U.S. Department of Justice
Civil Division

Deputy Assistant Attorney General

May 4, 2018

Re: *Hamama v. Adducci*, Nos. 17-2171, 18-1233

Dear Judge Batchelder, Judge Sutton, and Judge White:

The federal government respectfully submits this letter brief in response to the Court's April 27, 2018 invitation to address three questions. As explained below, this court should vacate the preliminary injunctions at issue in these appeals. In No. 17-2171, the Court should remand with directions to dismiss the removal-based claims because the district court lacks jurisdiction over those claims. In No. 18-1233, the Court should recognize that the district court has jurisdiction over the detention-based claims, but vacate the injunction because it rests on misinterpretations of the relevant statutes, and hold that class-wide relief on any remaining constitutional claims is barred.

(1) In what way, if any, would the jurisdictional ruling with respect to the removal-based claims in No. 17-2171—either finding jurisdiction or not—affect the district court's jurisdiction over the detention-based claims in No. 18-1233?

The district court's jurisdiction over the detention-based claims in No. 18-1233 is independent of the district court's jurisdiction over the removal-based claims in No. 17-2171. If this Court holds that the district court lacked jurisdiction to enter the injunction on the removal-based claims, however, that holding would make it even clearer that the district court erred on the merits in its resolution of the detention-based claims.

Under 28 U.S.C. § 2241, "[w]rits of habeas corpus may be granted by the" district courts "within their respective jurisdictions." 28 U.S.C. § 2241(a). Nothing in the Immigration and Nationality Act (INA) divests district courts of that jurisdiction to consider a habeas petition contending that continued immigration detention without a bond hearing is unlawful or unconstitutional—so long as such a claim is targeted at the legality of detention for reasons unrelated to the legality of the removal order or the steps taken to execute such a removal order, where habeas review is precluded by 8 U.S.C. § 1252. Two provisions of the INA are potentially relevant to claims challenging the lawfulness of continued immigration detention without a bond hearing—8 U.S.C. § 1226(e) and 8 U.S.C. § 1252(g)—but neither forecloses district-court habeas jurisdiction over such claims.

First, 8 U.S.C. § 1226(e) provides that the "[Secretary of Homeland Security's] discretionary judgment regarding the application of this section shall not be subject to

review," and that "[n]o court may set aside any action or decision by the [Secretary of Homeland Security] under this section regarding the detention or release of any alien" during the pendency of removal proceedings. Section 1226 is the INA provision that authorizes the Secretary to arrest aliens and take them into custody for removal proceedings, and provides that aliens ordinarily may be released on bond, 8 U.S.C. § 1226(a), except for certain criminal aliens who are subject to mandatory detention without bond, *id.* § 1226(c).

Section 1226(e) does not bar jurisdiction over the detention-based claims in No. 18-1233. In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court held that section 1226(e) did not foreclose habeas jurisdiction over a challenge to the constitutionality of 8 U.S.C. § 1226(c), the statute providing for mandatory detention, without bond, during removal proceedings. *See id.* at 516–17. The alien in that case "[did] not challenge a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release." *Id.* at 516. "Rather, [he] challenge[d] the statutory framework that permits his detention without bail." *Id.* at 517. The Court accordingly held that it had jurisdiction over the alien's claim. In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), a plurality of the Supreme Court recently reaffirmed that interpretation of section 1226(e) and concluded that it applied equally to habeas challenges where, as here, the aliens contended that continued detention without bond for more than six months is unlawful because the statutes are properly interpreted to provide for bond hearings at that point. *See id.* at 841 (plurality opinion). Petitioners' challenges to continued detention without bond in No. 18-1233 are materially identical to the claims in *Demore* and *Jennings*, so section 1226(e) does not bar jurisdiction here.[1]

Second, 8 U.S.C. § 1252(g) provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." This jurisdictional bar applies "notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision"—"[e]xcept as" otherwise "provided in" section 1252. 8 U.S.C. § 1252(g). Section 1252 otherwise channels review through petitions for review filed in the courts of appeals to challenge a final removal order. *See id.* § 1252(a). Under 8 U.S.C. § 1252(b)(9), "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order" of removal in a petition for review. Section 1252(g) bars habeas jurisdiction over a claim "arising from the decision or action" by the Secretary to "commence proceedings, adjudicate cases, or execute removal orders." *Id.* § 1252(g).

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[1] Section 1226(e) also does not bar petitioners' challenge to the lawfulness of continued detention under 8 U.S.C. § 1231(a) without a bond hearing, because section 1226(e)'s restriction on review applies to decisions "under this section"—namely, section 1226.

Section 1252(g) does not bar the detention-based claims in No. 18-1233. In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 485 (1999) ("*AADC*"), the Supreme Court noted that section 1252(g) applies "only to three discrete actions that the Attorney General [now the Secretary of Homeland Security] may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" The Court explained that "Section 1252(g) seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations" regarding the commencement of proceedings, adjudication of cases, or execution of removal orders, "providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention." *Id.* at 485. And in *Jennings*, Justice Alito's plurality opinion reiterated that section 1252(g) does not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General." 138 S. Ct. at 841 (plurality opinion). "Instead," the plurality "read the language to refer to just those three specific actions themselves." *Id.* (citing *AADC*, 525 U.S. at 482–83). The four Justices in dissent agreed that the district court had jurisdiction over the detention claims at issue in that case, and indeed would have affirmed the injunction in that case prohibiting continued detention for more than six months under 8 U.S.C. § 1226(c) without a bond hearing. *See id.* at 859–82 (Breyer, J., dissenting). Accordingly, seven Justices in *Jennings* concluded that section 1252(g) did not deprive the district court of habeas jurisdiction over claims challenging the legality of continued detention without a bond hearing.[2]

Consistent with the Supreme Court's decisions, the courts of appeals have interpreted section 1252(g) to bar habeas jurisdiction over challenges to the Secretary's discretionary decisions to arrest and take into custody an alien for removal proceedings, as such claims are "connected directly and immediately with a 'decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders.'" *Foster v. Townsley*, 243 F.3d 210, 214 (5th Cir. 2001) (explaining that section 1252(g) bars due-process challenges to detention where the detention is tied to the "decision to execute [plaintiff's] removal order"); *accord Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013) (affirming dismissal based on section 1252(g) because "[s]ecuring an alien while awaiting [his removal hearing] constitutes an action taken to commence proceedings"); *Sissoko v. Rocha*, 509 F.3d 947, 949–51 (9th Cir. 2007) (similar). The Supreme Court in *AADC* also agreed that section 1252(g) bars claims like those in No. 17-2171 over a "refusal to stay deportation" or the "execution of [a] removal order." 525 U.S. at 485 (describing lower-court cases with approval).

But Section 1252(g) does not bar jurisdiction over habeas claims challenging the legality of continued detention in a manner that does not call into question the validity of a removal order or the decision to execute a removal order. *Jennings* held that section 1252(g) did not bar a challenge to the legality of continued detention without a bond hearing under

[2] Justice Alito's plurality opinion is the controlling decision under *Marks v. United States*, 430 U.S. 188, 193 (1977).

section 1226(c). Petitioners' challenge in No. 18-1233 to detention under section 1226(c) is materially identical. And in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court held that "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention"—that is, detention under 8 U.S.C. § 1231(a) that has lasted beyond the initial 90-day removal period. *Id.* at 688. The Court concluded that section 1252(g) did not bar such claims. *Id.* Notably, *Zadvydas* involved a habeas challenge to detention under 8 U.S.C. § 1231(a), the other statute at issue in the detention-based claims in No. 18-1233. For purposes of habeas jurisdiction under 28 U.S.C. § 2241, there does not appear to be any material difference between petitioners' length-of-detention claims here and the claim in *Zadvydas*: As in *Zadvydas*, petitioners here contend that their continued detention is unlawful, regardless of the propriety of the Secretary's decision to arrest them to execute their removal orders, because the length of their detention conflicts with the statute and the Constitution. Second Amended Petition, RE 118, Page ID #2993–3000, 3022–26. Moreover, the claim that their continued detention is unlawful due to its length without an individualized review in an agency bond hearing is distinct from a challenge to the removal order or the discretionary decision to take them into custody to execute their removal orders. The district court accordingly has jurisdiction over the length-of-detention claims in No. 18-1233, under *Zadvydas*, *Demore*, and *Jennings*, regardless of whether it also has jurisdiction over the underlying removal claims.

To be sure, as explained in the government's previous briefing, this Court should hold that the district court lacks jurisdiction over the removal-based claims in No. 17-2171. *See* No. 17-2171 Opening Br. 19–23; No. 17-2171 Reply Br. 4–8. Under section 1252(g), "no court"—except a federal court of appeals reviewing an administrative decision—"shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action . . . to . . . execute removal orders." 8 U.S.C. § 1252(g). As the district court recognized, this provision strips jurisdiction over claims, like petitioners', that attack the execution of final removal orders by requesting that the court block removal pending their filing motions to reopen their removal proceedings. Op., RE 87, Page ID #2338. In contrast to claims challenging continued detention, the removal-based claims here plainly "aris[e] from the decision or action . . . to . . . execute removal orders." 8 U.S.C. § 1252(g). Although the district court held that applying section 1252(g) would violate the Constitution's Suspension Clause in the circumstances here, that holding is wrong. *See* No. 17-2171 Opening Br. 23–38; No. 17-2171 Reply Br. 8–14. Thus, the Court should hold that the district court had no jurisdiction over petitioners' challenge to the action to "execute removal orders," and direct the district court to dismiss the removal-based claims.

Moreover, although the district court would have jurisdiction under 28 U.S.C. § 2241 to address the legality of continued detention without bond, on the facts presented here, such challenges would be meritless. Indeed, for many of the aliens here, detention is continuing because of the court's underlying stay on the removal-based claims. If the stay is dismissed because the court lacked jurisdiction to enter it, this Court should instruct the

district court to dismiss petitioners' claims under section 1231 unless petitioners can demonstrate, on an individual basis, that their removal is not reasonably foreseeable without this impediment to removal. *See Zadvydas*, 533 U.S. at 699–700.

In sum, the district court's jurisdiction over a habeas challenge to the legality of continued detention without bond—like the challenges made in the detention-based claims in No. 18-1233—is independent of its jurisdiction over the removal-based claims. For the reasons stated in the government's previous briefing in No. 18-1233, however, *see* No. 18-1233 Opening Br. 29–45; No. 18-1233 Reply Br. 12–23, this Court should vacate the injunction on the detention-based claims and remand with instructions to dismiss the section 1231 and section 1226 detention class claims unless petitioners can demonstrate that "the complained-of 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," or "litigated on common facts" notwithstanding the fact that "[d]ue process is flexible" and "calls for such procedural protections as the particular situation demands." *Jennings*, 138 S. Ct. at 852. This Court should also instruct the district court to consider whether it has jurisdiction to grant class-wide injunctive relief from detention on any constitutional basis, in light of 8 U.S.C. § 1252(f)(1), which bars the district court from doing so. *See* Response to Question (3), *infra*. And for the reasons stated in the government's previous briefing in No. 17-2171, *see* No. 17-2171 Opening Br. 19–38; No. 17-2171 Reply Br. 4–14, this Court should vacate the injunction in No. 17-2171 and direct dismissal of the removal-based claims.

(2) What are the differences, if any, between seeking an emergency stay of removal from an agency or circuit court (during the pendency of a motion to reopen or petition for review) and seeking such a stay from a district court or circuit court (during the pendency of a habeas petition)?

To seek and obtain an emergency stay from an immigration court or the Board of Immigration Appeals (Board or BIA), a petitioner must follow well-established processes. The immigration court and BIA standards regarding stays of removal for pending motions to reopen are delineated in federal regulations, 8 C.F.R. §§ 1003.2(f), 1003.6(b), 1003.23(b)(1)(v), and are further explicated in publicly available practice guides, BIA Practice Manual § 6.4(c); Immigration Court Practice Manual § 8.3(b). The processes are the same for filing emergency stay motions with an immigration court or the BIA. *See* 8 C.F.R. §§ 241.6(a)–(b), 1241.6(a)–(b); *see generally* McNulty Decl., RE 81-3, Page ID # 1998–2003. A motion for a stay must be accompanied by, or must follow, the filing of a motion to reopen, so a petitioner must first file a motion to reopen before the Board. Board Practice Manual § 6.3(a) ("The Board entertains stays only when an appeal, a motion to reopen, or a motion to reconsider is pending before the Board."); Immigration Court Practice Manual § 8.3. The motion to reopen need only "state the new facts that will be proven" and include evidence relating to those facts. 8 U.S.C. § 1229a(c)(7)(B). To the extent that an individual did not have all evidence that he

wanted to submit in support of a motion to reopen, a motion can be promptly filed and then supplemented. Board Practice Manual § 5.2(f) (supplemental evidence); *see also* McNulty Decl., RE 81-3, ¶¶ 18–20, Page ID #2001. The filing of a motion generally does not stay execution of the underlying decision. So along with or after a motion to reopen is filed, the alien must move for (and be granted) a stay of removal. *See* 8 C.F.R. §§ 1003.2(f), 1003.23(b)(1)(v). The immigration courts are "authorized to grant stays as a matter of discretion, but only for matters within the Board's [or immigration court's] jurisdiction." Board Practice Manual § 6.3(a); Immigration Court Practice Manual § 8.3. A stay of removal "should be made in the form of a written motion," which "may be submitted at any time during the pendency of a case before" the Board or immigration court. Board Practice Manual §§ 6.3(b), 6.4(b); Immigration Court Practice Manual § 8.3 (judges can grant discretionary stays, upon written motion, when a motion to reopen or reconsider is pending). The stay motion need only "contain a complete recitation of the relevant facts and case history and indicate the current status of the case," and "a specific statement of the time exigencies involved." Board Practice Manual § 6.4(c)(i). If the immigration court denies a motion to reopen, an alien can file a motion for a stay with the Board. McNulty Decl., RE 81-3, ¶ 13, Page ID #2000. The alien may also request a stay from the immigration court while his appeal to the Board (from the immigration court's denial of the motion to reopen) is pending. *Id.*; 8 C.F.R. § 1003.6(b). The Board considers emergency stay requests on a highly expedited basis. With emergency stays, "the Board may rule immediately on an 'emergency' stay request, which may be submitted only when an alien is in physical custody and is facing imminent removal." *Id.* § 6.4(d)(i). Finally, "motions can be expedited . . . upon the filing of a motion to expedite and a demonstration of impending and irreparable harm or similar good cause." *Id.* § 6.5(a). While "[e]xpedited requests are generally not favored," an "[e]xample[] of appropriate reasons to request expedited treatment include . . . imminent removal from the United States." *Id.* Additionally, the Board has created the Emergency Stay Unit designed for the sort of circumstances presented here, "to achieve the timely adjudication of every [stay] request it receives." Gearin Decl., RE 81-2, ¶ 17, Page ID #1997. For cases before the Board, when circumstances require immediate action, the Board may entertain a telephonic stay request made to the Unit. Board Practice Manual § 6.3(b). Immigration courts review emergency-stay requests under similar standards and guidelines. *See* Immigration Court Practice Manual § 8.3; *see also* McNulty Decl., RE 81-3, ¶¶ 10–13, Page ID #1999–2000.

If a forum for federal-court review of a request to stay a final removal order pending final action on a motion to reopen is to be available, it would be in a federal court of appeals through the petition-for-review process under 8 U.S.C. § 1252(a)(1), rather than in a habeas case that sidesteps this process. *See*, *e.g.*, *Khan v. Attorney General*, 691 F.3d 488, 492 (3d Cir. 2012) (panel "granted the petitioners a temporary stay of removal" in case where petitioner alleged that BIA had not "adjudicate[d] their motion"

to reopen their removal orders denying asylum, withholding of removal, and relief under the CAT, where the petition for review and stay motion were filed "within hours of [the alien's] scheduled removal"). This approach would be "consistent with Congress' clear intent to streamline the review process by consolidating and channeling review of all legal and factual questions that arise from the removal of an alien into the administrative process, with judicial review of those decisions vested exclusively in the courts of appeals." *Jama v. DHS*, 760 F.3d 490, 496 (6th Cir. 2014) (citations omitted). Federal courts of appeals can and do rule swiftly on motions to stay removal. *See, e.g., Trujillo-Diaz v. Sessions*, 880 F.3d 244, 248 (6th Cir. 2018) (petition for review and stay motion filed one day after BIA's denial of stay motion; the following day, on which petitioner was set to be removed to Mexico, the Sixth Circuit dismissed the petition for review and denied the stay motion); *Ochoa-Flores v. Sessions*, No. 17-3833 (6th Cir. 2017) (granting stay six days after motion was filed); *Ducran v. Att'y Gen.*, No. 15-15026 (11th Cir., order denying stay Nov. 9, 2015) (denying stay three days after motion was filed); *Posada v. Holder*, No. 14-1284 (4th Cir., order staying removal Apr. 3, 2014) (granting stay four days after motion was filed, two days after government filed its opposition). The traditional four-factor test for a preliminary injunction applies to motions to stay removal before the courts of appeals. *See Nken v. Holder*, 556 U.S. 418, 425–36 (2009). A petitioner must establish: (1) that he "has made a strong showing that he is likely to succeed on the merits"; (2) that he will be "irreparably injured absent a stay"; (3) that "other parties" will not be "substantially injure[d]" by issuance of a stay; and (4) that a stay is in the "public interest." *Id.* at 434.

To seek and obtain emergency relief from removal in the district court (assuming, contrary to our submission on question 1, that the district court has jurisdiction), a petitioner would need to go through a substantially similar process. First, a petitioner would need to file a petition for a writ of habeas corpus under 28 U.S.C. § 2241. The habeas petition would have to "allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known." 28 U.S.C. § 2242.

To obtain emergency relief on that petition, a petitioner would need to file in the district court a motion for a temporary restraining order (TRO). Motions for TROs are governed by the same four-factor test governing preliminary injunctions. *Ne. Ohio Coal. for Homeless and Serv. Emps.' Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). Accordingly, petitioners must make a showing on each of the four factors set forth above. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). This requires an evidentiary showing. Specifically, a petitioner must provide sufficient evidence "to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). Further, a petitioner must demonstrate at least some likelihood of success on the merits, and "[m]ore than a mere

'possibility' of relief is required." *Nken*, 556 U.S. at 434.[3] And given the bar in 8 U.S.C. § 1252 to district-court habeas jurisdiction, an alien attempting to establish a likelihood of success to obtain a stay of removal in federal district court, as in this case, faces a double challenge: the alien must show both a likelihood of meeting the standard on his substantive claim and that, under the Suspension Clause, the agency process is inadequate and unconstitutional as applied to the alien's circumstances. *See Munaf v. Geren*, 553 U.S. 674, 691 (2008) (preliminary injunction inquiry must assess both jurisdiction and likelihood of success on the merits). The notion that the administrative process is inadequate because it is more difficult to utilize does not withstand scrutiny, as explained above. Further, a TRO motion must be supported by: (1) "specific facts in an affidavit or a verified complaint clearly show[ing] that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition"; and (2) the movant's attorney's written certification of "any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1). A TRO expires after no more than 14 days unless the court extends it for a similar period. Fed. R. Civ. P. 65(b)(2).

A petitioner seeking a longer stay or initially denied a TRO can move for a preliminary injunction, which requires notice to the adverse party and a hearing. Fed. R. Civ. P. 65(a). A preliminary injunction is governed by the same four-factor test and requires the same evidentiary support. *See id.*; *Winter*, 555 U.S. at 20, 22; *Nken*, 556 U.S. at 434–35. A petitioner denied a preliminary injunction may take an immediate interlocutory appeal to a federal court of appeals. 28 U.S.C. § 1292(a)(1). A petitioner seeking to have his removal stayed pending appeal must file both a notice of appeal as well as a stay motion. *See* Fed. R. App. P. 8. The petitioner is ordinarily required first to seek a stay pending appeal in the district court (and have it denied); the petitioner's appellate stay motion must indicate either why the district court denied such relief or why moving in the district court was impracticable. Fed. R. App. P. 8(a)(1), (a)(2)(A). The motion for a stay or injunction pending appeal must include: "(i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record." Fed. R. App. P. 8(a)(2)(B). Such a motion is governed by the same four-factor test and requires the same evidentiary support as a preliminary-injunction motion in the district court. *See id.*; *Winter*, 555 U.S. at 20, 22; *Nken*, 556 U.S. at 434–35.

A class action cannot be permitted to circumvent these principles. As this case has shown, the class inquiry does not account for or entail an individualized showing that relief is warranted or that the administrative process is inadequate—in other words, no class member here actually showed an entitlement to relief under the Convention

[3] Habeas requires a similar showing. *See* 28 U.S.C. § 2241(c)(3) (petitioner must show "custody in violation of the Constitution or laws or treaties"); Habeas Rule 2(c) (petition must "specify all the grounds for relief" and "state the facts supporting each ground").

Against Torture (or any other authority) *in federal district court,* and no class member showed that the carefully designed review process enacted by Congress was inadequate as to him or her. Importantly, habeas corpus at its common law core is a remedy for *individual* detention. *See Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004) (core habeas is "designed to relieve an individual from oppressive confinement"). There is no history or tradition of class-action relief in habeas cases that avoids inquiry into the individual circumstances presented. *See Schall v. Martin*, 467 U.S. 253, 261 n.10 (1984) ("[w]e have never decided" whether Rule 23 "is applicable to petitions for habeas corpus relief"); *Jennings*, 138 S. Ct. at 858 (Thomas, J., concurring in part and in the judgment) (in class action for injunctive relief governing immigration detention, "[r]espondents do not seek habeas relief, as understood by our precedents"). A fortiori, an administrative review scheme that requires an inquiry into individual circumstances, and differs from the remedy granted here only in that it cannot be awarded on a class-wise basis without such an individualized inquiry, does not violate the Suspension Clause.[4]

In sum, the procedures for seeking and obtaining an emergency stay of removal would be largely indistinguishable between the administrative process (followed by the courts of appeals) and the district court (followed by the courts of appeals). Both routes would require applications for relief, a heightened showing of entitlement to such relief, and sufficient evidence to establish eligibility. Similarly, both avenues would accord petitioners the same form of relief—a stay of removal—along roughly the same timeframes (if not faster through the administrative process). Finally, each path would permit petitioners to seek further review.

(3) Was the district court authorized to grant petitioners class-wide injunctive relief from detention in light of 8 U.S.C. § 1252(f)(1) and *Reno v. American-Arab Anti- Discrimination Committee*, 525 U.S. 471, 481 (1999)?

Under section 1252(f)(1), "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C.

[4] A habeas class action with nationwide scope also raises concerns regarding the custodian rule—that the "proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official," and limits on the authority of district courts to issue the writ "within their respective jurisdictions." *Padilla*, 542 U.S. at 435, 442; *see id.* at 442 (in section 2241, Congress limited courts to granting relief "'within their respective jurisdictions' . . . to avert the . . . possibility that 'every judge anywhere [could] issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat'"); *id.* at 447 (without rule there would be "rampant forum shopping, district courts with overlapping jurisdiction, and the very inconvenience, expense, and embarrassment Congress sought to avoid when it added the jurisdictional limitation 137 years ago").

§§ 1221–1231] . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). "By its plain terms," section 1252(f)(1) is "a limit on injunctive relief." *AADC*, 525 U.S. 471, 481 (1999). That provision "prohibits federal courts from granting classwide injunctive relief against the operation of [8 U.S.C.] §§ 1221–1231, but specifies that this ban does not extend to individual cases." *Id.* at 481–82. As *Jennings* indicated, section 1252(f) forecloses class-wide injunctive relief based on constitutional claims. 138 S. Ct. at 851.[5] *AADC* supports this conclusion: it rejected the view that section 1252(f)(1) provides "an affirmative grant of jurisdiction" over class-based constitutional challenges to removal decisions. 525 U.S. at 482.

Even assuming that section 1252(f)(1) did not strip the district court of authority to issue class-wide injunctive relief from detention on a *statutory* basis, *see Jennings*, 138 S. Ct. at 851 (noting Ninth Circuit's holding to that effect), it is clear following *Jennings* that the district court erred on the merits in ruling, as a matter of statutory interpretation, that 8 U.S.C. § 1226 and 8 U.S.C. § 1231(a) each contain an implicit six-month time limitation on the detention that they authorize here. *See* No. 18-1233 Opening Br. 29–45; No. 18-1233 Reply Br. 12–23. Thus, independent of 8 U.S.C. § 1252(f)(1), the district court had no *statutory* basis to grant class-wide injunctive relief from detention on any claim at issue in No. 18-1233.

Section 1252(f)(1) clearly does strip the district court of jurisdiction to grant class-wide injunctive relief from detention on any *constitutional* basis. So, to the extent that petitioners have sought class-wide injunctive relief on the grounds that their detention violates the Constitution, the district court may not issue such relief. *See* Second Amended Petition, RE 118, Page ID #3022–26 (arguing that due process requires that immigration detention bear a reasonable relationship to its purpose and claiming that due process requires individualized custody determinations before neutral arbiters and that applying mandatory detention to petitioners with reopened removal orders violates the Due Process Clause). The Court should direct that any such challenges be dismissed on remand.

Very truly yours,
/s/ Scott G. Stewart
Scott G. Stewart
Counsel for Appellants

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[5] The Supreme Court has suggested that, to the extent that section 1252(f)(1) permits declaratory relief (as opposed to injunctive relief), the appropriate court would need to "decide whether that remedy can sustain the class on its own" under Federal Rule of Civil Procedure 23(b)(2). *Jennings*, 138 S. Ct. at 851. That issue, including the availability of declaratory relief in this habeas proceeding, can be addressed, if need be, on remand.

CERTIFICATE OF SERVICE

I certify that on May 4, 2018, the above letter brief was served on all counsel of record through the Court's CM/RE system.

/s/ *Scott G. Stewart*

CERTIFICATE OF COMPLIANCE

I certify that the above brief is no longer than 10 pages singled spaced, in accordance with this Court's April 27, 2018 order inviting letter briefing.

/s/ *Scott G. Stewart*