UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NAHUM GILBERTO ORTIZ; DENNY MOLINA CANTOR; LUCAS PALACIOS ALVARADO; JEREMIAS LOPEZ LOPEZ; ELMER MOSCOSO GUERRA; and LUIS GONZALEZ CARBAJAL,

Plaintiffs,

v.

ORANGE COUNTY, NEW YORK; PAUL ARTETA, Sheriff of Orange County, in his official and individual capacity; CARL DUBOIS, former Sheriff of Orange County, in his individual capacity; KENNETH JONES, former Undersheriff of Orange County, in his individual capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; and KENNETH GENALO, Acting ICE Field Office Director, in his official capacity,

Defendants.

23 Civ. 2802 (VB)

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE FEDERAL DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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THIS COURT LACKS JURISDICTION TO REVIEW ICE'S TRANSFER DECISIONS

As explained in the Federal Defendants' opening brief (*see* ECF No. 39, Memorandum of Law in Support of the Federal Defendants' Motion to Dismiss the Complaint ("Mem.")), since decisions about where to house and transfer detainees are committed to the statutory discretion of DHS, they are unreviewable by this Court.[1] Specifically, 8 U.S.C. § 1252(a)(2)(B)(ii) bars courts from reviewing any decision or action that is committed to DHS's statutory discretion, and 8 U.S.C. § 1231(g)(1) grants DHS the statutory responsibility for arranging housing for detained aliens. Accordingly, and as numerous district courts in this Circuit have held (*see* Mem. at 10-11), this Court lacks jurisdiction to review ICE's discretionary transfer decisions with respect to Plaintiffs Palacios and Molina.

In opposing the Federal Defendants' motion on this point, Plaintiffs cite to out-of-circuit case law, from the First and Fourth Circuits, which is not binding on this court. (*See* ECF No. 49, Plaintiffs' Opposition to Federal Defendants' Motion to Dismiss ("Opp.") at 4-5). In those cases, the courts held that § 1231 did not provide ICE with the requisite statutory discretion to strip the district court of jurisdiction over ICE's transfer decisions. However, those cases stand in stark contrast to the Second Circuit's decision in *Wood v. United States*, 175 F. App'x 419, 420 (2d Cir. 2006). While the Court in *Wood* was not deciding a jurisdictional question, it nevertheless explicitly held that the Attorney General's decision about where to house a detainee, including in what state to hold him in light of available facilities, was an exercise of "statutory discretion." *Id*. Because the Second Circuit held in *Wood* that § 1231(g) provides the Attorney General with statutory discretion in determining where to house detainees, this Court need not rely on out-of-circuit authority.

[1] Acronyms in this brief are the same as those contained in the Mem.

Plaintiffs' response to the Second Circuit's holding in *Wood* is to cite *Nethagani v. Mukasey,* 532 F.3d 150 (2d Cir. 2008). In that case, which was decided after *Wood*, the Court examined an entirely different provision than the relevant one here. There, the government argued that the Court did not have jurisdiction to review the BIA's decision that the petitioner was ineligible for asylum and withholding of removal because he had been convicted of a "particularly serious crime." *Id*. at 154. The Court disagreed because the text of the statutes stating that the Attorney General must "determine" or "decide" whether an alien was convicted of a particularly serious crime, do not contain language "specifically rendering that *determination* to be within his discretion." *Id*. (emphasis added).

But the statute at issue here is different because it does not require a "determination" by DHS—it provides that DHS has the responsibility to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." 8 U.S.C. § 1231(g)(1). 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).[2] The statute further notes that "[w]hen United States Government facilities are unavailable or facilities adapted or suitably located for detention are unavailable for rental, the Attorney General *may* expend . . . amounts necessary to acquire land and to acquire, build,

[2] To the extent the Fourth Circuit in *Reyna as next friend of J.F.G. v. Hott*, 921 F.3d 204, 209 (4th Cir. 2019), held that the word "appropriate" in § 1231(g) only "connotes," but does not "specify" discretion, that holding is flawed. A statute need not contain the word "discretion" in order to specify that authority is discretionary. *See, e.g. 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"); *Poursina v. United States Citizenship & Immigr. Servs.*, 936 F.3d 868, 872 (9th Cir. 2019) (holding that the use of "may" in 8 U.S.C. § 1153(b)(2)(B)(i) specifies statutory discretion bringing that provision within the ambit of § 1252(a)(2)(B)(ii)). Indeed, just as the Supreme Court "has repeatedly observed that 'the word 'may' clearly connotes discretion,'" *Biden v. Texas*, 142 S. Ct. 2528, 2541 (2022) (internal quotation and citations omitted), the use of the word "appropriate" in § 1231(g) clearly connotes statutory discretion.

remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention." 8 U.S.C. § 1231(g)(1) (emphasis added). And it further requires the Attorney General to "ensure that undocumented criminal aliens incarcerated in Federal facilities are held in facilities . . . which provide a level of security *appropriate* to the crimes for which they were convicted." *Id.* § 1231(i)(4)(B) (emphasis added). The statute's use of "appropriate," and "may" provides ICE with clear discretionary authority with respect to various components of housing detainees—including inter-facility transfers.

Even after the decision in *Negathani*, numerous district courts have relied on *Wood*, in concluding that 1231(g) provides the Attorney General with *discretionary* authority to choose where to house a detainee. *See* Mem. 10-11 (collecting cases); *see also Hassoun v. Searls*, 453 F. Supp. 3d 612, 620 (W.D.N.Y. 2020) ("The Second Circuit has characterized the decision of where to house an immigration detainee under § 1231(g) as discretionary." (citing *Wood*, 145 F. App'x at 420)); *Ogunmola v. Barr*, No. 19 Civ. 6742 (EAW), 2020 WL 13554804, at *5 (W.D.N.Y. Apr. 29, 2020) (court does not have jurisdiction to consider request seeking order enjoining ICE from transferring her); *Salim v. Johnson*, No. 15 Civ. 68 (JTC), 2015 WL 4094696, at *2 n.3 (W.D.N.Y. July 7, 2015) ("To the extent that petitioner also seeks an order preventing DHS from transferring him from the Buffalo Federal Detention Facility, this aspect of the motion is denied for lack of jurisdiction."); *Jiang v. Holder*, No. 15 Civ. 48 (JTC), 2015 WL 3649739, at *1 (W.D.N.Y. June 11, 2015) (holding court did not have jurisdiction to enjoin DHS from transferring petitioner to another facility). Plaintiffs cite no cases extending the holding in *Negathani* to DHS's discretionary decision as to where to house a detainee.[3]

[3] Plaintiffs claim there is "substantial authority" in this Circuit that detainee transfer decisions are reviewable, (Opp. 7); however, none of the cited cases address the issue of whether § 1252(a)(2)(B)(ii) precludes judicial review of transfer decisions.

Further, Plaintiffs argue that § 1252 does not strip the court of jurisdiction to hear constitutional claims. (*See* Opp. 8-11). They are correct that they have a mechanism to raise constitutional claims. But § 1252(a)(2)(D) explicitly provides that a constitutional claim or question of law can be raised upon a petition for review with an appropriate court of appeals. *Shabaj v. Holder*, 718 F.3d 48, 51 (2d Cir. 2013) ("Thus, while this court would have jurisdiction to review any constitutional claims or questions of law properly raised in a petition for review, the district court did not have jurisdiction to review Shabaj's challenge to CIS's discretionary hardship determination."). Accordingly, to raise their constitutional claims, petitioners must file a petition for review.[4]

PLAINTIFFS' APA CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY

As noted in the Federal Defendants' opening brief, Plaintiffs' Molina's and Palacios' APA claim is barred by sovereign immunity. (*See* Mem. at 12). The APA provides a waiver of the Government's sovereign immunity *except* for where a statute precludes judicial review *or* the challenged action is committed to agency discretion by law. 5 U.S.C. §§ 701(a), 702. Since 8 U.S.C. § 1252 strips the Court of jurisdiction to review DHS's discretionary decisions, like where to house the Plaintiffs, such decision is also unreviewable under the APA. *See Shabaj*, 718 F.3d at 52 ("[T]he judicial review provisions of the APA do not apply to the extent that . . . statutes preclude judicial review" (internal quotation marks omitted)); *Ying Lin v. DHS,* 699 F. App'x 44, 46 (2d Cir. 2017) ("[J]udicial review of agency action is not available under the APA where such review is limited by another statute—here, the INA."); *see also Bouarfa v.*

[4] To the extent Plaintiffs claim a petition for review would not be available in this circumstance, (Opp. 7-8), that does not impact this Court's lack of subject matter jurisdiction over the transfer decisions. *See Shabaj*, 718 F.3d at 51 n.5 ("[W]e need not decide whether a petitioner could file a 'petition for review' of a CIS hardship determination directly with this court because, in this case, Shabaj filed his legal challenge in the district court, which indisputably lacked jurisdiction under § 1252.").

DHS, No. 22-12429, 2023 WL 4832661, at *4 (11th Cir. July 28, 2023) (§ 1252 bars judicial review under the APA for certain discretionary decisions of Attorney General); *Chirico v. Jaddou*, No. 21 Civ. 6278 (RPK), 2023 WL 2483415, at *3 (E.D.N.Y. Mar. 13, 2023) (same). Here, because the APA provides no waiver of sovereign immunity in instances where a statute precludes judicial review, the Court need not reach the separate question of whether Plaintiffs are entitled to assert that DHS's alleged failure to follow its own internal policies was arbitrary and capricious.

PLAINTIFFS HAVE NOT ALLEGED THE FEDERAL DEFENDANTS' INVOLVEMENT IN ANY ADVERSE ACTIONS

In opposing the Federal Defendants' motion to dismiss Plaintiffs' First Amendment retaliation claim, Plaintiffs argue that the Federal Defendants were involved in four adverse actions: (1) the Plaintiffs' assignment to segregated confinement during the hunger strike; (2) interference with Plaintiffs' ability to communicate with others inside and outside the jail, including their lawyers, during the hunger strike; (3) disciplinary citations resulting in 7 days in segregated confinement immediately following the strike; and (4) Ortiz's, Lopez's, and Moscoso's transfer to the Delta-1 Unit. But Plaintiffs do not cite a single non-conclusory allegation that the Federal Defendants were involved in carrying out any of these actions. At most, Plaintiffs allege that ICE Officer Flynn interacted with two of the Plaintiffs at OCJ during the hunger strike, (*see* Compl. ¶ 74 (Officer Flynn "came to OCJ and met with Plaintiffs Gonzalez and Ortiz" on the second day of the hunger strike)), and that Director Almodovar told Plaintiff Gonzalez that she would change the food and improve conditions at OJC, (*see id*.). The Complaint does not allege that any ICE official was involved in any decision by OCJ to take the alleged adverse actions or knew about them before they were taken.

Instead, the Complaint states that: (i) *OCJ guards* engaged in a campaign of escalating retaliation; (ii) *OCJ defendants Jones and DuBois* coordinated the response to the hunger strikers' advocacy; (iii) *OCJ guards* placed the hunger strikers in segregated confinement; (iv) *OCJ guards* blocked Plaintiffs from using their jail-provided tablets to communicate with people outside the jail; and (v) *OCJ guards* began issuing disciplinary citations to the participants in the A3 unit. (*See id*. ¶¶ 75-81). Plaintiffs' conclusory assertion, "upon information and belief," that ICE was "informed of and approved of these disciplinary actions" (*id*. at ¶ 82) is insufficient to show that ICE took any adverse actions against the Plaintiffs.[5] *See Karim v. Ball*, No. 18 Civ. 11508 (AJN), 2020 WL 6807078, at *4 (S.D.N.Y. Nov. 19, 2020) (dismissing retaliation claim where plaintiff failed to allege retaliatory conduct in non-conclusory terms); *Jackson v. Prack*, No. 16 Civ. 7561 (CS), 2019 WL 6119010, at *10 (S.D.N.Y. Nov. 18, 2019) (dismissing retaliation claim where plaintiff failed to allege, in non-conclusory terms, that any of the defendants were responsible for the decision to transfer plaintiff to another facility); *Aho v. Anthony*, 782 F. Supp. 2d 4, 7 (D. Conn. 2011) (dismissing claim where "[t]he only allegation with respect to the defendants' personal involvement is that they were "acting in concert" with each other); *Malcolm v. Honeoye Falls–Lima Educ. Ass'n*, 678 F. Supp. 2d 100, 107 (W.D.N.Y. 2010) ("[A] complaint containing only conclusory, vague or general allegations of conspiracy to

[5] Plaintiffs rely on the fact that Officer Flynn was at OCJ on the day that OCJ officials conducted searches of the Plaintiffs' cells. (*See* Opp. 16-17). But Plaintiffs do not contend that the search of their cells was an adverse action, and for good reason. Because "a prisoner has no reasonable expectation of privacy in his or her prison cell . . . a search of an inmate's cell, even for retaliatory reasons, . . . does not implicate a constitutional right." *Battice v. Phillip*, No. 04 Civ. 669, 2006 WL 2190565, at *7 (E.D.N.Y. Aug. 2, 2006) (collecting cases); *see also Harnage v. Brighthaupt*, No. 12 Civ. 1521, 2016 WL 10100763, at *6 (D. Conn. June 3, 2016) (holding that "even if [the plaintiff] could demonstrate a retaliatory motive for the search, his claim would be legally insufficient," because a "retaliatory cell search is insufficient to support a First Amendment retaliation claim"), *aff'd*, 720 F. App'x 79 (2d Cir. 2018).

deprive a person of constitutional rights cannot withstand a motion to dismiss." (quoting *Sommer v. Dixon*, 709 F.2d 173, 175 (2d Cir. 1983)).

Plaintiffs argue that the Federal Defendants had a duty to intervene to stop OCJ's retaliatory actions. (*See* Opp. 14-19). But the Complaint does not contain any allegations suggesting that the Federal Defendants knew that the Plaintiffs' constitutional rights were being violated and had a realistic opportunity to prevent the violation. *See Ross v. Willis*, 16 Civ. 6704 (PAE) (KNF), 2021 WL 3500163, at *15 (S.D.N.Y. Aug. 9, 2021) (for failure to intervene claim, plaintiff must prove that defendants knew others would violate the constitution and a realistic opportunity to intervene to prevent them from doing so); *Alvarez v. City of New York*, 11 Civ. 5464 (LAK), 2012 WL 6212612, at *1 (S.D.N.Y. Dec. 12, 2012) (same). As explained below, Plaintiffs do not allege that the Federal Defendants were notified before OCJ took adverse actions, knew that the adverse actions were taken in retaliation for engaging in protected conduct, or were otherwise present on the scene with a realistic opportunity or authority to countermand actions OCJ took with respect to internal operations within the jail.

Moreover, the facts of this case are distinguishable from the cases relied upon by Plaintiffs concerning law enforcement officers failing to intervene to stop the excessive use of force. (*See* Opp. 15-16 (citing *Boehner v. City of Rochester*, 609 F. Supp. 3d 220, 231 (W.D.N.Y. 2022) (declining to dismiss retaliation claims against officers who failed to intervene to stop other police from unleashed chemical weapons, including tears gas and pepper spray, on protestors); *Ferguson v. City of New York*, No. 17 Civ. 4090, 2018 WL 3626427, at *7 (E.D.N.Y. July 30, 2018) (reinstating retaliation claim against officers for failure to intervene where another officer shoved and threatened the plaintiff that he would be taken to jail for exercising his First Amendment rights); *Campbell v. City of Yonkers*, No. 19 Civ. 2117 (VB), 2020 WL 5548784, at

*9-10 (S.D.N.Y. Sept. 16, 2020) (plaintiff stated failure to intervene claim against certain defendant officers, where other defendant officers shot and killed the decedent)). These cases all involve allegations of constitutional violations being carried out in front of law enforcement officers who knew that a constitutional violation was occurring and had the opportunity and authority to stop the violation. Plaintiffs' Complaint only alleges that the Federal Defendants found out about alleged adverse actions *after* they occurred, and it does not assert that any ICE official knew any specific adverse action was taken in retaliation for Plaintiffs' protected conduct. Significantly, there is no allegation that OCJ informed the Federal Defendants of the alleged adverse actions before it took them. Indeed, as the Complaint states, in many cases, the Federal Defendants found out about the alleged adverse actions from Plaintiffs themselves. (*See* Compl. ¶ 74 (Officer Flynn and Director Almodovar speaking directly to Plaintiffs Gonzalez and Ortiz on the second day of the hunger strike); *id*. at ¶ 84 (Officer Almodovar learning of disciplinary tickets from Plaintiffs and attempting to help and remedy allegedly retaliatory actions taken by OCJ); *id*. at ¶ 111 (Officer Flynn visiting the D1 Unit and telling Plaintiffs he did not know why they had been moved to such unit)). Simply put, the Federal Defendants could not intervene to prevent a constitutional violation that they did not learn about until after it occurred.

Finally, ICE did not have the authority to intervene. ICE has contracted with OCJ, an independent governmental entity, to house detainees. By Plaintiffs' own allegations, OCJ retains broad authority on law enforcement and jail related matters (*see id*. ¶ 9 ("The Sheriff has broad authority on law enforcement and jail-related matters, including the transport of persons within the Sheriff's custody.")). ICE, as a contractual counterparty, does not have authority to intervene and countermand OCJ's decisions concerning the internal operations within the jail.

Accordingly, Plaintiffs have failed to allege a retaliation claim against the Federal Defendants on a failure to intervene theory.

PLAINTIFFS HAVE NOT ALLEGED A CAUSAL CONNECTION BETWEEN THEIR PROTECTED CONDUCT AND TRANSFERS

In responding to the Federal Defendants' argument that they have not alleged a causal connection between their protected speech and transfers, Plaintiffs argue that prevailing law entitles them to rely only on temporal proximity between the two. (*See* Opp. 20-22). Without conceding that temporal proximity alone could be sufficient to establish a retaliation claim, here it does not provide the requisite circumstantial evidence of causation. Notably, the only allegedly retaliatory action that was taken by the Federal Defendants, as opposed to the OCJ Defendants, is the transfer of Molina and Palacios to detention facilities in the South. This was done years after Plaintiffs began their advocacy and more than five months after the conclusion of Molina's and Palacios' participation in the hunger strike. Plaintiffs offer no good rationale for why the Court should infer that the transfer five months after Plaintiffs' protected activity was retaliatory. As this Court has held, without more, the passage of five months between protected activity and alleged retaliation is insufficient to establish causation. *See Ramirez v. Annucci,* No. 17 Civ. 3825 (VB), 2018 WL 4335513, at *7 (S.D.N.Y. Sept. 11, 2018) ("The five-month interval between the protected speech and the alleged retaliation, without more, is too long to infer a retaliatory motive."); *see also Jeune v. City of New York*, No. 11 Civ. 7424 (JMF), 2014 WL 83851, at *7 (S.D.N.Y. Jan. 9, 2014) ("[D]istrict courts within the Circuit 'have consistently held that the passage of two to three months between the protected activity and the adverse employment action does not allow for an inference of causation,'" (quoting *Murray v. Visiting Nurse Servs. of N.Y.*, 528 F. Supp. 2d 257, 275 (S.D.N.Y. 2007) (collecting cases))).

Plaintiffs' additional allegations concerning causation are entirely unavailing. Plaintiffs claim "circumstantial evidence" demonstrates the Federal Defendants' retaliatory motive, (Opp. 23-24); however, the Plaintiffs rely on statements made by Orange County Sherriff Jones, not ICE. Indeed, Plaintiffs fail to allege that ICE officials made any remarks, official or unofficial, indicating that their transfers were related, in any way, to their protected activity. Had the Federal Defendants wanted to retaliate for Plaintiffs' protected activity, they could have transferred Molina and Palacios to facilities outside of OCJ as soon as they began engaging in protected activity or immediately following the hunger strike. Indeed, Plaintiffs repeatedly emphasize that the Federal Defendants were aware of the hunger strike as it was happening. Nevertheless, Plaintiffs only allegations concerning Officer Flynn and Director Almodovar indicate that, even if ineffectively, they tried to help Plaintiffs and address their concerns related to OCJ. In sum, Plaintiffs' Complaint contains no allegations indicating that the Federal Defendants were motivated to transfer Molina and Palacios out of OCJ *as a result of* their protected activity.

Plaintiffs' additional claims regarding the nature of the transfers do nothing to help establish that the transfers themselves were retaliatory. That the intra- and inter-facility transfers, which Plaintiffs themselves denote a "mass transfer" (Compl. ¶ 105), were executed in the early morning hours is consistent only with the fact that ICE and OCJ intended to carry out transfers in an efficient manner. And the purported lack of explanation for the transfers still does not explain a delay of five months in effectuating them. Further, it defies logic that ICE was retaliating against the hunger strikers, given that it transferred both hunger-strikers and non-hunger-strikers out of the facility. This combined with the passage of time between the hunger

strike (and the height of Molina's and Palacios' alleged protected activity) falls flat in establishing a causal relationship sufficient to show that the transfers were retaliatory.

Accordingly, Plaintiffs have failed to adequately plead a First Amendment retaliation claim against the Federal Defendants.

CONCLUSION

For the reasons set forth above and in the Federal Defendants' opening brief, the Court should dismiss Plaintiffs' claims against the Federal Defendants.

Dated: New York, New York
August 21, 2023

Respectfully submitted,

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