UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CLEBERSON QUADRELLI and ABDY NIZEYIMANA, on behalf of themselves and all others similarly situated, Petitioners, v. ANTONE MONIZ, Superintendent of the Plymouth County Correctional Facility Respondent.	)	Civil Action No. 20-10685-ADB

RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITITION TO PETITIONERS' EMERGENCY MOTION FOR ORDER HALTING TRANSFERS OF CLASS MEMBERS OUT OF THE DISTRICT

Respondent Antone Moniz, Superintendent of the Plymouth County Correctional Facility ("Respondent"), respectfully submits this memorandum of law in opposition to Petitioners' emergency motion for order halting transfers of class members out of the district. Doc. # 138.

BACKGROUND

On June 8, 2020, Petitioners' counsel emailed the undersigned regarding information he had received that some number of Petitioners would soon be transferred out of PCCF. As a courtesy, the undersigned made inquiries at ICE, learned that eight Petitioners were scheduled to be transferred on June 9, 2020 (three for removal and five to make additional room for social distancing in Unit C-3), and promptly relayed that information to Petitioners' counsel. In response, that afternoon, Petitioners' counsel filed an emergency motion to halt those transfers. Doc. # 138. That evening, this Court entered the following electronic order:

> Currently pending before the Court is Petitioners' emergency motion [ECF [138]] concerning the transfer of 8 members of the recently certified class. Respondent is ordered not to remove any Petitioners from this jurisdiction until further notice. Although the Court is generally aware of Respondent's position on the motion, Respondent has not yet filed anything on the record and the Court will not make a decision without giving Respondent an opportunity to do so. That being said, assuming that Respondent confirms on the record what he has represented in emails, the Court is likely to allow the three being transferred to facilitate immediate removal to be removed from Plymouth. The clerk will set an initial hearing on the issue for Tuesday, June 9, 2020, at which time the Court may amend this order.

Doc. # 139.

The same evening, Respondent filed an emergency motion to lift the Court's order only as to three Petitioners scheduled to be removed from the United States. Doc. # 141. Respondent explained that, unless the Court lifted the stay as to those Petitioners, ICE's ability to effect timely removal would result in great financial expense to the federal government and would increase health risks for those three Petitioners. *Id.*; *see also* Doc. # 141-1 (declaration). The same evening, this Court entered an electronic order granting Respondent's motion:

> Currently before the court is Respondents Emergency Motion to Lift the Courts Order Only as to Three Petitioners [ECF No. 141]. Specifically, Respondent seeks to be able to remove Petitioners Mohommad Ahmed, Mohammad Rasel Ahmed and Abdur Rahim from this jurisdiction early tomorrow morning to facilitate their removal to Bangladesh. Counsel for Petitioners take no position on the motion. The motion is allowed.

Doc. # 142.

On June 9, 2020, the Court held a Zoom conference, among other things, to discuss the transfer with respect to the five other Petitioners. Doc. # 145. The Court allowed Respondent until June 12, 2020, to file an opposition to Petitioners' motion. This timely opposition followed.

ARGUMENT

I. PETITIONERS' MOTION SHOULD BE DENIED, AND THE COURT SHOULD LIFT THE STAY, BECAUSE THIS COURT DOES NOT HAVE JURISDICTION TO HALT THE SECRETARY'S DISCRETIONARY POWER TO TRANSFER ALIENS FROM ONE LOCALE TO ANOTHER.

Section 1252(a)(2)(B)(ii) states that:

> Notwithstanding any other provision of law (statutory or nonstatutory), . . . no court shall have jurisdiction to review . . . (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter [8 U.S.C. §§ 1151–1382] to be in the discretion of the Attorney General or the Secretary of Homeland Security.

8 U.S.C. § 1252(a)(2)(B)(ii). In the present context, § 1252(a)(2)(B)(ii) operates in tandem with 8 U.S.C. § 1231(g)(1), which provides that "[t]he [Secretary of Homeland Security] shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal."

In authorizing the Secretary to arrange for "appropriate places of detention," § 1231(g)(1) specifies that the Secretary's authority is discretionary. Indeed, the word "appropriate" connotes discretion. *West v. Gibson*, 527 U.S. 212, 225–26 (1999) (Kennedy, J., dissenting) (interpreting the phrase "appropriate remedies" in Title VII of the Civil Rights Act of 1964). A statute need not contain the word "discretion" in order to specify that authority is discretionary. *Celaj v. Ashcroft*, 121 F. App'x 608, 611 (6th Cir. 2005) (holding that § 1252(a)(2)(B)(ii) precludes judicial review of the Attorney General's decisions under 8 U.S.C. §§ 1158(b)(2)(A) and 1231(b)(3), even though those statutes do not contain the word "discretion"); *El-Khader v. Monica*, 366 F.3d 562, 566 (7th Cir. 2004) (concluding that § 1252(a)(2)(B)(ii) bars review of the Attorney General's decisions under 8 U.S.C. § 1155, which does not contain the word "discretion"); *see also Onyinkwa v. Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004) (holding that the phrase "for good cause shown" specifies discretionary authority within the meaning of § 1252(a)(2)(B)(ii)).

Appellate courts have applied this reasoning with respect to § 1231(g)(1). *See, e.g.*, C*alla-Collado v. Attorney Gen. of U.S.*, 663 F.3d 680, 685 (3d Cir. 2011) ("An alien, however, does not have the right to be detained where he believes his ability to obtain representation and present evidence would be most effective."); *Wood v. United States*, 175 F. App'x 419, 420 (2d Cir. 2006) ("[The Attorney General, in the exercise of his statutory discretion . . . was not required to detain Wood in a particular state."); *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999) (holding that § 1231(g)(1) affords the Attorney General "discretionary power to transfer aliens from one locale to another"); *Gandarillas-Zambrana v. Bd. of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995) (interpreting 8 U.S.C. § 1252(c), the statutory predecessor to § 1231(g)(1), and concluding that the Government "necessarily has the authority to determine the location of detention of an alien in deportation proceedings, . . . and therefore, to transfer aliens from one detention center to another.").[1] As these cases explain, § 1231(g)(1) specifically affords the Secretary discretionary authority to determine the places at which aliens are detained, and precludes courts from reviewing the Secretary's decisions to place immigration detainees in particular facilities.

The First Circuit's decision in *Aguilar* does not require a contrary result. *Aguilar v. U.S. Immigration & Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1 (1st Cir. 2007). There,

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[1] So have district courts, including other sessions of this Court. *E.g.*, *Jacquet v. Hodgson*, No. 03-11568, 2003 WL 22290360, at *1 (D. Mass. Oct. 6, 2003) (Zobel, J.) (citing § 1231(g)(1) and recognizing that "this Court is without power to prevent the transfer of plaintiff"); *see also, e.g.*, *Lopez Canas v. Whitaker*, No. 19-06031, 2019 WL 2287789, at *6 (W.D.N.Y. May 29, 2019) ("The Court concludes that it does not have the authority to dictate to DHS where Petitioner should be housed."); *Zheng v. Decker*, No. 14-4663, 2014 WL 7190993, at *15–16 (S.D.N.Y. Dec. 12, 2014) (citing § 1231(g)(1) and recognizing "[w]e therefore lack jurisdiction to review petitioner's request and deny it accordingly"); *Avramenkov v. I.N.S.*, 99 F. Supp. 2d 210, 213–15 (D. Conn. 2000) (holding that, per § 1252(a)(2)(B)(ii), "the court lacks jurisdiction to prevent the INS from transferring the Petitioner to a federal detention facility in Oakdale, Louisiana"); *Earle v. Copes*, No. 05-1614, 2005 WL 2999149, at *1 (W.D. La. Nov. 8, 2005) ("Decisions regarding the place of confinement for aliens subject to removal orders are within the discretion of the Attorney General and not subject to judicial review.").

the court held that "section 1252(a)(2)(B)(ii) does not strip the district courts of jurisdiction over substantive due process claims that are collateral to removal proceedings when those claims challenge decisions about the detention and transfer of aliens *on family integrity grounds*." *Id.* at 21 (emphasis supplied). But here, unlike *Aquilar*, Petitioners have not raised a family integrity claim. Although they fleetingly mention that "some of these detainees have . . . family in Massachusetts" (Doc. # 138 at p. 2), they do not elaborate on that assertion or substantiate it with any evidence. Instead, the gravamen of their motion is a challenge to the Secretary's authority to transfer detainees based on assertions that "ICE is attempting to deplete the class to frustrate the Court's ability to grant these class members relief" (*id.* at p. 2), and that "this transfer will place the class members . . . at greater risk of serious illness or death" (*id.* at p. 3). Those assertions have nothing to do with family integrity and are not supported with any evidence. Rather, they directly challenge the Secretary's statutory authority to transfer aliens from one locale to another. *Aquilar* therefore does not control.

In sum, § 1252(a)(2)(B)(ii) bars the relief Petitioners seek because they challenge authority that is specified to be in the discretion of the Secretary of Homeland Security. 8 U.S.C. § 1231(g)(1). This Court therefore lacks jurisdiction and must lift its order halting transfers.

II. EVEN IF THE COURT FINDS THAT IT HAS JURISDICTION, PETITIONERS' MOTION SHOULD BE DENIED, AND THE COURT SHOULD LIFT THE STAY, BECAUSE PETITIONERS CANNOT ESTABLISH A DUE PROCESS VIOLATION IN THEIR TRANSFERS.

Even if the Court were to find that it has jurisdiction to halt transfers based on Petitioners' above assertions (and it does not), Petitioners cite no legal authority for the extraordinary proposition that a district court may enjoin ICE from transferring a detainee in ICE custody from one locale to another. In *Aguilar*, which Petitioners cite and rely upon, the First Circuit held that district courts may consider ancillary due process claims involving government conduct "so

egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." 510 F.3d at 21; *see also id.* ("the requisite arbitrariness and caprice must be stunning"). But here, Petitioners' vague assertion that "some of these detainees have . . . family in Massachusetts" (Doc. # 138 at p. 2) is more amorphous than what the First Circuit rejected in *Aguilar* itself. *See Aguilar*, 510 F.3d at 19 (rejecting narrower family integrity claim that ICE's failure to allow petitioners time to make arrangements for the care of their children violated substantive due process); *see also, e.g.*, *Payne–Barahona v. Gonzales,* 474 F.3d 1 (1st Cir. 2007) (rejecting family integrity claim when father with two children argued that splitting the family unit would violate substantive due process). *Accord Reyna as next friend of J.F.G. v. Hott*, No. 18-1503, 2019 WL 1601987, at *5 (4th Cir. Apr. 16, 2019) ("[W]e, like the district court, have been unable to find a substantive due process right to family unity in the context of immigration detention pending removal.").

As the First Circuit said in *Aquilar*, "[a]ny interference with the right to family integrity alleged here was incidental to the government's legitimate interest in effectuating detentions pending the removal of persons illegally in the country." *Aguilar*, 510 F.3d at 22; *see Demore v. Kim*, 538 U.S. 510, 523 (2003) (recognizing "detention during deportation proceedings as a constitutionally valid aspect of the deportation process"). So, too, in this case. In the attached declaration, ICE makes clear that the transfers are based on legitimate and routine government interests, including the government's interest "to transfer a limited number of detainees to other detention facilities outside of the Boston AOR to allow even greater spacing at its facilities." *See* Greenbaum Decl., attached as <u>Exhibit A</u> hereto, ¶ 11; *see also id.* ¶ 9 ("Aliens arrested within the Boston AOR by ICE typically are detained within the Boston AOR pending removal proceedings before the Boston Immigration Court or pending removal from the United States once a removal order has been entered. However, ICE ERO Boston transfers detained aliens to facilities outside

the Boston AOR for medical or mental health treatment at specific facilities or to stage aliens to better prepare to effectuate removal. ICE ERO Boston also transfers detained aliens to facilities outside the Boston AOR for purposes related to administrative factors such as housing capacity.").

In addition, the declaration describes in detail the chronology of ICE's decision-making process regarding these transfers:

- "On May 28, 2020, I received an electronic message from an ERO Supervisory Detention and Deportation Officer ("SDDO") in the ICE ERO office responsible for detention at the Etowah County Detention Center in Gadsden, Alabama. The SDDO stated that Etowah was open to transfers of certain types of cases and that Etowah had approximately 50 open beds at the facility and could accommodate a transfer of 25 detainees initially." *Id.* ¶ 13.

- "The SDDO stated that Etowah could accept cases involving aliens with final orders of removal, aliens with appeals pending before the Board of Immigration Appeals, and aliens with pending petitions for review before circuit courts. The SDDO indicated that Etowah could not accept severe disciplinary cases, cases with psychiatric or altered mental status issues, cases with significant chronic medical care issues, or cases with pending asylum hearings." *Id.* ¶ 14.

- "With this guidance and offer of bed space, I directed officers under my supervision to review the detained dockets at the five detention facilities within the Boston AOR to determine possible cases suitable for transfer. I did not direct or suggest to my officers that detainees should be selected for transfer who were petitioners within the *Augusto* litigation at Plymouth County. The purpose of the transfer of detainees from the Boston AOR to Etowah was to create more space at the detention facilities within the Boston AOR." *Id.* ¶ 15.

- "According to ICE ERO in Etowah, the current population at Etowah prior to ICE ERO Boston's intended transfer to Etowah was 103 ICE detainees. Etowah has a funded capacity for 320. Etowah has also only had one COVID-19 case at such facility and that individual eventually tested negative and was transferred out of the facility." *Id.* ¶ 16.

- "By June 3, 2020, ICE ERO Boston compiled a list of 25 detainees for possible transfer to Etowah based upon the criteria set forth by the SDDO above. Of these 25 detainees, 23 were detainees at Plymouth County." *Id.* ¶ 17.

- "Five were petitioners within the *Augusto* litigation at Plymouth County. Of those five, three had appeals pending with the Board of Immigration Appeals and two had final orders of removal. All were deemed to meet the criteria set forth by the SDDO above." *Id.* ¶ 18.

As demonstrated above, ICE's decision to transfer these five Petitioners has no sinister or unlawful purpose, contrary to the accusation in Petitioners' motion. *See* Doc. # 138 at p. 2 ("ICE is attempting to deplete the class to frustrate the Court's ability to grant these class members relief"). Far from it. The decision was based on a desire to foster "even greater spacing" among the Petitioners who would remain and other immigration detainees in Plymouth's other units. *Id.* ¶ 11. Nor does ICE intend to transfer these five Petitioners to a facility that would present greater health risks to them, as Petitioners suggest. Doc. # 138 at 3 ("[T]his transfer will place the class members . . . at greater risk of serious illness or death."). Indeed, the Etowah facility in Alabama currently has *zero* confirmed cases of COVID. *See* Greenbaum Decl. ¶ 16.[2]

Given the record evidence that these transfers are intended to increase social distancing at Plymouth, Petitioners' attempt to halt all transfers is as perplexing as it is unsupported. Indeed, their Amended Complaint alleges that "[p]reventing infection currently requires steps such as 'social distancing,'" Doc. # 119 ¶ 18, that "[p]eople incarcerated at the PCCF live in close quarters and rely on shared spaces to eat, sleep, shower, and use the bathroom," *id.* ¶ 26, and "[p]ublic health information makes clear that the only way to prevent infection is through social distancing," *id.* ¶ 49. Naturally, transferring these five Petitioners would go some way in readdressing these complaints to the benefit of the class as a whole. Petitioners ought not be heard to complain about

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[2] If any transferred Petitioner wishes to challenge the conditions of his confinement at the Etowah facility, he is free to do so by bringing a claim against his immediate custodian in Alabama. There are a number of organizations in Alabama that could represent any complaining Petitioner, including the ACLU, which bills itself as "the nation's largest public interest law firm, with a 50-state network of staffed, autonomous affiliate offices." *See* ACLU Website, https://www.aclu.org/about/aclu-history (last visited June 12, 2020). Alternatively, any transferred Petitioner could seek to join the multi-petitioner habeas case already pending in the Northern District of Alabama, just like aliens subsequently detained in Plymouth and housed in Unit C-3 have successfully sought to join this case without objection from the government.

conditions at Plymouth while at the same time seeking extraordinary injunctive relief to stymie the government's attempts to ameliorate those conditions.

Accordingly, because none of Petitioners' assertions amounts to a due process violation warranting the extraordinary relief they seek, the motion should be denied and the Court should lift its order halting transfers. *E.g.*, *Aguilar*, 510 F.3d at 19.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court deny the motion and lift its order halting transfers.

Respectfully submitted,

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