No. 17-2171

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, et al.,
Petitioners-Appellees,
v.
THOMAS HOMAN, Deputy Director and
Senior Official Performing the Duties of the Director,
U.S. Immigration and Customs Enforcement, et al.,
Respondents-Appellants.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
D. Ct. No. 2:17-cv-11910

PETITIONERS-APPELLEES' BRIEF

ORAL ARGUMENT REQUESTED

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 17-2171 Case Name: Hamama, et al. v. Homan, et al.

Name of counsel: Kimberly L. Scott

Pursuant to 6th Cir. R. 26.1, Petitioners-Appellees
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on February 5, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Petitioners-Appellees[1] request that the Court hold oral argument. This case addresses whether the federal government can remove approximately 1,400 Iraqis to a country where they face persecution, torture, or death without first providing them a meaningful opportunity to challenge their deportations. The ability of counsel to answer questions at oral argument about the facts and applicable law will aid the Court in deciding this appeal. *See* Fed. R. App. P. 34(a)(2)(C).

[1] "Appellees" is used herein to encompass both Named Petitioners-Appellees and the putative class they seek to represent.

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. §1292(a)(1).

II. STATEMENT OF ISSUES

There are two principal questions:

First, where Appellees are likely to be persecuted, tortured, or killed if removed to Iraq, was the district court powerless to slow their deportation, or could the court temporarily delay removal while Appellees contest the lawfulness of such removal before the immigration courts? That is the jurisdictional question. The district court correctly found that it was not powerless because declining jurisdiction "would expose Petitioners to the substantiated risk of death, torture, or other grave persecution before their legal claims can be tested in court." Jurisdiction Opinion (Juris. Op.), R.64, Pg.ID#1225.

Second, should Appellees have a meaningful opportunity to access the immigration court system, or can they be removed without being able to present their claims that they face grave harm if deported? That is the merits question. The district court correctly found that "[g]iven the compelling evidence Petitioners have presented regarding the probable deprivation of a meaningful opportunity to present their [] claims" that they will be persecuted, tortured, or killed in Iraq, Appellees needed time to access the immigration courts. Preliminary Injunction Opinion (PI Op.), R.87, Pg.ID#2351-2. In light of the Appellees' likelihood of success on the merits and the irreparable harm they would suffer if the status quo is

not preserved, the district court correctly granted preliminary relief, tailoring its injunction to enable Appellees to actually access the system Congress designed to prevent unlawful removals.

III. STATEMENT OF THE CASE

A. Introduction

In mid-June 2017, U.S. Immigration and Customs Enforcement (ICE), without warning, arrested and prepared to immediately deport hundreds of Iraqi nationals who had been ordered removed long ago, but who had been living in the community for years or decades because Iraq had refused their repatriation. Iraq is indisputably very dangerous for anyone, but particularly for Americanized Iraqis and religious and ethnic minorities, including the many Chaldean Christians from Michigan arrested, who face severe persecution akin to genocide in Iraq.

Appellees filed this emergency action asking for the one thing that could save the hundreds of lives at stake: time. Appellees have strong claims for immigration protection. It is unlawful for the U.S. government to remove them to a country where they are likely to be persecuted, tortured, or killed; and country conditions in Iraq have changed since their removal orders were entered long ago, so Appellees have the statutory right to file motions to reopen their immigration cases and have their cases decided based on current dangers. What they need is time to access the immigration court system Congress designed to hear such claims.

The district court's decision to give them the necessary time is grounded in the extensive factual record, which sets out the "compelling confluence of extraordinary circumstances," PI Op., R.87, Pg.ID#2323, that prevented Appellees from accessing the normal immigration process without a stay. Under these extraordinary circumstances, the district court properly exercised habeas jurisdiction and temporarily paused Appellees' removal, giving them the opportunity they needed to seek individual relief through the normal immigration channels.

B. Facts

1. ICE, Without Warning, Arrested Hundreds of Iraqis with Old Removal Orders to Immediately Deport Them Although They Face Persecution, Torture, or Death in Iraq.

On June 11, 2017, ICE suddenly arrested over a hundred Iraqis, most Chaldean Christians, in mass raids in the Detroit area, with the intention of immediately deporting them. 2d Am. Hab. Petition,[2] ¶¶65-67, R.118, Pg.ID#3001-02. Around the same time, ICE arrested other Iraqis across the country, many likewise from persecuted minority groups, including Kurds and Yazidis. *Id.* ¶5, Pg.ID#2958; PI Op., R.87, Pg.ID#2324-6. Within 48 hours ICE had detained over

[2] Although the First Amended Petition, R.35, was operative when the preliminary injunction was granted, Appellees primarily cite the currently operative Second Amended Petition, R.118. *See* 6 Charles Alan Wright et al., *Fed. Prac. & Proc.* §1476 (3d ed. 2010 & Supp. 2017). Allegations regarding removal are materially the same in both petitions.

200 people nationwide, and additional arrests brought the number of detained Iraqis to 305 by November 27, 2017.[3] 2d Schlanger Decl., ¶26, R.174-3, Pg.ID#4923. Approximately 1200 other Iraqis had final removal orders, and it was ICE's intention to arrest and deport them rapidly as well. PI Op., R.87, Pg.ID#2323-5; Bernacke Decl., ¶¶6-7, R.184-2, Pg.ID#5071.

Iraq is incredibly dangerous. The district court found it highly likely that repatriated Americanized Iraqis will be tortured and many will face death. Juris. Op., R.64, Pg.ID#1244; PI Op., R.87, Pg.ID#2330, 2353. "Each Petitioner faces the risk of torture or death on the basis of residence in America and publicized criminal records; many will also face persecution as a result of a particular religious affiliation."[4] PI Op., R.87, Pg.ID#2354. Minorities are subject to arbitrary

[3] Appellate courts should "consider any change, either in fact or in law, which has supervened" since a judgment was entered. *Patterson v. Alabama*, 294 U.S. 600, 607 (1935); *see also Honig v. Students of California Sch. For the Blind*, 471 U.S. 148, 149 (1985) (considering fact that requirements of preliminary injunction had been completed by time case reached Supreme Court); *University of Texas v. Camenisch*, 451 U.S. 390, 393 (1981) (considering events since entry of preliminary injunction); *City of Pontiac Retired Empls. Ass'n v Schimmel*, 751 F.3d 427, 432-33 (6th Cir. 2014) (same). While appellate courts frequently remand for further development of post-injunction records, here facts about the injunction's effectiveness are already in the record. *See infra* §III.B.2.c.

[4] *See also* U.S. Dep't of State, *Iraq 2016 Human Rights Report*, at 2 (Mar. 29, 2017), https://www.state.gov/documents/organization/265710.pdf (criticizing Iraqi government for officials' own widespread abuses and the "impunity" the government grants other human-rights abusers); 2d Lattimer Decl., ¶15, R.77-13, Pg.ID#1807 (attacks against Iraqis perceived as American "occur in a climate of general impunity and widespread official complicity"); Smith Decl., ¶¶1-2, R.84-6,

executions, torture, sexual enslavement, and severe discrimination.[5] *Id.*, Pg.ID#2328-30; Juris. Op., R.64, Pg.ID#1230. Indeed, "ethnic and religious minorities are at risk of extinction in Iraq." 1st Lattimer Decl., ¶17, R.77-10, Pg.ID#1791. The United Nations High Commissioner for Refugees considers relocations of repatriated Iraqis unsafe.[6] Experts attest that "[f]or Iraqi-Americans, there is no area of relocation that would be safe." Heller Decl., ¶56, R.77-14, Pg.ID#1824. The U.S. Department of State advises, simply, "Do not travel to Iraq."[7]

Pg.ID#2243 (describing "extremely high likelihood that Iraqis who are deported to Iraq, especially those who are suspected of having criminal records, will be detained upon arrival in Iraq and interrogated by internal security forces," who routinely "accompany interrogation with physical violence, isolation, and other techniques that qualify as torture").

[5] Congress described the atrocities in Iraq against religious and ethnic minorities as "includ[ing] war crimes, crimes against humanity, and genocide." H. R. Con. Res. 75, 114th Cong. (2016). The U.S. State Department similarly describes ethnic cleansing, crimes against humanity and genocide against Yazidis, Christians, Shia Muslims, Sunni Muslims, Kurds, and other minorities; former Secretary of State John Kerry cited ISIL's "responsib[ility] for genocide against groups in areas under its control, including Yazidis, Christians and Shia Muslims." U.S. Dep't of State, *Atrocities Prevention Report* (March 17, 2016), https://www.state.gov/j/drl/rls/254807.htm.

[6] United Nations High Comm'r for Refugees, *UNHCR Position on Returns to Iraq*, ¶¶47-48 (Nov. 14, 2016), http://www.refworld.org/docid/58299e694.html.

[7] U.S. Dep't of State, *Iraq Travel Advisory* (last updated Jan. 10, 2018), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/iraq-travel-advisory.html.

Those ICE sought to deport had old removal orders, dating back as far as 1986.[8] *See* PI Op., R.87, Pg.ID#2350. For decades, ICE has not deported Iraqis who had final removal orders but lacked travel documents, because Iraq refused their repatriation.[9] *Id.*, Pg.ID#2325. "Over eighty-three percent of those detained have been subject to final orders of removal for at least five years, with more than fifty percent being subject to the orders for a decade or more." *Id.*, Pg.ID#2325. Over the years since Appellees were ordered removed, they have lived in the community. They worked and built businesses. They raised children and watched grandchildren grow up. They are thoroughly Americanized. 2d Am. Pet., ¶¶22-36, R.118, Pg.ID#2964-85.

Typically ICE had put Appellees on orders of supervision and required them to report just once or twice a year. *See* PI Op., R.87, Pg.ID#2350; Free Decl., R.77-15, ¶6, Pg.ID#1829. Until shortly before their arrests, Iraqis who reported to ICE

[8] For example, Appellee Asker came to the U.S. at age 5 and was ordered removed in 1986 at age 10. Valk Decl., ¶¶2-3, R.77-5, Pg.ID#1769. Appellees were ordered removed for various reasons. *See, e.g.*, Bajoka Decl., ¶¶4-5, R.84-5, Pg.ID#2239 (visa overstay). Many removal orders were based on (now old and often minor) criminal convictions; the immigration consequences of those convictions have frequently changed in the years since. *See, e.g.*, 1st Abrutyn Decl., ¶10, R.77-2, Pg.ID#1755; Free Decl., ¶14, R.77-15, Pg.ID#1833-34.

[9] Some individuals have been removed to Iraq over the last decade because they chose to return or because they had unexpired passports that Iraq accepted. But ICE has been unable to deport Iraqis without travel documents—the group at issue here. PI Op., R.87, Pg.ID# 2342.

for supervision were still being told that their annual/semi-annual check-ins would continue. *See*, *e.g.*, Hanna Decl., ¶6, R.84-4, Pg.ID#2236.

ICE's sudden change in policy[10] sent shock waves of fear and panic through Iraqi communities. 2d Am. Pet., ¶66, R. 118, Pg.ID#3001. Desperate families frantically searched for emergency legal assistance, fearing that their loved ones would not just be deported, but would be tortured or killed in Iraq before any court could review their claims that removal to such a fate is unlawful. PI. Op., R.87, Pg.ID#2323-24; Youkhana Decl., ¶7, R.77-3, Pg.ID#1760; Free Decl., ¶¶7-13, R.77-15, Pg.ID#1829-1833. Locally, a small community nonprofit stayed open into the night, struggling to obtain even basic information on those arrested, hoping to match them with counsel. Yousif Decl., ¶¶5-11, R.77-11, Pg.ID#1794-95. For families fortunate enough to find counsel, attorneys struggled to assemble emergency motions—despite their inability to reach clients being moved rapidly from facility to facility across the country, despite the unavailability of necessary documents and information, and despite understanding that hastily-cobbled-together pleadings were entirely insufficient given the life and death stakes. Free

[10] ICE's abrupt decision to enforce decades-old removal orders resulted from Iraq's agreement to relax its repatriation policy in exchange for removal from the U.S. travel ban. PI Op., R.87, Pg.ID#2325; *Protecting the Nation from Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 13209, §1(g) (Mar. 6, 2017).

Decl., ¶¶5-12, R.77-15, Pg.ID#1828-33; Youkhana Decl., ¶¶7-18, R.77-3, Pg.ID#1760-61; Realmuto Decl., R.77-26, Pg.ID#1885-92.

ICE's refusal to say when Appellees would be loaded onto planes increased the urgency. When Appellees filed their TRO motion on June 15, 2017, "government's counsel [had] informed petitioner's counsel that removal will not take place today or tomorrow, but was unwilling to offer other assurances—so that means removal could be as early as **Saturday, June 17**." TRO Mot., R.11, Pg.ID#46 (original emphasis). The government later revealed that a flight had been scheduled on an undisclosed date in June. 1st Schultz Decl., ¶7, R.81-4, Pg.ID#2007.

2. Iraqis Suddenly Facing Imminent Removal Could Not Access the Immigration Courts in Time to Prevent Their Deportation Without a Stay from the District Court.

Faced with this emergency, the district court acted to protect the status quo and allow Appellees to access the immigration courts. The Named Appellees' stories, a few briefly summarized here, are representative:

- Sam Hamama came to the U.S. in 1974 as a child and lives in West Bloomfield, Michigan with his wife and children, all U.S. citizens. He was arrested without warning on June 11, 2017, based on a 1994 removal order. As a Chaldean Christian, he faces grave danger in Iraq. Only after the district court entered the TRO was he able to file a motion to reopen and motion to stay removal. Both

remain undecided. 2d Am. Pet., ¶22, R.118, Pg.ID#2964-66; Hamama Decl., ¶¶16-17, R.138-6, Pg.ID#3443.[11]

- Abbas Al-Sokaini, a father and grandfather who came to the U.S. more than 20 years ago as a refugee and lives in Albuquerque, New Mexico, lacked counsel at the time of his sudden arrest. A practicing Baptist who fears he will be a special target for persecution, torture, or death in Iraq, Mr. Al-Sokaini was unable to file a motion to reopen, both because his rapid transfer to Texas made it difficult for his family to retain counsel or communicate with him and because he did not have the necessary files. 2d Am. Pet., ¶26, R.118, Pg.ID#2970-71; Al-Sokaini Decl., R.138-3, Pg.ID#3412-18.

- Abdulkuder Al-Shimmary, the father of three U.S.-citizen children and a resident of Nashville, Tennessee, is an Iraqi Kurd who came to the U.S. as a refugee in 1994. After he was arrested, he filed an emergency stay motion with the Board of Immigration Appeals (BIA) on June 15, 2017; it still had not been decided when Appellees filed for a TRO. As a result of the district court's stay, Mr. Al-Shimmary was able to litigate and win his case in immigration court. Removal proceedings against him were terminated in September 2017, because the offense for which he was ordered deported in 1999 is no longer grounds for removal. 1st Am. Pet., ¶26, R.35, Pg.ID#521-22; Free Decl., ¶14, R.77-15, Pg.ID#1833-34; Al-Shimmary Decl., ¶¶8-9, R.138-33, Pg.ID#3731.

[11] The facts in the Second Amended Petition about each of the Named Appellees are verified and set out in greater detail in their declarations, R.138-3 to 138-16. Appellees note that those declarations had not yet been filed when the district court granted the preliminary injunction.

a. Appellees' Only Chance for Immigration Relief Was to File Motions to Reopen, Which Require Extensive Documentation and Considerable Time to Prepare.

After the June mass arrests, with just a few days until the first plane was to depart, the only established path to legal protection available to hundreds of Iraqi nationals facing both imminent removal and the likelihood of persecution, torture, or death in Iraq was to file an immigration court motion to reopen. While Appellees all had final removal orders, those orders were years or decades old, meaning they were necessarily issued without considering whether removal to Iraq *now* would violate the government's obligations under the Immigration and Nationality Act (INA) and the Convention Against Torture (CAT) (codified by the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)), which prohibit removal to countries where a person is more likely than not to face persecution or torture. *See* INA, 8 U.S.C. §1231(b)(3); U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; FARRA, Pub. L. No. 105-277, §2242, 112 Stat. 2681, 2681-82 (1998), codified at 8 U.S.C. §1231 note. A critical component of the system for preventing unlawful removals is the opportunity—guaranteed by statute—to file motions to reopen based on changed country conditions. 8 U.S.C. §1229a(c)(7).

Preparing a motion to reopen is complicated, time-consuming, and expensive. PI Op., R.87, Pg.ID#2330-31. First, by statute and regulation, a motion

to reopen requires substantial new evidence in the form of affidavits or other evidence, which takes significant time to assemble—particularly when the motion, as here, is based on changed country conditions. Realmuto Decl., ¶¶8-11, R.77-26, Pg.ID#1887-88 (citing 8 U.S.C. §1229a(c)(7)(B); 8 C.F.R. §1003.2(c)(1)). Second, the motion "must be accompanied by the appropriate application for relief and all supporting documentation"; filing a motion to reopen thus requires also preparing the application for underlying merits relief. 8 C.F.R. §§1003.2(c)(1), 1003.23(b)(3); *see also* 8 C.F.R. §103.5(a)(2). Third, "[r]eview of both the [Alien file ("A-file")] and the complete Record of Proceedings is absolutely critical" to assessing the viability of any claim, Realmuto Decl. ¶10, R.77-26, Pg.ID#1888, but it can take months to obtain those documents. PI Op., R.87, Pg.ID#2331. Once obtained, the attorney must consult the client and perform additional research. Realmuto Decl., ¶10, R.77-26, Pg.ID#1888. Moreover, because the availability of different forms of immigration protection depends on criminal history, attorneys often need to obtain and review criminal-history information in light of relevant changes in the law. Scholten Decl., ¶8, R.77-27; Pg.ID#1896; 1st Abrutyn Decl., ¶10, R.77-2; Pg.ID#1755. It typically takes six to twelve weeks to prepare the motion after receipt of the A-file and Record of Proceedings—more, if the case is complex or there are obstacles to attorney/client communication. Realmuto Decl., ¶12, R.77-26; Pg.ID#1888.

The district court found:

- "Even without the pressure of an immediate removal without advance notice, preparing a motion to reopen proceedings before the immigration courts—the recognized route for presenting Petitioners' arguments based on changed circumstances—is no easy task"; it can require "'several months' of obtaining files and affidavits, preparing applications for relief, and 'gathering hundreds of pages of supporting evidence.'" Juris. Op., R.64, Pg.ID#1231-32.

- The "two most important documents" for filing a motion to reopen—the A-file, which contains the individual's immigration history, and the immigration court Record of Proceedings—"are generally obtainable only through a Freedom of Information Act [] request," which can often take over five months.[12] PI Op., R.87, Pg.ID#2331.

- Preparing motions to reopen and to stay removal is expensive, costing between $5,000-$10,000 for the motion, and up to $80,000 if the motion is granted and the case proceeds to the merits. *Id.*

b. Due to Appellees' Sudden Arrests, Long-Dormant Orders, and Difficulty Communicating with Counsel, It Was Virtually Impossible for Appellees to File Meaningful Motions to Reopen Without Additional Time.

At the time of their sudden arrests, many Appellees lacked not only lawyers, but also basic documents necessary to file motions to reopen. *See, e.g.*, 1st Abrutyn Decl., ¶¶11-13, R.77-2, Pg.ID#1755-56; Youkhana Decl., ¶11, R.77-3, Pg.ID#1760. The repeated transfer of detainees, the barriers detention facilities impose for attorney access, and the large number of individuals needing

[12] *See* USCIS, Check Status of FOIA Request, https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/foia-request-status-check-average-processing-times/check-status-foia-request (22-25 week processing time).

emergency assistance from the small immigration bar made matters worse. Juris. Op., R.64, Pg.ID#1245; *see also* 1st Free Decl., ¶¶8-9, R.77-15, Pg.ID#1830-31 (describing transfer of Iraqis arrested in Nashville to Davidson County, Tennessee, then to Fort Payne, Alabama, then Jena, Louisiana, then to Alexandria, Louisiana, then to Dallas, Texas, and then to Florence, Arizona); Kaur Decl., ¶¶6-11, R.77-22, Pg.ID#1865-66 (drive four hours to detention facility and then denied access to clients for two days); 1st Peard Decl., ¶¶15-32, R.77-21, Pg.ID#1860-62 (describing obstacles to representation for detainees in Florence, Arizona: they need counsel both in home state, where relevant records and immigration courts are located, and in Arizona, to conduct interviews and obtain signatures); Samona Decl., ¶¶9-12, R.77-23, Pg.ID#1870 (describing difficulty of 10-hour trips to Ohio to visit clients, and of 10-minute phone-conversation limits); Youkhana Decl, ¶¶9-11, R.77-3, Pg.ID#1760 (volunteer attorneys unable to meet clients due to transfer outside Michigan); Jajonie-Daman Decl., ¶¶6-8, R.77-7, Pg.ID#1776-77 (contacted by 50 families seeking emergency motions during three-day period following raids).

A few lawyers, particularly those with preexisting client relationships, did manage to file emergency motions. *See, e.g.*, 1st Abrutyn Decl., ¶¶10-11, R.77-2, Pg.ID#1755. However, given the urgency, attorneys were "filing[] at much quicker rates than is otherwise advisable given the complexity of the cases, potentially

sacrificing effectiveness to exigency." Valenzuela Decl., ¶17, R.77-24, Pg.ID#1877; *see also* Samona Decl., ¶¶5-8, R.77-23, Pg.ID#1869 (inability to review file made it "impossible to ascertain" whether client was lawfully ordered removed, much less argue case effectively); 2d Peard Decl., ¶18, R.84-7, Pg.ID#2253-54 (although 50 attorneys were working pro bono to assist Arizona detainees, necessary motions to reopen probably could not be completed before expiration of the TRO).

It was highly unlikely that Appellees could obtain stays from the immigration system before their removal. Neither a motion to reopen nor the appeal of a denial of such a motion automatically stays removal. 8 C.F.R. §§1003.2(f); 1003.6(b). For that, a stay motion is required. BIA Practice Manual, §6.3(a); Realmuto Decl., ¶¶13-14, R.77-26, Pg.ID#1889. A stay motion, however, will be granted only if accompanied by a complete motion to reopen—thus requiring full information on country conditions and complete legal analysis regarding eligibility for the underlying immigration relief. Reed Decl., ¶12, R.77-12, Pg.ID#1800. Because stay motions require original signatures, preparing such motions generally requires in-person visits to the detained noncitizen, *id.*, ¶¶12, 14, Pg.ID#1800; that assumes, of course, that the attorney can both discover where the client is detained and travel there.

Even in ordinary circumstances—and the mass arrests, long-dormant removal orders, absence of necessary documents, repeat transfers, and the other circumstances described above make this case anything but ordinary—the system for obtaining emergency stays "is not reliable and does not ensure the meritorious stay motions will be heard and adjudicated while a motion to reopen is pending." Realmuto Decl. ¶4, R.77-26, Pg.ID#1886. The BIA and the immigration courts have not promulgated any standard for granting stays. *Id.*, ¶15, Pg.ID#1889. Deficiencies in the system create widespread problems getting stay motions decided before removal. *Id.*, ¶¶16-25, Pg.ID#1889-91; Samona Decl., ¶¶14-24, R.77-23, Pg.ID#1870-72. For example, immigration judges and the BIA will grant a stay only if removal is imminent—but neither the detainee nor immigration counsel can reliably get timely information on the removal schedule, much less find out if a deportation date has changed. "[I]t can easily happen that a detainee's removal is effectuated without the BIA ever considering a pending motion to stay, because the BIA never finds out that the removal is imminent." Samona Decl., ¶23, R.77-23, Pg.ID#1872. The problem of ICE executing removal orders before a decision on the stay motion is "widespread." Realmuto Decl., ¶¶21-22, R.77-26, Pg.ID#1890-91 (describing an individual removed before the BIA considered—and *granted*—the stay request because ICE failed to inform the BIA that the deportation date had changed).

Based on these facts, Appellees lacked meaningful access to the immigration courts:

- Through its "unanticipated decision to enforce removal orders, the Government ha[d], without notice, put some 1,444 persons at risk of deportation," thereby "tax[ing] the immigration bar's ability to promptly service all in need of legal protection" and "tax[ing] the resources of the immigration courts to provide prompt and appropriate decisions to all affected." Juris Op., R.64, Pg.ID#1245.

- The government's decision to move Appellees, often repeatedly, away from counsel and the communities that could provide legal assistance, *id.*, Pg.ID#1231, further exacerbated the difficulty of filing, *id*., Pg.ID#1245. Approximately 79% of Appellees were detained in a different state than where the immigration court issued their removal order.[13] PI Op., R.87, Pg.ID#2331.

- Detention locations and repeated transfers impeded attorney-client communication; motions to reopen and stay require original signatures, thus necessitating in-person visits that were often impractical in light of the distance to facilities and Appellees' ever-changing locations. Juris. Op., R.64, Pg.ID#1245. Phone communication between attorneys and clients was also difficult. PI Op., R.87, Pg.ID#2332, 2348-49.

- These obstacles were "greatly hinder[ing] [Appellees'] ability to file motions to reopen," *id*., Pg.ID#2340, "either prevent[ing] Petitioners from filing motions altogether, or caus[ing] them to sacrifice the quality of their filings in light of the pace at which the Government is moving," *id*.

[13] As of July 1, 2017, 234 Appellees were detained in 31 facilities across 18 states. Kitaba-Gaviglio Decl., ¶5, R.77-20, Pg.ID#1853-54.

The district court therefore found that if it did not issue a stay of removal, Appellees would be unable to file, litigate, or receive judicial review of their motions.

Moreover, the court found it would be unreasonable to have expected Petitioners to file motions to reopen in prior years:

- "[F]iling a motion to challenge enforcement of removal orders that stood no reasonable chance of being enforced in the foreseeable future would have been a purely academic exercise." Juris. Op., R.64, Pg.ID#1246. "Petitioners justifiably assumed that a motion to reopen was not necessary until given notice otherwise." PI Op., R.87, Pg.ID#2342; *see id*., Pg.ID#2349-50. Therefore, it was not reasonable "to incur the prohibitive cost of filing a motion to reopen" before their arrests. PI Op., R.87, Pg.ID#2342.

- The situation in Iraq has deteriorated over time; there is no single date on which country conditions changed. "The earliest Iraq's changed conditions became apparent to Petitioners was 2014, with conditions threatening to some Petitioners not arising until much later." PI Op., R.87, Pg.ID#2342. Threats to certain groups "did not become apparent until well after [2014]." *Id.*, Pg.ID#2349.[14]

- The government's recent highlighting of Appellees' criminal records, which has received substantial media coverage, has further increased the danger: "Petitioners face a heightened risk of interrogation due to media coverage of their criminal records, as well as Iraq's fear of American espionage…. Many of the interrogation techniques used by Iraq's internal security forces would qualify as torture." PI Op., R.87, Pg.ID#2330.

[14] *See* 1st Lattimer Decl. ¶¶7-16, R.77-10, Pg.ID#1789-91 (describing increasingly dangerous conditions in Iraq in recent years); Smith Decl., ¶¶35-37, R.84-6, Pg.ID#2249 (discussing dangers from September 2017 Kurdish referendum).

And there was no realistic possibility of litigating motions to reopen post-removal[15]:

- "For those who have been able to file motions, their ability to further litigate these motions will almost assuredly be extinguished upon their removal to Iraq. Those who are tortured or killed will obviously not be able to argue their motions; even those who are able to evade this treatment will likely be focused on their safety, rather than devoting the requisite attention to their legal proceeding." *Id.*, Pg.ID#2349. From Iraq, "[m]aintenance of legal paperwork and communication with lawyers and potential witnesses would likely become extraordinarily problematic, if not impossible." *Id.*, Pg.ID#2341-42.
- If "removed prior to their filing and adjudication of motions to reopen, [Appellees'] ability to seek judicial review in the courts of appeals will be effectively foreclosed." *Id.*, Pg.ID#2341.

In sum, the district court concluded that the immigration court system, which is "ordinarily" the proper venue for stay motions, was "effectively foreclose[d]" in the unusual circumstances here. *Id*., Pg.ID#2337.

c. Appellees' Experiences Demonstrate That, Without the Additional Time Provided by the District Court's Stay, Appellees with Meritorious Claims Would Have Been Removed.

The district court's stay of removal has been in effect since June 22, 2017 (counting from the TRO), and the results are measurable. Three things are striking:

[15] Even if someone whom ICE removed were to succeed, from abroad, in litigating a motion to reopen, success would not necessarily allow return to the United States, even to participate in reopened immigration proceedings. *See Devitri v. Cronen*, __F. Supp. 3d__, No. 17-cv-11842-PBS, 2018 WL 661518, at *7 (D. Mass. Feb. 1, 2018).

First, the data confirm the difficulty of filing motions to reopen without adequate time and access to files: only 12% of motions to reopen filed in the Detroit Immigration Court before the preliminary injunction by putative class members were granted, whereas 91% were granted thereafter. 1st Schlanger Decl., ¶17, R.138-2, Pg.ID#3405 (analyzing court-ordered disclosures of government data).

Second, Appellees' remarkable success in those immigration cases decided thus far demonstrates the strength of their underlying claims. The most recent data in the record show that as of October 28, 2017, putative class members had won 87% of the motions to reopen finally decided within the immigration court system (even including the early losses). Ten cases, including that of Named Appellee Al-Shimmary, had been decided on the merits—with *all* granting immigration relief and/or protection, including withholding and deferral under CAT, cancellation of removal, and termination of removal proceedings because the individual was not actually deportable. 1st Schlanger Decl., ¶¶21-23, R.138-2, Pg.ID#3406-07; Al-Shimmary Decl., ¶¶8-9, R.138-33, Pg.ID#3731. Since then, additional individuals, including Named Appellee Taymour, have likewise won on the merits. Taymour Order, R.159-2, Pg.ID#4177-78.

Finally, it is taking far longer for motions to reopen to be filed and adjudicated than the few days between the mid-June arrests and the scheduled late-

June charter flight to Iraq. As of October 28, 2018, the immigration courts and BIA were taking many months to decide these motions. 1st Schlanger Decl., ¶¶25-27, R.138-2, Pg.ID#3407-08. Many motions remain undecided today. Without the district court's stay of removal, many Appellees would be deported without any chance for a hearing on the likelihood of torture and persecution in Iraq. The government does not contest that this would have occurred—it is, rather, the outcome the government claims was appropriate.

C. Procedural History

Appellees filed this action and a motion for a temporary restraining order—both seeking relief on behalf of a putative class—on an emergency basis on June 15, 2017. Petition, R.1, Pg.ID#1-26; TRO Mot., R.11, Pg.ID#45-175. On June 22, the district court stayed removal for fourteen days for Iraqi nationals within the jurisdiction of ICE's Detroit Field Office. Order Pending Jurisdictional Review, R.32, Pg.ID#497-502. On June 24, after it became apparent that ICE was arresting Iraqis around the country, Appellees filed an amended petition and moved to expand the stay of removal nationwide. 1st Am. Pet., R.35, Pg.ID#509-48; Emergency Mot., R.36, Pg.ID#549-615. On June 26, the district court expanded the stay nationwide. Order Expanding Stay, R.43, Pg.ID#671-77.

On July 11, the district court found it had jurisdiction. Juris. Op., R.64, Pg.ID#1225-48. On July 17, Appellees sought a stay of removal/preliminary

injunction, R.77, Pg.ID#1703-1915, and on July 20, class certification, R.83, Pg.ID#2061-2206. On July 24, the district court granted preliminary relief, *see* PI Op., R.87, Pg.ID#2323-57, noting that it exercised its discretion to do so prior to deciding class certification "[g]iven the grave issues at stake." *Id.*, Pg.ID#2355 n.13.

The court barred the government from "enforcing final orders of removal directed to any and all Iraqi nationals in the United States who had final orders of removal on June 24, 2017, and who have been, or will be, detained for removal by ICE." *Id.*, Pg.ID#2355. Putative class members have 90 days to file a motion to reopen in immigration court after the government transmits the necessary documents—the A-file and the immigration court record. *Id.* Protection from removal lasts through any appeal to the BIA and until resolution of any stay motion in a federal court of appeals. *Id.*, Pg.ID#2355-56. The stay will be terminated for any individual who fails to file a timely motion to reopen or a timely appeal, or who consents to removal. *Id.*

IV. SUMMARY OF ARGUMENT

1. The district court correctly found it had jurisdiction. First (and here the district court erred), the REAL ID Act's jurisdictional amendments to the INA do not foreclose habeas jurisdiction, because petition-for-review jurisdiction in the court of appeals is unavailable given the unique circumstances. Second, as the district court correctly concluded, if the REAL ID Act is construed to bar habeas review here, the Suspension Clause requires habeas jurisdiction to avoid an unlawful suspension of the writ. The government's series of arguments that the case is outside the scope of the Suspension Clause—because Appellees challenge removal not detention; because there are facts involved; because relief is classwide—all fail under longstanding precedent. The government's claim that the motion to reopen process constitutes an adequate and effective substitute for habeas fails under the district court's well-supported findings about special circumstances here.

2. On the merits, the district court did not abuse its discretion in granting the preliminary injunction. Appellees are likely to succeed because, under the circumstances, the government's attempt to remove them without providing them adequate time to file motions to reopen and obtain adjudications of those motions would violate both their constitutional and statutory rights. The hardships, equities, and public interest tilt heavily in their favor.

The Due Process Clause guarantees fair removal procedures. And substantive statutory law—the INA and CAT/FARRA—forbids the government from removing noncitizens into probable persecution or torture. Statutory law implements that substantive right with a procedural right to file a motion to reopen based on changed country conditions at any time. As the district court found, removal without a chance to file motions to reopen and have those motions adjudicated would deprive Appellees of a meaningful opportunity to present their claims. Thus, due process requires a stay of removal.

Although the district court disagreed, statutory law requires the same result. Because both the substantive and procedural rights Congress enacted would be meaningless without time to file and litigate a motion to reopen before removal, the INA and CAT/FARRA are best read to require a stay of removal in circumstances, like here, where only a stay can preserve the meaningful opportunity to raise claims of persecution and torture, and in turn prevent the removal of noncitizens more likely than not to be persecuted or tortured if removed.

The government argues that the district court erred because Appellees should have filed motions to reopen in prior years, or could have effectively accessed the immigration courts in the few days between their arrests and the scheduled flight to Iraq. The government thus argues that it is Appellees' own fault

if they are deported to torture or death. The district court, based on the voluminous record below, found differently. Appellees' underlying immigration claims are based on changed country conditions, which did not arise until recently. Moreover, the court found that Appellees cannot reasonably have been expected to undertake the complicated and expensive process of seeking to reopen their cases in prior years, because there was, then, no real prospect of repatriation. The district court also found that, without a stay of removal, they could not reopen their cases now, because filing a motion to reopen is time-consuming; their detention and transfers among detention facilities obstructed their access to documents and counsel; and the administrative stay process, often unreliable, was foreclosed under the circumstances. Finally, because removal will expose them to precisely the dangers that are the subject of their merits claims, the hypothetical prospect of a post-removal motion to reopen from Iraq is a sham.

These facts, found by the district court, underlie both jurisdiction and the merits. The government has not argued, much less shown, clear error. Nor does it even attempt to challenge the district court's factual findings that Appellees face grave danger if removed to Iraq; indeed, the government acknowledged below that "there are risks to certain minority groups in Iraq." Resp. Opp. to Prelim. Inj., R.81, Pg.ID# 1987.

V. STANDARD OF REVIEW

The purpose of preliminary relief is "to preserve the relative positions of the parties until a trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Motions for preliminary injunctions and stays of removal are governed by the familiar four-factor test: (1) likelihood of success on the merits, (2) irreparable harm in the absence of such relief, (3) balance of equities, and (4) the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008) (preliminary injunction); *Nken v. Holder*, 556 U.S. 418, 434 (2009) (stay of removal). These "are interrelated considerations that must be balanced together." *N.E. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). "For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay." *Id*.

Factual findings underlying a district court's decision in granting a motion for preliminary injunction are reviewed for clear error. *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 858 (6th Cir. 1992). Legal conclusions are reviewed de novo. *Id.* Subject-matter jurisdiction is reviewed de novo, but "factual findings made by the district court" in the course of determining jurisdiction are "reviewed for clear error." *Cartwright v. Garner*, 751 F.3d 752, 760 (6th Cir. 2014). Finally, "the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief" is

reviewed for abuse of discretion. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc). "[A] trial court's decision to grant a preliminary injunction is accorded [] great deference," and this Court "will disturb such a decision only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Washington v. Reno*, 35 F.3d 1093, 1098 (6th Cir. 1994).

VI. ARGUMENT

A. The District Court Had Jurisdiction.

The district court agreed with the government that the INA stripped habeas jurisdiction, but found jurisdiction under the Suspension Clause. Because the statutory conclusion was erroneous, this Court can affirm without reaching the constitutional question. If, however, this Court agrees that the INA divested the district court's jurisdiction, it should affirm the ruling that the Suspension Clause requires judicial review of Appellees' claims. The government's contention that Appellees could have pursued their claims without more time to file their motions to reopen is foreclosed by the factual findings of the district court.

1. The District Court Erroneously Concluded that the INA Bars Habeas Jurisdiction Over Appellees' Claims, Even Though They are Non-Discretionary and Could Not Have Been Raised in a Petition for Review.

Habeas jurisdiction under 28 U.S.C. §2241 is always available to review removal orders unless Congress repeals it. The government makes two incorrect

arguments that the INA strips habeas jurisdiction over Appellees' claims.

a. The government's first argument is that the INA generally channels review of removal orders to the courts of appeals by petition for review from a decision of BIA, including cases involving CAT claims. Gov't Br. 21-22. But that general rule—which is not disputed—does not apply where the petition-for-review process is unavailable. That is the case here, because Appellees' claims—that their removal would be unlawful and that they are being deprived of a meaningful opportunity for the immigration courts to hear their motions to reopen based on changed country conditions—did not arise until after conclusion of their original proceedings and their accompanying opportunity for judicial review.

The general rule that removal orders are reviewed in the courts of appeals is based on two premises. First, the legality of a removal order must be reviewable in some Article III court to avoid a Suspension Clause violation. *INS v. St. Cyr*, 533 U.S. 289-90 (2001) (Suspension Clause "unquestionably requires some jurisdiction in deportation cases"). Second, court of appeals review by petition for review will *generally* be feasible, thereby avoiding the Suspension Clause problem that would otherwise exist. The history of judicial review of removal orders reflects these twin premises and shows why habeas review remains available in district court in those relatively rare cases where claims cannot be reviewed through a petition for review in the courts of appeals.

Until 1996, the principal means of challenging removal was a petition for review. *St. Cyr*, 533 U.S. at 329. In 1996, Congress passed jurisdictional amendments to the INA that eliminated review in the courts of appeals for certain noncitizens. In *St. Cyr*, the Supreme Court held that although these 1996 amendments eliminated circuit courts' petition-for-review jurisdiction over claims raised by those noncitizens, review could be obtained instead in district court habeas actions.

In the REAL ID Act, Congress responded by channeling judicial review back to the petition for review process. The Act was shaped by two overriding points in *St. Cyr*. First was the Supreme Court's admonition that the elimination of all review of removal orders would trigger "serious constitutional" problems. 533 U.S. at 314. Second was the Court's observation that although the Constitution "required" review of deportation orders, *id*. at 300, the Suspension Clause does not mandate that the forum for review be a habeas action in district court. Rather, Congress could choose an alternative to habeas *if but only if* that alternative provides a constitutionally adequate substitute. *Id.* at 314 n.38. The Court thus invited Congress to return to the pre-1996 petition-for-review scheme, if it chose, and once again make the courts of appeals the principal forum for judicial review for all noncitizens challenging removal. *Id.* The REAL ID Act took up the Court's invitation.

In light of this history, and the constitutional background principles, courts have recognized that the REAL ID Act does not eliminate district court habeas review where doing so would leave the petitioner with no forum, and have regularly found habeas jurisdiction available where removal orders cannot be challenged adequately through petitions for review.

This Court in particular has found that habeas remains available where the petitioner's challenge is based on events post-dating review of the initial removal order that could therefore not have been raised or judicially reviewed in that proceeding, such as where there have been changed circumstances or post-order ineffective assistance. *Kellici v. Gonzalez*, 472 F.3d 416, 419–20 (6th Cir. 2006) (habeas available to challenge government's failure, after a removal order became final, to provide notice of petitioner's arrest, because "[w]here a habeas case does not address the final order, it is not covered by the plain language of the [Real ID] Act"). *Accord Jama v. INS*, 329 F.3d 630, 632-33 (8th Cir. 2003), *aff'd sub nom Jama v. ICE*, 543 U.S. 336 (2006) (claims based on events after removal order; finding habeas jurisdiction to review agency's failure to adhere to mandatory post-order statutory requirements); *Singh v. Gonzales*, 499 F.3d 969, 980 (9th Cir. 2007) (finding jurisdiction over ineffective-assistance-of-counsel claim that arose after removal order because "a successful habeas petition in this case will lead to

nothing more than 'a day in court' ..., which is consistent with Congressional intent underlying the REAL ID Act").

For the same reason, courts have uniformly found that habeas remains available where petitioners contend they are being unlawfully detained pending their removal hearings, because review in the courts of appeals would come too late to remedy unlawful detention during the immigration court process. *See*, *e.g.*, *Kellici*, 472 F.3d at 419-20; *Hernandez v. Gonzales*, 424 F.3d 42, 42-43 (1st Cir. 2005); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006).

The circumstances in which courts have found that habeas remains available vary, but the common thread is that review in the courts of appeals would be unavailable or inadequate. *See Aguilar v. ICE*, 510 F.3d 1, 11-12 (1st Cir. 2007) (district courts retain jurisdiction over "claims that cannot effectively be handled through the available administrative process").

Here, Appellees assert claims that could not have been raised in petitions for review of their initial removal orders, because the claims arose after those proceedings concluded. Specifically, Appellees contend they would be persecuted or tortured under the *current* situation in Iraq, and that, absent a stay of removal by the district court, they will be deported before they have a meaningful opportunity for the lawfulness of their removal to be assessed by the immigration courts. Because their opportunity-to-be-heard claims could not possibly have been raised

in their original petitions for review, the REAL ID Act does not foreclose district court habeas review. If Appellees can access the immigration court system, judicial review of their underlying immigration claims will eventually be available through petitions for review. But the district court did not take jurisdiction of those claims—which continue to be channeled through the immigration court system—but rather over the opportunity-to-be-heard claims, for which there is no alternative to habeas review. Far from "usurping the authority of the immigration courts," Gov't Br. 1, habeas review bolsters those courts' authority by ensuring that they will actually be able to hear Appellees' underlying immigration claims.[16]

b. The government's second argument—erroneously adopted by the district court—is that 8 U.S.C. §1252(g) eliminates all review over the "execution" of removal orders and therefore bars jurisdiction over Appellees' claims. But §1252(g) bars habeas review only for challenges to the exercise of prosecutorial discretion. As the Supreme Court held in *Reno v. AADC*, 525 U.S. 472, 485 n.9 (1999), §1252(g) should be interpreted "narrowly" as directed "against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion."[17]

[16] The government notes that 8 U.S.C. §1252(a)(4) provides that CAT claims must be reviewed in the courts of appeals. But §1252(a)(4), like the other, more general provisions on which the government relies (*e.g.*, §1252(a)(5)) is simply a channeling provision that applies only where the petition-for-review process is available.

[17] *See also Madu v. Attorney General*, 470 F.3d 1362, 1368 (11th Cir. 2006)

Appellees do not challenge the government's prosecutorial discretion to seek their removal. Rather, their legal and constitutional claims are that before they can be removed they must have the opportunity to seek meaningful review based on changed country conditions.

The district court held, however, that §1252(g) nonetheless barred its review of Appellees' claims, relying on *Elgharib v. Napolitano*, 600 F.3d 597, 605 (6th Cir. 2010). *Elgharib* does not foreclose habeas jurisdiction here. In *Elgharib*, this Court held only that §1252(g) barred review of a constitutional claim that directly challenged the validity of the original order, explaining: "If Elgharib's petition raised a challenge that did not require the district court to address the merits of her order of removal, then this court's precedents would support" jurisdiction. *Id*. at 605; *see also Mustata v. U.S. Dept. of Justice*, 179 F.3d 1017, 1021-23 (6th Cir. 1999) (finding jurisdiction, notwithstanding §1252(g), over claim seeking stay of removal, because it did not challenge the removal order's original validity: the

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(§1252(g) "does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions"); *Flores-Ledezma v. Gonzales*, 415 F.3d 375, 380 (5th Cir. 2005) (no §1252(g) bar where petitioner "challenges the constitutionality of the statutory scheme allowing for such discretion"); *Jama v. INS*, 329 F.3d 630, 632 (8th Cir. 2003) (§1252(g) does not bar review of Attorney General's non-discretionary "legal conclusions"); *Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001) (§1252(g) "limits the power of federal courts to review the discretionary decisions of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders"); *Wallace v. Reno*, 194 F.3d 279, 283 (1st Cir. 1999) (same).

government's "argument to the contrary confuses the substance of the . . . claim with the remedy requested"). In addition, unlike here, *Elgharib*'s petitioner could have raised the very claim she subsequently filed in district court in her original petition for review, but waived appeal. 600 F.3d at 600 n.2.

Here, Appellees do not ask the district court to review the merits of their original removal orders, but rather claim that their removal under the current conditions in Iraq would be unlawful, and that they have a constitutional and statutory right to be heard in immigration court on their underlying claims that removal would now violate the INA and CAT/FARRA because of circumstances that arose *after* their original removal orders were final.

In short, §1252(g) does not eliminate habeas jurisdiction over Appellees' nondiscretionary claims, which could not have been raised in a petition for review, do not challenge prosecutorial discretion, and do not attack the validity of their original removal orders. This Court need not, therefore, reach the Suspension Clause issue.

2. The District Court Correctly Held That Appellees' Claims Must Be Reviewable under the Suspension Clause.

If this Court concludes that the REAL ID Act does strip habeas jurisdiction, then to avoid a Suspension Clause violation it must find, as the district court did, that jurisdiction nonetheless exists. The Suspension Clause guarantees judicial review here under longstanding precedent, as the Supreme Court made clear in *St.*

Cyr. There, the Supreme Court exhaustively canvassed history and precedent to conclude that, should Congress unambiguously eliminate all federal court review over the legality of removal decisions, it would unconstitutionally suspend the writ. 533 U.S. at 301-05. The district court thus properly concluded that the Suspension Clause guarantees review of Appellees' claims.[18]

The government offers two arguments to the contrary. First, it maintains as a threshold matter that the Suspension Clause does not cover the type of claims Appellees raise. Second, it contends that even if the Suspension Clause applies, the Clause is not violated by elimination of the habeas forum, because the motion to reopen process provides an adequate alternative. The first argument cannot be squared with a century of Supreme Court precedent, including *St. Cyr*; the second argument cannot be squared with the district court's findings.

a. The government argues that the Suspension Clause covers only claims seeking physical release from detention and not challenges to removal. That remarkable contention is flat wrong—and definitively contradicted by *St. Cyr*, which involved not a detention claim but rather a challenge to a removal order. 533 U.S. at 300, 305 ("[T]o conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law."). As this

[18] As the district court properly held, the Suspension Clause also supports relief on the merits, providing Appellees an opportunity to receive Article III review of their individual motions to reopen. PI Op., R.87, Pg.ID#2352.

Court has long recognized, in the context of an "immigration-related habeas petition," the term "in custody" has a "specialized meaning" that includes situations where the "alien is not suffering any actual physical detention ... so long as he is subject to a final order of removal." *Mustata*, 179 F.3d at 1021 n.4.

The government slights *St. Cyr* and instead relies on wholly inapposite cases involving overseas wartime detainees and enemy combatants. For instance, the government cites *Munaf v. Geren*, 553 U.S. 674 (2008), which held that the courts should not block the military's wartime transfer of individuals, arrested and detained in Iraq, to the Iraqi government for criminal prosecution. The government analogizes Appellees' challenge to removal to *Munaf*'s challenge to transfer from U.S. to foreign control. But *Munaf*'s overseas context means that it could not be more different. Even more important, the government ignores that the *Munaf* Court *found* habeas jurisdiction and denied the claim on the merits. 553 U.S. at 680 (holding "the habeas statute extends to American citizens held overseas by American forces" but denying relief "[u]nder circumstances presented"). The government's reliance on cases like *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), is equally misplaced. *Kiyemba* involved enemy combatants held at

Guantanamo; the D.C. Circuit held only that CAT claims could not be raised by enemy combatants overseas and wholly outside the immigration system.[19]

The government additionally argues that class-wide relief "falls outside the traditional use of habeas." Gov't Br. 28-29. This disregards the ample precedent, both recent and longstanding, for class-wide claims in habeas proceedings. *See, e.g.*, *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub. nom.*, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (class action habeas challenge to immigration detention); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973) (rejecting argument that habeas corpus cases cannot be class actions). Although habeas actions are not strictly governed by the Federal Rules and therefore Rule 23 does not automatically apply, a court retains power "to fashion for habeas actions 'appropriate means of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.'" *Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974) (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)).

b. The government alternatively argues that the habeas writ has not been suspended because Congress has provided an adequate and effective alternative to

[19] The government argues that Appellees' claims fall outside the scope of traditional habeas review because they raise "factual" questions whether country conditions have changed. Gov't Br. 27-28. In resolving legal claims, like Appellees', habeas courts routinely do and must make factual findings. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 780 (2008); *Harris v. Nelson*, 394 U.S. 286, 290-92 (1969).

habeas review—the motion to reopen process, followed by judicial review in the court of appeals. The district court properly concluded on this record that this alternative was not, in fact, available here.[20] *See supra* §III.B.2.

The government emphasizes that this and other circuits have held that the motion to reopen process is categorically sufficient under the Suspension Clause. Gov't Br. 33. But those cases held only that the motion to reopen process was not *facially* inadequate; they did not find the reopening process adequate regardless of the factual circumstances. *See, e.g.*, *Muka v. Baker*, 559 F.3d 480, 484-85 (6th Cir. 2009) ("every circuit to confront this issue has agreed that, *facially*, the petition for review filed in the court of appeals provides an adequate and effective process to review final orders of removal, and thus the elimination of habeas relief does not violate the Suspension Clause") (emphasis added); *Iasu v. Smith*, 511 F.3d 881, 888 (9th Cir. 2007) ("[*F*]*acially*, the REAL ID Act is not an unconstitutional suspension of the writ….") (emphasis added).

The government further claims that the district court's Suspension Clause ruling suggests that the motion to reopen process is *always* constitutionally inadequate where individuals raise CAT claims based on changed country

[20] To the extent the government frames its argument in terms of exhaustion of remedies, the only requirement is to exhaust adequate and available remedies. *See Boumediene*, 553 U.S. at 795 (noncitizens held as enemy combatants could seek habeas review without exhausting administrative review procedures because those procedures were inadequate).

conditions. Gov't Br. 34-35. But neither the district court nor Appellees rely on the mere fact that Appellees are raising CAT claims based on changed conditions. Rather, as discussed above, the district court relied on the totality of circumstances, including the length of time Appellees have lived here, the lack of any notice that they might be removed, the difficulty in finding and communicating with counsel, their sudden detention and frequent transfer, the preliminary showing of changed country conditions, and the grave danger they face in Iraq, which would render the motion to reopen remedy at that point futile. *Supra* §III.B.2.b. Indeed, the district court was explicit that "[u]nder ordinary circumstances" it would not be proper to enjoin removal. PI Op., R.87, Pg.ID#2338.

Finally, the government argues that Appellees should have brought their motions to reopen earlier, when there was more time for the immigration courts to act. Gov't Br. 36. The district court found, however, that there was no reason for Appellees to file motions to reopen during the years—even decades—they lived in the community after being ordered removed, and that in any event, conditions have worsened very recently. *Supra* §III.B.2.b. These findings are not clearly erroneous.[21] Moreover, the government's argument that Appellees should have

[21] Notably, withholding and deferral of removal can be rescinded if country conditions no longer place an individual at risk for persecution or torture. 8 C.F.R. §§ 1003.2, 1003.23, 1208.17(d)(1). The government's contrary suggestion, Gov't Br. 41 n.6, focuses solely on (more permanent) asylum relief unavailable for most

filed their motions earlier also conflicts with the statutory text, which provides, "[t]here is no time limit on the filing of a [covered] motion to reopen…" 8 U.S.C. §1229a(c)(7)(C)(ii). The only timing-related requirement is that the evidence "was not available and would not have been discovered or presented at the previous proceeding." *Id.*[22]

B. The District Court Did Not Abuse Its Discretion in Granting a Preliminary Injunction.

The most important underlying legal issue here is not disputed: The government may not remove noncitizens to a country where they face persecution, torture, or death without giving them a meaningful opportunity to be heard. Under the circumstances here, Appellees' removal without time for their motions to reopen to be filed and adjudicated would violate their constitutional and statutory rights.

Appellees. Moreover, Appellees had good reason not to file, since as the government has explained, ICE frequently incarcerates individuals with final orders who are living in the community when their cases are reopened. Resp. Br. Opposing Detention PI, R.158, Pg.ID#4113 (arguing that Iraqis who "reopen[] their final removal orders and re-enter[] removal proceedings" are subject to detention).

[22] By contrast, affirmative asylum applications must be filed within "a reasonable period given . . . 'changed circumstances.'" 8 C.F.R. §1208.4(a)(4)(iii).

1. Due Process Forbids Removal in the Face of Likely Persecution and Torture Without an Opportunity to Be Heard.

The district court correctly held that Appellees' removal would violate due process. Although "the administrative [immigration court] process is equipped to adjudicate the substance of Petitioners' motions to reopen ... [t]he process Congress erected can only adjudicate claims that are actually before [the immigration courts]." PI Op., R.87, Pg.ID#2348. Under the "confluence of extraordinary circumstances" here, Appellees could not meaningfully access that system without more time. Moreover, pursuing motions from abroad, where Appellees would already be subjected to the very persecution and torture from which they need protection, would be futile. As argued above, the practical unavailability, here, of the motion to reopen/stay process means that it is not an adequate alternative to habeas jurisdiction—necessitating jurisdiction under the Suspension Clause (which also, on the merits, compels a meaningful judicial process for review of Appellees' claims). *Supra* §VI.A.2. That same practical unavailability means the Due Process Clause likewise requires a stay. Juris. Op., R.64, Pg.ID#1246-47; PI Op., R.87, Pg.ID#2347-52.

Appellees' interest in avoiding deportation is protected by the Due Process Clause, which guarantees fair removal procedures. *Reno v. Flores*, 507 U.S. 292, 306 (1993) ("[T]he Fifth Amendment entitles aliens to due process of law in

deportation proceedings."). Under the Due Process Clause, "the degree of potential deprivation that may be created by a particular decision"—here, the gravest of deprivations—"is a factor to be considered in assessing the validity of any administrative decisionmaking process." *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976). Appellees' protectable interest is particularly strong both because of their core interest in avoiding grave bodily harm and because of the mandatory right against removal to probable persecution or torture. *See* INA, 8 U.S.C. §1231(b)(3); CAT/FARRA, *id*. §1231 note.

Due process, of course, requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Had the government succeeded in rapidly removing Appellees, it would have denied them the opportunity to be heard at a meaningful time—*before* their removal to Iraq—about the dangers they face.

The Supreme Court has emphasized that motions to reopen are crucial to the immigration system's procedural fairness, *Kucana v. Holder*, 558 U.S. 233, 242 (2010), and the government does not dispute that due process extends to motions to reopen. Gov't Br. 39 (arguing that the "only pertinent questions" are whether petitioners had a meaningful opportunity to access the motion to reopen process).[23]

[23] Even before Congress's 1996 codification of the motion to reopen process, *see* 8 U.S.C. §1229a(c)(7), this Court held that the Due Process Clause applies. *See, e.g.*,

While the government concedes that Appellees have a due process right not to be removed to Iraq without the opportunity to be heard, it argues that Appellees have been given all the process due. Gov't Br. 39. The government focuses first on the *past* availability of motions to reopen, at a time when Iraq was refusing repatriations, and second on the purported *current* availability of motions to reopen. The district court properly rejected both these arguments for the same reasons that it properly rejected the argument that the motion to reopen process provides an adequate alternative to habeas review. *See supra* §III.B.2.b; §VI.A.2. The government's argument that Appellees had an opportunity to file motions to reopen earlier ignores, as the district court found, that (1) until there was an actual risk of removal it would have been unreasonable to expect Appellees to seek reopening; and (2) there is no single date on which country conditions changed, but rather conditions continue to evolve and new threats have emerged very recently. *See supra* §III.B.2.b. The government disagrees, but those findings were not

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Dokic v. INS, 899 F.2d 530, 532 (6th Cir. 1990) (denial of motion to reopen could be challenged "as violative of due process"); *see also, e.g.*, *Precaj v. Holder*, 491 F. App'x 663 at *5 (6th Cir. 2012) (failure even to consider motion to reopen would violate due process). While this Court has also held that motions to reopen seeking, "at bottom," only discretionary relief involve no liberty/property interests and therefore no due process protections are required, *United States v. Estrada*, 876 F.3d 885, 887 (6th Cir. 2017), that holding has no application here, where the underlying relief/protection is mandatory.

clearly erroneous. The government's argument that changed country conditions should have been apparent earlier, Gov't Br. 38, is thus beside the point.

Second, the district court found that it was difficult for Appellees to file even bare-bones, destined-to-lose motions, much less adequate ones, during the short period between their arrest and threatened removal. *See supra* §III.B.2.b. That the few emergency motions that were filed—which were, unavoidably, made without sufficient explication of the underlying claims, without expert support for changed country conditions, and without full briefing—were largely unsuccessful, while the later-filed motions have nearly all been granted, underscores the point: the government's quick-march to removal deprived Appellees of the time needed for fair process. *See supra* §III.B.2.c.

Relatedly, the nominal availability of immigration court stays—which exists only after a motion to reopen has been filed (accompanied by the papers seeking the underlying relief)—could not cure the due process violation here. The procedures governing administrative stays do not adequately ensure that individuals will not be removed even after motions are filed. Even Appellees with pending stay applications, like Mr. Al-Shimmary, *see supra* §III.B.2., would almost certainly have been removed without the district court's stay. *Cf. Trujillo-Diaz v. Sessions*, __ F.3d ___, No. 17-3669, 2018 WL 443879, *2 (6th Cir. Jan. 17,

2018) (remanding for further consideration of changed-country-conditions motion to reopen for a noncitizen removed while the motion was pending in the BIA).

Finally, the district court found that Appellees could not reasonably pursue a motion to reopen from Iraq. The government may disagree with the district court's factual determination that Appellees were "prevented ... from availing themselves of the administrative system's procedural protections." PI Op., R.87, Pg.ID# 2349. But those findings are fully supported by the record.

2. The INA and CAT/FARRA Are Best Read to Require a Stay of Removal to Effectuate Appellees' Rights to File a Motion to Reopen Based on Changed Country Conditions and to Protection Against Probable Persecution or Torture.

The district court correctly recognized that the INA, 8 U.S.C. §1231(b)(3), and CAT/FARRA, 8 U.S.C. §1231 note, prohibit removal to persecution or torture. It also correctly recognized that Congress implemented those substantive rights with a statutory procedural right to seek protection with a motion to reopen based on changed country conditions. Where the district court erred was in rejecting Appellees' statutory argument: because both rights would be meaningless without time to file and litigate the motion to reopen before removal, the INA and CAT/FARRA are best read to require a stay of removal in extraordinary circumstances, like those here, where only a district court stay can preserve the meaningful opportunity to raise claims of persecution and torture, and in turn

prevent the removal of noncitizens more likely than not to be tortured or persecuted if removed. If this Court rules on this statutory ground, it need not reach the due process constitutional claim.[24]

The INA enacts a "[r]estriction on removal to a country where [an] alien's life or freedom would be threatened." 8 U.S.C. §1231(b)(3). Often referred to as "withholding of removal," this provision—which for those who qualify is mandatory, not discretionary, *id*. at §(b)(3)(A)—implements "the 'non-refoulement obligation' reflected in Article 33 of the Refugee Convention." *Yousif v. Lynch*, 796 F.3d 622, 632 (6th Cir. 2015). CAT similarly forbids its signatories, including the United States, to "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." CAT art. 3(1). CAT's prohibition on removal is mandatory, too: without exception, a signatory country may not remove a person to a country where s/he is likely to face torture. This core international law commitment was made binding domestic law by FARRA, 8 U.S.C. §1231 note: "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture."

[24] "[T]his court may consider any arguments that support the lower court's judgment, even if a cross appeal is not filed." *Landrum v. Anderson*, 813 F.3d 330, 335 (6th Cir. 2016).

FARRA gave CAT "wholesale effect." *Medellin v. Texas*, 552 U.S. 491, 520 (2008). The implementing regulations confirm that a noncitizen may not be removed if "it is more likely than not that [they] would be tortured if removed to the proposed country of removal." 8 C.F.R. §208.16(c)(2).[25]

The substantive right not to be removed to persecution or torture is protected by an associated procedural right to seek reopening of prior removal orders. *See Dada v. Mukasey*, 554 U.S. 1, 14 (2008) (INA establishes a "right to file a motion to reopen"); *see also* 8 U.S.C. §1229a(c)(7)(A); U.N. Special Rapporteurs on Torture Amicus Brief, R.80, Pg.ID#1920-50. The critical role that motions to reopen play in avoiding unlawful removals to persecution or torture is reflected in the statutory provision that guarantees noncitizens the right to file motions to reopen based on changed country conditions at any time. 8 U.S.C. §1229a(c)(7)(C)(ii).

As the Supreme Court has explained, the "motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Kucana*, 558 U.S. at 242 (quoting *Dada*, 554 U.S. at 18). But that safeguard can operate only if there is a real opportunity to actually pursue motions

[25] Witholding of removal under the INA and CAT is unavailable to those convicted of "particularly serious crimes." 8 U.S.C. §1231(b)(3); 8 C.F.R. §1208.16(b)(3). But CAT "deferral of removal" applies universally, regardless of criminal history. 8 C.F.R. §1208.17(d)(1).

to reopen. If, instead, noncitizens are removed to probable persecution and torture before they can file those motions and have them heard, that would violate the INA and CAT/FARRA.

The Supreme Court has explained that "[i]t is necessary ... to read the [INA] to preserve the alien's right to pursue reopening," and that courts should be "reluctant" to infer limits on the availability of motions to reopen that would "nullify a procedure so intrinsic a part of the legislative scheme." *Dada*, 554 U.S. at 18-19 (quoting *Costello v. INS*, 376 U.S. 120, 127-28 (1964)). Under the circumstances here, that means that the INA and CAT/FARRA require a stay of removal: After all, as the district court held, Appellees could not reasonably be expected to have pursued a motion to reopen in the past; they could not reasonably pursue a motion to reopen in the few days between their arrest and their intended removal; and they cannot reasonably pursue a motion to reopen from Iraq. PI Op., R.87, Pg.ID#2340, 2348-49; Juris. Op., R.64, Pg.ID#1244; *supra* §III.B.2.b. Moreover, a requirement to file motions to reopen as soon as country conditions change is inconsistent with the statute. *See supra* §VI.A.2.

The district court, in declining to read the INA and CAT/FARRA to require a stay, where necessary to protect the opportunity to file a motion to reopen before removal to likely persecution or torture, focused on regulations providing that removal is not automatically stayed by the filing of a motion to reopen or appeal of

the denial of such a motion. PI Op., R.87, Pg.ID# 2346. However, the language in 8 C.F.R. §§1003.23(b)(1)(v) and 1003.6(b), providing that removals are not automatically stayed when a motion to reopen is filed or pending appeal of its denial, both predate FARRA. *See* 36 Fed. Reg. 316, 317 (Jan. 9, 1971); 61 Fed. Reg. 18900, 18907 (Apr. 29, 1996); 62 Fed. Reg. 10312, 10331 (Mar. 6, 1997). These regulations therefore cannot constitute any kind of effort—much less a reasonable one entitled to deference under *Chevron v. NRDC*, 467 U.S. 837 (1984)—to interpret that statute. It is the statutory prohibition on removals to persecution or torture that controls.

In any event, Appellees do not claim that the motion to reopen process must *always* be accompanied by a stay of removal. The argument is far more limited: to preserve their statutory right to reopen in cases of probable persecution or torture—and to avoid the constitutional problem described above—the Court should read CAT/FARRA and the INA to include a judicially-enforceable right to a stay of removal in circumstances like those presented here, where plausible claims to (1) mandatory relief/protection and (2) changed country conditions are joined with persuasive showings that only a stay can preserve the right to seek reopening.

C. The Scope of the Injunction is Appropriate.

The government challenges three aspects of the district court's order as overbroad. In fact, all are well within the district court's equitable discretion. Moreover, the government made only the third argument—that the stay should not last long enough to allow for judicial review of administrative immigration decisions—in the district court prior to filing this appeal. Therefore, while these challenges are without merit, should this Court believe a narrower injunction is required, it should remand for the district court to make an initial determination. Guided by this Court's decision on the injunction more generally, the district court can then exercise the discretion it is due under the preliminary injunction standard. *See, e.g.*, *Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 430 (6th Cir. 2016) (Court of Appeals "will not consider arguments raised for the first time on appeal unless the failure to consider the issue will result in a plain miscarriage of justice"); *People by Abrams v. Terry*, 45 F.3d 17, 24 (2d Cir. 1995) (declining to address challenges to preliminary injunction scope because district court should have first opportunity to rule).

Coverage. The government argues that the order is overbroad because it covers (1) people whose final removal orders date from 2015 or later, and (2) people who are currently non-detained. Neither issue was timely raised below.[26]

With respect to removal orders that postdate 2014, the government argues that because ISIS's rise preceded the orders, changed-country-condition motions must fail, obviating any need to access the motion-to reopen process. Gov't Br. 48. The argument assumes, contrary to the district court's factual findings, that country conditions have not changed further since 2014, that ISIS is the only threat Appellees face, and that recent developments—including media coverage of Appellees' criminal records—have not further heightened the risks. *See supra* §III.B.2.b. In addition, the right the injunction protects is procedural; if an individual cannot sustain a changed-country-conditions claim, the immigration courts will say so. *Barry v. Lyon*, 834 F.3d 706, 722 (6th Cir. 2016) (class members who might not prevail on substantive claims are still entitled to due process). Finally, the government's suggested approach would not only deny procedural due process to individuals ordered removed after some undetermined date, but would also necessitate a complex evidentiary hearing about country

[26] *After* filing this appeal, the government did move to lift the injunction for one individual with a more recent removal order, Al-Bidairi Mot., R.143, Pg.ID#3840-63. But the district court by then lacked jurisdiction, because the appeal was pending before this Court. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 513, 514 (6th Cir. 1992).

conditions in Iraq. Whether any individual Appellee can demonstrate changed country conditions is a decision best left to the immigration courts, the BIA, and (on a petition for review) the relevant court of appeals.

The government's argument that the order is overbroad in its application to nondetained individuals is equally misplaced. Gov't Br. 47-48. In fact, the order does not apply to nondetained individuals; it is not until the government detains an Iraqi national that the order comes into play. PI. Op., ¶1, R.87, Pg.ID#2355. If the government's point is that *future* detainees should not be protected, that argument ignores the fundamental due process requirement—applicable equally to current and future detainees—of notice. Due process requires not just a meaningful opportunity to be heard, but also notice because, as the Supreme Court has held many times, the "right to be heard has little reality or worth unless one is informed that the matter is pending." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see also Dusenbery v. United States*, 534 U.S. 161, 168 (2002).

It may be that non-detained Iraqis do not face all of the barriers to accessing the immigration courts as those already detained (although some barriers, like the length of time it takes to obtain necessary files and prepare pleadings, are the same). But the due process violation here is grounded in the fact that Appellees suddenly face immediate enforcement of removal orders "which had lain dormant" for years because of their past non-repatriability, and now face grave danger in

Iraq. PI Op., R.87, Pg.ID#2323. That is just as true of future detainees as it is of current detainees.

The government's implicit assumption is that, while detained Iraqis had no notice that they were suddenly to be removed, those not yet detained should all realize that their long-dormant removal orders may suddenly be enforced. The government does not explain why this is so. Moreover, case law establishes that due process requires the government to provide notice even to sophisticated parties with "means at their disposal to discover" the relevant facts. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799-800 (1983); *see also Jones v. Flowers*, 547 U.S. 220, 232-33 (2006) (rejecting "inquiry notice" argument that common knowledge satisfies the government's notice obligations).

The government—which has regular contact with the non-detained Iraqis with removal orders, since they report to ICE for supervision—has given them no notice that anything has changed since they were deemed non-repatriatable years ago. Justice Frankfurter emphasized in an opinion about the due process rights of noncitizens that "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). Unless and until the government takes steps to use that instrument, the district court's injunction appropriately

protects the due process rights of future as well as current detainees. (If the Court deems this not-previously-raised argument sufficiently plausible to justify further consideration, it can remand for the district court to address any requested modification to the injunction.)

Immigration File Production. The government challenges the requirement that it provide the files the district court found necessary to competently draft motions to reopen. PI Op., R.87, Pg.ID#2331. Again, this issue was not raised below in the TRO or Preliminary Injunction briefing or hearings. Moreover, even in post-injunction briefing on the deadlines for transmittal, the government has never offered more than a naked assertion of burden. *Cf.* 8 Charles Alan Wright et al., *Fed. Prac. & Proc. Civ.* § 2008.1 n. 20 (3d ed. 2010 & Supp. 2017) (conclusory allegations of burden insufficient to defeat discovery). In addition, with stray exceptions, all files for current class members have already been produced. *See* Produc. of A-Files Order, R.195, Pg.ID#5372-77.

The part of this order that remains is the government's obligation to provide files to future detainees. For those new detainees the file production remains important because the ordinary process—the Freedom of Information Act (FOIA)—can take many months, rendering it entirely inadequate for time-sensitive needs. PI Op., R.87, Pg.ID#2331. *See Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (requiring routine production of A-files in removal proceedings without a

FOIA request, "because FOIA requests often take a very long time, continuances in removal hearings are discretionary, and aliens in removal hearings might not get responses to their FOIA requests before they were removed"). The government complains that production is burdensome, but of course FOIA compliance would require equivalent government resources. The district court clearly had discretion to order production that is no more taxing on the government than the statutory right for which it substitutes, provides a clear start to the 90-day clock for filing motions, and allows for more efficient production techniques, monitoring, and supervision.

Availability of Judicial Review. Finally, it was entirely appropriate for the district court to structure its stay of removal to last through the administrative adjudication process and, for individuals whose motions are denied by the BIA, until filing of a petition for review and decision on a stay from the court of appeals. This entire process is the one that the INA mandates, but absent the injunction, it might well be pretermitted. Moreover, as explained in §VI.A.2., the Suspension Clause requires that some federal court be able to review the merits of individual removal orders. If the government were permitted to remove Appellees prior to a court of appeals ruling on a stay motion, that would effectively allow an administrative agency to wipe out the jurisdiction of the federal courts. The district court instead reasonably acted to ensure federal court review prior to removal.

D. The District Court Did Not Abuse Its Discretion In Weighing the Stay/Preliminary Injunction Factors.

The district court explained that "the significant chance of loss of life and lesser forms of persecution" constitutes irreparable harm that "far outweighs any conceivable interest the Government might have in the immediate enforcement of the removal orders." TRO Op., R.32, Pg.ID#501. In granting the preliminary injunction, the court rejected each of the government's arguments—re-raised here—challenging the court's weighing of the factors. PI Op., R.87, Pg.ID#2352-55.

First, the court rejected the government's efforts to minimize Appellees' irreparable harm: "Petitioners' claims are far from speculative. Each Petitioner faces the risk of torture or death on the basis of residence in America and publicized criminal records; many will also face persecution as a result of a particular religious affiliation." *Id.* Pg.ID#2354; *supra* §III.B.1. The government's assertion that Appellees will not be removed to ISIS-controlled territory "provides little solace," given that they face threats from Iraq's security forces and other groups and given the "uncertainty created by the ever-shifting fortunes of war." *Id.* Pg.ID#2353.

Second, Appellants, having not enforced these removal orders for years or decades, now claim, implausibly, that they are irreparably harmed by a far shorter delay. The district court weighed things differently, finding that Appellees time "to

invoke the [motion-to-reopen] process Congress established is a small price to pay" for fundamental fairness. *Id.* The district court did not abuse its discretion in weighing human life over administrative efficiency.

VII. CONCLUSION

The district court's preliminary injunction should be affirmed.

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CERTIFICATE OF SERVICE

I certify that on February 5, 2018, the above brief was served on all counsel of record through the Court's CM/ECF System.

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CERTIFICATE OF COMPLIANCE

I certify that the above brief contains 12,996 words, excluding portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that the above response brief complies with the type size and typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure: it was prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point typeface.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Hamama, et al., v. Homan, et al.

Eastern District of Michigan, Case No. 17-cv-11910

ECF No.	Page ID #	Date Filed	Description
1	1–26	06-15-2017	Habeas Corpus Class Action Petition
11	45–83	06-15-2017	Petitioners' Motion for TRO and/or Stay of Removal
11-2	85–89	06-15-2017	(First) Declaration of Russell Abrutyn
11-3	91–95	06-15-2017	Declaration of Nora Youkhana
11-4	97–99	06-15-2017	Declaration of Ameer Salman
11-5	101–03	06-15-2017	Declaration of Albert Valk
11-6	105–06	06-15-2017	Declaration of Silvana Nissan
11-7	108–10	06-15-2017	Declaration of Eman Jajonie-Daman
11-8	112–14	06-15-2017	Declaration of William Swor
11-9	116–18	06-15-2017	Declaration of Cynthia Barash
11-10	120–24	06-15-2017	Declaration of Mark Lattimer
11-11	126–29	06-15-2017	Decisions of the Board of Immigration Appeals
14	178–81	06-16-2017	Declaration of Brianna Al-Dilaimi
29	357–410	06-22-2017	Memorandum of *Amicus Curiae* The Chaldean Community Foundation
30	411–20	06-22-2017	Petitioners' Reply in Support of Motion for TRO and/or Stay of Removal
30-2	423–425	06-22-2017	Declaration of Nadine Yousif
30-3	427–31	06-22-2017	Declaration of Susan E. Reed
30-4	433–38	06-22-2017	Declaration of Mark Lattimer
30-5	440–54	06-22-2017	Declaration of Rebecca Heller

ECF No.	Page ID #	Date Filed	Description
31	455–96	06-22-2017	Transcript of June 21, 2017 Hearing of Petitioners' Motion for TRO and/or Stay of Removal
32	497–502	06-22-2017	Opinion & Order Staying Removal of Petitioners Pending Court's Review of Jurisdiction
34	507–08	06-23-2017	Order Regarding Public Access
35	509–48	06-24-2017	First Amended Habeas Corpus Class Action Petition and Class Action Complaint for Declaratory, Injunctive, & Mandamus Relief
36P	549–84	06-24-2017	Plaintiffs/Petitioners' Emergency Motion to Expand Order Staying Removal to Protect Nationwide Class of Iraqi Nationals Facing Imminent Removal to Iraq
36-2	587–604	06-24-2017	Declaration of R. Andrew Free
36-3	605–08	06-24-2017	Declaration of María Martínez Sánchez
36-4	609–11	06-24-2017	Declaration of Brenda Sisneros
36-5	612–13	06-24-2017	Declaration of Cheryl Lane
36-6	614–15	06-24-2017	Declaration of Kellita Rivera
43	671–77	06-26-2017	Opinion & Order Granting Petitioners'/Plaintiffs' Motion to Expand Order Staying Removal to Protect Nationwide Class
44	678–711	06-27-2017	Transcript of June 26, 2017 Hearing of Plaintiffs/Petitioners' Emergency Motion to Expand Order Staying Removal to Protect Nationwide Class of Iraqi Nationals Facing Imminent Removal to Iraq
59	886–924	07-06-2017	Transcript of July 5, 2017 Hearing of Petitioners/Plaintiffs' Motion for Expedited Briefing Schedule for Plaintiffs/Petitioners' Motion for Preliminary Injunction and to Extend Order Staying Removal

ECF No.	Page ID #	Date Filed	Description
60	925–26	07-06-2017	Plaintiffs/Petitioners' Letter to the Court in Response to Order Regarding Public Access (ECF# 34)
61	1195–97	07-06-2017	Order Extending Stay of Enforcement of Removal Orders Pending Court's Review of Jurisdiction
62	1198	07-10-2017	Order Directing Clerk's Office to Unseal Case
63	1199–1224	07-11-2017	Habeas Corpus Class Action Petition *Sealed Version at ECF #1*
64	1225–48	07-11-2017	Opinion & Order Regarding Jurisdiction
66	1251–87	07-12-2017	Petitioners' Motion for TRO and/or Stay of Removal *Sealed Version at ECF #11*
66-2	1291–95	07-12-2017	(First) Declaration of Russell Abrutyn *Sealed Version at ECF #11-2*
66-3	1297–1301	07-12-2017	Declaration of Nora Youkhana *Sealed Version at ECF #11-3*
66-4	1303–05	07-12-2017	Declaration of Ameer Salman *Sealed Version at ECF #11-4*
66-5	1307–09	07-12-2017	Declaration of Albert Valk *Sealed Version at ECF #11-5*
66-6	1311–12	07-12-2017	Declaration of Silvana Nissan *Sealed Version at ECF #11-6*
66-7	1314–16	07-12-2017	Declaration of Eman Jajonie-Daman *Sealed Version at ECF #11-7*
66-8	1318–20	07-12-2017	Declaration of William Swor *Sealed Version at ECF #11-8*
66-9	1322–24	07-12-2017	Declaration of Cynthia Barash *Sealed Version at ECF #11-9*
66-10	1326–30	07-12-2017	Declaration of Mark Lattimer *Sealed Version at ECF #11-10*

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66-11	1332–35	07-12-2017	Decisions of the Board of Immigration Appeals *Sealed Version at ECF #11-11*
67	1382–85	07-12-2017	Declaration of Brianna Al-Dilaimi *Sealed Version at ECF #14*
68	1386–1425	07-12-2017	First Amended Habeas Corpus Class Action Petition and Class Action Complaint for Declaratory, Injunctive, & Mandamus Relief *Sealed Version at ECF #35*
69	1426–61	07-12-2017	Plaintiffs/Petitioners' Emergency Motion to Expand Order Staying Removal to Protect Nationwide Class of Iraqi Nationals Facing Imminent Removal to Iraq *Sealed Version at ECF #36*
69-2	1464–81	07-12-2017	Declaration of R. Andrew Free *Sealed Version at ECF #36-2*
69-3	1482–85	07-12-2017	Declaration of María Martínez Sánchez *Sealed Version at ECF #36-3*
69-4	1486–88	07-12-2017	Declaration of Brenda Sisneros *Sealed Version at ECF #36-4*
69-5	1489–90	07-12-2017	Declaration of Cheryl Lane *Sealed Version at ECF #36-5*
69-6	1491–92	07-12-2017	Declaration of Kellita Rivera *Sealed Version at ECF #36-6*
70	1493–1553	07-13-2017	Transcript of July 13, 2017 Status Conference
77	1703–47	07-17-2017	Petitioners/Plaintiffs' Motion for Preliminary Stay of Removal and/or Preliminary Injunction
77-2	1752–56	07-17-2017	(First) Declaration of Russell Abrutyn *Sealed Version at ECF #11-2*
77-3	1758–62	07-17-2017	Declaration of Nora Youkhana *Sealed Version at ECF #11-3*

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77-4	1764–66	07-17-2017	Declaration of Ameer Salman *Sealed Version at ECF #11-4*
77-5	1768–70	07-17-2017	Declaration of Albert Valk *Sealed Version at ECF #11-5*
77-6	1772–73	07-17-2017	Declaration of Silvana Nissan *Sealed Version at ECF #11-6*
77-7	1775–77	07-17-2017	Declaration of Eman Jajonie-Daman *Sealed Version at ECF #11-7*
77-8	1779–81	07-17-2017	Declaration of William Swor *Sealed Version at ECF #11-8*
77-9	1783–85	07-17-2017	Declaration of Cynthia Barash *Sealed Version at ECF #11-9*
77-10	1787–91	07-17-2017	Declaration of Mark Lattimer *Sealed Version at ECF #11-10*
77-11	1793–95	07-17-2017	Declaration of Nadine Yousif *Sealed Version at ECF #30-2*
77-12	1797–1801	07-17-2017	Declaration of Susan E. Reed *Sealed Version at ECF #30-3*
77-13	1803–08	07-17-2017	(Second) Declaration of Mark Lattimer *Sealed Version at ECF #30-4*
77-14	1810–24	07-17-2017	Declaration of Rebecca Heller *Sealed Version at ECF #30-5*
77-15	1826–35	07-17-2017	Declaration of Andrew Free *Sealed Version at ECF #36-2 (with exhibits)*
77-16	1837–40	07-17-2017	Declaration of María Martínez Sánchez *Sealed Version at ECF #36-3*
77-17	1842–44	07-17-2017	Declaration of Brenda Sisneros *Sealed Version at ECF #36-4*
77-18	1846–47	07-17-2017	Declaration of Cheryl Lane *Sealed Version at ECF #36-5*
77-19	1849–50	07-17-2017	Declaration of Kellita Rivera *Sealed Version at ECF #36-6*

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77-20	1852–56	07-17-2017	Declaration of Bonsitu Kitaba-Gaviglio
77-21	1858–62	07-17-2017	(First) Declaration of William B. Peard
77-22	1864–66	07-17-2017	Declaration of Ruby Kaur
77-23	1868–72	07-17-2017	Declaration of Randy Samona
77-24	1874–77	07-17-2017	Declaration of Claudia Valenzuela
77-25	1879–83	07-17-2017	Declaration of Constantin Jalal Markos
77-26	1885–92	07-17-2017	(First) Declaration of Trina A. Realmuto
77-27	1894–97	07-17-2017	(First) Declaration of Hillary J. Scholten
77-28	1899–1902	07-17-2017	Second Declaration of Russell Abrutyn
77-30	1912–14	07-17-2017	Declaration of Brianna Al-Dilaimi *Sealed Version at ECF #14*
80	1920–50	07-19-2017	Brief of *Amici Curiae* Current & Former U.N. Special Rapporteurs on Torture
81	1987	07-20-2017	Respondents' Response in Opposition to Petitioners' Request for Preliminary Injunction
83	2061–99	07-20-2017	Petitioners'/Plaintiffs' Motion for Class Certification
84	2207–21	07-21-2017	Petitioners/Plaintiffs' Reply in Support of Petitioners/Plaintiffs' Motion for Preliminary Stay of Removal and/or Preliminary Injunction
84-2	2224–27	07-21-2017	Declaration of Detention and Deportation Officer Julius Clinton (June 12, 2017)
84-3	2229–33	07-21-2017	Third Supplemental Response in Opposition to Petition for Writ of Habeas Corpus (ECF 14), *Ablahid v. Adducci*, Case No. 17-10640
84-4	2235–36	07-21-2017	Declaration of Danielle Hanna
84-5	2238–40	07-21-2017	(First) Declaration of Edward Amir Bajoka
84-6	2242–49	07-21-2017	Declaration of Daniel W. Smith
84-7	2251–54	07-21-2017	(Second) Declaration of William B. Peard

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84-8	2256–58	07-21-2017	Declaration of Detention and Deportation Officer Julius Clinton (May 9, 2017)
86	2269–2322	07-24-2017	Transcript of July 21, 2017 Hearing of Petitioners/Plaintiffs' Motion for Preliminary Stay of Removal and/or Preliminary Injunction
87	2323–57	07-24-2017	Opinion & Order Granting Petitioners' Motion for Preliminary Injunction
95	2522–55	08-30-2017	Petitioners' Status Report
100	2599–2661	09-01-2017	Transcript of August 31, 2017 Status Conference
118	2956–3033	10-13-2017	Second Amended Habeas Corpus Class Action Petition and Class Action Complaint for Declaratory, Injunctive, and Mandamus Relief
138	3338–97	11-07-2017	Petitioners/Plaintiffs' Motion for Preliminary Injunction on Detention Issues
138-2	3402–10	11-07-2017	(First) Declaration of Margo Schlanger
138-3	3412–20	11-07-2017	Declaration of Abbas Oda Manshad Al-Sokaini *Sealed Version at ECF #220*
138-4	3422–29	11-07-2017	Declaration of Kamiran Taymour *Sealed Version at ECF #220-1*
138-5	3431–39	11-07-2017	Declaration of Adel Shaba *Sealed Version at ECF #220-2*
138-6	3441–49	11-07-2017	Declaration of Usama Jamil Hamama *Sealed Version at ECF #220-3*
138-7	3451–56	11-07-2017	Declaration of Ali Al-Dilaimi *Sealed Version at ECF #220-4*
138-8	3458–62	11-07-2017	Declaration of Sami Al-Issawi
138-9	3464–69	11-07-2017	Declaration of Qassim Hashem Al-Saedy *Sealed Version at ECF #220-5*

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138-10	3471–76	11-07-2017	Declaration of Atheer Fawozi Ali *Sealed Version at ECF #220-6*
138-11	3478–84	11-07-2017	Declaration of Moayad Jalal Barash *Sealed Version at ECF #220-7*
138-12	3486–91	11-07-2017	Declaration of Jami Derywosh *Sealed Version at ECF #220-8*
138-13	3493–98	11-07-2017	Declaration of Anwar Hamad
138-14	3500–04	11-07-2017	Declaration of Jony Jarjiss *Sealed Version at ECF #220-9*
138-15	3506–10	11-07-2017	Declaration of Mukhlis Youssif Murad *Sealed Version at ECF #220-10*
138-16	3512–16	11-07-2017	Declaration of Habil Nissan *Sealed Version at ECF #220-11*
138-33	3730–33	11-07-2017	Declaration of Abdulkar Hashem Al-Shimmary
143	3840–63	11-15-2017	[Respondents'] Motion to Lift Preliminary Injunction as to Maytham Al-Bidairi
158	4113	11-30-2017	Respondents' Opposition to Petitioners' Motion for Preliminary Injunction on Detention Issues
159-2	4177–78	11-30-2017	Kamiran Taymour Relief Order, November 27, 2017
174-3	4916–26	12-12-2017	Second Declaration of Margo Schlanger
184-2	5071	12-22-2017	Declaration of Michael V. Bernacke
220	*	02-02-2018	Declaration of Abbas Oda Manshad Al-Sokaini
220-1	*	02-02-2018	Declaration of Kamiran Taymour
220-2	*	02-02-2018	Declaration of Adel Shaba
220-3	*	02-02-2018	Declaration of Usama Jamil Hamama
220-4	*	02-02-2018	Declaration of Ali Al-Dilaimi
220-5	*	02-02-2018	Declaration of Qassim Hashem Al-Saedy

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220-6	*	02-02-2018	Declaration of Atheer Fawozi Ali
220-7	*	02-02-2018	Declaration of Moayad Jalal Barash
220-8	*	02-02-2018	Declaration of Jami Derywosh
220-9	*	02-02-2018	Declaration of Jony Jarjiss
220-10	*	02-02-2018	Declaration of Mukhlis Youssif Murad
220-11	*	02-02-2018	Declaration of Habil Nissan

* ECF 220 Page ID #s are unavailable from the district court at this time.