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

JOINT STATEMENT OF ISSUES

The Court instructed Petitioners/Plaintiffs ("Petitioners") and Respondents/Defendants ("Respondents") to submit the following Joint Statement of Issues in advance of the Court's status conference scheduled for January 11, 2018 (*see* Opinion & Order, ECF 191, PgID 5362).

Given the length of this report, a Table of Contents is included for the Court's convenience.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

1) DETAINEES WITH OPEN INDIVIDUAL HABEAS PETITIONS

Petitioners' Position

Each of the just-certified subclasses does not include detained Primary Class Members who "have an open individual habeas petition seeking release from detention." Jan. 2 Order, ECF 191, PgID 5359-60. This language was not included in Petitioners' original proposed class definition, but was added to address Respondents' arguments regarding comity. Petr's Reply on Class Certification, ECF 175, PgID 4942-44. Specifically, Respondents argued that granting class certification would "strip other courts of jurisdiction over claims currently pending in their own courts." Resp. on Class Certification, ECF 159, PgID 4169. As the Court indicated in its colloquy with Respondents' counsel, that concern can be—and has been—addressed by defining the subclasses to exclude those with pending individual habeas petitions. Transcript of Dec. 20, 2017 Hearing, at 71-73.

There are two issues with respect to detainees who have filed individual habeas petitions: 1) identification of detainees who have filed petitions; and 2) ensuring detainees have a reasonable opportunity to make an informed choice about whether to seek relief from detention through this class action or through an individual habeas petition.

Identification of Detainees Who Have Filed Individual Habeas Petitions

First, as the Court noted at the December 20, 2017 hearing, there needs to

be a mechanism to identify detainees who have filed individual habeas petitions so that they cannot "double dip." *Id.* at 72-73. Individuals must choose either relief from this Court or relief through an individual petition, and it must be clear which detainees will receive the relief ordered by the Court and which will not. Petitioners are currently aware of 21 individual petitions. (A few additional detainees have filed habeas petitions since Petitioners tallied them before the December 20 hearing.) But Petitioners' method for identifying individual habeas petitioners—which involves monitoring PACER for filings by class members—is not foolproof. (For example, PACER does not alert counsel if the spelling of the name is even slightly different from the spelling that was used for the search.) Counsel have become aware on several occasions of individual habeas filings for which no PACER alert was received.

The government, of course, is a Respondent in each of the individual habeas matters, and therefore is in a better position to ensure that all individual habeas petitions are identified. Therefore, as discussed in Section 4, *infra*, Petitioners propose that the government be required to provide both an initial list of all currently pending individual habeas cases, as well as biweekly updates of any newly filed individual habeas actions. Petitioners attach as Exhibit A to this Joint Statement a list of known pending individual habeas cases, to help ensure that a comprehensive list can be assembled. (In addition, most District Courts do not

make immigration habeas filings electronically available except to parties, so occasionally Petitioners may need Respondents' assistance in actually obtaining a filing whose content is not clear from the docket entry.)

Ensuring Detainees Can Make an Informed Choice About Whether to Pursue Relief from Detention Through This Case or an Individual Petition

As briefed in the class certification papers, it is Petitioners' position that "[a]s part of class notice, class members would be informed that they could choose whether to pursue detention relief through individual habeas actions or as part of the class." Petr's Reply on Class Certification, ECF 175, Pg ID 4943.

It appears that all the habeas petitions were filed pro se. As government counsel indicated during the December 20 hearing, such pro se petitions are commonly filed when immigration detainees hit the six-month mark. Transcript of Dec. 20, 2017 Hearing, at 70. Petitioners' counsel have also learned that in several of the facilities with large numbers of detainees, there are "jailhouse lawyers" who have been encouraging detainees to file petitions using standard pro se *Zadvydas* packets. As this Court is well aware, this case raises complex and unusual issues; pro se litigants using form pleadings face daunting odds proceeding on their own.

Detainees who filed prior to this Court's January 2 order could not know the potential impact on their participation in this case. Indeed, conversations with detainees and family members have made it clear that detainees remain confused even after the decision has been issued. Until there is notice to the class about the

implications of filing individual habeas petitioners, there remains a danger that detainees will unwittingly forego protections offered by this Court by filing such petitions. (As discussed in Section 5, *infra*, due to difficulties Petitioners' counsel face in conducting timely Know Your Rights presentations, no such presentations have yet been held; they would not, in any event, substitute for written notice to the class, particularly given that it is not feasible to conduct such presentations in each of the dozens of facilities where detainees are held.)

As Respondents concede, the choice whether to seek relief from the Court or through an individual habeas action "an important legal decision." It is therefore only fair to allow each detainee to make an informed choice now, giving them a reasonable time to respond and withdraw their individual habeas cases if they so choose. Respondents suggest that "[i]t would be improper for class counsel to contact individuals who have filed individual habeas cases, and no notice should be provided that would encourage these individuals to withdraw their habeas petitions in order to join the subclasses." But they offer neither citation nor justification for this position, which would punish individuals for their uncounseled choice. That was not the purpose of the Court's subclass definitions. Rather, the purpose was to ensure that the common relief granted to subclass members did not interfere with orders by other courts. Allowing detainees to make an *informed* decision now about whether to dismiss their individual habeas actions does not interfere with

that objective. Nor does it allow detainees to "double dip." Petitioners are not suggesting that detainees need not make a choice; they ask only that the choice be an informed one.

Petitioners propose that notice should be given to all class members as soon as possible, *see* Section 6, *infra*, and should explain, in plain language, that:

- The subclass definitions exclude those who have open individual habeas petitions, and therefore such detainees will not receive any detention relief granted by this Court.

- Detainees have until a specified cut-off date—Petitioners propose three weeks after the notice is promulgated—to move to dismiss their pending habeas petitions; they will then receive any relief ordered by this Court, but will also be bound by any adverse decisions issued by this Court or by an appellate Court.

- Any detainees who have not moved to dismiss their individual habeas petitions before the cut-off date will be excluded from the subclasses. Detainees cannot subsequently become subclass members.

Petitioners also propose the following procedure after the cut-off date:

- The parties will jointly provide the Court with a list of all detainees who are not members of the subclasses.

- If the government opposes bond hearings for any detainee who has moved to dismiss his/her habeas petition, it can so note in a memorandum to the Court filed a week after the cut-off date. (As these are cases in active litigation, the government should be able to assemble any such information quickly.)

- The government should be given two additional weeks to either conduct bond hearings or release those detainees who have dismissed their individual habeas petitions.

For any detainee who in the future files an individual habeas petition, Petitioners propose essentially the same procedure: after the government notifies Petitioners that the habeas petition has been filed, the government shall provide the detainee with the section of the class notice explaining the impact of such a petition (and shall provide class counsel the date of such notice), and the detainee shall then have three weeks to move to dismiss the petition if that is the detainee's informed choice. The reason for resending the relevant section of the notice is that a detainee who receives a complex notice *now* about multiple issues, including the individual habeas petition issues, is unlikely to remember it when that detainee thinks about filing a habeas petition several months from now. To be sure the choice is, indeed, a knowing one, detainees require notice closer to the decision point.

Once class counsel have received Respondents' list of individual habeas filings (*see* Section 4, *infra*), counsel will attempt to reach out to the individual habeas petitioners to ensure they have received and understood the Class Notice. Respondents assert, again without authority, that "[c]lass counsel should [sic] not in the position to provide this legal advice to individuals who are not members of the subclasses unless they already have an attorney-client relationship." There is no reason offered—and none exists—for this constraint, but in any event, class

counsel intend to offer information rather than advice. Detainees cannot make an informed choice without information.

Finally, as discussed in Section 4, Respondents should also include additional habeas filings in their biweekly reports, and class counsel will attempt to do the same thing going forward.

Respondents' Position

It would be improper for class counsel to contact individuals who have filed individual habeas cases, and no notice should be provided that would encourage these individuals to withdraw their habeas petitions in order to join the subclasses. Petitioners' proposed subclasses specifically excluded individuals who had "an open individual habeas petition seeking release from detention." Class Cert Reply, PgID 4943. Petitioners proposed this modification to the subclasses to address Respondents' argument that certification of the subclasses would violate principles of inter-circuit comity. *Id.* at PgID 4942. Now that the Court has certified the subclasses, however, and has granted preliminary relief to two subclasses, individuals should not be permitted to join the subclasses simply by abandoning their individual habeas cases. Indeed, this would undermine the inter-circuit comity that the modification purportedly sought to protect. *See* Order, ECF No. 191, PgID 5359. Moreover, whether to withdraw an individual habeas petition—based on the assumption that the relief granted by this Court is either the same or preferable to

what may result in the individual habeas case—is an important legal decision. Class counsel should not in the position to provide this legal advice to individuals who are not members of the subclasses unless they already have an attorney-client relationship. Therefore, Respondents propose modifying the court's January 2, 2018 order to exclude from the certified subclasses "an open individual habeas petition seeking release from detention as of January 2, 2018, and those who elect to petition for habeas relief in the future."

- As can be discussed further at the status conference, Respondents do not have a superior method for tracking individual habeas cases filed by class members. To the extent that Respondents are informed of the filings they share an interest with Petitioners in promptly identifying such filings promptly, and will do so.
- At the status conference the parties and Court should discuss the proper treatment of individuals who had pending habeas petitions at the time of the Court's January 2, 2018 order. Respondents do not believe that allowing individuals to withdraw their petitions *after* receiving relief from this Court in the January 2, 2018 order was what the Court intended.

2) CLARIFICATION OF THE DETENTION ORDER

Petitioners' Position

For each member of the Detained Final Order Subclass and the Mandatory Detention Subclass who had been detained for six months or more by January 2, 2018, this Court's order provides that one of three things must occur by February 2, 2018:

1. The government releases the detainee;

2. The government conducts a bond hearing for the detainee before an immigration judge; or
3. The government files with this Court a memorandum objecting to a bond hearing for that particular detainee and supplies evidence specific to that detainee supporting the objection.

For members of the Detained Final Order Subclass and Mandatory Detention Subclass who have not yet been detained for six months, the same three options apply, except that the relevant date is not February 2, 2018, but rather 30 days from when the individual has completed six months of detention.

Only the government knows how many class members fit in each of these three categories. The number of class members falling under the three categories matters for planning purposes.

If the government releases most class members by reinstating their prior orders of supervision, the process is straightforward, requiring little more than for ICE to process the appropriate paperwork for release under supervision. Given that most class members have demonstrated long-standing compliance with orders of supervision, the government could decide that there is no need to go through a bond hearing process at all. Alternately, if the government fails to conduct a bond hearing or file individualized objections, release on February 2 is the default.

If, however, the government intends to conduct bond hearings[1] for the bulk

[1] The government points out that immigration judges may release immigrant detainees on bond, conditions, or their own recognizance, not, technically, on an

of the class members, then the government must proceed promptly with scheduling those bond hearings to ensure that they can be conducted before February 2, 2018. Petitioners and Respondents agree that under the order, it is the government's responsibility to schedule bond hearings. (In Petitioners' view detainees may also, if they wish, request a hearing, or they may wait until February 2, 2018, at which time they will be released if no hearing has been held.) To Petitioners' knowledge, the government has scheduled no hearings to date, although this Court's order was issued a week ago.

The government may be gambling on a stay of this Court's order. *See* Section 9, *infra*. But there is no reason that the government cannot take the steps necessary to comply with this Court's order, while simultaneously pursuing a stay. The government can schedule bond hearings now and—if it so chooses—schedule them towards the end of January. Should this Court or the Sixth Circuit grant a stay, those hearings can be cancelled.

This Court provided a generous month-long implementation period for its order. That is plenty of time to conduct any bond hearings that the government wishes to conduct. The government's position on this issue is unclear. First Respondents assert that "it will not be possible for EOIR to schedule all of the

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order of supervision. The nomenclature does not appear to make any difference to the substance of this Court's order.

bond hearings required under the January 2, 2018 order by February 2, 2018, without moving and delaying the hearings of other detained and non-detained individuals unrelated to this case"—and decline at this point even to commit to being able to carry out bond hearings in an additional 30 days. But a paragraph later, they write, "with the caveat addressed in the previous paragraph, EOIR currently believes that, if it moves the hearings of other individuals, it is able to schedule all of the bond hearings required under the January 2, 2018 order to take place by February 2, 2018—but if Petitioners or class members request continuances, EOIR cannot guarantee that the hearings will be completed by February 2, 2018."

Petitioners have no objection to allowing detainees and their counsel to seek continuances. Petitioners agree that continuances may push bond hearing scheduling past February 2, provided that immigration counsel receive at least 48 hours' notice of the hearings and that immigration counsel (many of whom represent multiple detainees) are not double-scheduled. But if Respondents are claiming a broader inability to comply with the February 2 deadline, that beggars belief. Petitioners lack precise information on class members' detention start dates—but believe that there are about 200 detainees eligible for bond hearings under the January 2 order. (Some of these are also eligible for similar hearings under 9th Circuit precedent.) Bond hearings are frequently conducted by video

teleconference from detention facilities—so they present no logistical difficulties. Some of the immigration courts responsible for these hearings will have only a handful of bond motions. In those few courts with jurisdiction over a large numbers of detainees, the bond hearings could be conducted by visiting judges and the like. For comparison, there are over 60,000 immigration bond motions made annually to the immigration courts.[2]

And of course, the government could obviate any time pressure by releasing individuals on DHS orders of supervision rather than bond. The Court should not allow the government to slow-walk compliance with its order. Similarly, the Court should not countenance a situation where the government fails to schedule hearings in hopes of a stay, and then, several weeks from now if it fails to secure that stay, argues that the detainees should not be released on February 2 because the government cannot complete the bond hearings on time. If the government fails to take the necessary steps to comply with this Court's order and does not schedule bond hearings in a timely fashion, it should live with the consequences of that choice: release of detainees for whom bond hearings are not held.

Finally, with respect to the Respondents' third option—governmental objections to bond hearings—the Court was clear that this is the exception to the

[2] Data derived from Executive Office of Immigration Review, FY 2016 Statistics Yearbook (March 2017), table 1a (Total Immigration Court Receipts, New NTAs). https://www.justice.gov/eoir/page/file/fysb16/download.

rule and that it anticipates only a "small percentage" of cases might merit such objections. Jan. 2 Order, ECF 191, PgID 5344. The Court identified "bad faith tactics that prolong what would otherwise be a relatively brief period of detention" as appropriate grounds for objection. *Id.* While the Court did not preclude the government from relying on other issues for such objections, its discussion of such possible objections suggests that the Court doubts there are many other bases for objection. *Id.* at n.11. The Court was clear that any objections to bond hearings must be based on evidence that is specific to the particular detainee; the government cannot simply reassert the class-wide arguments against bond hearings that the Court has already rejected. Nor, of course, are issues of danger or flight risk a proper basis for objection, as those are to be addressed through the bond hearing process. *Id.* at PgID 5344, 5361.

This Court's order set the same 30 day period for holding bond hearings and for filing objections to such hearings. Jan. 2 Order, ECF 191, PgID 5361. Assuming the government intends to condition release on the posting of bond—and not merely release class members under orders of supervision without a bond hearing—then bond hearings must commence for all subclass members on or before the last date on which the government can object to any particular hearing. As the Order creates a presumptive entitlement to bond hearings and expressly recognizes that at most a small percentage of subclass members may be denied

those hearings, the absence of any sequencing of the dates for objections and for bond hearings is appropriate. However, as noted below, it makes sense from a logistical standpoint for the government to provide a preliminary identification of any subclass member it believes fits into this exceptional third category of detainees not entitled to bond hearings before the February 2 deadline for filing objections. Given that this will cover no more than a few subclass members, an early identification of the relevant individuals should impose no hardship.

To facilitate an orderly process for all concerned, Petitioners respectfully suggest that this Court set some procedural scheduling deadlines. Specifically, Petitioners propose that the Court's January 2 order be implemented as follows:

- By January 16, 2018, the government should identify which detainees it will release without bond hearings, for which detainees it will conduct bond hearings, and for which detainees it will object to bond hearings. (The basis for the government's objection to bond hearings need not be provided until February 2, 2018.)

- By January 17, 2018, the government should notice bond hearings, to be completed by February 2, 2018, for all detainees for whom it intends to conduct bond hearings. The parties should meet and confer as to the content of this notice. Notice should be provided to class counsel, the detainee, and counsel with an appearance in the case.

- The scope of the bond hearings is set by this Court's January 2 Order: the government bears the burden of proving by clear and convincing evidence that a class member poses a danger or flight risk that cannot be ameliorated by conditions of supervision. Absent such a showing, class members should be ordered released.

- The Court should clarify that detainees can seek a subsequent bond hearing if there has been a material change in their circumstances

(e.g., their motion to reopen has been granted). (As a general rule, after there has been an initial bond redetermination, an individual may request a subsequent bond redetermination in writing based on a showing that the individual's circumstances have materially changed since the prior bond redetermination. *See* 8 CFR § 1003.19(e). The same principle should apply here.)

- Detainees may seek a continuance of the bond hearing should they need more time to prepare.

- Detainees may appeal adverse bond decisions to the Board of Immigration Appeals. 8 C.F.R. § 1236.1(d)(3).

Finally, Respondents ask this Court to specifically deny bond hearings to 1) individuals for whom this Court has entered an order lifting the stay of removal (eight people) and 2) individuals who have simply signed forms indicating that they are considering removal. With respect to the first group, Petitioners are not asking that those individuals receive bond hearings or release by February 2. Instead, Petitioners intend to communicate with each of the eight affected detainees to ensure that, in light of the Court's January 2 Order, the detainee still wishes to be removed. (It is clear from communications with the detainees that the coercive pressure of detention has been a major factor in detainees' decisions to request removal.) Should any of those detainees no longer seek removal, Petitioners will bring that issue to the Court for appropriate resolution at that time.

With respect to the second group—those who have indicated a potential interest in removal—the process ordered by this Court does not allow for removal simply upon signing of a form, but rather provides that individuals first meet with

an attorney so that they can make an informed choice. Experience has shown that many individuals, upon meeting with counsel, elect to withdraw their request. There is no basis to deny those individuals the same relief from detention as other subclass members. (In any event, Petitioners are aware of just one individual who has signed the initial form seeking prompt removal and has not either changed his mind or had the stay of removal terminated by this Court—and that single individual will receive counseling very soon. If he decides he does not want to waive the stay, there is no reason to exclude him from this Court's detention relief.)

Respondents' Position

Respondents are still reviewing the Court's January 2, 2018 order and determining the next steps in how to proceed. A few issues, however, raise immediate concerns that Respondents would like to address at the status conference.

First, it will not be possible for EOIR to schedule all of the bond hearings required under the January 2, 2018 order by February 2, 2018, without moving and delaying the hearings of other detained and non-detained individuals unrelated to this case. EOIR believes that it may be able to schedule all of the hearings without needing to reschedule as many hearings of other individuals if provided an additional 30 days to comply with the Court's order. Respondents will have more

current information related to this request by the status conference but want to raise this issue for maximum awareness and consideration by Petitioners and by the Court.

Second, Respondents request clarification concerning whether the Court is requiring that all hearings required under its order be completed by February 2, 2018, even if Petitioners, class members, or attorneys for class members request continuances of their hearing dates. In other words, with the caveat addressed in the previous paragraph, EOIR currently believes that, if it moves the hearings of other individuals, it is able to schedule all of the bond hearings required under the January 2, 2018 order to take place by February 2, 2018—but if Petitioners or class members request continuances, EOIR cannot guarantee that the hearings will be completed by February 2, 2018. Accordingly, Respondents request that the Court either clarify this point or modify the order to account for any continuances requested by Petitioners or class members.

Third, the January 2, 2018 order suggests that immigration judges have the authority to order individuals released under Orders of Supervised Release (or "OSUPs"). Immigration judges have the ability to order an immigration detainee released on bond, conditions, or his or her own recognizance, but they do not have the authority to do so under OSUPs, which are only permitted by statute and regulation to be ordered by DHS. *See* 8 U.S.C. § 1231(a)(3)(A). This clarification

is important because, even if Respondents request a stay of proceedings pending a potential appeal to the Sixth Circuit, it is likely that some bond hearings will occur before the stay is addressed by the court.

Finally, Respondents seek clarification from the Court that individuals who have pending requests to opt out or have filed stipulated orders to opt out of the relief provided under the preliminary injunction entered on July 24, 2017 are not entitled to bond hearings under the January 2, 2018 order.

3) MANDATORY DETENTION SUBCLASS BOND HEARINGS

Petitioners' Position

Petitioners brought two claims on behalf of the Mandatory Detention Subclass: a Prolonged Detention Claim and a 1226 Claim. In its January 2 Order this Court addressed both. With respect to the Prolonged Detention Claim, the Court followed *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), and *Casas-Castrillon v. Dep't of Homeland Sec.*,535 F.3d 942, 949 (9th Cir. 2008), to hold that detention cannot be prolonged without individualized determinations of flight risk or dangerousness, and accordingly ordered the process for release, bond hearings or objections. Jan. 2 Order, ECF 191, PgID 5337. With respect to the 1226 Claim, this Court held "[b]ecause § 1226(c) does not apply to those who have their motions to reopen granted, or who were living in the community for years

prior to their immigration detention, those purportedly being held under § 1226(c) are deemed to be held pursuant to § 1226(a).” Jan. 2 Order, ECF 191, PgID 5341. Individuals who are held under § 1226(a) are statutorily entitled to bond from the outset of that detention,[3] and are frequently released after only a few days.

For any member of the Mandatory Detention Subclass who has reached six months of detention, the Court’s Order setting out relief on the Prolonged Detention Claim fully covers the bond hearing issue. But for the Mandatory Detention Subclass members who have not yet been detained for six months, the statutory holding on the 1226 Claim just quoted entitles them to an *immediate* bond hearing, if they request one. Petitioners accordingly request that the Court specifically so order, providing that Mandatory Detention Subclass members are entitled to immediate bond hearings upon request, and should therefore be released if the government does not afford that bond hearing within a reasonable time.

Respondents agree that “[i]ndividuals detained under 8 U.S.C. § 1226(a) are eligible to request bond redetermination hearings at any time after they are detained up and until an administratively final order of removal.” However, it is unclear to Petitioners whether Respondents are referring to individuals who have won motions to reopen and are not purportedly subject to Section 1226(c) (of

[3] Section 1226(a) provides in relevant part that noncitizens “detained pending a decision” on their immigration case, may be “release[d] . . . on—(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole.”

whom there are just a handful), or whether the government is referring to members of the Mandatory Detention Subclass, whom Respondents have detained under the purported authority of Section 1226(c).

With respect to individuals who are have won motions to reopen and are not purportedly subject to Section 1226(c), those individuals are not members of either the Detained Final Order Subclass or the Mandatory Detention Subclass, and hence are not affected by this Court's order; they are already entitled to bond hearings as a matter of law. However, if the government is suggesting that the Mandatory Detention Subclass is unaffected by this Court's order, that is wrong. Mandatory Detention Subclass members are entitled to relief both on their Prolonged Detention Claim (i.e. the same process that the Court set out for the Detained Final Order Subclass) and on their 1226 Claim (i.e. bond hearings under Section 1226(a) prior to six months).

Respondents' Position

To the extent that Petitioners are requesting clarification that the Court's January 2, 2018 order did not intend to eliminate the statutory right to a bond hearing before six months for individuals detained under the discretionary detention authority at 8 U.S.C. § 1226(a), Respondents agree that this group is unaffected by the Court's order. Individuals detained under 8 U.S.C. § 1226(a) are eligible to request bond redetermination hearings at any time after they are

detained up and until and administratively final order of removal. During this hearing, the individual has the burden of showing by a preponderance of the evidence that he or she is entitled to release based on the factors and standards set forth by regulation and case law.[4] Accordingly, this group is not included within the Court's order and, if these individual detainees request bond hearings, they may receive bond hearings pursuant to regulations before, or after, the February 2, 2018 deadline that applies to the two subclasses.

4) SUPPLEMENTAL DATA REQUEST

Petitioners' Position

So that Petitioners can monitor the Government's compliance with the January 2 Order, Petitioners request that Respondents be ordered to produce the following data:

A. One time, for all currently-detained class members, by January 18 and then included in the existing bi-weekly disclosure for new detainees:

- Date detention started
- For any detainee whose motion to reopen has been granted, statutory basis for detention
- Name, A-number, court, and docket number of all currently pending habeas actions filed by any detained class member (one time only)

[4] Once a detainee has had a bond redetermination hearing, he/she must show changed circumstances to merit a new hearing. 8 C.F.R. § 1003.19(e).

B. Bi-weekly

- Reason for any releases from detention
- Date of any releases from detention
- Name, A-number, court, and docket number of any new habeas actions filed by any detained class member

C. Weekly information about bond hearings

- Date that the government or detainee requested a hearing
- Hearing date
- Hearing court and judge
- Decision date
- Decision
- Bond amount, if any
- Supervision conditions
- Whether either side has appealed or sought a stay
- For any appeal or stay, the outcome and date

Respondents' Position

Respondents' position is that no further reporting should be required at this time. Addressing Petitioners' specific requests for data, Respondents' preliminary are:

- It is unclear what Petitions mean by "detention dates." This could mean full detention history, just the date an individual was detained initially, or just when an individual is detained 180 days. Without more clarity it is difficult for Respondents to assess the burden of providing this information or to determine whether the information is equally accessible to both parties.

- Concerning Petitioners' request for biweekly reporting on detention authority, this requires a manual search of an individual's file to determine. This process is currently being conducted to ensure compliance with the Court's January 2, 2018 order, but providing this information on a biweekly basis would constitute an undue burden. Under the Court's order anyone detained pre-final order is receiving a bond hearing so the distinction

between 1226(a) and (c) is not presently relevant and does not merit additional reporting.

- Concerning the request for reporting on filed habeas cases, this information is equally accessible to both Petitioners and Respondents. At this time PACER serves as the only known method of tracking case filings by class members. Contrary to what Petitioners suggest, just because the government is a respondent in habeas cases does not mean that Respondents will receive prompt notification of a habeas petition filed by class members.

- Concerning Petitioners' request for reporting on bond hearings, EOIR is unable to track bond hearing information for these individuals in a manner that would allow EOIR to utilize its electronic database and report this information accurately. Absent being able to utilize EOIR's electronic system to report this information, EOIR would be required to have each immigration court manually track this information and report it on a weekly or bi-weekly basis. This would be extremely burdensome and time-consuming since this is a nationwide class action and numerous different immigration courts are conducting these bond hearings across the nation.

5) CLASS COUNSEL COMMUNICATIONS WITH DETAINEES

Petitioners' Position

To provide effective representation, class counsel must communicate with class members, explaining updates in this litigation and obtaining information. But communication is rendered far more difficult because the class is in Respondents' custody. One essential communication method is in-person group presentations. There are several facilities in which there are more than a dozen class members; Petitioners' counsel have done a number of in-person question-and-answer sessions at them. These are very important so that detainees can be informed and receive reliable information rather than rumor. Until now, such sessions have been

conducted according to ICE policy/practice governing "Know Your Rights" (KYR) presentations. *See, e.g.*, ICE Performance Based National Detention Standard 6.4, Legal Rights Group Presentations, https://www.ice.gov/doclib/detention-standards/2011/6-4.pdf.

However, two of the ordinary rules governing KYR presentations pose problems. First, under ICE policy, any informational handouts must be prescreened by ICE's lawyers. Now that this case has been certified as a class action, it is particularly inappropriate for Respondents and their counsel to see—and vet—class counsel's privileged communications with the class.

Second, ICE requires 10 days' notice for a KYR session. Only some of the Field Office Directors have been willing to accommodate requests for fewer days' notice, and in practice it can take longer than 10 days before a session can be held. *See id.* at V.A ("The ICE/ERO Field Office Director may allow a presentation to take place on shorter notice at his or her discretion, or when circumstances arise that compel presentations on shorter notice."). As noted above, Petitioners' counsel has, as of yet, been unable to schedule KYR sessions regarding this Court's January 2 order despite having requested several of those sessions in advance of the decision, on December 26, 2017, in the hopes of being able to meet with detainees shortly after it was issued. In light of the fast-moving nature of this litigation, Petitioners request that the Court order ICE to make best efforts to

accommodate this kind of presentation more quickly, as well as to order that the presentations and materials for the class are privileged, and can be shared without screening or pre-approval by ICE.

Alternatively, Petitioners would be happy for counsel's communications with class members to proceed under some different protocol, so long as that protocol allows for large group in-person question and answer sessions with class members, no vetting of written materials by Respondents or their counsel, confidential communications during the sessions, and speedy scheduling at any of the relevant detention facilities.

The parties may be near agreement on this point—Respondents yesterday advised Petitioners to seek meetings that meet these criteria from specific detention facilities, proposing that issues that arise can be addressed as they arise. Petitioners seek a firmer commitment, though: that ICE instruct each facility where class members are held that the facility should (1) allow group meetings between Petitioners' counsel (not limited to named class counsel but the team more broadly), (2) schedule such meetings promptly, and (3) treat them as confidential, with respect to both written handouts and oral content.

Respondents' Position

Petitioners allege that Respondents are unwilling to facilitate visits. In fact, the opposite is true, Respondents have worked with Petitioners to facilitate Know

Your Rights presentations, visits, and even individual phone calls, when the requests are properly made and, even if untimely, Respondents have attempt to accommodate the requests quickly if able. The detention standards provide for group legal presentations or group legal visits – and initially Respondents had not clearly specified to Respondents which procedure it is seeking; Respondents have maintained that they are amenable to working through any requests made pursuant to the appropriate standards, with which Petitioners counsel are well-familiar. The issues Petitioners raise with respect to their most-recent request are due to Petitioners' failure to clearly articulate the type of request they are seeking and to provide all required information. The difference is important because, as discussed herein, it affects what process needs to be followed and what information needs to be provided in accordance with that request.

The three facilities at which Petitioners are seeking to present are each on a distinct set of detention standards: NEOCC (Youngstown) is on PBNDS 2011; Calhoun County is on PBNDS 2008; and Saint Clair is on the NDS. Each of these sets of standards has slightly different requirements related to group presentations on legal rights and associated written materials. *See* PBNDS 2011 Standard 6.4, "Legal Rights Group Presentations"; PBNDS 2008 "Legal Rights Group Presentations"; NDS "Group Presentations on Legal Rights." Although there are different versions of the standards, each set describes the purpose of the legal

rights group presentations as "informing [detainees] of U.S. immigration law and procedures." This is a far broader aim than Petitioners' stated desire to provide legal advice to class members regarding the court's most recent order. Moreover, all versions of ERO's detention standards require group presentations on legal rights to be open to *all* detainees, regardless of the presenter's intended audience, except where a particular detainee would pose a security threat. Thus, if class counsel wants to conduct these meetings under the authority of the group legal rights presentation detention standards, then neither the presentations nor the associated handouts can be privileged—class counsel would waive the privilege if it conducted the presentations openly in accordance with the standards.

There are provisions in the standards for group legal visits: PBNDS 2011 Standard 5.7 part V.J.12; PBNDS 2008, "Visitation," part V.J.13; and NDS, "Visitation," part III.I.13. All versions of the detention standards allow facility administrators to permit "confidential meeting[s] (with no officer present) involving the [legal representative or assistant] requester and two or more detainees," and encourage facilities to grant such requests to the greatest extent practicable. The standards note that such meetings may occur for various purposes, including pre-representational, representational, and removal-related discussions.

Given the different standards and presentation types, Respondents asked

Petitioners to clarify the type of request they were seeking, so that Respondents can proceed with implementing the appropriate procedures to accommodate the requests. As Petitioners have not yet clarified this information with Respondents, this information is not ripe for the court's intervention.

6) CLASS NOTICE

Petitioners' Position

Once this Court has decided how to address the issues of habeas and the bond hearing process, those decisions should be relayed to the class and their immigration counsel via official class notice. As discussed above, those issues are time sensitive, and there is a great deal of confusion both among class members and among their immigration counsel about what steps they must take to secure release. Accordingly, Petitioners propose that, based on the Court's direction at the status conference on January 11, 2018, the parties submit a joint draft class notice, or if they are unable to agree, their respective versions of class notice by 9 am on Tuesday, January 16, 2018. The notice would go out as soon as it is approved by the Court.

Respondents' Position

At the time of the meet and confer, Petitioners had not yet decided whether they wanted to pursue notice to the subclasses. Accordingly, Respondents have not

had the opportunity to review any proposal that may be included in this report by Petitioners with adequate time to respond.

7) CLASS COUNSEL

Petitioners' Position

The Court on January 2 appointed Margo Schlanger and Kimberly Scott as class counsel, and explained that appointment of additional attorneys as class counsel could be addressed at the forthcoming status conference. Petitioners respectfully request that Miriam Aukerman, of the ACLU of Michigan, and Judy Rabinovitz, of the ACLU Immigrant Rights Project, be added as class counsel. They (and their organizations) are essential to effective class representation in this case, and—as the Court's discussion of the class counsel issue demonstrates, see ECF 91, PgID 5357-58—they have established their capacity, expertise, and commitment both in practice and in the biographies previously cited.[5]

Respondents' Position

At the meet and confer, Petitioners' counsel indicated that they intended to ask the Court to appoint Miriam Aukerman and Judy Rabinovitz as class counsel. Respondents do not object.

[5] Miriam Aukerman, http://www.aclumich.org/miriam-aukerman; Judy Rabinovitz, https://www.aclu.org/bio/judy-rabinovitz.

8) ATTORNEYS' FEES

Petitioners' Position

Respondents have apparently backed away from their earlier proposal to burden the Court with ongoing review of Petitioners' counsel's timekeeping. Respondents' Response in Opposition to Mot. for Class Certification, ECF 159, PgID 4171-72. Instead, they now propose a set of abstract limitations on future billing. These matters can be dealt with in due course, if and when a fee petition is filed. Petitioners' counsel are experienced with fee petitions; if Petitioners ultimately prevail, counsel will use billing judgment to ensure that fees requested are reasonable for the work performed, as they have done in other cases. For example, in a recently filed class action fee petition where over $900,000 in fees were awarded, the ACLU of Michigan and co-counsel voluntarily deducted more than 600 hours of attorney time—a 20% reduction—even prior to negotiations, and then deducted an additional 150 hours at the government's request. *See Barry v. Lyon*, 5:13-cv-13195 (E.D. Mich., Levy, J.), ECF 215, PgID 5836. Petitioners anticipate using similar billing discretion here, if and when a fee petition becomes appropriate.[6]

[6] Respondents' onerous proposal would consume significant resources. Petitioners have no objection to keeping detailed time records, which is necessarily done by each individual attorney. However, consolidating the time each attorney has spent, say, on drafting this Joint Statement of Issues into on "project" billing is both unnecessary and cumbersome at this stage of the litigation. Respondents, having

Neither case cited by Respondents supports the type of limitations they are proposing here. The court in *In re Cont'l Illinois Sec. Litig.*, 572 F. Supp. 931, 932 (N.D. Ill. 1983), imposed conditions on attorneys who developed a convoluted organizational structure involving "lead counsel" and "liaison counsel" in a simple shareholder derivative suit in which the legal issues were not "particularly complex." The court imposed no limitations on drafting court papers or researching complex issues of law, such as Respondents seek here. The court in *In re Johnson & Johnson Derivative Litig.*, No. 10-2033(FLW), 2013 WL 11228425, at *14 (D.N.J. June 13, 2013), *adopted* No. CIV.A. 10-2033 FLW, 2013 WL 6163858 (D.N.J. Nov. 25, 2013), did not actually impose *any* recordkeeping conditions on the attorneys involved in that case. Rather, it made its comments in the course of evaluating a fee application submitted by attorneys from six different firms who provided only generalized descriptions of task categories, kept time in markedly different manners inhibiting comparison, duplicated a significant amount of work, and billed paralegal-level work to the highest paid attorney in the firm. As

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Continued from previous page.
themselves assembled a large litigation team, also propose undue limits on the number of attorneys who can seek compensation for particular types of work. For example, Respondents—having had three attorneys argue at the last hearing—argue that Petitioners should be allowed only two. This Court has already recognized "that many laboring oars are required in a nationwide litigation such as this" and that it is to be "expected that a case of this size, moving at an expedited pace, would require a large number of attorneys." Jan. 2 Order, ECF 191, PgID 5358.

previously stated, Petitioners will use billing discretion and diligent recordkeeping. No additional conditions are needed. If Respondents eventually believe any part of Petitioners' billing to be duplicative or wasteful, they can object then. There is no reason at all to adjudicate these kinds of disputes in the abstract and in advance.

Should any additional burden of ongoing attorneys' fee review be imposed, moreover, it should be conditioned on Respondents' stipulation that they will not contest that this is a fee-generating case and that they will be liable for fees associated with the case should Petitioners prevail. (Respondents would, of course, be free to object to the amounts requested.) Respondents should not be permitted to divert counsels' or the Court's attention from the merits and into the minutia of fee filings only to later argue that fees cannot be assessed in any event.

Respondents' Position

Given that an award of fees and costs is a possibility in litigation such as this, Respondents ask that the Court establish an "early framework for an eventual fee award" at this juncture [and] "for monitoring the work of class counsel during the pendency of the action." Fed. R. Civ. P. 23(h) advisory committee's note to 2003 amendment. Guidelines will be useful in this case to provide a "presumptive starting point in determining what is an appropriate award" should an award of fees and costs become proper. *Id.* Courts may use fee and cost provisions to guide class counsel regarding such matters as "the number of attorneys appropriate for

attending depositions, court hearings, court conferences, settlement conferences, conferences with opposing and cooperating counsel, and trial." 5 Moore's Federal Practice § 23.123[1] (3d ed. 2009). Fee and cost provisions may also be used to "provide class counsel with guidance respecting the need for senior attorneys to delegate certain routine matters to more junior personnel," and "what is and is not appropriate in terms of overhead expenses." *Id.; see also* Manual for Complex Litigation (Fourth) at 201 (2004). With these principles in mind, we propose the following initial limitations.

- Class counsel must keep timely, accurate, and complete time records to substantiate the number of hours each fee-charging person devotes to the case and the reasonableness of those fees. The fees should be tracked by project, rather than by individual or organization. The records should be kept in a way that shows the total amount expended for project, such a preparing a specific filing, with specific information about the individuals contribution to the project. *See In re Johnson & Johnson Derivative Litig.*, No. 10-2033(FLW), 2013 WL 11228425, at *14 (D.N.J. June 13, 2013), *adopted* No. CIV.A. 10-2033 FLW, 2013 WL 6163858 (D.N.J. Nov. 25, 2013).
- The Court should establish limitations on the number of individuals presumptively necessary to preform discrete tasks, *see, e.g., In re Continental Illinois Sec. Litig.*, 572 F. Supp. 931 (N.D. Ill. 1983), including the following:
    - Only one attorney may seek fees associated with attendance at each deposition.
    - Only two attorneys may seek fees associated with attendance at each hearing.
    - Only three attorneys (of varying levels of experience - senior, mid-level, and junior) may seek fees associated with the research or drafting of any motion, response, reply or other brief
    - Only two attorneys may seek fees associated with attendance at any settlement conference, mediation or arbitration.

- Fees claimed for work performed will be paid only at a rate commensurate with the level of expertise and skill necessary to perform the work. *Id*.

9) RESPONDENTS' STAY OF THE JANUARY 2 ORDER

Petitioners' Position

In Petitioners' view there is no basis for a stay of this Court's January 2 Order. The stay standard is the same as the preliminary injunction standard—except, crucially, it would be the government, as the stay movant, that would have to demonstrate irreparable harm. *See*, e.g., *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Nothing in the January 2 Order poses any harm on the government, much less irreparable harm; no class member will be released who presents a flight risk or risk to public safety. Indeed, this Court has already found just the opposite: it is Petitioners who will suffer irreparable harm if they unjustly remain in detention. Jan. 2 Order, ECF 191, PgID 5346-47.

The absence of a justification for a stay is underscored by the fact that the January 2 Order's requirement of bond hearings only gives class members what *all* immigration detainees already get in the Ninth Circuit—which has one quarter of

the nation's immigration cases, both as a whole and as to detained cases in particular.[7]

Respondents' Position

Due to the challenges of providing bond hearings to everyone covered by the Court's January 2, 2018 order, and the potential harm caused by the release of some class members on bond or otherwise, Respondents will likely be seeking a stay of this requirement in the near future pending an appeal to the Sixth Circuit.

10) JANUARY 4 ORDER ON A-FILES / ROPS (ECF 195)

Petitioners' Position

Respondents attempt to relitigate several points. Taking them in turn:

Respondents suggest it is impossible to send the A-Files and ROPs electronically. This is incorrect; the files are too big for some email systems, but can be shared (encrypted if desired) using any of many easily available file transfer protocols.

With respect to the Court's order of service on attorneys for Anon-25, Anon-46, and Anon-62, Respondents argue that there is no proper attorney appearance on file.

[7] Data derived from Executive Office of Immigration Review, FY 2016 Statistics Yearbook (March 2017), tables 1a (Total Immigration Court Receipts, New NTAs) and 8 (Immigration Court Initial Case Completions for Detained Cases), https://www.justice.gov/eoir/page/file/fysb16/download.

- Anon-25: Respondents have previously stated "a Notice of Appearance was not entered until December 22, 2017." So that appearance has, indeed, been filed.
- Anon-46: Petitioners possess dated copies of these appearance forms and would be happy to share them with Respondents if somehow the forms have been lost by the government. There is certainly no Privacy Act violation caused by sharing the files, because the sharing is pursuant to Court order. *See* 5 U.S.C. § 552a(b)(11).
- Anon-62: The ROP was correctly produced to the current counsel which suggests there was, indeed, a filed appearance. Again, given the Court order, there is no Privacy Act issue. But if there is a new form Respondents would like filed, Petitioners can facilitate that.

Respondents reargue their prior position about the 90-day clock, but this Court has already fully addressed and rejected their point.

Respondents also reargue the clock issue with respect to Anon-64, Anon-39 Anon-40, and Anon-42. Again, the Court has already fully canvassed this question, rejecting Respondents' position.

Respondents' Position

Respondents would like to address a few of the Court's conclusions in the January 4, 2018 order on A-File and ROPs, ECF 195. First, on page 5 of the order, the Court—citing the earlier November 21, 2017 order on the file production, states: "This Court's order stated that "[t]he Government will inform Petitioners' counsel if any putative class member has submitted Forms deemed inadequate, providing an electronic copy of the Forms and identifying the problem with them." *See* 11/21/2017 Order at 4. *It appears that this was not done here*." ECF 195 (emphasis added). However, Respondents assert that this is incorrect. Respondents

provided timely notice of any forms that were deemed inadequate—a point that Respondents believe Petitioners do not dispute. Accordingly, Respondents want the Court to be aware that they complied with the November 21, 2017 order concerning how inadequate forms were to be treated.

Second, on page 2 of the January 4 order, the Court credits Petitioners' statement that "eight sets of files can simply be electronically sent to counsel of record, thus minimizing any further burden placed on the Government." ECF 195 at 4. To the contrary, many of these files are simply too large to send electronically due to the size of the attachments. For this reason, the only practical way for Respondents to serve these files is via U.S. Mail, FedEx, or a similar courier service on disks or in paper copies. This fact is important to correct moving forward to the extent that Respondents have to serve files in the future.

Finally, the Court appears to have ordered production of files to several attorneys for which Respondents do not have any record of an attorney filing a G-28, an E-27, or E-28, for the filing could not be accepted. Specifically, for Anons 25, 46, and 62,[8] the government does not have a valid notice of appearance. The government does not have a record of appearance for Anon 46, and the attempted filings for 62 and 25 were rejected as improper. For 25, the attorney could have

[8] This issue also would apply to Anons 38, 52, and 53, but petitioners have marked these cases as "resolved" in the spreadsheet attached to their reply. Thus, Respondents and Petitioners are in agreement that no further service is required and the 90-day clock is running.

filed a G-28, but did not do so. For 62, the attorney could have submitted a corrected filing, but has not done so. For 46, the attorney could resubmit the G-28 or provide a copy of the form that was allegedly provided on November 2, 2017. Respondents are not unwilling to serve attorneys of record, but cannot do so when appearances have not been properly entered or received. As Respondents have previously briefed to this court, Respondents legally cannot provide the A-file to a party other than the alien unless there is a valid privacy waiver or valid attorney appearance on file. *See* Respondent's August 30, 2017, Status Report at 24-25, ECF 96. Respondents therefore request to be relieved of the obligation to serve these files until the attorney appearances are corrected. Respondents also request, that for 46 and 62, in which the files have been served, that the 90-day clock should not be suspended due to the attorney's failure to enter the appropriate appearance form in the appropriate place. For 25, no service has yet occurred so Respondents agree that the 90-day clock has not started to run. Respondents can serve the attorney once a proper appearance is entered.

Further, on several cases that petitioners continue to dispute, the reason a file was not provided to an attorney who entered an appearance shortly before November 27, 2017, was because the A-file had *already* been served before the appearance was entered. Thus, Respondents served the appropriate party at the time of service. While Respondents can provide courtesy copies to these late-filed

appearances, Respondents disagree that the 90 day clock should not start until the late filers have been served, as the court's order has unintentionally penalized Respondents for providing some files prior to November, 27, 2017, as Respondents stated they would endeavor to do in light of Petitioners' representations that the files were urgently needed. Furthermore, Petitioners have not alleged that counsel for these individuals have even tried to procure the files from their respective clients, or that they have been unable to do so. Specifically, Respondents have identified this issue regarding Anons 64 (A-file produced to detainee on 11/20, multiple attorney appearances were entered on 11/22, the multiple appearances were not withdrawn until after 11/27); 39 (A-file produced to detainee November 21; appearance not entered until 11/24); 40 (A-file served to detainee on November 21, 2017; appearance entered on 11/27); and 42 (A-file served on detainee on 11/24, same day appearance was entered). Respondents should not be penalized for cases at which the file was provided to the appropriate recipient at the time of service and an attorney appearance was not entered until after service was completed.

Respondents do not have any record of an attorney filing any of these three forms and, accordingly, did not serve these attorneys with the immigration files for these for individuals. Respondents therefore request to be relieved of the obligation to serve these files.

11) MOTIONS TO REOPEN DENIED PRIOR TO A-FILE/ROP

Petitioners' Position

Petitioners and Respondents are close to agreement on this issue, on which the Court ordered and received supplemental briefing (ECF 193, 194, 197). The parties now agree that this Court's July 24 Order should be modified to allow class members time to supplement the record if motions to reopen filed prior to transmittal of A-Files or ROPs are denied by the Board of Immigration Appeals; individuals should receive 90 days after such transmittal to file a new motion to reopen, motion to reconsider, or similar motion.

What is left is implementing language. The remaining contested text is in bold and brackets:

> In the event that a motion to reopen filed prior to transmittal of the A-File and ROP is or has been denied in the Board of Immigration Appeals (whether filed in or appealed to the BIA), the stay of removal shall not terminate until {Pet'r: **both** / Resp. **either**} (i) ninety days following transmittal of the files {Pet'r: **and** / Resp. **or**} (ii) final resolution of any new motion to reopen, motion to reconsider, or similar motion filed in immigration court or the BIA, or, if such a motion is the subject of a petition for review in the United States Court of Appeals, the denial of a motion for a stay by the United States Court of Appeals. For the stay for removal to apply to any motion filed under (ii) above, however, such motion must be filed within the time period described in (i).

Petitioners' proposed "both/and" language is designed to ensure that if an individual does file such a motion to reconsider, etc., the stay of removal remains in effect until that motion is finally resolved.

Respondents' Position

Following the Court's January 3, 2018 order on this issue, and the supplemental briefing by Petitioners and Respondents, the parties have been communicating about the appropriate clarification of the Court's July 24, 2017 order for this group of individuals. Respondents' current proposed language is provided below:

- "In the event that a motion to reopen filed prior to transmittal of the A-File and ROP is or has been denied in the Board of Immigration Appeals (whether filed in or appealed to the BIA), and the alien files a new motion to reopen, motion to reconsider, or similar motion filed in immigration court or the BIA within ninety days of receiving his or her transmittal of the A-file and ROP, the stay of removal period will apply until final resolution of any new motion to reopen, motion to reconsider, or similar motion filed in immigration court or the BIA, or, if such a motion is the subject of a petition for review in the United States Court of Appeals, the denial of a motion for a stay by the United States Court of Appeals."

12) DISCOVERY

Petitioners' Position

Under the January 2 Order, the parties may engage in discovery directed to the *Zadvydas* claim. ECF 191, PgID 5362. This includes depositions of government officials with knowledge of the Iraq repatriation agreement or program, and production of documents pertaining to that subject. *Id*. The parties conferred on January 5, 2018, on the scope of discovery, scheduling and Respondents' objections to outstanding discovery requests. Respondents requested

30 days to respond substantively to the outstanding discovery. In light of Respondents' request, their objections to the discovery requests, and Respondents' recent declarations from Messrs. Schultz and Bernacke regarding negotiations with the Iraqi government, Petitioners believe amended discovery requests will make discovery more efficient. Petitioners anticipate serving the amended discovery requests shortly. The parties disagree on a schedule and process for resolving Respondents' objections to the discovery requests.

Petitioners ask the Court to adopt the process set forth below to resolve Respondents' objections to the discovery requests:

- Respondents will produce any documents responsive to the discovery requests (including those to be produced pursuant to Fed. R. Civ. P. 33(d)) and their privilege log 30 days after service of the discovery requests. Additionally, Respondents will provide the following information for each request for production:
    - the identity of each custodian and the source of ESI and hard documents searched for responsive documents;
    - the identity of each custodian and the source of ESI and hard copy documents that may possess or contain responsive documents that Respondents did not search;
    - any categories of potentially responsive documents that were not produced and the reason they were not produced, if withheld for reasons other than privilege;
    - the search terms and other methodology used to collect and identify potentially responsive records; and
    - the date parameters used for searching for responsive documents.

- If Respondents object to any discovery request, their discovery response shall provide their reasoning and legal justifications, with full citations and argument.

- Respondents' privilege log will also provide their reasoning and legal justifications for any records withheld from production under (1) the deliberative process privilege (*NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-151 (1975)); and (2) the law enforcement privilege (*In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 569 (5th Cir. 2006)).

- Within 5 days after Respondents serve objections to the discovery requests, the parties will meet and confer to discuss if they can resolve any disputes regarding Respondents' objections or responses.

- If the parties cannot resolve any disagreement regarding the discovery, they will submit to the Court a joint statement of issues setting forth their respective positions on any discovery dispute, including legal authorities. The joint statement will be submitted within 10 days after service of Respondents' objections and responses.

- The Court will hold a status conference, if necessary, to address the discovery disputes.

- If the Court determines any initial discovery response should be supplemented, Respondents will supplement the discovery response within one week of entry of the Court's order.

Respondents object to any discovery, claiming that it is not ripe since the Court cannot determine *how much time* will be needed to effectuate removal of the class members as long as the Court's stay is in effect. Respondents misunderstand the discovery the Court has permitted. The Court is allowing discovery about whether class members are in fact repatriatable, given the purported agreement between the governments of Iraq and the United States:

> As explained below, the Court agrees that the end point of the legal process is reasonably foreseeable. But it holds that there is insufficient evidence in the record to determine whether Iraq is willing to accept

> class-wide repatriation. Without a reasonable expectation that removal would follow the termination of legal proceedings, the definitive "end-point" of the legal process does not solve the due process problem of indefinite detention. Because it is unclear whether repatriation is likely, the Court defers ruling on Petitioners' *Zadvydas* claim, pending further discovery. . . .
>
> Thus, the Government is correct that Petitioners would have no *Zadvydas* claim if removal were blocked solely because the legal proceedings had not terminated. But that is not necessarily our circumstance. It is still an open question whether Iraq has agreed to accept class-wide repatriation. As noted above, a more developed record is necessary to answer this question. Thus, the Court defers ruling on the likelihood of success on the *Zadvydas* claim pending further discovery.

ECF 191, PgID 5324, 5334-35. The government's opposition to discovery simply misses the point of that discovery.

In addition, the government's concession that it is "considering whether there is additional information that it could provide that might further aid the court in its deliberations on the legal issues relating to *Zadvydas*" itself underscores the need for discovery, so that Petitioners are in a position to evaluate, test, and explore whatever additional declarations the government may in the end decide to provide.

Respondents' Position

Respondents' position is that discuss this important topic warrants further discussion at the status conference. In accordance with Pursuant to the Court's Order Regarding Further Proceedings, ECF 115, Respondents have already

provided objections to Petitioners' discovery requests. *See* ECF 129–32. Following the Court's January 2, 2018 order, Petitioners narrowed those requests, and the parties discussed discovery on January 5, 2018. It now appears that Petitioners are withdrawing their initial requests and amending them

At the outset, Respondents assert that the issue of whether removal to Iraq is significantly likely in the reasonably foreseeable future pursuant to the Supreme Court decision in *Zavydas v. Davis* is not ripe and, therefore, Petitioners' *Zadvydas* claim should be denied. In *Zadvydas*, the Supreme Court addressed how much time the Government has to effectuate the removal of an alien with a final order of removal when there was no judicial impediment to removal. Unlike *Zadvydas*, an impediment to removal exists in this case – namely, this court's stay of removal. Therefore, the full *Zadvydas* analysis cannot be truly completed until the stay is lifted and then applied on a case-by-case basis. And, by ordering bond hearings for post-order aliens, the court's has rendered such an analysis unnecessary, as post-order aliens will have received consideration for release – a similar remedy as under *Zadvydas* – based on detention for more than 180 days. Notably, for some subclass members, such a bond hearing would occur before this court's stay of removal expires if the subclass member fails to file a motion to reopen within 90 days of transmittal of the A file and ROP. The Government already has provided multiple declarations detailing the removal

process for Iraqi nationals and has actually removed Iraqi nationals who have asked to be excluded from the stay in this case. For the above reasons, the Government believes that significant additional discovery on this issue would be unduly burdensome. Nevertheless, the Government is considering whether there is additional information that it could affirmatively provide that might further aid the court in its deliberations on the legal issues relating to *Zadvydas*. This may obviate the need for significant additional discovery on this issue.

Respectfully Submitted,

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Dated: January 10, 2018

EXHIBIT A

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Kadhim Al Ebadi, A071-680-087, 4:17-cv-02082

Hussain Al-Jabari, A071-680-533, 4:17-cv-01972

Mohammed Al Asady, A070-414-957, 4:17-cv-01970

Ehsan Al Hallaf, A071-674-680, 4:17-cv-02068

Maytham Al Bidairi, A212-190-307, 4:17-cv-00824-RDP-JHE

Hussain Al Kinani, A075-048-530, 4:17-cv-01021

D. Mass.

Alaa Al Jaber, A071-724-101, 1:17-cv-12520

Husam Al Battat, A078-788-714, 1:17-cv-12334

Jomaa Al Essa, A078-771-483, 1:17-cv-12490

W.D. Mich.

Sarmd Atou, A072-753-242, 1:17-cv-00959

Bassil Yousif, A078-570-659, 1:17-cv-01038

Abidoon Ali Khudair, A071-673-728, 1:17-cv-01037

Salman Saiyad, A018-340-524, 1:17-cv-00995

Other

Hayman Sabir, A028-217-975, 2:17-cv-04766 (D. Ariz.)

Ayad Hanna, A027-006-405, 5:17-cv-02493 (C.D. Cal.)

George Phillip Arthur, A209-151-821, 1:17-cv-23343 (S.D. Fla.)

Khalaf Abdullah-Hussein, A212-207-529, 0:17-cv-05214 (D. Minn.)

Marwan Azabo, A077-580-600, 4:17-cv-02712 (N.D. Ohio)

Ali Al Hisnawi, A071-672-919, 3:17-cv-02401 (M.D. Penn.)

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2018, I electronically filed the foregoing document with the Clerk of the Court using the electronic filing system, which will send notification of such filing to all counsel of record.

By: */s/ Kimberly L. Scott*
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