No. 17-2171

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, et al.,
Petitioners-Appellees,

v.

THOMAS HOMAN, Deputy Director and
Senior Official Performing the Duties of the Director,
U.S. Immigration and Customs Enforcement, et al.,
Respondents-Appellants.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
D.C. No. 2:17-cv-11910

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DISCLOSURE OF CORPORATE AFFILIATIONS

Appellants are officers of the United States sued in their official capacities and are therefore not required to make these disclosures under 6 Cir. R. 26.1(a).

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Appellants respectfully request oral argument. The issues in this case are important, and the Court's consideration of those issues would be aided by oral argument.

INTRODUCTION

This case arises from the government's efforts to execute lawful final removal orders against Iraqi nationals. In a decision that is the first of its kind, the district court issued a nationwide preliminary injunction barring the government from executing those removal orders. In doing so, the district court held invalid, as applied to Iraqi nationals subject to final removal orders, a frequently applied and oft-upheld statute that strips district courts of jurisdiction over challenges to final removal orders and channels review to immigration courts and then the federal courts of appeals. That congressionally designed review mechanism is established and effective. The district court's decision usurping the authority of the immigration courts is manifestly erroneous and should be rejected.

To start, this Court should vacate the preliminary injunction because the district court had no jurisdiction over this case and so had no authority to grant relief at all. Under 8 U.S.C. § 1252(g), "no court"—except a federal court of appeals reviewing an administrative decision—"shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action . . . to . . . execute removal orders." Section 1252 strips the district court of jurisdiction over petitioners' case, which directly attacks the execution of removal orders. Yet the district court held that applying that provision here would suspend the writ of habeas corpus in violation of

the Constitution's Suspension Clause, *see* U.S. Const. Art. I, § 9, cl. 2, by depriving petitioners of judicial review before they are removed. That was wrong. The Suspension Clause does not even come into play here because petitioners do not seek a cognizable application of habeas: petitioners do not seek release from custody, but instead seek to halt their removals and remain in custody. And rather than exhaust their readily available individual remedies, petitioners have obtained class-wide relief based on speculation about factual circumstances that individuals would face in Iraq, a process that defies traditional habeas—which requires exhaustion, does not traditionally permit class-wide relief, and is not a forum to re-litigate factual issues. And even if the Suspension Clause were triggered, it would be satisfied because Congress created an adequate and effective alternative to district-court habeas review—the well-established scheme of immigration-court review with extensive procedural protections and with judicial review in the federal courts of appeals.

Even if the district court had jurisdiction, this Court would still need to vacate the injunction because petitioners' due-process claims—on which the injunction rests—are meritless. Petitioners contend that they should not be removed to Iraq because country conditions have changed and put them at risk of torture and death. The immigration courts and Board of Immigration Appeals (BIA) provide robust procedures to address these very claims—indeed, they adjudicate such claims every day. Petitioners can move the immigration courts or the BIA to reopen their proceedings,

to stay their removals, and to adjudicate their claims about changed country conditions. And those courts would look at the individual circumstances presented by the alien petitioner, rather than speculate—as the district court did here—about potential harm that a class member might face. Those procedures afford all that the Due Process Clause requires: a right to be heard at a meaningful time and in a meaningful manner. The district court was concerned that petitioners could be removed to a dangerous country without necessarily obtaining a pre-removal adjudication of their motions to reopen. But petitioners can seek exigent relief in immigration court and those courts are fully capable of addressing the claims. Moreover, petitioners long had the opportunity to raise their current claims in the immigration courts or the BIA. They have by their own allegations known since 2014 that conditions in Iraq have changed. Their failure to use existing legal procedures does not establish that the government has denied them due process.

Finally, even if the district court were correct to order some injunctive relief, the injunction that it issued is plainly overbroad and should be narrowed. The injunction applies nationwide to over 1,400 Iraqi nationals without regard to when they received their removal orders or what type of relief is available to them. The injunction also inexplicably lasts through the entire motion-to-reopen process and up to the federal appellate courts, even though any injunctive relief should at those stages come—if at all—from those courts with jurisdiction over the removal litigation. The injunction also

imposes baseless and burdensome document-production requirements upon the government. At the least, this Court should substantially narrow the injunction.

STATEMENT OF JURISDICTION

This is an appeal from a preliminary injunction entered on July 24, 2017. The government filed a timely notice of appeal on September 21, 2017. Notice of Appeal, RE 108, Page ID #2812. *See* Fed. R. App. P. 4(a)(1)(B). The Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1).

As explained below, however, the district court does not have jurisdiction over this ongoing case and it lacked authority to enjoin the government's execution of final removal orders. *See infra* Part I. In 8 U.S.C. § 1252(g), Congress stripped district courts of jurisdiction over claims attacking the government's decision to execute final removal orders. All claims arising out of removal proceedings must be brought in the administrative immigration courts and appealed to the federal courts of appeal on petitions for review. 8 U.S.C. § 1252(a)(5), (b)(9).

STATEMENT OF THE ISSUES

This case presents three legal issues for review:

(1) Did the district court err in exercising jurisdiction over this case challenging the government's execution of final removal orders against petitioners, when: (a) under 8 U.S.C. § 1252(g), "no court"—except the federal courts of appeals on review of a final removal order—"shall have jurisdiction to hear any cause or claim by or on behalf

of any alien arising from the decision or action . . . to . . . execute removal orders"; and (b) federal law provides comprehensive alternative procedures by which petitioners could challenge the execution of their removal orders?

(2) Even if the district court possessed jurisdiction over this case, did it err in ordering preliminary injunctive relief based on petitioners' procedural-due-process claims where: (a) petitioners have (and have long had) an avenue to seek relief against their removal orders by moving to reopen their removal proceedings and to stay their removals, and there was no evidence that these procedures had failed to protect the interests of any petitioner who had attempted to use them before being detained for removal; and (b) an injunction severely undermines the federal government's enforcement and removal operations and negates multiple statutory provisions?

(3) Even if the district court should have issued some preliminary injunctive relief, should the injunction barring removal of all Iraqi nationals possessing removal orders be narrowed where: (a) many Iraqi nationals who benefit from the injunction independently have available to them—or have already been afforded—the process and entitlements that the injunction ostensibly gives them; (b) the injunction extends through multiple levels—and many months if not years—of administrative and judicial review, even though other forums could issue any further injunctive relief that is appropriate; and (c) the injunction requires a burdensome production from the

government of hundreds of files and records to individuals that have no logical bearing on the relief petitioners seek.

STATEMENT OF THE CASE

Factual Background. For many years it was difficult for the government to remove Iraqi nationals to Iraq. Schultz Decl., RE 81-4, Page ID #2006. From 2009 through 2016, for example, Iraq would accept only those of its nationals who had unexpired passports and only those returning via commercial flights. *Id.*, Page ID #2007. As a result, many Iraqi nationals who had been ordered removed remained in the United States under the supervision of United States Immigration and Customs Enforcement (ICE). TRO Op., RE 2, Page ID #498–99.

After renewed discussions between the United States and Iraq this year, however, Iraq changed its approach and "agreed to the . . . return of its nationals subject to final orders of removal through use of chartered flights." Schultz Decl., RE 81-4, Page ID #2006. In April 2017, ICE conducted its first charter removal mission to Iraq since 2010, to remove eight Iraqi nationals. *Id.*

A second charter mission was scheduled for late June 2017. *Id.* In mid-June 2017, ICE began taking into custody about 200 Iraqi nationals with final removal orders, to prepare to remove them. Jurisdiction Op., RE 64, Page ID #1226. Of the 234 Iraqi nationals who were in custody when the district court entered its preliminary injunction, 114 were residing in the Detroit area and the rest in other states across the

country. *See* Op. and Order Granting Prelim. Inj. ("Op."), RE 87, Page ID #2324. Nationwide, over 1,400 Iraqi nationals are subject to final removal orders as of July 24, 2017, the date of the preliminary-injunction order. *See* Mot. for Preliminary Injunction, RE 77, Page ID #1717.

Procedural History. On June 15, 2017, petitioners filed a putative class-action habeas petition and a motion for a temporary restraining order in the Eastern District of Michigan, asking the district court to halt their removal to Iraq based on allegedly changed conditions in that country. *See* Habeas Petition, RE 1, Page ID #1-26; TRO Motion, RE 11, Page ID #45–80. Petitioners alleged that ISIS had taken over Iraq's second-largest city in June 2014, committing slaughter and atrocities and forcing the flight or forcible conversion of thousands of Christians and other residents. Mot. for Preliminary Injunction, RE 77, Page ID #1720; *see also* Habeas Petition, RE 1, Page ID #1-24.; TRO Mot., RE 11, Page ID #45–175. A week later, the district court "stayed the Government's execution of Petitioners' final orders of removal pending" the court's "determination" whether it had subject-matter jurisdiction over the case. Order, RE 32, Page ID #497–502. The court later expanded its stay to Iraqi nationals nationwide. Order, RE 43, Page ID #671–76; Order, RE 61, Page ID #1195–97 (extending stay).

In an amended habeas petition filed shortly after the initial stay was entered, petitioners alleged that the district court had jurisdiction on several grounds. *See* First Am. Habeas Pet., RE 35, Page ID #509-48. Petitioners claim jurisdiction under the

federal habeas statute, 28 U.S.C. §§ 2241 *et seq.* Petitioners further claim jurisdiction under the Suspension Clause of the United States Constitution, which provides: "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. Petitioners also cite the general federal-question jurisdiction statute, 28 U.S.C. § 1331; the mandamus statute, 28 U.S.C. § 1361; the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*; Article III and Amendment V of United States Constitution; and "the common law." *Id.*, Page ID #515.

Petitioners sued on behalf of a putative class 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." *Id.*, Page ID #538. The amended petition contains four claims. *Id.* Count One alleges that petitioners "face persecution and/or torture if removed to [Iraq] in light of changed circumstances since their cases were first considered" and contends that the government "ha[s] a mandatory duty under the [Immigration and Nationality Act (INA)] and under the international treaties to which the U.S. is a signatory [the Convention Against Torture (CAT) codified through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)] to determine for each Plaintiff/Petitioner and members of the class will face persecution, torture, or death if deported to Iraq." *Id.*, Page ID #542. Count Two alleges that petitioners "have a right" under the Fifth

Amendment's Due Process Clause "to a fair proceeding before they are removed from the country" and that "because the danger to Plaintiffs/Petitioners in Iraq is based on changed country conditions, they have not received their core procedural entitlement" since their removal orders are not based on "current conditions" but instead on "the conditions that existed at the time their removal order was first issued." *Id.*, Page ID #543. Count Three alleges that "ICE's decision to transfer Plaintiffs/Petitioners who reside in one state to detention centers that are hundreds of miles away . . . is interfering with their statutory right to counsel and their due process right to a fair hearing." *Id.*, Page ID #544; *see also id.*, Page ID #543–44. Count Four alleges that "Petitioners' detention violates due process" because it "bears no reasonable relationship" to "the government's purpose—effectuating removal and protecting against danger." *Id.* at 36, Page ID #544.

On July 17, 2017, the district court concluded that it had jurisdiction over petitioners' claims. Jurisdiction Op., RE 64, Page ID #1247. The district court recognized that "[b]ecause 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." *Id.*, Page ID #1241. The district court concluded, however, that Congress's chosen process for the review of removal orders—seeking relief in the administrative immigration courts with judicial review in the federal courts of appeals—

would violate the Suspension Clause as applied here because that process would not permit petitioners to present their claims. *Id.*, Page ID #1247. The court believed that the sudden change in policy for such a large group of people made it hard for petitioners to obtain counsel, and that the transfers of several petitioners between detention facilities "exacerbate[d] this problem, as it disrupt[ed] attorney-client communications and preparation of necessary court papers." *Id.*, Page ID #1245.

Thereafter, petitioners moved for a preliminary injunction, asking the district court to "grant a preliminary stay that gives them three months from receipt of their A[lien] files [A-files] and Records of Proceedings [ROPs] to file a motion to reopen." Mot. for Preliminary Injunction, RE 77, Page ID #1745.[1] Petitioners maintained that they need their A-files and ROPs "to properly frame both factual and legal arguments for [filing motions to] reopen[]." *Id.*, Page ID #1708. Petitioners sought a stay of removal for petitioners and putative class members who elect to file motions to reopen, with that stay lasting "until the immigration court and the BIA adjudicate the motion,

[1] A-files are files maintained by DHS that contain an alien's immigration and naturalization records. An A-file typically includes attorney notes as well. Resp'ts Status Report, RE 96, Page ID #2577. An ROP is the official file of the documents relating to an alien's immigration-court proceedings. Executive Office of Immigration Review, *The Immigration Court Practice Manual* Ch. 4.10(c), https://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf. (last accessed Nov. 18, 2017). The contents of ROPs vary, but generally include "application(s) for relief, exhibits, motion(s), brief(s), hearing tapes (if any), and all written orders and decisions of the Immigration Judge." *Id.*

and the Petitioner has had the opportunity to file a petition for review and seek a stay with the Court of Appeals." *Id.* Petitioners also moved to certify a provisional class. RE 83, Page ID #2061–69.

On July 24, 2017, the district court issued an opinion and order granting petitioners a nationwide preliminary injunction. The injunction prevents the government from enforcing final removal orders against Iraqi nationals and requires the government to produce extensive discovery. *See* Op., RE 87, Page ID #2355–56. Three elements of that opinion are central to this appeal.

First, the district court again concluded that it has subject-matter jurisdiction over this case. *See id.*, Page ID #2334–43. The court reiterated its conclusion, reached in its prior jurisdictional opinion, that "[u]nder ordinary circumstances, the REAL ID Act [8 U.S.C. § 1252(g)] would apply to divest" the court "of jurisdiction." *Id.*, Page ID #2338. But the court also again concluded that applying the Act here would improperly suspend the writ of habeas corpus by precluding the "judicial intervention in deportation cases" that the Clause requires, without providing an "adequate and effective" way to challenge the alleged illegality of petitioners' removal. *Id.*, Page ID #2339; *see also id.,* Page ID #2334.

The district court rejected the government's argument that, because "Petitioners are not challenging the fact of their detention," they had failed to raise a cognizable habeas claim that would trigger the Suspension Clause. *Id.*, Page ID #2336; *see also id.,*

Page ID #2334-37. The court explained that the parties cited no cases "regarding habeas jurisdiction in immigration cases" [where] "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." *Id.*, Page ID #2336; *see also id.*, Page ID #2335–37 (addressing cases).

The district court also rejected the government's argument "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." *Id.*, Page ID #2337; *see also id.,* Page ID #2337–43. The court concluded that "the confluence of events in this case would effectively foreclose th[e] route [of filing motions to reopen and motions to stay at the administrative level] for many Petitioners without intervention by the Court." *Id.*, Page ID #2337; *see also id.*, Page ID #2340 (similar). To start, the district court pointed to "[t]he sudden decision to detain Petitioners in facilities far from home and with limited phone access." *Id.* "The shortcomings of th[e] facilities [in which petitioners are detained], along with ICE's successive transferring to different facilities in order to facilitate removal, has either prevented Petitioners from filin[g] motions altogether, or caused them to sacrifice the quality of their filings in light of the pace at which the Government is moving." *Id.* Next, the district court noted that petitioners have "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." *Id.*, Page ID #2341. The court believed that petitioners' "status as religious minorities" and "affiliation with the United States" put them "at grave risk of torture and other forms of persecution at the hands of ISIS," and that petitioners who face mistreatment will be unable in Iraq "to vindicate their habeas rights." *Id.* The court deemed "unpersuasive" the suggestion that petitioners should have previously pursued motions to reopen, given that "[t]he earliest Iraq's changed conditions became apparent to Petitioners was 2014" as ISIS took greater control of the county, that at that time "Iraq's refusal generally to accommodate removals led Petitioners . . . to reasonably conclude that filing a motion to reopen was an academic exercise," and that "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." *Id.,* Page ID #2342. "These circumstances" led the court "to hold that the REAL ID Act violates the Suspension Clause, as applied" in this case. *Id.*

Second, the district court ruled that petitioners were entitled to a preliminary injunction. *See* Op., RE 87, Page ID #2343–55. Starting with petitioners' likelihood of success, the district court first rejected petitioners' argument that the INA or other federal statutes "grant[] them the right to file motions to reopen based on changed country conditions and to have these motions adjudicated prior to their removal." *Id.*,

Page ID #2345; *see also id.*, Page ID #2344–47. The district court then held, however, that petitioners were likely to succeed on their Fifth Amendment Due Process Clause claims that their "access to the administrative system" had been "impeded." *Id.,* Page ID #2351; *see also id.*, Page ID #2347–52.[2] The court emphasized several factors that, in its view, combined to "significantly imped[e]" petitioners "from filing motions to reopen": "the large number of Iraqis simultaneously affected by th[e] sudden change in policy [regarding repatriation of Iraqis]"; "the intensive time and logistic pressures placed on the immigration bar in preparing necessary filings"; "the interference with attorney-client communications as detainees are shuttled around the country"; "the significant cost of the legal work"; and "the difficulty that Petitioners would face trying to present their claims from foreign soil if they were removed prior to adjudication." *Id.*, Page ID #2351; *see also id.,* Page ID #2348–51. The district court added that these points reaffirmed its prior conclusion "that the right of habeas corpus would be significantly compromised without according pre-removal adjudication." *Id.,* Page ID #2352.

The district court then concluded that the other equitable factors supported preliminary injunctive relief. *See* Op., RE 87, Page ID #2352–55. In the court's view,

[2] The district court did not single out a specific count of the petition, but instead seemed to amalgamate the petition's due-process arguments. *See* Op., RE 87, Page ID #2347–52.

petitioners had demonstrated irreparable harm: "the risk of persecution, torture, and death they face if removed to Iraq." *Id.,* Page ID #2352; *see also id.*, Page ID #2352–54. And the court "disagree[d]" that the government's interest in "prompt, efficient removal" outweighed petitioners' claims of irreparable harm. *Id.*, Page ID #2354.

Third, the district court issued a nationwide preliminary injunction. *See* Op., RE 87, Page ID #2355–56. That injunction bars the government 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 or removed by ICE." *Id.*, Page ID #2355. The court then ordered that "[t]he 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 several events, including: "a class member's failure to file a motion to reopen" "not later than ninety days following [the government's] transmittal to the class member of the A-file and ROP pertaining to that class member"; "a class member's failure to timely appeal to the BIA a final adverse ruling from an immigration judge"; "a class member's failure to timely file a petition for review with the appropriate" federal court of appeals following an adverse BIA order "together with a motion for a stay"; "the denial of a motion for a stay filed by" a federal court of appeals; or "a class member's consent that" the preliminary injunction "be terminated as to that class member." *Id.,* Page ID #2355–56. The court further ordered the government, "[a]s soon as practicable," to "transmit

to each class member that class member's A-file and ROP, unless that class member advises [the government] that he or she will seek to terminate" the preliminary injunction "as to that class member." *Id.,* Page ID #2356.[3]

This timely appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred in granting a preliminary injunction. This Court should vacate that injunction and remand with instructions to dismiss this case. If the Court reaches the merits, it should still vacate the district court's injunction. At the least, the Court should order the district court to significantly narrow the injunction.

I. This Court should vacate the preliminary injunction because the district court lacks jurisdiction over this case and so it lacked authority to grant injunctive relief at all. Under 8 U.S.C. § 1252(g), "no court"—except a federal court of appeals reviewing an administrative decision—"shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action . . . to . . . execute removal orders." The district court recognized that this provision strips district courts of jurisdiction over claims, like petitioners', that attack the execution of final removal orders. Yet the district court concluded that applying that jurisdictional bar here would

[3] The district court granted the injunction without ruling on class certification. Op., RE 87, Page ID #2355 n.13. In a footnote, the court stated that "[g]iven 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." *Id.*

violate the Constitution's Suspension Clause. That is wrong. First, the claims and relief requested here are not a proper application of the writ of habeas corpus, let alone such a core application that would trigger the Suspension Clause and render invalid the exclusive judicial-review process established by Congress. Second, even if the Suspension Clause were triggered and so could apply to Congress's decision to consolidate judicial review of claims arising out of removal proceedings, *see* 8 U.S.C. § 1252(b)(9), there would be no Suspension Clause violation because that review mechanism is fully adequate to consider petitioners' individual claims.

II. Even if the district court correctly exercised jurisdiction over this case, this Court should still vacate the preliminary injunction. *First,* the district court erred in ruling that petitioners are likely to succeed on the merits of their due-process claims. Due process requires that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976). Petitioners' core basis for reopening their removal proceedings is the alleged rise of ISIS *in 2014*. The administrative-review process is—and has been—well-equipped to address those claims and to give petitioners all that the Due Process Clause requires. That petitioners delayed seeking relief from removal to Iraq until they had been taken into pre-removal custody did not deprive them of the opportunity to be heard "at a meaningful time and in a meaningful manner," and so does not violate the Due Process Clause. *Id.* at 332. The administrative-review process for considering their

motions, with the availability of obtaining a stay and judicial review by a court of appeals, is fully adequate to adjudicate petitioners' claims for relief. *Second*, the district court erred in concluding that petitioners risked suffering irreparable harm at the hands of ISIS without the requested relief. Petitioners did not establish (and cannot establish now) that any of them would be removed to ISIS-controlled areas of Iraq. *Third*, the district court erred in assessing the balance of harms and public interest. Impeding removals to a country significantly disrupts ICE's removal operations and the orderly immigration enforcement regime crafted by Congress.

III. Even if the district court should have issued some injunctive relief, the relief that it granted is plainly overbroad and should be significantly narrowed. The court imposed nationwide relief for *all* Iraqi nationals with final removal orders—without regard to whether such sweeping relief was useful to or appropriate for many of those nationals, and without regard to the material differences in the removal orders at issue. The district court also imposed onerous document-production requirements on the government that are not necessary—or even related—to a fair reopening proceeding, but merely delay the immigration courts' consideration of reopening requests and ICE's ability to effectuate removals.

STANDARDS OF REVIEW

This Court reviews questions of subject-matter jurisdiction de novo. *See Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788, 798 (6th Cir. 2012). The district court's decision

to issue a preliminary injunction is reviewed for an abuse of discretion. *See S. Glazer's Distribs. of Ohio, L.L.C. v. Great Lakes Brewing Co.*, 860 F.3d 844, 854 (6th Cir. 2017). A district court necessarily abuses its discretion when it commits an error of law. *Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, L.L.C.*, 774 F.3d 1065, 1071 (6th Cir. 2014). "Whether the movant is likely to succeed on the merits is a question of law . . . review[ed] de novo." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam). District-court factual findings are reviewed for clear error. *See Max Trucking, L.L.C. v. Liberty Mut. Ins. Corp.*, 802 F.3d 793, 803 (6th Cir. 2015).

ARGUMENT

I. This Court should vacate the preliminary injunction because the district court lacked jurisdiction over this case.

This Court should vacate the preliminary injunction because the district court had no authority to grant relief at all. The INA eliminates district-court jurisdiction—in favor of federal-appellate-court jurisdiction under special conditions—over claims attacking DHS's execution of final removal orders, such as the claims brought by petitioners here. The district court recognized this, Op., RE 87, Page ID #2338, yet it held that applying the INA's jurisdictional bar here would violate the Constitution's Suspension Clause. That is wrong. Petitioners do not seek core habeas relief, so the

Suspension Clause does not even apply. And even if the Clause applied, it would be satisfied because Congress provided a fully adequate alternative to habeas relief.

A. The INA bars the district court from exercising jurisdiction over petitioners' claims because those claims attack the execution of final removal orders.

The district court correctly concluded that 8 U.S.C. § 1252(g) bars petitioners' claims as a matter of federal statutory law. *See* Op., RE 87, Page ID #2338.

In 8 U.S.C. § 1252, Congress made two rules clear. *First*, federal district courts lack subject-matter jurisdiction over claims attacking the federal government's decision to enforce a final removal order. Under section 1252(g), except as otherwise provided in section 1252, "*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 [Secretary of Homeland Security] to . . . execute removal orders against any alien." 8 U.S.C. § 1252(g) (emphases added).[4] Instead, judicial review is provided through the familiar petition-for-review process in the federal courts of appeals, and the immigration courts, the BIA, and courts of appeals have ample authority to halt the execution of a removal order. *See id.* §§ 1252(a)(1), (b)(3)(B); *see also* 8 C.F.R. §§ 1003.2(f), 1003.6(b), 1003.23(b)(1)(v). Section 1252(g)'s jurisdictional bar applies "notwithstanding any other provision of law (statutory or

[4] The Attorney General once exercised this authority, but that authority has been transferred to the Secretary of Homeland Security. *See Clark v. Martinez*, 543 U.S. 371, 375 n.1 (2005). Many of the INA's references to the Attorney General are now understood to mean the Secretary. *See id.*

nonstatutory)"—"[e]xcept as" otherwise "provided in" section 1252. *Id.* This unequivocal language protects the government's authority to make "discretionary determinations" over whether and when to execute a removal order, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999), and reaches constitutional claims. *Elgharib v. Napolitano*, 600 F.3d 597, 606 (6th Cir. 2010) ("[T]he Constitution qualifies as 'any other provision of law (statutory or nonstatutory)' under all subsections of § 1252.").

Second, section 1252 otherwise provides that claims arising from the removal process, including a claim seeking review of a final removal order, must first be exhausted administratively and then ultimately channeled to the federal courts of appeals through petitions for review. 8 U.S.C. § 1252(d)(1). That section specifies that a petition for review is the "*sole and exclusive* means for judicial review of an order of removal." *Id.* § 1252(a)(5) (emphasis added); *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."). Aliens can obtain review, reopening, or stays of removal orders—but *only* through the established administrative-review process, with judicial review available in the federal courts of appeals. The immigration courts and the BIA have authority to adjudicate motions to reopen removal proceedings on the basis of

"new facts," 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3), and to grant stays of the execution of removal, *id.* §§ 1003.2(f), 1003.23(b)(1)(iv).

Section 1252 provides further that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the" Convention Against Torture. 8 U.S.C. § 1252(a)(4). This holds true "[n]otwithstanding any other provision of law (statutory or nonstatutory)." *Id.* Moreover, even the courts of appeals may review a cognizable claim "only if [] the alien has exhausted all administrative remedies available as of right." *Id.* § 1252(d)(1). Section 1252(b) adds that review of "all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available *only* in judicial review of a final order under this section." *Id.* § 1252(b)(9) (emphasis added). In exigent circumstances the forum for federal court review is through this process, not a habeas case. *See*, *e.g.*, *Khan v. Att'y Gen.*, 691 F.3d 488, 491 (3d Cir. 2012) ("grant[ing] the petitioners a temporary stay of removal" where petitioners alleged that the BIA had not yet "adjudicated their motion" that was filed "within hours of [the alien's] scheduled removal").

These statutes preclude the district court from exercising jurisdiction over the claims on which petitioners moved for a preliminary injunction. Petitioners challenge the execution of their final removal orders. *See, e.g.*, Mot. for Preliminary Injunction, RE 77, Page ID #1709. (requesting a stay "barring the removal of petitioner class

members"). Petitioners are thus aliens with "removal orders against" them, this case arises because of DHS's "decision[s] or action[s]" to "execute removal orders" against them, and the claims upon which petitioners moved for an injunction challenge those "decision[s] or action[s]." 8 U.S.C. § 1252(g). Section 1252(g) unambiguously directs that "no court shall have jurisdiction" to hear these "claim[s]" in the first instance. *Id.* Petitioners must instead seek relief in the immigration courts and before the BIA, where they can move to reopen their removal proceedings based on changed country conditions and move to stay their removals. 8 C.F.R. §§ 1003.2, 1003.23. To the extent that petitioners ultimately seek judicial review regarding their "order[s] of removal," they must file petitions for review with the federal courts of appeals. 8 U.S.C. § 1252(a)(5), (d)(1); *see also id.* § 1252(a)(4) (same for CAT claims); *id.* § 1252(b)(9) (emphasizing the breadth of this rule). But petitioners cannot seek relief in federal district court.

B. The INA's jurisdictional bar of petitioners' claims is consistent with the Constitution's Suspension Clause.

The district court correctly recognized that in 8 U.S.C. § 1252(g) Congress eliminated district-court jurisdiction over challenges like petitioners'. *E.g.*, Jurisdiction Op., RE 64, Page ID #1234–35. But the court concluded that the Suspension Clause requires the exercise of habeas jurisdiction here given what it regarded as the "extraordinary circumstances" present. *Id.,* Page ID #1225.

This Court should reject that conclusion. There is no support for such a broad and novel application of the Suspension Clause. And in any event, the Suspension Clause does not create jurisdiction where there is an adequate substitute to habeas relief, and the substitute that Congress designed—review by the immigration courts, BIA, and federal appellate courts—is entirely adequate. Applying section 1252(g) here is appropriate and constitutional.

1. The claims and relief that petitioners seek are not a core application of the writ of habeas corpus, so the claims do not trigger the Suspension Clause at all.

As a threshold matter, the Suspension Clause is not even triggered here because petitioners fail to seek relief that is properly cognizable in habeas.

The Suspension Clause protects core applications of the writ of habeas corpus. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (explaining that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789'" and then analyzing the protections of the writ "[a]t its historical core"). "Habeas is at its core a remedy for unlawful executive detention," and "[t]he typical remedy for such detention is, of course, release." *Munaf v. Geren*, 553 U.S. 674, 693 (2008); *see, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (similar); *St. Cyr*, 533 U.S. at 301 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.").

The claims and relief requested here are fundamentally different from a traditional habeas claim. In seeking a preliminary injunction, petitioners did not challenge their 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." Mot. for Preliminary Injunction, RE 77, Page ID #1707–08; *cf. Munaf*, 553 U.S. at 692, 693–94, 697 (habeas not available to prisoners who did not object to being held in U.S. custody, but rather only to being released into Iraq). And the relief ordered by the district court—a stay of removal, Op., RE 87, Page ID #2355—did not result in the release from custody. So petitioners did not seek a traditional exercise of habeas jurisdiction that is protected by the Suspension Clause. That Clause thus does not even come into play in this case.

It is true that before the INA's enactment in 1952, habeas review was the only mechanism to challenge a deportation order, *St. Cyr*, 533 U.S. at 306, because immigration was a purely administrative determination and there was no statutory avenue to challenge "the Executive's decisions to admit, exclude, or deport aliens," *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 436 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017). To avoid a scenario where the Executive could exclude or deport

aliens based on wholly arbitrary or capricious reasons or procedures, the Supreme Court adopted the principle that the statute "had the effect of precluding judicial intervention in deportation cases *except insofar as it was required by the Constitution*." *Heikkila v. Barber*, 345 U.S. 229, 234–35 (1953) (emphasis added); *accord St. Cyr*, 533 U.S. at 300 (quoting *Heikkila*, 345 U.S. at 235). Importantly, though, in the traditional challenge to a deportation order, the alien was arguing that removing him from the country was not permitted, and thus that his detention in aide of that removal was unlawful and he was entitled to be released into the country—*i.e.*, traditional habeas relief. *See, e.g.*, *Heikkila*, 345 U.S. at 230 (holding that the statute authorizing the alien's deportation was unconstitutional); *cf. St. Cyr*, 533 U.S. at 293 (holding that the basis for denying a waiver of deportation was legally erroneous). That is not what this injunction involves.

Other features of petitioners' request for preliminary relief and the district court's preliminary-injunction order underscore how unconventional petitioners' purported habeas claims are—and so confirm that the Suspension Clause is not triggered here.

First, in conflict with settled habeas principles, petitioners have not exhausted available remedies, but seek habeas in advance and in lieu of exhausting such remedies. It is a fundamental that before seeking relief under the habeas writ, administrative remedies must be exhausted. *See Boumediene v. Bush*, 553 U.S. 723, 793 (2008) ("in other contexts and for prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief"); *Schlesinger v. Councilman*, 420

U.S. 738, 758 (1975) ("federal courts normally will not entertain habeas petitions . . . unless all available . . . remedies have been exhausted"). And an exhaustion requirement "is in no sense a suspension of the writ of habeas corpus" *Gusik v. Schilder*, 340 U.S. 128, 132 (1950). Petitioners here have done the opposite by seeking relief in the district court rather than using the process available in the immigration courts, BIA, and federal appellate courts.

Second, petitioners claims' are based on allegedly changed factual circumstances, *see* Mot. for Preliminary Injunction, RE 77, Page ID #1718, which is not a core use of habeas. Petitioners claimed that unless the district court halted their removals, they would be unable to alleged changed conditions in Iraq in motions to reopen filed in immigration court. Even if petitioners were correct (and they are not, because they were just as able to seek reopening there as relief in the district court here, *see infra* Part I.B.2), factual review is not a traditional role for a habeas court in immigration cases. *St. Cyr*, 533 U.S. at 305–06. Under traditional immigration habeas jurisdiction, "other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive." *Id.* at 306. This is because at "its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention," *id.* at 301, not the factual justification for removal. *See also id.* at 301 n.14 ("[a]t common law . . . an attack on an executive order could raise all issues relating to the legality of the detention"). *A fortiori*, it is not

a traditional use of habeas relief to halt the execution of a valid removal order to enable factual claims to be asserted in another forum. *See id.* (at ratification, habeas "encompassed detentions based on errors of law"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("the final determination of those facts may be in trusted by congress to executive officers," and "no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted").

Third, although petitioners attack Congress's channeling mechanism, traditional habeas does not preclude such a mechanism. Petitioners are subject to valid removal orders. Congress has leeway in establishing procedures to collaterally attack final orders, and traditional habeas does not preclude limitations or channeling of that kind of collateral review. *Cf. Felker v. Turpin*, 518 U.S. 651, 664 (1996) (a modified res judicata rule falls well within the evolving principles involved in "abuse of the writ" doctrine and does not violate the Suspension Cause). Petitioners could have sought review (in federal court) in Congress's alternative mechanism for years before execution.

Fourth, petitioners' effort to seek class-wide relief falls outside the traditional use of habeas. The only power a modern habeas court arguably has that the petition-for-review scheme lacks is the ability to provide class-wide relief, rather than individual relief based on the specific factual circumstances presented by an individual who thinks that reopening of his or her removal order is warranted and a stay or removal justified.

But the Supreme Court has questioned the availability of class-wide relief in habeas, showing that such relief was not a feature of the writ at common law and that its absence, therefore, does not effect a suspension of the writ as it existed in 1789—or even today. *See Schall v. Martin*, 467 U.S. 253, 260 n.10 (1984) ("[w]e have never decided" whether Rule 23 "is applicable to petitions for habeas corpus relief").

Finally, immigration courts normally play the central role in protecting noncitizens in cases of immigration detention, and courts have approved of that system without requiring federal-court intervention in individual cases. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1077 (9th Cir. 2015) (in habeas case challenging immigration detention, explaining that "the discretion to release a non-citizen on bond or other conditions remains soundly in the judgment of the immigration judges the Department of Justice employs"), *cert. granted sub nom. Jennings v. Rodriguez,* 136 S. Ct. 2489 (2016); *cf. Swain v. Pressley*, 430 U.S. 372, 382–83 (1977) (D.C. superior court judges who lack life tenure are "presume[d] . . . neither ineffective nor inadequate" to address habeas claims in substitute habeas remedy). This traditional primary role for the immigration courts in protecting the liberties of aliens confirms that Congress's review-channeling does not trigger the Suspension Clause.

Despite the authority and considerations set forth above, the district court concluded "that Petitioners have raised a cognizable habeas claim," Op., RE 87, Page ID #2337, even though they "are not challenging the fact of their detention," *id.*, Page

ID #2336. The district court explained that the parties had not cited a case "regarding habeas jurisdiction in immigration cases" where "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." *Id.*, Page ID #2336; *see id.,* Page ID #2335–36 (discussing *Munaf*, 553 U.S. 674, and *Kiyemba v. Obama*, 561 F.3d 509 (D.C. 2009)).

The district court provided no affirmative argument for its conclusion, which is rebutted by the authority and considerations detailed above. And the court erred when it tried to paper over key points in *Munaf* and *Kiyemba* just because those cases involved different facts. *See* Op., RE 87, Page ID #2336. *Munaf* examined "the nature of the relief sought" by the petitioners and concluded that "habeas was not appropriate" because "the last thing petitioners want is simple release" but instead "a court order requiring the United States to shelter them." 561 F.3d at 693–94. That conclusion undermines the district court's Suspension Clause ruling here. In moving for an injunction, petitioners here did not seek release from custody, but rather a court order protecting them from removal—in effect, an order continuing their detention. "[H]abeas is not [an] appropriate" hook for petitioners' claims. *Id.* at 693.

And in *Kiyemba* the D.C. Circuit held that habeas was unavailable for claims that sought the prevention of transfer to a country where the petitioners alleged that they were likely to be tortured, detained, or persecuted. 561 F.3d at 516. The district court

here distinguished *Kiyemba* on the ground that, unlike the enemy-combatant petitioners in *Kiyemba*, "Petitioners here are participants in the immigration process, who wish to raise CAT/FARRA arguments to challenge the present enforcement of their removal orders." Op. 14, RE 87, Page ID #2336. But that distinction is irrelevant to *Kiyemba*'s unqualified holding that "the district court may not issue a writ of habeas corpus to shield a detainee from prosecution or detention at the hands of another sovereign on its soil and under its authority." 561 F.3d at 516. That distinction defeats the view that petitioners seek a core use of habeas that is cognizable under the Suspension Clause.

The district court failed also to distinguish between statutory and constitutionally protected habeas relief. That distinction is critical here because the Suspension Clause protects core habeas as it existed at common-law. *St. Cyr*, 533 U.S. at 301. Noting that *Munaf* and *Kiyemba* held that there was habeas jurisdiction over the claims in those cases challenging transfers, the district court thought that those holdings refuted the government's position that petitioners' transfer-related claims here are not cognizable in habeas. *See* Op., RE 87, Page ID #2335–36. But the district court failed to recognize that both those cases relied on *statutory* habeas under 28 U.S.C. § 2241. *See Munaf*, 553 U.S. at 685 n.2 ("These cases concern only . . . the statutory reach of the writ."); *see also, Kiyemba*, 561 F.3d at 513–18. Statutory habeas is broader than the writ of habeas as it existed at common-law. *See Rasul v. Bush*, 542 U.S. 466, 474 (2004) (recognizing that the "habeas statute clearly has expanded habeas corpus 'beyond the limits that obtained

during the 17th and 18th centuries"'). Even exercising statutory habeas, both courts held that a claim seeking to bar transfer did not state a claim for habeas relief. *See Munaf*, 553 U.S. at 692–99; *Kiyemba*, 561 F.3d at 516. So neither case supports the district court's conclusion here that there is a *constitutionally* protected habeas right at issue precluding removal to Iraq. And as *Kiyemba* explained, under 8 U.S.C. § 1252(a)(4), CAT claims are enforceable only in the context of a challenge to a final removal order. 561 F.3d at 514–15. Statutory habeas jurisdiction thus does not extend to CAT claims. *See* 8 U.S.C. § 1252(g) (no jurisdiction, including under habeas, to challenge execution of removal orders); *id.* § 1252(a)(4) (no jurisdiction, including under habeas, over CAT claims, except as raised in a petition for review of an order of removal). *A fortiori*, common-law habeas jurisdiction does not encompass such claims. Indeed, given that the United States did not sign and ratify CAT until the late 20th century, the district court was wrong to conclude that claims arising under CAT are part of the common-law habeas rights protected by the Suspension Clause.

In sum, petitioners' use of habeas to halt their removals is not so inherent in traditional habeas as to trigger the Suspension Clause. The district court erred in concluding otherwise.

2. Even if the Suspension Clause were triggered, it would be satisfied because the administrative motion-to-reopen process provides a fully adequate alternative to habeas.

Even if petitioners were seeking relief that could trigger the Suspension Clause, that Clause's requirements would be satisfied. Congress can, consistent with the Suspension Clause, foreclose a habeas remedy if it provides an adequate substitute. *See Muka v. Baker,* 559 F.3d 480, 483 (6th Cir. 2009) (Suspension Clause not violated where "there is the substitution of a new collateral remedy which is both adequate and effective") (internal citation omitted). Here, that substitute—the procedure of pursuing relief in the immigration courts and then review in the federal courts of appeals—has been widely held to be adequate and constitutional.[5] This procedure allows petitioners to move to reopen their removal proceedings, even years after their removal orders are final and enforceable, if circumstances have changed. 8 C.F.R. § 1003.23. No time or numerical limits apply to motions based upon materially changed conditions in the

[5] *See Muka,* 559 F.3d at 485 ("[b]ecause a petition for review provides an alien with the availability of the same scope of review as a writ of habeas corpus, . . . facially, the limitation on habeas corpus relief in the REAL ID Act does not violate the Suspension Clause."); *Iasu v. Smith*, 511 F.3d 881, 893 (9th Cir. 2007) ("[A] potential motion to reopen at the administrative level and the possibility of judicial review thereafter provides the necessary process to alleviate Suspension Clause concerns."); *Alexandre v. U.S. Att'y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006) (motion-to-reopen procedure with judicial review in courts of appeals "offers the same review as that formerly afforded in habeas corpus" and therefore "is adequate and effective") (internal citations omitted); *Luna v. Holder*, 637 F.3d 85, 97 (2d Cir. 2011) (similar); *Kolkevich v. Att'y Gen. of U.S.*, 501 F.3d 323, 332 (3d Cir. 2007) (similar).

country to which the alien will be removed. 8 U.S.C. § 1229a(c)(7)(C)(ii). Those courts are able to grant stays of removal in exigent circumstances, and are experts in addressing those circumstances.

The district court ruled that applying the REAL ID Act's jurisdiction-channeling provision here would violate the Suspension Clause because several factors frustrated petitioners' ability to access the administrative process. Op., RE 87, Page ID #2342. The court cited the "sudden decision to detain Petitioners in facilities far from home and with limited phone access," allegations that several attorneys had difficulties meeting with their clients in detention facilities, and "ICE's successive transferring [of petitioners] to different facilities in order to facilitate removal." *Id.*, Page ID #2340. Further, the court thought that if petitioners were "removed prior to their filing and adjudication of motions to reopen, their ability to seek judicial review in the courts of appeals [would] be effectively foreclosed" due to the "grave risk of torture and other forms of persecution" they faced if removed to Iraq. *Id.*, Page ID #2341.

These factors do not establish a Suspension Clause violation. To start, most of these purportedly "extraordinary" and "singular" circumstances (Op., RE 87, Page ID #2323–24) apply in any or most cases when an alien seeks to avoid removal based on changed country conditions. The access challenges and other difficulties that come with being detained before adjudication are common. All individuals subject to a final removal orders are subject to immigration detention during the removal period and

during the period necessary to execute removal, *see* 8 U.S.C. § 1231(a)(1)(A)–(C), and, once in detention, are subject to transfer for operational reasons. *See* Schultz Decl., RE 81-4, Page ID #2008–09. Importantly, to ensure that detention is not lengthy, *see Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), and to avoid the risk of absconding, ICE must take aliens subject to valid removal orders into custody close to the time it will effectuate the removal and that timing is critical to the effective operation of the removal system. Next, consider the impediments for those removed to Iraq before their motions to reopen were adjudicated: This feature would arise in *any* removal case involving a claim of torture in light of changed country conditions. *Every* case involving a motion to reopen citing changed country conditions involves a particularized allegation or allegations by an individual that removal would result in torture or persecution. In sum, these factors—the restrictions and challenges resulting from detention and the difficulty of seeking relief if removed—are ever-present realities of the immigration system. Yet the district court here is the first court to hold that these ever-present realities lead to a Suspension Clause violation. That was error.

Given the district court's view that its cited factors were all important to its Suspension Clause holding, the above is alone enough to reject that holding. But the district court erred further in relying on the purported barriers that it identified. The court vastly overstated any difficulties that petitioners faced in accessing counsel. Record evidence shows that policies at the various detention facilities allow broad

telephone access through which counsel can be obtained and consulted. *See* McGregor Decl., RE 81-7 ¶¶ 3–5, Page ID #2019–20 (access to phones); *see also* Carusso Decl., RE 82 ¶¶ 4–5, 7–12, Page ID #2055–56, 2058–60 (in-person visitation and phone access).

Rather than find a Suspension Clause violation, the district should have applied circuit precedent to reject petitioners' constitutional challenge. In *Muka* this Court dismissed an as-applied Suspension Clause challenge because the petitioners "[had] an avenue to argue their . . . claim," but had failed to use it when the opportunity presented itself. 559 F.3d at 485. The petitioners there "knew of the . . . argument [they wanted to raise] during the prior proceedings before both the IJ and the BIA and could have raised the argument at that time." *Id.* "Simply 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.*

So too here. Petitioners allege, and the district court concluded, that conditions in Iraq began to change in 2014. *See* Op., RE 87, Page ID #2328. Petitioners do not offer any concrete reason—through factual allegations in their operative petition or declarations attached to any of their relevant briefing—why individual claimants chose not to pursue a motion to reopen earlier if they believed they were entitled to relief from their removal orders based on these allegedly changed conditions. Indeed, petitioners do not allege that ICE promised never to remove them or to continue

merely to supervise them indefinitely. Petitioners' orders of supervision did not invalidate their final removal orders. *See* 8 U.S.C. § 1231(a)(3)(A); 8 C.F.R. § 241.5. And there is no basis to reasonably believe that the federal government's temporary inability to remove Iraqi nationals lacking travel documents gave rise to (1) a settled position of permanent relief from removal; or (2) the right to notice of removal so far in advance as to allow "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," Mot. for Preliminary Injunction, RE 77, Page ID #1707–08, when no statute or other court requires *any* such notice. Petitioners thus fall squarely within *Muka*'s teaching: They have long had "an avenue to argue their . . . claim, " even if they chose not to use it. 559 F.3d at 485. "Simply because" petitioners "failed to make a known argument" does not entitle them to district-court relief under the Suspension Clause. *Id.*

The district court distinguished *Muka* on the ground that "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." Op., RE 87, Page ID #2340. This distinction misses the point that petitioners have long been able to file motions to reopen and have now for years—since 2014—had a basis for doing so. *Muka*'s holding turned on whether the petitioners there had "an avenue to argue their . . . claim," not whether they

could have made their arguments in their underlying or prior proceedings. 559 F.3d at 485. The district court here believed that filing motions to reopen before 2014 "would have been academic." Op. 27, RE 87, Page ID #2349. But that is wrong. Such action would have served the eminently useful purpose of potentially staying or reopening and rescinding a final removal order that, under the law, meant a petitioner could be removed at any time, and as soon as Iraq agreed to accept returnees. Therefore, similar to the petitioners in *Muka*, petitioners here do not dispute that they knew of conditions in Iraq that could potentially support a motion to reopen on the basis of changed country conditions, offer no specific explanation for why they did not raise such a claim by filing a motion to reopen sooner, and thus fail to plead a successful as-applied Suspension Clause violation. *See Muka*, 559 F.3d at 485–86.

In sum: The forum that Congress created as the exclusive one for petitioners' claims—the immigration courts and the BIA—possesses the authority to address exigent circumstances and provide complete adjudication of petitioners' claims. Directing petitioners' claims to that forum is adequate, effective, and fully consistent with the Suspension Clause. The district court erred in concluding otherwise.

II. Even if the district court possessed jurisdiction, this Court should reject the injunction because petitioners are not entitled to relief on the merits of their claims.

Even if the district court had jurisdiction, the Court should still reject the preliminary injunction because petitioners are not entitled to that relief.

A. Likelihood of Success on the Merits. The district court held that petitioners have "shown a likelihood of success on their due process claim" that they have been "depriv[ed] of a meaningful opportunity to present their INA and CAT/FARRA claims immigration courts and courts of appeals." Op., RE 87, Page ID #2352. The district court erred. Due process requires that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976). This requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 332. Here, the district court was not concerned about the adequacy of the administrative process to adjudicate petitioners' claims, which it recognized "is equipped to adjudicate the substance of Petitioners' motions to reopen," Op., RE 87, Page ID #2348. Thus, the only pertinent questions are whether petitioners had an opportunity to access that process "at a meaningful time and in a meaningful manner." 424 U.S. at 332. The court erred in concluding that they had not.

Petitioners had the notice and opportunity to be heard that due process required. As the district court recognized, by 2014 "changed country conditions in Iraq started to become apparent," with the rise of ISIS and other groups. Op., RE 87, Page ID #2349. From at least 2014, then, petitioners had the opportunity to file motions to reopen their removal proceedings to assert claims for withholding under CAT "based on changed country conditions arising in the country of nationality or the country to which removal has been ordered." 8 U.S.C. § 1229a(c)(7)(C)(ii). The court

acknowledged that "the administrative process is equipped to adjudicate the substance of Petitioners' motions to reopen." Op., RE 87, Page ID #2348. These administrative immigration courts are tailored to address petitioners' claims, to do so expeditiously, and to grant stays and ultimate relief. *See supra* Part I.B.2. For these reasons, petitioners have had the opportunity to be heard "at a meaningful time and in a meaningful manner" (*Mathews*, 424 U.S. at 332) on any claims that they might assert under CAT since 2014. That is all that due process requires.

Yet the district court concluded that petitioners had shown a likelihood of success on their due-process claim based on several factors that combined to "significantly imped[e]" petitioners "from filing motions to reopen": "the large number of Iraqis simultaneously affected by th[e] sudden change in policy [regarding repatriation of Iraqis]"; "the intensive time and logistic pressures placed on the immigration bar in preparing necessary filings"; "the interference with attorney-client communications as detainees are shuttled around the country"; "the significant cost of the legal work"; and "the difficulty that Petitioners would face trying to present their claims from foreign soil if they were removed prior to adjudication." Op., RE 87, Page ID #2351–52. None of this demonstrates that petitioners were impeded from accessing the administrative process.

As an initial matter, the district court erred in concluding that petitioners were not on notice that they had to act to present any claims under CAT until Iraq changed

its policy on accepting individuals without valid passports in March 2017. Op., RE 87, Page ID #2350. As noted above, the court recognized that by 2014 conditions had changed in Iraq, yet it excused petitioners from failing to file motions to reopen earlier because it would have been "impractical" based on Iraq's former policy and the costs of securing counsel to file motions to reopen.[6] *Id.*, Page ID #2349. Yet, if anything, it was these deteriorating conditions in Iraq that began in 2014, not Iraq's change in policy in 2017, that gave rise to any potential CAT claims petitioners may have. Stated differently, petitioners could not have filed motions to reopen for relief under CAT simply because the government of Iraq changed its policy to make their removal more imminent. Rather, the motions petitioners seek to file here request asylum or withholding under CAT and must be "based on changed country conditions arising in the country of nationality or the country to which removal has been ordered." 8 U.S.C. § 1229a(c)(7)(C)(ii). Thus, petitioners have been on notice for several years that they had to act to preserve any rights that they had to reopen their removal proceedings based on the conditions in Iraq, and the court erred in concluding that they had been on notice only since March 2017.

[6] Reopening a removal order before removal is certain is not an "academic" exercise. Op., RE 87, Page ID #2349. Individuals who are granted reopening may obtain protection against removal and additional benefits, particularly in the case of asylum. *See, e.g.*, 8 U.S.C. § 1158(c)(1) (providing that aliens with asylum shall not be removed, may receive employment authorization, and may travel abroad).

The district court also erred in concluding that the number of Iraqis subject to the change in policy impeded petitioners' access to the administrative process. Petitioners presented no evidence that the administrative process had failed to protect the interests of any petitioner affected by the change in policy who had attempted to use them prior to being detained. The Detroit immigration court was responding to the large number of motions filed by Iraqi nationals after June 13, 2017, and prioritizing decisions on these motions "so that no respondent with a pending motion to reopen is removed prior to receiving an adjudication of his or her motion to reopen." McNulty Decl. ¶ 14, RE 81-3, Page ID #2000. Petitioners had the ability to request stays of their removal pending decisions on their motions to reopen from both the immigration court and the BIA. *Id.* at ¶¶ 9, 13, Page ID #1999–2000; Gearin Decl. ¶¶ 5–9, Page ID #1994–95; *see also* 8 C.F.R. §§ 241.6(a)–(b), 1241.6(a)–(b). The BIA even has an Emergency Stay Unit designed for exigent circumstances "to achieve the timely adjudication of every [stay request] it receives." Gearin Decl. ¶ 17, RE 81-2, Page ID #1997. Tellingly, petitioners failed to present evidence of a single case where an Iraqi national affected by the change in policy was removed before his or her motion to reopen was adjudicated. And while petitioners indicated that they would need around "six weeks or two months" to seek relief from the immigration courts, TRO Hr'g Tr., RE 31, Page ID #464, an injunction has now been in place for five months preventing

DHS from conducting lawful removals and requiring ongoing oversight of an immigration-court process that has never been subject to challenge.

The district court also concluded that the "intense time and logistic pressures placed on the immigration bar in preparing necessary filings" (Op., RE 87, Page ID #2351) interfered with petitioners' access to the administrative process. There was no evidence that large numbers of petitioners were attempting to find counsel and could not, or that the immigration bar was entirely saturated and could not take another case. The court also discounted, without explanation, the fact that filing a motion to reopen based on changed country conditions was not (as petitioners claimed, *see, e.g.,* Mot. for Preliminary Injunction, RE 77, Page ID #1726) necessarily hard or complex. Such a motion need only "state the new facts that will be proven" and include evidence relating to those facts. 8 U.S.C. § 1229a(c)(7)(B); *see also* 8 C.F.R. §§ 1003.2(c)(1), 1003.23. To the extent that an individual did not have all evidence that he wanted submit in support of a motion but wanted to file due to threat of removal, both the BIA and Detroit immigration court (where most detained petitioners would file unless their last adjudication had been before the BIA, in which case they would file there) will take this into account. Board Practice Manual § 5.2(f) (supplemental evidence); *see also* McNulty Decl. ¶¶ 18–20, RE 81-3, Page ID #2001 (where removal is imminent the immigration court will take into account that the stay request and motion to reopen may have been prepared without sufficient time for the alien to submit all appropriate evidence).

Although a movant may not meet the burden necessary to reopen his case, the opportunity to seek reopening is available.

Further, as addressed in the Suspension Clause discussion above, the district court improperly credited (*see* Op., RE 87, Page ID #2340, 2348–49) petitioners' allegations that their ability to communicate effectively with counsel was impeded due to their detention. Neither petitioners nor the district court have explained how the access afforded to petitioners is insufficient in a constitutional sense or under the statute providing for the "privilege of being represented" in immigration proceedings. 8 U.S.C. § 1362. Further, the expense of moving to reopen is not a cognizable barrier to accessing the administrative system. Petitioners have not alleged that they lack the resources to hire attorneys and, in any event, there is no right to a court-appointed counsel in removal proceedings. *See, e.g., Leslie v. Att'y Gen.*, 611 F.3d 171, 181 (3d Cir. 2010) ("the Fifth Amendment does not mandate government-appointed counsel for aliens at removal proceedings"). Rather, the expense of hiring an attorney is a factor that every individual in removal proceedings must account for if the individual wants to be represented. Finally, petitioners' claims are not different from thousands of others across the country where individuals are seeking to reopen their proceedings based on changed country conditions. There is no legal basis for concluding that the mere possibility that an individual could be removed before his motion is adjudicated constitutes a violation of due process.

For these reasons, the district court erred in concluding that petitioners are likely to succeed on the merits of their due-process claim. The preliminary injunction should be rejected on this ground alone.

B. Other Equitable Factors. The remaining preliminary injunction factors independently require rejection of the injunction. Here, the preliminary injunction is not based on "actual and imminent" irreparable harm but rather on "harm that is speculative or unsubstantiated." *Abney v. Amgen, Inc.* 443 F.3d 540, 552 (6th Cir. 2006). Moreover, "[a]lthough removal is a serious burden for many aliens, it is not categorically irreparable." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Indeed, ICE's scheduled "charter flights fly into Baghdad, not ISIS controlled territory," and once "[i]n Baghdad, the Iraqi nationals will be met by U.S. [Department of State] officials and Iraqi officials." Schultz Dec. ¶ 6, RE 81-4, Page ID #2007. The public interest and the Executive Branch's interest in its enforcement of the immigration laws also requires rejection of the injunction. The injunction causes direct, irreparable injury to the interests of the government and the public, which merge here, by delaying the execution of final removal orders for aliens ordered removed from the United States. *See generally Nken*, 556 U.S. at 435. And "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). This substantial interest should be overcome only when an *individual* shows that he or she

would face irreparable harm. Here, the district court based its injunction not on individual circumstances, but on petitioners' generalized allegations regarding country conditions. That was error.

III. At the least, this Court should significantly narrow the district court's overbroad injunction.

Even if the district court were right to order some injunctive relief, the relief that it ordered was far too broad. As noted above, the district court issued its injunction based on what it saw as a "compelling confluence of extraordinary circumstances" that combined to "significantly imped[e]" petitioners "from filing motions to reopen." Op., RE 87, Page ID #2323–24. Yet the injunction applies to many Iraqi nationals who do not face "these singular circumstances." *Id.*, Page ID #2324. The injunction blocks ICE 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." *Id.*, Page ID #2355. That directive covers about 1,400 Iraqi nationals across the country. In particular, the injunction applies to an overly broad group of Iraqi nationals, improperly applies through several levels of review, and requires the government to shoulder overly onerous production requirements. If this Court allows some of the injunction to stand, it should direct the district court to drastically narrow the injunction to cover only those who can show imminent harm. *See Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 516 (6th

Cir. 2006) (usual approach to addressing overbroad injunctions is to vacate the offending portions) (collecting cases). At a minimum, once a petitioner files a motion to reopen and a stay request, and either the immigration court or the BIA reopens the proceedings or grants the stay, the government should be relieved of the obligation of providing the A-files because any due process issue would undeniably be satisfied.

A. The injunction applies to an overly broad group of Iraqi nationals.

To start, the injunction should be vacated as to two groups that do not come within the "extraordinary circumstances" on which the injunction rests.

First, the injunction should not apply to non-detained individuals, because these persons have unrestricted access to attorneys and to obtaining their own files both before and after the government action challenged in this case. In addressing the due-process claims on which the injunction rests, the district court focused on several alleged obstacles that petitioners claim have frustrated their access to the administrative process. *See* Op., RE 87, Page ID #2347–52. While this list includes the government's expeditious removal efforts, the number of affected Iraqis, and the expense of filing a motion to reopen, the balance of the court's merits analysis relates to claims of those who have been detained. The court emphasized that "transfers to out-of-state facilities," "reduced access to counsel at those facilities," and alleged limitations on telephone use had disrupted petitioners' access to counsel and, thus, the ability to prepare and file motions to reopen. *Id.*, Page ID #2348–49. But these alleged

impediments do not apply to non-detained Iraqi nationals. Indeed, the district court did not explain why the injunction should apply to non-detained Iraqis. Any injunction should not extend to approximately 1,100 non-detained Iraqis, who do not face any unusual difficulty in communicating with counsel or requesting their A-files or ROPs.

Second, the injunction should not encompass individuals who were ordered removed so recently that they had had the ability to raise asylum and CAT claims based on the 2014 changes in Iraq that the district court found significant. The district court's decision is premised largely on its adoption of petitioners' contention that "it was not until 2014 that conditions [in Iraq] became especially dire for religious minorities." Op., RE 87, Page ID #2328. Yet the injunction bars removal of individuals with final removal orders up to June 24, 2017. *Id.*, Page ID #2355. Indeed, when the district court entered its order, about 17 percent of the detained group had removal orders that were less than five years old. *Id.*, Page ID #2325. Further, the district court did not explain why it was extending the injunction to this group with more recent removal orders. Accordingly, the preliminary injunction should be vacated to the extent it covers Iraqi nationals with final removal orders at least from 2015 on (if not earlier in 2014), or where there is evidence that the individual was able to apply for asylum or CAT based on the country conditions in Iraq from 2014 forward.

B. The injunction improperly lasts through multiple levels of administrative review and up to the petition-for-review process.

The injunction also should not last through the entire motion-to-reopen and petition-for-review process because under federal regulations an alien can file a motion to stay removal concurrently with a motion to reopen. *See* 8 C.F.R. § 1003.23. An alien can thus seek all appropriate relief at the same time from the courts that can, at each level, adjudicate the entire case. At that point, the alien has been "allow[ed] an orderly filing for relief with the immigration courts before deportation." Op., RE 87, Page ID #2324. Given all of this, any injunction should terminate once a motion to reopen has been filed and the immigration court or the BIA assumes jurisdiction.

C. The injunction improperly requires the government to produce an alien's complete A-file and ROP to trigger an alien's deadline for pursuing the motion-to-reopen process.

Finally, the injunction takes the wholly unwarranted and disproportionate step of requiring the government to produce an alien's complete A-file and record of proceedings to trigger an alien's deadline to use the motion-to-reopen process. *See* Op., RE 87, Page ID #2355–56. Locating, copying, scanning and producing 1400 paper A-files and ROPs imposes on the government an enormous burden. That burden is wholly improper because the A-files and ROPs provide very little (if any) benefit to the vast majority of Iraqi nationals covered by the injunction. To successfully reopen proceedings, they must establish "changed country conditions arising in the country of

nationality [where] 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). Petitioners' A-files and ROPs thus have limited value to this showing. An A-file includes an individual's historical immigration data, and the ROP is the record of the alien's earlier removal proceedings. Neither would contain new information regarding changed conditions arising in Iraq. And any files that an alien could conceivably need—particularly, the final removal order, applications for relief filed by the alien, and any findings made during prior removal proceedings—may already be in the alien's possession, as the alien was present for his or her previously concluded removal proceedings and was able to submit any admissible applications or evidence during those proceedings and receive all evidence upon which DHS sought to rely in litigating the matter. 8 C.F.R. §§ 1003.32, 1240.7, 1240.11. There is accordingly no basis for foisting this unnecessary burden of production on the government. That is particularly true given the passage of time since the injunction was issued. As of the date of this filing, it has been approximately eight months since the government of Iraq changed its policy, five months since the district court's first TRO, and almost four months since the district court entered its injunction on July 24, 2017. Petitioners have now had ample time to collect all information they could need to reopen their proceedings. This Court should reject the judicially created, onerous, and unwarranted discovery burden imposed by the district court.

CONCLUSION

The district court's injunction should be vacated or, at minimum, significantly narrowed.

November 22, 2017

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CERTIFICATE OF SERVICE

I certify that on November 22, 2017, the above brief was served on all counsel of record through the Court's CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that the above brief contains 12,993 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that the above brief complies with the type size and typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure: it was prepared in a proportionally spaced typeface using Microsoft Word in Garamond, 14-point typeface.

/s/ Michael A. Celone
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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Hamama, et al., v. Rebecca Adducci, et al.

Eastern District of Michigan, Case No. 17-cv-11910

Record Entry No.	Page ID #	Date Filed	Description
1	1-26	06/15/2017	Habeas Corpus Class Action Petition
11	45-175	06/15/2017	Petitioners' Motion for a Temporary Restraining Order and/or Stay of Removal
31	464	06/22/2017	Transcript of Hearing on Petitioners' Motion for Temporary Restraining Order and/or a Stay of Removal
32	497-502	06/22/2017	Opinion and Order Staying Removal of Petitioners Pending Court's Review of Jurisdiction
35	509-48	06/24/2017	First Amended Habeas Corpus Class Action Petition and Class Action Complaint
43	671-76	06/26/2017	Opinion & Order Granting Petitioners' Motion to Expand Order Staying Removal to Protect Nationwide Class
61	1195-97	07/06/2017	Order Extending Stay of Enforcement of Removal Orders Pending Court's Review of Jurisdiction
64	1226; 1234-35; 1241; 1245; 1247	07/11/17	Opinion & Order Regarding Jurisdiction

77	1707-09; 1717-18; 1720; 1726; 1745	07/17/2017	Petitioners' Motion for a Preliminary Stay of Removal and/or Preliminary Injunction
81-2	1994-95; 1997	07/20/2017	Gearin Declaration, Exhibit to Respondents' Response in Opposition to Petitioners' Request for a Preliminary Injunction
81-3	1999-2001	07/20/2017	McNulty Declaration, Exhibit to Respondents' Response in Opposition to Petitioners' Request for a Preliminary Injunction
81-4	2006-09	07/20/2017	Schultz Declaration, Exhibit to Respondents' Response in Opposition to Petitioners' Request for a Preliminary Injunction
81-5	2011-13	07/20/2017	Lowe Declaration, Exhibit to Respondents' Response in Opposition to Petitioners' Request for a Preliminary Injunction
81-7	2019-20	07/20/2017	McGregor Declaration, Exhibit to Respondents' Response in Opposition to Petitioners' Request for a Preliminary Injunction
82	2056; 2058-60	07/20/2017	Carusso Declaration, Exhibit to Respondents' Response in Opposition to Petitioners' Request for a Preliminary Injunction
83	2061-69	07/20/2017	Petitioners' Motion for Class Certification
87	2323-25; 2328; 2334-56	07/24/2017	Opinion & Order Granting Petitioners' Motion for Preliminary Injunction

96	2577	08/30/2017	Respondents' Status Report