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

RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING PETITIONERS DETAINED UNDER 8 U.S.C. § 1225(b)

The Court should deny Petitioners' motion to "clarify" that their 8 U.S.C. § 1226(c) subclass includes individuals with reopened removal orders who are detained under 8 U.S.C. § 1225(b) and that they are entitled to bond hearings after six months of detention. First, the motion is procedurally improper. Petitioners cannot alter the scope of a preliminary injunctive order through "clarification" of an unambiguous order, especially when that order is on appeal to the Sixth Circuit. The Court should deny Petitioners' attempt at an end-run around Federal Rule of Civil Procedure 23's standard for class certification and the rigorous standard for obtaining preliminary injunctive relief for a unique subset of detainees. Second, Petitioners' motion fails on the merits. The Supreme Court's recent decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), demonstrates that Petitioners' constitutional challenge to section 1225(b) cannot be commonly resolved with the claims raised by the section 1226(c) subclass. Petitioners have not demonstrated that section 1225(b) is categorically unconstitutional when applied to putative class members who have been detained for six months or longer.

PROCEDURAL HISTORY

On January 2, 2018, this Court entered its second preliminary injunction, which required the government to provide bond hearings after six months of detention to a subclass defined as individuals "whose motions to reopen have been or will be granted . . . detained in ICE custody under the authority of the mandatory

detention statute, 8 U.S.C. § 1226(c)." ECF 191. Despite Respondents' objection that the 1226(c) subclass lacked numerosity because Petitioners were improperly counting "individuals detained under other provisions, including 8 U.S.C. §1225(b)," ECF 159 at Pg ID 4164, Petitioners claimed to be unaware of the existence of these detainees, ECF 227 at Pg ID 5881. Rather than move for relief for the section 1225(b) detainees, on February 8, 2018, Petitioners moved to "clarify" that their provision-specific subclass also includes individuals detained under a different immigration detention regime. ECF 227 at Pg ID 5881-82. Petitioner seek an order requiring the government to provide bond hearings after six months of total detention time to all detainees with reopened immigration proceedings who are detained under the authority of section 1225(b). *Id*.

BACKGROUND

As relevant here, Section 1225(b) applies to two categories of aliens with reopened removal proceedings.[1] First, section 1225(b)(2)(A) requires the detention of certain applicants for admission who were determined "not to be clearly and beyond a doubt entitled to admission" at a port of entry. Second, sections 1225(b)(1)(B)(ii) and 1225(b)(1)(B)(iii)(IV) require the detention of arriving aliens found to have a credible fear of persecution "for further consideration of the

[1] Section 1225(b)(1)(B)(iii)(IV) also applies to a third category of detainees subject to expedited orders of removal. These detainees, however, are not within the modified subclass definition because there is no procedure to reopen an expedited removal order. ECF 134 at Pg ID 3256-57.

application for asylum." Although section 1225(b) detainees are not entitled to release on bond, they are eligible to seek release through parole. Through this process, DHS may "for urgent humanitarian reasons or significant public benefit" temporarily parole aliens detained under section 1225(b) into the United States until the purposes of such temporary parole have been served. 8 U.S.C. § 1182(d)(5)(A); *see* 8 C.F.R §§ 212.5(b), 235.3 (2017).

ARGUMENT

I. The Court cannot substantively alter the scope of an appealed injunction order on a motion for clarification.

The Court's injunction unambiguously applies to a class of individuals with reopened removal orders detained pursuant to 8 U.S.C. § 1226(c) and cannot be fairly read to apply to any other category of individuals. Despite acknowledging that they never contemplated inclusion of individuals detained under section 1225(b), ECF 227 at Pg ID 5881, Petitioners now seek to expand the subclass definition and the scope of the injunction. This is procedurally improper for two reasons.

First, Petitioners cannot substantively expand a classwide injunction through a clarification motion. Such an approach would allow Petitioners to circumvent their rigorous burden of proving (1) section 1225(b) and section 1226(c) detainees share a common legal claim that is capable of uniform resolution, and (2) that section 1225(b) detainees are entitled to a preliminary injunction on their constitutional due process claim. Petitioners have not attempted to meet either standard. Rather, they

expressly acknowledge that section 1225(b) detainees do not share a common statutory claim with the 1226(c) subclass, ECF 227 at Pg ID 5876 n.1, making certification of a hybrid class for the statutory claim de-facto untenable under Rule 23(b)(2). To the extent the Court is considering the propriety of stand-alone relief for individuals detained pursuant to section 1225(b), Petitioners must move for and satisfy all applicable standards for obtaining such relief.

Second, the Court lacks jurisdiction to alter the scope of the injunction while the notice of appeal is pending. Petitioners' motion seeks modification of the January 2, 2018 Order, which is now on appeal. *See* ECF 247. While this Court retains jurisdiction under Fed. R. Civ. P. 62(c) to modify an order that is the subject of an interlocutory appeal, that authority is limited and inapplicable here. *See Basicomputer Corp. v. Scott*, 973 F.2d 507, 513 (6th Cir. 1992). The relief Petitioners seek does not preserve the status quo or the litigating positions of the parties and, therefore, cannot be accomplished through modification of an injunction that is the subject of a pending appeal. *Id*.

II. Section 1225(b) detainees are not entitled to classwide injunctive relief.

Petitioners' request is meritless. Petitioners do not dispute that, as a statutory matter, sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A) apply during reopened proceedings. *See* ECF 227 at Pg ID 5876 n.1; *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (Section 1225(b) unambiguously permits the government to hold

aliens without bail "until immigration officers have finished 'consider[ing]' the application for asylum, § 1225(b)(1)(B)(ii), or until removal proceedings have concluded, § 1225(b)(2)(A)."). Petitioners' "clarification" request raises only a constitutional due process challenge on behalf of section 1225(b) detainees. ECF 227 at Pg ID 5881. The motion should be denied. Petitioners' constitutional challenge to section 1225(b) cannot be commonly adjudicated with the challenge to section 1226 because the categories of aliens stand on different constitutional footing and have meaningfully different procedural entitlements and safeguards. The Constitution does not require bond hearings after six months for aliens seeking initial admission to the United States. As a result, Petitioners' motion fails to demonstrate that the proposed modification comports with Rule 23(b) and the standards for obtaining preliminary injunctive relief.

A. Petitioners' clarified class fails under Rule 23(b)(2).

For the proposed clarification to satisfy Rule 23(b)(2), Plaintiffs must show that "declaratory relief is available to the class as a whole" and that the challenged conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011). More specifically, here, Petitioners must establish that the constitutional claims of its Section 1225(b) detainees can be commonly analyzed and adjudicated with the claims of the section 1226 detainees in order for the

modification to be legally permissible. Petitioners must also establish that the 1225(b) detainee would be entitled to the very same remedy as the section 1226 subclass members. We know, however, that is not the case because (1) the due process analysis cannot be commonly applied to a hybrid section 1225-section 1226 subclass; and (2) the Court lacks jurisdiction to enjoin application of section 1225(b) and, therefore, the ordered relief is not available to the hybrid subclass as a whole.

First, the required due process analysis cannot be uniformly applied to the very different categories of detainees covered by sections 1225 and 1226. In *Jennings*, the Supreme Court directed the Ninth Circuit to examine whether classwide adjudication of constitutional challenges to prolonged immigration detention is consistent with *Wal-Mart* and Rule 23(b)(2). *Jennings*, 138 S. Ct. at 852. The Court specifically identified potential problems with classes that include individuals detained pursuant to section 1225(b) given the Ninth Circuit's conclusion that section 1225(b) covers individuals with very different due process interests in admission. *Id*. (citing *Rodriguez v. Robbins*, 804 F.3d 1060, 1082 (9th Cir. 2015) ("*Rodriguez III*"); *Rodriguez v. Robbins*, 715 F.3d 1127, 1139-41 (9th Cir. 2013) ("*Rodriguez II*")). The Court also noted that it has "repeatedly stressed" that due process is a flexible concept that requires an individualized assessment of numerous factors including "interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the

probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures." *Id.*; *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)**;** *see Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976). For this reason, *Jennings* counsels caution in evaluating the suitability of due process challenges to immigration detention for class treatment under Rule 23(b)(2). *Jennings*, 138 S. Ct. at 852.

The Court's concerns similarly apply here. Just as in *Jennings*, the proposed subclass includes individuals detained pursuant to section 1225 with widely varied constitutional interests—ranging from aliens who are still seeking initial admission to the a United States to Lawful Permanent Residents returning from abroad. *See* 227-2; 227-3; 227-4. Unlike the *Jennings* subclasses, moreover, Petitioners propose a hybrid arriving alien-criminal alien subclass. Thus, in addition to the internal variations among individuals subject to section 1225(b) detention, Petitioners have also infused additional class certification problems related to consideration of the rights and interests of individuals subject to completely different admissions systems, relief opportunities, and procedures for obtaining release. *Cf. Jennings*, 138 S. Ct. at 837-8. It is not possible to heed the Supreme Court's "repeated[]" instruction that due process is "flexible" and tailored to the "demands" of a "particular situation" while ignoring all relevant features of the individual's immigration history (and detention scheme) in favor of a blanket six month rule. *Id*. at 852.

Second, this Court lacks jurisdiction pursuant to 8 U.S.C. § 1252(f)(1) to grant injunctive relief to remedy a constitutional challenge to section 1225(b). Section 1252(f)(1)provides: "Regardless of the nature of the action or claim . . . no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221-1232], other than with respect to the application of such provisions to an individual alien against whom proceedings . . . have been initiated." Some courts have recognized an exception to this provision where the class is seeking to enjoin conduct that is not authorized by the statute, rather than seeking to enjoin the statute itself. *See, e.g., Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) ("*Rodriguez I*"). In *Jennings*, however, the Supreme Court observed that "[t]his reasoning does not seem to apply to an order granting [bond hearings] on constitutional grounds." *Jennings*, 138 S. Ct. at 852. Because injunctive relief is not available to the whole of the hybrid subclass, it fails under Rule 23(b)(2) and *Wal-Mart*, 564 U.S. at 360-61.

B. Section 1225(b) detainees are not entitled to bond hearings after six months.

This Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). As a result, even the Ninth Circuit recognized that section 1225(b) is constitutional for the duration of proceedings in the "vast

majority" of its applications. *Rodriguez II*, 715 F.3d. at 1141; *see Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied [initial] entry is concerned."). For unusual section 1225(b) cases, *Demore v. Kim*, 538 U.S. 510 (2003), demonstrates that—even for lawful permanent residents—six months of mandatory detention is not per se unconstitutional, as the Court affirmed the detention that had already exceeded six months and removal proceedings remained ongoing. The clear import of *Demore* and *Jennings* is that the due process entitlement must be judged by more than just the calendar—it requires an individualized assessment of the facts and circumstances surrounding the detention.

Here, the facts and circumstances support application of Section 1225(b) beyond the six-month mark. First, all of the individuals covered by the clarified subclass have already been ordered removed at least once—some without contesting their removal or pursuing any discretionary relief. *See, e.g.*, 227-4. Indeed, the only section 1225(b) individual to have completed any stage of reopened proceedings has been ordered removed for a second time. Exhibit A, Burgus Declaration; *see* ECF 227-1. The government has a powerful and increasing interest in maintaining custody of such individuals as removal proceedings progress towards completion.

In addition, these detainees have spent only a portion of their total detention time in section 1225(b) detention. All of these individuals were initially detained for

immediate removal (pursuant to 8 U.S.C. § 1231), but they traded their immediate removal for additional administrative process. Detention, however, is no less justified when a detainee makes choices that necessarily add time to the resolution of the case. *See Demore*, 538 U.S. at 530 n.14 ("[T]he legal system. . . is replete with situations requiring the making of difficult judgments as to which course to follow,' and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices."). In any event, even the *Jennings* dissent suggests that ordinarily 1225(b) does not raise constitutional concerns until after six months of *section 1225(b) detention*.

Petitioners attempt to downplay the importance of the "label[] 'applicants for admission,'" but because due process is so adaptable, even small differences in underlying facts or circumstances may be outcome determinative. *See Mathews*, 424 U.S. at 334-335. Indeed, that difference in constitutional footing was enough to convince the Ninth Circuit that, although detention exceeding six months under section 1226(c) posed serious constitutional concerns, section 1225(b) is "clearly" constitutional as applied to "likely the vast majority of aliens." *Rodriguez II*, 715 F.3d. at 1141. To date, no court has held that section 1225(b) is categorically unconstitutional when it crosses the six-month mark. Petitioners have not met their burden to show that this Court should "clarify" the injunction and become the first.

Dated: March 20, 2018
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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 Respondents' Supplemental Brief Regarding Petitioners Detained Under 8 U.S.C. § 1225(b) to be served via CM/ECF upon all counsel of record.

Dated: March 20, 2018

Respectfully submitted,

/s/ *Sarah Wilson*
U.S. Department of Justice

Counsel for Respondents

Exhibit A:
Burgus Declaration

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

USAMA JAMIL HAMAMA, et al., Plaintiffs-Petitioners, v. **REBECCA ADDUCCI,** et al., Defendants-Respondents.	Case No. 2:17-cv-11910 Hon. Mark A. Goldsmith Mag. David R. Grand Class Action **DECLARATION OF ELIZABETH BURGUS**

1. I hold the position of Paralegal Specialist in the Office of the General Counsel ("OGC") for the Executive Office for Immigration Review ("EOIR"). My duties include, among other things, reviewing records of proceedings ("ROP") and EOIR's electronic database ("CASE") for purposes of confirming case procedural history. I make this declaration in my official capacity..

2. I have queried EOIR's electronic database ("CASE") for records related to the removal proceedings for W-A- (571). I have reviewed the results of this query and am familiar with the procedural history of W-A-'s removal proceedings as reflected in the electronic database records.

3. EOIR's electronic records reflect the following:

- On August 3, 2006, an Immigration Judge at the Detroit Immigration Court ordered W-A- removed pursuant to section 212(a)(2)(C)(i) of the Immigration and Nationality Act.[1]

[1] Section 212(a)(2)(C)(i) of the Immigration and Nationality Act states that "[a]ny alien who the consular officer or the Attorney General knows or has reason to believe – is or has been an illicit trafficker in any controlled substance . . . or who is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit

- On September 7, 2006, W-A- filed a motion to reopen with the Detroit Immigration Court.
- On October 18, 2006, an Immigration Judge denied W-A-'s motion to reopen.
- On or about June 20, 2017, W-A- filed a second motion to reopen and a motion for a stay of removal with the Immigration Court in Detroit. On June 21, 2017, an Immigration Judge at the Detroit Immigration Court granted the stay of removal.
- On August 16, 2017, an Immigration Judge granted W-A-'s June 20, 2017 motion to reopen.
- Between September 7, 2017 and February 13, 2018, an Immigration Judge at the Detroit Immigration Court held hearings to consider W-A-'s application for relief from removal.
- On February 28, 2018, an Immigration Judge denied W-A-'s application for relief and ordered him removed to Iraqi.
- According to EOIR's electronic records, W-A- has not filed an appeal with the Board of Immigration Appeals to date.

I declare under penalty and perjury that the foregoing is true and correct to the best of my information and belief.

Executed this 20th Day of March 2018.

Elizabeth Burgus

Elizabeth Burgus

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trafficking of a controlled substance . . . is inadmissible."