IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910

Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

PETITIONERS' STATUS REPORT

The Petitioners/Plaintiffs ("Petitioners") submit the following Status Report in advance of the Court's status conference scheduled for August 31, 2017. Given the length of this report, a Table of Contents is included for the Court's convenience.

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I. Report on Status of the Putative Class

Pursuant to this Court's order, Respondents are providing specified information about Iraqi nationals, both detained and non-detained, every two weeks. The last such production occurred on August 21, 2017. The data produced is about a week old on the date of production, meaning that the last data produced is from August 14, 2017. Petitioners' counsel have attempted to update information where possible, through the ICE detainee locator system, so some information may be slightly more current, or may combine information obtained from Respondents' August 14 data and more recent information obtained from the ICE detainee locator system.

So far, Respondents have timely provided the disclosures required by the Court's Preliminary Injunction Order on August 7 and August 21. There remain some glitches to work out on the biweekly reporting—missing fields and missing detainees—but Petitioners are hopeful that they can resolve these issues with Respondents.

A. Number of Class Members and Potential Class Members

There are about 1,428 Iraqis who had final orders of removal on June 24, 2017.[1] Of those, approximately 288 were detained as of August 14, 2017. Petitioners had previously reported that as of July 1, 2017, there were 234 Iraqi nationals with final orders who were detained by ICE. *See* Kitaba-Gaviglio Declaration, ECF 77-20, Pg.ID# 1853. The increase in the number of detainees reflects the fact that ICE is continuing to arrest Iraqi nationals with final removal orders.

B. Location and Transfer of Detainees

Class members are detained in 58 locations across the country. The facilities with the most detainees are:

Northeast Ohio Correctional Center, Youngstown: 117 (40%)

Denver Contract Detention Facility: 19 (6.6%)

Jena/Lasalle Detention Facility: 15 (5.2%)

Calhoun County Detention Facility: 13 (4.5%)

Otay Mesa Detention Center, San Diego: 12 (4.2%)

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[1] As explained in Section II.A., below, there is some dispute between the parties about how to count Iraqis who had previously had a final order of removal, but whose Motion to Reopen had been granted prior to June 24.

Most of the other 53 facilities have only a few detainees. Only five detainees are being held in Florence, Arizona, where a large number of detainees had previously been held. A full list of detention locations is attached as Exhibit A.

Transfers have emerged as occasions for abusive treatment of detainees. *See* Elias Declaration, Ex. C; Mallak Declaration, Ex. D; Alkadi Declaration, Ex. E; Peard Declarations, Exs. F, I; Free Declaration, Ex. G; Hernandez Decl, Ex. J; Free Letter, Ex. L.

Transfers have also continued to disrupt efforts to obtain counsel for detainees, as have delays in the availability of information about where particular detainees are being housed. This information is supposed to be kept reasonably up-to-date in ICE's online detainee locator system. Unfortunately, the system is not functional for detainees at the Northeast Ohio Correctional Center, in Youngstown—which, according to ICE's last data disclosure, houses approximately 40% of the detainees. For these detainees, the online locator instructs users to call ICE's Detroit Field Office. ICE's field offices will share information about detainee location only for counsel who have filed a G-28 form—which excludes both putative class counsel ("Petitioners' counsel") and any potential immigration counsel for individual detainees who are considering representation but have not yet filed an appearance.

Petitioners' and Respondents' counsel are trying to work out a method by which Petitioners' counsel can verify the location of particular detainees in real time, to facilitate access to them. As discussed in Section II.F., Petitioners are requesting notification within three days when detainees are transferred.

C. Status of Efforts to Obtain Counsel for Detainees

Advocates continue to try to find a lawyer for each detainee who does not yet have immigration counsel. This process has been slowed considerably by detainees' transfers and by the difficulty of confirming the location of detainees prior to visits by counsel. Petitioners are hopeful that the number of transfers will decrease, and that the effort to find counsel can move forward.

In addition, as discussed in the attached declarations, representations by ICE employees, agents and contractors to class members regarding this litigation, including representations that their detention will be prolonged if they obtain counsel, have further hindered efforts to provide counsel. Relief on that issue is discussed in Section II.G. *See* Elias Declaration, Ex. C; Mallak Declaration, Ex. D; Alkadi Declaration, Ex. E; Peard Declarations, Exs. F, I; Free Declaration, Ex. G; Hernandez Decl, Ex. J; Free Letter, Ex. L.

Petitioners' counsel's best information is that 158 of the 288 detainees have immigration attorneys, and that 61 detainees do not have attorneys. For another

69, it is unknown whether or not they have counsel, but no counsel had filed an appearance as of August 14. The group coordinating counsel for class members continues to try to place each of these cases with appropriate lawyers.

Given the large volume of cases involving Iraqi nationals that are now before immigration judges and the Board of Immigration Appeals (and may eventually be before the Courts of Appeals) Petitioners' counsel and other advocates are working with immigration attorneys representing individual class members to explore the most efficient way to handle this influx. Petitioners' counsel is working with a national law firm to prepare amicus briefs to be filed in individual cases of class members. In addition, given that many of the factual issues in the individual class members' cases are similar, there are relatively small number of qualified country conditions experts who cannot possibly testify in all of the cases, and holding potentially hundreds of evidentiary hearings would place a significant burden on the administrative immigration system, immigration attorneys and Petitioners' counsel are exploring possibilities for joint presentation of evidence and other coordination or consolidation of cases both within the administrative immigration system and, if necessary, in the federal courts. (For example, Petitioners' counsel is aware of one pro se habeas case that has been filed by a class member.)

It is Petitioners' counsels' intent to share class members' names, A numbers, lawyer information and information relating to the immigration case's procedural posture, and detention location with the law firm(s) and other advocacy groups vetted by the ACLU of Michigan who will be involved in filing amicus briefs in the individual immigration cases and other efforts to coordinate representation and presentation of evidence in the individual immigration cases. Petitioners are alerting the Court and opposing counsel so that, if necessary, the Protective Order can be amended to allow for sharing of the limited class member information with designated counsel who are handling the amicus filings and the efforts to coordinate representation in the class members' individual immigration cases.

The parties have not yet had an opportunity to discuss this issue in detail with Respondents, and Petitioners hope to resolve this matter through such discussion.

D. Status of Filings in the Immigration System

As of August 14, 2017, 120 of the current detainees had taken steps to open their cases before the immigration judges or the BIA. 106 of their motions were

filed prior to this Court's preliminary injunction dated July 24. As of August 14, the status of filings in the immigration system was as follows[2]:

Status	Detained	Non-detained	Total
Denied by BIA (potentially the subject of appeal to Court of Appeals)	3	6	9
Pending before BIA			
Pending on MTR	28	10	38
Pending on appeal (from denial of MTR by Immigration Judge)	24	14	38
Denied by Immigration Judge (potentially the subject of appeal to BIA)	16	3	19
Pending before Immigration Judge			
Pending on a Motion to Reopen	37	11	48
Pending on the merits after IJ granted MTR	10	5	15
Pending on the merits, after remand by BIA	2	3	5
Total	120	52	172

E. Releases and Custody Reviews

Because the biweekly reports only started a few weeks ago, and Respondents have declined to share even recent detention history for class members detained prior to the first disclosure, Petitioners have been unable to

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[2] As discussed above in Section 1.A, Respondents have interpreted the class definition as excluding Iraqi nationals who had a motion to reopen granted before June 24, 2017. As a result, this data does not include MTRs granted before that date. Petitioners' counsel is aware of at least three granted MTRs, but the actual number is unknown.

ascertain the extent to which detainees are being released. It is clear that at least a few detainees have been released, but Petitioners do not know how many.

ICE has begun conducting post-order custody reviews for detainees. See Section II.F. The Court's order did not include reporting on post-order custody reviews and data is not available on the status or results of those reviews. Petitioners are asking the Court to order Respondents to provide this information.

II. Report on Outstanding Issues Related to this Court's Preliminary Injunction Order and Requests for Additional Relief

In setting the upcoming status conference, the Court anticipated that it would be necessary "to assess what modifications, if any, are required" to the Court's preliminary injunction order. Order Granting Petitioners' Motion for Preliminary Injunction, ECF 87, Pg.ID 2356 (hereinafter, Preliminary Injunction Order). The Petitioners bring the following issues to the Court's attention.

A. Definition of Putative Class

The Court defined the putative class as "all Iraqi nationals in the United States who had final orders of removal on June 24, 2017, and who have been, or will be, detained for removal by ICE." *Id.* at Pg.ID 2354. This is the group covered by both the bar on removal and by the court-ordered disclosure requirements.

The class definition used in the Preliminary Injunction Order was adopted at the request of Petitioners, who proposed this modification to avoid confusion about

exactly who is member of the class. Difficulties have arisen with the new definition. Respondents take the position that the new definition excludes any Iraqi national who *previously* had a final order of removal, if that removal order had been rendered inoperative on June 24, 2017 as a result of a granted Motion to Reopen. For example, one Iraqi national filed an emergency Motion to Reopen on June 15, 2017. The Immigration Court granted that motion on June 21, and thus the individual's order of removal was no longer final as of June 24, 2017. Respondents take the position that neither the disclosure nor substantive requirements of this Court's Preliminary Injunction Order apply to that individual. In other words, Respondents would exclude this detainee and others like him from the protection offered by the stay of removal while such detainees litigate their cases up to the Court of Appeals. Thus, if that individual lost his substantive motion, this Court's stay would not prevent deportation while he sought to appeal. Respondents also believe they have no obligation to report on Iraqi nationals who had a final order of removal but whose order was inoperative on June 24, 2017 because a motion to reopen had been granted before that date.

Petitioners believe this Court intended its order—both substantively in terms of barring removal and procedurally in terms of reporting requirements—to cover individuals whose motions to reopen were filed and granted prior to June 24, 2017.

In Petitioners' view, Respondents' reading fails to recognize that the due process claims of someone whose motion to reopen was granted on June 23 are no different than those of someone whose motion to reopen was granted on June 25. In the interest of clarity, Petitioners suggest that the class definition be amended to cover "all Iraqi nationals in the United States who have been, or will be, detained for removal by ICE; and who had final orders of removal on June 24, 2017, or whose removal proceedings were, as of that date, pending due to a granted Motion to Reopen."

B. Notice to Putative Class

Rule 23(d)(1) provides:

> *In General.* In conducting an action under this rule, the court may issue orders that:
> . . .
> (B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:
>
> (i) any step in the action . . .

To date, no formal notice has been provided to putative class members regarding this action. On July 18 and 19, Petitioners' counsel mailed an informational letter describing this Court's preliminary injunction order to 234 class members, who were all the class members known at that time. The letter described the contents of this Court's order extending the temporary stay until July

24 (ECF 61). A significant number of those letters have been returned by the Post Office, in part due to detainee transfers from facility to facility. The returned letters have been remailed. Petitioners' counsel and other organizations have also conducted know your rights presentations at the detention facilities in Youngstown, Ohio and Florence, Arizona.

The parties have been discussing distribution by ICE of a Know Your Rights fact sheet, prepared by Petitioners' counsel, accompanied by one or more relevant forms. The parties have been unable to come to agreement, however, with the major stumbling block being the process and forms to be used for individuals who may wish to return to Iraq (discussed in more detail in Section II.C. below). Attached as Exhibit B are Petitioners' proposed forms (covering both voluntary removals and production of A-files/Records of Proceedings), and the proposed ACLU Know Your Rights fact sheet. Petitioners have been discussing with Respondents how best to address potential Privacy Act concerns if the A-files and ROPs are provided to family members. Petitioners believe that it should be possible to resolve this issue through an appropriate waiver. Respondents have informed Petitioners that they do not wish to distribute a form regarding production of A-files/Records of Proceedings at this time.

Communications with class members and their immigration counsel have revealed that many detainees do not understand this Court's Preliminary Injunction Order or their rights more generally within the immigration system. There is widespread confusion and rumors spread rapidly. Petitioners believe it is imperative that all class members be fully informed about their rights and have an opportunity to consult with an immigration lawyer, so they can make voluntary and knowing choices about whether/how to proceed in their individual immigration cases. *See* Elias Declaration, Ex. C; Mallak Declaration, Ex. D; Alkadi Declaration, Ex. E; Peard Declarations, Exs. F, I; Free Declaration, Ex. G; Hernandez Decl, Ex. J; Free Letter, Ex. L.

It is a separate question whether the information should be provided through a court-ordered notice. A notice process agreed to by the parties would likely be simpler and quicker than court-ordered notice. Guidance from the Court on some of the issues in dispute may be enough for the parties to proceed with such an informal notice. If not, a court-ordered notice may be necessary.

Petitioners believe that the notice process, whether court ordered or agreed to by the parties, should satisfy the following criteria:

- The notice should reach **all** class members. Due to repeated transfers of detainees and more general problems with mail delivery at ICE

facilities, mailings by Petitioners' counsel are unlikely to reach all detainees. In addition, ICE continues to arrest and detain additional Iraqi nationals, and any notice procedure should ensure that newly-detained class members are informed of their rights.

- The notice should explain this Court's Preliminary Injunction Order, as well as how class members can request legal assistance in their individual cases.
- The notice should facilitate the process Petitioners propose in Section II.C. below by which detainees can self-identify their potential interest in terminating the preliminary injunction as to them.
- The notice should cover the A-File/ROP issues discussed in Section II.D. below.

C. Procedure for Determining Whether a Class Member's Desire to Return to Iraq is Knowing and Voluntary

This Court's Preliminary Injunction Order, ECF 87, Pg.ID 2355-56, provides:

> 2. This preliminary injunction shall be terminated as to a particular class member upon entry by the Court of a stipulated order to that effect in connection with any of the following events:
>
> . . .
>
> e. a class member's consent that this preliminary injunction be terminated as to that class member.

> If the parties dispute whether any of the foregoing events has transpired, the matter will be resolved by the Court by motion. Termination of this preliminary injunction as to that class member shall abide the Court's ruling.

The parties have been discussing a process for identifying individuals who voluntarily consent to removal to Iraq, but have been unable to agree on that process.

Petitioners have requested from Respondents a list of any class members who ICE understands to want to be promptly removed to Iraq. That list has not been forthcoming.

Petitioners have no objection to Respondents' desire to affirmatively solicit the entire group of Iraqi detainees to find out if they may wish to terminate the protection from removal afforded by this Court's Preliminary Injunction Order. However, ICE detention is an environment rife with misinformation and the potential for coercion, where the threat of prolonged or indefinite incarceration can lead people who are unaware of their rights to forego them in order to be released from detention. The attached declarations detail this general point, as well as the specific ways in which ICE employees and/or contractors are subjecting the detainees to harassment, factual distortion, and pressure to abandon their rights.

For Petitioners' counsel, then, it is essential to individually evaluate whether any class member's expressed desire to be returned to Iraq is both knowing and

voluntary. In Petitioners' view, a waiver form—signed by a detainee under unknown circumstances in the face of unknown pressures and potentially in a language they do not speak or read fluently—cannot provide sufficient assurance of knowledge and voluntariness.

Instead, Petitioners propose a process by which detainees who may wish to forego the protections of the Preliminary Injunction Order identify themselves to both ICE and Petitioners' counsel. For detainees who have immigration counsel, Petitioners and Respondents agree that assurances from that counsel about knowledge and voluntariness can provide sufficient confidence to move forward. In such cases, the detainee's counsel, putative class counsel and Respondents' counsel would stipulate to removal. Indeed, that has already been done in one case.

For detainees who do *not* have counsel, Petitioners' counsel—upon receipt of the detainees' forms indicating a possible interest in removal—will inform the advocates locating immigration counsel to identify a pro bono lawyer to visit the detainees' detention locations, advise them about available options, confirm that no pressure is being placed upon them, and ensure that their decision to forego the protections of this Court's stay is knowing and voluntary. Some detainees may wish to acquiesce to their own removal; in that case, the interview will provide Petitioners' counsel the necessary information on which to base a stipulation,

following the Court's previously established process. The plan is that these lawyers will be independent—not Petitioners' class counsel—to avoid any possible conflict of interest. Petitioners' proposed form (along with the accompanying "Know Your Rights" document and accompanying form regarding production of the A-files/Records of Proceedings) is attached as Exhibit B.

If the Court believes further development of this issue would be useful, Petitioners can brief their proposal. In the meantime, if ICE knows of unrepresented class members who may wish to be removed to Iraq, ICE can share the names with Petitioners' counsel, who will attempt to ascertain whether any waiver of rights is knowing and voluntary, and if so, will stipulate to the termination of the Preliminary Injunction for the relevant individual.

D. Transmittal of A-Files and Records of Proceedings (ROPs) to Class Members

This Court, recognizing the centrality of A-Files and ROPs for the ability of class members to file motions to reopen, ordered that a 90-day period for filing such motions commences upon "Respondents' transmittal to the class member of the A-file and ROP pertaining to that class member." Preliminary Injunction Order, ECF 87, Pg.ID 2355. The Court further ordered that:

> As soon as practicable, Respondents shall transmit to each class member that class member's A-file and ROP, unless that class

> member advises Respondents that he or she will seek to terminate this preliminary injunction as to that class member.

Id. at PgID 2356.

To date, Respondents have not transmitted any A-files or ROPs to class members. Every day that Respondents delay producing the A-files and ROPs prolongs class members' incarceration. Class members can attempt to file motions without these documents—as many class members did before this Court's Preliminary Injunction Order gave them the breathing room to obtain the documents before filing—but this greatly reduces the likelihood of their success.

As of August 14, 2017, Petitioners' best information is that 172 Iraqis with final orders—120 of them currently detained—have so far sought to reopen their cases, nearly all filing prior to this Court's preliminary injunction order. It is highly likely that many of these rushed motions were filed without access to the A-files and Records of Proceedings. Petitioners believe that some of the motions that are being denied within the immigration system were greatly hindered by counsel's lack of the necessary documents, and that speedy production of these files is critical, both to ensure that class members have a meaningful opportunity to present their claims for immigration relief and to prevent unnecessary and prolonged incarceration.

Petitioners and Respondents have discussed the process for producing A-files and ROPs. ICE originally proposed transmitting the files directly to the incarcerated detainees, regardless of whether they have immigration counsel, citing the language of the Court's order. Petitioners are concerned about the practicalities, particularly the ability of detainees to then send their files on to their immigration counsel. It is not clear, for example, whether or how detainees would be able to copy and remail these files (which can number hundreds of pages).

Areas of Agreement

It is Petitioners understanding that the parties have reached agreement in principle on some issues with respect to production of the A-Files and ROPS. Those areas of agreement are:

- If an attorney has filed a representation form (a G-28, EOIR-27, or EOIR-28) in January 2017 or later, the detainee's A-File and ROP will be transmitted to that attorney unless the detainee directs otherwise.
- ICE will provide a form to all detainees allowing them to select to whom the A-file and ROP will be sent: the detainee's attorney (who may not yet have an appearance on file), the detainee, or another person such as a family member (provided the detainee grants appropriate authorization under the Privacy Act).

Petitioners believe the proposed process is consistent with the language of the Court's order, which should be read to require production to the class member's counsel, if represented, and to the class member or his/her designee if the class member is unrepresented. Alternately, Petitioners request modification of the order to allow for the process agreed upon by the parties.

Areas of Disagreement

First, the delay in production of A-files and ROPs is highly prejudicial to the class members, undermining their ability to file effective motions and prolonging their incarceration. Petitioners believe that the form allowing unrepresented class members to select the recipient of these documents should be sent out along with the formal or informal class notice (discussed above), so that Respondents can commence with transmitting the files as soon as they become available. Given that more than a month has passed since this Court ordered transmittal of the files, and given Respondents have been unable to provide a date when the files will be ready, Petitioners also believe that the Court should set a reasonable deadline for production.

Second, Petitioners have asked Respondents to provide Petitioners' counsel (putative class counsel) a copy of all A-files and ROPs, which would be subject to the existing protective order. Specifically, Petitioners have proposed that, once the

files are available, Respondents provide Petitioners' counsel with a copy in PDF format, in addition to providing a copy to the class member or his or her designee. These documents are clearly relevant to Petitioners' claims, and Petitioners intend to ask for them in discovery. As a practical matter, it will be more efficient for Respondents to provide these documents to class counsel at the same time as they are provided to class members and/or class members' individual counsel. Respondents have not agreed to this request.

E. Production of Detention Information and Modifications to Injunction's Reporting Requirements to Include Detention Issues

Overview of Custody Reviews and Legal Issues Related to Detention

8 U.S.C. 1231(a)(2) provides that, in general, "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." During the 90-day removal period, detention is mandatory. 8 U.S.C. 1231(a)(2). Because Petitioners were ordered removed years or even decades ago (and some class members were detained during the removal period when their orders were initially entered), Petitioners' view is that the 90-day period for mandatory detention has long since run. The government's view is that the 90-day mandatory detention period began anew when the class members were re-detained.

Because many class members have been incarcerated for almost 90 days, the government recently began the process of conducting 90-day custody reviews that are required pursuant to 8 C.F.R. § 241.4. That regulation provides that prior to expiration of a 90-day removal period during which the individual is detained, the government must conduct a review to determine if additional detention is warranted. *See* 8 U.S.C. 1231(a)(6) (designating circumstances under which aliens "*may be detained* beyond the removal period") (emphasis added). *See also* 8 C.F.R. § 241.4 (setting forth process for determining whether detention will continued beyond the removal period).

Under the government's view, ICE is required to make an individualized determination of whether class members' detention is justified only after class members have been re-detained for 90 days. Petitioners disagree with this reading of the government's detention authority and believe that individualized detention determinations should have been made much sooner. Moreover, in Petitioners' view, because class members were released on Orders of Supervision for years prior to their recent detention, release and not detention should be the norm.

However, given that the custody review process is now under way for many class members, Petitioners believe that as a practical matter, resolution of any disagreements between the parties on the detention of class members can await the

outcome of the initial set of 90 day reviews. In light of the significant deprivation of class members' liberty interest, however, it is important that Petitioners' counsel promptly receive information about the outcome of the 90-day reviews, as well as the underlying custody review documents, so as to ensure adherence to relevant legal limits on detention.

Request for Reporting re Custody Reviews and Bond Hearings

This Court ordered:

> Commencing on August 7, 2017, and continuing every other Monday thereafter, Respondents shall report to class counsel the following information: attorney representation of individual class members; transmittal of A-files and ROPs; status of filing and adjudication of motions to reopen, stay, and petitions for review; detention locations, transfers, releases from detention. The parties may negotiate additional information that should be supplied; agreement shall be memorialized in a stipulated order.

Preliminary Injunction Order, ECF 87, Pg.ID# 2356.

Petitioners and Respondents have been working amicably on a number of data and other issues related to the biweekly reporting. These issues have largely been resolved.

At the same time, Petitioners have unsuccessfully sought Respondents' agreement to produce additional information that is turning out to be important, particularly with respect to detention issues. Specifically, Petitioners have requested that Respondents produce all class members' full detention history, that

they report biweekly on the status and outcome of the 90-day custody reviews that are currently underway, and that they provide notice to both class counsel and individual immigration counsel within three days of any transfers of class members (given the problems with the on-line locator system and the fact that the biweekly reporting is already a week out of date at the time reported, and hence it can be three weeks before counsel learn of a transfer).

The parties' dispute about production of this information centers on timing, since the information sought is relevant and obtainable in discovery. (Petitioners do not believe Respondents could assert any valid objections to producing this information, and that any such objections would simply be for the purpose of delay.) Most class members have already spent close to three months incarcerated. Given the fact that ICE has not produced the A-files or ROPs (or even determined the process for doing so), it could be months before class members have those documents, and many more months before class members cases are adjudicated in the administrative immigration system. If ICE insists on detaining class members—nearly all of whom were living in the community under Orders of Supervision before their recent arrests—throughout this process, then the inevitable result will be the prolonged detention of class members, along with the pressure this places on them to give up their cases. No class member should remain

incarcerated simply because the discovery process takes time. Petitioners' counsel need detention information *now*—not months from now—so that, depending on the outcome of the upcoming custody reviews, they can seek appropriate relief from the Court.

In addition, Petitioners counsel is concerned about the continuing detention of class members whose motions to reopen have been granted. These individuals are not entitled to custody reviews but should be provided with bond hearings, except to the extent that they are subject to mandatory detention. Petitioners' counsel therefore seeks information about the status and outcome of bond hearings provided to such class members, as well as whether the government claims that mandatory detention applies.

Accordingly, Petitioners ask that this Court order that Respondents provide custody review information for all class members as part of their ongoing biweekly reporting, as well as information about any bond hearings provided to those class members whose motions to reopen were granted. Petitioners believe, given the Court's familiarity with the case and its prior recognition that amendment of ongoing reporting may be needed, that the Court should simply amend its prior order after hearing from the parties at the August 31, 2017 status conference. Alternately, should the Court desire briefing on this issue or the related issues

regarding production of documents related to detention, Petitioners ask that the Court set an expedited briefing schedule for resolution of this issue.

Specifically, Petitioners ask for biweekly reporting on:

- The status and outcome of all 90-day custody reviews being conducted for class members, including the basis for any continued detentions;
- The status and outcome of any bond hearings conducted for class members whose motions to reopen were granted, including the basis for any continued detentions (e.g. whether based on the claim of mandatory detention);
- The release from detention of any class members on any ground;
- Full post-release contact information for anyone released.

Petitioners also ask that the Court order production on an expedited basis of the discovery sought in Petitioners' First Set of Document Requests, attached as Exhibit M, which seek information related to custody reviews, bond hearings, and repatriation issues (see Section II.F.). Petitioners ask the Court to order that responsive documents related to custody reviews or bond hearings be produced on a rolling basis within one week of the decision. Petitioners propose that for any decisions made to date, Respondents be given additional time until September 15, 2017 to produce them. Documents related to repatriation should similarly be

produced on a rolling basis as they become available, with all currently available documents to be produced by September 15, 2017.

F. The Status of Iraq's Agreement to Accept Class Members

As the Court is aware, prior to recent arrests, many (perhaps nearly all) of the putative class members were living in their communities subject to Orders of Supervision. It is a typical requirement of such an order that its subject obtain travel documents—usually a passport—from their nation of citizenship. But when class members attempted to do that, it seems at least some of them were denied the requisite documents by the Iraqi consulate. It has also come to Petitioners' counsels' attention that some class members have recently received letters from Iraqi officials denying them travel documents. Moreover, some class members—designated as Iraqi by ICE, and subject to Orders of Removal to Iraq—believe that they are not, in fact, Iraqi at all, because they were not born in Iraq. *See* Documents from Class Members Regarding Iraq's refusal to Issue Travel Documents, Exs. H, K; Peard Declaration, ¶ 16, Ex. I.

If Iraq is not willing to accept the removal of some portion of the class members, it is clear that, for those individuals, "there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Accordingly, those individuals need to be identified, and then should

be released from detention. In addition, the government should provide Petitioners' counsel with information about 1) any U.S.-Iraq Agreement by which the government of Iraq has agreed to accept the return of Iraqi citizens ordered removed, and 2) the status of the Iraqi embassy's ability to issue travel documents or to accept Iraqi nationals without travel documents. Information on those issues is sought in Petitioners' discovery requests.

G. Communications by ICE with Class Members Regarding This Litigation

As set out in the attached declarations, Petitioners' counsel have received numerous reports regarding abuse, coercion, and misinformation directed at *Hamama* class members. *See* Elias Declaration, Ex. C; Mallak Declaration, Ex. D; Alkadi Declaration, Ex. E; Peard Declarations, Exs. F, I; Free Declaration, Ex. G; Hernandez Decl, Ex. J; Free Letter, Ex. L. Beyond the ordinary coercive effects of detention, the situation is exacerbated here by the fact that ICE employees, contractors, and agents—who unlike class counsel have direct, ongoing access to the detainees—are misrepresenting this litigation and the detainees' rights. Class members who are abused or harassed, or who are told that they will suffer in prolonged detention if they get a lawyer, cannot make voluntary and knowing choices about how to proceed with their immigration cases.

Accordingly, Petitioners ask that this Court prohibit ICE employees, agents or contractors from discussing this litigation in any way with class members, and require ICE to inform all employees, agents, or contractors who have or could have contact with class members of this order. The order should specify that all communications by ICE with class members regarding this litigation should be in writing, and must be reviewed in advance by Petitioners' counsel.

III. Petitioners' Proposal Regarding Next Steps In This Litigation

A. Pending Motions

Petitioners' motion for class certification is pending, with Respondents' response due on September 11, 2017, and Petitioners' reply due on September 25, 2017.

B. Sequencing of Next Steps in Litigation

This is an unusual case in that Petitioners' primary goal has been to secure time for class members to access the administrative immigration court system. It is unclear at this stage, particularly given the Respondents' delays in producing the A-files and ROPs, how much time will be required for class members' individual cases to be adjudicated.

The parties could now engage in extensive and costly discovery to flesh out the issues that this Court has already decided for the purposes of issuing a

Preliminary Injunction. Petitioners would be seeking evidence to support and Respondents to oppose a permanent injunction similar to the preliminary injunction that has been issued. Such discovery is necessarily time consuming, as is briefing and decision on summary judgment. This means, as a practical matter, that it is likely that many or even most class members' individual immigration cases will likely be far along, or perhaps resolved, by the time this Court could decide summary judgment motions.

At the same time, almost three hundred class members are currently detained, with many having been detained for almost three months. Given that these individuals were previously living in the community and reporting regularly under orders of supervision, often for decades, it is difficult to comprehend what purpose is served by incarcerating them while their immigration cases are wending their way through that system, other than coercing them through prolonged detention to give up their rights.

As set out above in Section II.F., Petitioners seek to monitor the 90-day custody reviews, and may return to the Court for relief on the detention claim if those reviews prove only to rubber stamp detentions. Both ongoing reporting and expedited discovery related to detention are necessary to ensure that class members

do not remain incarcerated unless ICE can establish, on an individual basis, that they are a flight risk or a danger to the community.

In light of this, and in light of the parties' prior discussions about the possibility of a settlement, Petitioners believe that the parties should postpone discovery until they have explored the possibility of settlement, with the exception of limited expedited discovery related to detention. Petitioners request that the Court schedule this matter for a settlement conference before the magistrate.

Respectfully Submitted,

Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
Bonsitu A. Kitaba (P78822)
Miriam J. Aukerman (P63165)
AMERICAN CIVIL LIBERTIES
UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814
msteinberg@aclumich.org

Kimberly L. Scott (P69706)
Wendolyn Wrosch Richards (P67776)
Cooperating Attorneys, ACLU Fund
of Michigan
MILLER, CANFIELD, PADDOCK
& STONE, PLC
101 N. Main St., 7th Floor
Ann Arbor, MI 48104
(734) 668-7696
scott@millercanfield.com

Judy Rabinovitz (NY Bar JR-1214)
Lee Gelernt (NY Bar NY-8511)
Anand Balakrishnan* (Conn. Bar 430329)
ACLU FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2618
jrabinovitz@aclu.org

Margo Schlanger (N.Y. Bar #2704443)
Samuel R. Bagenstos (P73971)
Cooperating Attorneys, ACLU Fund
of Michigan
625 South State Street
Ann Arbor, Michigan 48109
734-615-2618
margo.schlanger@gmail.com

Nora Youkhana (P80067)
Nadine Yousif (P80421)
Cooperating Attorneys, ACLU Fund of Michigan
CODE LEGAL AID INC.
27321 Hampden St.
Madison Heights, MI 48071
(248) 894-6197
norayoukhana@gmail.com

Susan E. Reed (P66950)
MICHIGAN IMMIGRANT RIGHTS CENTER
3030 S. 9th St. Suite 1B
Kalamazoo, MI 49009
(269) 492-7196, ext. 535
susanree@michiganimmigrant.org

Lara Finkbeiner (NY Bar 5197165)
Mark Doss (NY Bar 5277462)
Mark Wasef* (NY Bar 4813887)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
Urban Justice Center
40 Rector St., 9th Floor
New York, NY 10006
(646) 602-5600
lfinkbeiner@refugeerights.org

Attorneys for All Petitioners and Plaintiffs

William W. Swor (P21215)
WILLIAM W. SWOR & ASSOCIATES
1120 Ford Building
615 Griswold Street
Detroit, MI 48226
wwswor@sworlaw.com

Attorney for Petitioner/Plaintiff Usama Hamama

María Martínez Sánchez (NM Bar 126375)
AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO
1410 Coal Ave. SW
Albuquerque, NM 87102
msanchez@aclu-nm.org

Attorneys for Petitioner/Plaintiff Abbas Oda Manshad Al-Sokaina

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* Application for admission forthcoming.