UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA J. HAMAMA, et al,

Petitioners,

-v- Case No. 17-cv-11910

REBECCA ADDUCCI,

Respondent.
_____/

PETITIONERS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR A STAY OF REMOVAL

BEFORE THE HONORABLE MARK A. GOLDSMITH

Detroit, Michigan, Wednesday, June 21st, 2017.

APPEARANCES:

FOR THE PETITIONERS: MARGO SCHLANGER
ACLU FUND OF MICHIGAN
625 South State Street
Suite LR910
Ann Arbor, MI 48109

FOR THE PETITIONERS: LEE GELERNT
JUDY RABINOVITZ
ANAND BALAKRISHNAN
ACLU FOUNDATION, IMMIGRANTS' RIGHTS
125 Broad Street
18th Floor
New York, NY 10004

(Appearances, continued):

FOR THE PETITIONERS: MICHAEL J. STEINBERG
ACLU FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, MI 48201

FOR THE PETITIONERS: WENDOLYN W. RICHARDS
MILLER, CANFIELD
150 West Jefferson Avenue
Suite 2500
Detroit, MI 48226-4415

FOR THE PETITIONERS: WILLIAM W. SWOR
615 Griswold Street
Suite 1120
Detroit, MI 48226

FOR THE PETITIONERS: NORA YOUHKANA
FIEGER, FIEGER, KENNY & HARRINGTON
19390 West Ten Mile Road
Southfield, MI 48075

FOR THE RESPONDENT: JENNIFER L. NEWBY
JULIE BECK
U.S. ATTORNEY'S OFFICE
211 West Fort Street
Suite 2001
Detroit, MI 48226

FOR THE PETITIONER: CATHERINE PINCHECK
I.C.E. OPLA DETROIT
333 Mount Elliott
Detroit, MI 48207

David B. Yarbrough, CSR, RMR, FCRR
Official Court Reporter
(313) 410-7000

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EXHIBITS

NONE

Detroit, Michigan.

Wednesday, June 21st, 2017.

At or about 2:11 p.m.

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THE CLERK OF THE COURT: Please rise. The United States District Court for the Eastern District of Michigan is now in session, the Honorable Mark Goldsmith presiding. You may be seated.

The Court calls case number 17-11910, Hamama versus Adducci. Counsel, please state your appearances for the record.

MS. SCHLANGER: Margo Schlanger for petitioners.

MR. GELERNT: Good afternoon, your Honor. Lee Gelernt for petitioners.

MR. STEINBERG: Michael J. Steinberg for the petitioners.

MS. RABINOVITZ: Judy Rabinovitz for the petitioners.

MR. BALAKRISHNAN: Anand Balakrishnan for the petitioners.

MS. RICHARDS: Wendolyn Richards for the petitioners.

MR. SWOR: William Swor for the petitioners.

MS. YOUKHANA: Nora Youkhana on behalf of the petitioners.

MS. NEWBY: Good afternoon, your Honor. Jennifer Newby on behalf of the respondents.

MS. PINCHECK: Good afternoon, your Honor. Catherine Pincheck on behalf of the respondents.

MS. BECK: Good afternoon, your Honor. Julie Beck on behalf of the respondents.

THE COURT: All right. Good afternoon, everybody. Just a few preliminary matters. I notice we have a pretty full spectator section and everyone is welcome to listen to the arguments here in court. I know all of our spectators are going to be respectful in their decorum today and all the vocal expression is going to come from the lawyers and not from the spectators, but the other housekeeping matter I want to bring up is there was a reply brief that petitioners sought to file and is there any problem with me granting the motion for leave to file that?

MS. NEWBY: The respondent concurred in their request.

THE COURT: The Court's going to grant that motion. There's also a motion to file an amicus brief. Is there any opposition to that?

MS. SCHLANGER: No, your Honor.

MS. NEWBY: Respondent has no objection, your Honor.

THE COURT: Okay. So we'll grant that as well. There was some question communicated to my staff regarding service. Is service still an issue in this case or not?

MS. SCHLANGER: We have solved the issue, your Honor.

Thank you.

THE COURT: I'm sorry, what?

MS. SCHLANGER: We've solved that issue so I think we're set, thank you.

THE COURT: All right. So then let's proceed then to the motion that was filed. I've read your submissions and who's going to lead off then?

MS. SCHLANGER: I think that would be me.

THE COURT: All right.

MS. SCHLANGER: Thank you, your Honor, and again I'm Margo Schlanger and I am here for the petitioners who as you know are a class of over 100 Iraqi nationals who have lived here in the United States mostly for many years and who are now being hurried into removal as soon as this Friday and we have some confirmed dates for June 28th. They're being hurried into removal into Iraq without ever getting a chance that they are entitled to statutorily and Constitutionally to assert their claim to immigration relief and to avoid being shipped to Iraq where they face a possibility, a probability of torture and persecution, so the way that I'm hoping to do this is that I was going to address the TRO factors and the, as much as the merits of the case as you're inclined to hear today and my colleague, Lee Gelernt, from the ACLU Immigrant Rights Project who's going to speak to jurisdiction which is the main issue that the government has raised in opposition.

I want to start off by just saying that the stakes of this litigation really just can't be overstated which is why we've moved for emergency relief. The, most of the petitioners are Christian, others are members of other minority groups in Iraq and all of them if they are in Iraq are going to be identified as American affiliated. We've filed with you a set of declarations from Mark Lattimer and Rebecca Heller who are experts on a situation in Iraq and also many governmental and NGO reports explaining how this puts a bulls-eye on them and makes them at risk of persecution and torture and so what we're seeking is a stay of removal, a TRO stay of removal to slow things down enough that they get a chance to assert their claims. The --

THE COURT: And how long would it remain in effect if I were to grant that? Would it be until everyone can file a motion with the immigration courts or is it until they decide those motions or what?

MS. SCHLANGER: Right, so the TRO obviously starts off at 14 days and can be extended for good cause and what we would propose to do is to brief to you a PI on a calendar that would get it briefed by the end of July and so for right now what's at stake is from now until the end of July.

If you're asking what we're seeking overall in the case, we want enough time that due process is served and we're working very, very hard and many members of the legal community

are working very, very hard to get these folks represented and get their motions filed so we're not trying to do anything dilatory, we're trying to get those motion filed.

THE COURT: So how many motions have been filed up to this point? I understand two have been granted; is that right?

MS. SCHLANGER: Yes, I think more than two have been granted, but two out of the named petitioners have been granted. It's hard to say because we doesn't have class-wide information. We believe there are 114 or 120'ish members of the class. The government knows a little bit better than we do, but we think that motions have been filed in maybe, maybe half, maybe more of those, something in that range. We, umm, we believe that there might be somewhere between 15 and 30 who don't yet have lawyers, we're working very hard to try to find them lawyers and so it's a question of getting the lawyers and getting the motions filed.

I have to say that the government that has recently made this a good deal harder because they shipped a whole bunch of the petitioner class from, they started off in Michigan. They initially went to Youngstown, Ohio which is a four-hour drive which is hard enough. They shipped a whole bunch of them to Jena, Louisiana and we are now hearing that a bunch of those folks in Jena are being sent to Phoenix and so they've been moving around considerably. It's pretty hard for lawyers to

reach their clients and have the conversations they need to have while everybody is being shipped all over the United States, but we are working hard to get this done so that it doesn't have to be a long period of time.

THE COURT: Typically if you can give an answer to this, how long does it take typically to get a disposition of a motion to reopen?

MS. SCHLANGER: Well, the disposition on the motion to reopen can take, it can take anything, my understanding is a couple months. The stays are faster when you seek a stay from the immigration court or from the BIA. They're faster, but the immigration court and the BIA won't consider a motion for a stay usually unless there's an imminent deportation and so you can't, and that sometimes creates a little bit of a glitch. I've heard from some colleagues that they know of situations where they've filed for a stay, I don't mean in this -- I don't mean in this case. Just to be clear I'm not talking about this case, but where they filed for a stay, the immigration court has called over to ICE. ICE says no we don't have, we don't have deportation scheduled, he's in detention, but we don't have a scheduled date of deportation. The immigration judge then, you know, doesn't grant the stay. ICE then schedules deportation, nobody knows about it, there's no stay and their client gets deported. So, so there's a little bit of an iffyness around that process, but I would say that when there

is a pending deportation date scheduled, that the stays are, are quite fast and so, but the motions tend to take a couple months.

THE COURT: So your best guesstimate then for motions to reopen for all the class members would be?

MS. SCHLANGER: If, if we had, umm, two months, six weeks or two months, we think that they could all get filed. The reason that I can't say -- some of them have been filed already and that's only been in a week, so you might wonder why does it take longer and the answer is it depends on the relationship between the detainee and the attorney and if they have a preexisting relationship, if they've got a filed appointment of counsel on record, if they've talked, if they've got the records that they need. In order to file a motion to reopen and for this, I refer you to the declaration that my colleague, Susan Reed, put into the TRO reply. In order to file a motion to reopen, what you have to file is a motion to reopen if you're going to put a stay with it, you put the stay with it and an application for the underlying relief. That's required under the regulation. So you have to get, you know, a real file together and sometimes that can be quite difficult and as I say, it's rendered really considerably more difficult when you can't talk to your client and when you can't reach your client in person and to have your client sign it since ordinarily a signature is required at the end of the process.

THE COURT: This movement of the detainees to different locations, is that standard procedure or is that something unusual?

MS. SCHLANGER: Well, my understanding is that ICE will very often move people right before they're ready for deportation and so what's been going on is that these are people being put into kind of a staging area. I'm, I mean, you can ask the government and they'll be able to tell you more definitively, but it seems that what's going on is that they're being put into a staging kind of a situation to get them ready for immediate deportation. I think when people are not going to be immediately deported there's a little bit more stability, but ICE does move people around some. There is in the ICE transfer policy some little bit of an idea that one shouldn't do that when people have, umm, counsel so there's notification to counsel and maybe there's --

THE COURT: Notification that a detainee's going be to moved?

MS. SCHLANGER: Correct, correct. So I wouldn't want to say that it's totally unusual, but I would say it seems that this is preparatory to mediate deportation. We would obviously like very much for the folks who were from Michigan to be back in a location where the legal community that is actually providing them the services that they need to access due process that they're entitled to under the statute and the

Constitution, we'd like that to be easier rather than harder and shorter rather than longer and so this is making it very, very difficult.

So what I want to emphasize is that because this is a TRO, that the, I mean, the factors are just like in any TRO. The factors are likelihood of success on the merits, irreparable harm, balance of the equities in the public interest and so the key thing for a TRO is that the, umm, the likelihood of success on the merits. In a situation of grievous harm and a really obvious balance of the equities which is what we have here, that the likelihood of success on the merits although of course we believe that we will win on the merits, you don't have to be convinced yet. You can think think that there are serious questions going to the merits and give us time to brief out the merits and hold the situation in the status quo so that our clients don't get shipped to Iraq where they are likely to be persecuted or tortured, so that's the underlying legal standard and so --

THE COURT: Pardon me for interrupting. In terms of the class now, the fact that some have been shipped around, are they still members of the class because you've defined it in your petition as all Iraqi nationals within the jurisdiction of the Detroit ICE field office. Are they still within that field office's jurisdiction if they're in Louisiana?

MS. SCHLANGER: Well, your Honor, we -- when we heard

that there were about to be some transfers, we discussed that issue with government counsel and they assured us that they have no intention of contesting that part of the jurisdictional issues in this case so they were not trying to get people out of this Court's jurisdiction when they transferred them and are not going to contest this Court's jurisdiction, so we think they are members of the class and we have an agreement on the personal jurisdiction part of the habeas matter.

So what, what I'd like to do is just tell you a bit about the merits as I say and then leave the jurisdictional issues to my colleague. So on the merits, the obligations for the government under the Immigration and Nationality Act and under CAT, the Convention Against Torture, are mandatory obligations. INA 241 which is the asylum piece of the INA requires withholding of removal where there's a probability of persecution. It's not a matter of discretion and likewise, CAT states in its codification it shall be the policy of the United States not to expel, extradite or otherwise affect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, so these are not, these are not, umm, discretionary. These are not if all other issues align, if the stars are right, these are mandatory requirements and in light of that, the due process clause requires, they require that our clients not be deported without a chance to

assert their eligibility for relief, those statutes themselves require that and the due process clause likewise requires a meaningful hearing at a meaningful time and --

THE COURT: Now your papers talk about how this Court or the immigration courts could decide the merits of --

MS. SCHLANGER: Right.

THE COURT: -- this issue you're raising about how changed circumstances requiring modification of their removal orders. Would you be content with this Court staying the removal orders until the immigration courts can address the merits?

MS. SCHLANGER: Yes, we would, your Honor. So the due process claim to a meaningful hearing at a meaningful time is kind of the, the method for acting on that claim is for most of them a motion to reopen because most of them have quite old sets of immigration proceedings and final orders of removal. A motion to reopen is allowed without respect to its timing if it asserts, umm, under the asylum provision or under CAT, if it asserts changed country conditions that render the underlying deportation illegal under those statutes and so that motion to reopen, the Supreme Court has informed us a whole bunch of times is a really important safeguard to ensure a proper and lawful disposition, I'm quoting here from Dada (phonetic) v. Mukasey, of the underlying case and it's got a due process stature.

So the government takes the position that our clients should have filed them years ago. The thing is that years ago we didn't have the current country conditions in Iraq. Iraq has gotten extraordinarily dangerous in recent years with the rise of ISIS and the, umm, answering sets of militias so that the changed country conditions that are the things that makes these removals violative of CAT and the INA were not -- they were not applicable when they were previously in front of the administrative immigration system and so that's why they need a hearing now so they need to be able to file these motions to reopen joined with motions to stay and the underlying applications and get them heard.

THE COURT: Well, is your action really an as applied challenge based on a violation of the suspension clause; that is, the government has created a set of circumstances that has made whatever legal avenues you might have in the immigration courts ineffective and inadequate?

MS. SCHLANGER: Right.

THE COURT: Is this an as applied challenge then?

MS. SCHLANGER: It is an as applied challenge, but I don't think you have to find a violation of the suspension clause because it's an as applied challenge to their removal, not to -- if, if they would just -- the government has not asserted any reason whatsoever that it is running this express train. It just has nothing -- it has not asserted any equities

in the situation, certainly no equities that are sufficient to overwhelm the risk of, umm, of torture and persecution and so in light of that, there's no reason to hurry and so you wouldn't need to find a violation of the suspension clause because the system is capable of taking account of the situation right now. All that has to happen is that things get slowed down.

THE COURT: Well, I might and this has to do with jurisdiction, but if I were to read 1252(g) the way the government is suggesting it should be read, more than suggesting, arguing that it should be read and --

MS. SCHLANGER: Right, right.

THE COURT: -- if they're correct in their reading of it, then we might have to go to the Constitutional level and say in these circumstances, to enforce that provision of the statute would be unconstitutional.

MS. SCHLANGER: Right, so I'm going to actually with your forbearance ask that my client be the one who address the 1252(g) issue.

THE COURT: Right, no I understand. That's why I said it kind of dovetails into the jurisdiction.

MS. SCHLANGER: Yes. The underlying merits challenge which, the underlying merits issue which obviously would be raised if as we think you have jurisdiction is a question of the due process and CAT and INA obligations of the government

to slow things down enough that there can be a meaningful hearing at a meaningful time and so, umm, so, so, umm, that is basically the things that I want to say before we get up to jurisdiction. So --

THE COURT: All right.

MS. SCHLANGER: -- applying those four factors it seems to me that, umm, that there is a strong likelihood of success on the merits and the government doesn't even contest the issues related to irreparable harm, balance of the equities and the public interest.

THE COURT: All right, very well. Thank you.

MS. SCHLANGER: Thank, your Honor.

THE COURT: Let me hear from your colleague.

MR. GELERNT: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. GELERNT: Lee Gelernt from the national office of the ACLU. Let may pick up on your question 'cause I think your question was a good one and I think it's the right one about sort of where does the suspension clause fit in here and our view is that there just needs to be an avenue in your words and I think that's the absolute right way to put it, an avenue for review and we are not saying it has to be, that the merits are heard by this Court as opposed to in the immigration proceeding, but we have to be able to access one of those avenues.

We believe that 1252(g), contrary to the government's position, can be construed to allow this Court to either hear the merits or to issue a stay. If, however, you were to agree with their interpretation of Eight U.S.C. 1252, the jurisdictional provisions including subsection (g) that there was no avenue, then I think we would be looking at a clear suspension clause problem because I don't even think the government disputes that the suspension clause applies to immigration removal, the Supreme Court in St. Cyr has said it very squarely. In the Boumediene v. Bush case, the Guantanamo case, they again cited St. Cyr saying the suspension clause requires review and so that's where I think we are. We do however think you can avoid the suspension clause problem by construing (g), subsection (g), in the way that the Supreme Court, the Sixth Circuit and other courts have and I think the critical thing that the Supreme Court said in AADC v. Reno is that it's not a zipper clause provision, it's not an all encompassing provision. I think if that were the case, almost no case could be heard. What it does is it's directed at a specific evil. A lot of times the government will for humanitarian reasons choose not to execute an order. They then turn around and say, well, six months later we are going to execute it. The Court said (g) stops you from raising an abuse of discretion claim saying no, we think the humanitarian factors favor us. What the Supreme Court said, the Sixth

Circuit has repeated that in Mustata and other courts have repeatedly said you cannot second-guess that abuse of discretion. What we have here is a completely different situation. It's where there's a mandatory duty, you're interpreting the Constitution, you're interpreting the convention against torture and you're interpreting federal law, so --

THE COURT: Do we have a case similar to this where the argument is the government is being unduly hasty in proceeding with deportation and not giving the potential deportee enough time to invoke legal avenues?

MR. GELERNT: Yes, your Honor. I think the closest case we think and is Mustata which we've cited in our opening brief and our reply brief where there was ineffective assistance in the original removal order. The noncitizens were trying to get more time to pursue an avenue. They went to district court. The government cited (g) and the Sixth Circuit said no, they're not challenging discretion, they're saying there was an ineffective assistance claim, that's a mandatory legal -- a legal duty at least, not maybe as mandatory as CAT and the Sixth Circuit said (g) doesn't apply because they're not challenging discretion and it's clear that the government's confusing remedy with substance, that the Court has the ability to slow things down to evaluate that legal claim and I think that's almost an a fortiori case to this one because here we

have a mandatory duty with a convention against torture so there's absolutely no question the government cannot remove someone to be tortured and so if there was ever a case where jurisdiction would be, would be in place, I think it would -- would be available, would be here, you know, and I think just broadening it out a little bit, what the government is saying also putting aside (g), they don't think you can ever walk into district court and I just want to say that we have common agreement with them that the general rule is yes you go to the Court of Appeals of course and so when you go to the board of immigration appeals, you file a petition for review, but the rule is fairly settled that where you cannot file a petition for review for whatever reason and in this case because the events occurred after the removal process and deal with the current conditions in Iraq, you can to district court and we've cited those case and obviously this is on a quick briefing schedule. We're happy to cite additional cases, but what the government is saying is no, no, no, no, there's no suspicion clause problem because there's this motion to reopen avenue and again we're not pushing back on having the motion to reopen process be the process, but we have to be able to access that avenue and so that's what I think is at stake here is are we going to be able to access that avenue if your Honor ultimately chose to say the process should be there rather than in this court and --

THE COURT: Well, you can't go to the Court of Appeals right now.

MR. GELERNT: Exactly.

THE COURT: You want to reopen and you have to be in the immigration courts or possibly in this court.

MR. GELERNT: Exactly your Honor and so that's what we're saying. If this Court decided it does not want to review whether they are entitled to process and wants the immigration court to do it which would be probably the more normal course of business, if we had a, got a stay there and it was denied, if we had a stay denied or the motion to reopen was denied, we could then go to the Court of Appeals and that's what we would do, but we have to be able to access the process and for the government to say well you once had process years ago, that's sort of illusory when we're talking about this situation because what they're challenging are the current conditions in Iraq so it makes no sense to say 15 years ago they had a removal hearing. They obviously couldn't raise the claims they're raising now at their current removal.

I think what's particularly unique about this situation is how the shear number of years, sometimes it's been decades and it's through no fault of their own that they're still here. Iraq wouldn't take them back. It's not as if they went on the lamb. They've all been checking in, they've been under orders of supervision and now the government wants to

send them back to what effectively could be a death sentence and saying no, you had your process years ago or just file a motion to reopen and we're saying fine, we will file a motion to reopen, but we can't do it from Iraq if we're going to be tortured. I mean, the government's saying well you can file from out of the country. Well, you know, that's somewhat of an illusory process for people who very well may be killed or abused or tortured immediately when they get there. So I think that's where we are is that you can construe subsection (g) easily under the Supreme Court's decision in AADC v. Reno and Mustata and under the other cases we've cited to say it applies to a challenge to an abuse of discretion, not a mandatory legal claim.

THE COURT: Are there other threatened deportations of the Iraqi nationals outside of Michigan?

MR. GELERNT: Yeah, that's a good question, your Honor, and so when we filed this case, what we were hearing about were cases here. It now turns out that there appear to be cases around the country and so I think we're going to have to figure out how to deal with it and whether it's to amend our complaint before you, your Honor, if you would be amenable to that and that makes sense to deal with it all at once or whether we need to go around the country filing additional cases because we are very fearful that now what we're hearing is people around the country are going to be transferred and

then removed to Iraq immediately and that would be unfortunate just because no one was able to get into court and file a habeas or a complaint, umm, so unless the Court has additional questions about jurisdiction, I would --

THE COURT: Not right now. Let me hear from the government.

MR. GELERNT: Okay. Thank you, your Honor.

MS. NEWBY: Thank you, your Honor. Jennifer Newby again for the respondent. No one contends that petitioners should not be able to raise changed conditions in Iraq or to seek whatever relief from the removal orders they may be entitled to under the law. The question in this case is whether a federal district court has jurisdiction to enter an order staying execution of removal orders while they seek such relief. Pursuant to Eight U.S.C., 1252(g) of the Real ID Act, the answer is no. This Court does not have jurisdiction to hear petitioner's claim in this case because the only claim in this case is for injunctive relief. This Court cannot rule on the merits of their asylum argument or for relief under the Convention Against Torture. This Court does not have jurisdiction to grant that relief in the first instance. What petitioners seek from this Court is injunctive relief to allow them to seek that type of relief in the immigration court.

Now --

THE COURT: Can you address the as applied issue that

I was raising with counsel for petitioners? They seem to be making an argument that the government has impeded petitioner's ability to take advantage of the only legal avenue in the government's view that's available to them by distancing them from their attorneys and not giving them sufficient time to present the detailed paperwork that's necessary to file a motion to reopen. Can you address that?

MS. NEWBY: I can, your Honor. I think it's important to note that all of the petitioners, the named petitioners in this case had orders of removal in place at least four years ago. Most of them, significantly longer. Based on the exhibits that the petitioners submit to support their arguments that there are changed conditions currently in Iraq, all of those documents date as early as 2014, so as early as 2014, the changed conditions on which they seek to rely existed in Iraq. Petitioners could have at that time and any time sense sought the relief that they seek now before the Court.

THE COURT: They argue that unless a deportation is imminent, then there's not likely to be much receptivity in the immigration court.

MS. NEWBY: I believe that argument --

THE COURT: Can you respond to that?

MS. NEWBY: Yes, I can, your Honor. That argument was directed toward whether a stay would be entered by the

immigration court, but the immigration court has to hear a motion to reopen based on changed country conditions. For the reasons cited at respondent's page 10, we cite the law that requires that in cases where you're asserting changed country conditions, there are no limitations on number that you can file and the timing so they certainly could have filed these petitions. They may not have gotten stays of removal while the Court heard them, but only because they wouldn't have been necessary, removal wouldn't have been imminent. At this point petitioners waited until removal was imminent before they sought this relief, thereby creating their their own emergency and there are cases in this district where courts have found that district court lacks jurisdiction in similar circumstances.

THE COURT: Well, they talking about in their papers about how expensive it is to put together these motions and I guess the argument is that while these orders of removal were extant, the petitioners didn't think anything was imminent and therefore that explains why they didn't proceed to undertake this effort and incur this expense. Is that not reasonable in the government's view?

MS. NEWBY: Well, certainly that might explain why they chose not to do that, but it doesn't change the underlying law. In this case, they could have exercised any of the rights that they seek to exercise now in a fashion that wouldn't have

created this emergency. It's not the government who created this circumstance, it's the fact that petitioners are just now seeking this relief. There may be reasons why they didn't seek it earlier, but the cost of litigating an immigration claim is the same for anyone regardless of the country that you're going to be removed to and it certainly is not a basis to ignore the Real ID Act and Congress' purpose behind it.

I'd like to direct the Court's attention to a few cases that were cited in respondent's brief at page six, the first is Benitez v. Dedvukaj. In that case the alien filed a complaint asserting due process violations claiming that he was scheduled to be removed before his application for adjustment of status could be heard. In that case, former Chief Judge Rosen noted that the application to adjust was filed only when removal was imminent even -- to avoid the consequences of a removal order even though the underlying basis for the application for adjustment of status existed and it could have been filed earlier. Judge Rosen found that the plaintiff cannot circumvent the Real ID Act, review provisions and express limitations on district court jurisdiction by claiming that they're pursuing a dis -- excuse me, a due process claim that's somehow distinct from the removal order. Judge Rosen found that it was an indirect attack on the decision to execute the removal order and for that reason, 1252(g) applied and the Court lacked jurisdiction.

Judge Roberts similarly found in Paljusevic v. Dedvukaj, also at page six. In that case, a plaintiff was ordered excluded in 1994. In 1998, he married a U.S. citizen. At that time, he had the ability to seek an adjustment of his status when she filed an application for alien relative. He didn't do that. Not until 2009 when he was detained and his removal was scheduled did the plaintiffs then file the necessary applications to adjust his status and obviate the order of removal. The plaintiff argued in the case before the district court where he sought injunctive relief so that he could go and have that process heard that he was not arguing before the district court that the order was invalid, the order for exclusion or that ICE did not have authority to execute it. Instead, he was challenging the decision by ICE to execute it before his adjustment for status application could be heard. Judge Roberts found that the plaintiffs' applications were filed only when it became clear that deportation was imminent. For that reason, it was treated as an indirect attack on the decision to execute removal and the Court found it lacked jurisdiction.

Judge Rosen made an another similar finding in Ba v. Holder, again at page six of the respondent's brief. In that case he found that the Court lacked jurisdiction for a habeas claim in which the petitioner was alleging that he had a due process violation because his order of removal was going to

be executed the before his valid claims for application or his valid application for adjustment of status could be heard. Judge Rosen again said that the habeas claim was nothing but a vehicle to forestall removal while he pursued adjustment of status that could have been sought sooner and for that reason again it was an indirect challenge to the decision to execute the removal order and for that reason 1252(g) applied and the Court lacked jurisdiction.

THE COURT: Now the argument made by petitioners is that there's a line to be drawn between discretionary and nondiscretionary decisions and there are cases post-2005 that maintain that, there are decisions before that as well and the argument here is that there are -- they are not discretionary issues, these are matters of law and if petitioners are right, then the government's under a mandatory obligation to desist from deportation. What's wrong with that reading of 1252(g)?

MS. NEWBY: I think there are a couple of issues. First of all, and your, the cases that they're relying on were talking about what the purpose was in enacting the Real ID Act of 2005, talking about trying to get rid of no deferred action cases so to speak. As they mentioned, in some case ICE would exercise its discretion not to remove someone who was removal for various reasons and then some aliens would bring actions saying if you did it for this person, you should be doing it for me. By enacting 1252(g), those kinds of cases are

eliminated because the discretion can't be challenged.

In this case, it's important to know what decision we're talking about. Petitioners are talking about the decision whether or not they should get relief under the Convention Against Torture or asylum. No decision has been made yet. Right now they're seeking relief. The only decision that's been made in this case is the decision to execute their removal orders. That falls squarely within the plain language of 1252(g) and divests this Court of jurisdiction.

Now the cases that we discussed are instructive. As I mentioned, the plain language of 1252(g) requires that notwithstanding any other provision of law, notwithstanding Constitutional lawyer, statutory law or nonstatutory law where the claim before the district court is one that arises from a decision to execute a removal order, the Court does not have jurisdiction.

As in the cases that were just discussed, the petitioner in this case as in those is arguing that they're not challenging the underlying order of removal, they're not challenging the validity of the order of removal and they're not seeking relief on the merits in this case because they can't. In this case before the district court they cannot get relief like asylum or relief from their order of removal under CAT. The only thing they're looking for in this case is injunctive relief.

Like they were in the cases that Judge Rosen and Judge Roberts found there was no jurisdiction, the petitioners are seeking to forestall their removal while they bring claims in the immigration court that they could have brought sooner and that there's no reason that they weren't able to bring at least as soon as 2014 when the changed conditions in Iraq occurred that they now seek to rely on. Because their claims arise only from the decision now to execute their orders of removal, 1252(g) applies and this Court does not have jurisdiction.

I think I've already addressed the suspension clause argument. In Mucka v. Baker, the Court found that the petition for review process provided by the Real ID Act satisfies the suspicion clause. It is an adequate and affective collateral remedy allowing people judicial review. Nothing about that has changed in this set of circumstances. In this case, that very same process is available to the extent that the motions to reopen based on changed country conditions are denied. They could seek review with the Court of Appeals and that satisfies the suspicion clause.

THE COURT: Does that become illusory if they don't have an effective, prompt avenue in the immigration courts? Does the possibility of a review in the Court of Appeals when they can't effectively present their contentions to the immigration court provide the kind of acceptable alternative

that would avoid a suspension clause problem?

MS. NEWBY: Your Honor, the Sixth Circuit has already held that the petition for review is an adequate and effective remedy to review an immigration court decision. In this case, the petitioners cannot make an argument that that is not an adequate and effective means because they've already filed petitions in the immigration court. Several of them have been granted. Several of the petitioners in this case, Asker, Al-Issawi and I believe Nissan have now all received stays of their removal while the immigration court reviews their motions to reopen. This is not illusory. There is a process that has already been in place and has always been in place for them to vindicate these rights based on changed country conditions. Those who have gone that route which I believe is about half of the class according to what Ms. Schlanger represented, a number of them have received relief and in this --

THE COURT: Do you ever some numbers for me, how many petitions have been filed, how many have been granted for reopening?

MS. NEWBY: I can check with counsel for ICE to see if she has any exact numbers or close estimates for you.

THE COURT: All right. I would like to get a better sense of how many motions for reopening have been filed and how many have been granted and how many motions for stay have been filed and how many have been granted.

MS. NEWBY: And are you talking, your Honor, about the named petitioners or anyone who would fall within petitioner's class?

THE COURT: Well, I'm curious about the class.

MS. NEWBY: Okay. Can I have an a moment to confer and see if we have that information?

THE COURT: Sure.

(Pause)

MS. NEWBY: Thank you, your Honor. I'm told from ICE counsel that her best estimate right now is that there have been about 50 motions to reopen filed, but that number is fluid because they're continuing to come in. She doesn't have a precise number on the stays. We've cited three in this case that have been granted. She said as far as she knows they are granting them when these come in, not, for some reason including that they have to have time to even address the underlying motion and so they are granting stays in this case, but I don't have any better number for you. I'd be happy to provide that if we could after the hearing.

To the extent the only thing that petitioners rely on in this case to distinguish it from any other immigration case where a removal order has been in place and then there's a decision made to execute it is this compressed time frame for them to seek relief. That's due to petitioners sitting on their rights. Regardless of whether they had their own

personal reasons for doing so, financial reasons for doing so, they sat on their rights. It's not the government that created the compressed time frame, it's the petitioners and that doesn't except them from 1252(g) and it's important to note that this Court is not denying them the opportunity for a stay if it says it does on the have jurisdiction under 1252(g) because as we've already noted the immigration court is routinely granting stays in these cases and at least three petitioners in this case who filed on June 15th and June 16th have already received stays of their orders of removal. I can also rep --

THE COURT: Well, if the immigration court is routinely granting these, what's the government's interest in not allowing that court an opportunity to consider motions for stay for the balance of the class? What is the need for having roughly have the class be subject to the possibility of facing deportation and then not getting a stay the way other members of the class are? Again, we're not talking about it doesn't seem like an extended period of time, it sounds like it's a matter of maybe a few months until all of the class can put together the necessary paperwork. What -- is there some strong government interest in moving at this point without giving the full class an opportunity to make their case for a stay in front of the immigration court?

MS. NEWBY: Well, first of all we're not not giving

them an opportunity. They have the opportunity. In terms of why ICE wants to continue to enforce the orders of removal, it's ICE's obligation to enforce these types of orders. That's their role. It's ERO's job to do enforcement and removal proceedings. There are orders of removal finding that these particular individuals, it's against the law for them to remain in the United States, they no longer have a legal basis to be in this country. It is ICE's job to enforce those orders and it's not that ICE chose not to, it's that Iraq was not accepting people. As soon as they were, ICE is now continued its obligation to enforce those orders. It is the immigration court who has the prerogative to say whether a particular individual is entitled to a stay. For further relief, those people can seek that relief, but it's not ICE's position to decline to exercise their obligation to enforce these orders.

THE COURT: Okay. Well, that would explain why the proceedings are being initiated to enforce the orders, but that doesn't answer my question why does there need to be a proceeding that moves forward at this time without some assurance that these petitioners can have a chance to make claim for a stay in front of the immigration court.

MS. NEWBY: I think for a couple of reasons, your Honor. First of all where you have a situation like this one where the petitioners for whatever reason could have raised their argument sooner and waited until removal was imminent,

until ICE has already invested a lot time and resources putting together the logistics of gathering these folks, detaining these folks and getting them removed to the appropriate country, if they're allowed to wait until removal is out the doorstep and assert rights that they've been sitting on, that really prohibits ICE from doing its function. There's nothing that would prevent that argument in a number of cases. So I think as a matter of course, ICE needs to stay its course and enforce the orders unless and until the immigration court enters an order directing it to do otherwise or the BIA or the Court of Appeals.

And as I mentioned, there are a lot of resources that have already been invested in this operation so to ask ICE to just put that off is not as simple as it sounds. There are a lot of operational needs to go into detaining these people for a length of time until they can all be accumulated and removal effectuated. So for those reasons, ICE would like to continue to, to perform its duties. Does the Court have any further questions?

THE COURT: Umm, I don't thing so at this point so we'll turn back to petitioners, see if they have any rebuttal.

MS. NEWBY: Thank you, your Honor.

MR. GELERNT: Your Honor, I just want to start, jump into the conversation you were just having with the government and just make one point along the lines that you were asking

the government about and that's that they have an overriding mandatory duty themselves to comply with CAT and so it's not clear to me what their interest is in removing people who they, the BIA has already found in the two cases that or a couple of cases where they've reached, where they've reached the merits that there were changed country conditions and as you said if stays are being routinely granted, then obviously the agency recognizes something was wrong so it's not clear to us why ICE is insisting on removing these people knowing that if they get to the BIA, the BIA is going to find changed country condition and that there's a serious risk of harm and the difference between this case and other cases is this was -- people are here for decades. They did not know that Iraq would take them back. They couldn't just keep filing motions to reopen and if they were denied, it's only at the moment where they're going to be removed that it really matters and so we do not see why the government would not allow them to actually have their process because the government keeps saying well of course they can have their process and that's the way out of the Constitutional jam and the suspension clause, but they know full well that if they get to Iraq they're not really going to be able to pursue motions to reopen and the second point I wanted to make is the government is saying that the Sixth Circuit has said after Real ID, the petition for due process satisfies the suspension clause. What the Sixth Circuit has

said, what the Supreme Court has sad, what everyone has said is of course it does as a general matter because it provides you with a federal forum, but it's never said in every single instance and that's exactly why sometimes there has to be another avenue of review where your process couldn't be through the petition for review of process.

The final thing I would just say about the government's case is that they're citing cases as your Honor pointed out that involved discretionary-type claims, adjustment-type claims and where the person was sitting on their rights, they had no reason to believe they wouldn't be removed. They weren't -- it wasn't a situation like Iraq where Iraq was saying for decades they wouldn't take people back, so it's a very different situation. Unless there are further questions or you would like to ask my colleague questions --

THE COURT: Well, I have a question regarding factual development. Is it your view that any facts need to be developed for purposes of answering the jurisdictional question?

MR. GELERNT: Umm, I don't know that any jurisdictional fact, that any facts need to be developed. I think your Honor certainly has jurisdiction to determine its jurisdiction and we realize this has been very quick briefing so you certainly have jurisdiction to enter a TRO to determine your jurisdiction if you'd like further briefing, but I don't

know that there are any factual issues that you'd need to determine your jurisdiction.

THE COURT: All right, thank you.

MR. GELERNT: Thank you, your Honor.

THE COURT: Ms. Newby, I do have a question. It was my understanding that the government had agreed to hold off deportations until Friday; is that right?

MS. NEWBY: We represented that there would be no removals before Friday and I'm able to represent today that there will be no removals to Iraq before June 27th. If I could just make one additional point to the Court?

THE COURT: Okay.

MS. NEWBY: I just wanted to point out that ICE counsel informs me that as recent as March of April of 2017 an immigration judge has found that there are no changed conditions in Iraq so it's not a foregone conclusion that if you get to the motion to reopen, that there will be a finding of changed conditions and you will get relief. That's one of the reasons why these cases need to be dealt with in the integration court in an individual basis and not just a blanket injunction from this Court.

THE COURT: Now you don't contest, do you, that I have jurisdiction to decide my jurisdiction and unless I found I didn't have jurisdiction I could enter a TRO to maintain the status quo until I determined that I have jurisdiction? You

agree with all those propositions?

MS. NEWBY: I agree that you have jurisdiction to determine if you have jurisdiction and that if you -- and that in keeping with that jurisdiction, you could enter a TRO while you're determining jurisdiction, but once it's clear the Court lacks subject matter jurisdiction, the Court must dismiss and cannot enter injunctive relief.

THE COURT: And do you think there needs to be any factual development regarding the jurisdiction issue?

MS. NEWBY: I do not, your Honor. I think the plain language of 1252(g) speaks for itself. The only decision in this case is the decision to execute the removal orders and that is where this, this claim for injunctive relief arises and therefore there is no jurisdiction in this court and this case should be dismissed.

THE COURT: Okay.

MS. NEWBY: Thank you, your Honor.

THE COURT: Thank you. All right.

MS. SCHLANGER: Your Honor, if I may make one final point?

THE COURT: All right.

MS. SCHLANGER: The changed country conditions question is going to vary on the basis of changed from what and from when, but our -- so I don't know the immigration court decision that counsel was just referring to, but for our

clients who it's been some years and who have their particular situations, there are materially changed country conditions that we think made that an important issue to raise. That's what the Sixth Circuit has itself found in some similar cases and we just don't think there's really much doubt about it. I think that was only point I wanted to make unless you have other questions.

THE COURT: Well, the only other question I had is to both sides. I know the briefing was done on a fairly quick basis and not withstanding that, it was very thoroughly and I want to congratulate the lawyers for doing an excellent job in educating me about these issues. Nonetheless, is there anything more you wanted to say in writing if I gave you a little more time to put something in? Anything for petitioners?

MS. SCHLANGER: From us, we're happy to brief any issue you'd ask us to elaborate, but we feel that for purposes of this emergency order, that you have what you need.

THE COURT: Ms. Newby?

MS. NEWBY: I would echo those sentiments. I'm happy to address anything you'd like, your Honor.

THE COURT: Okay. Well, our next step then would be for me to give you my view on all of this. I will be issuing something in writing. Watch your in boxes. I can't tell you exactly when, but I understand the urgency of giving you a

decision so I will attend to it as promptly as possible. Thank you all.

MS. SCHLANGER: Thank you, your Honor.

MS. NEWBY: Thank you, your Honor.

(Motion hearing concluded at 3:08 p.m.)

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C E R T I F I C A T E

I, David B. Yarbrough, Official Court Reporter, do hereby certify that the foregoing pages comprise a true and accurate transcript of the proceedings taken by me in this matter on Wednesday, June 21st, 2017.

6/22/2017
Date

/s/ David B. Yarbrough

David B. Yarbrough,
(CSR, RPR, FCRR, RMR)
231 W. Lafayette Blvd.
Detroit, MI 48226