UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA

Rushinga Francois Muzaliwa Petitioners, v. JOEL BROTT, Sherburne County Sheriff; SCOTT BANIECKE, Field Office Director, Immigration and Customs Enforcement; SARAH SALDAÑA, Director, Immigration and Customs Enforcement; JEH JOHNSON, Secretary, Department of Homeland Security; LORETTA LYNCH, Attorney General of the United States. Respondents.	Civil Action No: _____ CLASS ACTION **MEMORANDUM IN SUPPORT OF CLASS ACTION PETITION FOR WRIT OF HABEAS CORPUS**

INTRODUCTION

Respondents are detaining Petitioners Rushinga Francois Muzaliwa and other Class members ("Petitioners") in immigration detention under the U.S. Immigration and Customs enforcement ("ICE") St. Paul Field Office's interpretation of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(2)—an erroneous interpretation that is in stark contrast to controlling court cases and ICE policy memos. Under the Respondents' unlawful policy, individuals are subject to detention under § 1231(a)(2) even if they have been granted protection from removal—namely, withholding of removal – due to the persecution they face upon return to their home country –, or protection under the Convention Against Torture ("CAT"). Withholding and CAT are mandatory forms of immigration relief, meaning that the government *cannot* remove

Petitioners and others to their countries of origin. Moreover, Petitioners' removal to any other country is a virtual impossibility. Thus, Petitioners ask this Court to rule that they and similarly situated immigrants be immediately released from detention absent a finding by the United States Government that they are significantly likely to be removed to a third country in the reasonably foreseeable future.

The detention of noncitizens who have been ordered removed from the United States must comply with the Supreme Court rulings in Zadvydas v. Davis, 533 U.S. 678 (2001) and Clark v. Martinez, 543 U.S. 371 (2006). These decisions affirm the Due Process Clause's strong protections for the liberty interests of noncitizens as well as citizens, including the constitutional requirement that the duration of detention bear a "reasonable relation" to its purpose. Zadvydas, 533 U.S. at 690-694. At all times, the government must hold individuals for a legitimate governing purpose. If that purpose no longer applies, the detention is no longer valid. Our immigration laws permit detention to either make sure an individual shows up for his hearing or, if ordered removed, to effectuate his deportation. The Petitioners, and the class they represent, fit neither of these categories. Not only is their physical removal not reasonably foreseeable, it has been found a near impossibility. See Kumarasamy v. Att'y Gen., 453 F.3d 169, 171 n.1 (3d Cir. 2006); see also Nadarajah v. Gonzales, 443 F.3d 1069, 1082 (9th Cir. 2006). As such, the government lacks any authority to detain them and they are entitled to immediate release under conditions described in Zadvydas.

FACTS AND PROCEDURAL HISTORY

A. Petitioner Rushinga Francois Muzaliwa

Rushinga Francois Muzaliwa is a native and citizen of the Democratic Republic of Congo who entered the United States in 2010 as a refugee. On January 14, 2016, Immigration Judge (IJ) William J. Nickerson, Jr., ordered Mr. Muzaliwa removed to the Democratic Republic Congo, denied his applications for asylum and withholding of removal, and granted his application for DCAT, prohibiting his removal to the Democratic Republic of Congo. Legally, that means that the United States government cannot remove him to the Democratic Republic of Congo, and he has no ties to any other country. His removal is a practical impossibility.

Petitioners are detained for no legitimate reason and are suffering irreparable harm with each passing day. Their families suffer during their loss. Although Petitioners are civil immigration detainees, they are held with criminals serving their criminal sentences.[1] The government lacks any reason to hold them.

Importantly, the St. Paul Field Office's policy violates ICE's own national policy. See exhibit 18 to Bratlie Declaration 1. The Strait memo states that policies implemented in 2000 and 2004 are still in effect and

> "[iIn general, it is ICE policy to favor release of aliens who have been granted protection relief by an immigration judge, absent exceptional concerns such as national security issues or danger to the community and absent any requirement under law to detain." Protection relief includes asylum, withholding of removal under section 241 (b)(3) of the Immigration and Nationality Act, and withholding or deferral of removal under the regulations implementing U.S. obligations under Article 3

[1] Courts have noted with concern the practice of placing immigrants in civil detention in detention with convicted criminals. Chavez-Alvarez v. Warden York County Prison, 783 F.3d 469, 478 (3d. Cir. 2015). "The reality that merely calling a confinement "civil detention" does not, of itself, meaningful differentiate it from penal measures." The sexual assault of a refugee at Sherburne County Jail by a convicted sex offender made national news. http://www.startribune.com/sex-abuse-of-detained-immigrant-in-minn-jail-shows-national-pattern/255046481/

> of the U.N. Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, *see* 8 C.F.R. § 1208. 16(d) - 1208. 18. This policy applies at all times following a grant of protection, including during any appellate proceedings and throughout the removal period.

Id. The Strait memo specifically speaks to the conditions affecting the Petitioners in the instant case and requires that they be released, not held.

The St. Paul Field Office has a policy and practice of detaining noncitizens like Petitioners for ninety days after they have an administratively final grant of withholding or CAT relief. The Field Office asserts that such detention is required by statute. See Exhibit 1 to Bratlie Declaration 1. The only statutory provision that could authorize this detention, 8 U.S.C. § 1231(a), reads as follows:

> (a) Detention, release, and removal of aliens ordered removed
>
> (1) Removal period
> (A) In general
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
> (B) Beginning of period
> The removal period begins on the latest of the following:
> ***(i)*** *The date the order of removal becomes administratively final.*
> **(ii)** If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
> **(iii)** If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.
> (2) Detention
> During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

Id. (emphasis added).

In short, Respondents contends that it is required to detain Petitioners for the duration of the ninety-day "removal period," which in most cases begins the date that the removal order becomes administratively final.

ARGUMENT

The Fifth Amendment's Due Process Clause places strict limits on detention. "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Jones v. United States, 463 U.S. 354, 361 (1983) (internal citations omitted). Detention is unconstitutional "unless . . . ordered in a criminal proceeding with adequate procedural protections, or, in certain special and narrow nonpunitive circumstances where a special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint." Zadvydas, 533 U.S. at 690 (emphasis removed) (citations and internal quotation marks omitted). This guarantee prohibits immigration detention unless it is reasonably related to the purpose of *effectuating noncitizens' removal* from the United States. Id. at 690-92, 699-700.

Petitioners' detention is not related to that permissible purpose because it is highly unlikely if not impossible that the government will be able to effectuate their removal in the reasonably foreseeable future. Instead, Petitioners are being detained by immigration authorities based on a local policy of keeping noncitizens who have been granted CAT relief or withholding in detention for 90 days of post-removal detention under 8 U.S.C. §

1231(a)(2). See Letter from Scott Baniecke, (exhibit 1 to Bratlie Declaration 1). Such detention is unconstitutional.

However, this Court need not reach this constitutional issue. As the Supreme Court held in Zadvydas, under the canon of constitutional avoidance, statutes must be construed to avoid serious constitutional problems whenever it is "fairly possible" to do so. Zadvydas, 533 U.S. at 689. The Zadvydas Court applied this canon to construe § 1231 to authorize detention only where removal is still "reasonably foreseeable." Id. at 699. Because Petitioners' removal is not "reasonably foreseeable"—indeed, it is a virtual impossibility—this Court should hold that their continued detention violates the INA and order their immediate release.

A. Due Process Prohibits ICE from Detaining Noncitizens When Removal Is Not Reasonably Foreseeable, Even for Relatively Short Periods of Time

The Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Addington v. Texas, 441 U.S. 418, 425 (1979). "[D]ue process requires that the nature and duration" of any civil detention "bear some reasonable relation to the purpose" of that commitment. Jackson v. Indiana, 406 U.S. 715, 738 (1972); see also Foucha v. Louisiana, 504 U.S. 71, 79 (1992). For example, someone who is incompetent to stand trial cannot be detained for longer than the "reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." Jackson, 406 U.S. at 738. And if there is no "substantial

probability" that he will become competent to stand trial, he cannot be detained on the basis of his incapacity. Id.

Just as due process prohibits arbitrary detention in other contexts, the Supreme Court has repeatedly held that the Due Process clause permits detention of noncitizens pursuant to the general immigration detention statutes[2] only if that detention "bears a reasonable relation to the purpose for which the individual was committed." Demore v. Kim, 538 U.S. 510, 530 (2003); see also Zadvydas, 533 U.S. at 690-92, 699-700; Clark v. Martinez, 543 U.S. at 384. This check on the government's power to detain equally limits both mandatory and permissive detention statutes. See Zadvydas, 533 U.S. 678 (holding that due process limits the duration and scope of permissive no-bond detention under 8 U.S.C. § 1231(a)(6)); Bah v. Cangemi, 489 F. Supp. 2d 905, 920 (D. Minn. 2007) (explaining that if detention of noncitizens under 8 U.S.C. § 1226(c) were to become indefinite, and thus divorced from the statutory purpose, it would raise constitutional concerns, despite that detention statute's mandatory language).

The central purpose of immigration detention under the general detention statutes is to secure removal of those ordered removed from the United States, Zadvydas, 533 U.S. at 699; Demore v. Kim, 538 U.S. 510, 527-28 (2003); therefore, the Supreme Court

[2] There are four general immigration detention statutes that authorize civil detention of noncitizens at various times: 8 U.S.C. § 1225(b) (authorizing detention of noncitizens seeking admission at the border); 8 U.S.C. § 1226(a) (authorizing permissive detention of noncitizens pending a determination of removability); 8 U.S.C. § 1226(c) (authorizing mandatory detention of noncitizens with certain types of criminal records pending a determination of removability); and 8 U.S.C. § 1231(a) (authorizing detention of noncitizens with final removal orders during and after the removal period, including authorizing detention of all noncitizens for ninety days after a removal order becomes final and for an additional ninety days for noncitizens ordered removed with certain types of criminal records).

has recognized that immigration detention is lawful only where it bears a reasonable relation to that purpose, see Zadvydas, 533 U.S. at 690-92; Demore, 538 U.S. at 527-28; Clark, 543 U.S. at 384. Detention of a noncitizen who has received a final order of removal, therefore, is limited "to a period reasonably necessary to bring about that alien's removal." Zadvydas, 533 U.S. at 689. Where removal is not "practically attainable," immigration detention does not "bear a reasonable relation to the purpose for which the individual was committed." Zadvydas, 533 U.S. at 690 (internal citations and quotations omitted); Demore, 538 U.S. at 527. Thus, a noncitizen can be detained after a final order of removal only if his removal is "reasonably foreseeable"; otherwise, continued detention is unlawful. Zadvydas, 533 U.S. at 699-700; Jackson, 406 U.S. at 738; see also Clark, 543 U.S. at 384 (explaining that the post removal statute authorized detention "only for a period consistent with the purpose of effectuating removal"); Nadarajah v. Gonzales, 443 F.3d 1069, 1078 (9th Cir. 2006) (concluding, under Zadvydas, that portions of 8 U.S.C. § 1225(b) authorizing detention of noncitizens seeking admission into the United States "permit detention only while removal remains reasonably foreseeable"); Bah v. Cangemi, 489 F. Supp. 2d 905, 920 (D. Minn. 2007) (explaining that "assuring that removable aliens will in fact be removed" is the justification for detention under both the pre- and post-removal order detention statutes, and noting that when removal is "not reasonably foreseeable," detention can no longer be justified).

Furthermore, the Due Process Clause protects against even periods of unlawful and arbitrary confinement well shorter than the ninety days at issue here. See, e.g., Young v. City of Little Rock, 249 F.3d 730, 736 (8th Cir. 2001) (upholding a jury

decision that detention for just thirty minutes after being ordered released violated a prisoner's due process right to be free from unlawful deprivations of liberty); see also Coleman v. Frantz, 754 F.2d 719, 723 (7th Cir. 1985) ("We hold that the plaintiff's eighteen-day detention without an appearance before a judge or magistrate was a deprivation of liberty without due process of law."); Douthit v. Jones, 619 F.2d 527, 532 (5th Cir. 1980) ("Detention of a prisoner thirty days beyond the expiration of his sentence in the absence of a facially valid court [commitment] order or warrant constitutes a deprivation of due process.").

B. Petitioners' Detention Is Arbitrary, and Thus Unconstitutional, Because It Bears No Relation to the Purpose of Removing Petitioners

1. Petitioners' Removal Is Not Reasonably Foreseeable

Petitioners' detention violates the Fifth Amendment's Due Process Clause because it bears no relations to the detention statute's purpose of ensuring their presence for removal. Because Petitioners were granted withholding of removal under 8 U.S.C. § 1231(b)(3), withholding of removal under CAT, 8 C.F.R. § 1207.16, or deferral of removal under CAT, 8 C.F.R. § 1207.17, an immigration judge has ordered that they may not be removed to their home countries because of the grave harm they would face there. The Petitioners also are not removable to any third country, foreclosing *any* likelihood of removal in the reasonably foreseeable future.

Courts that have reviewed similar facts have also found that removal is not realistic in these circumstances. Nadarajah, 443 F.3d at 1082. ("Thus, at this juncture, the government is not entitled to remove Nadarajah to Sri Lanka, and no other country

has been identified to which Nadarajah might be removed. Therefore, examining the circumstances objectively, one cannot say that his removal is reasonably foreseeable."). Like the petitioner in Nadarajah, who likewise had been granted CAT relief, this class of petitioners cannot be removed to their designated countries and no other country has been identified by the government to remove them to.

Although relief under the Convention Against Torture does not itself bar removal to a third country, "commentators have noted that '[i]n practice . . . non-citizens who are granted restrictions on removal are almost never removed from the U.S." Kumarasamy v. Att'y Gen., 453 F.3d 169, 171 n.1 (3d Cir. 2006) (quoting Weissbrodt, David & Laura Danielson, Immigration Law and Procedure 303 (5th ed. 2005).

Instead of detaining the Petitioners in order to effectuate their removal, Respondents are detaining Petitioners based on a local policy of keeping noncitizens who have been granted withholding or CAT relief in detention for 90 days of post removal detention under 8 U.S.C. § 1231.

2. Zadvydas Requires Release When Removal to the Home Country Is Prohibited and the Noncitizen Is Not Removable to a Third Country

In Zadvydas v. Davis, the Supreme Court held that noncitizens with criminal records ordered removed cannot be detained beyond the period reasonably necessary to ensure removal (a presumptive period of six months) pursuant to 8 U.S.C. § 1231(a)(6) without an individualized showing that there is a significant likelihood of removal in the reasonably foreseeable future. Zadvydas, 533 U.S. at 699-700.

The Court's holding in Zadvydas requires habeas courts to determine the legality of post-order detention based on the statute's purpose to effectuate removal. It instructs that "if removal is not reasonably foreseeable, *the court should hold continued detention unreasonable and no longer authorized by statute*." Id. at 699-700 (emphasis added). Therefore, applying the principles of Zadvydas to CAT and withholding grantees—whom ICE is prohibited from removing to their home countries and who have no citizenship in any third country—detention of Petitioners and proposed Class members is unreasonable and contrary to statute because it serves no legitimate purpose. Unlike the petitioners in Zadvydas, the Petitioners' post-removal-order detention was never premised on the notion that ICE would be attempting to remove them, since an Immigration Judge has prohibited their removal to the only country where removal could have been viable. From day one of this post-removal order detention, the statutory purpose of the detention statute—to effectuate removal—has never been implicated.

Because Petitioners' detention under 8 U.S.C. § 1231(a)(2) has no reasonable relation to the purpose of effectuating their removal, that detention in its entirety violates the Fifth Amendment Due Process Clause's guarantee of freedom from arbitrary deprivation of liberty, and Petitioners should be immediately released.

C. Under the Canon of Constitutional Avoidance, No Statute Authorizes Petitioners' Detention

1. In Order to Avoid Constitutional Concerns, 8 U.S.C. § 1231(a)(2) May Not Be Interpreted as Authorizing Petitioners' Detention

Only one detention provision, 8 U.S.C. § 1231(a)(2), could conceivably authorize Petitioners' detention. But in light of the serious constitutional concerns identified above,

that provision cannot be read to authorize the Petitioners' detention after they were granted humanitarian relief prohibiting removal to their home countries. See INS v. St. Cyr, 533 U.S. 289, 299-300 (2001) (courts must construe statutes to avoid serious constitutional questions if "an alternative interpretation of the statute is fairly possible" (citation and internal quotation marks omitted)); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) ("[S]tatute[s] must be construed, if fairly possible, so as to avoid not only the conclusion that [they are] unconstitutional but also grave doubts upon that score."); see also Clark v. Martinez, 543 U.S. 371, 380-81 (2005) (applying constitutional avoidance canon to limit the length and scope of immigration detention); Bah v. Cangemi, 489 F. Supp. 2d 905, 919-21 (D. Minn. 2007) (same).

Statutory authority to detain noncitizens after a final order of removal under § 1231(a) is premised on the ability to effectuate removal. Zadvydas, 533 U.S. at 699 ("[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by [8 U.S.C. § 1231]."). Section 1231(a)(1)(A) requires federal authorities to remove noncitizens who are subject to final orders of removal within 90 days after the order becomes final, a period called the "removal period." Under § 1231(a)(2), DHS "shall" detain an alien "[d]uring the removal period." Moreover, "[u]nder no circumstance during the removal period shall [DHS] release an alien who" is subject to criminal or terrorism-based grounds of deportability under 8 U.S.C. § 1227(a)(2) and (a)(4)(B). Id.

As a matter of plain language, Section 1231(a)(2) does not provide authority to detain a noncitizen who—like Petitioners—cannot be removed because he is protected

from return to the only country designated for removal. The statute applies to noncitizens who can be removed, requiring their detention during the removal period, i.e., the period in which the government "shall" remove them. By its plain terms, the provision has no application to noncitizens who cannot be removed, like Petitioners. Removal of a noncitizen awarded protection from removal is surely not required during the removal period; neither is detention.

But even assuming the statute were ambiguous, it cannot be construed to authorize the detention of people, like Petitioners, whose removal is not reasonably foreseeable. While Zadvydas only directly examined extended detention of noncitizens with certain criminal records under 8 U.S.C. § 1231(a)(6), the Zadvydas principles have been used to limit all four of the general immigration detention statutes. See, e.g., Bah v. Cangemi, 489 F. Supp. 2d 904, 919 (D. Minn 2007) ("This Court believes that allowing unlimited pre-removal period detention under § 1226[c] would be inconsistent with the reasoning underlying Zadvydas."); Nadarajah, 443 F.3d at 1082 ("[C]onsistent with the Supreme Court's approach in Zadvydas, we conclude that the statutes at issue [referring to portions of § 1225(b)] permit detention only while removal remains reasonably foreseeable."); Owino v. Napolitano, 575 F.3d 952, 955-56 (9th Cir. 2009) (holding that, based on Zadvydas, 8 U.S.C. § 1226(a) can only authorize detention during removal proceedings when a noncitizen is "not significantly likely to be removed" upon conclusion of judicial and administrative review, and that even if the statute authorizes detention, due process requires a bond hearing).

2. Any Argument that 8 U.S.C. § 1231(a)(2) Compels Mandatory Detention of Petitioners is Belied by National ICE Guidance to the Contrary

Respondents' policy to hold individuals like Petitioners who have been granted humanitarian relief runs contrary to ICE's guidance and standard national practice. At the national level, for at least sixteen years ICE has had a policy that defaults to release of individuals granted withholding of removal or CAT relief, even during the removal period.

An email to ICE Field Office leadership, including the St. Paul Field Office, sent on behalf of Gary Mead, Executive Associate Director, Enforcement and Removal Operations in March 2012, reminded Respondents of ICE's longstanding policy to release noncitizens in the Petitioner's class.

> This Field Guidance is sent as a reminder that the April 21, 2000 Immigration and Naturalization Service Memorandum by General Counsel Bo Cooper (Detention and Release during the Removal Period of Aliens Granted Withholding or Deferral of Removal) and the February 9, 2004 ICE Memorandum by Assistant Secretary Michael Garcia (Detention Policy Where an Immigration Judge Has Granted Aslum and ICE Has Appealed) are still in effect and should be followed.
>
> The memorandum provides guidance that "[i]n general, it is ICE policy to favor release of aliens who have been granted protection relief by an immigration judge, absent exceptional concerns such as national security issues or danger to the community and absent any requirement under law to detain." Protection relief includes asylum, ***withholding of removal under section 241 (b)(3) of the Immigration and Nationality Act, and withholding or deferral of removal under the regulations implementing U.S. obligations under Article 3 of the U.N. Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment***, see 8 C.F.R. § 1208. 16(d) - 1208. 18. This policy applies at all times following a grant of protection, including during any appellate proceedings and throughout the removal period.

> Per the April 21, 2000 and February 9, 2004 Memoranda, the Field Office Director must approve any decision to keep an alien who received a grant of any of the aforementioned protections in custody. This includes situations where the Office of the Chief Counsel (OCC) is appealing the grant of relief. Additionally, any decision to continue to hold an alien should be done in consultation with the local OCC.

See Exhibit 18 to Bratlie Declaration 1. (emphasis added). The relevance of this national ICE policy *not* to detain individuals similarly situated to the Petitioners cannot be overstated.

3. The Blanket Policy of Continuing to Detain Individuals Granted Humanitarian Relief Is Bad Policy

Importantly and unsurprisingly, many of the victims of this unconstitutional policy suffer because of it. Many grantees of humanitarian asylum have suffered severe trauma, and continued detention, with no conceivable reason for it, continues that harm.[3] See affidavits of former detainees. The harms that continued detention works on those detained, in terms of mental and physical health and overall wellbeing, cannot be overstated.

Holding these people beyond the time that removal is reasonably foreseeable gives the government no benefit but harms the immigrants who have already been separated from their families and communities for the duration of the removal proceeding process, which lasts months if not years in most cases.

CONCLUSION

[3] See also Rachel Aviv, The Refugee Dilemma, The New Yorker, Dec. 7, 2015, available at http://www.newyorker.com/magazine/2015/12/07/the-refugee-dilemma. Detailing the concerns of a refugee held under this policy.

Respondents' policy violates the Constitution. It has no support from the national ICE offices who have expressly argued against this policy. And it has no support in the statute itself. As such, this court should enjoin Respondents from this practice and grant Petitioners immediate release and attorneys' fees.

DATED: April 11, 2016

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

s/ Ian S. Bratlie
Ian Bratlie #0319454
709 S Front St. Suite 1B
Mankato, MN 56001
(507) 995-6575

Teresa Nelson #269736
2300 Myrtle Ave, Suite 180
St Paul, MN 55114-1879
(651) 645-4097

UNIVERSITY OF MINNESOTA LAW SCHOOL, CENTER FOR NEW AMERICANS

Rebecca Cassler (Student Attorney)
Brent Johnson (Student Attorney)
Nick Hittler (Student Attorney)
Benjamin Casper #276145 (Supervising Attorney)
190 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
(612) 625-6484

DORSEY & WHITNEY LLP

Kirsten E. Schubert #0388396
schubert.kirsten@dorsey.com
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600
Facsimile: (612) 340-2868