UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.M.M., ON BEHALF OF HIS MINOR CHILD, J.M.A., *ET AL.*,	)	
Plaintiffs,	)	
v.	)	No. 1:18-cv-1759 (PLF)
JEFFERSON BEAUREGARD SESSIONS, III, ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

The Court should deny a temporary restraining order and transfer this case to the Southern District of California so that it can be considered together with *Ms. L v. ICE*, No. 18-428 (S.D. Cal.) (Sabraw, J.), a certified class action involving claims, issues, relief, and parties that substantially overlap with this case and in which, over a month ago, the district court issued a preliminary injunction that the present case, if permitted to proceed, will undermine and obstruct. In *Ms. L*, Judge Sabraw certified a nationwide class of parents of minor children separated at the border and entered an order requiring that those families be reunified. That court-ordered reunification process has progressed quickly under Judge Sabraw's orders and oversight, and multiple judges have recognized that cases raising claims and issues that overlap with *Ms. L* should be transferred to Judge Sabraw. During the reunification ordered by Judge Sabraw, two groups of children—including one putative class—filed suits in the Southern District of New York seeking to halt reunifications due to the impact that those reunifications would have on the children's immigration proceedings. The Southern District of New York transferred those actions to the

Southern District of California to be considered in conjunction with the interests of *Ms. L* class member parents in pursuing the reunification order.

This Court should do the same thing here. In this case, a putative class of parents, on behalf of their children, which essentially parallels the certified class of parents in *Ms. L*, seeks relief from removal on behalf of themselves and their parents. This relief overlaps with the multiple suits now before the Southern District of California—and indeed challenges the reunification requirements and process ordered and authorized by that court. This Court should promptly transfer this case so that the claims can be considered together with the claims of the certified class of parents in *Ms. L*, and to avoid imposing inconsistent and conflicting obligations on the government. The relief sought here is fundamentally inconsistent with the claims in *Ms. L*, where the parents pressed a theory that they are entitled to be detained with, and have immigration-removal decisions made together with, their children. Having received that relief, and there having been no showing that reunified parents are unfit or otherwise not entitled to act on behalf of their children, claims that are purportedly brought on behalf of their children should not be separately considered in this action.

LEGAL STANDARD

Preliminary relief is appropriate only if a plaintiff demonstrates that: (1) he is substantially likely to succeed on the merits; (2) he will be irreparably injured if an injunction is not granted; (3) preliminary relief will not substantially injure the defendant; and (4) preliminary relief furthers the public interest. *Barton v. District of Colum.*, 131 F. Supp. 2d 236, 241 (D.D.C. 2001) (quoting *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998)). When a plaintiff seeks preliminary relief, he must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis in original).

The "D.C. Circuit 'has set a high standard for irreparable injury.'" *Jones v. D.C.*, 177 F. Supp. 3d 542, 545 (D.D.C. 2016) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). To meet this standard, "[t]he injury must be both certain and great; it must be actual and not theoretical." *Id.* (quoting *Chaplaincy*, 454 F.3d at 297).

ARGUMENT

Plaintiffs seek a temporary restraining order barring Defendants from removing "all non-citizen children, and the parents or guardians of such children, who were separated upon entry into the United States." Mem. 27. This Court should deny that relief. *First*, this Court should not entertain this suit at all because it would obstruct and undermine a class-wide preliminary injunction, entered in the Southern District of California in *Ms. L*, that involves claims, issues, relief, and parties that overlap with this case.[1] As other courts have done in recent days, this Court should transfer this case to the Southern District of California to promote the orderly and consistent administration of the issues and claims presented in these cases. *Second*, this Court lacks jurisdiction to grant the stay of removals that Plaintiffs request. The Immigration and Nationality Act (INA) bars district courts from enjoining the execution of removal orders.

A. This Court Should Deny a TRO and Immediately Transfer this Case Because the Requested Relief Would Interfere with an Injunction in an Ongoing Case that Involves Overlapping Claims, Issues, Relief, and Parties.

The TRO should be denied—and the case should be transferred to the Southern District of California—because a TRO would overlap and interfere with the reunification process being administered by Judge Sabraw in *Ms. L*. Judge Sabraw has ordered and is overseeing relief on the claims of a certified class of the parents seeking relief on behalf of the putative class here with

[1] While the majority of the *Ms. L.* class members have been reunified either in ICE custody or in the interior of the United States, the federal government is still reunifying some class members, including those removed from the United States, as they become eligible or available.

respect to their custody and removal. Absent a severing of parental rights, those parents are entitled to act on behalf of their children in litigation—including by seeking reunification and departure from the United States as a family unit rather than separate immigration proceedings for the parent and child, as a UAC. Judge Sabraw is also considering the very issues presented here in connection with a putative class action filed on behalf of children in New York that directly overlaps with the putative class here. This class claim must also be promptly transferred to Judge Sabraw's court to consider the request for injunctive relief.

The "usual rule" in this Circuit is that '[w]here two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first." *UtahAmerican Energy, Inc. v. Dep't of Labor*, 685 F.3d 1118, 1124 (D.C. Cir. 2012) (quoting *Wash. Metro. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980)). The D.C. Circuit follows this rule because "[c]onsiderations of comity and orderly administration of justice dictate that two courts of equal authority should not hear the same case simultaneously." *Id.* (quoting *Wash. Metro.*, 617 F.2d at 830); *see Colo. River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976) ("As between federal district courts . . . the general principle is to avoid duplicative litigation."); *Crawford v. Bell*, 599 F.2d 890, 892 (9th Cir. 1979) (dismissal appropriate where "the complainant is a member in a class action seeking the same relief").

That rule supports transferring this case to the Southern District of California. Plaintiffs seek an order that, if granted, would interfere with ongoing litigation in another court. In *Ms. L.*, the Southern District of California approved the use of an "Election Form," which allows an alien parent to elect that, "[i]f I lose my case and am going to be removed, I would like to take my child with me." Notice at 2, ECF No. 97. In approving the use of the Election Form, which the class

plaintiffs proposed in *Ms. L*, the *Ms. L* court accepted the established principle that a parent can lawfully waive her child's potential rights to relief, including under the immigration laws. *See, e.g.*, Fed. R. Civ. P. 17(c)(1). And because this action has been brought by the parents of the minor children—*see* Compl. 1 & ¶ 10—who are class members in *Ms. L*. and have waived the rights of their children through their class counsel and pursuant to a reunification form, the parents must seek relief in the Southern District of California. The parents cannot seek to link their removal orders to their children's putative asylum claims by filing an action in another federal court. That is, they cannot seek relief that is inconsistent with what they have already received in the Southern District of California, and so their claims here should be rejected.

Here, Plaintiffs allege that the government has implemented a policy that unlawfully allows a parent to waive her child's "independent asylum and other statutory protection rights." Mem. 7. But the *Ms. L.* court has already approved the use of an Election Form—which was proposed by the parents themselves through class counsel—under which a parent can waive her child's separate immigration rights. So if this Court enjoined the government from allowing a parent to waive her child's rights, the injunction would interfere with the *Ms. L.* litigation, violate principles of comity, and undermine the orderly administration of justice.

At least two other judges have refused to hear claims that overlapped with the *Ms. L* claims. In *N.T.C. v. ICE*, No. 18-cv-6428 (S.D.N.Y. July 19, 2018), the court found that the plaintiffs' claims were, "at bottom, *directly* related to the reunification process being supervised by Judge Sabraw [in *Ms. L*]." Order at 3. The court accordingly transferred the case to Judge Sabraw. And in *E.S.R.B. v. Sessions*, No. 18-cv-6654 (S.D.N.Y. July 24, 2018), another judge in the Southern District of New York reached the same conclusion and transferred the case to Judge Sabraw.

Like the claims in the Southern District of New York cases, the claims in this case directly relate to the reunification process that Judge Sabraw is supervising in *Ms. L*. If this Court were to grant a temporary restraining order, it would affirmatively interfere with the *Ms. L* litigation. In accordance with the principles of comity and orderly administration of justice, the Court should not enter an order that would interfere with the *Ms. L* litigation. *UtahAmerican Energy*, 685 F.3d at 1124. Instead, the Court should transfer this case to Judge Sabraw.

B. This Court Lacks Jurisdiction Over This Case.

As discussed above, the Court should decline jurisdiction because "a complaint involving the same parties and issues has already been filed in another district." *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1161 (9th Cir. 2011). "The well-established rule is that, in cases of concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case." *Entines v. United States*, 495 F. Supp. 2d 84, 85 (D.D.C. 2007). Because the *Ms. L* case was filed before this one, and because it raises the same issues and involves many of the same parties as this case, the Court should decline jurisdiction pursuant to the first-to-file rule.

Even if the Court did not decline jurisdiction pursuant to the first-to-file rule, it would lack jurisdiction to grant the stay of removal that Plaintiffs request. The Immigration and Nationality Act (INA) deprives district courts of jurisdiction to enjoin the execution of a final expedited removal order, *see* 8 U.S.C. §§ 1252(a)(2)(A)(i), 1252(e)(1), (2), (4), and more generally forbids district courts from hearing any cause or claim that arises from the government's "decision or action . . . [to] execute removal orders," *id.* § 1252(g). These provisions foreclose the stay of removal that Plaintiffs request.

Plaintiffs allege that the government has implemented an unlawful "policy of denying [them] their rights to pursue asylum in the United States." Mem. 11. Plaintiffs claim that they are

challenging this alleged new policy under 8 U.S.C. § 1252(e)(3). Under that provision, a party may assert a claim that "a written policy directive, written policy guideline, or written procedure . . . to implement [8 U.S.C. § 1225(b)], is not consistent with applicable [law]." Such a claim must be brought "no later than 60 days after the date the challenged . . . directive, guideline, or procedure . . . is implemented." 8 U.S.C. § 1252(e)(3)(B).

Plaintiffs do not identify any specific written document that implements § 1225(b) and was issued in the past 60 days. Because section 1252(e)(3) applies only with respect to a written document that was issued in the past 60 days, Plaintiffs do not properly invoke section 1252(e)(3). And to the extent that Plaintiffs challenge an unwritten policy or practice, section 1252(e)(3) does not apply. *AILA v. Reno*, 18 F. Supp. 2d 38, 58 (D.D.C. 1998) ("[B]ased on the clear language of the jurisdictional provision of § 242(e)(3)(A)(ii), this Court cannot review unwritten policies or practices . . . ."). Plaintiffs' § 1252(e)(3) claim is not likely to succeed on the merits.

Plaintiffs also allege that "DHS, ICE and other Defendants promulgated, at some point after June, 2018, internal written directives implementing the reunification order in *Ms. L* and Executive Order 13841." Compl. ¶ 62. Plaintiffs go on to allege that these directives "ordered DHS and ICE personnel to effectuate the deportation of families as soon as practically possible following reunification by securing the parent's agreement to be deported with their child, extracting the child from removal proceedings under Section 240, and placing the child back in the custody of the parent so that they could be prepared for immediate deportation." *Id.* The complaint further alleges that the challenged policy "of denying Plaintiffs their rights to pursue asylum . . . is reflected in written statements and directives included but not limited to the DHS Fact Sheet . . . ." Compl. ¶ 132. In substance, Plaintiffs challenge: (1) the fact that after Defendants reunified alien minors with their parents, Defendants cancelled notices to appear that it had issued

to the minors on the premise that they were "unaccompanied;" and (2) the process by which a parent with a final expedited order of removal may elect to be removed from the United States with her child, notwithstanding the child's assertion that she has a credible fear. Mem. 5, 8.

Plaintiffs fail to state a claim under section 1252(e)(3), and are not likely to succeed on the merits of that claim. Other than issuing documents needed to implement the injunction – which can't form the basis of a case under section 1252(a)(3) – Plaintiffs do not allege that there are any guidance or policies that have been issued in the last 60 days under the Executive Order or otherwise, and there are none. The DHS Fact Sheet that Plaintiffs reference is not new guidance. Indeed, Defendants' compliance with the court's Order in *Ms. L* is not the type of new policy or directive that is subject to challenge only in this district under section 1252(e)(3). Allowing Plaintiffs' claim to proceed on that basis only opens the door to improper horizontal appeals of the decisions of other district courts.

The practices that Plaintiffs now challenge derive from two separate and hardly novel policies. First, permitting parents to make decisions on behalf of their children reflects longstanding precepts regarding parental rights. In fact, recognition of those parental rights is what permits the parents of the six named Plaintiffs to bring this lawsuit on the Plaintiffs' behalf. *See* Fed. R. Civ. P. 17. Such parental rights were also recognized by a now rescinded August 23, 2013 Immigration and Customs Enforcement internal directive entitled "Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities," which defined parental rights as "[t]he fundamental rights of parents to make decisions concerning the care, custody, and control of their minor children without regard to the child's citizenship, as provide for and limited by applicable law." *United States v. Dominguez-Portillo*, No. EP-17-MJ-4409-MAT, 2018 WL 315759, at *11

(W.D. Tex. Jan. 5, 2018).[2] Judge Sabraw's own statements reflect his acknowledgment of parental rights in this very context. *See* Exhibit 1, *Ms. L*, No. 18-cv-428, July 28, 2018 Status Conf. Tr. 39:19-40:2 ("But under the law what matters in the parent. I mean, what this case has always been about is the due process right to family integrity. . . . And it is the parent that makes the decisions. In a perfect world it could be a family decision, but the child's view, under the law, doesn't matter. It is the parent's view, ultimately, whether to remove together or separately."). In any event, the UAC provisions and procedures were designed to address unaccompanied minors, and are not appropriate when a parent has custody of, and to act for and make decisions on behalf of, the child. *See* 6 U.S.C. § 279(g) (UAC provisions apply only when "no parent or legal guardian is available to provide care and physical custody"). And Judge Sabraw is currently considering the impact of his injunction with respect to children, given the requests before him with respect to a stay of removal to permit reunified families to confer and the transferred class action from New York. These are issues that relate to injunction compliance and implementation; accordingly, Plaintiffs' § 1252(e)(3) claim is not likely to succeed on the merits.

C. Plaintiffs Are Not Entitled to Classwide Relief.

Here, Plaintiffs' only attempt to distinguish this action from *Ms. L* is Plaintiffs' claim under § 1252(e)(3). Even if Plaintiffs properly invoked § 1252(e)(3), they would not be entitled to relief beyond the named Plaintiffs. Section 1252(e)(1)(B) provides that "no court may . . . certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection." Accordingly, for a § 1252(e)(3) claim (a claim for which judicial review is authorized under a paragraph of subsection (e) that is

[2] That directive was superseded on August 29, 2017 by a directive entitled "Detention and Removal of Alien Parents or Legal Guardians." *See* https://www.ice.gov/doclib/detention-reform/pdf/directiveDetainedParents.pdf (last visited July 29, 2018).

subsequent to paragraph (e)(1)), a court may not certify a class action. If the Court issues a temporary restraining order, the order should grant relief only to the named Plaintiffs. 8 U.S.C. § 1252(e)(1)(B).

Dated: July 30, 2018

Respectfully submitted,

/s/ Jeffrey S. Robins

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