UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al.,

Petitioners,

v.

REBECCA ADDUCCI, Director, Detroit District of Immigration and Customs Enforcement, et al.,

Respondents.

Civil No. 17-11910
Hon. Mark A. Goldsmith
Mag. Judge David R. Grand

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION ON DETENTION ISSUES

Respondents, by and through their undersigned counsel, oppose Petitioners' Motion for a Preliminary Injunction on Detention Issues, ECF No. 138. The grounds for this motion are set forth more fully in the attached supporting brief.

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Dated: November 30, 2017

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I. STATEMENT OF ISSUE PRESENTED

Whether Petitioners are entitled to release from immigration detention, or an individualized determination by a third-party arbiter as to whether they should be released, when they are in motion-to-reopen or removal proceedings with definite endpoints, after which they will either be removed to Iraq or released upon a grant of relief or protection from such removal.

II. MOST CONTROLLING AUTHORITY

8 U.S.C. § 1231(a)

8 U.S.C. § 1226(c)

Demore v. Kim, 538 U.S. 510, 527 (2003)

Ly v. Hansen, 351 F.3d 263, 270 (6th Cir. 2003)

Zadvydas v. Davis, 533 U.S. 678, 701 (2001)

I. INTRODUCTION

The Court should deny Petitioners' Motion for a Preliminary Injunction on Detention Issues, ECF No. 138. Petitioners seek immediate release from detention by the U.S. Department of Homeland Security ("DHS") while in reopening or removal proceedings and pending removal. Petitioners are not likely to succeed on the merits, they have not established irreparable injury, and the public interest favors continuing the detention of aliens who are subject to final removal orders and/or have significant criminal histories. Indeed, it is the addition to the motion to reopen process imposed by this Court, which far exceeds what is called for by the INA or by due process, that has led to the detention being extended. *See Devitri v. Cronen*, No. 17-11842-PBS, 2017 WL 5707528, at *7 (D. Mass. Nov. 27, 2017) (holding, in a similar case raising a Suspension Clause challenge to the motion-to-reopen procedure for aliens with longstanding orders of removal recently rendered executable, that "the Immigration Court's procedures typically are an adequate and effective administrative alternative to habeas corpus relief" and "will also likely be adequate for Petitioners"). Making matters worse, Petitioners are now delaying proceedings in the Sixth Circuit—where the Government is seeking to overturn this Court's injunction preventing Petitioners' immigration proceedings from going forward as they normally would, and to narrow aspects of this Court's injunction

that have caused the most significant delays. A preliminary injunction ordering release should not be entered in these circumstances.

To start, Petitioners cannot succeed on the merits because their detention has not been unreasonably prolonged and because the law allows their continued detention. For Petitioners subject to final removal orders (that is, most Petitioners), detention is lawful because there is a significant likelihood of removal in the reasonably foreseeable future ("SLRRFF"). *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Petitioners also receive post-order custody reviews to individually evaluate the need for continued detention. *See* 8 C.F.R. §§ 241.4, 241.13. These rules are well established by *Zadvydas*, and Petitioners' effort to greatly alter the protections of *Zadvydas*—by inventing a bond-hearing process that does not exist, or challenging the agency custody review process—are inconsistent with the Supreme Court's holding and should be rejected.

For Petitioners with reopened removal orders, those with sufficiently serious criminal histories are lawfully subject to mandatory detention under the Immigration and Nationality Act ("INA") during the pendency of their removal proceedings at least until such detention grows unreasonably prolonged—which it has not here. *See* 8 U.S.C. § 1226(c); *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003). Even then, that inquiry must be made on a case-by-case basis—based on the highly individualized circumstances presented by each Petitioner—and cannot warrant

class-wide relief. *See Ly*, 351 F.3d at 271. The Sixth Circuit addressed the rules that apply in these circumstances in *Ly*, and Petitioners' effort to create a new set of rules to apply here should be rejected as inconsistent with that ruling. Further, while Petitioners attempt to challenge mandatory detention on the grounds that their current detention did not begin "when" they were "released" from criminal custody, *see* 8 U.S.C. § 1226(c)(1), that argument ignores the impact of a grant of a motion to reopen. Section 1226(c) is the authority governing detention of criminal aliens in removal proceedings. Petitioners have placed themselves within its ambit by operation of law by reopening their final removal orders and re-entering removal proceedings, rendering them subject to mandatory detention based on their criminal histories, as they would have been had they not been previously ordered removed and were in their initial removal proceedings.

Finally, the public interest favors denying preliminary relief. Congress adopted mandatory detention for certain classes of aliens based on its understanding that "permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." *Demore v. Kim*, 538 U.S. 510, 528 (2003). That concern is heightened now that Iraq has indicated its willingness to accept a return of its citizens, and Petitioners' arguments based on the existence of orders of supervision prior Iraq's changed approach are not persuasive. The

statutes that Petitioners challenge support public safety and reflect Congress's strong public interest in ensuring the prompt completion of removal proceedings and removal of those, like Petitioners who are subject to mandatory detention, who have come to our country from abroad and committed serious crimes here. These interests—reflected in Congress's detention framework—strongly cuts against Petitioners' immediate release.

For these reasons, Petitioners fail to meet the high standard required to support mandatory preliminary injunctive relief, and their motion should be denied.

II. BACKGROUND

Petitioners' Request for Injunctive Relief. Respondents incorporate the background set forth in their prior briefing. ECF Nos. 17, 38, 81, 135. On October 13, 2017, Petitioners filed a Second Amended Class Habeas Petition, which added additional claims based on their detention. ECF No. 118. Petitioners allege that their detention is impermissible under the standards governing post-order detention and pre-order detention, and claim a right to an individualized assessment by a neutral arbiter of whether Petitioners pose a flight risk or danger to justify their detention. ECF No. 118 ¶¶ 127-43.

On November 7, 2017, Petitioners filed another motion for a preliminary injunction, this time on the detention claims raised in the Second Amended Petition. ECF No. 138. In their motion, Petitioners restyle these detention claims as: (1) a

Zadvydas Claim, (2) a Prolonged Detention Claim, and (3) a Section 1226 Claim. They also seek a declaration from the Court that its first preliminary injunction, ECF No. 87, stays the removal of Petitioners who filed motions to reopen prior to obtaining their Administrative Files ("A-files") and Records of Proceedings ("ROPs"). ECF No. 138 ¶¶ 26-28.

In the *Zadvydas* Claim, Petitioners contend that they are being subjected to indefinite post-removal-order detention, held unlawful by *Zadvydas*, 533 U.S. at 701. Petitioners ask that they be ordered released under orders of supervision within 14 days unless the Government provides "individualized evidence" that "ICE has secured travel documents from Iraq for that individual detainee or Iraq has agreed to the repatriation of that detainee without travel documents," and that "[i]t is significantly likely that the individual detainee's immigration proceedings . . . will be concluded within nine months from the date on which the detainee was first taken into ICE custody." *Id.* at 11-12. They also seek a declaration that Petitioners in this group "have provided good reason to believe that their removal is not significantly likely in the reasonably foreseeable future." *Id.* at 11.

In the Prolonged Detention Claim, Petitioners contend that those detained under both section 1231 and under 8 U.S.C. § 1226(c) (providing for mandatory detention of a criminal alien pending a determination of removability) have been

subject to unreasonably prolonged immigration detention. They request declaratory relief and a court order stating:

> Petitioners Usama Hamama, Ali Al-Dilaimi, Qassim Al-Saedy, Abbas Al-Sokaini, Atheer Ali, Moayad Barash, Jami Derywosh, Anwar Hamad, Jony Jarjiss, Mukhlis Murad, Adel Shaba, and Kamiran Taymour, and members of the Detained Final Order and Mandatory Detention Subclasses . . . shall be released under orders of supervision within 14 days unless Respondents by that date either (a) conduct individualized bond determinations in the administrative immigration court system or (b) provide to the Court individualized evidence of danger or flight risk that cannot be mitigated by alternative conditions of release and/or supervision, whereupon the Court shall order a process for individualized hearings for persons for whom such evidence is produced.

Id. at 12.

In the Section 1226 Claim, Petitioners contend that, during reopened removal proceedings, they are subject to detention under 8 U.S.C. § 1226(a)—which provides for discretionary detention or release of non-criminal aliens during removal proceedings—not the mandatory detention of criminal aliens under section 1226(c). They also claim that they are not subject to section 1226(c) detention because they were not placed in such detention "when . . . released" from criminal custody. *See* 8 U.S.C. § 1226(c)(1). They request a declaration that "[t]he mandatory detention statute, 8 U.S.C. § 1226(c), does not apply to individuals in reopened removal proceedings, or to individuals taken into immigration custody months or years after they were released from criminal custody," and an order that "Petitioners Atheer Ali, Anwar Hamad, and Kamiran Taymour, and members of the Mandatory Detention

Subclass . . . receive immediate individualized bond determinations pursuant to 8 U.S.C. § 1226(a)." ECF No. 138 at 12-13.

Petitioners also seek an order "[c]larify[ing] the Court's existing stay of removal so that Petitioners who filed motions to reopen their immigration cases prior to receiving their A-files and Records of Proceedings are protected from removal for three months after receipt of these files . . . and for the time it takes for those motions to be adjudicated." *Id.* at 13.

ICE's Removal Preparations and Efforts. Recent evidence indicates that each Petitioner will either be removed or released from custody upon conclusion of their reopened proceedings. Recent negotiations between the governments of the United States and Iraq have resulted in increased cooperation in removal of Iraqi nationals ordered removed from the United States. Declaration of ICE Deputy Assistant Director John A. Schultz Jr. (Exhibit A) ¶ 4. Travel documents for many Iraqi nationals are now being approved directly by Baghdad, and the travel documents are then subsequently issued by Iraq officials in the United States. *Id.* Since April 2017, the Government of Iraq has issued twelve travel documents. The first eight individuals were removed on an ICE charter in April 2017. *Id.* ¶ 5.

ICE originally had a charter flight scheduled in June 2017 to remove some of the Petitioners that was rescheduled for July 2017 because of the court's temporary restraining order; however, ICE was not able to effectuate that flight due to the

court's July 24, 2017 preliminary-injunction order. *Id.* ¶ 6. Since then, ICE has needed to obtain travel documents for aliens to be removed to Iraq on a case-by-case basis as those aliens are individually excluded from the class. *Id.*

So far in Fiscal Year 2018, ICE has received one travel document for the removal of an Iraqi national under a final order of removal. *Id.* ¶ 7. Several more travel-document requests are now being processed for individuals who have recently been removed from coverage by the preliminary injunction at their request. *Id.* ICE expects to receive travel documents for all individuals that ICE has requested to remove to Iraq. *Id.* The Embassy of Iraq has facilitated interviews of Iraqi nationals to gather information to ensure that those being removed can be resettled more easily. *Id.* The interview process has not increased the time it takes for a travel document to be issued. *Id.* But due to the preliminary injunction in place in this case, interviews of individuals with final orders have been held in abeyance pending an individual's removal from coverage by the preliminary injunction. *Id.*

To minimize the risk of having to ask a foreign government to re-issue or extend an expired travel document, ICE waits until there are no impediments to removal to request a travel document. *Id.* ¶ 8. Thus, ICE currently does not have travel documents for all detained final order Iraqis. *Id.* Of the detained Iraqi nationals with final orders of removal, ICE believes that the central government of Iraq in Bagdad will issue travel documents if the Court lifts the injunction preventing

their removals to Iraq. *Id.* The documentary evidence of these detainees' identity in each alien's official immigration file strongly supports their Iraqi nationality. *Id.*

ICE believes that the removal of these detainees is significantly likely in the reasonably foreseeable future. *Id.* ¶ 9. In the interim, ICE continues to conduct individualized custody reviews as required by law and regulation for aliens subject to administratively final orders of removal. *Id.* A decision to continue detention for removal is communicated to the detainee in a Continued Detention letter; although these letters contain some common language, each detainee's individual circumstances are considered when conducting a custody review and in making a determination regarding whether the alien should continue to be detained. *Id.*

III. LAW AND ANALYSIS

A preliminary injunction is "an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008). A party seeking such relief "must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). "'The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits.'" *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit*

Auth., 163 F.3d 341, 348 (6th Cir. 1998) (quoting *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978)).

The Court should deny Petitioners' request for this extraordinary relief. On the merits, Petitioners fail to show that there is no significant likelihood of their removal to Iraq in the reasonably foreseeable future, that their detention has been unreasonably prolonged under Sixth Circuit law, or that there is any cognizable reason why those with qualifying criminal histories and reopened removal orders are not subject to mandatory detention under section 1226(c). Petitioners fail to show any cognizable irreparable injury arising from their immigration detention, or that the balance of interests favors their immediate release. Finally, Petitioners fail to show any entitlement for extending the Court's first preliminary injunction order.

A. Petitioners Fail to Show a Likelihood of Success on the Merits.

Petitioners are not likely to succeed on the merits of any claim. The Court should deny their preliminary-injunction motion on this ground alone. *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009) (court need not consider other injunction factors when "plaintiff has failed to show the likelihood of success on the merits").

1. **Petitioners Have Not Established a Significant Likelihood of Removal in the Reasonably Foreseeable Future, so Their *Zadvydas* Claim Is Likely to Fail.**

Petitioners claim that their detention under section 1231 is unlawful because there is no significant likelihood of removal in the reasonably foreseeable future.

ECF No. 138 at 40; *see also id.* at 42-47. That claim is baseless, as Petitioners have not been detained for six months and have not established that there is no significant likelihood of their removal in the reasonably foreseeable future ("SLRRFF"). Their argument also disregards the rules for post-order detention set forth in *Zadvydas*.

First, Petitioners have not reached the six-month detention period that the Supreme Court has identified as critical. Aliens with final orders of removal are detained under section 1231 in order to effect their removals. *See* 8 U.S.C § 1231(a)(1), (2) (following the events triggering "the removal period," the government "shall detain the alien"). The initial "removal period" is 90 days. 8 U.S.C § 1231(a)(2). Thereafter, ICE must conduct a custody review for an alien where the alien's removal cannot be accomplished during the prescribed period. 8 C.F.R. § 241.4(k)(1)(I). ICE may release the alien under conditions of supervision at this time if it finds, among other circumstances, that "[t]ravel documents for the alien are not available or, in the opinion of [DHS] immediate removal, while proper, is otherwise not practicable or not in the public interest." *Id.* § 241.4(e)(1); *see id.* § 241.13(g)(2) (providing that if ICE "determines . . . that there is a significant likelihood that the alien will be removed in the reasonably foreseeable future, [ICE headquarters] shall deny the alien's request" and continue to evaluate the propriety of detention or release under 8 C.F.R. § 241.4). Even if released, ICE may later re-

detain the alien if changed circumstances create a "significant likelihood that the alien may be removed in the reasonably foreseeable future." *Id.* § 241.13(i)(2).

Thus, while law permits detention well past the 90-day removal period, it is subject to a limitation to ensure it does not become indefinite. After the presumptively reasonable post-removal-order detention period of six months, "'once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.'" *Rosales-Garcia*, 322 F.3d at 415 (quoting *Zadvydas*, 533 U.S. at 701). As Petitioners acknowledge and this Court has already found, the vast majority of aliens at issue here are either not yet detained or have been detained only since June 11, 2017 or later. ECF No. 87 at 2; No. 138 at 27-29. Their detention has yet to reach the six-month mark as of filing this response, and therefore it is still presumptively reasonable based on length alone. *See Rosales-Garcia*, 322 F.3d at 415. Any other conclusion cannot be squared with *Zadvydas*.

Zadvydas was designed to account for existing immigration procedures, which are well established and provide for a speedy removal once there is a final order of removal and a country of nationality that is cooperating, both of which are present here. At Petitioners' request, this Court has now added in a preliminary ruling a new set of procedures—not required by the INA or the Constitution—that must be satisfied in advance of consideration of a motion to reopen filed by an

individual Petitioner. It is those new procedures that Petitioners requested that have directly led to the period of post-order detention faced by the class members. That period that Petitioners invited should not lead to the court-ordered release of aliens, which would greatly undermine the ability to execute those valid removal orders and create a corrupt incentive for those who lack a viable claim for immigration relief or who would seek to abscond to avoid enforcement of a valid removal order. *See Demore*, 538 U.S. at 521. In short, the delay requested by Petitioners cannot form the basis of a conclusion that the government has imposed prolonged detention. *See Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting) (aliens "have good reason not to cooperate by making their own repatriation or transfer seem foreseeable"); *see also* 8 U.S.C. § 1231(a)(1)(C) ("The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien . . . acts to prevent the alien's removal subject to an order of removal.").

Second, Petitioners have not "provide[d] good reason to believe that there is no" significant likelihood of removal. *Rosales-Garcia*, 322 F.3d at 415. They assert that because they have not seen "individuated evidence that Iraq will accept repatriation of any particular detainee," ECF No. 138 at 44, there is presumptively no likelihood of removal. This is not the *Zadvydas* standard, nor does it logically follow from Petitioners' factual allegations. As they acknowledge, they were previously released from section 1231 custody when Iraq was refusing to accept their

repatriation and, in March, Iraq changed this policy, ECF No. 138 at 43-44, and this whole case began when Petitioners filed emergency motions *to stop their impending removals to Iraq*. *See* ECF No. 87 at 2-3. As Petitioners acknowledge, detaining and staging them for removal uses significant administrative resources, and detention itself is costly. ECF No. 138 at 45, 57. And the parties have repeatedly come to the Court to seek relief from the Court's injunction to enable individual removals. Petitioners offer no rationale for the Government detaining specific Petitioners in June and informing them that removal was imminent, initiating the pre-removal arrangements and detaining them at significant cost, if the Government lacked a reason to believe it could effect their removal. It is fundamentally inconsistent with *Zadvydas* that a stay entered to rectify removals deemed *too speedy* might provide the basis for relief the Supreme Court made available exclusively to individuals whose removals are moving *too slowly*. *See Demore*, 538 U.S. at 530 n.14 ("'[T]he legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow,' and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices[.]").

To the extent the Court finds that Petitioners' allegations would meet their initial burden of providing reason to believe there is no SLRRFF under *Zadvydas*, however, the attached declaration of ICE Deputy Assistant Director John A. Schultz Jr. (Exhibit A) establishes that, but for the stay in place in this case, ICE would obtain

travel documents for detained Petitioners. *See* Ex. A ¶ 8. ICE believes that the central government of Iraq in Bagdad will issue travel documents for detained Iraqi nationals subject to final orders of removal if and to the extent that the Court lifts the injunction that currently prevents removals to Iraq. *Id.* Once a Petitioner's Iraqi identity is verified, Iraq will issue a travel document and conduct an interview with the alien to assist in resettlement in Iraq. *Id.* ¶¶ 5-8

That ICE has not obtained travel documents for Petitioners yet does not indicate that those documents are unavailable. Travel documents for Iraqis are not being obtained through normal processing, but through direct negotiations with the Iraqi national government in Baghdad. *Id.* ¶ 4. These negotations have already resulted in ICE obtaining travel documents for removals of 12 Iraqis who are outside the scope of this Court's injunction. *Id.* ¶ 5. However, ICE waits until there are no impediments to removal to request a travel document, in order to minimize the risk of having to ask a foreign government to re-issue or extend an expired travel document. *Id.* ¶ 8. Thus ICE has not yet obtained travel documents for the Iraqis with final orders in this case, who are subject to the court's stay. *Id.* Even so, the documentary evidence of these detainees' identity in each alien's official immigration file strongly supports their Iraqi nationality, and "ICE expects to receive travel documents for all individuals that ICE has requested to remove to Iraq." *Id.*

¶¶ 7-8. For these reasons, "ICE believes the removal of these detainees is significantly likely in the reasonably foreseeable future." *Id.* ¶ 9.

In addition to this factual basis, the law dictates that there is a significant likelihood of removal for Petitioners. Petitioners are in finite proceedings to reconsider protection from removal to a country willing to accept their removal. Those proceedings will conclude, and Petitioners will then either be removed or released (if they obtain relief or protection from removal). Thus, they are not in the limbo of detained aliens ordered removed and who therefore "could be subjected to a life sentence in prison simply because their country of origin will not have them back," the problem *Zadvydas* and its progeny addressed. *See Rosales-Garcia*, 322 F.3d at 413. Detention during judicial review is necessarily "not indefinite because the end of the litigation provides a definite end point." *Flores v. Holder*, 977 F. Supp. 2d 243, 249 (W.D.N.Y. 2013) (citing *Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008); *Soberanes v. Comfort*, 388 F.3d 1305, 1311 (10th Cir. 2004)). Petitioners' section 1231 "detention is clearly neither indefinite nor potentially permanent like the detention held improper in *Zadvydas*; it is, rather, directly associated with a judicial review process that has a definite and evidently impending termination point"—the completion of their reopening, or reopened removal, proceedings. *Soberanes*, 388 F.3d at 1311.

An alien's "continued detention" while he pursues judicial review of his removal order—though it may be "lengthy"—"is not indefinite." *Prieto-Romero*, 534 F.3d at 1065. Here, there is SLRRFF because Petitioners are "not stuck in a 'removable-but-unremovable limbo.'" *Id.* at 1063. Rather, the government has introduced evidence showing both a system now in place for their removal to Iraq "and that the government stands ready to remove [them] as soon as judicial review is complete." *See id.*(quoting *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 347 (2005)). Petitioners' *Zadvydas* Claim therefore lacks merit.

2. **Petitioners' Prolonged-Detention Claim for 'Individualized, Impartial' Custody Hearings is Squarely Defeated by Sixth Circuit Precedent.**

Petitioners claim that both those detained under section 1231 and those detained under section 1226(c) are entitled under the Due Process Clause, and the that the INA must be construed so as to avoid offending the Due Process Clause, which means "individualized bond determinations in the administrative immigration court system" where detention must be justified based on an "individualized evidence of danger or flight risk." ECF No. 138 at 47-51. This claim cannot succeed under the Sixth Circuit's decision in *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003).

Ly held that a bond hearing may be required for section 1226(c) detainees only where "removal proceedings [are not] concluded within a reasonable time" and where actual removal is not reasonably foreseeable. *Id.* at 270, 273. Petitioners'

claims must fail under *Ly* for two reasons. First, their detention is nowhere near the length which courts applying a reasonableness limitation on section 1226(c) have found problematic. The alien in *Ly* had been in pre-order detention for 18 months, more than three times as long as Petitioners here. *Id.* at 271-72. Other jurisdictions implying a reasonability limitation on section 1226(c) similarly do not find detention unreasonably prolonged until it approaches periods substantially longer than those at issue here. *See Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1220 (11th Cir. 2016) (holding that alien's detention for four years, "at least three-and-a-half of which have been under § 1226(c) detention," was unreasonably prolonged, entitling him to a bond hearing); *Reid v. Donelan*, 819 F.3d 486, 501 (1st Cir. 2016) (holding that 14-month detention had become unreasonable under § 1226(c)"); *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 478 (3d Cir. 2015) (holding that alien's section 1226(c) detention was unreasonably prolonged after 12 months). Thus, Petitioners in section 1226(c) detention cannot succeed on a claim that they are entitled to bond hearings under *Ly*.[1]

Second, Petitioners are not entitled to bond hearings or release under Ly because their "actual removal" *is* "reasonably foreseeable." *See id.* at 273. Ly

[1] Some jurisdictions impose a bright-line limit on pre-order detention at six months, a holding that the Supreme Court is currently considering. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1074 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

explained that, because "[t]he goal of pre-removal incarceration must be to ensure the ability of the government to make a final deportation . . . [t]he actual removability of a criminal alien therefore has bearing on the reasonableness of his detention prior to removal proceedings." *Id.* at 272. Petitioners here are in fact removable. *See* 351 F.3d at 270. In *Ly*, the Court explained, "[a]ctual removal of Ly from the United States was never a possibility" because "Vietnam has not and does not accept deportees because there is no repatriation agreement between the United States and Vietnam." *Id.* at 266 n.1. In contrast, the United States has negotiated a repatriation agreement with Iraq and a system to accomplish such removals is now in place, under which ICE believes it will be able to effect Petitioners' removal once their reopened proceedings conclude. Ex. A at ¶¶ 4-5. Petitioners are in finite immigration proceedings and, upon completion of those proceedings, they will either be removed or released—they are by definition not subject to the indefinite detention that *Zadvydas* prohibits. *See Prieto–Romero*, 534 F.3d at 1065; *Soberanes*, 388 F.3d at 1311 (10th Cir. 2004)).

Petitioners contend that their detention may only be justifed on the basis of an "individualized determination of danger and flight risk." ECF No. 138 at 48. This is incorrect under *Ly* for aliens in section 1226(c) detention, as explained, because they are subject to mandatory detention that is not unreasonable and their actual removal is likely. *See* 351 F.3d at 270, 273. It is also incorrect for aliens in section

1231 custody. Whether an alien poses a danger or flight risk is irrelevant to post-order constitutional limits on detention. "[A]n alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. That is not the case here as there is a likelihood of their removal in the reasonably foreseeable future. Petitioners also claim that their former compliance with conditions of release indicates there is no need to redetain them. ECF No. 138 at 50. Whether or not they were complying with conditions of release that guard against danger or flight risk is irrelevant, as they may be redetained to effect removal when again forseeable. *See id.*; 8 C.F.R. § 241.13(i)(2). Thus, even were Petitioners eligible for the individualized administrative custody review of post-order detention that they request, they would nevertheless not be entitled to release, regardless of other factors, because they cannot show no significant likelihood of removal.

3. **The Section 1226 Claim Lacks Merit, As Petitioners Are Not Entitled to Bond Hearings, Either Due to Length or Timing of Re-detention.**

Finally, Petitioners claim that they should receive immigration court bond hearings because section 1226(c) does not apply to detention after removal proceedings have been reopened—but rather section 1226(a) does. ECF No. 138 at 51-53. Second, they argue that section 1226(c) does not apply to "individuals who were living in the community prior to detention." *Id.* at 53; *see also id.* at 51-53. These arguments fail. Pre-order criminal aliens may be lawfully detained under

section 1226(c) unless and until their detention becomes unreasonably prolonged and there is no significant likelihood of their actual removal. *See Ly*, 351 F.3d at 270. Their detention is not unreasonably prolonged and removal is likely, as explained. Petitioners' attempts to undermine these points lack merit.

First, Petitioners ask the Court to follow the Ninth Circuit in holding that section 1226(a), providing for the discretionary release of non-criminal aliens in removal proceedings, and not section 1226(c), governs individuals who are in reopened removal proceedings. *See Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 948 (9th Cir. 2008). *Casas-Castrillon*, however, does not support Petitioners. That case addressed what statute governs an alien's detention during, and following any remand from, a petition for review of his removal order to the circuit court of appeals—not, as here, during reopened removal proceedings. *See id.* Central to that court's reasoning was that section 1226(c) was intended to govern "during removal proceedings"—as Petitioners with reopened removal proceedings once again are in—as opposed to the "detention of aliens awaiting judicial review of their removal orders," which is not the case here. *See id.* Second, regardless of the specific statutory authority, *Casas-Castrillon* held that the government could continue to detain the alien there—who had been detained for nearly seven years already—because he "face[d] a significant likelihood of removal to Colombia once his judicial and administrative review process is complete." *Id.* As explained *supra*,

Petitioners also face a significant likelihood of removal to Iraq once their immigration proceedings conclude, dictating that even under the reasoning of *Casas-Castrillon*, they are not entitled to release.

Petitioners claim that the factors employed by the magistrate judge in *Ly* for assessing that alien's detention support this argument. ECF No. 138 at 53. However, those factors do not distinguish between initial removal proceedings and reopened proceedings, nor did *Ly* anywhere hold that section 1226(a) was applicable to the pre-order detention of a criminal alien. *See Ly*, 351 F.3d at 268–70. As explained, *Ly* defeats Petitioners' argument because they (1) have yet to be detained for any length approaching the length that the Sixth Circuit in *Ly* or any other jurisdiction imposing a reasonableness limitation on section 1226(c) have found improper; and (2) have a significant likelihood of removal upon completion of their proceedings. *See id.* at 270-73.

Petitioners' second argument that section 1226(c) does not apply to them is based on their claim that they were not taken into ICE custody "when . . . released" from criminal incarceration, *see* 8 U.S.C. § 1226(c)(1), but were previously released on orders of supervision when Iraq was not accepting their removal. ECF No. 138 at 54. They thus ask the Court to follow some jurisdictions imposing restrictions on section 1226(c)'s detention authority to only those criminal aliens taken into ICE custody immediately upon release from criminal detention. *See, e.g.*, *Preap v.*

Johnson, 831 F.3d 1193, 1197 (9th Cir. 2016), *cert. filed*, No. 16-1363 (May 11, 2017); *Saysana v. Gillen*, 590 F.3d 7, 18 (1st Cir. 2009).[2] Other jurisdictions and the BIA, however, have rejected this reading of the statute. *See, e.g.*, *Sylvain v. Att'y Gen. of U.S.*, 714 F.3d 150, 157 (3d Cir. 2013); *Hosh v. Lucero*, 680 F.3d 375, 384 (4th Cir. 2012); *In Re Rojas*, 23 I. & N. Dec. 117, 124 (BIA 2001).

However, the Court need not address this division because the meaning of "when . . . released" is not relevant to this situation. Section 1226(c) is the authority governing detention of criminal aliens in removal proceedings. *See Demore*, 538

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[2] In this vein, Petitioners cite a case from this district where the court held than alien was not subject to section 1226(c) detention because he was not taken into custody "within a reasonable period of time" following his release from criminal custody. *Rosciszewski v. Adducci*, 983 F. Supp. 2d 910, 916 (E.D. Mich. 2013). That case is distinguishable. The alien there was placed in deportation proceedings in 1994 due to an August 1982 conviction for possession of cocaine, but those proceedings were administratively closed in 1998. *Id.* at 913. However, when he applied for naturalization in 2013, DHS discovered that he had a 2002 marijuana conviction (his 30 day sentence was suspended and he only served four hours in jail) and took him back into custody in September 2014 and reopened his removal proceedings. *Id.* This case is markedly different. That alien's proceedings were reopened based on commission of an additional crime serving as a basis for removal, not due to having a final order of removal reopened upon a showing of changed country conditions. He was thus placed into section 1226(c) for purposes of determinining initial removability, not due to operation of law after a removal order was rendered no longer final. Further, unlike that alien, for whom there was an 11-year "gap" between release from the criminal sentence for which he was removable and subject to mandatory detention under section 1226(c), Petitioners here present no evidence that there was such a gap in time between their release from criminal custody and their initial apprehension for placement in removal proceedings.

U.S. at 518. Petitioners have placed themselves within its ambit by operation of law by reopening their final removal orders and re-entering removal proceedings. This case is not concerned with the circumstances of Petitioners' initial transition from criminal custody to immigration detention before they initially obtained their final orders of removal.[3] Rather, the arrest that precipitated this case was Petitioners' recent re-detention for purpose of removal under 8 U.S.C. § 1231(a). After all, all petitioners in this case by definition "had final orders of removal on June 24, 2017, and . . . have been, or will be, detained for removal by ICE." ECF No. 87 at 33. All Petitioners with now-reopened removal orders were necessarily detained for removal under 8 U.S.C. § 1231(a) after having received final removal orders. When their motions to reopen were granted, they were no longer administratively final, *see* 8 U.S.C. § 1231(a)(1)(B)(I), and thus their detention authority reverted to their pertinent pre-order authority: 8 U.S.C. § 1226(c) for those with a qualifying criminal history. Thus, there was no "gap" in custody between criminal incarceration and federal immigration custody; Petitioners transferred from post-order detention under section 1231 to pre-order detention under section 1226(c) by operation of law.

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[3] As noted, Petitioners present no evidence that there was any "gap" between their release from criminal custody and their original apprehension for removal, the period that would implicate any timing issue under section 1226(c)(1). The effect of having their proceedings reopened, after all, is to place Petitioners fully back into the position they were in when removal proceedings were initiated against them. *See, e.g.*, *Verano-Velasco v. Att'y Gen.*, 456 F.3d 1372, 1372 n.1 (11th Cir. 2006).

For this reason, this case does not implicate the concern some courts have found with reading section 1226(c) to authorize mandatory detention when an alien is apprehended following criminal custody for a different reason than the crime underlying his eligibility for mandatory detention and removal. *See, e.g.*, *Saysana v. Gillen*, 590 F.3d 7, 18 (1st Cir. 2009) ("[T]he statute contemplates mandatory detention following release from non-DHS custody for an offense specified in the statute, not merely any release from any non-DHS custody[.]"). Here, however there was no "release" causing the initiation of section 1226(c) detention, nor were Petitioners released from "non-DHS custody." *See id.* There is no concern that DHS is premising mandatory detention on a different intervening period of criminal custody that would not support section 1226(c) detention. *See id.* The passage of time from Petitioners' release from criminal detention until their current immigration detention does not pose this concern. *See In Re Rojas*, 23 I. & N. Dec. 117, 124 (BIA 2001) (noting "strong evidence that Congress was not attempting to restrict mandatory detention to criminal aliens taken immediately into Service custody at the time of their release from a state or federal correctional institution" in holding that apprehension of an alien immediately upon release from criminal custody was not a precondition for mandatory detention under section 1226(c)); *see also Hosh v. Lucero*, 680 F.3d 375, 384 (4th Cir. 2012) (holding "that the BIA's interpretation of

§ 1226(c) in *Rojas* was reasonable, and must be afforded deference"); *Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150, 157 (3d Cir. 2013).

Even were the Court to reach the issue of the meaning of "when . . . released" in section 1226(c)(1), which, as noted, is irrelevant here, it should follow the reasoning of those jurisdictions holding that this language does not impose a temporal restriction on the commencement of mandatory criminal-alien detention. Section 1226(c) has a public-safety purpose. "Congress adopted the mandatory-detention statute against a backdrop of rising crime by deportable aliens." *Sylvain*, 714 F.3d at 159. The First and Ninth Circuit's interpretation "would lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline. This reintroduces discretion into the process and bestows a windfall upon dangerous criminals." *See id.* at 160-161 (citing *United States v. Montalvo-Murillo*, 495 U.S. 711, 719–20 (1990)).

Moreover, Petitioners' policy argument supporting their claim for release are baseless. They claim that "[w]hen an individual is taken into custody immediately upon release from criminal custody, there will be little evidence available, making a hearing" as to whether "she is not a flight risk or a danger unlikely to result in release," unlike where such "an individual has been living in the community," and presumably creating such evidence. This argument falls flat because section 1226(c)

at the outset undisputedly—even in jurisdictions imposing individual custody hearings later if such detention grows prolonged—is based on Congress's determination that aliens with qualifying criminal histories categorically present danger or flight risks warranting detention, *not* upon individualized evidence of danger or flight risk. *See Demore*, 538 U.S. at 528 (explaining that, based on the evidence, Congress could categorically determine that "permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully"). "Congress designed the statute to keep dangerous aliens off the streets . . . by eliminating discretion, thereby preventing the release of those aliens who are most likely to skip town and to continue breaking the law." *Sylvain*, 714 F.3d at 160. That Petitioners may previously have been released from section 1231 custody after receiving final orders of removal during the period in which Iraq refused to repatriate them does not undermine this categorical determination of the need for detention. That post-order release was constitutionally dictated by a different concern: the lack of SLRRFF under *Zadvydas*. *See* 8 C.F.R. §§ 241.4(e)(1), 241.13; *Ly*, 351 F.3d at 270. Importantly, the concern for absconding arises because Iraq recently changed its policy and Petitioners' removal orders are likely to be enforced, a situation that did not exist when Iraq was not cooperating and therefore their release was required under *Zadvydas*.

Moreover, Petitioners' argument ignores that there is an immediate individualized hearing available to a section 1226(c) detainee who believes he is improperly subject to mandatory detention. Immigration judges have authority to review the ICE's initial determination that an alien is subject to mandatory detention under section 1226(c) at a so-called "*Joseph*" hearing. *See In re Joseph II*, 22 I. & N. Dec. 799, 800 (B.I.A. 1999). A *Joseph* hearing "gives an alien the opportunity to avoid mandatory detention by establishing that he is not an alien, was not convicted of a crime requiring mandatory detention, or is otherwise not subject to mandatory detention." *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011) (citing *Demore*, 538 U.S. at 514 n.3). That there is in fact such an individualized hearing available to aliens wishing to challenge their mandatory detention, regardless of when taken into such detention, undermines Petitioners' argument premised on the assumption that no such hearing would be necessary or have purpose if an alien is taken into section 1226(c) immediately upon release from criminal detention. The availability of such an individualized hearing also underscores why classwide determination of whether Petitioners are properly subject to section 1226(c) detention is inappropriate.

None of Petitioners' arguments that those in section 1226(c) are entitled to immediate bond hearings therefore has any likelihood of success on the merits.

4. Petitioners' Request for an Extension of the First Preliminary Injunction is Unclear, Speculative, and Unsupported.

In their motion, Petitioners also request that the Court "clarify" its existing preliminary injunction to extend its temporary protection from removal to "Petitioners who filed MTRs before receipt of their" A-files and ROPs "until they have an opportunity to submit motions to supplement or reconsider their earlier motions, and for the time it takes for these motions to be adjudicated." ECF No. 138 at 56. They claim that such relief is constitutionally mandated if early-filing Petitioners have their MTRs denied, because, they claim, "Respondents continued to pursue removal for individuals who filed emergency MTRs without" those documents. *Id.* However, Petitioners' claim is too speculative and unsubstantiated to be justiciable or to make the "clear showing" necessary for preliminary injuctive relief.[4] *See* Winter, 555 U.S. at 375.

Petitioners' claim is speculative and hypothetical, and thus nonjusticiable. Petitioners request the extension of the preliminary injunction on a mere possibility: "[i]f, as a result, class members' MTRs are denied[.]" *Id.* They do not point to a single early-filing class member who has in fact had their MTR denied for that

[4] It is unclear what basis Petitioners have for alleging that Respondents have "continued to pursue [their] removal." To undersigned counsel's knowledge, the Government has been abiding by the Court's order staying removal of Iraqis falling within the order's scope.

reason. And this is yet another attempt to slow down well-established procedures that are fully adequate to consider Petitioners' claims—particularly after they have had the opportunity to seek relief and a stay of removal from the immigration courts.

Such speculative harm does not present a justiciable claim within the Court's Article III jurisdiction. Where the threatened "injury is speculative or tenuous, there is no standing to seek injunctive relief." *Grendell v. Ohio Supreme Court*, 252 F.3d 828, 833 (6th Cir. 2001) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). Because Petitioners provide the Court with no basis other than speculation that an early-filed MTR will be denied, much less due to lack of consulting an A-file or ROP, this claim must fail for lack of standing.

Even if Petitioners had standing to assert this claim, it lacks sufficient support to meet the high standard for preliminary relief. "[I]njunctive relief" is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Petitioners fail to make a "clear showing" of such entitlement. The A-files and ROPs provide very little (if any) benefit to the vast majority of Iraqi nationals covered by the injunction. To successfully reopen proceedings, a Petitioner must establish "changed country conditions arising in the country of nationality [where] such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. § 1229a(c)(7)(C)(ii).

Petitioners' A-files and ROPs have limited value to this showing. An A-file includes an individual's historical immigration data, and the ROP is the record of the alien's earlier removal proceedings. Neither would contain new information regarding changed conditions arising in Iraq. *See Devitri*, 2017 WL 5707528, at *7 (explaining that, because the "focus in the motions to reopen is on the changed country situation . . . the need for the A-file is not necessarily persuasive unless an individual can show a specialized need"). And any files that an alien could conceivably need—particularly, the final removal order, applications for relief filed by the alien, and any findings made during prior removal proceedings—should already be in the alien's possession, as the alien was present for his or her previously concluded removal proceedings and was able to submit any admissible applications or evidence during those proceedings and receive all evidence upon which DHS sought to rely in litigating the matter. 8 C.F.R. §§ 1003.32, 1240.7, 1240.11.

Further, Petitioners' recent allegations establish that Petitioners do not require production of these files to successfully file motions to reopen ("MTRs"). According to Petitioners, 145 putative class members filed reopening motions since March 2017 and of the 105 that have been decided, 62 have been granted. ECF No. 118 ¶ 79. Over 80% were filed prior to the injunction ordering production of the A-files and ROPs. *Id.* ¶ 80. This strongly supports the conclusion that possession of these files is unnecessary to both filing a motion to reopen—many Petitioners were

clearly able to, and did, file MTRs prior to receiving these files—and to succeed on such a motion, as the alleged success rate has been 150% percent of the denial rate. *See id.* Indeed, the tension between this class-wide relief requested by counsel (to place any and all barriers in the way of removal) and the interests of individual Petitioners (to promptly seek and have their claims addressed in immigration court so they can either be released or removed) shows why this forum is not well suited to address the concerns of individual petitioners and especially not by adding to the process that has already signficiantly lengthened lawful immigration detention. Further, Petitioners provide no legal basis for now asserting that the preliminary injunction must be extended to provide extra protection to class members who did not think it was necessary to first obtain these files before filing an MTR.

Both due to lack of standing and the absence of factual or legal support for the merits, Petitioners' claim based on receipt of these files cannot succeed.

B. Petitioners Have Not Established Irreparable Harm, and the Public and Governmental Interest Weigh in Favor of Detention.

Petitioners claim that their immigration detention represents irreparable injury warranting immediate equitable relief. ECF No. 138 at 57. This is neither legally cognizable nor irreparable. Further, the balance of equities and public interest support the ongoing detention of Petitioners to ensure public safety and their presence at removal.

Harm that warrants the extraordinary remedy of preliminary injunctive relief must be legally cognizable harm. *See Stanton v. Hutchins*, No. 1:10-CV-74, 2010 WL 882822, at *6 (W.D. Mich. Mar. 8, 2010) (citing *Audi AG v. D'Amato*, 469 F.3d 534, 550 (6th Cir. 2006)); *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1143 (E.D. Mich. 2000), *aff'd*, 60 F. App'x 601 (6th Cir. 2003); *Luxottica Grp. S.p.A. v. U.S. Shoe Corp.*, 919 F. Supp. 1085, 1091 (S.D. Ohio 1995). A request for immediate release from lawfully instituted detention does not constitute a legally cognizable injury. *See Barhoumi v. Obama*, 234 F. Supp. 3d 84, 86 (D.D.C. 2017). Detention of criminal aliens for at least a reasonable period during removal proceedings, or following issuance of a removal order when there is a significant likelihood that removal will occur, is a lawful and constitutional component of the immigration process. *See Demore*, 538 U.S. at 523 ("[T]his Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process."); *Zadvydas*, 533 U.S. at 701.

Additionally, the public interest favors denying Petitioners preliminary relief. Congress adopted mandatory detention for certain classes of aliens based on its understanding that "permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." *See Demore*, 538 U.S. at 528. Petitioners' challenged detention is authorized by statutes designed to

support public safety and ensure that persons who have not established the safety or lawfulness of their presence not be permitted free reign within the country. *See, e.g.*, *Sylvain*, 714 F.3d at 159. Further, while Petitioners argue that failure to abscond when they were previously released on orders of supervision indicates that they are not a flight risk, there was no need to flee the law when their removal orders could not be executed. As the Supreme Court has observed, "by definition the first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility at best." *Zadvydas*, 533 U.S. at 690. The necessary corollary is that, as removal becomes more likely, the incentive to flee—and hence the public interest in preventing removable aliens' flight from the law—increases proportionately. Unless and until the Court determines that Petitioners' detention exceeds Congress's authority to require it, the interests of the public, as reflected in these statutes, oppose Petitioners' immediate release.

A final factor counseling against granting classwide preliminary relief here is that Petitioners' habeas inquiry will turn on the individual circumstances including the length of each Petitioner's detention, the status of her proceedings, the factors influencing the timing of her removal, etc., which render these determinations inappropriate on a generalized, classwide basis. *See Ly*, 351 F.3d at 271 ("[C]ourts must examine the facts of each case, to determine whether there has been unreasonable delay in concluding removal proceedings.")

Petitioners fail to show that any of the factors supporting preliminary injunctive relief weigh in their favor, and their motion should be denied.

C. Petitioners' Claims for Preliminary Declaratory Relief Should Be Dismissed As Noncognizable.

Additionally, the Court should deny Petitioners' claims for preliminary *declaratory* relief. "[P]rior to final judgment there is no established declaratory remedy comparable to a preliminary injunction." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Phillips Petroleum Co. v. U.S. Steel Corp.*, 597 F. Supp. 443, 445 (D. Del. 1984). This is because declaratory relief is inappropriate where it "would not finally determine the rights of the parties," *McGraw-Edison Co. v. Preformed Line Prod. Co.*, 362 F.2d 339, 343 (9th Cir. 1966), as is necessarily the case where its effect would be only provisional and based on only a showing of "likely" merit to the movant's claim. *See Winter*, 555 U.S. at 20. While the "court may order a speedy hearing of a declaratory-judgment action," Fed. R. Civ. P. 57, Petitioners have not requested an expedited full trial on the merits, but rather emergency relief based on an incomplete record. Declaratory relief is unavailable for this purpose.

IV. CONCLUSION

For the foregoing reasons, the Court should deny a preliminary injunction.

Dated: November 30, 2017

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Attorney General, Civil Division

WILLIAM C. PEACHEY
Director

Respectfully submitted,

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Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing Defendants' Opposition To Petitioners' Motion for a Preliminary Injunction on Detention Issues to be served via CM/ECF upon all counsel of record.

Dated: November 30, 2017

Respectfully submitted,

/s/ William C. Silvis
WILLIAM C. SILVIS

Counsel for Respondents

INDEX OF EXHIBITS

A. Declaration of ICE Deputy Assistant Director John A. Schultz Jr.

Exhibit A

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

DECLARATION OF JOHN A. SCHULTZ Jr.

I, John A. Schultz Jr., hereby make the following declaration with respect to the above-captioned matter:

1. I am the Deputy Assistant Director for the Removal Management Division East which encompasses the Asia and Europe Removal and International Operations (RIO) unit as well as the Middle East/East Africa unit within the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs (ICE), Enforcement and Removal Operation's (ERO) Removal Management Division (RMD). The RMD is located at ICE Headquarters in Washington, D.C. RMD provides guidance and assistance to officers attempting to obtain travel documents for foreign nationals who are ordered removed. RMD collaborates with embassies and consulates, as well as with interagency and international networks to facilitate the efficient removal of aliens from the United States. RMD provides nationwide Post-Order Custody Review (POCR) guidance, implements policy and procedures, and is responsible for providing case management support for aliens subject to a final order of removal.
2. I have been employed with ICE since April 2003, and I have worked with ERO since then. From July, 2016 to present, I have been employed as the Removal Management

Division East Deputy Assistant Director in both an acting and permanent capacity.

3. This declaration is based upon my professional knowledge, information obtained from other individuals employed by ICE, and information obtained from DHS records. I am aware of the facts and circumstances of this case and the efforts to arrange for the removal of Iraqi nationals that have been ordered removed from the United States.

4. Recent negotiations between the governments of the United States and Iraq have resulted in increased cooperation in removal of Iraqi nationals ordered removed from the United States. Travel documents for many Iraqi nationals are now being approved directly by Baghdad and the travel documents are then subsequently issued by Iraq officials in the U.S.

5. Since April 2017, the Government of Iraq has issued twelve (12) travel documents. The first eight (8) individuals were removed on an ICE charter in April of 2017. The additional four (4) Iraqis received travel documents making them eligible for commercial travel. All but one of the individuals issued travel documents has been removed. The final individual is scheduled for removal in December 2017 via a commercial flight.

6. ICE originally had a charter flight scheduled in June 2017 that was rescheduled for July 2017 in view of the court's original order; however, ICE was not able to effectuate that flight due to the court's July 24th order. Thus, ICE must obtain individual travel documents on a case-by-case basis as aliens are excluded from the class.

7. So far in fiscal year 2018, ICE has received one travel document for the removal of an Iraqi national under a final order of removal. Several more travel documents requests are currently being processed for individuals who have recently been removed from the class at their request. ICE expects to receive travel documents for all individuals that ICE has requested to remove to Iraq. The Embassy of Iraq has facilitated interviews of Iraqi

nationals to gather information to ensure that those being removed can be resettled more easily. The interview process has not increased the time it takes for a travel document to be issued. However, due to the injunction, interviews of individuals with final orders have been held in abeyance pending an individual's removal from the class.

8. To minimize the risk of having to ask a foreign government to re-issue or extend an expired travel document, ICE waits until there are no impediments to removal to request a travel document. Thus, ICE currently does not have travel documents for all detained final order Iraqis. Of the detained Iraqi nationals subject to final orders of removal, ICE believes that the central government of Iraq in Bagdad will issue travel documents should the court lift the injunction that currently prevents removals to Iraq. The documentary evidence of these detainees' identity in each alien's official immigration file strongly supports their Iraqi nationality.

9. ICE believes the removal of these detainees is significantly likely in the reasonably foreseeable future. In the interim, ICE continues to conduct individualized custody reviews as required by law and regulation for aliens subject to administratively final orders of removal. A decision to continue detention for removal is communicated to the detainee in a Continued Detention letter; although these letters contain some common language, each detainee's individual circumstances are considered when conducting a custody review and in making a determination regarding whether the alien should continue to be detained.

10. Since the filing of this litigation, nationwide ICE has released 13 Iraqis with final orders.

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing is true and correct based upon reasonable inquiry, knowledge, information, and belief.

Executed this 30th day of November, 2017.

John A. Schultz Jr.
Deputy Assistant Director
Removal Management Division
Washington, D.C.