UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, *et al*.,

Plaintiffs/Petitioners,

v.

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

Defendants/Respondents.
______________________________________/

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

RESPONDENTS' RESPONSE IN OPPOSITION TO PETITIONERS' MOTION FOR CLASS CERTIFICATION

Respondents, by and through their undersigned counsel, oppose Petitioners' Motion for Class Certification. The grounds for this opposition are set forth more fully in the attached brief.

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STATEMENT OF ISSUES PRESENTED

1. Whether any of Petitioners' highly fact-intensive claims can be commonly resolved without reference to the vastly different facts and circumstances surrounding the putative class members' removal proceedings and detention histories as required by Federal Rule of Civil Procedure 23(a)(2) when certifying a class under Rule 23(b)(2).

2. Whether it is appropriate to certify a class or subclass without testimony from the proposed class representatives regarding their understanding of their responsibilities as class representatives, their desire to participate in this litigation, or to show that they have the capacity to protect the interests of the putative class as required by Rules 23(a)(3) and (4).

3. Whether Petitioners have carried their burden under Rule 23(a)(1) of showing that the proposed subclass of individuals with serious criminal convictions detained under 8 U.S.C. § 1226(c) is sufficiently numerous where Petitioners have no basis for knowing what portion of the 59 individuals with reopened removal orders are detained under Section 1226(c), as opposed to other provisions that provide for detention while removability is being determined.

4. Whether Petitioners have demonstrated the need for six separate entities to serve as class counsel in this litigation and that such an arrangement will not result in

overstaffing, duplicative billing, or an "ungainly counsel structure," as required by Rule 23(g),(h).

MOST CONTROLLING AUTHORITY

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)

Califano v. Yamasaki, 442 U.S. 682 (1979)

Federal Rule Civil Procedure 23(a)(1)-(4), (b)(2) , (g)

INTRODUCTION

Petitioners request certification of a vast and varied class to address an assortment of claims with little or no discernable connection to the scope of the class they are seeking to certify. Petitioners' motion fails to satisfy the rigorous requirements of Federal Rule of Civil Procedure 23(a)(1)-(4) and (b)(2) and, accordingly, should be denied.

First, as Petitioners acknowledge, the members of the proposed class differ from each other in their ultimate entitlement to relief. ECF 83; 139. The statutory and due process claims Petitioners have presented require a highly fact-specific inquiry to resolve, which cannot be done on the basis of such an overly-broad class. ECF 118. As a result, the putative class lacks a common claim under Rule 23(a)(2).

Second, Petitioners have not established the capability of their class representatives or demonstrated the typicality of their claims. Petitioners, despite having the "rigorous" burden here, failed to submit even a single declaration from a class representative demonstrating their understanding of their role as a class representative or to discuss any of them by name in their briefing. Accordingly, the class fails under Rule 23(a)(3) and (4).

In addition, Petitioners have not demonstrated that the "Mandatory" subclass satisfies Rule 23(a)(1)'s numerousity requirement as they have not presented any information to suggest how many of the detained putative class members are

detained under the mandatory detention provision for criminal aliens, 8 U.S.C. § 1226(c). Further inquiry is, therefore, required before this subclass is capable of certification.

Finally, Respondents oppose the appointment of six discrete entities as class counsel. Petitioners have not shown any need for such an extraordinary number of attorneys with overlapping expertise. In the event, however, that the Court certifies a class as to any count, Respondents respectfully request that the class be limited in geographic scope, certified counsel be required to report its billing to the Court on an ongoing basis, and any proposed notice be subject to further briefing.

BACKGROUND

Petitioners initiated this action to prevent the immediate removal of "more than 100" Iraqi nationals—"mostly Chaldean Christians[1]"—arrested in the Eastern District of Michigan in June 2017. ECF 1. Petitioners argued that these individuals have a due process right to a stay of their removal orders to allow them to file applications for protection from removal—applications they believed likely to be successful based on similar claims made by Iraqi Chaldean Christians in the Eastern District of Michigan. ECF 1 at Pg ID 17. The Court has tentatively agreed and stayed their removal. ECF 43.

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[1] ECF 118 at Pg ID 2958.

Since then, the scope, size, and asserted claims of the putative class have substantially ballooned. Upon receiving a temporary restraining order, Petitioners expanded their proposed class to include all Iraqis—regardless of whether they were "suddenly" detained decades after their removal proceedings or denied protection from removal only weeks ago—nationwide. ECF 36. After obtaining a preliminary injunction staying all Iraqi removals, Petitioners filed an amended complaint raising a total of seven claims for relief, including claims related to their removal, transfer, detention, and access to files. ECF 118.

Petitioners now seek to certify all seven counts of the Amended Complaint as class claims using one primary class definition and two subclasses. For their primary class, Petitioners request certification of a class composed of "[a]ll Iraqi nationals in the United States who had final orders of removal on March 1, 2017 and who have been, or will be, detained for removal by U.S. Immigration and Customs Enforcement." ECF 139 at Pg ID 3734-35, 3736. Petitioners ask that this definition apply to five of their claims—specifically, their claims challenging: enforcement of their final orders of removal under the Immigration and Nationality Act, Convention Against Torture, and the Due Process Clause (Counts One and Two); their transfer away from counsel as a violation of their right to counsel (Count Three); their immigration detention as violating their due process rights (Count Four); and their lack of access to their immigration files (Count Seven). ECF 118 at Pg ID 3020-27.

For Petitioners' prolonged detention claims, they propose two subclasses. For their claim challenging continued detention without bond hearings (Count Five), Petitioners request certification of a subclass of "[a]ll Class Members with final orders of removal, who are currently or will be detained in ICE custody." ECF 139 at Pg ID 3735, 3737. And for their claim challenging the application of 8 U.S.C. § 1226(c)—a provision that requires the detention of certain criminal aliens during proceedings to determine their removability—to individuals with reopened removal orders (Count Six), Petitioners request certification of a class of "[a]ll class members whose motions to reopen have been or will be granted and who are currently or will be detained in ICE custody under the purported authority of the mandatory detention statute 8 U.S.C. § 1226(c)." ECF 139 at Pg ID 3735, 3737. Respondents oppose the motion for the reasons stated herein.

CLASS CERTIFICATION STANDARD

"Petitioners wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.,* 134 S. Ct. 2398, 2412 (2014); *see also Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011). "District courts may certify a class only where the plaintiff presents 'evidentiary proof' sufficient to withstand 'rigorous analysis' of Rule 23's requirements." *Rikos v. Procter &*

Gamble Co., 799 F.3d 497, 527–28 (6th Cir. 2015), *cert. denied,* 136 S. Ct. 1493 (2016) (quoting *Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1432 (2013)).

Petitioners' "rigorous" burden includes showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met. *In re BancorpSouth, Inc.*, No. 16-0505, 2016 WL 5714755, at *1 (6th Cir. Sept. 6, 2016) (citing Fed. R. Civ. P. 23(a), (b); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537 (6th Cir. 2012)). A district court may certify a class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

In addition to meeting the requirements set forth in Rule 23(a), the proposed class must also qualify under Rule 23(b)(1), (2), or (3). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). In this case, Petitioners seek certification under Federal Rule of Civil Procedure 23(b)(2), which permits class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the

injunctive or declaratory remedy warranted—the notion that the 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.*, 131 S. Ct. at 2557.

ARGUMENT

Petitioners' proposed class and subclasses fail under Rule 23(a) and (b)(2). First, the proposed classes are substantially broader than the counts on which Petitioners seek certification. The mismatch between these claims and the relief sought, as well and the individualized nature of the claims, prevent certification under Rule 23(a)(2)'s commonality requirement. Second, Petitioners have failed to demonstrate that their proposed representatives are adequate and have claims that are typical of the class as required by Rule 23(a)(3), and (4). Finally, Petitioners have not satisfied their burden to show that the Section 1226(c) subclass is sufficiently numerous to comply with Rule 23(a)(1).

In addition, Respondents oppose certification of six entities as class counsel under Rule 26(g) as Petitioners have failed to demonstrate a need for such an extraordinary order. In the event that this Court finds a certifiable class as to any claim, Respondents respectfully propose a number of limitations including limitations as to the geographic scope of the class, certified counsel, and the proposed notice.

I. Petitioners' proposed classes do not share any common claim that is capable of uniform resolution as required for certification under Rule 23(a)(2).

To obtain class certification, Petitioners must demonstrate that the proposed class is entitled to common relief as to each count on which certification is sought. *See* Fed. R. Civ. P. 23(a)(2), (b)(2). The Supreme Court has repeatedly held that "[i]t is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal–Mart Stores, Inc.*, 131 S. Ct. at 2551. The commonality requirement is especially rigorous when applied to a class—like Petitioners' proposed class—seeking certification under Rule 23(b)(2). For certification under Rule 23(b)(2), Petitioners 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.*, 131 S. Ct. at 2557. Accordingly, Petitioners have the burden of demonstrating that the factual differences in the class are unlikely to bear on the individual's entitlement to relief. *See id.* If the factual differences have the likelihood of changing the outcome of the legal issue, then class certification is not appropriate. *Cf. Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *Wal-mart*, 131 S. Ct. at 2251, 2257. Satisfaction of Rule 23(a)(2) for a class certified under Rule (b)(2), therefore, requires two steps: (1) the identification of a common legal problem and,

(2) a demonstration that the common legal issue may be resolved as to all class members simply by virtue of their membership in the class. *Wal–Mart Stores, Inc.*, 131 S. Ct. at 2551, 2557 (The common legal problem "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims *in one stroke*." (emphasis added)).

A. None of the primary class counts are capable of a common resolution.

Petitioners' proposed primary class fails under Rule 23(a)(2) because the primary class is not limited to individuals who share a common entitlement to relief.

1. Counts One and Two: Stay of Removal

In Counts One and Two, Petitioners assert a right to a stay of removal. ECF 118 at Pg ID 3020-23. Petitioners' entitlement to relief on these claims turns on an individualized and fact-intensive analysis of the facts and circumstances surrounding their immigration proceedings and relief claims.[2] *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (citing *Morrissey v. Brewer,* 408 U.S. 471, 481, (1972)); *Lujan v. G&G*

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[2] Respondents note that conducting this individualized assessment of the facts and circumstances surrounding Petitioners' removal proceedings and protection claims would require the Court to speculate on entitlement to relief or likelihood of harm. Such an analysis is exclusively the province of the immigration courts, the Board of Immigration Appeals, and the circuit courts. 8 U.S.C. § 1252(e)(1)(B); *see also* 8 U.S.C. § 1252(b)(9) (channeling judicial review over "all questions of law or fact" arising from removal proceedings to the court of appeals).

Fire Sprinklers, Inc., 532 U.S. 189, 196 (2001) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."). As a result, the Supreme Court has "declined to establish rigid rules" and instead employs the *Mathews* test to evaluate the sufficiency of particular procedures. *Id.* The *Mathews* test considers: (1) the significance of the interest at issue in the underlying proceeding; (2) the risk of an erroneous deprivation of that interest under the current procedures employed and the probable benefits of any additional procedural protections; and (3) the government's interest in avoiding the fiscal and administrative burdens that those additional protections would impose. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The due process analysis required to decide this case renders this matter unsuitable for class treatment because each factor represents an inquiry that cannot be conducted as to the class as a whole. Here the problem is even more pronounced because the proposed class includes individuals with claims of dramatically varying strength and includes a number of individuals who are not entitled to any relief whatsoever.

First, Petitioners' proposed class includes both individuals who were "sudden[ly]" detained in June 2017 and individuals "who will be detained for removal in the future." ECF 118 at Pg ID 2957, 3001. Anyone taken into custody after June 2017, however, did not suffer the same injury as those who claimed to have been blindsided. *See id.* at 2973 (noting the June 2017 arrests were known to

Petitioners arrested in July). Petitioners with potentially valid relief claims, who are now aware of the risk that they will be deported in the near future, no longer have any due process right to sleep on the administrative avenues for relief provided by Congress. Rather, any individuals taken into custody after the initial arrests in June 2017 have a substantially weaker justification for failing to act and a commensurately weaker claim for relief.

Second, the proposed class includes individuals who have no changed country condition claim. An essential component of Petitioners' claim is that there has been a meaningful change in country conditions such that the individual did not have a valid claim at the time of their removal proceedings, but may now have such a claim. This requires the class to be limited to individuals who were ordered removed *before* the time at which they would have had a valid claim for relief based on changed country conditions. As Petitioners acknowledge, "in the past several years," claims by Chaldean Christians "were almost invariably granted." ECF 118 at Pg ID 3003-04. Thus, the claims by individuals who finished their proceedings after 2014, and especially those that concluded in early 2017, cannot be commonly resolved with that of an individual with a twenty-year old removal order.

Finally, the class includes individuals with varying administrative interests as not all class members are entitled to file a motion to reopen, *see* ECF 134, and many have criminal convictions that bar them from obtaining the most common forms of

relief from removal. Indeed, some putative class members have determined that they do not want to be protected from removal based on their own assessment of their likelihood of success in challenging their order of removal. The very fact that this Court has permitted those individuals the opportunity to opt out of the injunction reflects its recognition that not all putative class members are facing uniform harm. This Court, however, cannot permit opt-outs from a 23(b)(2) class. *See, e.g., Lewis v. City of Chicago*, 702 F.3d 958, 962 (7th Cir. 2012) ("Rule 23(b)(2) does not require notice, because no one can opt out of a (b)(2) class"); *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 264 (3d Cir. 2011). Therefore any over-breadth issues must be addressed prior to certification or risk locking all putative class members into a stay of removal they neither wanted nor were constitutionally entitled to.

2. *Count Three: Transfers Away from Counsel*

In Count Three, Petitioners challenge the "decision to transfer [Petitioners] who reside in one state to detention centers that are hundreds of miles away, and sometimes far further" as "interfering with their statutory right to counsel and their due process right to a fair hearing." ECF 118 at Pg ID 3022. This claim is not capable of resolution on a classwide basis. The issue of whether someone was deprived of counsel or a fair hearing is a highly-individualized inquiry that will turn on a number of specific facts, including: whether the individual was detained while they were pursuing their relief from removal; whether the class member had counsel prior to

transfer; whether the class member was indeed transferred; the location of the transferee facility; whether the immigration court hearing can be conducted by video teleconference; the pro bono programs and legal resources available at the class member's facility; and the outcome of the hearing. *See Daskalea v. Washington Humane Soc.*, 275 F.R.D. 346, 367 (D.D.C. 2011) ("[W]hether a particular class member was denied due process will turn on the fact-intensive inquiry demanded by *Mathews* and its progeny . . . ."). However, as defined, the class includes individuals who are both detained and not detained; have counsel and are pro se; and have been transferred and have not been transferred. Many have proceedings in immigration courts that permit counsel to appear by video or teleconference, have extensive pro bono representation networks, and significant resources for *pro se* individuals. Therefore, it is not possible to determine the entire class's entitlement to relief on this count as a cohesive unit without reference to the detailed facts and circumstances surrounding their individual claims.

3. Count Four: Zadvydas *Detention Claim*

In Count Four, Petitioners allege that they are entitled to relief pursuant to *Zadvydas v. Davis*, 533 U.S. 678, 699-701 (2001), "because their removal is not significantly likely in the reasonably foreseeable future." ECF 138 at Pg ID 3762. To state a claim under *Zadvydas,* the detainee must show post-removal order detention in excess of six months, and must provide evidence of a good reason to

believe that there is no significant likelihood of removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 701. Only after the detainee satisfies both prongs must the government "respond with evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 701.

Zadvydas's highly individualized burden-shifting approach, however, cannot be uniformly applied to the class as a whole. First, the putative class includes individuals who are not currently detained and a large number of individuals who have not yet been detained for the requisite period to state a claim for relief under *Zadvydas*. *Zadvydas*, 533 U.S. at 701. Second, it includes individuals who are not detained under Section 1231 (including those detained under Sections 1226(a), (c) and Section 1225(b)) and, therefore, do not even fall within the *Zadvydas* legal framework. ECF 139 at Pg ID 3734-35. Third, the class includes a number of individuals who will not file a motion to reopen, or will have it quickly adjudicated, *see* ECF 134 (noting putative class members with expedited removal orders are not entitled to seek relief from the Board), and therefore will not be detained for the "prolonged amount of time it will take to adjudicate both their motions to reopen and their reopened proceedings." ECF 118 at Pg ID 3023. Finally, *Zadvydas* requires an individualized inquiry into the likelihood that the government will be able to confirm the detainee's identity and secure the necessary travel documents from the consulate. *Zadvydas*, 533 U.S. at 701. These inquiries cannot be

accomplished through a class representative and must be undertaken on a case-by-case basis.

4. Count Seven: Access to Files

In Count Seven, Petitioners claim that they "have been deprived of timely access to the files needed to file their motions to reopen." ECF 118 ¶¶ 143-44. This claim, however, is limited to individuals in the class who: (1) have not yet received their immigration files; and (2) filed motions to reopen without access to those files. *See id*. Respondents, however, have provided files to nearly all of the detained putative class members (or their counsel). *See id*. at 145 (discussing order requiring production by November 2017). Even if that were not the case, the individual circumstances of the Petitioners' immigration histories are relevant to the disposition of Count Seven. For example, some detained individuals may have a stronger claim than those who do not have access to their documents simply because they failed to save them or submit a FOIA request. Similarly, individuals whose proceedings completed only earlier this year have a substantially weaker claim than those with removal orders that are decades old. Finally, the putative class includes individuals whose records would provide limited value (if any) to their ability to obtain relief. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii) (allowing reopening based on changed country conditions arising in the country of nationality where "such evidence is material and was not available and would not have been discovered or presented at the previous

proceeding.”). As a result, not all putative class members are entitled to a declaration on this issue as there is no indication that all have suffered uniform harm.

B. The detention subclasses lack commonality.

Petitioners seek certification of the detention subclasses as to Counts Five and Six. In Count Five, Petitioners challenge prolonged detention without a bond hearing and request relief for class members detained with a final order of removal. In Count Six, Petitioners request similar relief on behalf of putative class members who have had motions to reopen granted and are now detained under 8 U.S.C. § 1226(c).

Success on Petitioners' prolonged-detention claim, however, cannot be decided with respect to the putative class as the class is not limited to individuals who have been in detention for an extended period of time. Rather, it includes individuals who have been detained for *any* period of time. In addition, the courts that have ordered bond hearings to remedy prolonged Section 1226(c) detention have recognized that the legal inquiry is highly individualized and requires the examination of a long list of factors. *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003); *see also Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1218 (11th Cir. 2016) (“The reasonableness inquiry is necessarily fact intensive, and the factors that should be considered will vary depending on the individual circumstances present in each

case."). Entitlement to relief from prolonged detention, therefore, cannot be decided on a classwide basis.

Petitioners assert that "[t]his case is very similar to *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010)," a case in which the Ninth Circuit directed certification of four subclasses of individuals respectively detained under four immigration detention provisions for a period exceeding six months to address the claim of whether due process requires that these individuals receive a bond hearing after six months of detention. *See* ECF 139 at Pg ID 3778. Petitioners' reliance on *Rodriguez* is misplaced.

First, *Rodriguez* was decided prior to the Supreme Court's decision in *Wal-mart*, which significantly changed the way courts analyze commonality for classes certified under Rule 23(b)(2). Prior to *Wal-mart*, Ninth Circuit precedent prohibited courts from engaging in any "preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.'" *See, e.g.*, *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO v. ConocoPhilips Co.,* 593 F.3d 802, 808 (9th Cir. 2010). As a result, there is good reason to doubt that the class in *Rodriguez* could be certified under current precedent.

Second, the claim in *Rodriguez*—whether six months of immigration detention without a bond hearing violates due process—was more closely linked to

the definition of the class—individuals "in the Central District of California . . . detained for longer than six months"—such that the Ninth Circuit believed that the answer to that question could yield a simple "yes" or "no" for the class as a whole. 591 F.3d at 1112. The definition was therefore limited to individuals that met the temporal threshold (six months) they asserted would be determinative of the due process analysis. The same cannot be said for the proposed class definition here, which is not narrowly tailored to test the foundational aspects of any of Petitioners' claims.

The *Rodriguez* class was also limited to individuals housed in a particular district and was subdivided by detention subclasses. The *Rodriguez* class could not have been certified as a nationwide class given the court's heavy reliance on particularities in Ninth Circuit precedent (*see, e.g., Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (finding prolonged detention occurs after six months)) and practices and conditions in detention centers located in the Los Angeles area. Petitioners here have not attempted to limit their class to any specific jurisdiction or detention centers. Nor have Petitioners limited their primary class to individuals detained under a specific provision. This precludes certification as to Count Four, which Petitioners seek certification as to the primary class. *See Rodriguez*, 591 F.3d at 1123-24.

II. Petitioners have not established the adequacy of the proposed class representatives or that their claims are typical of those of the class as required by Rule 23(a)(3), (4).

To satisfy Rule 23(b)(3) and (4), Petitioners must show that the proposed class representatives are both adequate to safeguard the interest of the class and have claims that are typical of the class's claims. Petitioners, however, do not discuss the proposed representatives' interests in this litigation, or attempt to demonstrate that they are capable of representing the vast and varied interests of the proposed class. This error is fatal to Petitioners' motion. As noted above, the requirements under Rule 23 are more than mere pleading requirements and must be supported with "*evidentiary* support capable of withstanding rigorous analysis of Rule 23's requirements." *Rikos*, 799 F.3d at 527-28 (emphasis added). Petitioners have not provided any evidentiary support and therefore fail to meet their "rigorous" burden under Rule 23(a)(3) and (4).

A. Petitioners have not supplied any evidence demonstrating the adequacy of their proposed class representatives.

Petitioners' motion is devoid of any testimonial support from any of their proposed representatives demonstrating their willingness, availability, or competency to serve as class representatives in this litigation.[3] The representatives'

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[3] Although Petitioners' second motion for a preliminary injunction, ECF 138, includes declarations from proposed class representatives, those declarations do not

testimony will assist the Court in determining whether the class representatives are actively engaged in the litigation such that they would be "able and willing to protect the interests of the class against the possibly competing interests of the attorneys." *Mendez v. U.S. Nonwovens Corp.,* 312 F.R.D. 81, 107 (E.D.N.Y. 2014); *see also Saucedo v. NW Mgmt. & Realty Servs., Inc.*, 290 F.R.D. 671, 683 (E.D. Wash. 2013) (probing representative testimony for evidence that the proposed class representative understood "that they are serving as representatives of a larger group of Petitioners with similar legal interests and that they must do what is best for the larger group"); *see also Douglin v. GreatBanc Tr. Co.*, 115 F. Supp. 3d 404, 411 (S.D.N.Y. 2015) ("the named Petitioners provide declarations establishing the alignment of their interests with the class members"). The vigilance of the class representative is uniquely important for a Rule 23(b)(2) class where class members lack the ability to opt out of the class and, therefore, have no choice but to trust the class representatives to protect their interests. *See* Fed. R. Civ. P. 23(e)(3) advisory committee's note to 2003 amendment.

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address issues related to their suitability as class representatives, and are not discussed in Petitioner's class certification briefing. Given that Petitioners' counsel have repeatedly questioned whether members of the class have the knowledge and capacity to agree to removal, ECF 119, 114, and the fact that Petitioners have the burden here, the Court should apply the same standard in assessing the proposed class representatives' knowledge and capacity to protect the interest of this large class. Petitioners' declarations do not satisfy that standard.

Here, the lack of specific testimony is especially problematic for the detention subclasses. Finding an appropriate class representative for these claims is difficult because detainees in this posture (particularly those like the Section 1226(c) subclass who are granted reopening) may quickly cycle through detention provisions. Petitioners who cycle out of mandatory detention (especially those who are released) lack the same need for an expeditious resolution of the class claim and risk losing interest in the litigation. For example, Kamiran Taymour, one of the three proposed representatives for the Section 1226(c) subclass, recently obtained cancellation of removal. Exhibit A, Taymour Relief Order. As a result, Taymour is no longer subject to detention under Section 1226(c), was never subjected to "prolonged" detention under any temporal standard, and no longer has a personal stake in obtaining the relief sought by the subclass. Petitioners, however, have not offered any such testimony from Taymour, or the other proposed Section 1226(c) subclass representatives[4], addressed to this concern. This is troubling as, through certification, the entire subclass—all Section 1226(c) Iraqi detainees nationwide—may lose their ability to challenge some of these issues in individual detention habeas petitions, and their claims will be inextricably bound with the subclass's claims. If these class

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[4] Similarly, Anwar Hamad, also a proposed Section 1226(c) subclass representative, has already had his merits hearing and is awaiting a decision, ECF 138-18 at Pg ID 3496; the final Section 1226(c) representative, Atheer Ali, is scheduled for a merits hearing before the end of the year.

members could potentially lose their ability to seek a speedy resolution to their detention through an individual habeas, there should be substantive information in the record demonstrating that the appointed representatives will be viligent in protecting their interests.

B. Petitioners' claims are not typical of the class claims.

Petitioners also failed to show that by proving the representatives' claims, they would "necessarily prove the claims of other class members." *Romberio v. Unumprovident Corp.*, 385 F. App'x 423, 432 (6th Cir. 2009) (citing *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006)); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007). Petitioners' brief does not mention any class representative by name, much less delve into the particularities of their claims on each count or compare them to the claims of other class members. Even if they had, Petitioners would be unable to satisfy Rule 23(a)(3). The commonality and typicality requirements of Rule 23(a) are interrelated and, in some instances, merge. *Wal-Mart*, 564 U.S. at 350. "Both [requirements] serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* But "[w]here a class definition encompasses many individuals who have no claim at all to the relief requested, or where there are

defenses unique to the individual claims of the class members, the typicality premise is lacking." *Romberio*, 385 F. App'x at 432. Thus, because here the classes are too broadly defined to satisfy the commonality requirement, Petitioners will be similarly unable to satisfy Rule 23(a)(3). *See id.* (where "individualized assessments are necessary" the class fails on typicality under 23(a)(3)). For example:

- Petitioners have not identified any representative for Count Three (access to counsel) who can plead a meritorious claim under this count. Indeed, Petitioners have not alleged any of its class members had counsel at the time they were detained, with whom they lost access to due to their transfer, and were prejudiced in their hearing as a result. Even if Petitioners had identified such an individual, that individual would not be typical of the class because the vast majority of the class is not detained. ECF 118 ¶ 112. In addition, the resources available to detained class members vary widely based on the particular detention facility, its proximity to a detainee's family members, whether the immigration court could conduct the hearings via VTC, and the availability of pro bono attorneys and programs for pro se individuals. Accordingly, it is not possible to identify a class representative for Count Three who is capable of representing all of the divergent positions of the class.
- Petitioners cannot identify a typical representative as to Count Four (*Zadvydas*) as the primary class includes individuals who are not detained,

have not been detained for a period of six months, who had travel documents from Iraq, who will not file (or prevail on) a motion to reopen, as well as individuals with none of these relevant characteristics. As a result, no class member can adequately stand in for all of these many permutations, all of which are likely to affect whether the individual is entitled to relief under *Zadvydas*.

- Petitioners have not identified any representative that suffered the harm described in Count Seven (access to files), much less shown that their claim is typical of that of all putative class members. As noted above, Respondents were under an injunction that prohibits removal of individuals during all periods during which Petitioners allege some class members were deprived of access to their files, which prevented the very harm alleged. Therefore, even if Petitioners could identify an individual who suffered such harm, that harm is atypical of the circumstances for the vast majority of the very broad class. As a result, this claim does not have a "typical" representative.

III. Petitioners have not established that they meet Rule 23(a)(1)'s numerousity requirement for the Section 1226(c) subclass.

In their certification motion, Petitioners represent that there are 59 members of the "Mandatory Subclass," a class of individuals detained pursuant to 8 U.S.C. § 1226(c)'s requirement that aliens with certain criminal convictions be detained for the duration of the period during which their removability is being

determined. ECF 139 at Pg ID 3771. Petitioners' support for this claim is a declaration from Petitioners' counsel stating: (1) that there are 59 detained putative main class members who have had their removal orders reopened; and, (2) an unsupported statement that "it appears that the vast majority [of the 59] are being detained without bond under 8 U.S.C. §1226(c)." ECF 138-2 at Pg ID 3409. Petitioners' accounting is directly contradicted by their acknowledgement that some "Primary Class Members are not in either subclass because they are detained under a third statutory provision, 8 U.S.C. § 1226(a)," the general detention provision for aliens in removal proceedings. ECF 139 at Pg ID 3762. Petitioners' assertion likewise ignores information Petitioners have received from Respondents identifying individuals detained under other provisions, including 8 U.S.C. § 1225(b), which applies to certain aliens interdicted at or near a port-of-entry. *See* ECF 134. As a result, Petitioners' claimed size of the subclass is inaccurate and insufficient to establish numerousity at this stage of the litigation.

IV. Class certification is improper under Rule 23(g) because Class Counsel cannot be appointed at this time.

"Unless a statute provides otherwise, a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g)(1). In appointing class counsel, the court must consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action;

> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> (iii) counsel's knowledge of the applicable law; and
> (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). Pursuant to Rule 23(g)(1)(B), the Court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," including whether class counsel face any potential conflicts of interest in their representation. Petitioners fail to satisfy Rule 23(g) in three important respects.

First, Petitioners have not provided any evidence to satisfy the requirements of Rule 23(g)(1)(A)(i)-(iv) by showing the particular resources or expertise class counsel brings to the litigation. *See Lemire v. Wolpoff & Abranson, LLP,* No. 3:08-CV-00249-CSH, 2009 WL 10689105, at *2 (D. Conn. Dec. 8, 2009) ("Because the Court "*must* consider" these factors, it follows logically that applicants must have a commensurate duty to provide the Court with information about those factors."). Petitioners have not supplied any affidavits from counsel in support of their motion and instead cite only generic internet "bio" pages. This is not sufficient to satisfy the requirements of the Rule 23(g)(1)(A).

Second, Petitioners have not justified the need for six organizations—with hundreds of attorneys—to serve as class counsel in this litigation. Federal Rule of Civil Procedure 23(g) governs the appointment of class counsel, and the Committee Note regarding that subsection provides, in part:

> The rule states that the court should appoint "class counsel." In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Fed. R. Civ. P. 23(g) advisory committee's note to 2003 amendment. Petitioners' proposal constitutes precisely this type of egregious overstaffing and sets up an ungainly counsel structure. *See Castaneda v. Burger King Corp.,* 264 F.R.D. 557, 573 (N.D. Cal. 2009) ("As stated in prior cases, from over 35–years of practice and presiding, the undersigned is convinced that it is best to have only one law firm as class counsel. This will greatly reduce the inevitable duplication of effort that flows from two or more firms."); *see also Rosario v. United States Citizenship & Immigration Servs.,* No. C15-0813JLR, 2017 WL 3034447, at *11 (W.D. Wash. July 18, 2017) ("The court's experience with this case and similar past actions suggests that 10 lawyers would constitute overstaffing and an ungainly counsel structure."); *see also Third Circuit Task Force on the Selection of Class Counsel Final Report,* at 96 (2002) (noting that multiple counsel carry the danger of duplication of fees, and courts should scrutinize staffing arrangements and intervene by removing class counsel if in the best interests of the class). Nothing in Petitioners' motion even hints at a reason for appointing six organizations as class counsel, all with overlapping areas of expertise. *In re: Merck & Co., Inc. Securities Litigation,* 432

F.3d 261, 267 n.4 (3rd. Cir. 2005) ("If Petitioners believe that more than one law firm is necessary, they must demonstrate to the Court's satisfaction the need for multiple lead counsel."); *Castaneda,* 264 F.R.D. at 573 ("Only when there is a special need for another firm should extra counsel be added."). Indeed, the current posture of this litigation strongly undermines any such need. Respondents have moved to dismiss the amended complaint, the Court has denied Petitioners' request for expedited discovery, and Respondents are pursuing an interlocutory appeal concerning the court's jurisdiction over this matter.

Finally, further inquiry is necessary to determine whether a conflict exists between class counsel and the members of the putative class based on class counsel's prior representation of class members. A key issue in this litigation is whether the existing administrative procedures adequately protect the interest of individuals who, due to changed country conditions, may have become eligible for relief in the time since their removal orders became final. *See* ECF 135 at Pg ID 3295-97. As a result, a subsidiary issue in this litigation will be whether (1) individual class members (or their attorneys) had valid grounds for relief at the time of their proceedings that they failed to pursue, or appeal that they improperly waived, and (2) whether it was reasonable for Petitioners (or their counsel) to have failed to file motions to reopen upon learning that they may be entitled to relief from their removal orders. Petitioners, therefore, may need to challenge the adequacy of their

prior representation either as part of their due process claim in this case or in a future motion to reopen. Class counsel may hesitate to make such arguments on behalf of the class if it may implicate co-counsel, and may place class counsel in the untenable position of being called as a witness in this case. *See* ABA Model Rule 3.7(a) (Lawyers as Witnesses) (adopted by Michigan on March 11, 1988). This issue should be carefully considered prior to approval of any counsel, especially any organization who has professed to have "represented over 700 Iraqis in 2016 alone." ECF 139 at Pg ID 3783.

V. In the event the Court certifies a class for any claim, the Court must narrowly craft its order.

Although Respondents submit that Petitioners' motion should be denied in its entirety, Respondents alternatively contend that any class order must include three important modifications. First, this Court must limit the class to individuals who have been arrested within the Eastern District of Michigan. Second, the certification order should include a provision for "monitoring the work of class counsel during the pendency of the action" and provide a "framework for an[y] eventual fee award," pursuant to Rule 23(g)(1)(C). Finally, the Court must decline to enter an order requiring notice without permitting further briefing in light of the claims the Court deems appropriate for class treatment.

A. The Court must decline to certify a nationwide class.

To the extent the Court finds a certifiable class, the Court should decline to certify a nationwide class. *See, e.g., Shvartsman v. Apfel*, 138 F.3d 1196, 1201 (7th Cir. 1998) (declining to certify a nationwide class where varying law and circumstances impacted validity of class claims). Nationwide class actions are certified with caution because they "may have a detrimental effect by foreclosing adjudication by a number of different courts and judges." *Califano*, 442 U.S. at 702; *see United States v. Mendoza*, 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."). "[A] federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts." *Califano*, 442 U.S. at 702.

Here, a national class would violate the principles of intercircuit comity, and strip other courts of jurisdiction over claims currently pending in their own courts, *see* ECF 143-1; 143-2. *See Geraghty v. U.S. Parole Comm'n*, 719 F.2d 1199, 1205 (3d Cir. 1983) (affirming the district court's decision to limit a class of federal prisoners to the Middle District of Pennsylvania because "it is within the district court's discretion to conclude that classwide consideration of the legality of the

parole guidelines and the constitutionality of the [statute at issue] might interfere with the litigation of similar issues in other judicial districts"). It is clear from the judicial disagreement on this issue that courts with different governing precedent may reach different conclusions regarding the validity of Petitioners' claims. *See, e.g., Alexandre v. U.S. Att'y Gen*, 452 F.3d 1204, 1206 (11th Cir. 2006); ECF 143-2. As a result, the Court cannot be "sure that nationwide relief is indeed appropriate" given that law in at least some jurisdictions may preclude relief. *Califano*, 442 U.S. at 702. Instead, the Court should allow "several courts of appeals to explore [this] difficult question." *Mendoza*, 464 U.S. at 160; *Hootkins v. Chertoff*, No. CV 07-5696, 2009 WL 57031, at *4 (C.D. Cal. Jan. 6, 2009) (limiting a class of individuals challenging the interpretation of an INA provision to the Ninth Circuit because "the Court is mindful of the importance of allowing the government to litigate legal issues before different courts throughout the country").

Limiting the class to individuals arrested in the Eastern District of Michigan also makes sense in light of Petitioners' claims. As discussed above, the individuals arrested in the region in June 2017 "mostly" share a common religious affiliation and therefore have more similar protection claims than "all Iraqis" detained nationwide. ECF 118 at Pg ID 2958. Petitioners relied on the success rates of these individuals as support for the validity of their protection claims and as evidence of their interest in avoiding removal. ECF 118 at Pg ID 3003-04. That there may also

be other groups that *could* qualify for relief does not make their due process claim uniform or capable of simultaneous resolution. Here, the particularities of the protection claim—including the associated risks, the possibility for regional relocation, and the timeline for when conditions changed—go to the heart of the due process analysis such that the weight of a particular factor could change the outcome of the due process claim. *See Mathews*, 424 U.S. at 335. Therefore, the Court should limit the class to individuals arrested in this district.

B. The Court should include a provision for monitoring the work of class counsel and place limits on billing.

Rule 23(h) encourages courts to use the class certification order to establish an "early framework for an eventual fee award" [and] "for monitoring the work of class counsel during the pendency of the action." Fed. R. Civ. P. 23(h) advisory committee's note to 2003 amendment. Consistent with the Rule, any certification order should require routine disclosure of class counsel's work to allow the Court to identify and correct excessive billing and redundant staffing on an ongoing basis. Respondents further request that the Court establish commonsense parameters for billing at the outset. These may include limiting the number of individuals that may bill for discrete tasks (including reviewing documents, appearing for status conferences, depositions, and hearings and preparing any written documents) and by requiring counsel to use junior attorneys and paralegals to the maximum extent possible while consistent with traditional practice. These limitations are necessary

to protect the taxpayer from an excessive bill should the Court find counsel entitled to fees in this case.

C. The Court should decline to enter any order requiring notice at this time.

In the event that this Court certifies any class in this case, it should not determine what, or if any, additional notice is due to the class at this time. Petitioners have not submitted any specific proposal, or demonstrated why any additional notice would be beneficial at this stage of the litigation. In addition, Rule 23 does not require class notice for a class certified under Rule 23(b)(2). This is based on the drafter's recognition that there should be no benefit to providing notice to class members since they are not permitted to opt out under Rule 23(b)(2), and, if correctly certified, their participation is unnecessary to protect the interest of the class. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998) ("Under Rule 23, the different categories of class actions, with their different requirements, represent a balance struck in each case between the need and efficiency of a class action and the interests of class members to pursue their claims separately or not at all."). Accordingly, Respondents oppose any further notice and, in any event, request the opportunity to brief the issue should Petitioners offer a concrete notice proposal.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Petitioners' motion to certify a class.

Dated: November 30, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing Respondents' Response in Opposition to Petitioners' Motion for Class Certification to be served via CM/ECF upon all counsel of record.

Dated: November 30, 2017

Respectfully submitted,

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