.").

Yet neither of these cases holds that habeas protections do not include protection from removal. Notably, *St. Cyr* involved "an alien subject to a federal removal order," and recognized that the Suspension Clause requires some "judicial intervention in deportation cases." *St. Cyr*, 533 U.S. at 300 (citing *Heikkila v. Barber*, 345 U.S. 229, 235 (1935)). The *St. Cyr* Court also stated that habeas was "the sole means by which an alien could test the legality of his or her deportation order" until the 1952 enactment of the Immigration and Nationality Act. *Id.* at 306. The Court explained that "even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law like the one raised by the

respondent in this case could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus." *Id.* at 304-05. As a result, the Court reasoned, "[i]t necessarily follows that a serious Suspension Clause issue would be presented" by Congress's withdrawal of habeas review from federal courts without providing an "adequate substitute for its exercise." *Id.* at 305. Like *St. Cyr*, the present case involves aliens subject to federal removal orders who seek habeas review on a question of law related to their immigration proceedings, specifically, whether a district court has jurisdiction to stay removal proceedings for aliens at risk of immediate deportation where the relief available in the immigration courts does not provide an adequate and effective alternative. The majority focuses on the relief sought—cancellation of removal, which would leave St. Cyr free to remain in the U.S., as opposed to withholding of removal, which would entitle Petitioners *not* to be released into Iraq. The majority then notes that an alien who shows he will suffer torture is not automatically entitled to stay in the U.S. and may be removed to some other safe place. I do not find this difference significant; the point is that protection against deportation was within the core of the writ.

Similarly, *Munaf* explains that the "typical" habeas remedy is release, but nowhere states that it is the only "core" habeas remedy. In *Munaf*, the petitioners were U.S. citizens who were arrested by U.S.-led forces in Iraq on terrorism-related charges. The petitioners conceded that they were subject to arrest by the Iraqi government and sought to prevent their transfer to Iraqi custody following an extradition request. *Munaf*, 553 U.S. at 693. The

Court explicitly found that it had jurisdiction over the habeas petitions but noted that the petitioners' requested relief was inappropriate because they were not asking for release from custody, which would "expose them to apprehension by Iraqi authorities for criminal prosecution." *Id.* The Court went on to explain that "habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them." *Id.* at 697. Here, Petitioners are not subject to the extradition request of a foreign power and are not seeking habeas that would "shelter them" from government prosecution. Although *Munaf* declined to grant the petitioners the requested relief, the *Munaf* Court did not hold that the writ is unavailable where the petitioner seeks to stay removal proceedings in order to pursue statutory remedies that would grant relief from removal.

Further, the history of the writ includes its application to challenge removal proceedings. In their amicus brief, Scholars of Habeas Corpus Law (Scholars) correctly observe that for over a hundred years, courts have recognized that the executive act of removing an alien from the country involves the sort of restraint on personal liberty that can properly form the basis of a habeas petition. (Scholars Br. at 5-6 (citing *Chin Yow v. U.S.*, 208 U.S. 8, 12 (1908) ("It would be difficult to say that [an alien] was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China."); *In re Jung Ah Lung*, 25 F. 141, 142 (D. Cal. 1885) ("If the denial, therefore, to the petitioner of the right to land, thus converting the ship into his prison-house,

to be followed by his deportation across the sea to a foreign country, be not a restraint of his liberty within the meaning of the habeas corpus act, it is not easy to conceive any case that would fall within its provisions."), *aff'd*, 124 U.S. 621 (1888)).) Thus, the district court did not err in concluding that it had jurisdiction over the removal-based claims under the Suspension Clause.

Adequate and Effective Alternative

Of course, even where the Suspension Clause applies, it is not violated where habeas is replaced with an adequate and effective alternative. Relying on *Muka v. Baker*, 559 F.3d 480 (6th Cir. 2009), the majority concludes that even assuming the Suspension Clause applies, "the REAL ID Act does not violate the Suspension Clause because a petition for review provides an 'adequate and effective' mechanism for relief." *Id.* at 484 (citing *Swain v. Pressley*, 430 U.S. 372, 381 (1977)). Petitioners do not dispute that the petition-for-review process generally provides an adequate alternative to habeas. Rather, they assert, and the district court found, that the petition-for-review mechanism is not adequate and effective as applied to Petitioners in the present "compelling confluence of grave, real-world circumstances." (R. 64, PID 1243-44.) Importantly, *Muka* did not "foreclose other distinct as-applied challenges" under the Suspension Clause. *Muka*, 559 F.3d at 486. The majority gives short shrift to the district court's core finding, simply asserting that "Petitioners had years to file their motions to reopen; they cannot now argue that the system gave them too little time. The administrative scheme established by Congress even provided multiple avenues to stay removal while pursuing relief." (Maj.

Op. at 9.) The majority plainly ignores the facts on the ground.

Aliens seeking to challenge their removal based on changed country conditions can file a motion to reopen, which is a request for redetermination of a prior decision to remove the alien. *See* 8 U.S.C. § 1229a(c)(7); 8 C.F.R. §§ 1003.2(c)(1) and 1003.23(b)(3). A motion to reopen does not automatically stay removal. Once a motion to reopen has been filed, the alien may also file a motion to stay, although there is no guarantee that an alien will not be deported during the pendency of the motion to stay removal. A motion to reopen based on changed country conditions must establish prima facie eligibility for the relief sought, *see* 8 U.S.C. § 1229a(c)(7), which means the motion and supporting documentation must (1) set forth a complete description of the new circumstances, (2) articulate how those new circumstances affect the party's eligibility for relief, and (3) include evidence of the changed circumstances, 8 C.F.R. §§ 1003.2(c); 1003.23(b)(3) and (4)(i); Immigration Court Practice Manual, Chapter 5.7(e)(i) (June 10, 2013).

In this case, Petitioners' grounds for relief from removal based on changed country conditions in Iraq arose *after* (in some cases, many years after) Petitioners' removal proceedings had ended. Petitioners presented the district court with evidence that because they were likely to be killed or tortured if deported, their impending removal would be in violation of the Immigration and Nationality Act (INA) and the Convention Against Torture (CAT), and that without a stay they would be deported before they could seek relief under these acts. The government did not contest this evidence, and the

majority does not find fault with the district court's findings that without a stay, deportations would commence immediately, with death, torture, and persecution probably resulting. Instead, the majority faults Petitioners for failing to file motions to reopen earlier. Yet there are good reasons for Petitioners' failure to do so. The government was unable to deport Petitioners to Iraq until 2017 when a diplomatic agreement resulted in the resumption of removals. Petitioners were living for years (or decades) under removal orders but with no actual prospect of being deported. Susan Reed, Petitioners' witness and the Managing Attorney of the Michigan Immigrant Rights Center, explained that stays of removal are not typically sought until removal is imminent because they are rarely granted when removal is not imminent. Although Petitioners could have filed motions to reopen and to stay removal, it is not reasonable to expect that they would have done so because there was no real possibility of removal, and it was unclear what country conditions might be at some hypothetical future time when removal might be possible.

There is abundant evidence in the record that motions to reopen are complicated, time- consuming, and expensive. These motions require the applicant to compile files, affidavits, and "hundreds of pages of supporting evidence," fill out all sections of the application, and include an original signature. (*See* R. 77-2, R. 77-26, R. 77-27, R. 30-3 ¶ 12, 8 C.F.R. § 1003.2(c)(1) (noting that a motion to reopen "must be accompanied by the appropriate application for relief and all supporting documentation").) Amicus Curiae American Immigration Lawyers Association's (AILA) explains that "[t]he mechanics of filing a Motion to

Reopen with either the immigration court or the Board of Immigration Appeals can be a highly-complex and time- consuming process even for the most-seasoned immigration attorney." (AILA Br. at 3.) Here, attorneys faced difficulties preparing the applications because Petitioners were transferred to out- of-state facilities and even when attorneys did visit the out-of-state facilities, they were often denied the opportunity to meet with their clients. (*See* R. 77-22 ¶¶ 7–9 (attorney who drove four hours to meet with client was denied the opportunity to visit on two separate occasions, despite prior assurances that they would be able to meet); R. 77-7 (attorney stating that it is "nearly impossible" for her to meet with her clients "because they were all transferred . . . approximately 4 hours away").)

Petitioners additionally note that their Alien files (A-files)—which document their immigration history—and Records of Proceedings (ROP)—which document past proceedings before the immigration courts and BIA—are ordinarily attainable only through a FOIA request and can take months to obtain. (R. 77-28 ¶¶ 6, 7; R. 77-26 ¶¶ 8, 9; AILA Br. at 2 (explaining that the motion to reopen "takes time, in large part due to the government's own bureaucratic weight, the difficulty in obtaining and reviewing records and evidence particularized to each individual respondent, and the sudden strain on a community affected by mass round-up of its members").) Under normal circumstances, preparing a motion to reopen can take between three and six months. (R. 77-26 ¶ 12; R. 77-27 ¶ 5.)

The majority's assertion that "[t]he administrative scheme established by Congress even provided multiple avenues to stay removal while

pursuing relief" would carry weight if the Petitioners had had time to pursue the "multiple avenues," or indeed *any* avenue. (Maj. Op. at 9.) But when the ICE raids began, Petitioners were faced with the very real possibility that they would be deported before they could reopen their immigration cases and then be imprisoned, tortured, or killed upon removal to Iraq. If the district court had not granted a stay of removal, Petitioners would have quickly been deported far beyond the reach of habeas and the court's jurisdiction. *See Boumediene*, 553 U.S. at 787 (explaining that "when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release"). The circumstances were such that recourse to the immigration courts, the BIA, and the courts of appeal would not have been an adequate or effective substitute for habeas relief.

Nor is the district court's application of the Suspension Clause under these circumstances novel or unusual. Courts throughout the country confronting similar circumstances have found that interpreting § 1252(g) to divest them of jurisdiction could violate the Suspension Clause. In *Devitri v. Cronen*, 289 F. Supp. 3d 287 (D. Mass. 2018), fifty Indonesian Christians who were subject to orders of removal brought habeas petitions seeking stays of deportation. The petitioners sought to file motions to reopen based on changed country conditions in Indonesia that occurred after their original removal orders were entered. *Id.* at 291. The district court noted that petitioners provided "persuasive evidence

demonstrating that it is likely that the BIA will not rule on their non-emergency motions to stay before they are deported." *Id.* at 294. As a result of this "Kafkaesque procedure," petitioners would be "removed back to the very country where they fear persecution and torture while awaiting a decision on whether they should be subject to removal because of their fears of persecution and torture." *Id.* The district court determined that the BIA's "processes for adjudicating motions to reopen and motions to stay are not adequate administrative alternatives to habeas for these petitioners," and that § 1252(g) resulted in an as-applied violation of the Suspension Clause. *Id.*

Other courts have concluded that the motion to reopen process is not an adequate substitute for habeas relief in circumstances similar to Petitioners'. *Ibrahim v. Acosta*, No. 17– cv–24574, 2018 WL 582520, at *5–6 (S.D. Fla. Jan. 26, 2018) (granting habeas petitions for stay of removal to class of Somali nationals subject to orders of removal and facing imminent deportation, concluding that § 1252(g) "violates the Suspension Clause as applied if it deprives Petitioners of a meaningful opportunity to exercise their statutory right to file motions to reopen their immigration cases"); *Sied v. Nielson*, No. 17–cv–06785, 2018 WL 1142202, at *25 (N.D. Cal. Mar. 2, 2018) (holding that the motion-to-reopen process "is not a constitutionally adequate substitute process in the facts of this case, where the government can manipulate the process by deporting Mr. Sied before he can be heard, to a country [Eritrea] where he may be tortured or killed"); *Hussein v. Brackett*, No. 18–cv–273–JL, 2018 WL 2248513, at *7 (D.N.H. May 16, 2018) (finding that

petitioner "has raised a colorable claim that the jurisdiction-divesting provisions of § 1252 violate the Suspension Clause as applied to him, and that this court has jurisdiction to resolve that question").

Because Petitioners had no reason to file motions to reopen and to stay without some notice that removal was imminent, and once they received such notice the petition-for-review process failed to provide a realistic possibility of effective relief, the district court correctly concluded that the petition-for-review process failed to provide an adequate alternative to habeas relief.

In sum, the majority's conclusion that Congress can permissibly render the federal courts impotent to temporarily stay the executive branch's imminent removal of aliens to a place where they are likely to be tortured before they have an opportunity to pursue relief based on changed country conditions is contrary to the historical understanding of the writ of habeas corpus and the Suspension Clause. I would affirm the district court's exercise of jurisdiction and its grant of the preliminary injunction on the removal-based claims.

II. Detention-Based Claims

Although § 1252(f)(1) and its interpretation by the Supreme Court in *Reno v. American- Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) appear to foreclose the possibility of class-wide *injunctive* relief, there is no indication that the statute forecloses class-wide *declaratory* relief, and it clearly allows for individual relief where the court

otherwise has jurisdiction.[1]

In *Reno*, the Supreme Court considered § 1252(f)(1) within the context of the broader Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and explained that "[b]y its plain terms," § 1252(f)(1) is "a limit on injunctive relief." *Id.* at 481. The Court stated that § 1252(f)(1) "prohibits federal courts from granting class-wide injunctive relief against the operation of §§ 1221–123[2]," but "does not extend to individual cases." *Id.* at 481-82.

But the Supreme Court addressed § 1252(f)(1) again in *Jennings v. Rodriguez,*[2] and seemingly left open the possibility that § 1252(f)(1) does not apply to constitutional claims. Citing *Reno* for the proposition that § 1252(f)(1) "prohibits federal courts from granting class- wide injunctive relief against the operation of §§ 1221–123[2]," the *Jennings* Court declined to consider the aliens' constitutional arguments in favor of injunctive relief. 138 S. Ct. at 851. The Court remanded to the Ninth Circuit, instructing that:

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[1] *Reno* expressly rejected the view that § 1252(f)(1) provides "an affirmative grant of jurisdiction" over class-based challenges to removal decisions. *Id.* at 482.

[2] In *Jennings*, the Court rejected the Ninth Circuit's conclusion that the doctrine of constitutional avoidance requires that § 1225(b) and § 1226(c) be interpreted to include a 6-month limit on mandatory detentions and to require bond hearings after that point, 138 S. Ct. at 846, explaining that the sections are unambiguous as to the permissible length of detention and do not authorize bond hearings. Thus, I agree that to the extent the district court determined that the statutes incorporate a bond-hearing requirement, it erred.

> the Court of Appeals should consider on remand whether it may issue classwide injunctive relief based on respondents' constitutional claims. If not, and if the Court of Appeals concludes that it may issue only declaratory relief, then the Court of Appeals should decide whether that remedy can sustain the class on its own.

Id.

The majority concludes that the issue was settled by *Reno*; but if this is so, the *Jennings* Court's remand is baffling. In any event, and assuming *Reno* settled the issue, *Jennings* clearly supports that class-wide declaratory relief is not barred. Other courts have determined that § 1252(f)(1) does not bar class-wide declaratory relief. *See Alli v. Decker*, 650 F.3d 1007, 1013 (3d Cir. 2011) ("[V]iewing the provision in context and then taking into consideration the heading of the provision ['limits on injunctive relief'], it is apparent that the jurisdictional limitations in § 1252(f)(1) do not encompass declaratory relief."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1119 (9th Cir. 2010) ("It is simply not the case that Section 1252(f) bars Petitioner from receiving declaratory relief on behalf of the class."); *Reid v. Donelan*, No. 13-30125-PBS, 2018 WL 5269992, at *6 (D. Mass. Oct. 23, 2018) (declining to address whether § 1252(f)(1) bars a class- wide injunction because the statute "does not bar class-wide declaratory relief, which suffices to satisfy Rule 23(b)(2)"). This, of course, is consistent with § 1252(f)(1)'s use of the words "enjoin" and "restrain," as compared with § 1252(e)(1)'s language explicitly preventing courts from entering "declaratory, injunctive, or other equitable relief" in

cases involving aliens excluded under 8 U.S.C. § 1225(b)(1).

The majority notes that the parties' letter briefs make clear that the issue of declaratory relief is not before us. (Maj. Op. at 14, N.8.) That is true in the sense that Petitioners state "§ 1252(f)(1) does not apply to Petitioners' request for classwide declaratory relief, which is not before this Court, as the district court has not yet ruled on Petitioners' request for such relief." (Petitioners' Letter Br. at 10.) But the request for such relief is part of the case and should be entertained by the district court on remand without prejudgment by this court.

Conclusion

In sum, I would affirm the district court's preliminary injunction as to the removal-based claims; as to the detention-based claims, I would vacate the district court's class-wide preliminary injunction and remand for reconsideration in light of *Jennings* and for further proceedings as are consistent with § 1252(f)(1).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 17-2171/18-1233

USAMA JAMIL HAMAMA, et al.,

Petitioners-Appellees,

v.

REBECCA ADDUCCI, et al.,

Respondents-Appellants.

Before: BATCHELDER, SUTTON, and WHITE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the preliminary injunctions for both the removal-based and detention-based claims are VACATED, and the matter is REMANDED to the district court with directions to dismiss the removal-based claims for lack of jurisdiction, and for further proceedings consistent with this opinion.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA J. HAMAMA, et al.,

Petitioners

vs.

REBECCA ADDUCCI,

Respondent.

_____/

Case No. 17-cv-11910

HON. MARK A. GOLDSMITH

OPINION & ORDER GRANTING PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION (Dkt. 77)

In their motion for a preliminary injunction, Petitioners ask this Court to halt temporarily their deportation to Iraq, until they can make their case in the immigration courts that their removal is legally prohibited. The grounds that they will urge in those courts and, if necessary, in the federal courts of appeals will be that returning them to the lawlessness and senseless religious hatred that engulfs much of Iraq would subject them to persecution, torture, and possible death. The Government opposes the motion, principally on the grounds that this Court has no jurisdiction to provide any relief — even temporary relief — and that Petitioners' only recourse is to seek a stay of removal before the immigration courts. As this Court explained in its earlier opinion on jurisdiction, and as it will explain again below, the Government's view is inconsistent with the Constitution's command that

the writ of habeas corpus — the fundamental guarantor of liberty — must not be suspended, except in the rare case of foreign invasion or domestic rebellion.

The Government's view ignores the compelling confluence of extraordinary circumstances presented here. Without warning, over 1,400 Iraqi nationals discovered that their removal orders — many of which had lain dormant for several years — were now to be immediately enforced, following an agreement reached between the United States and Iraq to facilitate removal. This abrupt change triggered a feverish search for legal assistance to assert rights against the removal of persons confronting the grisly fate Petitioners face if deported to Iraq. That legal effort has, in turn, been significantly impeded by the Government's successive transfers of many detainees across the country, separating them from their lawyers and the families and communities who can assist in those legal efforts.

In these singular circumstances, a federal district court is armed with jurisdiction to act as a first responder to protect the writ of habeas corpus and the allied right to due process, by allowing an orderly filing for relief with the immigration courts before deportation, thereby assuring that those who might be subjected to grave harm and possible death are not cast out of this country before having their day in court.

For the reasons explained fully below, the Court grants Petitioners' motion for a preliminary injunction (Dkt. 77).

I. BACKGROUND

A. Procedural History

On June 11, 2017, agents from United States Immigration and Customs Enforcement ("ICE") began arresting Detroit-based Iraqi nationals subject to final orders of removal. Am. Hab. Pet. ¶¶ 2, 5 (Dkt. 68). ICE's operation ultimately resulted in the arrest of 114 Iraqi nationals who have since been transferred to federal facilities in Michigan, Ohio, Louisiana, and Arizona, where they await removal to Iraq. *Id.* ¶¶ 5, 8. This operation was part of a nationwide effort to remove Iraqi nationals who have been subject to longstanding final orders of removal, resulting from criminal convictions or overstaying visas. *Id.* ¶¶ 2, 7. Outside of Detroit, approximately eighty- five Iraqi nationals from Tennessee, New Mexico, and California have been arrested and detained. *Id.* ¶¶ 5-6. Those individuals have since been transferred to facilities in Alabama, Louisiana, Tennessee, and Texas. *Id.* ¶ 52. In total, 234 Iraqi nationals subject to final orders of removal have been arrested and are currently detained in 31 facilities across the country. *See* Kitaba- Gaviglio Decl., Ex. S to Pet'rs Mot., ¶ 5 (Dkt. 77-20). The Government seeks to remove 1,210 additional Iraqi nationals subject to final orders of removal who have yet to be arrested. Am. Hab. Pet. ¶ 7.

Over eighty-three percent of those detained have been subject to final orders of removal for at least five years, with more than fifty percent being subject to the orders for a decade or more. *See* Kitaba-Gaviglio Decl. ¶ 8. However, prior to March 2017, the Government had difficulty executing removal orders for Iraqi nationals due to Iraq's

longstanding policy of not issuing the requisite travel documents for repatriation. Am. Hab. Pet. ¶ 42. It was not until the United States agreed to remove Iraq from the list of countries set forth in Executive Order 13780, issued March 6, 2017, that Iraq agreed to issue travel documents. *Id.* ¶ 43 (citing 82 F.R. 13209). Prior to this agreement, the Government was only able to repatriate Iraqi nationals with unexpired passports. Schultz Decl., Ex. C to Gov't Resp., ¶ 6 (Dkt. 81-4). Since 2007, just over 400 such individuals were removed by the Government or voluntarily agreed to return to Iraq. *Id.* ¶ 4. Iraq's recent willingness to issue travel documents has allowed for removal on a much more aggressive scale.

On June 15, 2017, Petitioners filed both a habeas corpus class action petition (Dkt. 63) and a motion for a temporary restraining order and/or stay (Dkt. 66). The motion sought to prevent their removal "until an appropriate process has determined whether, in light of current conditions and circumstances, they are entitled to mandatory protection from removal." Pet'rs Mot. for TRO at 2. After the Government opposed the motion on jurisdictional grounds, the Court issued a stay of removal, pending resolution of the jurisdictional issue, which stay was made applicable to the class as then defined, i.e., all Iraqi nationals subject to removal orders within the jurisdiction of the Detroit ICE Field Office. *See Hamama v. Adducci*, No. 17-CV-11910, 2017 WL 2684477 (E.D. Mich. June 22, 2017).

After Petitioners filed an amended habeas corpus class action petition and class action complaint, along with a motion to expand the stay (Dkt. 69), the Court entered an order expanding the

stay to a nationwide class of Iraqi nationals subject to final orders of removal. *See Hamama v. Adducci*, No. 17-CV-11910, 2017 WL 2806144 (E.D. Mich. June 26, 2017). [1] The stay was subsequently extended until July 24, 2017 to allow further consideration of the jurisdiction issue. *See* 7/6/2017 Op. & Order (Dkt. 61). Since that time, the Court has ruled that it has jurisdiction in this matter. *See Hamama v. Adducci*, No. 17-CV-11910, 2017 WL 2953050, ___ F. Supp. 3d ___ (E.D. Mich. July 11, 2017).

In their motion for a preliminary injunction, Petitioners argue that it is unlawful to remove them prior to an adjudication of their motions to reopen by the immigration courts and the filing of a petition for review with the courts of appeals, if necessary. Motions to reopen allow those who are already subject to final orders of removal to argue that the order is now unlawful, or that they are now eligible for immigration relief or protection based on changed country conditions. *See* Realmuto Decl., Ex. Y to Pet'rs Mot., ¶ 5 (Dkt. 77-26). Petitioners, many of whom are religious minorities, including Chaldean Christians, Kurds, and Sunni and Shiite Muslims, argue that they are eligible for mandatory relief under provisions of the Immigration and Nationality Act ("INA"), the Foreign Affairs Reform and Restructuring Act ("FARRA"), and the Convention Against Torture ("CAT"). Pet'rs Mot. at 18 (citing 8 U.S.C. § 1231(b)(3) (restricting removal to country where alien's life or freedom would be threatened); 8 U.S.C. § 1231 note (stating policy of the United States not to remove individual to a country where

[1] The members of the expanded putative class are encompassed within the term "Petitioners," unless otherwise indicated.

there are substantial grounds to believe the individual will be tortured in that country); 8 C.F.R. § 208.16(c)(2) (implementing regulation for the CAT, which forbids removal if more likely than not individual will be tortured upon removal). Petitioners argue that these laws prohibit their removal until motions to reopen have been filed and adjudicated. They also argue that the Fifth Amendment's Due Process Clause forbids removal prior to the opportunity to be heard regarding the risk of torture, persecution, or death.

Petitioners contend that the harm they will face if removed to Iraq far outweighs the harm to the Government that will result if removal is delayed pending the completion of administrative proceedings and the opportunity to seek a stay in the courts of appeals. They also maintain that the public interest weighs in their favor because the public has an interest in fair immigration proceedings.

To ensure their claims are heard, Petitioners request that their removal be enjoined for three months in order to file motions to reopen, beginning from the time the Government provides them with their Alien Files ("A-Files") and their Record of Proceedings ("ROP") from the immigration courts and/or the Board of Immigration Appeals ("BIA"). For those who file a motion to reopen within that three-month period, Petitioners request that the enjoinment of their removal continue through the adjudication of the administrative proceedings and, if necessary, until they have submitted both petitions for review and motions to stay in the appropriate courts of appeals.

In response, the Government reasserts its claim that the REAL ID Act, 8 U.S.C. § 1252, divests this Court of jurisdiction. It argues that there is no Suspension Clause violation under these circumstances, because the administrative motion to reopen process is adequate. The Government also raises, for the first time, the argument that there cannot be a Suspension Clause violation because habeas relief is inappropriate where the detainee is challenging a transfer from custody, as distinct from a challenge to detention itself. Finally, the Government argues that even if this Court has jurisdiction, Petitioners' motion for preliminary injunction should be denied because their claims are meritless and the balance of equities weighs in the Government's favor.

Prior to addressing these arguments, the Court turns to the pertinent facts.

B. Conditions in Iraq

As noted in the Court's opinion regarding jurisdiction, Petitioners' removal orders largely predate the deteriorating conditions in Iraq. *See Hamama*, 2017 WL 2953050 at *3; *see also* Heller Decl., Ex. D. to Pet'rs Mot., ¶ 8 (Dkt. 77-10)[2]; Kitaba-Gaviglio Decl. ¶ 7 (noting that over fifty percent of Petitioners have been subject to orders of removal since 2007). The country's instability traces back to the 2003 United States-led invasion of Iraq, which

[2] Rebecca Heller is the director and co-founder of the International Refugee Assistance Project ("IRAP"), a project of the Urban Justice Center, Inc. Heller Decl. ¶ 1. IRAP provides free legal services to refugees, including those who seek escape from persecution. *Id.* ¶ 4. The organization has extensive experience providing assistance to Iraqi refugees. *Id.* ¶ 5.

brought in its wake the persecution of religious minorities, including Christians, Yezidis, and others. *See* Lattimer Decl. I, Ex. I to Pet'rs Mot., ¶¶ 8, 10 (Dkt. 11-10).[3] However, it was not until 2014 that conditions became especially dire for religious minorities. In June of that year, the Islamic State in Iraq and Syria ("ISIS") took control of Mosul, Iraq's second largest city, causing an immediate exodus of some 500,000 civilians. *Id.* at 9.[4]

Religious minorities in Iraq face significant persecution at the hands of ISIS. *See* Lattimer Decl. I ¶¶ 8, 10. *see also id.* ¶ 17 ("[R]eligious minorities are at risk of extinction in Iraq . . . ."). In addition to desecrating numerous places of worship, ISIS has carried out large-scale killings and abductions of those who have been unable to flee. *Id.* ¶ 10. ISIS forces in Iraq have directed Christians, in particular,

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[3] Mark Lattimer, currently the executive director of Minority Rights Group International, has been extensively involved in various organizations dedicated to monitoring human rights abuses in Iraq. Lattimer Decl. ¶ 1.

[4] Destabilization flowing from the 2003 invasion caused about two-thirds of Iraq's Christian community to leave the country prior to June 2014. *See* "No Way Home: Iraq's Minorities on the Verge of Disappearance," (hereinafter, "*No Way Home* Report"), at 10, available at http://minorityrights.org/wp-content /uploads/2016/07/MRG_CFRep_Iraq_Aug16_UPD-2.pdf.
According to the United Nations High Commissioner for Refugees, an estimated one million Iraqi citizens remain internally displaced due to sectarian violence dating from about 2006 until ISIS became heavily active in roughly 2014. *See* Iraq, Int'l Religious Freedom Report, U.S. State Dep't at 3 (2015), available at https://www.state.gov/documents/organization/ 256479.pdf. The conflict with ISIS, however, caused a rate of displacement that vastly and rapidly outpaced the previous one, displacing an additional 3.4 million people in less than two years, from 2014 to July 2015. *Id.*

to "pay a protection tax, convert to Islam, or be killed." *Id.* ¶ 9. Christians have also been subject to rape and other atrocities. *Id.* ¶ 10. Five of the named Petitioners identify as Christian. *See* Am. Hab. Pet. ¶¶ 19-23.

Sectarian violence in Iraq is by no means limited to Christian minorities. Shiite Muslims and Yezidis have been subject to sexual slavery, abductions, and death at the hands of ISIS. Heller Decl. ¶¶ 32, 38. ISIS has gone as far as to target these groups for genocide. *Id.* ¶ 32.[5]Two of the named Petitioners identify as Shiite Muslims. *See* Am. Hab. Pet. ¶¶ 24-25.

ISIS is not the only group targeting religious minorities. The record indicates that Sunni Muslims have been singled out by militias associated with the Iraqi government. Following the rise of ISIS, the Iraqi government empowered the Popular Mobilization Forces ("PMF") to reclaim territory. Heller Decl. ¶ 16. PMF consists of mostly Shiite organizations that are trained by the Iranian government and has engaged in a campaign of abductions and extrajudicial killings against Sunni Muslims. *Id.* ¶¶ 16, 20.

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[5] The current International Religious Freedom Report, published by the State Department, also notes that "Yezidi, Christian, and Sunni leaders continued to report harassment and abuses" by certain regional governments. *See* Int'l Religious Freedom Report at 7; *see also id.* at 15 ("Coordinated [ISIS] bomb attacks continued to target Shia markets, mosques, and funeral processions. . . .); *id.* at 18 ("[ISIS] continued to publish open threats via leaflets, social media, and press outlets of its intent to kill Shia 'wherever they were found' on the basis of being 'infidels.'").

There is also evidence that Petitioners' association with Westerners will heighten their risk of persecution. In addition to targeting U.S. citizens, ISIS and other sectarian militias have targeted Iraqis who they perceive to be associated with "western interests." Lattimer Decl. II, Ex. K to Pet'rs Mot., ¶ 2 (Dkt. 77-13). There is a high likelihood that if they are removed to Iraq, Petitioners will be immediately detained and interrogated by the country's internal security forces. Smith Decl., Ex. E to Pet'rs Reply, ¶ 1 (Dkt. 84-6). Petitioners face a heightened risk of interrogation due to media coverage of their criminal records, as well as Iraq's fear of American espionage. *Id.* ¶ 5. Many of the interrogation techniques used by Iraq's internal security forces would qualify as torture. *Id.* ¶ 2. Any Iraqi who lived or spent a considerable amount of time in the United States would almost certainly be unable to conceal this fact upon return to Iraq. Lattimer II Decl. ¶ 11.[6]

C. Barriers to Asserting Claims

Petitioners assert that they have been significantly impeded in raising these changed conditions in immigration courts since their detention. According to Petitioners, even without the pressure of immediate removal without advance notice, preparing a motion to reopen proceedings before the immigration courts is a difficult task. They

[6] The State Department's recent Iraq Travel Warning notes that "[a]nti-U.S. sectarian militias may also threaten U.S. citizens and western companies throughout Iraq." *See* Iraq Travel Warning, U.S. Dep't of State (June 14, 2017), available at https://travel.state.gov/content/passports/en/alertswarnings/iraq-travel-warning.html.

note that it requires compiling files, affidavits, "hundreds of pages of supporting evidence," and preparing the application for relief. Abrutyn Decl. I, Ex. A to Pet'rs Mot., ¶¶ 11, 13 (Dkt. 77-2); *see also* Realmuto Decl., Ex. Y to Pet'rs Mot., ¶ 8 (Dkt. 77-26) (noting that time is necessary to gather "substantial new evidence" n support of a motion to reopen); Scholten Decl., Ex. Z to Pet'rs Mot., ¶ 8 (Dkt. 77-27); 8 C.F.R. § 1003.2(c)(1) (noting that an alien's criminal history will often need to be retrieved and reviewed, and that a motion to reopen "must be accompanied by the appropriate application for relief and all supporting documentation").

The two most important documents, the A-File (the file documenting the alien's immigration history) and the ROP (a court file that contains a history of the alien's past proceedings before the immigrations courts and BIA), are generally only attainable through a Freedom of Information Act ("FOIA") request. *See* Realmuto Decl, ¶¶ 8-9. Responses to these FOIA requests can often take over five months. *See* Abrutyn Decl. II, Ex. AA to Pet'rs Mot., ¶¶ 6, 7 (Dkt. 77-28).

Preparing a motion to reopen is also an expensive proposition. Preparing the motion requires "a high level of immigration law knowledge and experience," which costs clients somewhere between $5,000 and $10,000. *See* Reed Decl., Ex. K to Pet'rs Mot., ¶¶ 7, 10 (Dkt. 77- 12). This amount does not include fees of $10,000 to $30,000 that arise if the motion is granted and the case proceeds to a merits hearing on the underlying form of relief sought. *Id.* ¶ 10. In a case of this nature, costs can reach up to $80,000. *Id.*

The difficulty of preparing a motion to reopen has been compounded by Petitioners' detention in facilities far from their homes. Petitioners detained in Michigan have been transferred to Ohio, Louisiana, and Arizona; Petitioners detained in Tennessee have been transferred to Louisiana, Texas, Alabama, and Arizona. *See* Am. Hab. Pet. ¶ 52. It is estimated that approximately seventy-nine percent of Petitioners are being detained in facilities outside of the state in which the immigration court issued their final orders of removal. Kitaba-Gaviglio Decl. ¶ 9. Further, many Petitioners have been transferred multiple times. Am. Hab. Pet. ¶ 56. One Petitioner, Constantin Jalal Markos, has been transferred to facilities in Michigan, Ohio, Louisiana, and Arizona, with a layover in Texas, since his detainment in May 2017. *See* Markos Decl., Ex. X to Pet'rs Mot., ¶¶ 17-19 (Dkt. 77-25).

Relocation of Petitioners impedes retaining and communicating with counsel. Am. Hab. Pet. ¶ 55. And it impedes local community efforts to find and maintain counsel for Petitioners when they are shuttled around the country. *Id.* ¶ 53.

Attorneys have also described "extremely limited access to the phone" at detention facilities, thus making it difficult to compile the necessary information for a motion to reopen. *See* Kaur Decl., Ex. U to Pet'rs Mot., ¶ 4 (Dkt. 77-22); *see also* Markos Decl. ¶¶ 20-21 (stating that phone calls at the Arizona detention facility can last no longer than fifteen minutes at twenty-five cents per minute). Attempts to visit clients in person have also been impeded. Ruby Kaur, an attorney representing two Petitioners detained in Ohio, stated that after making the four-hour drive from Michigan to Ohio,

she was twice denied the opportunity to visit her clients despite receiving prior assurances. *See* Kaur Decl. ¶¶ 7-9; *see also* Jajonie-Daman Decl., Ex. F to Pet'rs Mot., ¶¶ 7- 8 (Dkt. 77-7) (stating it is "nearly impossible" for her to meet with her Petitioner-clients "because they were all transferred to Youngstown, Ohio approximately 4 hours away . . . ."); Samona Decl, Ex. V to Pet'rs Mot., ¶¶ 9-10 (Dkt. 77-23) (stating that it is impractical for him to drive over four hours to visit his clients in the Ohio facility).

In response to this detailed statement of evidence, the Government provides a generalized rebuttal. The Government first argues that "[t]he requirements for the motion [to reopen] are not elaborate." Gov't Resp. at 8 (Dkt. 81). It notes that a motion need only state the new facts that will be proven and provide evidence relating to those facts. *Id.* (citing 8 U.S.C. § 1229a(c)(7)(B)). Further, when considering motions to reopen and motions to stay removal, the immigration courts taken into account "the possibility that the motions may have been prepared and submitted without the alien (or his or her attorney) having time to obtain all appropriate evidence in support of the motion." McNulty Decl., Ex. B to Gov't Resp., ¶ 20 (Dkt. 81-3).

Regarding the transfer of most of the Detroit-based Iraqi nationals to Ohio, the Government states that this was done due to the lack of available space at local county jails. *See* Lowe Decl., Ex. D to Gov't Resp. ¶¶ 5-6 (Dkt. 81-5). Successive transfers to facilities in other states have been done for the purpose of staging for removal from the United States to Iraq. *Id.* ¶ 12.

The Government also states that it provides daily phone access to its detainees, and notes that at its Arizona facility, phone calls made to pro bono counsel, the immigrations courts, the BIA, the American Civil Liberties Union ("ACLU"), and other institutions are free of charge. *See* McGregor Decl., Ex. F to Gov't Resp., ¶ 3 (Dkt. 81-7). Detainees are also provided a handbook informing them of this right. *Id.*

Petitioners have presented specific facts contradicting the Government's generalized treatment of the facts. Detainees at the Arizona facility have stated that the list of legal service providers that they may call for free only consists of three organizations, only two of which can provide services, and such providers are limited by their resources to assisting only a small number of detainees. Peard Decl., Ex. F to Pet'rs Reply, ¶ 9 (Dkt. 84-7). Detainees contest that they are permitted to call the ACLU free of charge, and state that they must pay for calls to private immigration attorneys who have offered their services pro bono. *Id.* ¶ 10. Significantly, there is evidence that those in the Arizona facility are not permitted to call legal service providers in Michigan free of charge, despite the fact that the immigration court in which they received their final order of removal is in that state. *Id.* Further, there is evidence that detainees at the Ohio facility have been limited to just ten minutes of time when making phone calls to counsel. Samona Decl. ¶ 12.

II. STANDARD OF DECISION

To determine whether to grant a preliminary injunction, a district court must consider: (i) the plaintiff's likelihood of success on the merits; (ii) whether the plaintiff may suffer irreparable harm absent the injunction; (iii) whether granting the injunction will cause substantial harm to others; and (iv) the impact of its decision on the public interest. *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 578 (6th Cir. 2006). These four factors "are factors to be balanced, not prerequisites that must be met." *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 230 (6th Cir. 2003).

III. ANALYSIS

A. Jurisdiction

Prior to addressing whether issuance of a preliminary injunction is appropriate, the Court must again address the Government's jurisdictional challenge. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)).

In its most recent opinion, the Court held that the REAL ID Act did not apply to divest the Court of subject-matter jurisdiction because the Act violated the Constitution's Suspension Clause, as applied. *See* 7/11/2017 Op. & Order at 23. The Government now argues that there can be no Suspension Clause violation where, as here, there is no entitlement to habeas relief. It also reasserts its argument that

there is no violation because the REAL ID Act created an adequate and effective alternative through the administrative motion-to-reopen process.

In support of its argument that a habeas claim is improper under the circumstances, the Government relies on the Supreme Court's ruling in *Munaf v. Geren*, 553 U.S. 674 (2008). In *Munaf*, the petitioners were two American citizens, who traveled to Iraq where they were arrested by the Multinational Force-Iraq ("MNF-I") in connection with charges of kidnapping and providing aid to terrorist groups. *Id.* at 681, 683. The petitioners subsequently filed a petition for habeas corpus, seeking to prohibit their transfer from MNF-I custody to the custody of the Iraqi government for prosecution. *Id.* at 682, 684. The Court held, as an initial matter, that the federal courts had habeas jurisdiction in such circumstances. *Id.* at 688. It went on to say, however, that the habeas power should not be exercised in the context of that case, because "habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them." *Id.* at 697. The Court also rejected the petitioners' claim that they might be tortured if turned over to Iraqi authorities, explaining that the petitioners alleged "only the possibility of mistreatment in a prison facility." *Id.* at 702. Notably, regarding the petitioners' claim that their transfer was barred under FARRA, the Court stated that their pleadings did not plead any FARRA-based claim, and stressed that it was expressing no opinion "on whether [the petitioners] may be permitted to amend their respective pleadings to raise [a FARRA claim] on remand." *Id.* at 703 n.6.

The Government also relies on *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), which addressed a habeas claim by Guantanamo Bay detainees who sought to prevent transfer to countries where they might face torture. The court held that the petitioners had properly asserted that the federal courts had habeas jurisdiction, even though the petitioners sought to prevent transfer, rather than seek release from detention. *Id.* at 513 ("[I]it is clear they allege a proper claim for habeas relief, specifically an order barring their transfer to or from a place of incarceration."). However, the court concluded that the habeas power should not be exercised, because the Government had submitted a declaration expressly stating that it would not transfer any of the detainees to a country where a detainee was likely to be tortured. *Id.* at 514. The court also rejected a claim under FARRA, because the petitioners were not challenging a removal order.

Our case is far different from both *Munaf* and *Kiyemba*. Unlike the petitioners in *Munaf*, Petitioners here are not the subject of extradition requests by a foreign power, so there is no issue of interference with comity in regards to foreign nations, the expressed concern of the Supreme Court. And unlike the *Munaf* petitioners, Petitioners here have not made a speculative claim that they may be mistreated; they have produced substantial evidence that such mistreatment is highly probable. And unlike the *Munaf* petitioners, Petitioners here have specifically invoked the CAT.

Kiyemba is also distinguishable, because unlike the petitioners there, who were enemy combatants, Petitioners here are participants in the immigration process, who wish to raise CAT/FARRA

arguments to challenge the present enforcement of their removal orders. *See Hamama*, 2017 WL 2953050 at *9 (stating that, if constitutional, 8 U.S.C. § 1252(g) would apply because Petitioners' claims arise out of the Attorney General's decision to execute their final orders of removal).

The Government's argument that habeas is not appropriate — on the theory that Petitioners are not challenging the fact of their detention — thus has no support in *Munaf* or *Kiyemba*. In fact, in none of the many cases cited by the parties and by the Court regarding habeas jurisdiction in immigration cases has a court refused to consider a petitioner's argument on the grounds that the challenge to the removal order was not cognizable for failure to challenge detention. *See, e.g.*, *Elgharib v. Napolitano*, 600 F.3d 597 (6th Cir. 2010); *Benitez v. Dedvukaj*, 656 F. Supp. 2d 725 (E.D. Mich. 2009); *Ba v. Holder*, No. 09-14645, 2009 WL 5171793, at *2 (E.D. Mich. Dec. 24, 2009). As a result, the Court finds that Petitioners have raised a cognizable habeas claim.

The Government also reasserts its claim that there is no Suspension Clause violation because the alternative to habeas relief created by the REAL ID Act — claims brought by motions to reopen adjudicated at the administrative level followed by petitions for review in the courts of appeals — is adequate and effective. In support of this argument, the Government submits declarations from officials charged with overseeing the Detroit immigration court and the BIA. Sheila McNulty, the assistant chief immigration judge in charge of overseeing the Detroit immigration court, states that her office prioritizes the timely adjudication of emergency motions to stay removal. McNulty Decl., Ex. B to

Gov't Resp., ¶ 11 (Dkt. 81-3). She states that there are multiple avenues to seek a stay pending the adjudication of a motion to reopen: (i) the initial motion for stay in immigration court; (ii) filing a motion to stay with the BIA pending appeal and; (iii) requesting a stay from the immigration court while an alien's appeal before the BIA is pending. *Id.* ¶ 13; *see also* Gearin Decl., Ex. A to Gov't Resp. (Dkt. 81-3) (describing the BIA's Emergency Stay Unit, a division dedicated to timely adjudicating emergency motions to stay).

The Court agrees with the Government that the administrative level is the proper venue to adjudicate Petitioners' motions to reopen and, ordinarily, motions to stay. However, as noted in the Court's prior opinion, the confluence of events in this case would effectively foreclose this route for many Petitioners without intervention by the Court. As detailed below, the impediments to prosecuting their motions to reopen are formidable. The administrative process to file motions to reopen and stay can only be adequate and effective if individuals are given a fair chance to access the process.

The Government contends that Petitioners have been given such a chance, as evidenced by the fact that seventy-nine of the Detroit-based Petitioners have already received rulings on their motions to reopen and stay since the commencement of this case. *See* Gov't Resp. at 10 (citing McNulty Decl. ¶ 23). Unfortunately for the Government, this statistic does not prove much. For seventy-one of these cases, the Government does not state whether the motions to reopen and stay were filed before or after this Court's stay was entered. Thus, this Court's stay may well have given sufficient

"breathing room" for certain Petitioners to invoke the administrative process. If the Court had not intervened, it seriously doubts that a meaningful number of Petitioners would have been able to file necessary motions and receive an adjudication from the immigration courts or the BIA prior to the time they might otherwise have been removed. It has taken a herculean effort by members of the bar and several nonprofit organizations just to get those seventy-nine motions filed. The record indicates that, under normal circumstances, preparing a motion to reopen can take anywhere from three to six months. Realmuto Decl. ¶ 12; Scholten Decl. ¶ 5. And the Government's focus on the seventy-nine motions says nothing of the hundreds of others in the class who have not yet been able to file motions or even retain counsel.

What the Court said in its earlier opinion on jurisdiction remains true and bears repeating. Under ordinary circumstances, the REAL ID Act would apply to divest this Court of jurisdiction. The act states that, other than a petition for review in the courts of appeals following administrative adjudication, "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).

But to enforce the REAL ID Act in the present circumstances violates the Constitution's Suspension Clause. The Suspension Clause states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S.

Const. art. I, § 9, cl. 2. "[T]he Supreme Court has noted that this Clause requires 'some judicial intervention in deportation cases.'" *Muka v. Baker*, 559 F.3d 480, 483 (6th Cir. 2009) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001)). However, suspension will not be made out if there is a "new collateral remedy which is both adequate and effective" to challenge the alleged illegality. *Id.* (quoting *Swain v. Pressley*, 430 U.S. 372, 381 (1977)).

The Sixth Circuit in *Muka* held "facially, the petition for review filed in the court of appeals provides an adequate and effective process to review final orders of removal." *Id.* at 484-485. The court also rejected the petitioners' as-applied challenge, noting that the petitioners' failure to make a known argument during the administrative proceedings did not mean that the court "must grant them a second bite at the apple to satisfy the Suspension Clause's requirements." *Id.* at 486. However, the court allowed for the possibility of successful as-applied challenges in the future.[7] *Id.*

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[7] The Government notes that "the motion to reopen process has been upheld under the Suspension Clause by multiple courts of appeal." Gov't Resp. at 7-8 (citing *Iasu v. Smith*, 511 F.3d 881 (9th Cir. 2007); *Alexandre v. U.S. Atty. Gen.*, 452 F.3d 1204 (11th Cir. 2006); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011)). But two of the cases — *Iasu* and *Alexandre* — dealt with petitioners who, like the petitioners in *Muka*, had failed to raise a claim or submit evidence of which they had knowledge at the time of the initial removal proceeding. By contrast, Petitioners here seek to raise claims that became available to them only after their removal orders were entered. *Luna* is inapposite, because it held that the Suspension Clause was not violated where the petitioner's counsel failed to timely file a petition for review, noting that the petitioner was able to challenge his final order of removal by way of a motion to reopen. Unlike the

This case presents such a challenge. Unlike in *Muka*, Petitioners did not fail to raise a claim in their prior administrative proceedings; their CAT/FARRA and INA claims did not ripen until at least 2014, when the persecution of religious minorities and those affiliated with the United States became far more apparent. *See* Lattimer Decl. I. ¶ 9. More important, the REAL ID's alternative to habeas relief — filing motions to reopen followed by petitions for review in the courts of appeals — does not take into account the compelling confluence of grave, real-world circumstances present in this case that stand in the way of Petitioners' ability to access the administrative system.

The sudden decision to detain Petitioners in facilities far from home and with limited phone access has greatly hindered their ability to file motions to reopen. While the Government provides an overview of its efforts to provide detainees with access to counsel, it does not rebut the declarations of counsel and Petitioners who state they have been greatly impeded in their efforts to avail themselves of the administrative process. *See* Kaur Decl. ¶¶ 7-9 (noting that she was twice denied the opportunity to see her clients after driving four hours to Ohio); *see also* Markos Decl. ¶¶ 20-21 (phone calls at Arizona facility limited to fifteen minutes per day at twenty-five center per minute); Peard Decl. ¶ 9 (Arizona facility only allows free phone calls to two legal service providers that can only accommodate a small number of detainees); Reed Decl. ¶ 12 (stating that

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petitioner in *Luna*, Petitioners do not have an effective opportunity to file a motion to reopen absent this Court's prevention of their removal.

preparing motions to stay and motions to reopen requires original signatures from the detained clients, thus necessitating in-person visits that are often impractical in light of Petitioners' ever-changing locations). The shortcomings of these facilities, along with ICE's successive transferring to different facilities in order to facilitate removal, has either prevented Petitioners from filings motions altogether, or caused them to sacrifice the quality of their filings in light of the pace at which the Government is moving. Valenzuela Decl., Ex. W to Pet'rs Mot., ¶ 17 (Dkt. 77-24).

Petitioners have also submitted compelling evidence that if they are removed prior to their filing and adjudication of motions to reopen, their ability to seek judicial review in the courts of appeals will be effectively foreclosed. Their status as religious minorities places them at grave risk of torture and other forms of persecution at the hands of ISIS, other Sunni insurgencies, and the various Shi'a militias within the PMF. Heller Decl. ¶¶ 16, 20. Since ISIS's capture of Mosul in June 2014, the group has targeted Christian and Yezidi Iraqis, subjecting them to religious desecration, abductions, sexual slavery, and large scale killings. Lattimer Decl. I ¶¶ 9-10. Iraq responded to ISIS's rise by empowering the PMF, a group consisting of several Shi'a militias trained in Iran, a designated state sponsor of terror. Heller Decl. ¶ 16. In addition to combating ISIS, these militias have engaged in widespread persecution of the Sunni community as a form of retaliation. *Id.* ¶ 20. The militias have "carried out a systematic pattern of violations" against the Sunni community, including enforced disappearance and extrajudicial executions. *Id.*

The risk to Petitioners is compounded by their affiliation with the United States, an affiliation that will likely expose them to mistreatment by Iraq's internal security forces, as well as targeted killings by both Sunni and Shi'a groups. Immediately upon arriving in Iraq, Petitioners will be subject to interrogation that will likely cross the line into torture due to Iraq's fear of American espionage. Smith Decl. ¶¶ 1-2. Assuming they are released, Petitioners will be at risk from various groups. The record indicates that both Sunni and Shi'a militias continually target those associated with "western interests." Lattimer Decl. II ¶ 9.

Petitioners who face this severe mistreatment will obviously be unable to vindicate their habeas rights. Deportees who must undertake evasive action to avoid persecution, torture, or death — such as changing residences or leaving jobs — will be deprived of the stability that is often necessary to properly pursue legal challenges. Maintenance of legal paperwork and communication with lawyers and potential witnesses would likely become extraordinarily problematic, if not impossible.

The Government's attempt to characterize Petitioners as having slept on their rights prior to detainment is unpersuasive. The earliest Iraq's changed conditions became apparent to Petitioners was 2014, with conditions threatening to some Petitioners not arising until much later. Heller Decl. ¶ 35 (members of the Sabaean-Mandaean community reported robberies and death threats beginning in 2015); *id.* ¶ 20 (2016 State Department report noted the extent to which members of the PMF were retaliating against Sunni civilians); Smith Decl. ¶ 36 (stating that upcoming Kurdish independence

referendum could pose threat to Christians and Yezidis). By 2014, Iraq's refusal generally to accommodate removals led Petitioners — most of whom had been living peaceably under removal orders for over a decade — to reasonably conclude that filing a motion to reopen was an academic exercise. And given that lack of utility, it was reasonable not to incur the prohibitive cost of filing a motion to reopen, which can reach up to $80,000 in a case of this nature. Reed Decl. ¶ 10.

The Government points out that removals to Iraq have never fully ceased, noting that over 400 have been repatriated since 2007 alone. Schultz Decl. ¶ 4. However, this number includes those who have voluntarily returned and those with unexpired passports, a condition that had been imposed by Iraq for repatriation. Iraq also refused to accommodate charter flights for a number of years, another condition that prevented removal on a larger scale. Given the very limited nature of removals to Iraq prior to their detainment, Petitioners justifiably assumed that a motion to reopen was not necessary until given notice otherwise.

These circumstances once again lead the Court to hold that the REAL ID Act violates the Suspension Clause, as applied. Because the Act may not be enforced, the Court is not stripped of jurisdictional grants found in other sources of the law, including 28 U.S.C. § 2241 (habeas); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus).

B. Preliminary Injunction

The Court next turns to Petitioners' motion for preliminary injunction. A proper balancing of the four factors counsels granting the motion.

1. Likelihood of Success on the Merits

Before deciding whether Petitioners are likely to succeed on the merits, it is important to clarify what it is they are claiming. At the commencement of this action, Petitioners argued that they were entitled to relief under the INA and CAT/FARRA, and that this Court would be an appropriate forum to adjudicate their claims. Petitioners have since narrowed their claim, arguing that (i) they are statutorily and constitutionally entitled to adjudication of their claims via motions to reopen before the immigration courts and review by the courts of appeals, and (ii) this Court's role should be to make that process meaningful by staying enforcement of their removal orders until the immigration courts have acted and the courts of appeals have reviewed any motion for a stay. Regarding their statutory right to adjudication prior to removal, Petitioners contend that the INA and CAT/FARRA guarantee them the right to be heard prior to removal. Further, Petitioners contend that the Fifth Amendment's Due Process Clause forbids their removal without an opportunity to be heard in the face of probable persecution and torture.

The merits analysis must be conducted consistent with the Court's jurisdiction analysis. Having concluded that the Court's jurisdiction is limited to preserving a meaningful opportunity for access to the process that Congress intended be followed, this Court does not evaluate whether any class member will likely succeed on the substance of INA and CAT/FARRA arguments before the immigration courts and the courts of appeals. Rather, the Court's role now is to evaluate whether the sources of law put forward by Petitioners support

their claim of a right to adjudication of their motions to reopen prior to removal.

The standard regarding the merits that a court must evaluate is whether the moving party "has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997). Petitioners' showing meets that standard.

a. INA and CAT/FARRA

The first statutory ground identified by Petitioners is 8 U.S.C. § 1231(b)(3)(A), a subsection of the INA, which "implements the 'non-refoulement obligation' reflected in Article 33 of the Refugee Convention." *Yousif v. Lynch*, 796 F.3d 622, 632 (6th Cir. 2015). The principle of non-refoulement, codified in the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention"), restricts the ability of countries to send individuals fleeing persecution to countries where they would be further threatened. *See Almuhtaseb v. Gonzales*, 453 F.3d 743, 749 (6th Cir. 2006). The INA provision implementing the Refugee Convention states that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).[8]

[8] Title 8 U.S.C. § 1231(b)(3)(A) does not apply if (i) the applicant participated in persecution; (ii) the applicant is viewed as a danger to the community because he committed a serious crime; (iii) there is a reason to believe the applicant committed a

Petitioners state that they are also entitled to adjudication of their claims prior to removal based on statutory and regulatory provisions implementing the CAT. The statutory provision is the FARRA, which states that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." Pub. L. No. 105-277, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231 note). The CAT's implementing regulation provides that removal is to be withheld if the applicant establishes that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). Petitioners argue that "statutory immigration law, having granted individuals with final orders of removal a mandatory right to protection from persecution and torture, also grants them the right to file motions to reopen based on changed country conditions and to have these motions adjudicated prior to removal." Pet'rs Mot. at 21.

However, the plain language of these statutes — which is the principal guidepost for statutory interpretation, *Chapman v. Higbee Co.*, 319 F.3d 825, 829 (6th Cir. 2003) — does not support this conclusion. Neither the INA nor CAT/FARRA contains an express procedural guarantee that a motion to reopen on the basis of INA or CAT/FARRA

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serious nonpolitical crime outside the United States prior to arrival; or (iv) if there are reasonable grounds to believe that the applicant is a danger to the security of the United States. *See* 8 U.S.C. § 1231(b)(3)(B).

is to be adjudicated prior to removal.[9]

Petitioners instead rely on 8 U.S.C. § 1229a(c)(7), the subsection governing motions to reopen. That subsection states that:

> There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

8 U.S.C. § 1229a(c)(7)(C)(ii); *see also* 8 C.F.R. § 1003.23(b)(4) ("time and numerical limitations" do not apply to motions to reopen based on 8 U.S.C. 1231(b)(3) or the CAT claiming changed country conditions).

According to Petitioners, the "statutory entitlement" to adjudication prior to removal is

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[9] Amici argue that "[t]he [United Nations] Committee against Torture has made clear that the principles of non-refoulement set forth in Article 3 of the Convention Against Torture includes both a substantive obligation as well as a procedural obligation." Am. Br. at 14 (Dkt. 80). They state that the Committee Against Torture has taken the position that adjudication "must occur before removal is effectuated." *Id.* at 15. While amici cite to decisions by various U.N. bodies requiring adjudication prior to removal, neither they, nor Petitioners, have cited any American case law holding that CAT/FARRA contains a procedural obligation.

"clear" from the text of 8 U.S.C. § 1229a. The Court disagrees. The statute states that there is no time limit to file a motion to reopen; it does not state that removal is to be automatically stayed pending adjudication. To the contrary, the regulations governing motions to reopen indicate that removal is generally *not* stayed pending adjudication of the motion. Title 8 C.F.R. § 1003.23(b)(1)(v) states that "[e]xcept in cases involving in absentia orders, the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case."

Further, 8 C.F.R. § 1003.6, the regulation addressing stays pending a decision by the BIA, states that removal will not be automatically stayed pending the appeal of an immigration judge's denial of a motion to reopen, unless the motion was filed based on an order of removal entered in absentia. *See* 8 C.F.R. §1003.6(b); *see also Jusufi v. Chertoff*, No. 07-15450, 2007 WL 4591760, at *3 (E.D. Mich. Dec. 28, 2007) ("Petitioner's assertion that Congress could not have intended to allow an alien to be removed before all of his administrative remedies are exhausted is belied by the fact that Congress selectively imposed an automatic stay of removal orders under some circumstances but declined to do so in others."); *id.* at *4 ("grant of discretionary authority with respect to certain actions suggests that Congress, contemplated situations just such as this one but elected not to provide protection against deportation in all instances").

The above leads the Court to conclude that there is no statutory right to adjudication of motions to reopen prior to removal.

b. Procedural Due Process

Petitioners also contend that they have a constitutional right not to be removed prior to adjudication of their motions to reopen. Specifically, Petitioners argue that the Fifth Amendment's Due Process Clause prohibits their removal prior to adjudication under the circumstances present here. In support of their claim, Petitioners list several factors at play: "the speed of the proposed deportation dates; the government's insistence on removal before Petitioners can file motions to reopen and before those motions have been adjudicated; and the obstacles posed by detention far from home to obtaining and communicating with counsel." Pet'rs Mot. at 22. The Government argues that there is no due process violation because Petitioners could have filed motions to reopen at any time prior to their arrest if they believed conditions had changed in Iraq. Gov't Resp. at 22. It notes that some Petitioners did in fact file motions to reopen as early as 2011. Finally, the Government argues that the circumstances are not emergent in light of the procedural protections afforded by the administrative process.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

"Fifth Amendment guarantees of due process extend to aliens in [removal] proceedings." *Vasha v. Gonzales*, 410 F.3d 863, 872 (6th Cir. 2005) (quoting *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001)). "A violation of due process occurs when 'the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.'" *Hassan v. Gonzales*, 403 F.3d 429, 436 (6th Cir. 2005) (quoting *Ladha v. INS*, 215 F.3d 889, 904 (9th Cir.2000)).

The Court agrees with the Government that the administrative process is equipped to adjudicate the substance of Petitioners' motions to reopen. But the process Congress erected can only adjudicate claims that are actually before them. As noted above, Petitioners' efforts to prepare and file motions have been stymied by their successive transfers to out-of-state facilities, as well as by the reduced access to counsel those facilities afford Petitioners. The Court takes the Government at its word that these transfers have been conducted only for operational purposes and not with the intent to interfere with the right to counsel. Nevertheless, the effect of these transfers has been to severely disrupt this right.

The record contains numerous examples of the difficulties Petitioners and their attorneys have had preparing motions to reopen and stay removal since their detainment. Susan Reed, the managing attorney at the Michigan Immigrant Rights Center, states that Petitioners' original signatures are required on motions to reopen and stay removal, a requirement made more difficult by counsel's limited access to the detention facilities. Reed Decl. ¶ 12. Kaur described how, after making the four-hour drive from Detroit to the Youngstown, Ohio facility,

she was twice denied an opportunity to meet with her clients. Kaur Decl. ¶¶ 7-9. Markos has described a fifteen-minute limit on phone calls in the Arizona detention facility, with costs often reaching up to twenty cents per minute. Markos Decl. ¶¶ 20-21. Markos' account is corroborated by William Peard, an ACLU attorney, who notes that detainees at the Arizona facility are only afforded free phone access to two local legal service providers who are not equipped to handle the large number of Petitioners in need. Peard Decl. ¶ 9. Importantly, detainees are not given free phone access to private attorneys offering pro bono services, nor are they given free access to attorneys who are located in the states in which their final orders of removal were issued. *Id.* ¶ 10.

These difficulties have prevented Petitioners from availing themselves of the administrative system's procedural protections.[10] For those who have been able to file motions, their ability to further litigate these motions will almost assuredly be extinguished upon their removal to Iraq. Those who are tortured or killed will obviously not be able to argue their motions; even those who are able to evade this treatment will likely be focused on their safety, rather than devoting the requisite attention to their legal proceeding.

To the extent the Government argues that Petitioners should have filed motions to reopen prior to their detainment, the Court has already noted

[10] While the Government has submitted declarations describing generally the efforts the detention facilities undertake to provide phone access, none of the declarations rebuts the specific instances of interference alleged by Petitioners and the counsel of individual class members.

that such a filing would have been academic. *See Hamama*, 2017 WL 2953050 at *12. It was not until 2014 that the changed conditions in Iraq started to become apparent. The threat of ISIS to religious minorities and others was not recognized by the much of the international community until June 2014. Lattimer Decl. I ¶ 9. Further, threats posed by other groups to certain members of the class did not become apparent until well after. *See, e.g.*, Heller Decl. ¶ 20 (2016 State Department report noted the extent to which members of the PMF were retaliating against Sunni civilians).

Even when the threat was realized, Iraq's continued resistance to repatriation, combined with the prohibitive cost of preparing motions to reopen, made filing motions impractical. The Government's declarations indicate that, prior to the March 2017 agreement, Iraq would only accept repatriation for those individuals with unexpired passports. Schultz Decl. ¶ 6. The country was unwilling to issue travel documents or accept charter flights, two measures that made carrying out removals exceedingly difficult for the Government. *Id.* This difficulty was well known to Petitioners, the majority of whom had been living in their communities subject to final orders of removal for a decade or more with little expectation that they would be removed in light of Iraq's refusal to accommodate repatriation. *See* Kitaba-Gaviglio Decl. ¶ 8. One of the named Petitioners, Jihan Asker, had been living in her community subject to a final order of removal since 1986. Am. Hab. Pet. ¶ 20. Until notified otherwise, Petitioners had little reason to suspect that the effort and cost of preparing a motion to reopen — up to $80,000 in a case of this nature — was necessary, given that they had been

living peaceably for long periods of time under limited supervision. *See* Reed Decl. ¶ 10.

The Government notes that two of the Petitioners, Barash and Al-Dilaimi, filed motions to reopen prior to detainment, in 2011 and 2012, respectively. *See* Sidhu Decl., Ex. F. to Gov't Resp., ¶ 10 (Dkt. 73-7); Crowley Decl., Ex. C to Gov't Resp., ¶ 8 (73-4). These two exceptions prove the rule: hundreds of others reasonably assumed that such an undertaking was not required until they were informed of Iraq's change in policy. Now that Petitioners are on notice that filing motions is necessary, due process concerns would require that they be given a fair opportunity to present their cases.

The Government argues that even if there has been a due process violation, this Court cannot assess the prejudice inflicted upon each Petitioner, given the individualized nature of their claims. *See Graham v. Mukasey*, 519 F.3d 546, 549-550 (6th Cir. 2008) ("[T]o establish the requisite prejudice, [the alien] must show that the due process violations led to a substantially different outcome from that which would have occurred in the absence of those violations.").

But what the Government ignores is that the record contains compelling evidence that many Petitioners would be significantly impeded from filing motions to reopen. This is supported by abundant evidence concerning (i) the large number of Iraqis simultaneously affected by this sudden change in policy; (ii) the intense time and logistic pressures placed on the immigration bar in preparing necessary filings; (iii) the interference with attorney-

client communications as detainees are shuttled around the country; (iv) the significant cost of the legal work and; (v) the difficulty that Petitioners would face trying to present their claims from foreign soil if they were removed prior to adjudication.

Therefore, this record, as a whole, demonstrates significant prejudice. The due process violation at issue here — impeded access to the administrative system — is far different than due process challenge brought by way of a run-of-the-mill petition for review in the courts of appeals. The typical due process challenge is whether a decision by the immigration court rendered the proceeding fundamentally unfair. *See, e.g. Vasha*, 410 F.3d at 872. In such a case, the concept of prejudice is of a specific and individualized nature. Here, Petitioners are arguing that their due process rights will be violated by extraordinary circumstances impacting their ability to get into a system of adjudication at a meaningful time for the protection of their rights. Prejudice is the denial or impeded access itself, rather than the loss of a particular outcome. As a result, Petitioners need not make a more specific showing of prejudice from a particular ruling that impacted the substantive outcome of their case.

Given the compelling evidence that Petitioners have presented regarding the probable deprivation of a meaningful opportunity to present their INA and CAT/FARRA claims to the immigration courts and courts of appeals, they have shown a likelihood of success on their due process claim.

c. Habeas

The same concerns that inform traditional notions of due process support the view, previously

expressed by the Court, that the right of habeas corpus would be significantly compromised without according pre-removal adjudication. And what the Court has said regarding habeas rights in its earlier pronouncements on jurisdiction is applicable in the context of the merits.

In finding a Suspension Clause violation here, the Court has held that the extraordinary circumstances of this case — the longstanding unenforced removal orders, the detention far from home followed by successive transfers, and limited access to counsel — undermined the alternative to habeas set forth in the REAL ID Act. Because an injunction pending adjudication of the motions and the filing of petitions for review in the courts of appeals would allow for the requisite judicial review, its issuance is necessary to vindicate Petitioners' habeas rights.[11]

2. Irreparable Harm, Potential Injuries to Others, and the Public Interest

The "irreparable injury" factor requires that any harm to the plaintiff be "actual and imminent." *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir.

[11] The Government's contention that the difficulties faced by Petitioners are common to all litigants is without merit. Contrary to the Government's unsubstantiated assertion, everyday litigants are not forced to prepare motions while being transferred to successive detention facilities with limited access to counsel and their families. Further, litigants are not normally faced with the compressed time frame involved here. Nor are typical litigants forced to conduct their legal battle from foreign shores, on the run from hostile forces seeking to kill, torture, or otherwise persecute them.

2006). As stated above, Petitioners have provided the Court with ample evidence of the risk of persecution, torture, and death they face if removed to Iraq. Such grievous harm unquestionably establishes irreparable harm. *See Hadix v. Caruso*, 492 F. Supp. 2d 743, 753 (W.D. Mich. 2007) ("The Injunction in question is necessary to prevent irreparable harm, including bodily injury and death.").

While the Government notes that the Court cannot individually assess the risk of return for each Petitioner, there are several threats that apply to the entire class. For instance, the record is clear that all Petitioners will be targeted for torture or death based solely on their association with America. Lattimer II Decl. ¶¶ 2, 9 (noting that Petitioners will be targeted simply because of their association with "western interests"). Further, the perpetrators will not be limited to just ISIS, whose fortunes and influence may wax and wane with time. The record demonstrates that other Sunni groups, Shi'a militias backed by Iran, as well as Iraq's own internal security forces, harbor prejudice towards those affiliated with America, which will manifest itself in the form of torture and extrajudicial killings. *Id.* ¶ 9; Smith Decl. ¶¶ 1-2.

All Petitioners are also at risk due to the media coverage of their criminal records. Smith Decl. ¶ 5. And it appears that most Petitioners are religious minorities who will face persecution at the hands of ISIS, other sectarian militias, or Iraq's own forces. This harm is also imminent, as the Government's own declaration indicates that a charter flight was scheduled to depart prior to this Court's stay of removal. Schultz Decl. ¶ 8.

The Government also argues that Petitioners cannot establish irreparable harm because they will not be removed to ISIS-controlled territory. This assurance likely provides little solace to Petitioners. As an initial matter, the Government does not establish how it can ensure that each Petitioner will avoid ISIS territory once removed to Iraq. While it states that Petitioners will be flown into Baghdad, a city not controlled by ISIS, it does not discuss where Petitioners are supposed to go from there. *See Id.* ¶ 6. Further, the uncertainty created by the ever-shifting fortunes of war means that areas that are not currently under ISIS control could very well be captured by that group after Petitioners are removed. Finally, as stated above, the threat to Petitioners is not limited to ISIS. Their status as members of religious minorities and affiliation with America puts them at risk from a variety of Sunni and Shi'a militias. *See* Lattimer II Decl. ¶ 9.

This grievous harm must be weighed against the harm to the Government and the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) ("Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party."). The Government argues that its interest in the prompt, efficient removal outweighs Petitioners' "speculative, non-yet-substantiated" claims of irreparable harm. Gov't Resp. at 30. The Court disagrees.

Petitioners' claims are far from speculative. Each Petitioner faces the risk of torture or death on the basis of residence in America and publicized criminal records; many will also face persecution as a

result of a particular religious affiliation. While cost and efficiency in administering the immigration system are not illegitimate governmental concerns, such interests pale to the point of evaporation when weighed against the potential lethal harm Petitioners may suffer. A relatively brief delay in the removal process to assure that Petitioners have a meaningful opportunity to invoke the process Congress established is a small price to pay in service to the public interest in fundamental fairness.[12]

The above factors mandate issuance of a preliminary injunction.[13]

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[12] Regarding its ability to conduct efficient removals, the Government expresses concern that an injunction "has the potential to create duplicative review paths in thousands of cases." Gov't Resp. at 29. This concern is puzzling given that this Court's ruling is meant to foster review exclusively in the immigration courts and the courts of appeals. Only those courts will conduct a substantive review of Petitioners' INA and CAT/FARRA claims. To the extent the Government is concerned that a flood of future litigants will seek habeas relief in light of this Court's ruling, the Court notes that the REAL ID Act will serve to quickly divest courts of subject-matter jurisdiction, unless, like here, the court is presented with extraordinary facts giving rise to a successful as-applied Suspension Clause challenge.

[13] The Court notes that its issuance of a preliminary injunction comes prior to a decision on class certification. However, the Sixth Circuit has held that "there is nothing improper about a preliminary injunction preceding a ruling on class certification." *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012); *see also Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 767 (M.D. Tenn. 2015) ("[A] district court may, in its discretion, award appropriate classwide injunctive relief prior to a formal ruling on the class certification issue based upon either a conditional certification of the class or its general

IV. CONCLUSION

For the foregoing reasons, the Court grants Petitioners' motion for a preliminary injunction (Dkt. 77). The Court orders as follows:

1. Respondents Adducci, Homan, Kelly, and any other federal officials and personnel involved in the removal process, as well as all acting in concert with them, are preliminarily enjoined from enforcing final orders of removal directed to any and all Iraqi nationals in the United States who had final orders of removal on June 24, 2017, and who have been, or will be, detained for removal by ICE, except as provided below.
2. This preliminary injunction shall be terminated as to a particular class member upon entry by the Court of a stipulated order to that effect in connection with any of the following events:
    a. a class member's failure to file a motion to reopen with the appropriate immigration court, or, if appropriate, the BIA not later than ninety days following Respondents'

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equity powers."); Newberg on Class Actions § 4:30 (5th ed.) (court is permitted to issue a preliminary injunction prior to ruling on class certification). Given the grave issues at stake, and the uniform nature of the challenged Government conduct, the Court believes it equitable to issue a preliminary injunction prior to class certification. Further the Government is correct that the award of class-wide relief in habeas proceedings is a subject of debate. *See Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969) ("The applicability to habeas corpus of the rules concerning . . . class actions has engendered considerable debate."). However, the Government has not cited any Supreme Court or Sixth Circuit decision prohibiting preliminary relief to a putative class in a habeas proceeding.

transmittal to the class member of the A-file and ROP pertaining to that class member;

b. a class member's failure to timely appeal to the BIA a final adverse ruling from an immigration judge;

c. a class member's failure to timely file a petition for review with the appropriate United States Court of Appeals of a final adverse ruling from the Board of Immigration Appeals together with a motion for a stay;

d. the denial of a motion for a stay by the United States Court of Appeals;

e. a class member's consent that this preliminary injunction be terminated as to that class member.

If the parties dispute whether any of the foregoing events has transpired, the matter will be resolved by the Court by motion. Termination of this preliminary injunction as to that class member shall abide the Court's ruling.

3. As soon as practicable, Respondents shall transmit to each class member that class member's A-file and ROP, unless that class member advises Respondents that he or she will seek to terminate this preliminary injunction as to that class member.

4. Commencing on August 7, 2017, and continuing every other Monday thereafter, Respondents shall report to class counsel the following information: attorney representation of individual class members; transmittal of A-files and ROPs; status of filing and adjudication of motions to reopen,

stay, and petitions for review; detention locations, transfers, releases from detention. The parties may negotiate additional information that should be supplied; agreement shall be memorialized in a stipulated order.

5. The Court will conduct a status conference with counsel on August 31, 2017 at 2:00 p.m. to assess what modifications, if any, are required to this Order, and to discuss further proceedings in this case.[14]

6. This preliminary injunction shall remain in effect unless modified by the Court.

SO ORDERED.

Dated: July 24, 2017
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

[14] Some of the specific provisions of the preliminary injunction are based on Petitioners' contentions in the briefing and at argument. Specifically, the Court has adopted a modified definition of the class to avoid any ambiguity in Petitioners' earlier definitions, which had defined the class as including those who had been or would be arrested "as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal." The Court agrees that the phrase is unnecessary. In addition, reporting requirements are appropriate to monitor the progress of class members in preparing and filing motions to reopen and to stay.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA J. HAMAMA, et al.,

Petitioners

vs.

REBECCA ADDUCCI,

Respondent.

_____/

Case No. 17-cv-11910
HON. MARK A. GOLDSMITH

OPINION & ORDER REGARDING JURISDICTION

This case pits the power of Congress to control the jurisdiction of the federal courts against the Constitution's command that the writ of habeas corpus must be preserved. Both sides in this clash are right, in part. The Government is correct that Congress meant to strip federal district courts of jurisdiction to entertain the kind of habeas claims that Petitioners assert here challenging their repatriation to Iraq. But Petitioners are correct that extraordinary circumstances exist that will likely render their habeas claims meaningless, unless this Court intervenes to stay their deportation while review of their removal orders proceeds before the immigration courts and the courts of appeals.

This Court concludes that to enforce the Congressional mandate that district courts lack jurisdiction — despite the compelling context of this case — would expose Petitioners to the substantiated risk of death, torture, or other grave persecution

before their legal claims can be tested in a court. That would effectively suspend the writ of habeas corpus, which the Constitution prohibits.

The Supreme Court has instructed, "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). And under the law, the federal district courts are generally the "first responders" when rights guaranteed by the Constitution require protection. In fulfillment of that mission, this Court concludes that it has jurisdiction in this case to preserve the fundamental right of habeas corpus and the duty to do so.

I. BACKGROUND

A. Procedural History

On June 11, 2017, agents from United States Immigration and Customs Enforcement ("ICE") began arresting Iraqi nationals as part of ICE's efforts to execute longstanding orders of removal. Am. Hab. Pet. ¶¶ 2, 5 (Dkt. 35). The vast majority of arrests that have taken place so far have occurred within metropolitan Detroit; this includes approximately 114 Detroit-based Iraqi nationals who have been arrested and transferred to federal facilities in Michigan, Ohio, Louisiana, and Arizona, where they await removal to Iraq. *Id.* ¶¶ 5, 8. Outside of Detroit, approximately 85 Iraqi nationals have been arrested and detained, including individuals from Tennessee, New Mexico, and California. *Id.* ¶¶ 5, 6. Those individuals have since been transferred to facilities in Alabama, Louisiana,

Tennessee, and Texas. *Id.* ¶ 8. According to Petitioners, there are more than 1,400 Iraqi nationals across the country subject to final orders of removal whom the Government seeks to remove. *Id.* ¶ 7.

Most of the Iraqi nationals facing removal have been subject to final orders of removal for many years, resulting from criminal convictions and overstaying visas. *Id.* ¶ 2. However, the Government was unable to execute these removal orders due to Iraq's longstanding policy not to issue the requisite travel documents for repatriation. *Id.* ¶ 42. It was not until the United States agreed to remove Iraq from the list of countries set forth in Executive Order 13780, issued March 6, 2017, that Iraq agreed to issue travel documents. *Id.* ¶ 43.

The current operative pleading of Petitioners, filed on June 24, 2017, is their amended habeas corpus class petition and class action complaint for declaratory, injunctive, and mandamus relief.[1] In their pleading, Petitioners state that they are eligible for relief from removal under both the Immigration and Nationality Act ("INA") and the Convention Against Torture ("CAT") because of their status as persecuted religious minorities and their affiliation with the United States. *Id.* ¶¶ 34-39, 68-72 (citing 8 U.S.C. § 1158(b)(1)(A) (providing asylum for refugees); 8 U.S.C. § 1231(b)(3) (restricting removal

[1] Petitioners' original pleading, filed on June 15, 2017, was a habeas corpus class action petition (Dkt. 1). The petition was substantially the same as the amended pleading, with the principal change being that the new pleading expanded the class from Iraqi nationals within the jurisdiction of the Detroit ICE Field Office to all Iraqi nationals subject to the jurisdiction of any ICE office throughout the nation.

to country where alien's life or freedom would be threatened; 8 C.F.R. § 208.16(c)(2) (implementing regulation for the CAT)).

Petitioners Hamama, Asker, Barash, Ali, and Nissan fear removal to Iraq because their respective faiths — Chaldean, Christian, and Catholic — make them targets for persecution. *See id.* ¶¶ 19-23. Petitioners Al-Issawi and Al-Dilaimi fear similar persecution due to their status as Shiite Muslims. *Id.* ¶¶ 24-25. Petitioner Al-Saedy fears persecution due to his status as an apostate. *Id.* ¶ 27. Petitioner Al-Sokaini fears persecution because, although he identifies as a Muslim, he has been involved with a Baptist congregation in New Mexico. *Id.* ¶ 28.

Petitioners also assert that their removal prior to a hearing on the changed country conditions in Iraq violates their rights under the Fifth Amendment's Due Process Clause. *Id.* ¶¶ 73- 76. They also allege that the Government's decision to transfer them to multiple facilities across the country has interfered with their statutory right to counsel under the INA and their right to a fair hearing under the Due Process Clause. *Id.* ¶¶ 77-79 (citing 8 U.S.C. § 1362). Petitioners bring a separate Due Process claim based on their detention, arguing that they are being unlawfully detained, because their detention bears no reasonable relationship to effectuating their removal or protecting against danger. *Id.* ¶¶ 80-82.

Petitioners seek a variety of relief, with the following requests pertinent for present purposes:

> G. Enter a writ of mandamus and/or enjoin the government from removing Plaintiffs/Petitioners to Iraq without first providing them

with an opportunity to establish that, in light of current conditions and the likelihood that they would suffer persecution or torture if removed to Iraq, they are entitled to protection against such removal;

H. At a minimum, enjoin the government from removing Plaintiffs/Petitioners to Iraq until they have been given sufficient time and access to attorneys to enable them to file motions to reopen their removal orders and seek stays of removal from the immigration court;

Id. at 36-37 (Prayer for Relief).

Petitioners filed a motion for a temporary restraining order and/or stay (Dkt. 11), to prevent their removal "until an appropriate process has determined whether, in light of current conditions and circumstances, they are entitled to mandatory protection from removal." *Id.* at 2. After the Government opposed the motion on jurisdictional grounds, which the Court found not susceptible to immediate resolution, the Court issued a stay of removal, pending resolution of the jurisdictional issue, which stay was made applicable to the class as then defined, i.e., all Iraqi nationals subject to removal orders within the jurisdiction of the Detroit ICE Field Office. *See* 6/22/2017 Op. & Order (Dkt. 32). After Petitioners filed their amended habeas corpus class action petition and class action complaint, along with a motion to expand the stay (Dkt. 36), the Court entered an order expanding the

stay to a nationwide class of Iraqi nationals subject to final orders of removal. *See* 6/26/2017 Op. & Order (Dkt. 43).[2] The stay was subsequently extended until July 24, 2017. *See* 7/6/2017 Op. & Order (Dkt. 61).

It is to the jurisdictional issue that the Court now turns.

B. Conditions in Iraq

Petitioners contend that conditions in Iraq have changed dramatically since their orders of removal were issued. Specifically, Petitioners allege that the removal orders at issue "mostly predate the significant deterioration in Iraq following the government's destabilization and the rise of [ISIS]." Am. Compl. ¶ 49. This Court's investigation of the record bears out this claim.

Since the U.S.-led invasion of Iraq in March 2003, that country has essentially been in a continued state of unrest. *See* Heller Decl., Ex. D. to Pet. Reply, ¶ 8 (Dkt. 30-5).[3] Instability traceable to the invasion caused about two-thirds of Iraq's Christian community to leave the country prior to June 2014. *See* "No Way Home: Iraq's Minorities on the Verge of Disappearance," (hereinafter, "*No Way Home* Report") at 10.[4] According to the United

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[2] The members of the putative class are encompassed within the term "Petitioners," unless otherwise indicated.

[3] Rebecca Heller is the director and co-founder of the International Refugee Assistance Project ("IRAP"), a project of the Urban Justice Center, Inc. Heller Decl. ¶ 1. IRAP provides free legal services to refugees, including those who seek escape from persecution. *Id.* ¶ 4. The organization has extensive experience providing assistance to Iraqi refugees. *Id.* ¶ 5.

[4] *No Way Home* Report was published in July 2016 and is available at http://minorityrights.org/wp-content/uploads/

Nations High Commissioner for Refugees, an estimated one million Iraqi citizens remain internally displaced due to sectarian violence dating from about 2006 until ISIS became heavily active in roughly 2014. *See* Iraq, Internat'l Religious Freedom Report, U.S. State Dep't at 3 (2015), available at https://www.state.gov/documents/organization/256479.pdf. The conflict with ISIS, however, caused a rate of displacement that vastly and rapidly outpaced the previous one, displacing an additional 3.4 million people in less than two years, from 2014 to July 2015. *Id.*

Religious minorities have fled the country for good reason. The declaration of Mark Lattimer indicates that religious minorities in Iraq face significant persecution at the hands of ISIS. *See* Lattimer Decl., Ex. I to Pet. Mot., ¶¶ 8, 10 (Dkt. 11-10); *see also id.* ¶ 17 ("[R]eligious minorities are at risk of extinction in Iraq . . . .").[5] ISIS forces in Iraq have directed Christians, in particular, to "pay a protection tax, convert to Islam, or be killed." *Id.* ¶ 9. Christians have also been abducted and subjected to sexual slavery, rape, and other atrocities. *Id.* ¶ 10.

Sectarian violence in Iraq is by no means limited to Christian minorities. The U.S. State Department's website paints a bleak picture of the country, noting that "[t]he murder rate remains high

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2016/07/MRG_CFRep_Iraq_ Aug16_UPD-2.pdf. The report was jointly authored by several human rights organizations, with financial assistance from the European Union.

[5] Lattimer, currently the executive director of Minority Rights Group International, has been extensively involved in various organizations dedicated to monitoring human rights abuses in Iraq. Lattimer Decl. ¶ 1.

due to . . . religious/sectarian tensions." The current International Religious Freedom Report, also published by the State Department, notes that "Yezidi, Christian, and Sunni leaders continued to report harassment and abuses" by certain regional governments. *See* Internat'l Religious Freedom Report at 7.

Further, two of the Petitioners, Al-Issawi and Al-Dilaimi, identify as Shiite Muslims, a religious sect that has been targeted by ISIS. *See* Am. Compl. ¶¶ 24-25; *see also* Internat'l Religious Freedom Report at 15 ("Coordinated [ISIS] bomb attacks continued to target Shia markets, mosques, and funeral processions. . . ."); *id*. at 18 ("[ISIS] continued to publish open threats via leaflets, social media, and press outlets of its intent to kill Shia 'wherever they were found' on the basis of being 'infidels.'").

There is also evidence that Petitioners' association with Westerners will heighten their risk of persecution. In the wake of the U.S.-led invasion of Iraq in 2003, Christian community leaders "were targeted for their religious differences *as well as their perceived ties to the West*, resulting in a large exodus of Christians from the country as refugees." *No Way Home* Report at 10 (emphasis added). And the State Department's Iraq Travel Warning notes that "[a]nti-U.S. sectarian militias may also threaten U.S. citizens and western companies throughout Iraq." *See* Iraq Travel Warning, U.S. Dep't of State (June 14, 2017), available at https://travel.state.gov/content/passports/en/alertswarnings/iraq-travel-warning.html.

C. Barriers to Asserting Claims

Petitioners assert that they have been unable to raise these changed conditions in immigration courts since their detainment, noting that many of them have been detained in facilities far from their homes. Petitioners detained in Michigan have been transferred to Ohio, Louisiana, and Arizona; Petitioners detained in Tennessee have been transferred to Louisiana, Texas, Alabama, and Arizona. *See* Am. Hab. Pet. ¶ 52. Some petitioners were transferred multiple times. *Id.* ¶ 56. Legal help has been "mobilized by their local communities," *id.* ¶ 53, and relocating Petitioners away from counsel and the communities who help provide such legal assistance — sometimes in rapid succession — allegedly has deleterious effects, both for retaining and communicating with new counsel or communicating with retained counsel, *id.* ¶ 54-55.

Even without the pressure of an immediate removal without advance notice, preparing a motion to reopen proceedings before the immigration courts — the recognized route for presenting Petitioners' arguments based on changed circumstances — is no easy task. Attorney Russell Abrutyn describes the process that was involved in filing a motion to reopen for one of his clients: it involved "several months" of obtaining files and affidavits, preparing applications for relief, and "gathering hundreds of pages of supporting evidence." Abrutyn Decl., Ex. A to Pet. Mot., ¶¶ 11, 13 (Dkt. 11-2). Abrutyn personally spoke with family members of various Petitioners, who related that they are unable to even begin to prepare similar motions because they lack copies of relevant documents and, because of detention, the Petitioners cannot obtain representation by counsel. *Id.* ¶ 12, 13;

see also Barash Decl., Ex. H to Pet. Mot., ¶¶ 7-9 (daughter of Petitioner stating that Petitioner's detention prevents her from locating immigration documents and putting him in touch with counsel) (Dkt. 11-9). Some of the relevant documents may take weeks to obtain, even in the normal course. *See* Youkhana Decl., Ex. B to Pet. Mot., ¶ 16 (Dkt. 11-3). Even those petitioners who have counsel cannot communicate with counsel or otherwise develop their motions. *See Id.* ¶¶ 9-12 (describing the difficulties of retained and volunteer counsel in meeting with Petitioners due to relocation in order to file motions to reopen); Jajonie-Daman Decl., Ex. F to Pet. Mot., ¶¶ 7- 8 (stating it is "nearly impossible" for her to meet with her Petitioner-clients "because they were all transferred to Youngstown, Ohio approximately 4 hours away . . . .") (Dkt. 11-7).

Preparing motions to reopen and motions to stay removal is also costly. It requires "a high level of immigration law knowledge and experience," which costs clients somewhere between $5,000 and $10,000. *See* Reed Decl., Ex. B. to Pet. Reply, ¶¶ 7, 10 (Dkt. 30-3). This amount does not include fees of $10,000 to $30,000 that arise if the motion is granted and the case proceeds to a merits hearing on the underlying form of relief sought. *Id.* ¶ 10. In a case of this nature, costs can reach up to $80,000. *Id.*

III. ANALYSIS

Although Petitioners' request for injunctive relief, as set out in the amended petition, may be broad-based and in need of greater definition, they appear to be asking currently that this Court enjoin their removal until their claims can be adjudicated by the immigration courts and, if necessary, the

courts of appeals. 6/21/2017 Hr'g Tr. at 14 (Dkt. 31). It is that request that must be examined under a jurisdictional lens.

Jurisdiction is a threshold issue, because it is the source of a court's legitimate power; without it, a court is off the constitutionally sanctioned power grid. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)).

Petitioners invoke both general and specific grants of jurisdiction to federal district courts, including 28 U.S.C. § 2241 (habeas); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus). However, the Government contends that the REAL ID Act, codified at 8 U.S.C. § 1252, divests this Court of jurisdiction. Petitioners argue that the act is inapplicable, but in the event the Court disagrees, they contend that the act violates the Constitution's Suspension Clause as applied, because it suspends their right to habeas corpus without providing an adequate and effective alternative. The Court holds that Petitioners' claims regarding removal are excluded from this Court's jurisdiction by the REAL ID Act. But the Court further holds that the act is unconstitutional as applied to Petitioners in the extraordinary circumstances of this case.

A. REAL ID Act

To put the present jurisdictional question in proper perspective, a review of the history of court involvement with deportation proceedings is

required, starting with the 1996 enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009- 546. That act significantly restricted judicial review of deportation proceedings via 8 U.S.C. § 1252(g), whose language remains similar in important respects to the present language of the statute. As enacted, it read:

> 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 Act.

That provision could be read as a broad jurisdiction-stripping enactment, depriving courts of judicial review powers in all deportation matters, unless § 1252 otherwise provides for such review. But this "zipper" clause approach was rejected in the seminal case of *Reno v. American Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), where the Supreme Court held that the provision's reach is "much narrower." *Id.* at 482. The limitations on judicial review of an Attorney General's decision or action to "commence proceedings, adjudicate cases, or execute removal orders" only barred district courts from reviewing those three categories; the statute did not protect *all* deportation decisions from district-court review. *Id.* As support for its reading that the language was not intended to cover the waterfront of all deportation decisions, the Court claimed that there was good reason for Congress to focus on these

three areas: "At each stage, the Executive has discretion to abandon the endeavor, and at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience." *Id.* at 484. Because litigation had proliferated against the Attorney General, Congress stepped in, via § 1252(g), "to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations[.]" *Id.* at 485.

In 2005, the REAL ID Act was signed into law. The act, among other things, amended 8 U.S.C. § 1252, by adding language that expressly stated that habeas jurisdiction was withdrawn for any claims excluded by § 1252(g). The amended language — which is the current language at issue in our case — states:

> 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.

8 U.S.C. § 1252(g) (amendment emphasized). The act also clarified that the "sole and exclusive means for judicial review of an order of removal" shall be a

petition for review filed in the court of appeals. 8 U.S.C. § 1252(a)(5); *see also Elgharib v. Napolitano*, 600 F.3d 597, 600 (6th Cir. 2010) ("In the REAL ID Act, Congress sought to channel judicial review of an alien's claims related to his or her final order of removal through a petition for review at the court of appeals.").

Based on the current language of the statute, the Government argues that Petitioners' claims are beyond the jurisdiction of this district court. It asserts that what Petitioners seek — a restraint on enforcement of removal orders — is captured by the exclusion of any "claim by . . . any alien arising from the decision or action by the Attorney General to . . . execute removal orders against any alien[.]" Petitioners' sole recourse, according to the Government, is for Petitioners to seek relief in the form of a motion to reopen proceedings with the immigration courts and judicial review in the appropriate court of appeals. Gov. Resp. at 1 (Dkt. 17).

Petitioners respond by arguing that § 1252(g) does not preclude judicial review of all actions by the Attorney General coming within the three headings of commencing proceedings, adjudicating cases, or enforcing removal orders. Rather, only discretionary decisions within those types of matters are excluded from a district court's jurisdiction. They argue that because the Attorney General has no discretion to remove them in violation of the CAT and the INA, his decision to do so is reviewable by this Court. In support of this argument, Petitioners rely on Reno and its many references to the fact that § 1252(g) was designed to protect discretionary decisions of the Attorney General. *See, e.g., Reno*, 525 U.S. at 485 n.9

(Section 1252(g) "was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion.").

The problems with Petitioners' theory are manifold, starting with *Reno*. It is true that *Reno* notes that § 1252(g) was designed to protect certain discretionary decisions. But the opinion did not say that *only* discretionary decisions were protected. In fact, the allegation in *Reno* was that the Attorney General had violated the First Amendment by supposedly seeking to deport the petitioner because he was a member of a politically unpopular organization. That raised a nondiscretionary issue — a claimed constitutional violation — much like the CAT and the INA violations Petitioners allege in the instant case. Nonetheless, the Supreme Court held that the district court lacked jurisdiction to consider the claim because the challenge was to the Attorney General's decision to "commence proceedings" — a challenge that "falls squarely within [§] 1252(g) — indeed . . . the language seems to have been crafted with such a challenge precisely in mind[.]" *Id.* at 487.

Other courts have rejected the view that *Reno* viewed § 1252(g) as excluding jurisdiction for claims only when they are based on discretionary decisions. In *Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001), the court affirmed dismissal for lack of jurisdiction where the plaintiff claimed his deportation would violate non-discretionary regulations requiring that his deportation be stayed. In rejecting the argument that *Reno* interpreted § 1252(g) to exclude jurisdiction only for claims based on discretionary decisions, the court held that neither the *Reno* opinion nor the statutory language would support such a distinction:

> Foster asserts that [*Reno*'s] interpretation of the statute requires that judicial review be precluded only when the Attorney General makes discretionary decisions. We disagree. Although the Court emphasized the importance of preserving the Attorney General's discretionary functions in the three enumerated categories, it did not explicitly state that the provision applies only to review of discretionary decisions by the Attorney General in these areas and not to review of non-discretionary decisions . . . . The Court does not . . . state that the provision exclusively governs review of discretionary actions. Indeed, there is no discussion of review over non-discretionary actions. The provision itself does not distinguish between discretionary and non-discretionary decisions. Rather, the statute refers to "any cause or claim" that "arises from the decision or action by the Attorney General" in the three areas. 8 U.S.C. § 1252(g). Therefore, while it may be true that the officials executed the order despite the regulation's requirement of an automatic stay of his deportation, this distinction is not critical because a plain reading of the statute demonstrates that Congress did not exclude non-discretionary decisions from this provision limiting judicial review.

Id. at 214 (emphasis in original); *see also Lopez Silva v. United States*, 2016 WL 953233, No. 14- 5084 (D. Minn. 2016) (dismissing for lack of jurisdiction claims based on deportation in violation of mandatory, rather than discretionary, stay of removal order, because "*Reno* is silent with regard to an explicit substantive or procedural distinction between mandatory and discretionary decisions").

Petitioners' discretion-only theory fares no better under the Sixth Circuit authority they invoke. In *Mustata v. U.S. Department of Justice*, 179 F.3d 1017 (6th Cir. 1999), the court affirmed jurisdiction to hear a habeas petition because the petitioner's attorney in the immigration court had been entirely ineffective by failing to investigate grounds for asylum and failing to present any evidence during a hearing. The court noted *Reno*'s point that § 1252(g) was directed toward limiting judicial constraints on executive discretion, and that the petitioners were not claiming that the Attorney General should grant them discretionary, deferred-action type relief. But the court's statements on discretion were dicta: the nub of the decision is that the facts relevant to their claim took place well before any decision by the Attorney General, and the Attorney General's decision was "immaterial to the substance of this claim." *Id. at* 1023. In fact, the habeas claim had nothing to do with any action by the Attorney General, because it was based entirely on the inadequate performance by the petitioner's attorney. As such, *Mustata* is a vastly different case from ours, in which Petitioners' claims are premised on the Attorney General's decision to proceed with enforcement of removal orders, based on his legal

conclusions about the application of the CAT and INA provisions.

Petitioners' discretion-only theory — and their reading of *Mustata* – is contradicted by recent Sixth Circuit authority. In *Elgharib*, the petitioner filed an action in a district court, seeking to challenge her removal order, which she claimed had been entered without notice to her, in violation of the Due Process Clause. The court concluded that § 1252(g) deprived the district court of jurisdiction over the constitutional claim. *Elgharib*, 600 F.3d at 605 ("Congress acted within its constitutional powers to limit judicial review of constitutional questions under Section 1252, and we conclude that Section 1252(a)(5) & (g) both preclude district-court jurisdiction over constitutional challenges to final orders of removal."). Importantly, the court made no mention of discretion as part of its analysis (although it did note, in passing, that discretion was referenced in *Reno*); nor did it even mention *Mustata*, suggesting that it did not view that case as an arguably analogous one that needed to be distinguished. *Elgharib*'s dismissal of constitutional claims is a sobering rebuke of Petitioners' theory, given that constitutional claims are, by their nature, nondiscretionary claims. If the Sixth Circuit had adopted Petitioners' discretion-only theory, it would have entertained the constitutional claims.[6] *Elgharib*'s sweeping conclusion that §1252(g) bars

[6] Other courts have recognized that § 1252(g) prohibits constitutional challenges to orders of removal in district court. *See, e.g.*, *Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) (holding that district court did not have jurisdiction to review constitutional challenge to order of removal).

jurisdiction for constitutional claims dooms Petitioners' theory.[7]

Petitioners' alternative approach is that their claim is not based on a decision of the Attorney General to enforce a removal order. This argument is premised on the notion that the grounds giving rise to their CAT or INA arguments did not manifest until long after the removal orders issued. Pet. Reply at 2 (Dkt. 30).

However, if Petitioners are not challenging enforcement of a removal order, it is difficult to understand what they are challenging. To be sure, they ground their challenge upon circumstances that have transpired following issuance of the removal orders. But that does not change the fact that what they challenge is the Attorney General's current decision to enforce orders to remove them, and his rejection of their arguments based on new circumstances. Regardless of whether they could have asserted these grounds before the orders were

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[7] Petitioners' theory has support in other circuits. *See, e.g., Jama v. INS*, 329 F.3d 630, 632 (8th Cir. 2003) (holding that § 1252(g) did not deprive district court of jurisdiction, because court was not required to "second-guess the Attorney General's exercise of his discretion; it is to address a purely legal question of statutory construction."); *Madu v. U.S. Atty. Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006) ("While [§ 1252(g)] bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions."); *Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001) ("[Section 1252(g)] limits the power of federal courts to review the discretionary decisions of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders."). Unfortunately for Petitioners, the Sixth Circuit in *Elgharib* indicated its rejection of the discretiononly approach.

issued, they assert them now to challenge the Attorney General's decision and foreclose enforcement of the orders. It is simply not reasonable to characterize Petitioners' claim as not being one "arising from the decision or action by the Attorney General to execute removal orders."[8]

Any attempt to characterize Petitioners' efforts to avoid enforcement of an order as something other than a challenge to enforcement of an order not only runs counter to a natural reading of § 1252(g), but also to the Sixth Circuit's straightforward view expressed in *Elgharib*. There, the court made clear that § 1252(g) divested the district court of subject-matter jurisdiction, despite the petitioner's attempts to characterize her Due Process claim as being unrelated to her order of removal. *Elgharib*, 600 F.3d at 605. The court held that the petitioner's claim

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[8] The cases cited by Petitioners are not instructive here. In *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007), the court was addressing ineffective assistance committed after the removal order had been issued, when counsel failed to file a timely petition for review with the court of appeals. The court held that § 1252 did not strip the district court of jurisdiction, because the district court proceeding would not be based on a substantive challenge to the order of removal; rather it would focus on whether counsel had been ineffective – akin to the challenge in *Mustata*. Here, by contrast, there is no challenge to counsel's performance or anyone else's decision or action, other than the Attorney General's decision to remove them, allegedly in violation of the CAT and the INA.

The ruling in *Ilyabaev v. Kane*, 847 F. Supp. 2d 1168 (D. Ariz. 2012) is distinguishable, as well, because there the petitioners were challenging the revocation of the petitioners' I-140 petition for a skilled worker visa, not an order of removal. Section 1252(g) simply does not address revocation of a petition, *id.* at 1174, but it does address orders of removals – the orders at issue here.

"directly target[ed]" her order of removal because she explicitly requested that the Government be prohibited from removing her so that she could seek relief in an immigration court. *Id.* That is precisely the posture of the present case.

Courts in this District have similarly held that they are without jurisdiction to hear claims related to decisions to execute removal orders, regardless of whether the challenges might be deemed "direct" or "indirect" challenges to the Attorney General's decision to remove, and even if they are brought only to stay removal until the immigration courts can act. *See Benitez v. Dedvukaj*, 656 F. Supp. 2d 725, 728 (E.D. Mich. 2009) (dismissing case and dissolving temporary stay, because "Plaintiff cannot circumvent the REAL ID Act's review provisions and express limitation of district court jurisdiction by claiming that he is pursuing in this court a due process claim that is somehow distinct from his removal order"); *Ba v. Holder*, No. 09-14645, 2009 WL 5171793, at *2 (E.D. Mich. Dec. 24, 2009) (dismissing case and vacating temporary stay, because Due Process claim was not distinct from direct challenge to the execution of the petitioner's removal order).

Because Petitioners are bringing claims that arise out of the Attorney General's decision to execute final orders of removal, 8 U.S.C. § 1252(g) applies to divest this Court of subject-matter jurisdiction, unless to do so would violate the Constitution.

B. Suspension Clause

Petitioners contend that if their claims are barred by the REAL ID Act, the act violates the Constitution's Suspension Clause as applied.

6/21/2017 Hr'g Tr. at 15. Petitioners argue that because the changed conditions in Iraq arose subsequent to the issuance of their final orders of removal, they will be deprived of judicial review unless some court hears their claims. In response, the Government notes that Petitioners have the option to file motions to reopen in the immigration courts; in the event the motions are denied, they may seek review in the courts of appeals. The Government argues that, to the extent Petitioners are now impeded in their ability to file motions to reopen in light of their imminent removal, Petitioners are to blame for not filing earlier.

"The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." *Boumediene v. Bush*, 553 U.S. 723, 739 (2008). However, "the common-law writ all too often had been insufficient to guard against the abuse of monarchial power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system." *Id.* at 739-740. The Suspension Clause was ultimately drafted in order to protect against attempts to withhold habeas relief. The Clause guarantees that "the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Id.* at 745 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)).

The Suspension Clause states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. "[T]he Supreme Court has

noted that this Clause requires 'some judicial intervention in deportation cases.'" *Muka v. Baker*, 559 F.3d 480, 483 (6th Cir. 2009) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001)). "However, the writ of habeas corpus is not suspended in violation of this Clause if, when the right to habeas is eliminated, there is 'the substitution of a new collateral remedy which is both adequate and effective' in allowing an individual to challenge the legality of his or her detention." *Id.* (quoting *Swain v. Pressley*, 430 U.S. 372, 381 (1977)).

The court in *Muka* directly addressed this issue in the context of the REAL ID Act, holding that, "[b]ecause there is a remedy available, a petition for review filed with the court of appeals, the REAL ID Act does not violate the Suspension Clause so long as a petition for review provides an 'adequate and effective' mechanism for relief." *Id.* at 484. The court further noted that "every circuit to confront this issue has agreed that, facially, the petition for review filed in the court of appeals provides an adequate and effective process to review final orders of removal, and thus the elimination of habeas relief does not violate the Suspension Clause." *Id.* at 484-485.

After ruling that the REAL ID Act was not subject to a facial challenge, the court in *Muka* addressed whether the petitioner had made out an as-applied challenge. The petitioners argued that a holding that the district court was without subject-matter jurisdiction would leave them without a judicial forum in which to seek a status adjustment under 8 U.S.C. § 1255(i). In rejecting this claim, the court noted that the petitioners "did have an avenue to argue their § 1255(i) claim — their original

removal proceedings and their petition for review." *Id.* at 485. The court held that "[s]imply because the [petitioners] failed to make a known argument during their prior proceedings does not mean that we must grant them a second bite at the apple to satisfy the Suspension Clause's requirements." *Id.* at 486. Regarding future as-applied challenges, the court stated, "[w]e do not say that there will never be an alien claiming protection under § 1255(i) who could make a successful as-applied challenge to the REAL ID Act. However, we leave this inquiry to future panels presented with different cases and *do not foreclose other distinct as-applied challenges*." *Id.* (emphasis added).

The instant case is an as-applied challenge markedly different than the one found wanting in *Muka*. The most obvious difference is that the petitioners in *Muka* had failed to assert an argument that was available to them before their orders of removal were entered. Petitioners here did not fail to raise a claim in their prior administrative proceedings. Indeed, their CAT and INA claims did not ripen until fairly recently, sometime in or after 2014, when the persecution of religious minorities in Iraq became far more threatening. *See* Heller Decl., Ex. D to Pet. Reply, ¶ 30 (Dkt. 30-5).

Further, unlike in *Muka*, the alternative to standard habeas relief for Petitioners is plainly inadequate and ineffective. The mechanism provided by the REAL ID Act for judicial review of removal orders — filing motions to reopen proceedings in immigration courts and subsequent review in the courts of appeals — does not take into account the compelling confluence of grave, real-world circumstances present in our case. This makes

relegation to the immigration courts, without a stay from this court in place, an alternative that is neither adequate nor effective.

Without a stay in place, deportations will begin immediately, which may mean a death sentence for some deportees. Petitioners have presented significant evidence — not contested by the Government — that many will face death. Beginning in August 2014, ISIS began carrying out large-scale killings. Lattimer Decl. ¶ 10. Religious minorities were particularly vulnerable to these atrocities, with Christians being given the horrific choice to "pay a protection tax, convert to Islam, or be killed." *Id.* ¶ 9. Obviously, deportees who are murdered will never have the opportunity to present their arguments that their removal orders are prohibited by the CAT or the INA.

While death is certainly the most egregious outcome deportees face, other persecution would also compromise their ability to pursue their removal challenges from foreign shores. Petitioners have presented evidence — not contested by the Government — that they may well face torture and severe discrimination. ISIS routinely commits arbitrary executions, torture, and sexual enslavement against religious minorities and those affiliated with the United States. Heller Decl. ¶¶ 11, 46, 55.

Deportees who must undertake evasive action to avoid these grave challenges — changing residences, leaving jobs — will be deprived of the stability that is often necessary to properly pursue legal challenges. Maintenance of legal paperwork and communication with lawyers and potential

witnesses would likely become extraordinarily problematic, if not impossible.[9]

What compounds Petitioners' difficulties is the great number of individuals suddenly at risk. In an unanticipated decision to enforce removal orders, the Government has, without notice, put some 1,444 persons at risk for deportation. This abrupt action taxes the immigration bar's ability to promptly service all in need of legal protection. *See* Reed Decl., Ex. B. to Pet. Reply, ¶ 12 (Dkt. 30-3) (noting the "relatively small size of Michigan's immigration bar willing to handle removal cases, and the years to decades-long nature of most removal cases."). It also taxes the resources of the immigration courts to provide prompt and appropriate decisions to all affected. *See, e.g., Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1084 (9th Cir. 2007) (vacating departure order where petitioner was denied continuance to obtain counsel and "in effect, punished for the crowded docket of the immigration courts"); *Cui v. Mukasey*, 538 F.3d 1289, 1295 (9th

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[9] The Government responds that "concerns about the ability to adjudicate requests for relief before removal do not equate to a denial of relief." Gov't Resp. to Mot. to Expand Stay at 11 (Dkt. 38) (quoting *Roman v. Ashcroft*, 340 F.3d 314, 327 (6th Cir. 2003) ("[W]e do not believe that the possibility of an alien's removal prior to the adjudication of his habeas corpus petition amounts to an effective denial of the petitioner's opportunity to seek meaningful habeas corpus relief.")).

Crucially, *Roman* involved a petitioner whose ability to seek readmission to the U.S. was not meaningfully affected by his removal. *See Roman*, 340 F.3d at 327 ("[Petitioner] will not be deprived of his opportunity to seek habeas corpus relief even if he is removed prior to a court's resolution of his petition."). Here, the deprivation of a meaningful opportunity to pursue a habeas claim is virtually assured.

Cir. 2008) (continuance improperly denied because of "crowded docket of the immigration courts").

The Government's decision to move arrestees to different locations within the country only exacerbates this problem, as it disrupts attorney-client communications and preparation of necessary court papers. Preparing motions to stay and motions to reopen requires original signatures from the detained clients, thus necessitating in-person visits that are often impractical in light of Petitioners' ever-changing locations. *See* Reed Decl. ¶ 12; *see also* Youkhana Decl. ¶¶ 10, 12 (describing difficulties faced by Michigan-based attorneys in communicating with clients who have been transferred to Ohio); Jajonie-Daman Decl. ¶¶ 7-8 (stating that it is "nearly impossible" to meet with her Petitioner-clients detained in Ohio).

It is reasonable to assume that delays in preparing motions to reopen and stay and processing them in the immigration courts — and further delays in processing petitions for review in the courts of appeals — will mean that many Petitioners will not have their arguments heard before they are repatriated. This, in turn, means many may face the grave consequences of deportation — death, torture, or other persecution — before their legal rights can be properly adjudicated.

The Government's response that these difficulties are the result of Petitioners' dereliction unfairly ignores salient history. Although Petitioners theoretically could have filed motions to reopen and stay before the Government's recent decision to enforce orders, such action would have served no immediately useful purpose. For many years, Iraq

has refused repatriation of its nationals. The record is unclear regarding when exactly this refusal to accept deportees began, but it appears that repatriation had been unavailable since as long ago as 1986, the year in which one of the named Petitioners, Jihan Asker, was issued a final order of removal yet was not removed. *See* Am. Pet. ¶ 20. Prior to the recent agreement with Iraq announced in March 2017, filing a motion to challenge enforcement of removal orders that stood no reasonable chance of being enforced in the foreseeable future would have been a purely academic exercise. *See also* Reed Decl. ¶ 14 ("Stays of Removal are not typically sought until removal is imminent because they are rarely granted when removal is not imminent.").

And it would have been a costly exercise, at that. Petitioners have presented evidence — uncontested by the Government — of the steep legal cost to prepare such motions. The cost of simply preparing a motion to reopen or a motion to stay is between $5,000 and $10,000. *Id.* ¶ 10. If the motion is granted, the case will then proceed to a hearing on the merits, which can cost a client an additional $30,000. *Id.* When it is all said and done, a case of this nature can cost up to $80,000. *Id.* Spending such large sums to avoid a removal that seemed impossible until March of this year would have been unreasonable.

The totality of these facts leads to the conclusion that casting Petitioners out of this court without a stay — in the extraordinary context of this case — would ignore the reality that the process for judicial review provided for in the Real ID Act would not be adequate or effective in protecting their

habeas rights. The destructive impact would critically compromise their ability to file and prosecute motions to reopen — a legal right that the Supreme Court has characterized as "an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)). To enforce § 1252(g) in these circumstances would amount to a suspension of the right to habeas corpus. The Constitution prohibits that outcome.

Because Section 1252(g) may not be enforced, the Court is not stripped of jurisdictional grants found in other sources of the law, including 28 U.S.C. § 2241 (habeas); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus).

III. CONCLUSION

The Court concludes that it has jurisdiction to grant Petitioners the limited relief they request, i.e., an injunction against enforcement of the orders of removal so that their habeas rights can be meaningfully asserted and addressed before other courts.

The next steps in this litigation remain to be determined. As will be detailed in a separate order to be issued, the Court will convene a status conference with counsel on July 13, 2017 at 1:30 p.m. to discuss those steps.

In the interim, the Court's July 6, 2017 Order staying the removal orders of all class members remains in effect in accordance with its terms until July 24, 2017, unless otherwise ordered by the Court.

SO ORDERED.

Dated: July 11, 2017
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

UNITED STATES DISTRICT COUT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA J. HAMAMA, et al.,

Petitioners

vs.

REBECCA ADDUCCI,

Respondent.

_____/

Case No. 17-cv-11910

HON. MARK A. GOLDSMITH

OPINION & ORDER DENYING IN PART RESPONDENTS' MOTION TO DISMISS (Dkt. 135), GRANTING IN PART PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION (Dkt. 138), AND GRANTING IN PART PETITIONERS' AMENDED MOTION TO CERTIFY CLASS (Dkt. 139)

Last July, this Court put a halt to the deportation of hundreds of aliens whom the Executive Branch of the Federal Government had sought to repatriate to their native Iraq. The Court ruled that they must be given a hearing before immigration judges on their claims that they would face persecution, torture, and possibly death if sent back. While that immigration court process proceeds apace, the aliens who were arrested have now languished in detention facilities — many for over six months — deprived of the intimacy of their families, the fellowship of their communities, and the economic opportunity to provide for themselves and

their loved ones. Detention may stretch into years, as the immigration court proceedings and subsequent appeals wind their way to a conclusion.

They now ask this Court to be allowed to return to their productive lives by being placed on bond, while the legal process continues, unless the Government can show that they are unreasonable risks of flight or danger to the community.

What they seek is consistent with the demands of our Constitution — that no person should be restrained in his or her liberty beyond what is reasonably necessary to achieve a legitimate governmental objective. Here, the Government may fairly insist that those whose right to remain in this country is yet to be determined must not undermine the administration of justice by fleeing before that determination is made, nor endanger the public while that process unfolds. But those interests can be served by a bond hearing process before immigration judges, who can sort out those who endanger the efficacy of the immigration system and public safety from those who will not.

Our legal tradition rejects warehousing human beings while their legal rights are being determined, without an opportunity to persuade a judge that the norm of monitored freedom should be followed. This principle is familiar to all in the context of the criminal law, where even a heinous criminal — whether a citizen or not — enjoys the right to seek pre-trial release. In the civil context of our case, this principle applies with at least equal force. In either context, the principle illustrates our Nation's historic commitment to individual human dignity — a core value that the Constitution protects by preserving

liberty through the due process of law.

As explained below, the Court will grant relief by establishing a process of individual bond hearings for all detainees entitled to them.

I. BACKGROUND

This matter is before the Court on the motion to dismiss (Dkt. 135) filed by Respondents ("the Government"), Petitioners' motion for preliminary injunction (Dkt. 138), and Petitioners' amended motion to certify class (Dkt. 139). The issues have been fully briefed and a hearing was held on December 20, 2017. For the reasons stated below, the Court denies in part the Government's motion to dismiss, grants in part Petitioners' motion for preliminary injunction, and grants in part Petitioners' amended motion to certify class.

As recited in the Court's prior opinions, this case arises out of the arrest and detention of Iraqi nationals who are or were subject to long-standing final orders of removal. *See, e.g., Hamama v. Adducci*, 261 F. Supp. 3d 820 (E.D. Mich. 2017). In June 2017, agents from Immigration and Customs Enforcement ("ICE"), a division of the Department of Homeland Security ("DHS"), began arresting hundreds of these Iraqi nationals, the majority of whom are Chaldean Christians who would face persecution, torture, and possibly death if returned to Iraq. The initial round-up took place in Michigan, snaring approximately 114 individuals. Am. Compl. ¶ 5 (Dkt. 118). The number has since swelled to over 300, many of whom are still in Michigan detention facilities, with others scattered to various detention facilities throughout the country. *Id.* ¶¶ 5, 12.

The vast majority of these individuals were ordered removed to Iraq years ago (some decades ago), because of criminal offenses they committed while in the United States. There is only spotty information in the record regarding the nature of the detainees' offenses. The offenses of the named Petitioners range from relatively minor drug possession convictions to more serious matters, such as felonious assault and arson; one has no conviction at all. *Id.* ¶¶ 22- 36.[1] Although the Government

[1] Below is information taken from the amended complaint regarding the convictions of the named Petitioners:

Named Petitioner	Offense(s)	Year of Conviction	Sentence
Usama Hamama	Felonious assault; possession of a firearm; misdemeanor related to the possession of a firearm in a vehicle	1988	Two years' imprisonment; half served in custody, half supervised release
Ali Al-Dilaimi	Assault	2000	One year imprisonment; served five months
Sami Al-Issawi	Aggravated assault	1998	360 days' imprisonment
Qassim Al-Saedy	Domestic assault	2002	Unknown
Abbas Al-Sokaini	Two drug offenses	Unknown	No incarceration, placed on supervision

Atheer Ali	Breaking and entering; receipt or concealment of stolen property; drug possession	1996 (breaking and entering; receipt and concealment of stolen property) Drug possession convictions entered "more recently"	No incarceration, spent a month in a bootcamp
Jihan Asker	Misdemeanor fraud	2003	Six months' probation
Moayad Barash	Drug charge and possession of a weapon	"While still a teenager"	Incarcerated, unclear for how long
Jami Derywosh	Arson	1994	Seven years' imprisonment; served approximately half
Anwar Hamad	Misdemeanor drug crime; felony drug crime	2013 (misdemeanor) 2014 (felony)	Unknown
Jony Jarjiss	Never been convicted of a crime	N/A	N/A
Mukhlis Murad	Drug possession with intent to deliver	"Over two decades ago"	Unknown
Habil Nissan	Misdemeanor destruction of property; two misdemeanor assault charges	2005	Twelve months' probation

presumably knows the criminal history of all the putative class members, it has not placed that information in the record. What is known is that all detainees served their sentences and were released long ago, under orders of supervision because Iraq refused to accept repatriation. According to Petitioners, they lived peaceably in their respective communities under the orders of supervision — a point the Government does not contest.

While the detainees were scheduled for imminent removal following their arrests, this Court enjoined their removal in a July 24, 2017 ruling. *See Hamama*, 261 F. Supp. 3d at 841- 842. In its ruling, the Court held that while the REAL ID Act, 8 U.S.C. § 1252, prohibits habeas actions that arise out of the Attorney General's decision to execute orders of removal, the act was unconstitutional, as applied, because it suspended Petitioners' habeas rights. While the REAL ID Act provides an alternative to habeas actions (an administrative challenge in immigration courts, followed by a petition for review in the courts of appeals), the Court held that the circumstances of this case effectively foreclosed access to this alternative prior to removal.

Adel Shaba	Delivery and manufacture of less than fifty grams of a controlled substance	1987	Unknown
Kamiran Taymour	Three marijuana-related offenses	1998; 2006; 2011	Unknown

Having concluded that the Court had jurisdiction to rule on Petitioners' habeas claims, the Court determined that Petitioners were entitled to a preliminary injunction enjoining their removal until they had a meaningful opportunity to challenge the continued validity of their orders of removal — under the Convention Against Torture, as implemented by 8 C.F.R. § 208.18 and other authorities — in immigration courts and, if necessary, the courts of appeals.

Since this case began, 164 of the putative class members have filed motions to reopen. *See* Schlanger Decl., Ex. 1 to Pet. Mot., ¶ 14 (Dkt. 138-2). Of these 164 motions, seventy-four have been granted, eleven have been finally denied, and seventy-nine are pending. *Id.* ¶ 21. Approximately ten of the seventy-four grantees have had their cases adjudicated to the merits, with each one resulting in grants of relief or protection. *Id.* ¶¶ 22-23. Since the Court's preliminary injunction was entered, roughly ninety-one percent of the motions to reopen have been granted in the Detroit immigration court. *Id.* ¶ 17.

While these motions are being adjudicated, most of those arrested are still incarcerated. The most recent estimates have the number of detainees at 274, with the vast majority having spent six months or more in custody. Schlanger Decl. II, Ex. 34 to Pet. Reply, ¶ 26 (Dkt. 174-3). Some are held under 8 U.S.C. § 1231, which authorizes detention for those with orders of removal in place, and provides for release under certain circumstances. Others are held under 8 U.S.C. § 1226(c), a statute that purports to mandate detention when there is no order of removal in place for certain detainees, including those with certain criminal histories. The detainees held under

this subsection previously had final orders of removal; these orders were vacated when their motions to reopen were granted. A smaller subset, estimated to be six or seven individuals, are being held pursuant to 8 U.S.C. § 1226(a) (authorizing detention before entry of a removal order) or 8 U.S.C. § 1225(b) (authorizing detention for those interdicted at the border). *Id.* ¶ 8.

Based on due process principles and the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, Petitioners now seek relief from detention under a number of theories, as set forth in their motion for preliminary injunction.

Petitioners first argue that they are entitled to release pursuant to *Zadvydas v. Davis*, 533 U.S. 678 (2001), a seminal decision requiring, except in extraordinary circumstances, release of detainees when there is no reasonable likelihood of removal in the reasonably foreseeable future. Pet. Br. at 19. Petitioners argue that there is no significant likelihood of removal in the reasonably foreseeable future in our case, because there is no definitive agreement that Iraq will accept repatriation, and because there is no foreseeable end to their removal proceedings. *Id.* at 19, 22.

In response, the Government submits declarations from ICE officials stating that Iraq has agreed to cooperate in the removal of the putative class members. It also notes that it has removed a few of the individuals who have had their stays of removal consensually lifted. The Government also argues that, because removal proceedings have a definitive end-point, removal is reasonably foreseeable. Gov. Resp. at 10.

As explained below, the Court agrees that the end point of the legal process is reasonably foreseeable. But it holds that there is insufficient evidence in the record to determine whether Iraq is willing to accept class-wide repatriation. Without a reasonable expectation that removal would follow the termination of legal proceedings, the definitive "end-point" of the legal process does not solve the due process problem of indefinite detention. Because it is unclear whether repatriation is likely, the Court defers ruling on Petitioners' *Zadvydas* claim, pending further discovery.

Petitioners' second theory is that, even if their removal is reasonably foreseeable, their detention has become unreasonably prolonged. They argue that this unreasonable detention entitles them to a bond hearing before an impartial adjudicator, such as an immigration judge, to determine whether they are a flight risk or danger to the community. Pet. Br. at 24. In response, the Government argues that Sixth Circuit precedent defeats Petitioners' claim based on an unreasonably prolonged detention and corresponding entitlement to a bond hearing. The Government contends that Petitioners are not eligible for a bond hearing, because their detention has not been sufficiently lengthy, and because their actual removable is reasonably foreseeable. Gov. Resp. at 17.

The Court holds that those detainees who have been in custody for six months or more are entitled to bond hearings, unless the Government presents specific evidence to this Court demonstrating why a particular detainee should be denied that right, such as evidence that the detainee has engaged in bad-faith or frivolous motion practice in an effort to

artificially prolong the removal process. Bond hearings will be conducted by immigration judges who will consider flight and safety risks.

Petitioners contend that the *Zadvydas* and prolonged detention claims are assertable by detainees, regardless of whether the Government purports to detain them under the mandatory provisions of § 1226(c). Therefore, Petitioners also ask that bond hearings be ordered for those detainees being held under that provision. Petitioners argue that § 1226(c) does not apply to those who have had their motions to reopen granted or who have been living in the community for a significant period, after completion of their criminal sentence, prior to their immigration detention. Rather, Petitioners say, such people should be considered held under 8 U.S.C. § 1226(a), a provision that has been interpreted as requiring bond hearings after prolonged detention. Pet. Br. at 28. The Government argues that those who have had their motions to reopen granted are not exempt from mandatory detention, and that courts have interpreted § 1226(c) to require mandatory detention for those who had been living in their community after completion of their criminal sentences. Gov. Resp. at 20.

The Court agrees with Petitioners and holds that § 1226(c) does not apply to those who have had their motions to reopen granted or who were previously living in their communities for years after the conclusion of their criminal sentences. Section 1226(c) contemplates an expeditious removal proceeding, which is typically not possible when a motion to reopen is granted and certainly is not the case here. Further, the plain language of § 1226(c)

requires the conclusion that mandatory detention is only permissible when an alien is placed into immigration custody immediately following the completion of his or her criminal sentence.[2]

Petitioners' motion for preliminary injunction intersects with issues raised by the Government's motion to dismiss. In its motion, the Government seeks dismissal of all of Petitioners' claims as pled in the amended complaint — those pertaining to detention, as well as those based on removal, transfer, and right to counsel — on the grounds that they are either jurisdictionally barred or fail as a matter of law. See generally Gov. Mot. to Dismiss. The Court will consider — and deny — the Government's motion in conjunction with the detention claims raised in the motion for preliminary injunction, and defers a ruling on the remaining issues raised in the Government's motion.

Finally, Petitioners have filed a motion to certify the putative primary class and three detention subclasses. Because the Court is limiting its decision to detention issues, it will only consider certification of the detention subclasses. Petitioners argue that certification is appropriate because the detainees are seeking relief as a result of Government action that applies uniformly to those in custody. Pet. Br. at 31. They argue that they are sufficiently numerous; present common questions of

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[2] Petitioners also seek clarification regarding the Government's obligation to produce Alien Files ("A-Files") and Records of Proceedings ("ROPs") in connection with the Court's earlier preliminary injunction order. These are materials class members need to file well-supported motions to reopen. Because this issue bears on the stay of removal, not detention, the Court will address this by separate order.

law and fact; assert claims that are typical of the putative subclass members; and will fairly and adequately represent them. In response, the Government argues that each detention claim requires a highly fact-intensive inquiry that makes class treatment inappropriate. Gov. Resp. at 6. The Court holds that these individual differences are insufficient to defeat certification, and that Petitioners have made a sufficient showing for class certification of the subclasses.

II. STANDARDS OF DECISION

To determine whether to grant a preliminary injunction, a district court must consider: (i) the plaintiff's likelihood of success on the merits; (ii) whether the plaintiff may suffer irreparable harm absent the injunction; (iii) whether granting the injunction will cause substantial harm to others; and (iv) the impact of its decision on the public interest. *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 578 (6th Cir. 2006). These four factors "are factors to be balanced, not prerequisites that must be met." *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 230 (6th Cir. 2003).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable

to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

With regard to class certification, "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule . . . [S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* (quotation marks omitted).

III. ANALYSIS

The Court begins by analyzing the issues raised in Petitioners' motion for preliminary injunction. Next, the motion to dismiss is considered, but only insofar as it bears on the detention issues; consideration of the balance of the issues, including the jurisdictional challenge raised as to the removal claims, will be deferred. The Court will then turn to Petitioners' motion to certify class, considering only whether certification is appropriate as to the detention subclasses.

A. Motion for Preliminary Injunction

1. Likelihood of Success on the Merits

a. *Zadvydas* Claim

Petitioners first argue that, pursuant to *Zadvydas*, they are being unlawfully detained because there is no significant likelihood of removal in the reasonably foreseeable future. Pet. Br. at 19. *Zadvydas* involved two petitioners, Kestutis

Zadvydas and Kim Ho Ma. Zadvydas was taken into custody after the conclusion of his criminal sentence and ordered removed. Efforts by the Government to deport Zadvydas to Germany, Lithuania, and the Dominican Republic were all unsuccessful, and the district court ordered Zadvydas released after concluding that he would be permanently confined. The Fifth Circuit reversed, holding that Zadvydas's detention was constitutional because his removal was still possible in light of ongoing diplomatic negotiations. Ma was also taken into custody following completion of a criminal sentence. Both the district court and Ninth Circuit ruled that Ma was entitled to release because there was no likelihood of removal in light of the lack of a repatriation agreement between the United States and Cambodia, Ma's native country.

The Supreme Court began by interpreting 8 U.S.C. § 1231, the section of the INA addressing the detention and removal of aliens ordered removed. The statute establishes that where an alien has been ordered removed, the Attorney General shall remove the alien within ninety days. 8 U.S.C. § 1231(a)(1)(A). However, the statute permits the Attorney General to continue detention beyond this ninety day period. It states, in pertinent part:

> An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of

> removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision.

Zadvydas, 533 U.S. at 678 (quoting 8 U.S.C. § 1231(a)(6)). The question before the Court was whether this subsection "authorizes the Attorney General to detain a removable alien indefinitely beyond the removal period or only for a period reasonably necessary to secure the alien's removal." *Id.* The Court held that "the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." *Id.* The Court reasoned that indefinite detention would raise a significant constitutional question, specifically as it pertains to the Fifth Amendment's Due Process Clause. *Id.* at 690. The Court held that, in any event, it could not find "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed." *Id.* at 697.

The Court ultimately held that detention for six months is presumptively reasonable and then stated:

> After this 6–month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior postremoval confinement grows, what

> counts as the "reasonably foreseeable future" conversely would have to shrink.

Id. at 701. The Court remanded both cases in light of its new standard. It noted in Zadvydas's case that the Fifth Circuit had concluded that continued detention was lawful because Zadvydas had not demonstrated that his removal was "impossible" — meaning that an alien had to show "the absence of any prospect of removal" — which the Supreme Court found to be an excessive standard. *Id.* at 702 (emphasis in original). Remand was ordered in Ma's case, because the Ninth Circuit may have based its conclusion of no likelihood of removal based solely on the absence of a repatriation agreement, without giving due weight to future negotiations over repatriation.

With detention having exceeded the six-month milestone for the initial June detainees — and with more detainees reaching that milestone with the passage of time — Petitioners first argue that there is no significant likelihood of their removal in the reasonably foreseeable future because it is unclear whether Iraq will actually accept repatriation.[3] Petitioners argue that the Government has not provided any "particularized evidence" that removal can be effected in the reasonably foreseeable future.

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[3] At the time the Government filed its response to Petitioners' motion for preliminary injunction, the six-month period set forth in *Zadvydas* had not passed. As a result, the Government argued that the detention at issue was still presumptively reasonable. Gov. Resp. at 11. Circumstances have since changed. The majority of detainees began their detention on June 11, 2017, i.e. more than six months ago. Thus, the Government is no longer entitled to the presumption that continued detention is reasonable.

Pet Br. at 21. They note that the Government has only provided "vague representations" about its agreement with Iraq and that country's supposed willingness to relax its policies regarding issuance of travel documents. Petitioners state that since the alleged policy change was announced, several putative members have unsuccessfully attempted to receive their travel documents from the Iraqi government. *Id.* at 22. Petitioners cite the Sixth Circuit's ruling in *Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003), where the court held that there was no significant likelihood of removal in the reasonably foreseeable future for two Cuban aliens. The court noted that "[a]lthough the government presented evidence of . . . continuing negotiations with Cuba over the return of Cuban nationals excluded from the United States, neither [petitioner] is currently on a list of persons to be returned." *Id.* at 415.

In response, the Government provides the declaration of John Schultz, the deputy assistant director for DHS's removal management division - east. Schultz Decl., Ex. A to Gov. Resp., ¶ 1 (Dkt. 158-2). Schultz states that the Government's negotiations have resulted in Iraq's agreement to cooperate in removal of Iraqi nationals from the United States. *Id.* ¶ 4. As evidence of this cooperation, Schultz notes that, prior to this Court's rulings enjoining removal, ICE had scheduled charter flights to depart in both June and July. *Id.* ¶ 6. While very few travel documents have actually been provided since this Court's injunction was issued, Schultz's declaration states that these documents are only being sought for those not subject to the stay of removal, to avoid having to

make multiple requests to Iraq in the event travel documents expire during the pendency of the injunction. *Id.* ¶ 8.

The Government later submitted, following the hearing on these motions, a declaration by Michael Bernacke, the acting assistant deputy assistant director for DHS's removal management division - east. *See Bernacke* Decl., Ex. A to Gov. Supp. Br., ¶ 1 (Dkt. 184-2). In his declaration, Bernacke states that the agreement between the United States and Iraq is not memorialized in writing, but is instead the product of ongoing negotiations. *Id.* ¶ 4. Bernacke also states that "the agreement does not contemplate any numeric limitation on the number of removals," and that if the injunction is lifted, large-scale removals can be arranged via charter flight, without the need for travel documents. *Id.* ¶¶ 5-6.

Based on this record, the Court cannot make a determination regarding whether Iraq will accept repatriation of the class. Schultz's declaration does not contain information regarding the framework of the Government's diplomatic agreement with Iraq. When pressed at the hearing by the Court regarding details of the agreement, counsel for the Government was unsure whether there was any formal agreement that had been memorialized in writing. Although the post- hearing Bernacke declaration fills in some of the blanks — it acknowledges that there is no written agreement — there is still not enough information regarding the scope of the agreement with Iraq.[4] While a handful of Iraqi nationals have

[4] Further, Bernacke did not make the declaration based on his personal knowledge, but something he called his "professional

been removed to Iraq since April, it is unclear whether Iraq has agreed to repatriate all 1,400 putative class members at issue here, and if so, what conditions may have been attached that could impact on whether removal is likely. Until the Court has a more complete picture from the Government regarding its communications with the Iraqi government, it cannot make a ruling on Iraq's willingness to accept repatriation of the class.

Petitioners also argue that, even if Iraq has agreed to accept repatriation of the class, their removal is still not significantly likely in the reasonably foreseeable future, because it could take years to litigate their motions to reopen. Pet. Br. at 22. Petitioners contend that if a detainee is denied at every stage of the litigation, from the immigration judge to the court of appeals, the process can take nearly three years. *See* Pet. Br., Table A.

In support, Petitioners rely on the Sixth Circuit's decision in *Ly v. Hansen*, 351 F.3d 263 (6th. Cir. 2003), which addressed whether *Zadvydas* extended to 8 U.S.C. § 1226(c), the mandatory pre-removal detention statute. *Id.* at 267.[5] The

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knowledge" – a term his declaration does not define and not something that appears to support supposedly factual statements in an affidavit or declaration. *See Ondo v. City of Cleveland*, 795 F.3d 597, 605 (6th Cir. 2015) (affidavits and declarations in support of dispositive motions must be based on personal knowledge).

[5] Title 8 U.S.C. § 1226(c) states that "[t]he Attorney General shall take into custody any alien who [is inadmissible or deportable for having committed certain enumerated offenses] when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense."

Government in that case argued that the alien was partially responsible for his lengthy detention, noting that he had filed applications to cancel his removal. Petitioners rely on the court's statement that "appeals and petitions for relief are to be expected as a natural part of the process," and that "[a]n alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him." *Id.* at 272. Petitioners argue that they too should not be subject to indefinite detention simply because they have availed themselves of the motion to reopen process.

In response, the Government cites to cases holding removal to be reasonably foreseeable where the end of a litigation will terminate detention. *See Soberanes v. Comfort*, 388 F.3d 1305, 1311 (10th Cir. 2004) ("[H]is detention is clearly neither indefinite nor potentially permanent like the detention held improper in *Zadvydas*; it is, rather, directly associated with a judicial review process that has a definite and evidently impending termination point."); *see also Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008); *Flores v. Holder*, 977 F. Supp. 2d 243, 249 (W.D.N.Y. 2013). One of the cases relied on by Petitioners supports the Government's point; it held that an alien who had been in custody for seven years had a reasonably foreseeable removal date because Colombia was willing to accept his repatriation "if he ultimately fails in fighting the government's charge of removability." *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949 (9th Cir. 2008).[6]

[6] As discussed *infra*, *Casas* supports Petitioners' prolonged

This line of cases is much clearer than the language in *Ly* that Petitioners rely on. The court in *Ly* was merely noting which factors courts should consider when determining whether an alien has been subject to an unreasonable detention. It simply instructed courts to weigh whether prolonged detention was attributable to dilatory tactics by the alien. It does not reject the holdings by the Ninth and Tenth Circuits that there is a significant likelihood of removal in the reasonably foreseeable future where the only impediment to removal is the litigation process, which has a definite endpoint. The Court finds those rulings persuasive, and holds that removal is reasonably foreseeable where the only barrier to removal is ongoing immigration proceedings.[7]

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detention claim, even though it undermines their alternative theory under *Zadvydas* that an unduly long period can amount to no significant likelihood of removal in the foreseeable future although there is no impediment to ultimate removal.

[7] While *Ly* does not support Petitioners' argument on the definitive end-point issue, it does bear on other arguments raised by the Government — that the stay of removal has prolonged removal and that detention hearings would provide a "corrupt incentive" to litigate frivolously in the immigration courts to artificially prolong detention. Gov. Resp. at 13. *Ly* points out that aliens cannot be faulted for filing appropriate motions; implicitly, this means that frivolous actions can be evaluated in determining whether a period of detention is unreasonable. There is thus no corrupt incentive for needlessly churning a file. And while a stay of removal has — as a matter of tautology — delayed removal, *Ly* is not critical of bona fide efforts to utilize the tools the law affords, which is precisely what Petitioners did in securing the initial preliminary injunction.

Thus, the Government is correct that Petitioners would have no *Zadvydas* claim if removal were blocked solely because the legal proceedings had not terminated. But that is not necessarily our circumstance. It is still an open question whether Iraq has agreed to accept class- wide repatriation. As noted above, a more developed record is necessary to answer this question. Thus, the Court defers ruling on the likelihood of success on the *Zadvydas* claim pending further discovery.[8]

b. Prolonged Detention

Petitioners next argue that even if their removal is reasonably foreseeable, *Zadvydas* provides a basis for them to receive individualized hearings on the issue of release. Pet. Br. at 24. They note *Zadvydas*'s statement that "if removal is reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period." *Zadvydas*, 533 U.S. at 700. Petitioners also note rulings by other circuits recognizing that those subject to prolonged detention are entitled to bond hearings, even where their removal is reasonably foreseeable. For instance, the Ninth Circuit in *Diouf v.*

[8] Petitioners also note language in an ICE field office manual that states "[i]f the circumstances under which an alien was taken back into custody no longer exist *and his/her removal is no longer imminent, the alien is to be released*." Pet. Br. at 22 (citing ICE Field Office Manual, DHS p. 104 (Rev. March 27, 2006)) (emphasis added). This language notwithstanding, *Zadvydas* does not require that removal be imminent in order for the Government to continue detention; there need only be a significant likelihood of removal in the reasonably foreseeable future.

Napolitano, 634 F.3d 1081 (9th Cir. 2011), held that § 1231(a)(6) requires "an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." *Id.* at 1085. The court held that § 1231(a)(6) aliens are to be released on bond unless the government can establish that they are a flight risk or a danger to the community. *Id.*

Diouf extended an earlier ruling by the Ninth Circuit in Casas, in which the court, addressing a § 1226(a) detainee, held that "prolonged detention without adequate procedural protections would raise serious constitutional concerns," noting that "[e]ven where detention is permissible [under *Zadvydas*], due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" *Casas*, 535 F.3d at 951 (quoting *Zadvydas*, 533 U.S. at 690).[9] The *Casas*

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[9] Title 8 U.S.C. § 1226(a) states that:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on--
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole; but

court held that "the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful.'" *Id.* (quoting *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005)).

The Government does not address *Diouf*. Nor does it address that portion of the Casas decision that upheld a prolonged detention claim. Instead, it argues that *Ly* defeats any claim Petitioners have to an individualized hearing on whether their release would pose a flight risk or danger to the community. The Government claims that *Ly* holds that detainees must establish both that removal proceedings have not been concluded within a reasonable time, and that actual removal is not reasonably foreseeable. Gov. Resp. at 17.

However, *Ly* did not purport to address a detainee asserting a pure prolonged detention claim, i.e. a claim without any argument that removal was not foreseeable. It addressed only a *Zadvydas* claim, and specifically whether *Zadvydas*, which involved a § 1231(a)(6) detainee, "extends to the mandatory pre-removal detention statute [§1226(c)]." *Ly*, 351 F.3d at 267 (emphasis in original). *Ly* involved an alien who was detained and ordered removed after committing crimes, but his native Vietnam had no repatriation agreement with the United States. The court

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> (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

engaged in a multi-factor analysis to determine whether a 500-day detention was unreasonable, noting that what made the detention "especially unreasonable" was the lack of a repatriation agreement, *id.* at 271-272, meaning no likelihood of removal. While that factor contributed to the court's ultimate decision, nowhere in the opinion does the court state that that factor is necessary for granting a relief to a § 1226(c) detainee, or to a detainee under any other authority, whenever the detainee complains of excessive detention. Thus, *Ly* does not mandate that Petitioners demonstrate no likelihood of removal for a prolonged detention claim.

Courts that have been presented with circumstances where detention was prolonged, but removal was reasonably foreseeable, have adopted Petitioners' position. That is the teaching of *Diouf* and *Casas*, which this Court chooses to follow. The Government has presented no contrary authority analogous to our case. All that Petitioners must demonstrate is the unreasonableness of their detention, an issue discussed *infra*.

c. § 1226(c)

Petitioners next seek a ruling that those being detained under § 1226(c) should instead be considered § 1226(a) detainees, and as such entitled to bond hearings, pursuant to *Casas*. *See Casas*, 535 F.3d at 951 (deeming an alien held purportedly under § 1226(c) as one being held under § 1226(a) and ordering a bond hearing, reasoning that "[b]ecause the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,' we hold that § 1226(a)

must be construed as requiring the Attorney General to provide the alien with such a hearing") (quoting *Tijani*, 430 F.3d at 1242). They argue that § 1226(c) does not apply for two reasons: (i) it does not apply to detention pending reopened removal proceedings; and (ii) it does not apply to individuals who were living in the community prior to detention, i.e. they were not taken into immigration custody immediately upon release from their criminal sentences. Pet. Br. at 28.

In support of their contention that § 1226(c) does not apply to motion to reopen proceedings, Petitioners rely on the Ninth Circuit's ruling in Casas. In that case, the alien had been in custody for seven years at the time the Ninth Circuit was reviewing his petition for review. The court was tasked with determining whether the alien was being held under § 1226(c), which requires mandatory detention of criminal aliens, or § 1226(a), which entitles the alien to a bond hearing. The court rejected the Government's argument that § 1226(c) applied, holding that the mandatory detention provision "applies only to 'expedited removal of criminal aliens.'" *Casas*, 535 F.3d at 951 (quoting *Tijani*, 430 F.3d at 1242). The court also noted the Supreme Court's ruling in *Demore v. Kim*, 538 U.S. 510 (2003), that § 1226(c) detention is meant to be brief, and DHS regulations that interpreted § 1226(c) to apply only "during removal proceedings," which it defined as concluding upon dismissal by the Board of Immigration Appeals ("BIA"). *Id.* at 948 (quoting 8 C.F.R. §§ 236.1(c)(1)(i), 1241.1(a)). The court held that "[b]ecause neither § 1231(a) nor § 1226(c) governs the prolonged detention of aliens awaiting judicial review of their removal orders, we conclude

that Casas' detention was authorized during this period under the Attorney General's general, discretionary detention authority under § 1226(a)." *Id.*

The Government argues that *Casas* is inapposite, because it did not apply to motion to reopen proceedings; instead it addressed what statute governs an alien's detention during and following any remand from a petition for review proceeding in the court of appeals. Pet. Br. at 21. This difference is immaterial.

In *Casas*, the court rejected the Government's contention that even if the alien was not subject to § 1226(c) while his petition for review was pending, he became subject to such custody again after his petition was granted and the case was remanded to the BIA. The court reasoned that "[a]n alien whose case is being adjudicated before the agency for a second time - after having fought his case in this court and won, a process which often takes more than a year - has not received expeditious process." *Id.* at 948. The same principle applies here. Petitioners are adjudicating their cases for a second time, by way of a motion to reopen. For those who have prevailed on their motions, the merits proceeding will likely not conclude for several months or possibly years. *See* Pet. Br., Table A (noting that a decision on the merits of a motion to reopen can take anywhere from two months to nearly three years if an alien takes his case to the court of appeals). This is well beyond the "relatively brief" period of five months, which the Supreme Court found was acceptable and supported mandatory detention in *Demore*. *See Demore*, 538 U.S. at 529. On this basis alone, Petitioners have shown that

mandatory detention under § 1226(c) should not be deemed applicable, and that persons purportedly held under that provision should be deemed held under § 1226(a).

However, Petitioners also argue that § 1226(c) is inapplicable because it does not apply to individuals who were living in the community prior to detention. Title 8 U.S.C. § 1226(c) states that "[t]he Attorney General shall take into custody any alien who [has committed enumerated offenses] *when the alien is released*." (emphasis added). Petitioners argue that this language means an alien is only subject to § 1226(c) mandatory detention if he is released directly from criminal custody into the custody of the Attorney General.

Petitioners contend the subsection is inapplicable to those who were released years ago and had been living in their communities, citing rulings by the Ninth and First Circuits, as well as courts in the district. *See Preap v. Johnson*, 831 F.3d 1193, 1197 (9th Cir. 2016) (holding that § 1226(c) "unambiguously imposes mandatory detention without bond only on those aliens taken by the AG 'when [they are]' released from criminal custody"); *Castaneda v. Souza*, 810 F.3d 15, 43 (1st Cir. 2015) (Three judges of equally divided en banc court ruled "the detention mandate requires that aliens who have committed certain offenses be taken into immigration custody in a timely manner following their release from criminal custody . . . These petitioners were released from criminal custody years before they were first placed in immigration custody. For that reason, they clearly do not fall within 'this detention mandate.'"); *Khodr v. Adducci*, 697 F. Supp. 2d 774, 778–779 (E.D. Mich. 2010) ("If

Congress wished to permit the Attorney General to take custody of criminal aliens at any time after being released from criminal confinement, it could have done so using the phrase 'at any time after the alien is released.' But, by using the word 'when,' Congress demonstrated its intent that such aliens be taken into custody contemporaneous with their release or not at all (at least under section 1226(c)).").

In response, the Government notes cases by the Third and Fourth Circuits, as well as the BIA, holding that immediate detention upon release from criminal custody is not necessary to detain an alien under § 1226(c). *See Sylvain v. Att'y Gen. of U.S.*, 714 F.3d 150, 157 (3d Cir. 2013); *Hosh v. Lucero*, 680 F.3d 375, 384 (4th Cir. 2012); *In Re Rojas*, 23 I. & N. Dec. 117, 124 (BIA 2001). However, the Government argues that addressing this circuit split is not necessary, because Petitioners, by reopening their immigration cases, have placed themselves within § 1226(c) by operation of law. The Government notes that the mandatory detention subclass was originally detained pursuant to § 1231(a)(6), when their final orders were still live. When their motions to reopen were granted, the Government argues, they automatically reverted to the pre- order detention subsection for those with a criminal history, i.e., § 1226(c). It argues that this case does not implicate the concern courts have that § 1226(c) is being used to detain an alien for a reason other than the crime underlying his eligibility for mandatory detention and removal.

The case law is in conflict on this issue, but one point proves decisive — the plain language of the statute. The terms of § 1226(c) plainly state that mandatory detention is only authorized for those who

are taken into custody by DHS "when . . . released" from their criminal sentence. This was not done here. Petitioners were taken into custody years after their release from criminal sentences. *See Khodr*, 697 F. Supp. 2d at 778–779 ("[B]y using the word 'when,' Congress demonstrated its intent that such aliens be taken into custody contemporaneous with their release or not at all (at least under section 1226(c)).").

Because § 1226(c) does not apply to those who have their motions to reopen granted, or who were living in the community for years prior to their immigration detention, those purportedly being held under § 1226(c) are deemed to be held pursuant to § 1226(a). This conclusion is consistent with the principle recognized in several decisions that the length of the detention — not the stage of the proceeding — drives the constitutional concern. *See, e.g.*, *Diouf*, 634 F.3d at 1087 ("Regardless of the stage of the proceedings, the same important interest is at stake — freedom from prolonged detention.").

d. Reasonable Time Limitation

Having determined that those subject to prolonged detention under § 1231(a)(6) and § 1226(a) may be entitled to bond hearings, the Court must determine whether Petitioners have made a sufficient showing that they have been held for an unreasonably prolonged period.

Courts have taken different approaches regarding the reasonableness of detention. In the context of § 1226(c), the Sixth Circuit rejected the six-month bright-line limitation set forth in *Zadvydas*, instead holding that "courts must examine the facts of each case, to determine whether there

has been unreasonable delay in concluding removal proceedings." *Ly*, 351 F.3d at 271. The court considered several factors, including the actual removability of a criminal alien, his length in detention as compared to the length of his criminal sentence, and whether the alien has engaged in dilatory tactics. *Id.* at 271-272. The First, Third, and Eleventh Circuits follow this case-by-case approach. *See Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1217–1218 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486, 502 (1st Cir. 2016); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011).

In contrast, the Second and Ninth Circuits have adopted the six-month, bright-line rule set forth in *Zadvydas*. In *Lora v. Shanahan*, 804 F.3d 601, 615 (2d Cir. 2015), the Second Circuit stated that "*Zadvydas* and *Demore*, taken together, suggest that the preferred approach for avoiding due process concerns in this area is to establish a presumptively reasonable six- month period of detention." The court noted that the case-by-case approach results in "random outcomes resulting from individual habeas litigation in which some detainees are represented by counsel and some are not, and some habeas petitions are adjudicated in months and others are not adjudicated for years." *Id.* The court ultimately held that "in order to avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention." *Id.* at 616.

This is consistent with the Ninth Circuit's ruling in *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013), *cert. granted sub. nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016), which construed

"the government's statutory mandatory detention authority under Section 1226(c) and Section 1225(b) as limited to a six-month period, subject to a finding of flight risk or dangerousness." This followed its previous ruling in *Diouf* that § 1231(a)(6) required a bond hearing after the six-month mark. *See Diouf*, 634 F.3d at 1091–1092. Further, the court in *Rodriguez* held that "[t]o the extent *Diop* and *Ly* reject a categorical time limit, their reasoning in that respect is inapplicable here . . . because this petition is a class action (and thus relief will perforce apply to all detainees)." *Rodriguez*, 715 F.3d at 1139.

This Court follows the *Ly* multi-factor approach, adapted for use in this class action context. The starting point is the six-month benchmark, whose pedigree can be traced to *Zadvydas*, and which was followed in *Lora*, *Diouf*, and *Rodriguez*. The Court follows *Zadvydas* in concluding that any presumption of reasonableness ends after six months. As the Supreme Court noted, there is "reason to believe that Congress . . . doubted the constitutionality of detention for more than six months." *Zadvydas*, 533 U.S. at 701. Further, as noted in Lora, a six-month benchmark will help protect against inconsistent outcomes that could otherwise result.[10]

[10] The Government points out that certain cases granting relief from unreasonable detention have involved detentions in excess of six months. *See, e.g.*, *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1220 (11th Cir. 2016) (over three years of detention); *Reid v. Donelan*, 819 F.3d 486, 501 (1st Cir. 2016) (fourteen months); *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 478 (3d Cir. 2015) (twelve months); *Ly*, 351 F.3d at 271 (eighteen months). However, nothing in those cases suggests that those periods were viewed as minimum periods for establishing

This Court recognizes that in a small percentage of cases, detainees may engage in bad faith tactics that prolong what would otherwise be a relatively brief period of detention. To address this concern, the Government may present evidence that specific individuals have themselves significantly contributed to the unreasonable length of detention because of bad faith or frivolous tactics that delayed adjudication of their case. The Government may also present evidence of other factors as to a particular detainee that it claims should be considered as a basis for denial of a bond hearing as to a particular detainee.[11] If such evidence is presented as to a

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unreasonable detention. To the contrary, the six-month period referenced in *Zadvydas* was acknowledged as a benchmark. *See, e.g.*, *Ly*, 351 F.3d at 267.

[11] Beyond dilatory tactics, courts have considered the following factors when determining whether continued detention is reasonable: the alien's actual removability, whether the length of time in immigration detention has exceeded the alien's criminal sentence, and whether the immigration detention facility is "meaningfully different from a penal institution for criminal detention." *Sopo*, 825 F.3d at 1218; *see also Reid*, 819 F.3d at 502; *Ly*, 351 F.3d at 271-272. These factors do not appear to be appropriate in our case. Actual removability is contingent on the *Zadvydas* claim, for which there is insufficient evidence to make a ruling. As for comparing the criminal sentence to the period in immigration custody, such a comparison has little meaning when the sentence was served years before, even assuming that the comparison makes sense in some other context. And comparing detention facilities to prisons leads to the conclusion that both are very challenging environments, as the record amassed here of the hardship detention imposes on the economic, mental and medical health of detainees. *See* discussion *infra*. What purpose would be served by exploring the particular similarities and dissimilarities of the two environments is somewhat of a mystery. Nonetheless, the Government is free to present specific evidence as to a particular detainee if it concludes that

particular detainee, this Court will rule on whether the detainee will receive a bond hearing. Any bond hearing shall be conducted before an immigration judge at which the judge shall release the detainee under an appropriate order of supervision unless the Government establishes by clear and convincing evidence that the detainee is a flight or public safety risk. *Rodriguez*, 715 F.3d at 1131.[12]

The Government argues that granting habeas relief in the form of ordering bond hearings is somehow inconsistent with *Ly*. Gov. Resp. at 17. While upholding habeas relief for an alien asserting

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consideration of such evidence should bear on whether a detainee is entitled to a bond hearing.

[12] Although the Government notes that detainees receive post-order custody reviews ("POCRs") by ICE, *see* 8 C.F.R. §§ 241.4, 241.13, the Government does not, and cannot, contend that they are an adequate replacement for a bond hearing. The Supreme Court has suggested that "the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights." *Zadvydas*, 533 U.S. at 692. Further, the court in *Casas* held that a POCR "falls far short of the procedural protections afforded in ordinary bond hearings, where aliens may contest the necessity of their detention before an immigration judge and have an opportunity to appeal that determination to the BIA." *Casas*, 535 F.3d at 951–952. Moreover, there is strong evidence that the reviews in our case were not undertaken in a good faith effort to detain only those who were flight and safety risks. Virtually every detainee who had a POCR review was denied release, and given a terse written statement that the Government was still interested in removing the detainee; there is no indication that any legitimate bond issue was even considered. Pet. Mot. at 7. Those who have been released appear to have been released for medical reasons, or having won a bond hearing, not as a result of a POCR. *See* Schlanger Decl. ¶ 30.

a *Zadvydas* claim, the *Ly* court noted that "we do not require the United States to hold bond hearings for every criminal alien detained under [§ 1226(c)]" because "in the majority of cases, where an order of removal is promptly entered and removal is effected within the time allotted under *Zadvydas*, bond hearings are not required." *Ly*, 351 F.3d at 270. The court's meaning is not clear. It may have meant that there generally is no need for a bond hearing, given that removal usually takes place promptly. It may have meant that no bond hearing was required in that particular case, because the petitioner had already been released from immigration custody. But what is clear is that *Ly* did not purport to issue a blanket rule that bond hearings may never be appropriate, especially when used as part of habeas relief, as is being done here, and in particular, as part of class-wide relief. Thus, this Court is not acting contrary to *Ly*.

In sum, Petitioners have demonstrated a probability of success both as to their statutory and constitutional arguments regarding their prolonged detention claim and their § 1226(c) claim. Relief is accorded to all asserting such claims, as defined below in the class action discussion, provided they have been detained at least six months. Consideration of the *Zadvydas* claim is deferred pending further discovery.

2. Irreparable Harm; Balance of the Equities; Public Interest

Petitioners have unquestionably met their burden regarding irreparable harm. Detention has inflicted grave harm on numerous detainees for which there is no remedy at law. Some have lost

businesses and jobs. *See* Ali Al-Dilaimi Decl., Ex. 6 to Pet. Mot., ¶ 26 (Dkt. 138-7) ("After June 11, 2017, my oil change business, which my wife used to help manage, had to close down."); Atheer Ali Decl., Ex. 9 to Pet. Mot., ¶ 23 (Dkt. 138-10) ("Recently, I was forced to close my auto shop business and now face a real possibility of losing it forever because I cannot continue running it while I am detained, and cannot afford to have someone else replace all of my duties."). Dreams of a college education for the children of detainees are now in doubt. *See* Usama Hamama Decl., Ex. 5 to Pet. Mot., ¶ 25 (Dkt. 138-6) ("Our son is scheduled to attend college next year but as of now, we cannot afford to even pay the minimum deposit for his tuition."). The medical needs of some detainees have gone unmet. *See* Adel Shaba Decl., Ex. 4 to Pet. Mot., ¶¶ 24-25 (Dkt. 138-5) ("The medical care I receive in detention is inadequate as they do not provide some of the medications that my doctor prescribed me."); Habil Nissan Decl., Ex. 15 to Pet. Mot., ¶ 15 (Dkt. 138-16) ("[I]t took two months for me to receive medical treatment after my transfer to Chippewa County, Michigan."). Other harms have also been documented. Qassim Hashem Al-Saedy Decl., Ex. 8 to Pet. Mot., ¶ 21 (Dkt. 138-9) (describing assault while in custody).

The balance of equities tips decidedly in favor of preliminary relief. Without some relief from detention, detainees will undoubtedly continue to experience these or similar harms. On the other hand, the Government does not substantiate any claim that it will suffer any harm if enjoined.

Finally, the public interest requires preliminary relief. Our Nation has a long history of resisting unreasonable governmental restraints. In

the present circumstances, allowing bond hearings for those who have been subjected to prolonged detention is in keeping with the core value of liberty our Constitution was designed to protect.

In balancing all of the factors, the Court concludes that Petitioners are entitled to preliminary relief.

B. Motion to Dismiss

The Government's motion to dismiss argues that the detention counts in Petitioners' amended complaint — counts four, five, and six — should be dismissed because they fail to state a claim. There is no jurisdictional challenge to the detention claims. The Court has already ruled that not only do Petitioners state a plausible claim for relief, but that they are likely to succeed on the merits. As a result, the Government's motion to dismiss is denied as to Petitioners' detention claims.

C. Motion to Certify Class

Petitioners also seek to certify their putative primary class, which they originally defined in their motion to certify class as "All Iraqi nationals in the United States who had final orders of removal on March 1, 2017, and who have been, or will be, detained for removal by U.S. Immigration and Customs Enforcement (ICE)." Petitioners have since filed a supplemental brief (Dkt. 176) in which they seek to amend the primary class definition to "All Iraqi nationals in the United States who had final orders of removal at any point between March 1, 2017 and June 24, 2017 and who have been, or will be, detained for removal by U.S. Immigration and Customs Enforcement." This was done so that those who did not have final orders of removal as of March

1, 2017 are protected by the stay of removal.

Petitioners also seek to certify three subclasses. The first, referred to as the "*Zadvydas* subclass," is defined as "All Primary Class Members, who are currently or will be detained in ICE custody, and who do not have an open individual habeas petition seeking release from detention." Petitioners seek to certify this subclass as to count four. Count four alleges that the detainees are entitled to release because there is no significant likelihood that they will be removed in the reasonably foreseeable future.

Next, Petitioners seek certification for the "detained final order subclass," which they define as "All Primary Class Members with final orders of removal, who are currently or will be detained in ICE custody, and who do not have an open individual habeas petition seeking release from detention." Certification is sought for this subclass as to count five, which alleges that due process requires that those held for a prolonged period receive an individualized hearing before an impartial adjudicator to determine whether they are a flight risk or danger to the community.

Finally, Petitioners request that the Court certify the "mandatory detention subclass," defined as "All Primary Class Members whose motions to reopen have been or will be granted, who are currently or will be detained in ICE custody under the authority of the mandatory detention statute, 8 U.S.C. § 1226(c), and who do not have an open individual habeas petition seeking release from detention." Petitioners seek to certify this class as to counts five and six. Count six alleges that those who have had their motions to reopen granted or who had

been living in their community prior to their immigration detention are being improperly held under § 1226(c).

To obtain class certification, Petitioners must first show the following four requirements:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig., 722 F.3d 838, 850 (6th Cir. 2013) (quoting Fed. R. Civ. P. 23(a)).

The Court determines that certification is appropriate for the three detention subclasses and defers a ruling on whether the primary class should be certified. Deferral is prudent because Petitioners only seek certification of the primary class as to the removal counts, claims that are not at issue in this Opinion. Moreover, those claims are the subject of an appeal pending in the Sixth Circuit. At this point, it does not appear that there is a need to rule on certification of the primary class until that court has ruled.

1. Numerosity

The Government does not contest that Petitioners have met the numerosity requirement for the *Zadvydas* subclass or the detained final order subclass. However, it argues that the requirement is

not met for the mandatory detention subclass. Gov. Resp. at 23. It notes the assertion in the declaration of Petitioners' counsel that that there are fifty-nine detained putative class members who have had their motions to reopen granted, and that "it appears that the vast majority are being detained without bond under 8 U.S.C. § 1226(c)." Schlanger Decl. ¶ 31. The Government contends that this assertion is "directly contradicted" by Petitioners' motion, which notes that some primary class members "are not in either subclass because they are detained under a third statutory provision." The Government also argues that Petitioners are ignoring another group of individuals – those who are being held pursuant to 8 U.S.C. § 1225(b) as a result of being immediately detained at the border.

The Court does not see how Petitioners' counsel's assertion that a "vast majority" of the fifty-nine detainees who have had their motions to reopen granted are being held pursuant to § 1226(c) is contradicted by the acknowledgment that a small number (possibly six or seven) are being held pursuant to § 1226(a) or § 1225(b). *See* Schlanger Decl. II ¶ 7. Petitioners' calculation appears accurate, and sufficient to establish numerosity. *See Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) ("[W]hile there is no strict numerical test, 'substantial' numbers usually satisfy the numerosity requirement."); *see also Turnage v. Norfolk S. Corp.*, 307 F. App'x 918, 921 (6th Cir. 2009) (broad geographic proximity weighs in favor of numerosity); *Davidson v. Henkel Corp.*, 302 F.R.D. 427, 436 (E.D. Mich. 2014) ("[I]t generally is accepted that a class of 40 or more members is sufficient to satisfy the numerosity requirement."). The Government

provides no evidence to the contrary.

2. Commonality

The Court must next consider whether there are questions of law or fact common to the subclasses. "To demonstrate commonality, plaintiffs must show that class members have suffered the same injury." *In re Whirlpool Corp.*, 722 F.3d at 852. The plaintiffs' claims "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Id.* Commonality depends on "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart*, 564 U.S. at 350. "Commonality under Rule 23(a)(2) is met where, notwithstanding some factual differences, the class action claims are based on a common course of conduct of misrepresentations, omissions, or other wrongdoing affecting all class members in the same manner." *Yadlosky v. Grant Thorton, L.L.P.*, 197 F.R.D. 292, 298 (E.D. Mich. 2000) (quotation marks omitted).

a. Count Four: *Zadvydas* Claim

The *Zadvydas* subclass has multiple common questions of law and fact. As discussed at length above, Petitioners' *Zadvydas* claim rests on the factual issue of whether Iraq is actually willing to accept repatriation of all putative class members. Petitioners assert that Iraq will not, stating that

certain putative class members have been denied travel documents. *See* Andrade Decl., Ex. 21 to Pet. Mot., ¶ 13 (Dkt. 138-22). The Government argues otherwise, stating that, after ongoing negotiations, Iraq has agreed to accept the putative class members. There are also common legal issues, such as whether Petitioners can demonstrate that there is no significant likelihood of removal in the reasonably foreseeable future where they are subject to prolonged immigration proceedings, and if so, whether their detention is unlawful and they must be released.

In its response, the Government lists several reasons why it believes the class should not be certified as to this claim, including that (i) the putative class includes a large number of aliens who have not been detained for the requisite time or at all; (ii) it includes those not detained under § 1231; (iii) it includes a number of aliens who will not file motions to reopen or will have the motions adjudicated quickly because they are in expedited proceedings; and (iv) *Zadvydas* requires an individualized inquiry into each alien's nationality and travel documents. Gov. Resp. at 13. None of these defeats commonality. As discussed above, whether Iraq will actually accept the detainees will likely be dispositive of the *Zadvydas* claim, regardless of the length of time each class member has been in custody or how quickly their motions to reopen will be adjudicated. The Government's argument that there is not commonality because the *Zadvydas* framework only applies to § 1231 detainees ignores that courts have extended *Zadvydas* to § 1225(b), § 1226(a), and § 1226(c) detainees. *See Casas*, 535 F.3d at 949 (extending to § 1226(a));

Nadarajah v. Gonzales, 443 F.3d 1069, 1076–1077 (9th Cir. 2006) (extending to § 1225(b)); *Ly*, 351 F.3d at 267 (extending to § 1226(c)). Further, the Government's argument that *Zadvydas* requires an individualized inquiry into each travel document is belied by the Bernacke declaration, which states that Iraq has agreed to accept charter flights of the class members without travel documents, provided the injunction is lifted. *See* Bernacke Decl. ¶ 6. In sum, Petitioners have demonstrated commonality with regard to the *Zadvydas* subclass.

b. Counts Five and Six: Prolonged Detention and § 1226(c) Claims

There are also common questions of law as it relates to both the detained final order subclass and the mandatory detention subclass. With respect to the detained final order subclass, the Court must consider whether, as stated in *Diouf*, due process requires that those with final orders of removal are entitled to a bond hearing after being in detention for a prolonged period. The mandatory detention subclass presents multiple common questions of law. As it relates to count six, the Court has to determine whether § 1226(c) even applies to those who are being detained while they litigate motions to reopen, and to those who had previously been living in their communities long after their criminal sentences ended. The resolution of that issue bears on the next legal question, i.e., whether, as alleged in count five, the mandatory detention subclass is entitled to a bond hearing after being subject to prolonged detention.

The Government argues that there is no commonality because prolonged detention claims involve a highly individualized inquiry. Gov. Resp. at 15. The Ninth Circuit's ruling in *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010), is directly on point and rejects the Government's position. In *Hayes*, the petitioner sought certification of a class of aliens in the Central District of California who had been or would be detained under any of the general immigration statutes for more than six months and had not been afforded a hearing to determine whether prolonged detention was justified. The Government argued that the propriety of each putative class member's detention "turns on divergent questions of statutory interpretation and consideration of different factual circumstances." *Id.* at 1122. The court held that this did not defeat commonality, stating that Rule 23(a)(1) does not require that members of a putative class "share every fact in common or completely identical legal issues." *Id.* The rule requires that courts "look only for some shared legal issue or a common core of facts." *Id.* The court concluded that there was a common legal issue of whether the Constitution allowed an individual to be detained for longer than six months where not authorized explicitly by statute. *Id.* at 1123. That same question is posed here, both for the detained final order subclass and the mandatory detention subclass.

As a result, the Court finds commonality as to the detained final order subclass and the mandatory detention subclass.

3. Typicality

To demonstrate typicality, Petitioners must demonstrate that "the class members' claims are fairly encompassed by the named plaintiffs' claims." *In re Whirlpool*, 722 F.3d at 852 (quotation marks omitted). The typicality requires ensures that "the representatives' interests are aligned with the interests of the represented class members so that, by pursuing their own interests, the class representatives also advocate the interests of the class members." *Id.* at 852- 853. "[C]ommonality and typicality tend to merge in practice because both of them serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* at 853 (quotation marks omitted).

The claims of the named Petitioners are typical of the claims of members of the *Zadvydas* subclass, the detained final order subclass, and the mandatory detention subclass. With regard to the *Zadvydas* subclass, all but two of the named Petitioners are still being held in detention. They all allege that, pursuant to Zadvydas, they are entitled to be released because there is no significant likelihood of their removal in the reasonably foreseeable future. They are typical of all of the current or future detainees in the *Zadvydas* subclass who allege that their detention is unconstitutional because they are not likely to be released in the foreseeable future.

The named Petitioners are also typical of the prolonged detention subclasses. Nine of the named Petitioners — Usama Hamama, Ali Al-Dilaimi, Qassim Al-Saedy, Abbas Al-Sokaini, Moayad Barah, Jami Derywosh, Jony Jarjiss, Mukhlis Murad, and Adel Shaba — are typical of the detained final order subclass in light of their continued detention pursuant to § 1231(a)(6). Like the subclass, these named Petitioners contend that § 1231 mandates an individualized hearing before an impartial adjudicator on the issues of danger and flight risk. Further, two of the named Petitioners, Atheer Ali and Anwar Hamad, are being held in mandatory detention pursuant to § 1226(c).[13] Their claims encompass those of the mandatory detention subclass. Like the subclass, they argue that § 1226(c)

[13] A third named Petitioner, Kamiran Taymour, was previously held pursuant to § 1226(c); his removal proceedings were subsequently cancelled. *See* Taymour Order, Ex. A. to Gov. Resp. (Dkt. 159-2). The Government argues that this makes him an inadequate representative for the mandatory detention subclass. If, in fact, the Government is no longer proceeding at all against Taymour, he may no longer be in the class, but the Government has not clearly stated that. The Government also argues that Ali and Hamad are not typical or adequate representatives because they have had, or will have, merits hearings. It argues that because these Petitioners may succeed at their hearings, they will not be deported, and thus can no longer represent the putative subclass members. The Government's speculation regarding the potential success of these hearings is not sufficient to demonstrate their inadequacy as class representatives. Further, even if these individuals eventually are deemed inadequate because of their litigation success, others can be added as subclass representatives. The Government has offered no authority that potentially changing circumstances that may exclude a member from remaining a class representative must mean that the class action vehicle may not be used.

does not apply to those in detention while litigating a motion to reopen, nor to those who were previously living in their communities after being released from criminal custody years prior. They also argue that they are entitled to release unless an impartial adjudicator determines that they are a flight risk or danger to the community. The named Petitioners are typical of the three detention subclasses.

4. Adequacy

The Court must next consider whether the named Petitioners' representation will fairly and adequately protect the interests of the class. The Sixth Circuit employs the following two- prong test to determine adequacy: (i) the class representatives must have common interests with the putative class members; and (ii) the representatives will "vigorously prosecute the interests of the class through qualified counsel." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 757 (6th Cir. 2013).

As discussed above, the concerns of the named representatives are common to each putative subclass. *See In re Whirlpool*, 722 F.3d at 853 ("[C]ommonality and typicality tend to merge with the requirement of adequate representation, although the latter factor also brings into play any concerns about the competency of class counsel and any conflicts of interest that may exist."). Further, class counsel have established throughout the course of this case that they are more than willing to zealously prosecute this case on behalf of all putative class members. The named Petitioners, through class counsel, are adequate representatives.

5. Rule 23(b)(2)

Finally, the Court must determine whether certification pursuant to Rule 23(b)(2) is proper. The rule states that a class may be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted — the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (quotation marks omitted).

The Government argues that a Rule 23(b)(2) class is inappropriate in light of the class members' "highly fact-intensive claims." Gov. Resp. at vi. This objection was addressed and rejected in *Hayes*.[14] The court held that "[t]he rule does not require us to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Hayes*, 591 F.3d at 1125; *see also Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014) ("While each of the certified [Arizona Department of Corrections'] policies and practices may not affect every member of the

[14] The Government argues that *Hayes* is not good law because it was decided prior to *Wal-Mart*, which held that courts may consider the merits when deciding whether certification is appropriate. As Petitioners note, the Government has not explained how consideration of the merits would have altered the court's decision on certification.

proposed class and subclass in exactly the same way, they constitute shared grounds for all inmates in the proposed class and subclass.").

Petitioners are seeking uniform relief from a practice applicable to all three subclasses, i.e., the Government's uniform decision to detain each putative class member without granting release due to a lack of likelihood of removal, or without granting an individualized hearing on the issues of danger or flight risk. The preliminary relief is also of a class-wide nature because all affected detainees are being given the same habeas relief: the right to a bond hearing unless the Government can present some specific evidence why a particular detainee should not be entitled to that right. As the *Hayes* court noted, "[t]he fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Id.*

Petitioners have met the requirements for certification under Rule 23(b)(2).

6. Appointment of Class Counsel

The Government also argues that class certification is inappropriate because class counsel cannot be appointed at this time. Rule 23(g)(1) states that "[u]nless a statute provides otherwise, a court that certifies a class must appoint class counsel." Courts must consider the counsel's identification or investigation of potential claims, counsel's relevant experience, knowledge of relevant law, and the resources counsel will commit to representation. Fed. R. Civ. P. 23(g)(1)(A).

The Government argues appointment is not appropriate at this time because counsel have not

submitted affidavits in support of their motion, instead submitting their internet biographies. Gov. Resp. at 25. However, there is no requirement that an affidavit be submitted attesting to the biographies. The Court can accept the biographies as true, based on the attorneys' statements in the briefing to that effect.

Further, an examination of these biographies, in conjunction with the Court's awareness of the attorneys' past filings in this case, as well as their organizations' past work, all demonstrate that Petitioners' counsel satisfy the requirements of Rule 23(g)(1)(A). The attorneys have demonstrated that they have thoroughly investigated and researched each claim, and are willing to devote considerable time and effort to their representation. Their biographies show that they have more than enough relevant experience.

The Government also argues that Petitioners have not justified the need for six organizations consisting of hundreds of attorneys and argues that there may be a conflict between class counsel and their colleagues who may have failed to timely file motions in past immigration proceedings. *Id.*

With regard to the number of organizations and attorneys, the Court believes that many laboring oars are required in a nationwide litigation such as this. The putative primary class numbers approximately 1,400, with some 274 detainees in facilities across the country. It is to be expected that a case of this size, moving at an expedited pace, would require a large number of attorneys. Regarding the allegation of potential conflicts of interest, the Government has not identified any

particular conflicts between class counsel and past counsel for putative class members. If any such conflicts are presented, the Court will address them at that time.

At this time, the Court designates Margo Schlanger and Kimberly Scott of Miller Canfield as class counsel. To the extent additional attorneys should be appointed as class counsel or whether the participation of other counsel should be approved by the Court are matters that can be addressed at a forthcoming status conference.[15]

7. Nationwide Class

Finally, the Government argues that if the Court grants class certification, it should limit certification to those within the Eastern District of Michigan. *Id.* at 28. The Government contends that certifying a nationwide class would violate principles of inter-circuit comity and strip other courts of jurisdiction over claims pending before them. It argues that the Court should allow the other courts of appeals to decide the difficult questions posed by this case.

The Government's concerns that certification will strip other courts of jurisdiction over pending claims and harm inter-circuit comity is addressed by the Petitioners' amended subclass definitions. The definitions specifically exclude from the subclasses

[15] Further, the Government argues that the Court should establish a framework regarding billing and should decline to issue a class notice at this time because Petitioners have not submitted a proposed order, and because notice is unnecessary for a Rule 23(b)(2) class. These issues, and others relating to certification, will be addressed at a forthcoming status conference with the parties.

those who have filed individual habeas petitions. This Court's rulings will have no bearing on those petitions; to the extent those other courts disagree, the courts of appeals and the Supreme Court will receive the benefit of differing perspectives. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.").

As a result, nationwide certification of the three detention subclasses is appropriate.[16]

IV. CONCLUSION

For the reasons set forth above, the Court awards the following relief.

1. Petitioners' motion for class certification (Dkt. 139) is granted in part.

    a. The Court certifies a subclass for the *Zadvydas* claim pleaded in count four. The subclass consists of "All Primary Class Members, who are currently or will be detained in ICE custody, and who do not have an open individual habeas petition seeking release from detention." The definition of the primary class to be used for purposes of defining the subclasses is "All Iraqi nationals in the United States who had final orders of

[16] The Government also argues that limiting the class to those in this District is appropriate because they share a common religion, and thus have more similar removal claims than a nationwide group of "all Iraqis." Because the Court is not addressing the removal claims at this time, it need not consider this argument.

removal at any point between March 1, 2017 and June 24, 2017, and who have been, or will be, detained for removal by ICE." The primary class itself is not being certified at this time.

b. The Court certifies a detained final order subclass for those pleading a prolonged detention claim pleaded in count five. The subclass consists of "All Primary Class Members with final orders of removal, who are currently or will be detained in ICE custody, and who do not have an open individual habeas petition seeking release from detention."

c. The Court certifies a mandatory detention subclass for those pleading a prolonged detention claim pleaded in count five and for those pleading a § 1226(c) claim pleaded in count six. The subclass consists of "All Primary Class Members whose motions to reopen have been or will be granted, who are currently or will be detained in ICE custody under the authority of the mandatory detention statute, 8 U.S.C. § 1226(c), and who do not have an open individual habeas petition seeking release from detention."

d. Attorneys Margo Schlanger and Kimberly Scott of Miller Canfield are appointed as class counsel.

e. Any other relief requested in the motion for class certification is deferred. Any issues pertaining to class action may be raised at the forthcoming conference or through future proceedings.

2. Petitioners' motion for preliminary injunction (Dkt. 138) is granted in part.

   a. The Government shall be required to release, no later than February 2, 2018, any detained member of the detained final order subclass and any member of the mandatory detention subclass who has been detained, as of January 2, 2018, for six months or more, unless a bond hearing for any such detainee is conducted on or before February 2, 2018 before an immigration judge; provided that neither release of a particular detainee nor a bond hearing for that detainee shall be required if the Government files with this Court a memorandum, by February 2, 2018, objecting to a bond hearing for any specific detainee and supplies evidence supporting the objection. If such an objection is filed, the release of the detainee and the conducting of a bond hearing shall be deferred pending further order of the Court.

   b. Any subclass member whose detention first exceeds six months after January 2, 2018, shall be released no more than 30 days after the six-month period of detention is completed, unless a bond hearing for any such detainee is conducted during that 30-day period before an immigration judge; provided that neither release of such detainee nor a bond hearing for such detainee shall be required if the Government files with this Court a memorandum, before the end of that 30- day period, objecting to a bond hearing for such detainee and supplies evidence supporting the objection. If such an objection

is filed, the release of the detainee and the conducting of a bond hearing shall be deferred pending further order of the Court.

c. At the bond hearing, the immigration judge shall release the detainee under an order of supervision unless the immigration judge finds, by clear and convincing evidence, that the detainee is either a flight risk or a public safety risk.

d. The parties may engage in discovery directed to the Zadvydas claim. Discovery shall encompass depositions of appropriate government personnel with knowledge of the Iraq repatriation agreement or program, and production of documents pertaining to that subject. Counsel will confer regarding additional specific requests, and later depositions, by January 5, 2018. Disagreements regarding the discovery, including scope and applicable privileges, will be addressed by the Court at the forthcoming conference. The parties' respective positions on any disputes, including legal authorities, shall be set out in the Joint Statement of Issues referenced below.

e. Relief requested regarding A-Files and ROPs will be addressed in a separate order.

3. The Government's motion to dismiss (Dkt. 135), as it pertains to counts four through six, is denied. Consideration of the balance of the motion is deferred pending resolution of the appeal of this Court's earlier preliminary injunction before the United States Court of Appeals for the Sixth Circuit and/or pending other legal developments.

4. The Court will convene an in-person conference to address any issue raised by this Opinion and Order on January 11, 2018 at 9:30 a.m. By noon on January 9, 2018, the parties shall file a Joint Statement of Issues, setting forth their agreement and disagreement on any matter that they wish to raise at the conference.

SO ORDERED.

Dated: January 2, 2018
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 17-2171/18-1233

USAMA JAMIL HAMAMA, ET AL.,

Petitioners-Appellees,

v.

REBECCA ADDUCCI, ET AL.,

Respondents-Appellants.

ORDER

[Filed: April 2, 2019]

Before: BATCHELDER, SUTTON, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge White would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
501 POTTER STEWART U.S. COURTHOUSE
100 EAST FIFTH STREET
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt **513-564-7070**
Clerk

April 27, 2018

Scott Stewart, Esq.
Lee P. Glernt, Esq.
Margo Schlanger, Esq.

RE: Case Nos. 17-2171/18-1233, *Hamama v. Adducci*

Dear Counsel,

The panel has directed me to invite the parties to provide letter briefs, if they wish, about some issues that arose during the oral argument. Any letter briefs should be no longer than 10 pages single spaced and should be filed no later than Friday, May 4, 2018.

The parties are permitted to address the following questions:

(1) In what way, if any, would the jurisdictional ruling with respect to the removal-based claims in No. 17-2171—either finding jurisdiction or not—affect the district court's jurisdiction over the detention-based claims in No. 18-1233?

(2) What are the differences, if any, between seeking an emergency stay of removal from an agency or circuit court (during the pendency of a motion to reopen or petition for review) and seeking such a stay from a district court or circuit court (during the pendency of a habeas petition)?

(3) Was the district court authorized to grant petitioners class-wide injunctive relief from detention in light of 8 U.S.C. § 1252(f)(1) and *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481 (1999)?

Sincerely,

Deborah S. Hunt
Clerk of Court