IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HANAD ABDI and JOHAN BARRIOS RAMOS, on behalf of themselves and all others similarly situated, Petitioners, v. KIRSTJEN M. NIELSEN, Secretary of the U.S. Department of Homeland Security, *et al.*, Respondents.	CIVIL NO. 17-CV-00721-EAW

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO VACATE THE COURT'S PRELIMINARY INJUNCTION ORDER (ECF NO. 56) AND ORDER CLARIFYING THE INJUNCTION (ECF NO. 83)

INTRODUCTION

Respondents hereby move, pursuant to Federal Rule of Civil Procedure 54(b), for the Court to vacate its preliminary injunction rulings entered on November 17, 2017, and February 9, 2018, concerning Petitioners' challenges to their detention under 8 U.S.C. § 1225(b)(1) without a bond hearing. Currently, the Court's preliminary injunction ruling requires Respondents to provide subclass members with bond hearings after six months of detention, where the Government bears the burden of justifying continued detention by clear and convincing evidence. *See* ECF No. 56. The Court subsequently clarified its ruling to additionally require that immigration judges conducting such bond hearings consider alternative conditions of release, as well as detainees' ability to pay. *See* ECF No. 83. The Court's rulings were largely premised on the Ninth Circuit's holdings in *Rodriguez v. Robbins* and that court's application of the canon of constitutional avoidance in interpreting § 1225(b). The Court also

relied on the Second Circuit's analysis in *Lora v. Shanahan*, a case pertaining to § 1226(c) detention. Since this Court's issuance of these rulings, however, the Supreme Court has reversed the Ninth Circuit's judgment in *Rodriguez v. Robbins* and vacated the Second Circuit's judgment in *Lora v. Shanahan*—effectively overturning the legal foundation of the Court's preliminary injunctions regarding Petitioners' bond claims. The Court should therefore vacate its prior preliminary injunction rulings in light of intervening and controlling Supreme Court precedent on legal issues that are at the heart of Petitioners' bond claims.

RELEVANT PROCEDURAL BACKGROUND

This habeas action commenced on July 28, 2017, when Hanad Abdi ("Abdi") filed a petition for a writ of habeas corpus in the Western District of New York challenging the denial of his request for parole and prolonged detention at the Buffalo Federal Detention Facility ("BFDF") in Batavia, New York. *See* ECF No. 1. On August 21, the petition was amended to include a second petitioner, Johan Barrios Ramos ("Ramos"), and to seek class-wide relief on behalf of a putative class of individuals detained at BFDF challenging the denial of their requests for parole and a subclass of those individuals detained beyond six months. *See* ECF No. 17. Petitioners contend that their parole denials violate 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5, and the Due Process Clause of the Fifth Amendment. *Id.* at ¶¶ 106, 107. They further challenge their prolonged detention without a bond hearing as violative of 8 U.S.C. § 1225(b) and the Due Process Clause. *Id.* at ¶¶ 108, 109. Petitioners assert jurisdiction under 28 U.S.C. § 1331 (federal question), § 1651 (All Writs Act), §§ 2201-02 (declaratory judgment), and § 2241 (habeas corpus). *Id.* at ¶ 5.

1. The Court's Order

On September 12, 2017, Respondents moved to dismiss the first amended petition in its entirety under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) arguing, first, that

Petitioners' parole claims are barred by 8 U.S.C. § 1252(a)(2)(B)(ii), are outside the proper scope of habeas review, and are otherwise meritless; second, that Petitioners' bond claims fail to state valid claims for relief as a matter of law; and third, that the case should not proceed with Abdi and Ramos, whose claims are moot by virtue of their release from detention. *See* ECF No. 27. On September 25, 2017, Petitioners filed a motion for a preliminary injunction, seeking an injunction "ordering the Government to adjudicate or, where appropriate, readjudicate parole applications for all petitioners in conformance with its legal obligations and to provide bond hearings to all petitioners who have been detained for more than six months." ECF No. 38 at 1-2.

On November 17, 2017, the Court entered an order denying Respondents' motion to dismiss and granting Petitioners' motion for a preliminary injunction. *See* ECF No. 56 (the "Order"). In the Order, the Court held, *inter alia*, that it had jurisdiction to consider Petitioners' parole claims, that ICE is legally bound to apply the provisions of an internal guidance memorandum (the "Morton Memo") in implementing procedures for parole, and that an individual detained under 8 U.S.C. § 1225(b)(1) is entitled to a bond hearing after six months. *See generally id.*

With respect to the bond claims, the Court found the reasoning articulated by the Ninth Circuit in *Rodriguez v. Robbins* persuasive,[1] as well as Second Circuit's rationale in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) and district courts that had applied *Lora* to § 1225(b) detention. Order at 24-30. Employing the same logic of the Ninth Circuit in *Rodriguez II* and

[1] More specifically, the Court relied on *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) ("*Rodriguez II*"), and *Rodriguez v. Robbins*, 804 F.3d 1060, 1070 (9th Cir. 2015) ("*Rodriguez III*"). *See* Order at 24-30.

III, the Court concluded that § 1225(b) does not permit indefinite detention, but rather must be construed under the constitutional avoidance doctrine to require a bond hearing after six months where the government bears the burden to justify continued detention by clear and convincing evidence. *Id.* at 30, 66-68.[2] The Court nevertheless repeatedly acknowledged that this precise issue was then-pending before the Supreme Court in *Jennings v. Rodriguez*, No. 15-1204, and that a ruling in *Jennings* "could impact the appropriateness of this Court's ruling in this case." *Id.*; *see also id.* at 24 n.6 (noting that the bond issue is before the Supreme Court in *Jennings v. Rodriguez*) & 61 (acknowledging that "the Supreme Court is poised to address this issue in *Jennings v. Rodriguez* … and the outcome of that case could change the legal landscape in this area").

Additionally, the Court rejected Respondents' argument that 8 U.S.C. § 1252(f)(1) precludes the class-wide injunctive relief sought by Petitioners. Instead, the Court held that "§ 1252(f)(1) is inapplicable to Petitioners' request for relief," reasoning that "Petitioners do not seek to enjoin the operation of [§ 1225(b)], but rather Respondents' violation of [§ 1225(b)]." Order at 63. After concluding that Petitioners meet the other requirements for a preliminary injunction and that class-wide injunctive relief is appropriate, the Court ordered Respondents to: (1) immediately adjudicate or readjudicate the parole applications of all class members in conformance with the Morton Memo; and (2) provide members who have been detained beyond

[2] In subsequent opinions, the Court reiterated that its bond holding is premised on the constitutional avoidance doctrine: "the availability of an implicit bond hearing requirement is based upon the constitutional avoidance doctrine, which is a canon of *statutory* construction that enables a litigant to vindicate his or her *statutory* rights; it does not create constitutional rights." ECF No. 66 at 22 (emphasis in original); *see also* ECF No. 83 at 13 ("the Court also determined that because both non-resident arriving aliens and lawful permanent residents ('LPRs') can be detained under § 1225(b), the constitutional avoidance doctrine requires *Lora*-style bond hearings for aliens detained under § 1225(b) in order to avoid 'serious constitutional concerns'").

six months with individualized bond hearings, with Respondents bearing the burden to justify continued detention by clear and convincing evidence. Order at 65-66. Respondents appealed the Order to the Second Circuit on January 11, 2018. *See* ECF No. 74.

2. The Court's Clarification Order

On January 8, 2018, Petitioners filed a motion for clarification of the Order to require that, at bond hearings ordered by the Court, immigration judges consider alternative conditions of release and an alien's ability to pay. *See* ECF No. 67. After full briefing and a hearing on the motion, on February 9, 2018, the Court issued an order granting Petitioners' motion. *See* ECF No. 83 (the "Clarification Order").

Once more, the Court relied on *Lora* and *Rodriguez III* to hold that the constitutional avoidance doctrine mandates that the Court construe § 1225(b) to avoid the due process concerns discussed in *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017), and to ensure that the conditions of release will be reasonably related to the governmental interest in securing detainees' appearance at future hearings. Clarification Order at 9-17. Thus, in addition to the requirements imposed by the Order, the Clarification Order mandates that, when conducting bond hearings for subclass members, immigration judges take into account alternative conditions of release and the alien's ability to pay. *Id*. at 29. The Court ordered the re-calendaring of bond hearings for those subclass members who had already received bond hearings and were issued bond, but remain detained. *Id.* Respondents filed an amended notice of interlocutory appeal on February 15, 2018, to include the Clarification Order in the pending appeal. *See* ECF No. 84.

3. The Supreme Court's Decision in *Jennings v. Rodriguez*

On February 27, 2018, the Supreme Court issued a decision in *Jennings v. Rodriguez*. *See Jennings v. Rodriguez*, 583 U.S. __, 138 S. Ct. 830 (Feb. 27, 2018) ("*Jennings*"). The

Supreme Court reversed the Ninth Circuit's ruling that 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) require bond hearings after six months of immigration detention as a matter of statutory construction. With respect to § 1225(b), the *Jennings* court held that, subject to release on parole, §§ 1225(b)(1) and (b)(2) unambiguously authorize detention of applicants for admission until the end of applicable asylum or removal proceedings. The Supreme Court further rejected the Ninth Circuit's imposition of procedural protections that went well beyond the initial bond hearing, noting that nothing in the statutory text of § 1226(a) required that the Government bear the burden in bond hearings or that certain factors must be considered by an immigration judge. The Supreme Court declined to decide the respondents' constitutional claims in the first instance and remanded the case for further consideration of those claims. On remand, the Supreme Court directed the Ninth Circuit to first "reexamine whether respondents can continue litigating their claims as a class" in light of 8 U.S.C. § 1252(f)(1), Federal Rule of Civil Procedure 23(b)(2), and *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338 (2011). The case remains pending in the Ninth Circuit.

Moreover, on March 5, 2018, the Supreme Court granted the petition for a writ of *certiorari* in *Lora*, vacated the judgment below, and remanded to the Second Circuit for further consideration in light of *Jennings*. *See Shanahan v. Lora*, 138 S. Ct. 1260, 2018 WL 1143819 (Mar. 5, 2018). On appeal, the Second Circuit dismissed the appeal as moot. *Lora v. Shanahan*, 719 F. App'x 79 (2d Cir. Mar. 30, 2018).

4. The Second Circuit's Remand

On April 11, 2018, the Second Circuit issued an Order to Show Cause why Respondents' appeal of this Court's preliminary injunction rulings should not be remanded for the district court's further consideration in light of *Jennings*. *See* No. 18-94 at Doc. 49. Given that both

Petitioners and Respondents consented to remand, on September 5, 2018, the Second Circuit ordered the appeal remanded to the district court "for further consideration in light of the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)." *See* No, 18-94 at Doc. 72.

LEGAL STANDARD

Courts have inherent power and wide discretion to modify or vacate their injunctions. *United States v. LoRusso*, 695 F.2d 45, 53 (2d. Cir. 1982); *MNL Capital, Ltd. v. Republic of Argentina*, No. 08-CV-6978 (TPG), 2016 WL 836773, *6 (S.D.N.Y. Mar. 2, 2016), *aff'd sub nom. Aurelius Capital Master, Ltd. v. Republic of Argentina*, 644 F. App'x 98 (2d Cir. 2016). Moreover, Federal Rule of Civil Procedure 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties … may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). District courts are therefore "empowered to revisit and vacate ... any non-final order 'at any time before the entry of a judgment.'" *Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp.*, 619 F.3d 207, 212 (2d Cir. 2010) (citing Fed. R. Civ. P. 54(b)); *see also Parmar v. Jeetish Imports, Inc.*, 180 F.3d 401, 402 (2d Cir. 1999) ("All interlocutory orders remain subject to modification or adjustment prior to the entry of a final judgment adjudicating the claims to which they pertain.") (citing Fed. R. Civ. P. 54(b)).

Rule 54(b) motions are subject to the law of the case doctrine. *Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 166 (2d Cir. 2003). Accordingly, decisions considered under Rule 54(b) may not usually be changed unless there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice. *Id.*; *Virgin Atl. Airways, Ltd. v. Nat'l*

Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992); *see also MNL Capital, Ltd.*, 2016 WL 836773, at *7 ("Generally, a court may vacate only when 'there has been such a change in the circumstances as to make modification of the decree equitable.'"). Changes in law often "afford the clearest bases for altering an injunction," *MNL Capital, Ltd.*, 2016 WL 836773, at *7, and "an intervening change of controlling law" is one of the "major grounds" supporting a Rule 54(b) motion, *Virgin Atl.*, 956 F.2d at 1255.

ARGUMENT

I. *Jennings* Indicates That The Court Lacks Jurisdiction To Grant Class-Wide Preliminary Injunctive Relief Against The Operation of 8 U.S.C. § 1225(b).

As a threshold matter, *Jennings* suggests that the Court lacks jurisdiction to grant class-wide preliminary injunctive relief on Petitioners' challenges to their detention without a bond hearing as violative of 8 U.S.C. § 1225(b). Title 8, section 1252(f)(1) provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [§§ 1221 – 1232] 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). Simply put, § 1252(f)(1) "'prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221 – 1232.'" *Jennings*, 138 S. Ct. at 851 (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999)).

The Court nevertheless found § 1252(f)(1) inapplicable to Petitioners' bond claims, concluding that the class-wide prohibition on injunctive relief is inapplicable where a moving party seeks only to enjoin violations of the *statutory* framework. Order at 62-63. *Jennings*, however, found this reasoning inapplicable in the absence of any statutory violation of §§ 1225(b), 1226(a), or 1226(c). *Jennings*, 138 S. Ct. at 851. *Jennings* therefore instructs that the Court should reconsider the applicability of § 1252(f)(1) to Petitioners' request for preliminary

injunctive relief in the first instance, given that, as explained below, § 1225(b)'s statutory framework has not been violated as a matter of law. Because Petitioners seek to enjoin operation of § 1225(b)'s explicit terms on a class-wide basis, § 1252(f)(1) plainly deprives the Court of jurisdiction to grant such relief. *Id.*

II. Under *Jennings*, 8 U.S.C. § 1225(b) Cannot Be Construed Under The Canon Of Constitutional Avoidance To Require Bond Hearings.

The Court's core preliminary injunction ruling on Petitioners' bond claims should be vacated in light of *Jennings*. Underpinning the Court's grant of preliminary injunctive relief on Petitioners' bond claims is its reliance on *Rodriguez II* and *III* and *Lora* and its use of the canon of constitutional avoidance to conclude that § 1225(b) requires a bond hearing after six months of detention. Order at 24-30, 66-68.

Yet, *Jennings* flatly rejects that notion. In *Jennings*, the Supreme Court reversed *Rodriguez* and condemned the Ninth Circuit's application of the canon of constitutional avoidance to interpret § 1225(b), stating that the Ninth Circuit "misapplied the canon" and "all but ignored the statutory text," and that its interpretation of § 1225(b) is "implausible." *Jennings*, 138 S. Ct. at 842-43. The Supreme Court made clear that "[n]othing in the text of § 1225(b)(1) or § 1225(b)(2) even hints that those provisions restrict detention after six months," and that the "plain meaning" of those provisions is that "detention must continue until immigration officers have finished 'considering' the application for asylum … or until removal proceedings have concluded …" *Id.* at 843-44. As a result, the Supreme Court held that neither § 1225(b)(1) nor (b)(2) can reasonably be read to limit detention to six months or require bond hearings. *Id.* at 844. *Jennings* reinforces that the *only* express exception to § 1225(b) mandatory detention is a discretionary grant of parole under 8 U.S.C. § 1182(d)(5)(A). *Id.*

Jennings clearly constitutes an intervening change in controlling law that warrants the Court's reconsideration of its preliminary injunction order—which relied exclusively on case law and a tool of statutory construction that the Supreme Court has now expressly disavowed. Because there is no valid legal basis for the Court's preliminary injunction order requiring Respondents to hold bond hearings for subclass members detained under § 1225(b)(1) beyond six months, that portion of the Court's November 17, 2017, order should be vacated.

III. *Jennings* Forecloses The Court's Imposition Of Procedural Requirements That Go Well Beyond The Initial Bond Hearing Established By Regulations.

Aside from *Jennings*' rejection of *any* bond hearings for § 1225(b) detainees, the ruling also undermines the validity of the Court's orders imposing additional requirements on Respondents in those bond hearings. The Court's November 17, 2017, order requires Respondents to bear the burden in bond hearings for subclass members held beyond six months to justify by clear and convincing evidence that continued detention is warranted. Order at 66-68. The Court adopted this standard from *Rodriguez II* and from district courts in this Circuit that applied *Lora* in the § 1225(b) context. *Id.* at 66. Again resorting to the canon of constitutional avoidance, the Court reasoned that, because "Respondents would be required to prove by clear and convincing evidence that continued detention is necessary when the bond applicant is a [legal permanent resident] … the canon of constitutional avoidance requires Respondents to make the same showing when the particular detainee is a non-[legal permanent resident]." *Id.* at 67.

The Court's February 9, 2018, clarification order is likewise premised on the canon of constitutional avoidance. That order requires immigration judges conducting bond hearings for subclass members to consider alternative conditions of release and an alien's ability to pay. The Court concluded that such requirements are necessary "to 'avoid' the due process concerns

discussed in *Hernandez* [*v. Sessions*, 872 F.3d 976 (9th Cir. 2017)], which are equally applicable to detentions pursuant to § 1225(b)." Clarification Order at 14.

Jennings cautions courts against reading such requirements into bond hearings. Indeed, in the context of § 1226(a), which only says that the Attorney General "may release" an alien "on … bond," the Supreme Court explained that nothing in the text "even remotely supports" requiring the Government to bear the burden in bond hearings or to take into account the length of detention prior to a bond hearing in determining whether an alien should be released. *Jennings*, 138 S. Ct. at 847-48.

For the same reasons, there is no support in § 1225(b)'s unambiguous text—which makes no mention of bond hearings, let alone shifting the burden to the Government to justify detention or requiring that immigration judges consider certain factors—for the Court's imposition of a clear and convincing burden on Respondents or a mandate that immigration judges consider alternative conditions of release or an alien's ability to pay in determining bond. Accordingly, these rulings should also be vacated.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court grant their motion and vacate the portion of the Court's November 17, 2017, order granting class-wide preliminary injunctive relief on Petitioners' bond claims, and vacate the February 9, 2018, order in its entirety.

Dated: October 31, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2018, I filed the foregoing document with the Clerk of the Court through the Court's ECF system, which will send a notice of electronic filing to all counsel of record.

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