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 A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
D.C. No. 2:17-cv-11910

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

FEDERAL STATUES

FEDERAL REGULATIONS

INTRODUCTION

The district court's preliminary injunction is a frontal assault on immigration enforcement in this country. By staying the execution of lawful final removal orders for hundreds of Iraqi nationals who undeniably had access for years to the court-approved procedures for seeking withholding of removal under the Immigration and Nationality Act (INA) and the Convention Against Torture (CAT), the injunction obstructs the fully adequate system created by Congress and denies the government the opportunity to show that this system can properly adjudicate these claims on a time-sensitive basis. Instead, based on anecdotal evidence about a few detainees' efforts to file emergency motions to reopen their immigration proceedings and stay enforcement of their removal orders, the district court sweepingly concluded that Congress's procedures were not available to approximately 1,400 people, the overwhelming majority of whom had not been arrested or detained as a result of the enforcement action at issue in this case. Op., RE 87, Page ID #2347–52. The court then barred the government from enforcing the removal orders of anyone in this group who is or will be detained for removal until the government delivers the person's immigration files, provides 90 days to file a motion to reopen, and allows full adjudication of the motion before the immigration court and Board of Immigration Appeals (BIA), *id.* at Page ID #2355–56, thus ensuring a years-long embargo on the government's execution of many

removal orders. The decision also creates a de facto rule under which those who knowingly delay seeking to reopen their immigration proceedings are entitled to a district-court injunction on the eve of removal. This legally baseless rule has taken hold in other cases across the country, where courts have relied on the district court's decision here to further undermine the immigration enforcement regime established by Congress. *See, e.g.*, *Devitri v. Cronen*, 17-CV-11842-PBS, 2018 WL 661518, at *4 (D. Mass. Feb. 1, 2018); *Chhoeun v. Marin*, 17-CV-1898-CJC, 2018 WL 566821, *10–11 (C.D. Cal. Jan 25, 2018). That rule imperils any meaningful governmental effort at removal.

This Court should reject the district court's injunction. As the government has established, 8 U.S.C. § 1252(g) plainly strips the district court of jurisdiction over petitioners' attack on the execution of removal orders. *See* Opening Brief 20–23. Petitioners maintain, and the district court held, that section 1252(g), as applied to "the factual circumstances" of their case, would violate the Suspension Clause. Response Br. 33–39. But the Suspension Clause does not extend to this case, *see* Opening Br. 24–32, and even if the Suspension Clause were triggered, it is satisfied because Congress created an adequate alternative to district-court habeas review, *see id.* 33–38. Petitioners maintain that they can maintain as-applied challenges to section 1252(g). But they fail to grapple with the government's points that the Suspension Clause protects core applications of habeas (and petitioners' request for relief from removal does not qualify)

and that the administrative process (with judicial review in the federal courts of appeals) is both adequate and available to them.

Even if the district court had jurisdiction over petitioners' claims attacking the execution of their removal orders, this Court would still need to vacate the injunction because petitioners' due-process claims—on which the injunction rests—are meritless. *See* Opening Br. 38–46. Petitioners have not challenged the district court's conclusion that the administrative process "is equipped to adjudicate the substance of petitioners' motions to reopen." Op., RE 87, Page ID #2348. Instead, they claim that they have a due-process right to a federal court order barring their removal until they adjudicate motions to reopen because, under the circumstances, they lacked sufficient time to file such motions and attempting to file them post-removal would be futile. Response Br. 40. But these alleged due-process violations are the consequences of petitioners' own choices not to timely avail themselves of long-available avenues for relief—despite having notice of changed country conditions since at least 2014. Petitioners' inaction should not license them now to claim that the administrative process is now unavailable to them. Petitioners also ignore the fact that they can seek exigent relief in immigration courts to the same extent that they can in federal district court. *See* Opening Br. 33–38.

Finally, the district court's injunction should at least be substantially narrowed. *See* Opening Br. 46–50. Petitioners' claims boil down to a demand for access to the administrative process. But the sweeping injunction that the district court granted—

which applies to non-detained Iraqis, lasts through multiple levels of review, and requires onerous document production—goes well beyond that demand. Petitioners contend that the injunction is appropriate because not-yet-detained persons still need notice of their potential removal and government production of their files. *See* Response Br. 50–53. The notice claim is risible: persons who are not detained already have ample notice that removal to Iraq is possible, and have no impediment to accessing that process. Petitioners contend that the injunction's extension through multiple levels of review is appropriate because the process could be "pretermitted" otherwise. *Id.* at 54. But an alien can—and thus should—seek a stay at each level of the adjudication process from the adjudicating court. 8 C.F.R. § 1003.23. And petitioners never justify the burdensome document production imposed upon the government.

The injunction should be vacated or, at the very least, substantially narrowed.

ARGUMENT

I. This Court should vacate the preliminary injunction because the district court lacked jurisdiction to issue it.

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

As the government has explained, this Court should vacate the preliminary injunction because the district court lacks jurisdiction over claims arising from "the

decision or action . . . to . . . execute removal orders," 8 U.S.C. § 1252(g)—which are the claims on which the injunction is based. *See* Opening Br. 20–23.

Petitioners contend that section 1252(g) does not bar their changed-country-conditions claims because those claims "could not have been raised in a petition for review, do not challenge prosecutorial discretion, and do not attack the validity of their original removal orders." Response Br. 33; *see id.* at 26–33. The district court did not embrace this argument, for good reason: it is wrong at each to step.

First, petitioners are wrong to contend that their changed-country-conditions claims "did not arise until after conclusion of their original proceedings," thus could not be reviewed through the petition-for-review process, and thus section 1252 does not bar the district court from reviewing their claims in habeas. Response Br. 27; *see id.* at 27–31.[1] Many petitioners' claims *can* be reviewed through the petition-for-review process, and so must be. *See* 8 U.S.C. § 1252(a)(4). Claims for withholding and deferral of removal are appropriately brought as defenses in removal proceedings. *See id.*; *id.* § 1231(b)(3). And to the extent that the events giving rise to petitioners' claims arose

[1] Petitioners cite several cases for the proposition that habeas remains available where the petitioner's challenge is "based on events post-dating review of the initial removal order that could therefore not have been raised or judicially reviewed in that proceeding." Response Br. 29; *see id.* at 29–30 (citing, among other cases, *Kellici v. Gonzalez*, 472 F.3d 416, 419–20 (6th Cir. 2006); *Jama v. INS*, 329 F.3d 630, 632–33 (8th Cir. 2003); and *Singh v. Gonzales*, 499 F.3d 969, 980 (9th Cir. 2007)). But none of these cases addresses the situation here, where petitioners can seek to reopen their removal proceedings to assert the claim that caused their alleged harm.

after their final removal orders were entered, they can file motions to reopen to assert those claims now. *Id.* § 1229a(c)(7). If country conditions change such that an alien believes that he is eligible for withholding or deferral of removal, the alien must file a motion to reopen removal proceedings to raise that claim, *id.*, denial of which can be appealed to the BIA and then the court of appeals, all of which can enter emergency stays of removal. *See, e.g.*, *Diouf v. Napolitano*, 634 F.3d 1081, 1083 (9th Cir. 2011). Through this avenue, which petitioners have always had available to them, petitioners can adequately challenge the denial of a motion to reopen on a petition for review, even where a temporary stay is necessary because removal is imminent. *See id.* Holding that an alien's unpresented, putative basis for CAT relief should itself halt removal when he has made no effort to litigate the matter would paralyze immigration enforcement and is not the law.

Second, there is no textual basis for petitioners' claim that section 1252(g)'s jurisdictional bar applies only to discretionary determinations. *See* Response Br. 33; *see id.* at 31–32. Section 1252(g) strips district-court jurisdiction over "*any* cause or claim" "arising from the decision or action" to "execute removal orders." 8 U.S.C. § 1252(g) (emphasis added). The only court of appeals to squarely address the issue has accordingly held that section 1252(g) is not limited to discretionary decisions or actions. *Foster v. Townsley*, 243 F.3d 210, 213–14 (5th Cir. 2001). Whatever other claims section

1252(g) covers, it explicitly covers the decision to "execute removal orders." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

Third, petitioners are misguided in arguing that they "do not attack the validity of their original removal orders." Response Br. 33. Petitioners are surely challenging the "execut[ion]" of their "removal orders," 8 U.S.C. § 1252(g), so section 1252(g) squarely bars their claims. And petitioners *are* challenging the validity of their original removal orders, because if they reopen those orders, they may challenge their removal generally on other bases, such as that their crimes of conviction no longer render them removable. *See, e.g.*, 2d Am. Compl. ¶ 81, RE 118, Page ID #3008. In rejecting petitioners' argument on this score, the district court relied on *Elgharib v. Napolitano*, 600 F.3d 597 (6th Cir. 2010), in concluding that section 1252(g) bars petitioners' claims, even constitutional ones, challenging their removal. Op. on Jurisdiction, RE 64, Page ID #1239 ("*Elgharib*'s sweeping conclusion that § 1252(g) bars jurisdiction for constitutional claims dooms Petitioners' theory" that since section 1252(g) only precludes judicial review of discretionary decisions, there is jurisdiction to review the allegedly non-discretionary decision to remove Petitioners in violation of CAT and the INA); *see also id.* at Page ID #1235–40. Petitioners argue that the constitutional claim in *Elgharib* "directly challenged the validity of the initial [removal] order," and because the claim in that case could have been brought in a petition for review had the petitioner there not "waived appeal." Response Br. 33; *see id.* at 32–33. But petitioners' claims are

not distinguishable from those in *Elgharib*: like the alien's claims there, petitioners' claims "directly target[] [their] order[s] of removal" because they too request "that the Department of Homeland Security be prohibited from removing" them so they can "seek relief in a court of proper jurisdiction." 600 F.3d at 605; *see, e.g.*, Pet'rs' Mot. Prelim. Inj., RE 77, Page ID #1709 (requesting a stay "barring the removal of petitioner class members"). In light of *Elgharib*, petitioners' attempts to halt their removals while they belatedly make use of an always-available, emergency-equipped legal avenue to obtain their relief cannot escape the jurisdictional bar of section 1252(g).

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

The district court also erred in ruling that section 1252(g) would violate the Suspension Clause as applied here. *See* Opening Br. 23–38. Petitioners resist this conclusion, *see* Response Br. 33–39, but their arguments lack merit.

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.

The Suspension Clause protects core applications of the writ of habeas corpus, which do not include the type of challenge—a request for more time to seek reopening of final removal orders—that petitioners assert. *See* Opening Br. 24–32. Petitioners make several arguments in response. *See* Response Br. 33–36. None is availing.

To start, petitioners contend that the government is wrong to argue "that the Suspension Clause covers only claims seeking physical release from detention and not challenges to removal," emphasizing that this argument is "definitively contradicted by" *INS v. St. Cyr*, 533 U.S. 289, 301 (2001), and unduly relies on "cases involving overseas wartime detainees and enemy combatants." Response Br. 34, 35; *see id.* at 34–36. But *St. Cyr* explained that "[a]t 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." 533 U.S. at 301. Thus, the primary purpose of the writ, and so the availability of habeas corpus protected by the Suspension Clause, is to serve as a "remedy for unlawful executive detention." *Munaf v. Geren*, 553 U.S. 674, 693 (2008). It follows that the rationale for extending the Suspension Clause's protections in other circumstances—such as where removable aliens do not request release from detention, but rather a change of their immigration status so as to *avoid* release to their country of nationality to which they have been ordered removed—is weaker. *See St. Cyr*, 533 U.S. at 301.

In *St. Cyr*, the Suspension Clause was at issue because the aliens requested cancellation of removal, which would have freed them from detention and permitted them to remain in the United States. *See St. Cyr*, 533 U.S. at 297. In contrast, here petitioners request not to be removed to a particular country based on changed conditions there. This is not a traditional use of habeas, as *Munaf* made clear. *See Munaf*,

553 U.S. at 693–94. And unlike the aliens in *St. Cyr*, who faced the prospect of no judicial forum to litigate their claim for cancellation of removal, petitioners here have a recognized federal judicial forum in which to challenge an adverse decision on their motion to reopen their removal orders—the federal courts of appeals on a petition for review from denial of an administrative reopening motion and stay request. *See Muka*, 559 F.3d at 485; *Iasu v. Smith*, 511 F.3d 881, 892 (9th Cir. 2007) ("A potential motion to reopen can suffice to alleviate Suspension Clause concerns."). Further, unlike in *St. Cyr*, petitioners did not even directly challenge the agency's decision regarding their applications for relief from removal in federal court, but rather sought stays of removal in order to file reopening motions with the agency. *Compare St. Cyr*, 553 U.S. at 315 (litigating eligibility for cancellation of removal), *with* Pet'rs' Mot. Prelim. Inj., RE 77, Page ID #1707–08 (requesting a stay to provide time to adjudicate motions to reopen removal proceedings).

As noted, petitioners attempt to distinguish two cases—*Munaf* and *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009)—on the basis that they "involv[ed] overseas wartime detainees and enemy combatants." Response Br. 35; *see id.* at 35–36. But *Munaf* turned on the "the nature of the relief sought" by the petitioners, not their status; it concluded that "habeas was not appropriate" because "the last thing petitioners want is simple release" but instead they seek "a court order requiring the United States to shelter them," a conclusion that similarly defeats the district court's Suspension Clause

ruling here. 553 U.S. at 693–94. Similarly, *Kiyemba*'s holding about the scope of the writ was based on the limits of a government's sovereignty and unqualified as to the status of the subject. *See* 561 F.3d at 516 ("Therefore, 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.").

Petitioners' remaining points lack merit. Even if some class-action habeas cases exist, *see* Response Br. 36, that does not establish that it is a traditional use of habeas, a point confirmed in *Schall v. Martin*, 467 U.S. 253 (1984). *See id.* at 260 n.10 ("[w]e have never decided" whether Rule 23 "is applicable to petitions for habeas corpus relief"); Opening Br. 28–29. Petitioners also argue that their claim of lacking an adequate forum in the circumstances presented by this case presents a "legal" question rather than a fact-intensive one that falls outside traditional habeas. Response Br. 36 n.19. It does *not* present a legal question, however, as the legal validity of the petition-for-review process has been settled, *see, e.g.*, *Muka*, 559 F.3d at 485; *Iasu*, 511 F.3d at 893, and petitioners' claim involves primarily factual questions—whether they had enough time and adequate access to resources to file administrative stay requests and file motions to reopen once they understood that their longstanding removal orders would be enforced, and whether changed country conditions in Iraq gave them a basis to seek reopening. *See* Pet'r's Preliminary Injunction Mot., RE 77, Page ID #1718. More importantly, regardless of the type of question at issue, challenging removal to a

particular country is not a core function of habeas and thus does not implicate the Suspension Clause. *See Munaf*, 553 U.S. at 693–94.

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 the Suspension Clause were implicated here, Congress has provided an adequate substitute for habeas in administrative review process. *See* Opening Br. 33–38. Petitioners' arguments to the contrary, *see* Response Br. 36–39, lack merit.

First, petitioners contend that the cases cited by the government on this point address only the "facial[]" adequacy of the petition-for-review process, argue that these cases "did not find the reopening process adequate regardless of the factual circumstances," and maintain that the factual circumstances here rise to the level of a Suspension Clause violation. Response Br. 37; *see id.* at 37–39. But this Court has already concluded that no Suspension Clause violation occurs where aliens claim a right to raise a claim for which they had the legal avenue to raise previously in the system created by Congress and where the evidence did not support any explanation other than that the aliens "merely chose not to make the argument" at that time. *Muka*, 559 F.3d at 485. While some petitioners alleging changed country conditions would likely not have been able to raise those conditions during their initial removal proceedings, there is no dispute that those conditions existed before June 11, 2017, and that they had the avenue to raise them through an administrative motion to reopen. Rather, they "merely

chose not to make the argument" before being notified that removal was imminent. *Id.* *Muka* precludes finding a Suspension Clause violation in such circumstances.

Second, petitioners argue that the district court considered other circumstances regarding timing and access, and not just that they were claiming CAT relief based on changed country conditions, in finding an as-applied Suspension Clause violation. *See* Response Br. 37–39. But it is undisputed that these factors did not deprive petitioners of the opportunity to file a motion to reopen earlier, they apparently were just not strong enough to persuade petitioners to use the process available to them. *See* Op., RE 87, Page ID #2342 ("given that lack of utility, it was reasonable not to incur the prohibitive cost of filing a motion to reopen"). While petitioners may have thought it not in their economic self-interest to seek reopening until removal became certain, *see* Response Br. 23 (referring to "the complicated and expensive process of seeking to reopen"), an immigration system where aliens are required to challenge their removal only when it makes personal economic sense or when their removal orders are imminently executable is untenable. Such a regime, if upheld, would entitle petitioners, and those similarly situated, to wait to challenge their removal orders until they decide removal is likely enough to justify the litigation cost.[2] Such a rule would undermine fairness in the

[2] Although not raised below, Petitioners claim that they also decided against filing motions to reopen earlier out of fear of mandatory detention for criminal aliens, 8 U.S.C. § 1226(c), if their removal orders were reopened. Response Br. 38–39 n.21.

immigration system, flout the need for finality in that system, and grind the administrative system to a halt. It should be rejected.[3]

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, this Court should reject the preliminary injunction because petitioners are not entitled to that relief. *See* Opening Br. 38–46. Petitioners' arguments to the contrary, *see* Response Br. 39–48, are unavailing.

A. Petitioners had the notice and opportunity to be heard that due process required.

Petitioners first contend that the district court correctly held that their removal would violate due process in that "it would have denied them the opportunity to be heard at a meaningful time—*before* their removal to Iraq—about the dangers they face."

Moreover, for aliens who have committed qualifying crimes rendering them removable, detention is a normal and constitutionally permissible part of the removal process, designed to ensure an alien's presence for proceedings, not to discourage participation in them. *See Demore v. Kim*, 538 U.S. 510, 513 (2003).

[3] As noted in the opening brief, the district court concluded that several factors combined to "significantly imped[e]" petitioners "from filing motions to reopen," including time, cost, and proximity to counsel. Opening Br. 40 (quoting Op., RE 87, Page ID #2351–52). None of those factors, collectively or individually, demonstrate that petitioners were impeded from accessing the administrative process. *Id.* at 40–45. Petitioners do not address the government's arguments directly, arguing instead that the district court properly rejected them "for the same reasons that it properly rejected the argument that the motion to reopen process provides an adequate alternative to habeas review." Response Br. 42.

Response Br. 41 (emphasis in original); *see id.* at 40–41. In making this argument, petitioners maintain that "(1) until there was an actual risk of removal it would have been unreasonable to expect [petitioners] to seek reopening; and (2) there is no single date on which country conditions changed, but rather conditions continue to evolve and new threats have emerged very recently." *Id.* at 42.

Petitioners are wrong. At the start of this case, every petitioner had final removal orders and were on notice that they could be returned to Iraq at any time that government agreed to accept them. It would not have been academic to reopen their removal proceedings the very moment they had a basis for doing so, because by obtaining legal relief they could have obtained what they ultimately seek through this action—the right to stay in the United States. Further, to the extent that the district court's due process analysis is premised not on when petitioners had notice of a potential basis for reopening their proceedings, but rather on the cost-benefit analysis of seeking reopening when removal seemed unlikely, Op., RE 87, Page ID #2342, that was error. There is no evidence in the record suggesting that petitioners did not have the opportunity to act before the eve of their arrests by ICE.

In contending that the government's execution of petitioners' removal orders "deprived" them "of the time needed for fair process" in moving to reopen, petitioners tout the purported success of their later-filed motions to reopen compared to motions filed by a few petitioners shortly after their arrest. Response Br. 43. But petitioners'

evidence does not provide the support that they claim. They maintain that as of October 28, 2017, "putative class members had won 87% of the motions to reopen finally decided within the immigration court system (even including the early losses)." *Id.* at 19. But the "finally decided" limitation is important: by using that limitation, petitioners omit that immigration judges denied 40% of motions to reopen before them (43 out of 107) and the BIA denied 38 percent of motions to reopen that had been initially filed there and decided (5 out of 13). 1st Schlanger Decl. ¶ 20, RE 138-2, Page ID #3406. The 87% "finally decided" calculation excludes the 30 appeals to the BIA which were pending after having been denied by immigration judges, and 5 that had been denied by immigration judges where there was still time to appeal to the BIA. *Id.* At all events, the adjudication of these many motions to reopen just confirms that the process is and has been available to petitioners—even though they chose not to use it until now.

Petitioners also argue that administrative stays are only "nominally" available because there is no guarantee that the agency would adjudicate the stay motion before removal was scheduled. *See* Response Br. 43–44. Under this rationale, such stays are equally only "nominally" available in petitioners', but not Congress's, chosen forum—district court. Petitions must be accompanied by stay requests in district court as well, and stays are not automatic, but require timely adjudication by the court. Given that immigration courts routinely handle these motions, but district courts rarely, if ever,

now do, *see* 8 U.S.C. § 1252(a)(5), (b)(9), the former are more equipped to enter a time-appropriate stay where necessary. Petitioners' choice to short circuit the process by foregoing seeking administrative stays in favor of immediate district court intervention deprived this Court of an opportunity to see Congress's design in action.

Citing *Trujillo-Diaz v. Sessions*, 880 F.3d 244 (6th Cir. 2018), petitioners also contend that even those of them "with pending stay applications . . . would almost certainly have been removed without the district court's stay." Response Br. 43. But as *Trujillo-Diaz* demonstates, the BIA and this Court are fully capable of acting swiftly to adjudicate stay motions when removal is imminent. In *Trujillo-Diaz*, a Mexican citizen with a final removal order filed a motion to reopen/stay with the BIA based on changed county conditions. 880 F.3d at 248. Two days after her motions were filed, she was apprehended by ICE and scheduled for removal. *Id.* Although the BIA denied her stay motion the day before her scheduled removal, petitioner availed herself of section 1252's review processes and immediately filed a petition for review in this Court challenging the BIA's denial and sought an emergency motion to stay removal. *Id.* The very next day, this Court dismissed her petition for review and denied her motion to stay, and she was removed. *Id.* *Trujillo-Diaz* thus confirms that the forum Congress created as the exclusive one for petitioners' claims—the immigration courts, BIA, and subsequent review in the courts of appeals—possesses the authority and capability to expeditiously adjudicate motions to stay.

Finally, Petitioners argue that the district court correctly concluded that they could not reasonably puruse a motion to reopen from Iraq. *See* Response Br. 44. But aliens can puruse motions to reopen from abroad, following removal to the home countries they challenge as inhospitable. *See Pruidze v. Holder*, 632 F.3d 234, 239 (6th Cir. 2011). Moreover, to the extent that the district court's reasoning was based on country conditions, it is undermined by the fact that several people covered by the preliminary injunction have "opted-out" and returned to Iraq voluntarily, despite the protections provided by the district court.[4]

B. There is no statutory right under the INA or CAT/FARRA to an adjudication of a motion to reopen before removal.

Petitioners next contend that this Court should affirm the injunction on the ground that petitioners have a "statutory right" not to be removed before filing motions to reopen. *See* Response Br. 44–48. In their view, the INA and CAT/FARRA guarantee them the statutory and procedural right to file a motion to reopen and to obtain a stay of removal to raise their claims, and that such rights would be "meaningless without time to file and litigate a motion to reopen before removal." *Id.* at 44.

The district court rightly rejected this argument. Op., RE 87, Page ID #2344–47. As the district court held, "the plain language of these statutes . . . does not support

[4] Since this lawsuit started the district court has entered orders at the request of individuals who wanted the preliminary injuction lifted so that they could return to Iraq. *See* RE 85, Page ID #2265–67.

[petitioners'] conclusion." *Id.* at Page ID #2345. Indeed, neither the INA nor CAT/FARRA contains "an express procedural guarantee" that a motion to reopen is to be adjudicated prior to removal. *Id.* Petitioners lack both substantive and procedural rights under the statutes enacting these treaty obligations that are enforceable in district court.[5] The only enforceable CAT rights are available in removal proceedings or in a petition for review from those proceedings. *See* 8 U.S.C. §§ 1231(b)(3), 1252(a)(4); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 749 n.5 (6th Cir. 2006); 8 C.F.R. §§ 1208.16(c); 1208.17, 1208.18. If country conditions change after the alien's initial proceedings, the INA provides a statutory procedure to seek reopening. 8 U.S.C. § 1229a(c)(7). Petitioners had access to these procedures; their only (untested) claim is that these procedures were insufficient to respond rapidly to their stay requests. Such an argument—that the existing procedures are inadequate and petitioners have a due-process entitlement to the *extra*-statutory, prophylactic procedure imposed by the injunction here—means that existing statutory procedures provide no such right. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

[5] Indeed, because the district court cannot grant petitioners redress under these provisions, the district court could have rejected the statutory claim for want of standing, in addition to lack of merit. *See, e.g., Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 715 (6th Cir. 2015) ("An injury is redressable if a court order can provide 'substantial and meaningful relief.'" (quoting *Larson v. Valente,* 456 U.S. 228, 243 (1982)).

C. The district court erred in concluding that the irreparable harm and balance of harm factors weighed in favor of granting the preliminary injunction.

Finally, petitioners restate the district court's holding on the remaining injunctive factors. *See* Response Br. 55–56. As explained, the district court's showing is unavailing. *See* Opening Br. 45–46. Petitioners' claims of generalized harms (*see* Response Br. 55) are appropriately addressed on an individualized basis in immigration court, not before a district court in a class-wide manner that aggregates claims of individuals with varying backgrounds, religious beliefs, and time spent in the United States. Moreover, any country conditions in Iraq are not sufficient to meet the standards for CAT on a blanket country-wide basis, and petitioners are responsible for establishing individualized eligibility for relief before the immigration courts.

Petitioners also suggest that harm to "any conceivable interest the government might have" is minimal. Response Br. 55. But "[t]here is always a public interest in prompt execution of removal orders." *Nken*, 556 U.S. at 436. Indeed, "[t]he continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings [that Congress] established." *Id.* (internal quotation marks omitted). Petitioners also fail to acknowledge the government's strong interest in removing aliens, such as those here, who have criminal convictions and present a risk to public safety. Finally, petitioners do not grapple with the fact that the injunction compromises the government's diplomatic interests and ignores that any order enjoining the lawful

enforcement of immigration laws related to national security constitutes an irreparable injury weighing heavily against injunctive relief. *See, e.g., New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977).

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

Even if the district court could have justifiably issued some injunctive relief, the relief it granted was overbroad and should be significantly narrowed. *See* Opening Br. 46–50. Petitioners' arguments to the contrary, *see* Response Br. 49–54, lack merit.

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

The district court's injunction should not apply to the vast number of petitioners who possess final orders of removal but have not been detained for removal. Such individuals do not face the purported access issues and ability to obtain files that animated the district court's due-process analysis. *See* Opening Br. 47–48. Petitioners acknowledge that "[i]t may be that non-detained Iraqis do not face all of the barriers to accessing the immigration courts as those already detained," but argue that not extending the injunction to them deprives them "of notice." Response Br. 51; *see id.* at 51–53. That claim is not credible at this stage. Even if some petitioners had not been on notice of potential removal in June 2017, they are on notice now that Iraq is accepting its removed nationals and that petitioners could soon be removed. Petitioners argue that "[t]he government does not explain why" "those not yet detained

should all realize that their long-dormant removal orders may suddenly be enforced." Response Br. 52. But the district court itself said: "Now that *Petitioners are on notice* that filing motions is necessary, due process concerns would require that they be given a fair opportunity to present their cases." Op., RE 87, Page ID #2350 (emphasis added). That notice applies across the board. Since non-detained petitioners are on notice of, and cannot be said to be subject to the purported due process violation of "impeded access to the administrative system," *id.* at Page ID #2351, they should not be afforded the same injunctive relief as those who are detained.

Nor should the injunction encompass individuals ordered removed who have already had the ability to raise asylum and CAT claims based on the 2014 changes in Iraq. *See* Opening Br. 48. Petitioners contend that such an argument runs "contrary to the district court's factual findings." Response Br. 50; *see id.* at 50–51. But the district court stated that "Iraq's changed country conditions became apparent to Petitioners [in] 2014." Op., RE 87, Page ID #2342. And although the court determined that petitioners' "CAT/FARRA and INA claims did not ripen until at least 2014," *id.* at Page ID #2340, it failed to account for those petitioners ordered removed after 2014 who have already had the ability to present the same claims for relief in the administrative system. Petitioners resist this point regarding those who plainly should have challenged their removal orders after 2014 by contending that "the right the injunction protects is procedural." Response Br. 50. But the injunction says that "[t]he due process violation

at issue here" constitutes "impeded *access* to the administrative system." Op., RE 87, Page ID #2351 (emphasis added). Any individual with a post-2014 removal order has already had a "meaningful opportunity to present their INA and CAT/FARRA claims to the immigration courts." *Id.* at Page ID #2352. The injunction's application to individuals who have already been "given a fair chance to access [the administrative system]," *id.* at Page ID #2337, is thus overbroad.

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

Further, the injunction should not last through the entire motion-to-reopen and petition-for-review process. *See* Opening Br. 49. Petitioners contend that such a structure was "entirely appropriate" since this "process is the one that the INA mandates." Response Br. 54. But the relief petitioners seek is *access* to the administrative process, which the injunction permits by virtue of the opportunity to file motions to reopen. Petitioners contend that "the Suspension Clause requires that some federal court be able to review the merits of individual removal orders." *Id.* But petitioners have maintained that they are not challenging the merits of their underlying removal orders. Response Br. 33 ("Appellees do not ask the district court to review the merits of their original removal orders"). Moreover, a petitioner can file a motion to stay removal concurrently with a motion to reopen—which is all that is necessary to allow

for an "orderly filing for relief with the immigration courts before deportation." Opening Br. 49 (quoting Op., RE 87, Page ID #2324).

At a minimum, the injunction should last no longer than the time necessary for the adjudication of the administrative proceedings and, if necessary, until petitioners have submitted motions to stay in the appropriate court of appeals. Other courts have taken such a more modest approach. *See Chhoeun v. Marin*, 17-cv-01898, 2018 WL 566821 (C.D. Cal. Jan. 25, 2018) (execution of final removal orders stayed through the adjudication of the administrative process and seven days after the BIA denies any motion to reopen); *see also Devitri v. Cronen*. 17-cv-11842 (D. Mass. Feb. 1, 2018), --- F. Supp. 3d --- (2018) (same). At a minimum, the same approach should apply to the injunction here.

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 step of requiring the government to produce an alien's complete A-file and ROP before triggering an alien's 90-day timeframe to avail themselves of the motion-to-reopen process. *See* Opening Br. 49–50. While petitioners are right that nearly "all files for current class members have already been produced," Response Br. 53, they ignore (*see id.* at 53–54) why such production is unnecessary—because those files are not relevant to moving to reopen based on *changed* country conditions—and should not continue. *See* Opening Br. 49–

50. Petitioners also never mention why they or their attorneys do not already possess the very documents that they purportedly need from the government. Petitioners contend that the government's obligation to provide files to future detainees "is no more taxing on the government than the statutory right for which it substitutes . . . and allows for more efficient techniques, monitoring, and supervision." Response Br. 54. But the district-court-created discovery obligation mandates the production of files that go far beyond any statutory entitlement that aliens in removal proceedings have regarding the opportunity to examine evidence presented against them. *See* 8 U.S.C. § 1229a(b)(4)(B). Although no formal discovery process exists in administrative immigration proceedings that would entitle petitioners to their A-files or ROPs, petitioners here are not even in removal proceedings unless their motions to reopen are granted. Response Br. 50. And contrary to petitioners' statement that "the government has never offered more than a naked assertion of burden," *id.* at 53, the government emphasized below the tremendous logistical and legal burdens associated with the production of approximately 1,400 A-files. Respondents' Status Report, RE 96, Page ID #2575–81 (detailing process necessary to: locate; scan; review; determine governmental equities; assessing confidentiality/privacy/statutory preclusions; assert executive/common law privileges; obtain privacy waivers; redact files; coordinate delivery, etc.). For these reasons and those given above, any ongoing injunction should at least be substantially narrowed.

CONCLUSION

For the foregoing reasons, the district court's injunction should be vacated or, at minimum, significantly narrowed.

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CERTIFICATE OF SERVICE

I certify that on February 20, 2018, the above brief was served on all counsel of record through the Court's CM/RE system.

/s/ William C. Silvis
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CERTIFICATE OF COMPLIANCE

I certify that the above brief contains 6,500 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/ William C. Silvis
Assistant Director

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
64	1235-40	07/11/17	Opinion & Order Regarding Jurisdiction
77	1707-09; 1718	07/17/2017	Petitioners' Motion for a Preliminary Stay of Removal and/or Preliminary Injunction
81	1982	07/20/2017	Respondents' Response in Opposition to Petitioners' Request for a Preliminary Injunction
85	2265-67	07/21/2017	Stipulated Order Lifting Stay of Removal for Hussein Alrudaini
87	2324; 2337; 2340; 2342; 2344-52; 2355-56	07/24/2017	Opinion & Order Granting Petitioners' Motion for Preliminary Injunction
96	2575-81	08/30/2017	Respondents' Status Report
118	3008	10/13/2017	Petitioners' Second Amended Complaint
138-2	3406	11/07/2017	(First) Declaration of Margo Schlanger