UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al.,

Petitioners,

v.

REBECCA ADDUCCI, Director, Detroit District of Immigration and Customs Enforcement, et al.,

Respondents.
____/

Civil No. 17-11910
Hon. Mark A. Goldsmith
Mag. Judge David R. Grand

REPLY TO PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION TO DISMISS SECOND AMENDED CLASS PETITION

Dated: December 12, 2017

Respectfully submitted,

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STATEMENT OF ISSUES PRESENTED

Whether Petitioners' Second Amended Class Habeas Petition should be dismissed for lack of jurisdiction and failure to state a claim upon which relief may be granted under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) when:

1. The Court lacks jurisdiction under 8 U.S.C. § 1252(g), where the aliens' ability to challenge their removal orders in administrative motions to reopen and the petition-for-review process mean there is an adequate forum and thus no violation of the Suspension Clause; and
2. Petitioners' allegations do not state plausible, cognizable claims of any violation of substantive rights under the Immigration and Nationality Act, Convention Against Torture and implementing regulations, Due Process Clause, or this Court's preliminary injunction order, nor that they are being impermissibly detained.

MOST CONTROLLING AUTHORITY

8 U.S.C. § 1226(c)

8 U.S.C. § 1231(a)

8 U.S.C. § 1252

8 U.S.C. § 1362

Demore v. Kim, 538 U.S. 510, 527 (2003)

Elgharib v. Napolitano, 600 F.3d 597, 603 (6th Cir. 2010)

Graham v. Mukasey, 519 F.3d 546, 549 (6th Cir. 2008)

Ly v. Hansen, 351 F.3d 263, 270 (6th Cir. 2003)

Muka v. Baker, 599 F.3d 480 (6th Cir. 2009)

Munaf v. Geren, 553 U.S. 674 (2008)

United States v. Edward Rose & Sons, 384 F.3d 258, 261 (6th Cir. 2004)

Zadvydas v. Davis, 533 U.S. 678, 701 (2001)

Nothing in Petitioners' opposition overcomes Respondents' compelling showing that the Court should dismiss this case. The Court lacks jurisdiction over the case under 8 U.S.C. § 1252. Petitioners cannot establish that a federal district court can award them protection from removal, nor can they point to any prejudice in their reopening proceedings to properly allege a due process violation. Petitioners' due process challenges based on access to files and right to counsel suffer the same and other defects, and must be brought on petitions for review, not in federal district court. Regarding their detention, Petitioners allege an insufficient basis to show no significant likelihood of their removal in the reasonably foreseeable future, as the litigation stays on their removal are not permanent. Finally, Petitioners fail to allege a plausible basis to find that their detention during proceedings has been unreasonably lengthy, or that those with reopened removal orders and criminal histories are not properly subject to mandatory detention under 8 U.S.C. § 1226(c).

I. ARGUMENT

A. The Court Lacks Jurisdiction Over This Case.

As explained in Respondents' prior briefing, ECF Nos. 81, 135, the Court lacks jurisdiction over a challenge to the execution of Petitioners' removal orders under 8 U.S.C. 1252. *See, e.g.*, ECF No. 135 at 4-13. Respondents reincorporate those arguments. The Court's earlier factual findings and legal holdings supporting its jurisdiction, ECF Nos. 64, 87—*i.e.*, temporary, liminal determinations in

response to emergent requests for relief—are not binding on dispositive resolution of these claims. *See United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004) ("[F]indings of fact and conclusions of law made by a district court in granting a preliminary injunction are not binding at a trial on the merits."). And there is good reason why the Court may view the merits differently now, on a later, fuller examination of the allegations, the legal claims, and the case more broadly. In its earlier rulings, the Court recognized that it was not ordering relief on the substance of Petitioners' claims for relief from removal, but merely providing them with a longer opportunity to seek reopening of their removal proceedings. ECF No. 87 at 21-22. The Court stated that "preparing a motion to reopen can take anywhere from three to six months," ECF No. 87 at 16, and six months have elapsed since Petitioners were placed on notice of imminent removal to Iraq. Thus, the exigency that drove the Court's preliminary determination—that the "singular circumstances" caused by the "immediate[] enforce[ment]" of Petitioners' removal orders following an "abrupt change" in diplomatic relations with Iraq caused section 1252's jurisdictional bar to violate the Suspension Clause, ECF No. 87 at 1-2—has mostly if not entirely evaporated. To the extent that the Court views Suspension Clause rights as turning on the need for emergency provision of access, *see id.*, given that the state of emergency the Court found in June 2017 has long since passed, the need to find a jurisdictional exception has substantially declined.

B. Petitioners' Claims Are Otherwise Barred or Meritless.

1. Claim One: Convention Against Torture and Section 1231(b)(3)

As Respondents have explained, Petitioners lack standing to bring a substantive claim under the Convention Against Torture, as implemented in the immigration regulations at 8 C.F.R. §§ 1208.16(c)-.18, or the INA's withholding-of-removal provision, 8 U.S.C. § 1231(b)(3), because only the administrative courts and federal courts of appeals (on a petition for review) may address such claims. ECF No. 135 at 13-14; *see* 8 U.S.C. § 1252(a)(4), (b)(9). Respondents contend that the Government has treaty obligations to provide such protections from removal, ECF No. 154 at 14-15, but that argument sidesteps the critical issue of which courts have authority to enforce those protections within the statutory regime established by Congress. Because federal district courts have no such authority, *see* 8 U.S.C. § 1252(b)(9), this Court cannot award them statutory withholding or protection under the CAT and thus cannot redress an alleged deprivation of these protections. Petitioners maintain that the Court can redress injuries under the CAT and statutory withholding provisions because it ordered their removal stayed while they seek such relief in the administrative courts. But this Court rejected any right under the CAT or the INA to guarantee Petitioners the ability to adjudicate a motion to reopen before removal. ECF No. 87 at 25. Given that likely success on the merits is necessary for a court to provide preliminary-injunctive relief, *see Winter v. NRDC*, 555 U.S. 7, 20

(2008), the Court's ability to stay removal cannot have arisen from this claim. *See id.* at 29-30. The preliminary-injunction order thus cannot plausibly indicate that the Court has authority to award substantive protection from removal under the CAT or withholding of removal pursuant to section 1231(b)(3).

2. Count Two: Due Process Prior To Removal

Respondents have explained that Petitioners fail to allege an essential element of their claim: prejudice within their immigration proceedings that actually changed its outcome. *See* ECF No. 135 at 14-17. The Court preliminarily found the prejudice requirement satisfied generally, absent a showing of a different outcome in proceedings, because of "extraordinary circumstances impacting their ability to get into a system of adjudication at a meaningful time for the protection of their rights." *See* ECF No. 87 at 29. But those extraordinary circumstances have ended. *See Edward Rose & Sons*, 384 F.3d at 261.[1] Petitioners have surely now had the "ability to get into the [administrative reopening] system at a meaningful time." *See* ECF No. 87 at 29, 33-34. They can no longer plausibly claim any due process violation predicated on the inability to have their motions to reopen adjudicated. *See Modarresi v. Gonzales*, 168 F. App'x 80, 85 (6th Cir. 2006). While Petitioners claim

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[1] Indeed, Petitioners' allegations now indicate that such an emergency never existed: they acknowledge that courts "in the past several years" have been awarding relief from removal—and Petitioners therefore could and should have applied for it—on the basis of the alleged changed conditions in Iraq. ECF No. 118 ¶¶ 67, 70.

that they can establish specific prejudice, ECF No. 154 at 14, their allegations support the opposite inference. Their allegations that they have not been removed and that many of them have filed successful motions to reopen shows only the absence of a prejudicial effect on their reopening proceedings. *See* ECF No. 118 ¶¶ 65, 66, 79, 80. Petitioners' speculative assertions that if removed to Iraq "they would face risk of persecution, torture, death, and a likely total inability to litigate their claims," ECF No. 154 at 14, do not plausibly allege that they would suffer prejudice their reopening proceedings.[2] *See Graham v. Mukasey*, 519 F.3d 546, 549 (6th Cir. 2008). Plaintiffs thus fail to plausibly allege an essential element of their claim.

3. Count Three: Challenge to Detention Transfer

Petitioners have not plausibly alleged that detention transfer interferes with any statutory right to counsel and due process right to a fair hearing. ECF No. 135 at 17-22. Their arguments in opposition add nothing new. Contrary to Petitioners' argument, the Court did not even preliminarily find that the transfers materially interfered with an actual attorney-client relationship. *See Comm. of Cent. Am.*

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[2] While Petitioners allege some success on having their cases reopened, success on a motion to reopen does not necessarily equate to success on the merits of a case. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (motion to reopen requires establishment merely of a *prima facie* case for eligibility relief); 8 C.F.R. § 1208.16(b)(1)(B)(iii). Further, reopening is often being granted on issues unrelated to fear of return, such as cancellation of removal and vacatur of criminal charges, which likely could have been raised earlier. *See, e.g.,* ECF No. 159-2.

Refugees v. I.N.S., 795 F.2d 1434, 1439 (9th Cir.), *amended*, 807 F.2d 769 (9th Cir. 1986). The Court explained only that transfers within those first few weeks following their arrest for removal hindered their ability to file motions to reopen. ECF No. 87 at 18. And that initial time crunch has passed. Petitioners do not allege that their attorneys are unable to prepare their immigration court filings. *See* ECF No. 118 at ¶¶ 12-13, 48-49, 72-77. Petitioners allege only, in effect, that their transfers make it more difficult for lawyers in their previous locations to assist them, or to obtain counsel in the communities where they resided. *See* ECF No. 118 ¶¶ 74-76. They do not allege that they have suffered any prejudice by losing motions on this basis or otherwise suffered any loss of a right due to this distance from counsel, *see Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985), nor do they allege actually trying but being unable to obtain counsel in their transfer locations, *see Gandarillas-Zambrana*, 44 F.3d at 1256. Their allegations fail to stake out a cognizable claim for relief because the right to counsel in immigration proceedings is a shield against being barred from having representation or having counsel so incompetent as to prevent an alien from being able to present her case. *See* 8 U.S.C. § 1362; *Denko v. INS*, 351 F.3d 717, 723 (6th Cir. 2003). It is not a sword to force the Government to take affirmative action to ensure that an alien is represented by a particular lawyer, no matter where counsel is located and no matter the cost to the public of housing the alien in a location convenient to his or her lawyer.

Petitioners also fail to show why the Court has jurisdiction over the discretionary determination of where to detain aliens. Petitioners point out that some courts, in decisions not binding on this Court, *have* decided challenges to transfers. ECF No. 145 at 10-11. That is insufficient to establish that this Court should find that jurisdiction over such inherently discretionary decisions is not precluded by 8 U.S.C. § 1252(a)(2)(B)(ii). This is especially true when other courts, including one in this district, have held that jurisdiction is lacking. *See Marogi v. Jenifer*, 126 F. Supp. 2d 1056, 1066 (E.D. Mich. 2000); *Avramenkov v. INS*, 99 F. Supp. 2d 210, 213 (D. Conn. 2000). The reason this discretionary decision logically falls within the scope of section 1252(a)(2)(B)(ii) is manifest: such a decision turns on policy, logistic, and practical considerations. "[C]ourts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).

Petitioners argue that review of transfer decisions is necessary to ensure access to counsel. ECF No. 154 at 10-11. But review of whether there has been any denial of the right to counsel is available in a petition for review ("PFR") from administrative proceedings. *See, e.g.*, *Sako v. Gonzales*, 434 F.3d 857, 859 (6th Cir. 2006). Because this claim can be brought in administrative proceedings—as it arises from an action taken to remove Petitioners from the country—it must be brought there. *See* 8 U.S.C. § 1252(a)(5), (b)(9); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1033

(9th Cir. 2016) (holding that "right-to-counsel claims must be raised through the PFR process because they 'arise from' removal proceedings"). Thus, the Court should dismiss the transfer challenge.

4. Count Four: Challenge to Post-Final-Order Detention

As Respondents explained, Petitioners have not plausibly alleged unlawfully indefinite detention under *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). ECF No. 135 at 22-26. Petitioners fail to counter the public knowledge that Iraq is accepting removals of Iraqis or to explain why the Government would expend significant cost and effort for removals that are not possible. Petitioners also fail to show why detaining them during reopening proceedings is problematic under *Zadvydas*.

Petitioners claim that their allegation that the Government has not shown specific evidence that each individual will be removed at a particular time and place suffices to show no significant likelihood of removal in the reasonably foreseeable future ("SLRRFF") under *Zadvydas*. ECF No. 154 at 20-21. A guarantee of removal at a specific time and place is both infeasible, ECF No. 158 at 8, and not what the law requires. Rather, *Zadvydas* requires only a "significant likelihood" of removal, 533 U.S. at 701, which public knowledge readily establishes.

"Courts take judicial notice of matters of common knowledge," *Pearce v. Faurecia Exhaust Sys., Inc.*, 529 F. App'x 454, 459 (6th Cir. 2013), so long as the fact is "not subject to reasonable dispute because it (1) is generally known within the

trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). As widely reported, Iraq agreed, as part of negotiations to exempt it from the March 2017 executive order suspending travel from enumerated countries, to accept repatriation of Iraqi nationals that Iraq had previously denied. *See, e.g.*, *Stephen Dinan*, "Trump's first victory in deportation feud is Iraq," Washington Times, https://www.washingtontimes.com/news/2017/mar/7/iraq-removed-from-travel-ban-list-ater-agreeing-to/ (last updated Mar. 7, 2017). Indeed, DHS removed Iraqi nationals to Iraq under this agreement in the weeks before the Court entered its stay. Abigail Haulohner, "A charter flight left the U.S. carrying 8 Iraqis. A community wonders who will be next," Wash. Post, https://www.washingtonpost .com/national/a-charter-flight-left-the-us-carrying-8-iraqis-a-community-wonders-who-will-be-next/2017/04/28/a4ce9418-293c-11e7b60533413c691853_story. html?utm_term=.5fa739701022 (Apr. 28, 2017). These generally available facts are not reasonably subject to dispute. *Pearce*, 529 F. App'x at 459 (listing "a dictionary, public record, or even a newspaper article" as proper grounds for judicial notice).

This Court should follow the jurisdictions that have held that detention during review of removal orders is necessarily "not indefinite because the end of the litigation provides a definite end point." *Flores v. Holder*, 977 F. Supp. 2d 243, 249 (W.D.N.Y. 2013) (citing *Prieto–Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir.

2008); *Soberanes v. Comfort*, 388 F.3d 1305, 1311 (10th Cir. 2004)). Petitioners argue that those decisions may be "contrary to the Sixth Circuit's decision in *Ly*." ECF No. 154 at 22 n.11. But these decisions are consistent with *Ly*, which addressed prolonged pre-removal order detention under 1226(c), *not* the post-order detention at issue in Petitioners' *Zadvydas* claim. *See Ly v. Hansen*, 351 F.3d 263, 270-73 (6th Cir. 2003). And, *Ly* held only that pre-order detention was unreasonable where, among other things, removal was not reasonably foreseeable following proceedings, as it is here. *See id.* Finally, the timing of commencement of the removal period is irrelevant to whether SLRRFF is present, permitting the Government to continue to detain an alien under *Zadvydas*, 533 U.S. at 701. And it does not make sense that the extra-statutory stayed review period created by the Court for Petitioners in this case should be counted against that unobstructed period of time Congress gave DHS to make preparations and remove an alien. ECF No. 158 at 12-13.

5. Count Five: Claim for Individualized, Neutral Custody Review

As Respondents have explained, Petitioners have not plausibly alleged entitlement to non-DHS custody redeterminations for either section 1226(c) (pre-order) or section 1231 (post-order) detainees. ECF No. 135 at 26-30; ECF No. 158 at 17-20. Petitioners' arguments to the contrary lack merit. Their detention has been much shorter than the length that courts applying a reasonableness limitation on section 1226(c) have found problematic. *See Sopo v. U.S. Att'y Gen.*, 825 F.3d

1199, 1220 (11th Cir. 2016) (detention for four years); *Reid v. Donelan*, 819 F.3d 486, 501 (1st Cir. 2016) (14-month detention); *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 478 (3d Cir. 2015) (12 months). And their "actual removal" is "reasonably foreseeable," as explained, satisfying *Ly*. 351 F.3d at 273. *Ly* did *not* equate prolonged pre-order detention to indefinite detention, but rather used that term properly to describe potentially permanent detention, from removal proceedings through post-order detention, where there is no evidence that the Government could remove the alien. *See id.*

Nor have Petitioners alleged a plausible basis for such an entitlement in post-order detention. Whether an alien poses a danger or flight risk is irrelevant to post-order constitutional limits on detention. "[A]n alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. Petitioners cite *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011), to argue that they should receive bond hearings in section 1231 detention. ECF No. 154 at 30. But the Court should not follow *Diouf* because it fails to recognize that limits on post-order custody are *not*, as with pre-order custody, aimed at ameliorating prolonged detention by providing bond hearings, but rather protect against potentially permanent detention where an alien is unremovable—and bond hearings are insufficient to safeguard against this different, permanent deprivation of liberty. *See Ly*, 351 F.3d at 267, 270.

Petitioners also argue that they would be entitled to supervised release even if there was SLRRFF. ECF No. 154 at 28-29. But ICE considers the likelihood of foreseeable removal in both regulations addressing post-order release under orders of supervision. *See* 8 C.F.R. § 241.4(e)(1) (considering whether "[t]ravel documents for the alien are not available or, in the opinion of [DHS] immediate removal, while proper, is otherwise not practicable or not in the public interest"); *id.* § 241.13(g)(2).

Finally, Petitioners appear to argue that an alien is entitled to post-order release, even if there is SLRRFF, if he is not a significant danger to the community. *See* ECF No. 154 at 28. Although *Zadvydas* did discuss crime prevention as one reason why the Government would want to continue detaining post-order aliens, it did not indicate that those establishing no threat to the community are entitled to release. 533 U.S. at 699-700. *Zadvydas*'s directed simply that, "if removal is not reasonably foreseeable, the court should hold continued detention unreasonable." 533 U.S. at 699. Petitioners' removal is reasonably foreseeable, as it will occur at the conclusion of their reopening proceedings, if their removal orders remain.

6. Count Six: Challenge to Pre-Order Mandatory Detention

Petitioners fail to state a cognizable claim for relief that they are unlawfully subject to mandatory pre-order detention for criminal aliens under 8 U.S.C. § 1226(c). Petitioners' focus on whether their current detention began exactly "when" they were "released" from criminal incarceration, *see* 8 U.S.C. § 1226(c)(1),

misses the point. Section 1226(c) governs detention of criminal aliens in removal proceedings. *See Demore*, 538 U.S. at 518. Petitioners have placed themselves within its ambit by operation of law by reopening their final removal orders and re-entering removal proceedings. ECF No. 158 at 23-24. This case is not concerned with the circumstances of Petitioners' initial transition from criminal custody to immigration detention before they initially obtained their final orders of removal. Rather, it concerns detention now while they challenge those removal orders based on circumstances that have allegedly changed in the intervening period. Cases such as *Preap v. Johnson*, 831 F.3d 1193, 1197 (9th Cir. 2016), *cert. filed*, No. 16-1363 (May 11, 2017), which address the actual transition from criminal to immigration custody, are inapposite. Those cases' interpretation also "would lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline." *Sylvain v. Att'y Gen. of U.S.*, 714 F.3d 150, 160-61 (3d Cir. 2013). Finally, *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 948 (9th Cir. 2008), fails to support Petitioners' claim to bond hearings for multiple reasons. ECF No. 158 at 21. *Casas* authorized the continued detention of the alien there—who had been detained for nearly seven years already—because he "face[d] a significant likelihood of removal to Colombia once his judicial and administrative review process is complete." *Id.* Petitioners here face the same likelihood of removal to Iraq.

7. Count Seven: Access to Files

Finally, Petitioners fail to state a claim for deprivation of A-files and Records of Proceedings ("ROPs"). The Court created a timeline for production of these files. ECF No. 110 at 3. If Petitioners have issues with Defendants' production, their recourse is through discovery motions. *See generally* Fed. R. Civ. P. 37. Any claims of prejudice from lacking their A-files or ROPs are not cognizable in this Court because they "arise from" removal proceedings and can be raised there. *See* 8 U.S.C. §§ 1252(a)(5), (b)(9); *Elgharib v. Napolitano*, 600 F.3d 597, 603 (6th Cir. 2010).

In any event, Petitioners lack any such right to such materials but for the Court's preliminary injunction, which is not binding on this dispositive briefing. *See Edward Rose & Sons*, 384 F.3d at 261. Congress has made clear what information an alien in removal proceedings is entitled to receive. *See* 8 U.S.C. § 1229a(c)(2)(B); *see also id.* § 1229a(b)(4)(B). Further, any A-file, which would include historical data from the time of the alien's earlier removal proceedings, would not contain new information regarding changed conditions arising in Iraq, and is thus generally unnecessary to file a motion to reopen. *See Devitri v. Cronen*, No. 17-11842-PBS, 2017 WL 5707528, at *7 (D. Mass. Nov. 27, 2017).

CONCLUSION

The Court should dismiss the Second Amended Class Petition, ECF No. 118.

Dated: December 12, 2017

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing Reply to Petitioners' Opposition to Respondents' Motion to Dismiss the Second Amended Class Petition to be served via CM/ECF upon all counsel of record.

Dated: December 12, 2017

Respectfully submitted,

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