IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910
Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

PETITIONERS/PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF AMENDED MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Respondents oppose class certification primarily by claiming there is not a single common issue of law or fact for any claim. In making their arguments, Respondents ignore the most salient fact supporting certification: this Court has granted preliminary relief on behalf of the Primary Class that Respondents claim lacks a common interest, and that relief has been remarkably effective—advancing the interests of absent class members and the named Petitioners in equal measure.

Petitioners identified fifteen common issues of law or fact in their opening class brief. ECF 139, Pg.ID# 3775-77. Respondents do not address even one of them. Instead, Respondents argue that Petitioners cannot prevail on the merits. Whether a class is entitled to relief is a different question than whether it is a class.

There is no real impediment to certification. Many of the supposed factual differences among class members with respect to the removal claims relate to the merits of their underlying immigration cases rather than to their statutory and due process right to be heard. Similarly, the detention claims are subject to common resolution, presenting common legal and factual questions regarding the foreseeability of removal, the legality of prolonged detention without individualized determinations of flight risk or danger, and the applicability of the "mandatory detention" statute. Respondents' remaining objections fare no better. Their typicality challenges reiterate their arguments against commonality. Their

adequacy and numerosity objections are ill-founded and hyper-technical. Finally, this case demands a nationwide class. Nothing else can protect all persons similarly situated to the Petitioners.

ARGUMENT

I. Petitioners' Claims Present Common Issues of Law or Fact

The law is clear: "there need be only one common question to certify a class." *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 853 (6th Cir. 2013). Respondents cite no authority for their claim that "[t]he commonality requirement is especially rigorous" because Petitioners seek certification under Rule 23(b)(2), Resp., ECF 159, Pg.ID# 4147. No such authority exists. Rule 23(b)(2) does not modify the common question of law or fact requirement of Rule 23(a)(2).[1] There are common questions for all of Petitioners' claims.[2]

A. The Removal Claims

What matters for Rule 23(b)(2) is that the injunction or declaration sought "would provide relief to each member of the class." *Wal-Mart Stores, Inc. v.*

[1] In contrast, where certification is sought under Rule 23(b)(3), the court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members."

[2] Petitioners are not requesting class certification at this time for Count Three, regarding transfer. Count Seven, regarding motions to reopen filed without necessary documents, is not a claim for which a separate class must be certified—it is merely a remedy sought on behalf of certain members of the Primary Class based upon this Court's inherent equitable authority to supervise the case.

Dukes, 564 U.S. 338, 360 (2011). The preliminary relief already granted clearly meets this requirement, and by itself establishes the presence of common questions for Counts One and Two. Respondents raise three arguments against commonality. Resp., ECF 159, Pg.ID# 4149-51. But those arguments do not defeat certification because they go to how the Primary Class should be defined, not whether it should be certified. Even if the Court accepted each of these arguments, they require at most a modification to the proposed definition of the Primary Class.

Respondents first assert that the Primary Class should not include individuals detained after June 2017 because those persons have not "been blindsided" like other class members. *Id.*, Pg.ID# 4149. Respondents have presented this issue to the Sixth Circuit as a challenge to the scope of the preliminary relief. This Court has already decided how far its relief on the removal claims should reach. Given the Court's inherent ability to modify the certification order later, it is prudent to wait for guidance from the Court of Appeals. *See Whitlock v. FSL Management, LLC*, 843 F.3d 1084, 1090 (6th Cir. 2016) ("A district court 'retains the ability to monitor the appropriateness of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment.'").

Moreover, Respondents' argument assumes that the roughly 1,100 non-detained Iraqis spread around the country, who, like detained class members, have been living for years under orders of supervision, necessarily know that ICE is now

seeking to remove them. While the June arrests may have come to the attention of some (particularly where there is a concentrated Iraqi community), there is no reason to believe that all such persons knew then—or now—of ICE's sudden change in policy. Rather, because ICE has largely ceased arresting Iraqis at check-ins, Iraqis who are continuing to report now without being arrested may end up just as "blindsided" as those arrested in June. *See* 3d Abrutyn Decl., ¶ 30, ECF 138-18, Pg.ID# 3531; 2d Schlanger Decl., ¶ 26 (tbl. C), ECF 174-3, Pg.ID# 4923. Moreover, even assuming an individual knows of the change in ICE's policy, it could still take months to secure the documents needed to move for reopening and draft the requisite legal papers.[3]

Second, Respondents challenge inclusion of those with final orders "after 2014, and especially those that concluded in early 2017," Resp., ECF 159, Pg.ID# 4150, because they may have more difficulty establishing that country conditions have changed since their removal orders entered. This is again a variation of a question currently pending before the Sixth Circuit, and should await resolution there.

On the merits, as the vagueness of Respondents' argument makes clear, there is no single identifiable date on which country conditions changed in Iraq.

[3] If the Court does believe it necessary to define a class with a definite end date, that date should be triggered by notice to prospective class members that ICE is now seeking to remove them and thereafter provide sufficient time for them to obtain their A-files and Records of Proceedings and file motions to reopen.

The best Respondents can do is to assert that maybe CAT/FARRA claims could have been brought sometime in the last several years. Resp., ECF 159, Pg.ID# 4150. But as this Court noted, while the risk from ISIS may have been known in 2014, "threats posed by other groups to certain members of the class did not become apparent until well after." Prelim. Inj. Op., ECF 87, Pg.ID# 2349. *See also id.*, PgID# 2342 ("The earliest Iraq's changed conditions became apparent to Petitioners was 2014, with conditions threatening to some Petitioners not arising until much later."). A complex evidentiary hearing on country conditions would be necessary for this Court to determine a date certain after which persons had sufficient knowledge and factual basis to assert a CAT/FARRA claim in their original proceedings.[4]

Until now Petitioners and Respondents had agreed on one thing: the merits of changed country conditions claims should be addressed to the immigration court system. That remains the right answer, despite Respondents' attempt to muddy the waters. Differences among class members' underlying claims for immigration relief are irrelevant in this action, because as this Court has already held, it will "not evaluate whether any class member will likely succeed on the substance of

[4] Immigration law allows reopening based on country conditions that have changed since the substantive immigration court hearing. 8 U.S.C. § 1229a(c)(7)(C)(ii). Respondents seem to believe that the hearing date is the same as the **final** removal order date, but in fact, the hearing date can long pre-date the final removal order date. 8 U.S.C. § 1101(a)(47).

INA and CAT/FARRA arguments before the immigration courts and the courts of appeals." *Id*., Pg.ID# 2343. While individuals with more recent immigration court decisions *may* be somewhat less likely to prevail on their changed country conditions arguments than those with older orders, the common question for the class is whether they should have a reasonable opportunity to move for reopening.

Finally, Respondents contend that certification would harm putative class members who want to return to Iraq because they would be bound by this Court's decision staying removal. Resp., ECF 159, Pg.ID# 4150-51. This is clearly wrong. The Court has already lifted the stay of removal, on a case-by-case basis, for a handful of individuals who have decided that they are not interested in pursuing any further process in immigration court.[5] ECF 85, 119, 124, 147, 149, 150, 151, 161. Class certification would not prevent the Court from continuing to do so.[6]

B. The *Zadvydas* Claim

Like Petitioners' removal claims, the claim for release from detention under *Zadvydas v. Davis*, 533 U.S. 678 (2001), involves common legal questions, e.g., how to interpret *Zadvydas*, including whether to count the time it will take for

[5] Respondents inaccurately describe this as an "opt out" process, and claim that Rule 23(b)(2) does permit opt outs. What is needed in this circumstance is not an opt-out at all, but rather a modification to the existing relief that reflects that some individuals have already received all the process they seek.

[6] Similarly, Respondents' complaint about individuals who received final orders in the expedited removal context, ECF 159, Pg.ID# 4150, can be addressed in the briefing of their motion on lifting the injunction for those with such orders, ECF 134, Pg.ID# 3249, once Respondents explain who would be affected.

immigration proceedings to be adjudicated; how *Zadvydas*'s burden-shifting framework applies where Petitioners had previously been released based on non-repatriatability; and whether *Zadvydas* applies to persons detained after a motion to reopen has been granted. *Id*. This claim also involves common factual questions, e.g., whether Iraq has refused to allow repatriation; whether, even assuming repatriation is possible, it can be accomplished within a reasonable period; and whether the time necessary to resolve Petitioners' claims in the immigration courts will exceed any reasonable period of detention for purposes of effecting removal.

Respondents ignore these common questions, asserting that the *Zadvydas* claim requires an "individualized inquiry into the likelihood that the government will be able to confirm the detainee's identity and secure the necessary travel documents." Resp., ECF 159, Pg.ID# 4153. In essence, Respondents argue that because there are some individual facts, there can be no common questions. That is wrong: there are both. A decision on the common questions must come first; the Court's decision on the legal standards to apply and its findings on common factual issues will determine whether the individual facts are relevant and, if so, how they should be analyzed. If the Court agrees with Petitioners on the common legal and factual questions, Petitioners will have met their burden under *Zadvydas.* Respondents will then need to rebut Petitioners' showing that removal is not likely to occur soon. An opportunity to rebut based on individual facts is built into Petitioners' proposed

relief.

Respondents also argue that some detainees will not suffer prolonged detention, but will be removed because they fail to file motions to reopen. This is pure speculation. Respondents, having delayed producing the documents needed to file such motions, cannot know that detainees who have finally received their files will now fail to file their motions. Finally, Respondents' claim that some cases will proceed more quickly in immigration court than others only reinforces Petitioners' argument that class members face three options: winning quickly, winning slowly, or losing slowly. What is common to any of those outcomes is that removal is not significantly likely in the reasonably foreseeable future.

C. The Detention Subclasses

Respondents' commonality challenge to certification of the detention subclasses is a conclusory repeat of their response to the *Zadvydas* claim. As a threshold matter, the appropriate legal standard to justify detention without an individualized determination of danger or flight risk, a contested issue, is itself a common question of law. Respondents also ignore the common facts that entitle Petitioners to relief, including the class-wide failure to provide such individual determinations.

Respondents attempt to distinguish *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010), where the court approved certification of classes challenging immigration detention. Resp., ECF 159, Pg.ID# 4156-57. Respondents contend the

certification decision would have been different had it been made after *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), because *Wal-Mart* permits a consideration of the merits in deciding certification. Resp., ECF 159, Pg.ID# 4156. Respondents do not say what specific merits-based consideration would have resulted in a denial of certification in *Rodriguez*, nor is it possible to imagine any, as the same court, post-*Wal-Mart*, affirmed a judgment in favor of the classes. *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub. nom., Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). Respondents also note that the *Rodriguez* class was limited to detainees held over six months. 804 F.3d 1060, Pg.ID# 4156-57. The *Rodriguez* class corresponded to the claims advanced by the plaintiffs there. The class here is different, but similarly aligns with the common claims presented.

II. Certification Will Not Interfere with Decisions by Other Courts or Prevent Class Members from Raising Individual Detention Issues

Respondents argue that certification would violate principles of inter-circuit comity and prevent class members from raising individual detention issues through their own individual habeas petitions. Resp. ECF 159, Pg.ID# 4160, 4169. These concerns can be addressed through a modest change to the sub-class definitions.

First, class members who pursue release from detention through individual habeas petitions—a handful of which have been filed thus far, 2d Schlanger Decl., ¶¶ 28-30, ECF 174-3, Pg.ID# 4924-25—would be excluded from the detention sub-classes. Because exclusion from the Primary Class would potentially deprive

class members with individual detention habeas petitions from the protection of this Court's stay of removal, a third detention subclass, rather than the Primary Class, would bring the *Zadvydas* claim. The ***Zadvydas* Subclass** would be defined as:

> All Primary Class Members, who are currently or will be detained in ICE custody, and who do not have an open individual habeas petition seeking release from detention.[7]

(Creation of this sub-class also addresses Respondents' complaint that some Primary Class members are no longer detained. Resp., ECF 159, Pg.ID# 4150-51.) As part of class notice, class members would be informed that they could choose whether to pursue detention relief through individual habeas actions or as part of the class. This approach fully addresses any inter-jurisdictional comity concerns.

Respondents' second argument—that class members should not be precluded from raising individual issues—is addressed by the fact that Petitioners have crafted their requested relief on both the *Zadvydas* Claim and the Prolonged Detention Claim to allow for streamlined decisions on any individual issues that may emerge for class members who do not elect to file individual petitions for

[7] The definitions of the Detained Final Order Subclass and the Mandatory Detention Subclass would also be limited to persons "who do not have an open individual habeas petition seeking release from detention." Draft language setting out the revised sub-class definitions is attached as Ex. 1. *See* Fed. R. Civ. P. 23(c)(1)(B) (requiring certification order to define "the class claims, issues or defenses").

release.[8] This approach maximizes efficiency without compromising individual class members' claims. While only a few individual habeas petitions have been filed to date, in the absence of certification, this Court is likely to be faced with hundreds of individual habeas petitions. *See* E.D. Mich. LR 83.11(b)(7) (governing assignment of related cases). Petitioners' proposed approach will allow the Court to answer the common legal and factual questions once (not hundreds of times), while ensuring that any issues specific to individual class members can still be heard.

III. A Nationwide Class Is Appropriate

Respondents argue that the class should be limited to "individuals who have been arrested within the Eastern District of Michigan." Resp., ECF 159, Pg.ID# 4168. The common legal and factual questions presented here are not unique to class members who were arrested in Michigan (many of whom are no longer even in Michigan), but affect similarly-situated individuals nationwide.

Respondents do not, and cannot, argue otherwise. They suggest only that a nationwide class might strip other courts of jurisdiction over pending actions, a concern already addressed above. *See supra*, at II. Respondents also imply that multiple courts should address the claims here so that differing rulings can percolate to the Supreme Court. That ignores the emergency circumstances leading this

[8] The Section 1226 Claim turns on purely legal issues. If Petitioners prevail on those arguments, members of the Mandatory Detention Subclass will be eligible for individualized bond hearings before the immigration court.

Court to grant nationwide relief in the first place: across the country persons, mostly of modest means and legally unsophisticated, were faced with dire immediate consequences that could be challenged only through the emergency intervention of lawyers with specific expertise, who have capacity to manage one class case, but not 300 individual federal cases. The only way those detainees could get relief from the threatened removal was through this Court's prompt decision to extend the stay of removal nationwide. On the detention claims, while a handful of individuals have, *pro se,* filed individual habeas petitions, for the vast majority the only way—and certainly the only efficient way—to get relief from unlawful detention is through this Court's decision on the common questions raised.

IV. The Mandatory Detention Subclass Is Sufficiently Numerous

Respondents argue that Petitioners have not shown that the Mandatory Detention Subclass satisfies numerosity. Resp., ECF 159, Pg.ID# 4155-56. There were, as of October 28th, 59 persons detained after their motions to reopen were granted. Of these, the vast majority—an estimated 90%—are held under the purported authority of 8 U.S.C. § 1226(c), the INA's mandatory detention provisions. More detainees will be added to this subclass over time, as they win motions to reopen. Petitioners know the identities of 27 of these individuals, but cannot say for certain *precisely* how many more are in this group. 2d Schlanger Decl., ¶¶ 5-12, ECF 174-3, Pg.ID# 4917-18. But that knowledge is held by Respondents, who are

their jailers. Respondents are engaging in gamesmanship: they do not actually state that the subclass fails numerosity, just that Petitioners have not presented the definitive proof that Respondents possess but have refused to produce.[9] Petitioners have provided sufficient evidence of numerosity.

V. The Named Petitioners Are Adequate Representatives and Their Claims Are Typical

Respondents challenge the commitment of the class representatives, arguing they have not established their willingness to "protect the interests of the class against the possibly competing interests of the attorneys." Resp., ECF 159, Pg.ID# 4159 (citation omitted). Those "possibly competing interests" are nowhere identified. Petitioners' declarations are in the record.[10] ECF 138-3 to 138-16, Pg.ID# 3412-3516. What they show is that Petitioners are literally fighting for their lives. Removal carries the *likelihood* of persecution, torture and even death. Removal and detention carry the *certainty* of separation from family and lives built over years.

So, too, are Petitioners' claims typical. Respondents' main challenge to typicality is a repeat of their commonality claims: without common issues, there

[9] Remarkably, Respondents did not bother to ascertain this number before filing briefs contesting numerosity. Opp. to Mot. For Disc., ECF 165, Pg.ID# 4233-34. They claim they will now have to do this work for the first time. *Id.*

[10] Respondents argue that Named Petitioners who have been or could in future be released are inadequate class representatives because once freed they will cease to vigilantly pursue their claims. Resp. ECF 159, Pg.ID# 4160, n4. By this speculative logic, courts could never certify classes in jail cases since the class representatives are likely to be released prior to a decision on the merits. However, such classes are routinely certified. *See, e.g. County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *Ball v. Wagers*, 795 F.2d 579, 581 (6th Cir. 1986).

can be no typical representative. Resp., ECF 159, Pg.ID# 4161-62. This argument fails for reasons already noted. Respondents' assertion that this is especially true of the *Zadvydas* claim yet again repeats their commonality arguments. *Id.*, Pg.ID# 4162-63.[11] In fact, the class representatives' *Zadvydas* claims are typical because they raise common legal and factual questions about the foreseeability of removal.

VI. Class Counsel Should Be Appointed

Respondents argue that Petitioners' counsel are both not capable of prosecuting this class action *and* that there are too many lawyers. Resp., ECF 159, Pg.ID# 4164-68. Both claims are wrong.

The success of the attorneys in achieving results in this complex case on an emergency basis itself demonstrates their adequacy.[12] Respondents complain that the attorneys have provided biographical descriptions instead of affidavits. Counsel will happily supplement the record with declarations if that is useful to the Court.

As to the number of attorneys, it is true that there are quite a few. This is a complex nationwide class action on an expedited schedule seeking emergency relief. There has already been an interlocutory appeal, and over 4,000 pages of

[11] Respondents raise specific arguments about typicality for Counts Three and Seven. As noted above, Petitioners are not now seeking to include the Count Three claims in the certification order. Count Seven is not a "class claim," but rather an element of relief for Primary Class members who need it. No separate certification is required.

[12] Respondents advance an unsupported claim that counsel may sell the class short. Resp. ECF 159, Pg.ID# 4167-68. Claims of unethical conduct are serious, and call for more than a veiled reference to some imagined conflict.

filings. Counsel are communicating with clients detained across the country, and individual issues (often raised by Respondents) crop up daily. Though the core litigation team is composed of attorneys associated with the ACLU and Miller Canfield, other attorneys have provided invaluable counsel within their specific areas of expertise. The number of lawyers is that required to do the job.[13] Petitioners, however, have no objection if the Court prefers to name several lead class counsel.[14]

CONCLUSION

For the reasons stated herein and in their opening brief, Petitioners respectfully request this Court to certify this case as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), name the Petitioners as class and subclass representatives as specified in the motion, appoint Petitioners' counsel as class counsel, and order the parties to submit a proposed plan for class notice pursuant to Federal Rule of Civil Procedure 23(d)(1)(B).

[13] Petitioners see no need to burden the Court with ongoing review of their timekeeping. *See* Resp., ECF 159, Pg.ID# 4171. Those matters can be dealt with in due course, if and when a fee petition is filed. Should this additional burden be imposed, however, it should be conditioned on Respondents' stipulation that they will be liable for fees should Petitioners prevail. Respondents should not be permitted to divert counsel's attention from the merits and into the minutia of fee filings only to later argue that fees cannot be assessed in any event.

[14] Because the ACLU Fund of Michigan is not a law firm, the Court should designate the undersigned counsel from the ACLU of Michigan as class counsel. The ACLU Foundation (rather than ACLU Immigrants' Rights Project, which is not a law firm either) and other entities can be designated as class counsel in their organizational capacities if the Court prefers.

Date: December 12, 2017
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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2017, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

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EXHIBIT 1

PETITIONERS' PROPOSED LANGUAGE ON CLASS CERTIFICATION

The Court grants the motion of Petitioners and certifies the following classes for the identified claims:

1. **Primary Class:** All Iraqi nationals in the United States who had final orders of removal on March 1, 2017, and who have been, or will be, detained for removal by U.S. Immigration and Customs Enforcement ("ICE"). This shall be the "Primary Class." The Primary Class is certified for the claims in Counts One and Two of the Second Amended Habeas Corpus Class Action Petition and Class Action Complaint for Declaratory, Injunctive and Mandamus Relief, Dkt. 118 ("Petition").
2. ***Zadvydas* Subclass:** All Primary Class Members, who are currently or will be detained in ICE custody, and who do not have an open individual habeas petition seeking release from detention. This shall be the "*Zadvydas* Subclass." The *Zadvydas* Subclass is certified for the claims in Count Four of the Petition.
3. **Detained Final Order Subclass:** All Primary Class Members with final orders of removal, who are currently or will be detained in ICE custody, and who do not have an open individual habeas petition seeking release from detention. This shall be the "Detained Final Order Subclass." The

Detained Final Order Subclass is certified for the claims in Count Five of the Petition.

4. **Mandatory Detention Subclass:** All Primary Class Members whose motions to reopen have been or will be granted, who are currently or will be detained in ICE custody under the authority of the mandatory detention statute, 8 U.S.C. § 1226(c), and who do not have an open individual habeas petition seeking release from detention. This shall be the "Mandatory Detention Subclass." The Mandatory Detention Subclass is certified for the claims in Counts Five and Six of the Petition.