No. 17-2171

In The

United States Court of Appeals
For The
Sixth Circuit

USAMA JAMIL HAMAMA, et al.,

Petitioner-Appellees,

vs.

THOMAS HOMAN, Deputy Director and Senior Official Performing Duties of the Director, U.S. Immigration and Customs Enforcement, et al.,
Respondent-Appellants.

On Appeal from an Order of the United States District Court for the Eastern District of Michigan
D.C. Case No. 2:17-cv-11910

BRIEF OF FORMER FEDERAL IMMIGRATION AND DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND AFFIRMANCE

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici have served in the U.S. Department of Justice and senior positions in the federal agencies charged with enforcement of U.S. immigration laws, and in those capacities have played substantial roles in the development, implementation, and adjudication of federal immigration policy and laws. Amici thus have an interest in this case, and in the just and efficient operation of the U.S. immigration enforcement system.

Mónica Ramírez Almadani served in the U.S. Department of Justice as Counsel to the Assistant Attorney General for the Civil Rights Division from 2009 to 2012, and as Deputy Chief of Staff and Senior Counsel to the Deputy Attorney General from 2011 to 2012, during which time she, among other things, advised on immigration

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[1] Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). The parties have consented to the filing of this brief. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

policy and litigation and worked closely with the Executive Office of Immigration Review.

Seth Grossman served as Chief of Staff to the General Counsel of the U.S. Department of Homeland Security ("DHS") from 2010 to 2011, as Deputy General Counsel of DHS from 2011 to 2013, and as Counselor to the Secretary of Homeland Security in 2013.

Stephen Legomsky served as Chief Counsel of U.S. Citizenship and Immigration Services from 2011 to 2013, and as Senior Counselor to the Secretary of Homeland Security in 2015.

Leon Rodriguez served as Director of U.S. Citizenship and Immigration Services from 2013 to 2017.

John Sandweg served as the Acting Director of U.S. Immigration and Customs Enforcement ("ICE") in 2013 and 2014, and as the Acting General Counsel of DHS from 2012 to 2013.

Paul Wickham Schmidt served as an Immigration Judge for the U.S. Immigration Court from May 2003 until his retirement from the bench in June 2016. Before his Immigration Judge appointment, Judge Schmidt served as a Board Member and Board Chairman for the Board of Immigration Appeals, Executive Office for Immigration Review, from

1995 until 2003. Judge Schmidt also served as acting General Counsel of the former Immigration and Naturalization Service (INS) from 1979 to 1981 and again from 1986 to 1987, and as the Deputy General Counsel of INS from 1978 to 1987.

As former leaders of the nation's primary immigration agencies and the U.S. Department of Justice, and a former longtime Immigration Judge, amici are familiar with the operation of the United States immigration enforcement system. Amici support the district court's preliminary injunction order and urge this Court to affirm that decision. Amici focus here on two issues before this Court: (i) first, whether the "motion to reopen" process currently available before our immigration courts provides Petitioners with an "adequate and effective" substitute for habeas relief; and (ii) second, whether the public interest is served by briefly staying enforcement of removal orders regarding these Iraqi nationals so that the immigration courts have a fair opportunity to review their claims.

Based on our experience helping to lead the federal agencies charged with enforcement of U.S. immigration laws, we are compelled to conclude that the district court reached the correct conclusion on both these issues. In particular, without the "breathing room" provided by the district court's temporary stay of removal, our overburdened immigration courts are unable to provide an adequate and effective remedy for Petitioners having valid claims for protection from removal due to the likelihood they face persecution or torture on return to Iraq. In addition, given the clearly established changed circumstances in Iraq, which show that the Petitioners would have an objective well-founded fear of persecution if forced to return, the district court's order furthers the public interest by affording aliens threatened with persecution on removal to Iraq a meaningful opportunity to have these claims heard. The some-1,400 Iraqi nationals impacted by the district court's order represent a drop in the bucket compared to those subject to removal each year by immigration authorities, and a temporary stay of their removal to allow immigration courts time to assess their claims will not undermine the United States' immigration enforcement system.

ARGUMENT

I. The District Court Was Correct In Finding That, Under Current Circumstances, The Immigration Courts Do Not Provide Petitioners with Adequate and Effective Alternatives To Habeas Relief.

A. The Immigration Courts System.

The immigration courts are unique. Creatures of statute, they are not part of the judiciary branch, and are not administrative tribunals governed by the Administrative Procedure Act. *See* 6 U.S.C. § 521; 8 U.S.C. § 1101(b)(4); 8 C.F.R. § 1003.0(a). Instead, they are part of the executive branch, operating as tribunals within the U.S. Department of Justice (in the Executive Office of Immigration Review ("EOIR")).[2] Immigration judges are Department of Justice employees within EOIR appointed by the Attorney General, and their decisions are reviewable

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[2] 6 U.S.C. § 521. EOIR was created as a separate agency within DOJ in 1983 as part of an internal DOJ reorganization – the immigration courts previously were part of the legacy Immigration and Naturalization Service. *See* Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038 (Feb. 25, 1983).

by the Board of Immigration Appeals (BIA), also part of the DOJ. *See* 8 U.S.C. § 1101(b)(4); 8 C.F.R. § 1003.10.[3]

B. Our Immigration Courts Are Overburdened and Underfunded.

The U.S. immigration courts are notoriously underfunded and overburdened, especially in recent years. Although Congress has substantially increased funding for border security and protection over the years, it has not provided commensurate funding increases for the immigration courts. For example, between fiscal years 2002 and 2013, EOIR funding grew about 70 percent, while the funding for U.S.

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[3] Immigration judges and BIA members thus are federal civil servants and do not enjoy the employment protections afforded federal judges or administrative law judges. Any protections afforded them against discipline by their superiors within the DOJ would thus be found in the federal civil service laws. Various commentators have called for reorganization of these courts, in part to provide for their independence from the executive branch. *See, e.g.*, GAO, *Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges,* GAO-17-438 at 73-75 (June 2017) (outlining various reorganization proposals from experts and stakeholders); Hon. Dana Leigh Marks, *Let Immigration Judges Be Judges*, The Hill, May 9, 2013 (available at http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges) (advocating immigration courts becoming Article I courts).

Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) increased by about 300 percent.[4]

As a consequence, the number of open cases pending before the immigration courts has exploded. A recent Government Accountability Office (GAO) report noted that the "case backlog more than doubled from fiscal years 2006 through 2015," from approximately 212,000 cases in 2006 to 437,000 cases in 2015. GAO, *Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges,* GAO-17-438 at 22 (June 2017) (hereinafter "GAO Report"). This trend has continued. The case backlog grew to over 500,000 cases in 2016 and reached an all-time high of approximately 667,000 cases as of year-end 2017.[5] The chart below reflects this skyrocketing case backlog over the past decade.

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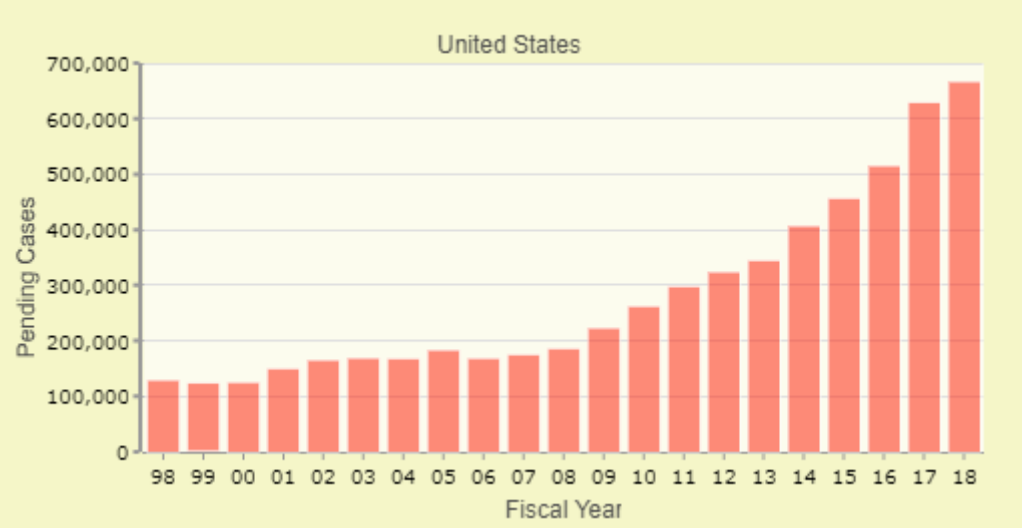
[4] Marc R. Rosenblum and Doris Meissner, *The Deportation Dilemma*, at 2, 17-18 (Migration Policy Institute, April 2014).

[5] Transactional Records Access Clearinghouse ("TRAC"), *Immigration Court Backlog Tool*, available at http://trac.syr.edu/phptools/immigration/court_backlog/.



TRAC, *Immigration Court Backlog Tool*, http://trac.syr.edu/phptools/immigration/court_backlog/.

While the case backlog has increased substantially over recent years, the number of immigration judges has not kept pace. In fiscal year 2006 there were 212 immigration judges, while almost a decade later, in fiscal year 2015, the number of immigration judges had increased to 247, spread across 58 courts nationwide. GAO Report 17-438, at 10-11, 23 (June 2017). By 2017, despite concerted efforts, the number of immigration judges had only grown to about 330.[6] As a

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[6] DOJ, Office of the Chief Immigration Judge, available at https://www.justice.gov/eoir/office-of-the-chief-immigration-judge. Although the DOJ has been committed to hiring more immigration judges to address the backlog, that hiring process has historically been a lengthy one. The

result, the average backload of cases has grown to over 2,000 cases for each immigration judge. Back in 2010, when the case backlog was half as high, the American Bar Association's Commission on Immigration expressed concern that EOIR underfunding resulted in too few judges and insufficient support staff "to competently handle the caseload."[7]

The crushing burden of this case backlog on these hardworking immigration judges has led, unsurprisingly, to substantial delays in processing cases. In 2006, the median pending time for cases before the immigration courts was 198 days, while by the start of fiscal year 2015 the median pending time had more than doubled, to 404 days. GAO Report 17-438, at 22. The delays in resolving immigration cases

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GAO "found that EOIR took an average of 647 days to hire an immigration judge," and concluded that the "EOIR does not have efficient practices for hiring new immigration judges, which has contributed to immigration judges being staffed below authorized levels." GAO Report 17-438, at 37-38, 40 (June 2017).

[7] ABA, Reforming the Immigration Court System at 2-16 (2010) ("EOIR is underfunded and . . . this resource deficiency has resulted in too few judges and insufficient support staff to competently handle the caseload of the immigration courts."), available at https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report. authcheckdam.pdf.

continues to increase. *See* TRAC, *Average Time Pending Cases Waiting*, available at http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php. As the President of the National Association of Immigration Judges recently put it, "[t]he stark reality is that the immigration courts have been chronically resource-starved for years," such that "our dockets too often prove true the adage that justice delayed is justice denied." Hon. Dana Leigh Marks, *Now is the Time to Reform the Immigration Courts*, International Affairs Forum, at 49-50 (Winter 2016).

C. Emergency Stay Motions before Our Immigration Courts Do Not Currently Offer Petitioners an Adequate and Effective Alternative Remedy.

The filing of a motion to reopen does *not* automatically stay a Petitioner's removal from the United States. 8 U.S.C. § 1252(b)(3); 8 C.F.R. § 1003.23(b)(1)(v). As a result, even where Petitioners file such a motion, immigration authorities are fully authorized under the law to remove Petitioners to Iraq during the pendency of the motion. Petitioners' theoretical recourse, as outlined by the district court and the government, is to file an emergency motion to stay removal until their motions to reopen can be resolved. *See* Op., RE 87, Page ID 2337.

The statistics recounted above, however, paint a picture of an overwhelmed immigration court system. The professional diligence of these judges allows them, *when given time*, to expertly resolve disputes before them despite their overloaded dockets. But these judges and their staff face a tremendous challenge to fairly address and resolve requests for expedited emergency relief, such as presented by Petitioners. *See Metko v. Gonzales*, 159 Fed.Appx. 666 (6th Cir. 2005) (Martin, J., concurring) (recognizing how "the difficulties faced by immigration courts and its caseload" undermine their ability to fairly resolve cases). Indeed, a recent GAO Report noted that "as a result of the backlog some immigration courts were scheduling hearings several years in the future," and reported that judges, experts, and stakeholders have expressed concern that aliens "with strong cases for relief [may] not obtain[] the relief to which they are entitled in a timely manner." GAO Report 17-438, at 22, 29 (June 2017). Given the overburdened immigration courts, Petitioners face the very real prospect that their emergency motions will not be docketed, heard, and resolved before their removal by enforcement authorities.

This issue is exacerbated by the fact that the immigration court filing system remains entirely paper-based. Unlike in the federal district and appellate courts, there is no electronic filing system in place in the immigration courts. GAO Report 17-438, at 43-44. As a result, a filing before an immigration court is made by hand, often by U.S. mail. *Id.* at 48. Delays in docketing these paper filings before the immigration courts have been recognized by the courts. *See Irigoyen-Briones v. Holder*, 644 F.3d 943, 950-51 (9th Cir. 2011). Also, a filing made before an immigration court in one location is not available to another immigration court considering the matter elsewhere unless the physical court file has been requested and transferred. These issues can be especially important in cases – like Petitioners' – where a detained person subject to a removal order has been transferred from one location to another, sometimes multiple times. *See* Op., RE 87, Page ID 2331-32 (estimating that approximately seventy-nine percent of Petitioners have been transferred, many of them "multiple times"). The problems arising from the failure of the immigration courts to adopt an electronic filing system have been lamented and well documented over the years. *See Irigoyen-Briones v. Holder*, 644 F.3d

943, 950-51 (9th Cir. 2011) (recognizing the "catastrophic consequences" arising from delayed paper filings caused by the immigration courts' unreasonable failure to timely adopt electronic filing); GAO Report 17-438 at 43 (recognizing that, *since 2001*, EOIR has identified "comprehensive electronic filing" as "essential to meeting its goals").

These facts further support the district court's conclusion that, under the circumstances, the motion to reopen process before our immigration courts is not an "adequate and effective" substitute for a habeas remedy for Petitioners. *See Muka v. Baker*, 559 F.3d 480, 483 (6th Cir. 2009). In its opinion, the district court highlighted numerous impediments *facing Petitioners* seeking to reopen their cases. *See* Op., RE 87, Page ID 2339-41. But even if those obstacles are overcome, and such motions to reopen are in fact filed, the overwhelmed immigration courts are ill-suited to provide a forum that ensures a meaningful hearing before Petitioners' removal. The district court's order thus provides the immigration courts with the necessary "breathing room" to resolve the very real issues Petitioners raise of changed circumstances in Iraq that may protect them from removal under U.S. law.

According to the government, at least some immigration courts have attempted to "triage these motions," despite their overloaded dockets, by making efforts to prioritize stay motions in cases like Petitioners' to ensure they are not removed before their motions are adjudicated. RE 81-3, Page ID 2001 (Hon. S. McNulty declaration describing efforts of the Detroit Immigration Court); Gov't Br. at 42. While such efforts by some immigration courts are laudable, there is no indication how effective or widespread this practice is, and no written rule or policy directive that outlines its contours.[8] Ultimately, as the district court concluded, the government's evidence on this front – which concerned only 79 out of a potential 1,400 cases – "does not prove much," and "says nothing" of the hundreds of other Petitioner cases. Op., RE 87, Page ID 2338.

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[8] In contrast, the Second, Third, and Ninth Circuits have implemented specific and public written rules and practices that automatically grant temporary administrative stays of removal when stay motions are filed to ensure that those circuits have an opportunity to review an alien's claims before deportation, provided that basic jurisdictional requirements are met. *E.g.*, Third Circuit Standing Order Regarding Immigration Cases (Aug. 5, 2015); *see infra* at 20-21 (outlining circuit immigration stay rules).

Despite controlling this information, the government thus fails to show that the immigration courts, despite their overwhelmed dockets, can ensure meaningful review of potentially 1,400 claims for emergency relief by Petitioners before their removal. Under these unique circumstances, the "motion to reopen" remedy presented by the government as "adequate and effective" is more hypothetical than real absent the district court's order staying enforcement of the removal orders until the immigration courts have an opportunity to consider Petitioners' claims. *See Muka v. Baker*, 559 F.3d 480, 483 (6th Cir. 2009) (quoting *Swain v. Pressley*, 430 U.S. 372, 381 (1977)).

II. Allowing Petitioners Time to Obtain Review of Their Motions To Reopen Is In the Public Interest and Will Not Unreasonably Interfere with Immigration Enforcement.

A. The United States has a Strong Interest In Protecting from Removal Those Petitioners Who Will Face Persecution or Torture in Iraq.

The district court properly found that the balance of harms and the public interest support its preliminary injunction. *See* Op., RE 87, Page ID 2353-54. The United States has a strong interest in protecting those who face persecution or torture in their countries of origin from removal to those countries. Indeed, the United States has long been an

international leader in ensuring the rights of individuals to be protected from persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group. Over thirty years ago Congress confirmed this interest in the Refugee Act of 1980, declaring "that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, Pub. L. No. 96-212, 8 U.S.C. § 1521. The Supreme Court acknowledged this interest in *Nken v. Holder*, 556 U.S. 418, 436 (2009), recognizing the public interest "in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." As this Court echoed in *Yousif v. Lynch*, "[s]ubject to very limited exceptions, 'the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.'" 796 F.3d 622, 632 (6th Cir. 2015) (quoting 8 U.S.C. § 1231(b)(3)(A)).

The core purpose of our immigration enforcement system is to ensure that the immigration laws are properly, justly, and timely

enforced, *including* our laws that protect certain aliens from deportation when an appropriate showing has been made. *See* 8 U.S.C. § 1231(b)(3)(A). Timely enforcement of final removal orders is of course important. However, that interest properly gives way where an objective and compelling showing is made of changed country conditions since the removal orders that invokes our laws' protections against removal for aliens facing persecution or torture because of their race, religion, nationality, membership in a particular social group, or political opinion.

That is precisely the situation here. As the district court found, "Petitioners' removal orders largely predate the deteriorating conditions in Iraq," and they have submitted "compelling evidence" that they face "grave risk of torture and other forms of persecution at the hands of ISIS" and others on return to Iraq. Op., RE 87, Page ID 2328, 2341. At the very least, the public interest dictates under these circumstances that the immigration courts have sufficient time to consider Petitioners' claims before their removal.

B. The District Court's Order Will Not Interfere With the United States' Immigration Enforcement Scheme.

In addition, based on our experience, the remedy provided by the district court – a limited stay of enforcement of removal orders to allow the immigration courts time to consider Petitioners' claims – will not meaningfully interfere with the executive branch's immigration enforcement scheme. The Petitioners here – approximately 1,400 Iraqi nationals – represent a tiny fraction of those facing removal orders in any given year in the United States. In fiscal year 2016, for example, the immigration enforcement system resulted in approximately 340,000 removals of individuals from the United States. DHS, Yearbook of Immigration Statistics 2016, Table 41 (available at https://www.dhs.gov/immigration-statistics/yearbook/2016.) The average number of removals each of the prior three fiscal years was approximately 380,000.[9] The removal orders at issue in this action, therefore, represent less than 1/2 of 1% of the yearly total of removals.

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[9] The total number of removals in fiscal year 2013 was 433,034, in fiscal year 2014 it was 405,589, and in fiscal year 2015 it was 326,962. DHS, Yearbook of Immigration Statistics 2016, Table 41 (available at https://www.dhs.gov/immigration-statistics/yearbook/2016.)

Nor will the district court's decision, under the unique circumstances presented here, "open floodgates" for others currently subject to removal orders to mimic. Here, the changed circumstances in Iraq on which Petitioners rely are based on objective, undisputed facts of persecution and violence in Iraq committed against persons based on their "race, religion, nationality, membership in a particular social group, [and] political opinion." 8 U.S.C. § 1231(b)(3)(A). As the district court outlined, Petitioners have presented compelling evidence of such persecution and violence in Iraq – facts which the government did not challenge. Op., RE 87, Page ID 2328-30.[10]

It would be virtually impossible for any significant number of others facing removal orders to clearly establish similar changed circumstances in their country of origin sufficient to demonstrate that they would have an objective well-founded fear of persecution if forced to return. (Notably, the vast majority of those removed over the last

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[10] Although the majority of Petitioners are Chaldean Christians who would face persecution, torture, and possibly death if returned to Iraq, the district court also recognized that some were members of other religious minorities and social groups who faced a similar fate. Op., RE 87, Page ID 2329-30.

four years – about 70% – were to a single country, Mexico. DHS, Yearbook of Immigration Statistics 2016, Table 41 (available at https://www.dhs.gov/immigration-statistics/yearbook/2016.)).

There also is nothing novel about the district court's remedy in this action that could undermine the public interest. In a related context, the Ninth, Third, and Second Circuits have instituted circuit rules to ensure that removal orders are not executed while motions to stay are pending before those courts. For example, a Third Circuit standing order provides: "In order to ensure that petitioners in immigration matters are not deported before the Court has an opportunity to act on a motion to stay removal and to ensure the Court has a sufficient record on which to decide such a motion, the Court adopts a policy of granting a temporary administrative stay pending disposition of the motion for a stay" so long as the basic jurisdictional prerequisites have been met. Third Circuit Standing Order Regarding Immigration Cases (Aug. 5, 2015) (available at http://www.ca3.uscourts.gov/sites/ca3/files/BIA%20 Standing%20Order%20final.pdf). The Ninth and Second Circuit's have implemented similar requirements. *See* Ninth Circuit Court of Appeals, General Orders,

6.4(c) (available at http://cdn.ca9.uscourts.gov/ datastore/ uploads/rules/generalorders/General%20Orders.pdf); *In the Matter of Immigration Petitions for Review Pending in the United States Court of Appeals for the Second Circuit*, Docket No. 12-4096 (Oct. 16, 2012).

The district court's decision here does no more than what these circuit courts have already found appropriate, and for the same critical reason: to allow the appropriate courts an opportunity to rule on motions to stay and reopen before the case is rendered moot by removal of the petitioner. These circuit court orders have not resulted in any noticeable interference with the immigration enforcement system (certainly none reported by the government) – and nor will the district court's order. Like these circuit orders, the district court's order gives the immigration system time to work, it does not disrupt it.

CONCLUSION

For these reasons, and those presented by petitioners, amici urge this Court to affirm the district court's decision.

Dated: February 12, 2018

Respectfully submitted,

/s/ Michael Doss

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The brief is proportionally spaced, has typeface of 14 points or more, and contains 4,575 words, based upon the word count feature of Microsoft Word.

/s/ Michael Doss
Attorney for Amicus Curiae

February 12, 2018

CERTIFICATE OF SERVICE

I, Michael Doss, a member of the Bar of this Court, hereby certify that on February 12, 2018, I caused the foregoing "Brief of Former Federal Immigration Officials As Amici Curiae in Support of Petitioners And Affirmance" to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Doss
Attorney for Petitioner-Appellant

February 12, 2018