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

USAMA JAMIL HAMAMA, *et al.*,

Petitioners/Plaintiffs,

v.

REBECCA ADDUCCI, *et al.*,

Respondents/Defendants.

Case No. 2:17-cv-11910-MAG-DRG

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

Class Action

PETITIONERS/PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION ON DETENTION ISSUES

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INTRODUCTION AND SUMMARY OF ARGUMENT

It has been six months since Respondents tore hundreds of Iraqi nationals from their families and communities and moved them to detention facilities all over the country. Why? Respondents' explanation is that detention is Petitioners' choice, because in picking between torture or death in Iraq, or the chance to continue their lives in the U.S. by asserting their rights, Petitioners chose the latter. This is wrong. Immigration detention is authorized only when it serves the government's interest in effectuating removal and protecting the public. Petitioners' detention does not serve those interests and therefore its continuation is unlawful. Respondents misread the cases and statutes, which establish three principals:

First, detention must "bear[] [a] reasonable relation to the purpose for which the individual [was] committed." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citation omitted). In the immigration context, where detention's purpose is to assist in effectuating removal, the government must show that removal is significantly likely in the reasonably foreseeable future. Respondents have offered (conclusory) evidence that removal is not impossible. But that is not the standard.

Second, the government may not subject individuals to prolonged civil detention without an individualized determination, by an impartial adjudicator, that detention is needed to serve the government's legitimate purposes. Respondents maintain that, so long as removal could happen someday, there is no limit on how

long they may hold people without providing even this most basic procedural protection. Every court that has considered the question disagrees.

Third, the mandatory detention statute does not apply. Many courts have recognized that 8 U.S.C. § 1226(c) authorizes detention without a bond hearing for individuals in removal proceedings only "when . . . released" from criminal incarceration and only for the "brief" period typically necessary to conclude proceedings. Petitioners' detention is outside § 1226(c)'s text and purpose.

In sum, Petitioners have a strong likelihood of prevailing on their detention claims.[1] The other preliminary injunction factors weigh entirely in their favor.

FACTS

Petitioners' motion was supported by 29 declarations; extensive factual analysis of class members' efforts to reopen their immigration cases; and dozens of (boilerplate) post-order custody decisions, notices of release revocation, and notices denying travel documents. ECF 138-1 to 138-33, Pg.ID# 3398-733. Respondents rely on a lone three-page declaration most striking for what it does *not* say. *See* ECF 158-2, Pg.ID# 4129-32.

It is worth briefly summarizing the evidence:

[1] While Respondents challenge the availability of preliminary declaratory relief, Opp'n, ECF 158, Pg.ID# 4124, in deciding a preliminary injunction, the Court is empowered to, and must, make preliminary legal and factual conclusions. *Nat'l Viatical, Inc. v. Universal Settlements Int'l, Inc.*, 716 F.3d 952, 956 (6th Cir. 2013).

Length of Detention: Petitioners' Zadvydas *and Prolonged Detention Claims*

- Petitioners have established that, although they have strong claims against removal and many are likely to win both reopening and their merits cases, they face months or years of additional incarceration because of the time this process requires. Decls. of Schlanger ¶¶ 25-27, ECF 138-2; Free ¶¶ 14-18, ECF 138-23; Maze ¶¶ 11-22, ECF 138-21; Bajoka ¶¶ 14-17, ECF 138-20; Abrutyn ¶¶ 14-18, 37, ECF 138-18; Realmuto ¶¶ 11-24, ECF 138-28; Scholten ¶¶ 10-32, ECF 138-29. *See* Exh. 33 (exemplar BIA letter, issued in dozens of cases, granting DHS until Dec. 29, 2017 to reply to amicus brief filed Oct. 16).

- Respondents present no contrary evidence; in their recently-filed Sixth Circuit brief they concede that Petitioners' immigration proceedings will take "many months if not years." Appellants' Brief at 14, No. 17-2171 (6th Cir.).

Petitioners' Zadvydas *Claim*

- Petitioners have established that they were living in the community under orders of supervision because Iraq would not accept their repatriation. Attempts by Petitioners to obtain Iraqi travel documents, even recently, were denied. Named Petitioner Decls., ECF 138-3 to 138-16; Bajoka Decl. ¶¶ 5, 13, ECF 138-20; Andrade Decl. and Ex. E, ECF 138-22.

- Respondents admit that Iraq has issued travel documents for only a handful of individuals, and do not even describe these individuals as class members (some or all may be recent entrants). Schultz Decl. ¶ 5, ECF 158-2, Pg.ID# 4130 (travel documents issued for four individuals since this case was filed).

- While "ICE believes" Iraq will issue travel documents for all class members, Schultz Decl. ¶ 8, ECF 158-2, Pg.ID# 4131, Respondents offer no basis for this belief, which runs counter to Iraq's recent refusal to provide documents to individual Petitioners. Moreover, Respondents have previously admitted that repatriation to Iraq is a "time consuming, complicated and costly process." Schultz Decl. ¶ 8, ECF 81-4, Pg.ID# 2008. Their new declaration is silent on how long it will take Iraq to provide documents for the hundreds of detainees ICE seeks to deport, most of whom have lived in the U.S. for decades, many since childhood. *See, e.g.* Decls. of Hamama ¶ 3, ECF 138-6; Barash ¶ 4, ECF 138-11; Derywosh ¶¶ 1-2, ECF 138-12; Hamad ¶ 2, ECF 138-13.

Petitioners' Prolonged Detention and Section 1226 Claims

- Petitioners have established, and Respondents do not dispute, that detainees held under the mandatory detention statute, 8 U.S.C. § 1226(c), have not and will not receive an individualized determination of flight risk or dangerousness, regardless of how long they are detained. Ex. 34, Schlanger Decl. ¶¶ 5-12; Decls. of Barash ¶¶ 21-23, ECF 138-11; Hamad ¶ 19, ECF 138-13. This means that for Petitioners' Section 1226 claim, there are no facts in dispute.

- Petitioners have established that detainees held under 8 U.S.C. § 1231 have not received an individualized determination of flight risk or danger before an impartial adjudicator. Indeed, even the minimal protections of the post-order custody review (POCR) process have been a sham. *See* Named Petitioner Decls. ECF 138-3 to 138-16; Andrade Decl. and Ex. E, ECF 138-22.

- Respondents assert that ICE is "conduct[ing] individualized custody reviews" for detainees with final orders. Schultz Decl. ¶ 10, ECF 158-2, Pg.ID# 4131. Yet Respondents have not stated what factors were considered or otherwise rebutted Petitioners' evidence that POCRs are merely rubber-stamping the government's general decision that class members should not be released. The government has not explained how an allegedly "individualized" process considering the appropriate factors would result in boilerplate denials for class members like Jony Jarjiss, who has no criminal history and who reported for supervision knowing he was likely to be taken into custody. Jarjiss Decl. ¶¶ 11-12, ECF 138-14, Pg.ID# 3501. An "individualized" determination that someone "has a final order of removal" is insufficient.

- Of more than 300 class members detained to date, ICE states that it has released 13 with final orders. Schultz Decl. ¶ 9, Pg.ID# 4131. Significantly, ICE has *not* said that those detainees were released as a result of individualized POCRs. Indeed, ICE has put forward no evidence that a POCR resulted in release of even a single class member. Respondents have not shared the identity of the 13 released individuals, but Petitioners have analyzed the government's data disclosures and found that some were transferred to criminal custody, some won protection from removal (but still have final orders), at least one was released on medical grounds, and at most 8 (likely fewer) *may* have been released through a custody review process. Ex. 34, Schlanger Decl. ¶¶ 13-16.

ARGUMENT

I. Petitioners Are Likely to Succeed on the Merits.

A. *Zadvydas* Claim: Respondents Do Not Rebut Petitioners' Showing that Removal Is Not Significantly Likely in the Reasonably Foreseeable Future

First, Respondents are wrong to argue that Petitioners' *Zadvydas* claim is premature. *Zadvydas* set six months as a "*presumptively* reasonable period of detention." 533 U.S. at 701 (emphasis added). Its core holding is that detention is authorized only when removal is reasonably foreseeable. *See* Resp. in Opp'n to Mot. to Dismiss, ECF 154, Pg.ID# 3967. In any event, two-thirds of the detained class members *have* been held for six months and the others will soon reach that marker. Ex. 34, Schlanger Decl. ¶¶ 26-28.

Second, Respondents do not rebut—and in their 6th Circuit brief confirm—Petitioners' evidence that their cases will take months or years to conclude, only arguing that "the delay requested by Petitioners cannot form the basis of a conclusion that the government has imposed prolonged detention." Opp'n, ECF 158, Pg.ID# 4102. But individuals fighting removal should not be detained indefinitely "merely because [they] seek[] to explore avenues of relief that the law makes available to [them]." *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003).

Third, Petitioners have met their initial burden under *Zadvydas*, because they were previously released based on ICE's determination of non-repatriatability. Respondents therefore must "respond with evidence sufficient to rebut that

showing." *Zadvydas*, 533 U.S. at 701. *See* Resp. in Opp'n to Mot. to Dismiss, ECF 154, Pg.ID# 3966-72. The government's argument that its decision to redetain Petitioners demonstrates that it had "a *reason to believe* it could effect their removal," Opp'n, ECF 158, Pg.ID# 4103 (emphasis added), is flatly inconsistent with *Zadvydas*. Due process requires that the government justify its detention decision, not assert naked good faith. And, contrary to Respondents' suggestion, there is no tension between Petitioners' stay litigation and their *Zadvydas* claim: at the time they were detained, Petitioners were told their removal was imminent, justifying this Court's emergency intervention. Developments since then have raised serious questions about the ongoing applicability of those initial representations to any particular class member. *See Rosales-Garcia v. Holland*, 322 F.3d 386, 415 (6th Cir. 2003) (government failed to meet burden to show foreseeability of removal when it could not produce a repatriation list naming petitioners). Moreover, because the stay enables Petitioners to access immigration court, where proceedings will be lengthy, removal is not likely soon.

Finally, Respondents' "evidence"—a single declarant's statement that his agency "believes" that Petitioners' removal is "significantly likely in the reasonably foreseeable future"—does not meet their burden under *Zadvydas*. The declarant concedes that travel documents must be obtained but gives no estimate for how long this will take. He asserts that "documentary evidence . . . in each alien's official

immigration file strongly supports their Iraqi nationality" and reports that "ICE believes that the central government of Iraq in Baghdad will issue travel documents." Schultz Decl. ¶ 8, ECF 158-2, Pg.ID#4131. However, he fails to offer his sworn agreement to that disembodied belief, which is contradicted by Petitioners' evidence that the Iraqi government has rejected recent requests for travel documents based on insufficient support of Iraqi nationality. Prelim. Inj. Br., ECF 138, Pg.ID# 3368-69. Fourteen current or recent detainees were not even born in Iraq; some are likely to be stateless. It is by no means clear that Iraq or any other country will accept them. Ex. 34, Schlanger Decl. ¶¶ 21-25.

B. Prolonged Detention Claim: Petitioners' Prolonged Detention without a Hearing on Flight Risk and Danger Violates Due Process

1. The Detained Final Order Subclass

Respondents mistakenly assert that the *only* constitutional limitation on post-removal-order detention is that specifically ordered in *Zadvydas*: release where there is no significant likelihood of removal in the reasonably foreseeable future. Opp'n, ECF 158, Pg.ID# 4108-09. But *Zadvydas* expressly stated that even where removal *is* foreseeable, courts should nonetheless ensure that the legitimate purposes of detention are being met: "if removal is reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor *potentially* justifying confinement within that reasonable removal period." 533 U.S. at 700 (emphasis added). *See* Opp'n to Mot. to Dismiss, ECF 154, Pg.ID# 3384-88.

Consistent with this language, the Ninth Circuit has held that "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise serious constitutional concerns," and therefore the statute must be interpreted "as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011) (quotation marks and citation omitted).

Respondents point to no cases supporting their position nor do they seriously contend that the POCRs provide sufficient process.[2] Even if POCRs were sufficient to justify some period of detention, they are facially insufficient to justify *prolonged* detention. *Diouf*, 634 F.3d at 1091 ("at the 180-day juncture, the DHS regulations are . . . not alone sufficient to address the serious constitutional concerns raised by continued detention . . . because they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge").[3] Moreover, the record establishes POCR process deficiencies as applied: (1) some putative class members did not even get POCRs; (2) some who received POCRs did not receive the required

[2] *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003), is inapposite to Petitioners' claim. *Ly* was not about § 1231(a)(6), which provides for discretionary post-order detention, including during litigation of a motion to reopen; *Ly* rather interpreted § 1226(c), which provides for mandatory detention during removal proceedings.

[3] The Ninth Circuit noted that bond hearings should be held even before 180 days for those, like Petitioners, for whom "prolonged detention [has] become[] a near certainty." *Diouf*, 634 F.3d at 1092, n.13.

procedures (e.g. notice and an opportunity to respond); and (3) the results demonstrate a uniform or all-but-uniform policy of denying release. *See* Named Petitioner Decls. ECF 138-3 to 138-16; Andrade Decl. and Ex. E, ECF 138-22; Ex. 34, Schlanger Decl. ¶¶ 13-16.

Respondents' sole evidence on the sufficiency of the POCR process consists of two paragraphs in the Schultz declaration. ICE claims to conduct "individualized custody reviews as required by law," and asserts that despite the "common language" of the denials, "each detainee's individual circumstances are considered when conducting a custody review." Schultz Decl. ¶ 9, ECF 158-2, Pg.ID# 4131. Tellingly, the declarant does not say that the "individualized circumstances" considered were tailored to the essential constitutional inquiry into flight risk or danger. *See Diouf*, 634 F.3d at 1082; *Zadvydas*, 533 U.S. at 690-91. The uniform POCR denials compel the conclusion that these factors were not considered.

ICE also claims that "[s]ince the filing of this litigation, nationwide ICE has released 13 Iraqis with final orders." Schultz Decl. ¶ 10, ECF 158-2, Pg.ID# 4131. But Respondents do not claim that these Iraqis were released through POCRs (or are even class members). Petitioners have offered evidence to the contrary. Ex. 34, Schlanger Decl. ¶¶ 13-16. Even if 13 class members *were* released through POCRs, 13 releases out of more than 300 detained—less than 4%—is far too small a portion to demonstrate constitutional sufficiency. *See Zadvydas*, 533 U.S. at 723 (Kennedy

J. dissenting) (concluding, based on statistics showing a more than 50% POCR release rate, that "the procedural protection here is real, not illusory").

2. The Mandatory Detention Subclass

Nearly all detained class members whose motions to reopen have been granted are being held under 8 U.S.C. § 1226(c) without a bond hearing. Their detention is unreasonable. Respondents' two counter-arguments misread *Ly*. While recognizing that *Ly* imposed a "reasonableness" requirement on detention under § 1226(c), Respondents argue that detention without a hearing is reasonable since it "is nowhere near the length which courts applying a reasonableness limitation on section 1226(c) have found problematic," and class members' "actual removal" is "'reasonably foreseeable.'" Opp'n, ECF 158, Pg.ID# 4107. Both arguments fail.

The mass arrests that prompted this litigation occurred six months ago, on June 11, 2017. Two-thirds of the detained class members—and the same proportion of those with reopened cases—have at this point spent six months or more in detention. Ex. 34, Schlanger Decl. ¶¶ 26-27. Two circuits have held that detention of six months is unreasonably prolonged and requires a bond hearing. *Rodriguez v. Robbins*, 804 F.3d 1060, 1084-85 (9th Cir. 2015), *cert. granted sub. nom.*, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016); *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). Another has found that detention becomes unreasonably prolonged somewhere between six months and one year. *Chavez-Alvarez v. Warden York Cnty.*

Prison, 783 F.3d 469, 478 (3d Cir. 2015). Absent relief from this Court, Mandatory Detention Subclass members will either win their immigration cases (in which case there is no reason to detain them) or, if they lose and appeal, will spend far more than 6 months in detention before their proceedings conclude.

Moreover, although Iraq may have, in theory, agreed to repatriate some unknown number of class members over some unknown period of time, this does not mean that any individual's "'actual removal' is 'reasonably foreseeable.'" Opp'n, ECF 158, Pg.ID# 4107 (emphasis omitted). First, class members who have won their motions to reopen are likely to prevail on the merits. *See* Prelim. Inj. Br., ECF 138, Pg.ID# 3372-75. Second, as Respondents concede, it will be months or years before class members' cases are finally adjudicated. Appellants' Brief at 14.

Moreover, *Ly* did not hold that either of these factors—a specific length of detention or the absence of "actual" removability—is essential to find mandatory detention pending removal proceedings unreasonable. *See*, *e.g.*, *Ly*, 351 F.3d at 272 (lack of a repatriation agreement made prolonged detention "especially" unreasonable). Rather, *Ly* directed assessment of the reasonableness of detention against the backdrop that "any detention . . . must be reasonably related to the goal of the statute." *Id.* at 271 (citing *Zadvydas*, 533 U.S. at 699-700). *See also id.* at 273 ("[C]ourts are familiar with and regularly assess reasonableness."); *id.* at 268 (factors courts consider include "the likelihood of deportation, the potential length

of the detention into the future, the likelihood that release will frustrate the petitioner's actual deportation, and the danger to the community posed by the petitioner if released") (quotation marks and citation omitted). Applying these factors, subclass members' detention without a bond hearing is unreasonable.

C. Section 1226 Claim: Because Petitioners' Detention is Not Authorized by Section 1226(c), They Are Entitled to Bond Hearings

1. *Petitioners' detention under § 1226(c) did not occur "when . . . released" from criminal custody.*

The plain language of § 1226(c) authorizes mandatory detention only for individuals detained upon release from criminal custody. Respondents argue that Petitioners somehow subjected themselves to § 1226(c) by reopening their removal orders, but offer no statutory language to support that argument. *See* Opp'n, ECF 158, Pg.ID# 4113. Because there was a gap between Petitioners' criminal and immigration custody, by its terms, § 1226(c) simply does not apply to them.

Moreover, § 1226(c)'s "public-safety purpose" does not support reading the "when released" language out of the statute. *See* Opp'n, ECF 158, Pg.ID# 4115. Rather, the "when released" clause reflects Congress's judgment about which noncitizens pose such a risk that they should be promptly placed in mandatory detention—i.e., people coming directly out of criminal custody. *See Preap v. Johnson*, 831 F.3d 1193, 1204 (9th Cir. 2016). Respondents' assertion that Congress intended detention without individualized review even for those who have long been living in

the community simply assumes that the statute applies in the first place.[4] Nor do Petitioners pose a heightened flight risk. They have strong incentives to litigate their claims. In any event flight risk is considered during bond hearings, and restrictions, like reporting or electronic monitoring, are available, if necessary. *See* Brané Decl., ECF 138-19, Pg.ID# 3539-44. That some Petitioners may lose their cases cannot justify detaining them without a bond hearing.

2. *Petitioners' detention under § 1226(c) is not authorized under the reasoning of* Casas-Castrillon *and* Ly.

More generally, detention during reopened removal proceedings is best understood to be governed by § 1226(a), not § 1226(c). *See Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008). Respondents try to distinguish *Casas-Castrillon* because there removal proceedings followed a "remand from [] a petition for review of his removal order . . . not, as here, . . . reopened removal proceedings." Opp'n, ECF 158, Pg.ID# 4110. This is a distinction without a difference. The Ninth Circuit's conclusion that § 1226(c) does not apply to "[a]n alien whose case is being adjudicated before the agency for a second time" because "mandatory . . . detention of aliens under § 1226(c) was intended to apply for only a limited time," 535 F.3d at 948, applies regardless of *why* there is a second round of

[4]Respondents' citation to *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999), is inapposite. Opp'n, ECF 158, Pg.ID# 4117. As Respondents acknowledge, *Joseph* hearings address whether the individual is properly classified under § 1226(c); they are *not* individualized hearings on flight risk or danger.

removal proceedings. *Ly*'s approach of avoiding constitutionally infirm statutory interpretations also supports this reading. *See* Opp'n to Mot. to Dismiss, ECF 154, Pg.ID# 3982.[5]

II. Clarification Relating to A-File Production is Appropriate.

Count Seven, regarding motions to reopen filed without necessary documents, seeks a remedy for certain class members based on this Court's inherent authority to supervise the case: clarification of the existing order to protect individuals who filed motions to reopen prejudiced by lack of necessary records. Recent problems with Respondents' production of files highlight the need to ensure that the relief previously granted is effective. *See* Ex. 34, Schlanger Decl. ¶¶ 31-35.

Respondents dismiss the claim as "speculative" because no motion to reopen has been specifically denied due to a lack of the records in A-Files. But, as this Court has recognized, access to those files is a necessary predicate to a competent and effective motion to reopen, and to simultaneously filed merits petitions. 8 C.F.R. § 1003.2(c)(I); Realmuto Decl. ¶ 5, ECF 77-26, Pg.ID# 1886. Moreover, motions to reopen have been denied and are on appeal. Schlanger Decl., ¶¶ 19-21, ECF 138-2,

[5] Respondents wrongly suggest that *Casas-Castrillon* supports continued detention without bond hearings. Opp'n, ECF 158, Pg.ID# 4110-11. In fact, in rejecting an argument under *Zadvydas* that detention was unauthorized because removal would take a long time, the court emphasized the "difference between detention being authorized and being necessary as to any particular person," and held that prolonged detention requires hearings "in which to contest the necessity of . . . continued detention," 535 F.3d at 949—the precise relief requested here.

Pg.ID# 3406. The government has also refused to defer adjudication of motions to reopen until files can be obtained. *See* Pleadings on Deferral of Adjudication of MTR Pending A-File, ECF 107-6 to 107-8, Pg.ID# 2790-2811.

III. All Other Preliminary Injunction Factors Weigh in Petitioners' Favor.

Respondents cannot dispute that "unnecessary deprivation of liberty clearly constitutes irreparable harm." *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1998).[6] Respondents' argument—that Petitioners' detention is lawful, so injury is beside the point, Opp'n, ECF 158, Pg.ID# 4122—confuses the merits with irreparable harm. Both matter: preliminary injunctions are appropriate where there are "serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) (quotation marks omitted). The harm to Petitioners here far outweighs any injury to Respondents. The public interest—which is in following the law and preventing unnecessary incarceration (at considerable taxpayer expense, *see* Schultz Decl. ¶ 8, ECF 81-4, Pg.ID# 2004; Brané Decl. ¶ 13, ECF 138-19, Pg.ID# 3540) likewise weighs in Petitioners' favor.

Respectfully submitted,
Date: December 12, 2017

[6] *See* Named Petitioner Decls., ECF 138-3 to 138-16; Ex. 35, Jahanian Decl. *See also* Chaldean Community Foundation Am. Br. and attached letters, ECF 170 to 170-9.

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

/s/Kimberly L. Scott
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

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

María Martínez Sánchez (NM Bar 126375)
American Civil Liberties Union
of New Mexico
1410 Coal Ave. SW
Albuquerque, NM 87102
msanchez@aclu-nm.org

Judy Rabinovitz (NY Bar JR-1214)
Lee Gelernt (NY Bar NY-8511)
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

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

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2017, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

By: *__/s/Kimberly L. Scott_______*
Kimberly L. Scott (P69706)
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

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TO PETITIONERS/PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION ON DETENTION ISSUES

Exhibit	33	November 29, 2017 Letter from Board of Immigration Appeals *A-number redacted pursuant to ECF 62*
Exhibit	34	Second Declaration of Margo Schlanger (December 12, 2017)
Exhibit	35	Declaration of Arash Jahanian (December 12, 2017)

EXHIBIT 33

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Office of the Chief Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

November 29, 2017

✓Harvey Reiter, Esquire
Tristan Brown, Esquire
Nicci J. Warr, Esquire
Stinson, Leonard, Street LLP
1775 Pennsylvania Avenue, NW, Suite 800
Washington, DC 20006

DHS/ICE Office of Chief Counsel - DET
333 Mt. Elliott Street, Room 204
Detroit, MI 48207

Mariko Hirose
Ann Nee
International Refugee Assistance Project
Urban Justice Center
40 Rector Street, 9th Floor
New York, NY 10006

Judy Rabinovitz
Anand Balakrishnan
American Civil Liberties Union
Foundation, Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Nadine Yousif, Esquire
CODE Legal Aid, Inc.
27321 Hampden Street
Madison Heights, MI 48071

Susan Reed, Managing Attorney
Michigan Immigrant Rights Center
220 E. Huron Street, Suite 600A
Ann Arbor, MI 48104

Michael J. Steinberg, Legal Director
Miriam J. Aukerman, Senior Staff Attorney
Margo Schlanger, Cooperating Attorney
ACLU Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201-3035

Re: Slewa, Laith N.
A[redacted]

Dear Counsel:

The Board of Immigration Appeals received on October 16, 2017, your request to file amicus curiae brief and the brief itself in the above referenced case currently pending at the Board.

Your brief has been accepted and placed in the record of proceedings.

If response is desired, respondent's attorney and the Department of Homeland Security are granted until December 29, 2017, to respond to the amicus brief. The Board asks the Department of Homeland Security and respondents counsel to direct their response to the Board with proof of service on opposing counsel.

We thank you for your helpful participation in this case.

Respectfully,

Mimi Gilliard
Supervisor Case Management Specialist

cc: Christopher Kelly, Chief
Immigration Law and Practice Division
Office of the Principal Legal Advisor
ICE Headquarters
Potomac Center North
500 12th Street, S.W., MS 5900
Washington, DC 20536

Eman Hayat Jajonie Daman, Esquire
Jajonie Daman, P.C.
8424 E. 12 Mile Road, Suite 200
Warren, MI 48093

EXHIBIT 34

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

USAMA JAMIL HAMAMA, et al.,

Petitioners/Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents/Defendants.

Case No. 2:17-cv-11910
Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

SECOND DECLARATION OF MARGO SCHLANGER

I, Margo Schlanger, hereby declare:

1. I make this declaration based upon my own personal knowledge and if called to testify, I could and would do so competently as follows.

2. My qualifications and background are fully set out in my first declaration in this case, dated November 6, 2017, ECF 138-2, Pg.ID# 3402-3410. As it says, I am the Wade H. and Dores M. McCree Collegiate Professor of Law at the University of Michigan Law School, and counsel for all Petitioners/Plaintiffs and proposed counsel for the putative class in the above-captioned case.

3. That first declaration also describes in more detail the available sources of information on which I rely.

4. This declaration addresses six topics:

   a. the number of putative class members currently detained under the purported authority of the mandatory detention provisions of the Immigration and Nationality Act (INA), INA § 236(c), 8 U.S.C. § 1226(c).

   b. the number of putative class members who have been released pursuant to post-order custody reviews (POCRs);

c. the number of class members whose most recent immigration hearings were held in 2015, 2016, and 2017;

d. the countries of birth for all putative class members and potential class members, and issues non-Iraq births may cause for repatriation;

e. the length of detention of putative class members;

f. habeas petitions filed by individual putative class members; and

g. issues relating to court-ordered A-File and Record of Proceedings (ROP) production.

Mandatory Detention

5. Mandatory detention is a statutory bar on bonded release for particular noncitizens in the midst of immigration proceedings, under INA § 236(c), 8 U.S.C. 1226(c). The number of putative class members whose current detention is under the purported authority of this mandatory detention statute changes daily. Some putative class members enter this status when their motions to reopen (MTRs) are granted; others exit when they either win or lose immigration protection or relief.

6. In my first declaration, I explained that as of the government's data disclosure dated October 28, 2017, there were 59 detainees with reopened immigration cases who remained in detention. I stated that "[t]he vast majority" of these class members were being subjected to mandatory detention based on the purported authority of 8 U.S.C. § 1226(c). ECF 138-2, ¶ 31, PgID 3409. This conclusion was based on my frequent contact with dozens of class members' immigration counsel for various purposes, and my conversations with them about their clients, as well as on the fact gathering the entire team did before filing this case's Second Amended Habeas Petition.

7. Based on additional inquiry, I can now estimate with more precision that approximately 90% of the class member detainees who remain in detention after their MTRs are granted but before resolution of their cases are being held under the purported authority of 8 U.S.C. § 1226(c).

8. I make this estimate based on the following: Because of Respondents' data disclosures, we are currently aware of 66 individuals who are currently or were until recently detained *after* getting an MTR

granted. This is the group of individuals who might currently be, or until recently have been, detained under the mandatory detention statute.

9. In the course of fact development for this case, we already had notes recording the mandatory detention status for a few of these specific individuals. By email, I asked the lawyers for each of the rest of the 66 current/former detainees about the basis of their clients' detention. I received many responses, and we now have information for well over half—40 of the 66. All but 3 of those 40—that is, over 90%—are or were (before their reopened immigration cases were recently successfully concluded) subjected to mandatory detention during the course of this litigation. The situations of those 3 vary: one individual has been granted bond, but lacks the necessary money; one has decided to focus on the merits of his case rather than seek bond; and one is held under a different INA provision.

10. Using this information, we now know the identities of at least 27 individuals currently being detained under the purported authority of 8 U.S.C. § 1226(c). We do not have individual information for the additional individuals whose immigration cases are open but who remain in detention. But the just-described inquiry robustly confirms the conclusion I stated in my first declaration—the vast majority of the class members who have open cases and are detained are being held under the purported authority of the mandatory detention statute.

11. There is no reason to think that the individuals for whom we do *not* have specific information differ systematically from those whom we do have information. Assuming that the unknown group are, like the known group, about 90% mandatory detention cases, that means there are currently 50-plus individuals in the putative Mandatory Detention Subclass.

12. In addition, the Mandatory Detention Subclass group is likely to grow over the next several months. As of the last data disclosed to Petitioners by the government, there were 85 MTRs pending in the immigration court or the BIA (some as appeals from the immigration court). Now that the government has produced A-Files and Records of Proceedings (ROPs) as required by this Court's orders, many more MTRs are likely to be filed in the next weeks and months. As the pending or new MTRs are granted, some detainees will bond out of detention, but many more will remain detained under the purported authority of the mandatory detention statute. For example, as set out in the Second Amended Habeas Petition, named

Petitioners Abbas Al-Sokaini and Moayad Barash, upon having their motions to reopen granted, are likely to be subjected to mandatory detention. While individuals will also exit the Mandatory Detention subclass as they win or lose their cases, that is almost certainly a smaller number than the number of detainees who will enter the subclass, because there are fewer currently reopened cases than cases likely to be reopened in the coming weeks and months.

Releases after post-order custody reviews

13. Since this litigation began, remarkably few putative class members whose cases have *not* been reopened—that is, who still have final orders—have been released. In Respondents' Opposition to Petitioners' Motion for a Preliminary Injunction on Detention Issues, Respondents offered the Declaration of ICE Deputy Assistant Director John A. Schultz Jr. (ECF 158-2). This Declaration, dated Nov. 30, 2017, stated "Since the filing of this litigation, nationwide ICE has released 13 Iraqis with final orders." *Id*., at ¶ 10, Pg.ID# 4131.

14. Government data provided to us by Court order is similar; it shows that 14 individuals with no noted MTR grant—that is with final orders of removal—were released from detention.

15. Neither the Schultz declaration nor the data produced by Respondents disclose the basis of these releases. But members of the plaintiffs' counsel team have attempted to find out this information. We were able to contact either the former detainee, family members, or counsel for 9 of the 14 individuals on our list. In the end, we have determined that 3 former immigration detainees were actually not released at all, but were transferred into criminal custody; and 1 was released because of medical issues and apparently without any POCR process. For at least 2, releases occurred after the noncitizen won immigration relief or protection. Only for 3 individuals does it seem possible—though by no means certain, based on the limited information we have—that POCR processes could have led to releases. We have no verified information that the POCR process was the reason for release in those cases. For the remaining 5 we have no information at all. In other words, at most 8, and almost certainly fewer, of the releases happened pursuant to post-order custody reviews.

16. Since this litigation began, there have been about 300 putative class members held in detention. Even if 13 of them were released pursuant to

post-order custody reviews, that's a POCR release rate of 4%. Given, as explained in the preceding paragraph, that many of the releases we have tracked down were *not* POCR releases, the true POCR release rate is almost certainly far lower.

Recent final orders

17. The government's disclosures in this case do not provide full information about the removal order dates for each putative class member. The disclosures include a variable labeled "Comp Date." For the most part, this is the most recent removal order date. There are, however, exceptions. For anyone whose motion to reopen has been granted and whose case is therefore pending without an extant removal order, "Comp Date" seems instead to be similar (though sometimes not identical) to the date the MTR was granted. For anyone whose MTR has been granted, therefore, the "Comp Date" does not provide the removal order date. I have had several conversations about this with Respondents' counsel, and it seems that "Comp Date" is the best that the government can do, in terms of disclosures of removal order dates.

18. Each of Respondents' data disclosures includes new "Comp Date" data. But we have kept the old data, too, so we are in most but not all cases aware of what the removal order date was prior to a recent reopening.

19. In addition, in mid-July we supplemented this information by calling the EOIR 1-800 number; that number includes a recording of the most recent immigration court merits decision and its date. As just explained, the "Comp Date" seems to be the removal order date—in the large majority of cases the "Comp Date" is the same as the decision date available on the EOIR recorded phone number. But the two dates are not always the same, and we do not entirely understand the differences.

20. Nonetheless, because the government has disclosed the "Comp Date" in response to a court order to disclose the date of the final removal order, Table A rests on that data. For the reasons explained in ¶ 17, Table A omits individuals if (a) the "Comp Date" data reflects a recent MTR (since March 2017) rather than the pre-MTR removal date and we do not have the pre-MTR date, or (b) the "Comp Date" data shows a removal date *after* June 24, 2017, because either that information is incorrect or the affected individual is not in the putative class (using either the definition in the Court's July 24, 2017 order or the definition Petitioners have more

recently proposed). In total, there are 10 individuals who have been detained during this lawsuit's pendency for whom we do not know a removal order date. For the remaining 10 individuals with listed "Comp Dates" in 2017, it seems plausible but not certain that their order date truly was in 2017. The information is summarized in Table A.

Table A: Current Class Members' Removal Order Year

Removal Order Year	#	%
< 2008	151	49.5%
2008 – 2014	109	35.7%
2015	12	3.9%
2016	13	4.3%
2017	10	3.3%
Unknown	10	3.3%
TOTAL	305	100%

Countries of Birth

21. Pursuant to this Court's order, ICE has disclosed the country of birth of each individual the government considers an Iraqi national, if that individual had an order of removal on June 24, 2017.

22. Nationality is not simply a matter of country of birth—different countries have different rules about qualifying as a national of that country, both substantive and as a matter of evidentiary basis. An individual thought to be an Iraqi national because he was born in Iraq may have a difficult time proving that, because he lacks a birth record; I understand that many registries in Iraq that once contained such records have been destroyed in recent years.

23. The matter is particularly uncertain for individuals born to Iraqi or mixed parents outside of Iraq. My understanding is that as a technical matter, Iraqi citizenship for those born outside Iraq requires that the father be Iraqi, and that a person born outside Iraq to an Iraqi mother is not automatically considered Iraqi. Regardless of the technical requirements of the law, it may be particularly difficult for individuals born outside of Iraq to be repatriated. Both their country of birth and Iraq may well reject their repatriation.

24. In the course of this litigation, I have learned about individual situations

in which repatriation seems particularly unlikely for these kinds of reasons. For example, I learned just this week about one detained individual whom ICE considers to be an Iraqi and whom ICE has included in its disclosures as a putative class member, but whose removal order specifies removal to Greece. It seems very unlikely that Greece will grant this individual travel papers, and it is unclear whether he could be removed to Iraq, if ICE is able to persuade the immigration court to amend his removal order. His removal is not likely in the reasonably foreseeable future—if ever—and his ongoing detention is therefore serving no purpose.

25. Table B sets out the prevalence of each country of birth among the full set of such individuals ("potential class members"), and the subset on individuals who are currently putative class members—that is, who have been detained by ICE during the pendency of this litigation.

Table B: Country of Birth, Potential and Current Class Members.

Country	Potential AND Current Class Members	Current Class Members
Iraq	**1,366**	**291**
Not Iraq	**58**	**14**
Kuwait	16	3
Greece	8	4
Saudi Arabia	7	2
Jordan	6	1
Afghanistan	4	1
Lebanon	4	2
Syria	2	1
United Arab Emirates	2	
United Kingdom	2	
Bulgaria	1	
Cuba	1	
Egypt	1	
El Salvador	1	
Iran	1	
Pakistan	1	
Turkey	1	
Total	**1,424**	**305**

Time in Detention

26. Two-thirds of the individuals detained during the course of this litigation were arrested on or before (mostly on) June 11 and 12, 2017—precisely six months ago. Table C sets out those and subsequent detentions: column (a) sets out dates every two weeks since the June 12 mass arrests. Column (b) tallies all the detentions that occurred on or before the the stated date. Column (c) lists the number of individuals arrested on or before the stated date and *still* in detention. Column (d) pulls out the individuals who have succeeded in getting their cases reopened, but who are still in detention—for the reasons described in ¶¶ 13-16 above, we know that these are nearly all individuals in the Mandatory Detention Subclass. Column (e) indicates the minimum number of days in detention as of December 12, 2017.

Table C: Time in Detention

(a) Newly detained on or before:	(b) All detained	(c) Still detained	(d) Reopened Case, Still Detained	(e) Minimum Days in Detention, as of 12/12/2017
June 12, 2017	206	186	42	183 (6 mos.)
June 26, 2017	33	29	9	169
July 10, 2017	16	11	1	155
July 24, 2017	16	15	2	141
Aug 7, 2017	4	4	3	127
Aug. 21, 2017	13	12	2	113
Sept. 4, 2017	5	5	1	99
Sept. 18, 2017	0	0	0	85
Oct. 2, 2017	0	0	0	71
Oct. 16, 2017	7	7	1	57
Oct. 30, 2017	3	3	1	43
Nov. 13, 2017	0	0	0	29
Nov. 27, 2017	2	2	0	15
TOTAL	305	274	61	

27. In Table C's columns (c) and (d), comparing the total number of detained (the last row) with those detained on or before June 12 (the first row), it is evident that as of today, two-thirds of the detainees have been in detention

for six months or more: this is true for detainees generally and for the individuals with reopened cases in particular.

Habeas petitions

28. As I described in my prior Declaration, we have systematically tracked current and potential class members' cases in the federal court system. In addition to looking for Court of Appeals Petitions for Review, we recently began tracking habeas petitions. Except where individuals have names too common to allow effective searches, these can be located online using their names, searching information from the U.S. District Court PACER system. I have trained several law and college student volunteers to conduct these name searches and set up alerts, so that we are notified electronically of any habeas matters filed by a class member or a potential class member. Once a search is set up, it runs automatically, once each day. We have set up such a search for each class member detainee and are in the process of setting them up for the non-detained individuals.

29. These habeas searches are not fail proof; names can be spelled differently, and name searches have many false positives, which can be challenging to sort through. Thus we cannot be certain that we are finding every habeas matter related to this litigation.

30. So far, we have located 9 habeas filings. All are pro se, except for the first one listed below, in which the District Court appointed counsel.

- N.D. Ala.
    - Maytham Al Bidairi, 4:17-cv-00824-RDP-JHE (filed May 19, 2017)
    - Hussain Al Kinani, 4:17-cv-01021 (filed June 19, 2017)
    - Hussain Al-Jabari, 4:17-cv-01972 (filed Nov. 22, 2017)
    - Mohammed Al Asady, 4:17-cv-01970 (filed Nov. 22, 2017)
- S. D. Fla.
    - George Phillip Arthur, 1:17-cv-23343 (filed Sept. 5, 2017)

- W.D. Mich.
  - Salman Saiyad, 1:17-cv-00995 (filed Nov. 13, 2017) (motion to transfer case to E.D. Mich. pending)
  - Abidoon Al Dilaimi, 1:17-cv-01037 (filed Nov. 27, 2017)
  - Bassil Yousif, 1:17-cv-01038 (filed Nov. 27, 2017)
- D. Minn.
  - Khalef Abdullah-Hussein, 17-cv-05214 (filed Nov. 27, 2017)

A-File and ROP Production

31. In its July 24 Order, this Court ordered Respondents to produce A-Files and Records of Proceedings to putative class members "as soon as practicable." ECF 87. By subsequent order—ECF 110 (Sept. 25, 2017), ECF 113 (Sept. 27, 2017), ECF 115 (Sept. 29. 2017), ECF 152 (Nov. 21, 2017)—deadlines were set. A-Files and ROPs were to be produced by November 6, 2017 for detained individuals who had already filed Motions to Reopen their immigration cases, by November 27 for the rest of the detained putative class members, and by December 11 for previously detained class members who had filed a motion to reopen. For those class members who have authorized disclosure of their files to class counsel, that production is scheduled to happen today, December 11, 2017. Respondents were also required to provide to class counsel a list of files produced and to whom and when they were produced.

32. The orders provide that for class members with immigration counsel, counsel should receive the files. Class members without counsel may designate who should receive their files. All class members are also allowed to authorize class counsel to receive their files.

33. ICE and the Executive Office of Immigration Review produced these files separately, and mailed them separately: ICE provided the A-Files and EOIR the ROPs.

34. Unfortunately, the productions have been marred by many problems. We have reported these, in detail, to the Respondents. Among the issues:

    a. For a large number of individuals, the A-File, the ROP, or both were

sent to the wrong person—the wrong lawyer, or to the detainee rather than the lawyer. For quite a few of these, one of the files was directed correctly but the other was not.

b. For at least one individual and maybe more, the files were sent to a detention facility that no longer housed the detainee—and were therefore refused and not delivered.

c. For a number of individuals, no information is provided about one or both file productions. For several, the file is noted as "missing." For several others, the ROP is noted as "Sent to DHS for production," with no further information on actual delivery.

d. Many of the lawyers reported a problem with decrypting the encrypted files. At Respondents' request, we have directed them to Detroit Office of Chief Counsel. But it is unclear whether all these problems have been solved.

e. Some of the files the detainees designated to be produced to Petitioners' counsel have not been produced to us.

35. Until problems like these are solved, the affected class member does not in fact have access to his or her files. In addition, for anyone who has already filed a motion to reopen, the delay further prejudices the possibility of supplementation and access during ongoing proceedings.

Pursuant to 28 U.S.C. § 1746, I state under penalty of perjury under the laws of the United States that the above statements are true and correct to the best of my knowledge, information, and belief.

Date: December 12, 2017

Margo Schlanger

EXHIBIT 35

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 ARASH JAHANIAN

I, Arash Jahanian, make this statement under the penalties of perjury of the laws of the United States, and if called to testify I could and would do so competently based upon my personal knowledge as follows:

1. I am a lawyer admitted to practice in the state of Colorado. I am employed as a staff attorney at the ACLU of Colorado.

2. Since August 9, 2017, I have been in regular contact with an Iraqi national in ICE detention whom I will call Mr. A., to preserve his privacy, and with his immigration counsel. Mr. A is a class member in this matter.

3. ICE arrested and detained Mr. A. on June 23, 2017. Since then, Mr. A. has been detained at the Denver Contract Detention Facility operated by the GEO Group in Aurora, Colorado.

4. Throughout his detention, Mr. A. has been experiencing medical issues that he believes are related to his heart, and he has not received adequate medical care. The account that follows is based on what he has told me about his recent medical situation while in ICE custody.

5. Prior to his detention, Mr. A. had suffered three heart attacks and received two heart surgeries, most recently in May 2017.

6. When Mr. A. first contacted me on August 9, he had been suffering from swelling in his right foot and ankle. Thereafter, the swelling exacerbated at points to where Mr. A.'s skin turned black and he felt it was about to break.

7. For the vast majority of the time Mr. A. has been in detention, the only treatment the medical department has provided him is to give him a compression sock and a pillow so

that he could prop up his leg. The medical unit at the facility does regularly check his blood pressure.

8. After filing a number of grievances, Mr. A. saw Dr. Peterson, whom I understand to be the sole physician at the Denver Contract Detention Facility, for the first time on September 2 or 3, 2017. Dr. Peterson examined the ankle and ordered an MRI, which confirmed that Mr. A. had not suffered from any trauma to his foot or ankle. The technician who conducted the MRI said Mr. A. should get a scan to check for blockage, but Dr. Peterson did not order one.

9. The swelling in Mr. A.'s ankle remained a problem, even to the point where it would cause alarm for officers supervising Mr. A. in detention. For example, on September 14, 2017, an officer became concerned about Mr. A.'s ankle and took him down to the medical unit. The officer waited with Mr. A. for approximately three hours. Medical personnel told the officer they would not see Mr. A. and that the officer should not bring Mr. A. down to medical again.

10. On the night of Thursday, December 7, Mr. A. observed that his hands had become purple. He was seen by the medical unit and eventually transported to Denver Health hospital.

11. A doctor at Denver Health conducted tests and found blockage in an artery. He told Mr. A. that his heart was weak and he would perform surgery to insert a stent. However, Mr. A. was then told, without explanation, that he was being taken back to detention. No surgery was performed.

12. Mr. A. was transported back to the Denver Contract Detention Facility midday Friday, and he has been held in general population, where he remains. He is no longer even getting compression socks.

13. Since he was taken to the hospital, Mr. A. has experienced trouble breathing. Both his hands are swollen and purple, and both ankles are swollen. He has also suffered from some lightheadedness. On Saturday, December 9, he reported his worsening condition and asked to be taken to the emergency room, but the nurse at the facility took his vitals and told him she did not see a need to send him to the emergency room.

14. The detention facility has also failed to accommodate Mr. A.'s need for a no-salt diet, even after Dr. Peterson ordered it for him on September 11, 2017. At one point, a kitchen employee told him, "What do you think; we're going to make separate food for you? That's not going to happen." On approximately October 1, the food preparation staff gave Mr. A. a tray with just water in it. Mr. A. has been forced to eat food with salt, against medical orders. According to a form from the facility, Mr. A. is apparently getting a daily diet that contains 2,400-to-2,600 calories and less than 3,000 mg of sodium. Obviously, less than 3,000 mg of sodium per day does not equate to a no-salt diet, which is what Mr. A.'s medical condition requires.

15. Mr. A. has filed numerous grievances for medical treatment throughout his detention, and Dr. Peterson and one official at the facility have told him to stop filing grievances.

16. In addition, I have made numerous attempts to bring Mr. A.'s situation to the attention of officials in charge, both at the facility and with ICE in Washington, DC. These efforts include emails on September 25, November 21, and December 11. Mr. A.'s immigration attorney has also spoken to officials at the facility. We have never received any response beyond something to the effect of "we are looking into it." Mr. Alkadi continues to receive ineffective and substandard treatment.

17. Mr. A. is afraid that he is going to die in detention. I am not a doctor, but in his place, I would be afraid of the same thing. His situation has been bad for months, and has gotten observably worse in recent days. He needs an immediate health intervention or to be released so that he can manage his own health as he has done for years in the community prior to his detention.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.

Executed this 12th day of December, 2017 in Denver, Colorado.

Signature