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

USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910

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

Class Action

RESPONDENTS' STATUS REPORT

Respondents/Defendants ("Respondents") submit the following Status Report in advance of the Court's status conference scheduled for August 31, 2017. Petitioners did not provide an advance copy of their filing until August 29, 2017, and did not provide drafts of their declarations regarding allegations until the afternoon of August 30, 2017, leaving Respondents insufficient time to review the declarations, investigate the allegations, and prepare responses. Respondents require additional time to review this information and respond, and request that the Court refrain from considering or ruling on this information until Respondents have had an opportunity to fully address these allegations. In the meantime, Respondents present the following responses.

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

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I. Report on Status of the Putative Class

Pursuant to this Court's order, Respondents are providing specified information about Iraqi nationals, both detained and non-detained, every two weeks to the Petitioners' counsel. The last such production occurred on August 21, 2017. The data produced are about one week old on the date of production; meaning that the last data produced are from August 14, 2017. Petitioners' counsel have attempted to update information where possible, through the ICE detainee locator system, so some information may be slightly more current, or may combine information obtained from Respondents' August 14 data and more recent information obtained from the ICE detainee locator system.

So far, Respondents have timely provided the disclosures required by the Court's Preliminary Injunction Order on August 7 and August 21. There remain some glitches to work out on the biweekly reporting—missing fields and missing detainees—but the parties believe they can resolve these issues.

A. Number of Class Members and Potential Class Members

There are about 1,428 Iraqis who had final orders of removal on June 24, 2017.[1] Of those, approximately 288 were detained as of August 14, 2017. Petitioners had previously reported that as of July 1, 2017, there were 234 Iraqi nationals with final orders who were detained by ICE. *See* Kitaba-Gaviglio Declaration, ECF 77-20, Pg.ID# 1853. The increase in the number of detainees reflects the fact that ICE is continuing to arrest Iraqi nationals with final removal orders.

B. Location and Transfer of Detainees

Class members are detained in 58 locations across the country. The facilities with the most detainees are:

Northeast Ohio Correctional Center: 117 (40%)

Denver Contract Detention Facility: 19 (6.6%)

Jena/Lasalle Detention Facility: 15 (5.2%)

Calhoun County Detention Facility: 13 (4.5%)

Otay Mesa Detention Center: 12 (4.2%)

[1] As explained in Section II.A., below, there is some dispute between the parties about how to count Iraqis who previously had a final order of removal, but whose Motion to Reopen had been granted prior to June 24.

Most of the other 53 facilities have only a few detainees. Only five detainees are being held in Florence, Arizona, where a large number of detainees had previously been held.

Respondents' Position

Respondents do not have the capability to provide real-time detainee location updates. Respondents' system is designed to provide "snapshots" of data at any given time, and is not refreshed on a real-time basis. Some delays in reporting are therefore unavoidable. To ameliorate some of that time differential, Respondents propose moving the reporting deadline to Wednesdays instead of Mondays. Respondents are also already using the entirety of the current two week reporting period to supply updated information and, as such, it is not possible to meet Petitioners' proposed timetable.

To attempt to improve upon reporting times, Respondents request that the reporting deadline be moved to Wednesdays, beginning with the next reporting date.[2] Respondents' systems refresh over the weekends and are inaccessible for most of the day on Mondays, limiting the ability to run new reports, particularly the large-scale lists required under this Court's order, until Tuesdays. The system's

[2] Currently, the next reporting date is Tuesday, September 5, as Monday September 4, is a federal holiday.

limitations necessitate that Respondents run detention reports during the prior week to ensure Respondents meet the Monday production requirements. Respondents believe that moving the reporting day to Wednesdays would also allow for more current information to be provided. The best that Respondents can currently do under the current reporting schedule is to provide detention status information that is approximately 10 days behind the reporting date and detention location information that is 5-7 days behind the reporting date. In order to meet the Court's order, Respondents must coordinate with the Executive Office for Immigration Review (EOIR), which provides the immigration court-related information, as Respondents do not have access to that data. In order to ensure EOIR can meet the reporting deadline, Respondents must provide an updated list to EOIR on "off" Mondays, as EOIR requires a week to run its data. Therefore, Respondents must finalize its list of detained and non-detained individuals by the Friday before providing the list to EOIR, which means the list for the next production is finalized 10 days prior to the production date. Respondents then search detention location information for the individuals on that list during the week preceding the Monday reporting deadline. By moving the deadline to Wednesdays, Respondents can provide their list to EOIR on Wednesdays of the "off week," but can then wait to run detention location information until the beginning of the following week after

systems have updated over the weekend. Respondents anticipate that this reporting schedule will allow for provision of more recent detention information. Accordingly, Respondents request to move the reporting date from Monday to Wednesday to allow a one-day buffer between system refresh on Mondays and production to Petitioners.

Also, in response to Petitioners' concerns referenced in their status report, Respondents are working to identify any issues or limitations with the online detainee locator system. Respondents believe the issue in the detainee locator system with respect to the Northeast Ohio Correctional Center detainees has been addressed as of August 30, 2017. Respondents will endeavor to address any additional or lingering issues as they arise.

With respect to Petitioners' allegations of coercion and abuse, Respondents have asked Petitioners for specific, particularized information, rather than generalized accusations and reference to rumors, regarding these allegations so that Respondents may investigate. Respondents take seriously any allegations of coercion and abuse. Unfortunately, Petitioners have so far declined to provide additional information, including a copy of the supplemental filing that Petitioners reference in this status report. With respect to the changes in the number of class members, the change in number was due, in part, to the Court's change in the class

definition in its July 24, 2017 order. The revised definition of the class included all Iraqis who had final orders on June 24, 2017, not only those who had been recently taken into custody, which Petitioners defined as individuals taken into custody on or after March 6, 2017. Since the Court's decision, Respondents have also taken into custody a small number of additional aliens who have mostly been transferred to Respondents' custody from criminal custody. Respondents regularly notify Petitioners of any changes to the biweekly reporting list, including individuals who have been released or taken into custody since the last production.

With respect to Petitioners' complaints regarding "missing" information, Respondents do not have the capability to conduct putative class-wide searches for petition for review information, nor is this information Respondents' to provide. This information belongs to the United States court system and is available on PACER, to which the parties have equal access. Further, ICE is not a party to petition for review litigation. Notwithstanding these objections, Respondents are investigating whether this information can be provided by the Department of Justice in a manner that is not burdensome and would not compromise internal information. If it turns out that this is not possible, Respondents request that the order be modified to eliminate a reporting requirement with which Respondents are unable to comply. The remaining "missing" fields also relate to information that Respondents are

unable to provide but may be available from EOIR. Counsel for the parties have been working through these issues and there does not appear to be any need for Court intervention at this time.

C. Releases and Custody Reviews

ICE has begun conducting post-order custody reviews for detainees. See Section II.F. The Court's order did not include reporting on post-order custody reviews and data is not available on the status or results of those reviews. Petitioners are asking the Court to order Respondents to provide this information.

II. Report on Outstanding Issues Related to this Court's Preliminary Injunction Order and Requests for Additional Relief

In setting the upcoming status conference, the Court anticipated that it would be necessary "to assess what modifications, if any, are required" to the Court's preliminary injunction order. Order Granting Petitioners' Motion for Preliminary Injunction, ECF 87, Pg.ID 2356 (hereinafter, Preliminary Injunction Order). The parties bring the following issues to the Court's attention.

A. Definition of Putative Class

The Court defined the putative class as "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.* at Pg.ID 2354. This is the group covered by both the bar on removal and by the court-ordered disclosure requirements.

Respondents' Position

This Court's order on the definition of the class was clear: individuals who had a final order of removal on June 24, 2017. Individuals who have been granted reopening of their immigration proceedings are no longer subject to a final order of removal. The definition was meant to remove ambiguity as to who should be included in the class, and has done so. The fluid nature of Petitioners' definition is not only contrary to the plain language of this Court's order, but is impractical. As discussed above, Respondents are capable only of providing "snapshots" of data on a specific date, such as individuals who currently have final orders and the dates on which those orders were received. Even for individuals who had final orders on June 24, 2017, and have since had their proceedings reopened, Respondents have had to manually track those cases to ensure they remain included on the biweekly reporting list. Respondents do not have a mechanism to determine which of the Iraqi nationals no longer subject to a final order of removal had their proceedings reopened and on what date that occurred without conducting a manual case-by-case review, which Respondents have neither the capability nor the resources to complete. Further, as this Court rightly recognized, without a date certain to define the putative class, it is impossible to determine which individuals should be class members and which should not.

For the same reasons, an alien whose motion to reopen has been granted should be automatically excluded from the class, as that alien no longer has a final order of removal. Petitioners have maintained throughout this litigation, and reiterate, *infra*, that their "primary goal has been to secure time for class members to access the administrative immigration court system," that class members' alleged injury was insufficient time to file a motion to reopen, and that the relief sought before this Court was the time needed to prepare and file a motion to reopen in order to pursue their administrative remedies. When an immigration judge or the Board of Immigration Appeals, as appropriate, has granted a motion to reopen, the alien has received all of the relief that he or she sought before this Court. Not only has the alien had his or her opportunity to seek reopening, the alien's motion was granted. The alien will now have the opportunity to appropriately seek protection from removal before the Immigration Judge. There is simply nothing further for this Court to address with respect to aliens who have had their proceedings reopened. [3]

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[3] As Petitioners note, the only practical difference between aliens who have had their motions to reopen granted and any other alien in removal proceedings is that, under the injunction an alien who files a petition for review cannot be removed until a federal circuit court denies a stay request, whereas in other cases, an alien with a pending petition for review, except in the Ninth and Second Circuits, may be removed unless a stay is actually granted. Leaving aliens in the class once proceedings have been reopened actually provides them *more* than

Therefore, such cases must automatically be terminated from the class once proceedings are reopened, as they are no longer part of the class.

Respondents' position does not, as Petitioners allege, "fail to recognize that the due process claims of someone whose motion to reopen was granted on June 23 are no different than those of someone whose motion to reopen was granted on June 25." In fact, such aliens have received all of the relief sought before this Court and are in exactly the same position as any other alien in removal proceedings. Once a motion to reopen is granted, an alien is no longer subject to a final order of removal and, thus, said order cannot be executed. At that point, an alien will have all procedural protections in place to pursue available relief from removal through immigration proceedings.[4] An alien is not again subject to removal unless the alien is once again ordered removed, all applications for protection are denied, and the order subsequently becomes administratively final, which is after any appeal period

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standard administrative processes and procedures and exceeds what this Court has found is its limited jurisdiction to provide Petitioners the opportunity to pursue the normal administrative process through the filing of a motion to reopen, not to supplement the administrative review and petition for review process with additional protections that not even the circuit courts themselves provide.

[4] Because withholding of removal under the Immigration and Nationality Act and withholding or deferral of removal under the regulations implementing Article III of the Convention Against Torture are forms of protection that withhold or defer removal, an alien granted such protection will nevertheless be ordered removed by the immigration court.

(if not waived) has expired or, if the case is appealed, after the BIA issues a decision. 8 C.F.R. § 1241.1.

Respondents also request that this Court clarify that any individuals who are not currently detained, or who are not detained before a specific date, are not putative class members and not part of the Court's A-file and ROP order. Non-detained class members are not subject to any of the allegations Petitioners make regarding the difficulties of filing a motion to reopen from a detained setting and are fully capable of seeking their own counsel and pursuing their own FOIA requests for A- files. Nor is their removal imminent. Should Respondents detain an individual who is subject to a final order of removal that was in effect on June 24, 2017, and remains in effect, up until a specific date set by this Court, Respondents will treat the individual as part of the putative class.

Therefore, Respondents request that this Court's order be modified to clarify that it applies to Iraqi individuals who are detained and remain subject to a final order of removal that was in effect on June 24, 2017, and whose motions to reopen are subsequently granted will be excluded from the class.

B. Notice to Putative Class

Rule 23(d)(1) provides:

> *In General.* In conducting an action under this rule, the court may issue orders that:

> . . .
> (B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:
>
> (i) any step in the action . . .

To date, no formal notice has been provided to putative class members regarding this action. On July 18 and 19, Petitioners' counsel mailed an informational letter describing this Court's preliminary injunction order to 234 class members, who were all the class members known at that time. The letter described the contents of this Court's order extending the temporary stay until July 24 (ECF 61). A significant number of those letters have been returned by the Post Office, in part due to detainee transfers from facility to facility. The returned letters have been remailed. Petitioners' counsel and other organizations have also conducted know your rights presentations at the detention facilities in Youngstown, Ohio and Florence, Arizona.

The parties have been discussing distribution by ICE of a Know Your Rights fact sheet, prepared by Petitioners' counsel, accompanied by one or more relevant forms. The parties have been unable to come to agreement, however, with the major stumbling block being the process and forms to be used for individuals who may wish to return to Iraq (discussed in more detail in Section II.C. below). Attached as

Exhibit A is Respondents' proposed form for voluntary removals, and their amended version of the ACLU Know Your Rights fact sheet.

Respondents' Position

Respondents do not object to providing notice to detained putative class members, and first approached Petitioners about including information with a form for individuals to opt-out of the class. Respondents object to any process that *requires* individuals to meet with the ACLU before being allowed to be excluded from the class and to any forms that Petitioners have drafted regarding A-file or ROP production to be provided.

C. Procedure for Determining Whether a Class Member's Desire to Return to Iraq is Knowing and Voluntary

This Court's Preliminary Injunction Order, ECF 87, Pg.ID 2355-56, provides:

> 2. This preliminary injunction shall be terminated as to a particular class member upon entry by the Court of a stipulated order to that effect in connection with any of the following events:
>
> . . .
>
> e. a class member's consent that this preliminary injunction be terminated as to that class member.
>
> If the parties dispute whether any of the foregoing events has transpired, the matter will be resolved by the Court by motion. Termination of this preliminary injunction as to that class member shall abide the Court's ruling.

The parties have been discussing a process for identifying individuals who voluntarily consent to removal to Iraq, but have been unable to agree on that process.

Respondents' Position

Petitioners state that they have no objection to Respondents soliciting putative class members regarding whether they wish to be removed to Iraq, but in their next sentence repeat unspecified allegations of coercion and also ask this Court for an injunction prohibiting Respondents from having *any* communications with putative class members. Given these allegations, Respondents will not put themselves in a position of orally soliciting information from putative class members as Petitioners propose– Respondents are currently aware only of individuals who have affirmatively approached them regarding potential removal. Respondents also have refrained from providing names of individuals who are seeking removal because, where the alien is represented, he or she needs to consult with his or her individual counsel, not putative class counsel. Respondents' position is that any unrepresented individuals seeking to be excluded from the class should be able to identify themselves and seek class exclusion through a uniform process agreed upon by both parties. As a class has not yet been certified, opposing counsel currently has no relationship with these individuals and, as discussed in more detail below, Respondents' ability to disclose information to third parties is limited. Respondents thus suggested the provision of documents, with information from the ACLU, for putative class members to convey whether they wish to be excluded from the class.

Respondents' position is that an affirmative representation is needed from the alien, not just putative class counsel, regarding his or her desire to be excluded from the class. Respondents drafted a proposed form for this purpose, along with a requirement that the alien indicate that he or she read and understood the form. The putative class members cannot and should not be required to speak with Petitioners' counsel if they do not choose to do so. Further, Petitioners' proposed process, with an interview "requirement" that may potentially remain unfulfilled by an alien's choice and without deadlines for Petitioners' counsel to speak with individuals seeking to be excluded from the class, serves only to further prolong detention--precisely the situation Petitioners claim they wish to avoid. Respondents offered a compromise by providing the ACLU's information sheet with Respondents' proposed form to detained putative class members; forwarding copies of any signed, returned forms to Petitioners' counsel; and then waiting one week for any response or stipulation from Petitioners' counsel before moving unilaterally to exclude these individuals from the class per their expressed wishes on the form. Respondents believe this process permits the individuals to express their desire to be removed and allows Petitioners' counsel sufficient time to arrange a meeting with such individuals before stipulating, but permits the process to move forward should the individual not wish to consult further with any counsel. Petitioners refused this proposal.

D. Transmittal of A-Files and Records of Proceedings (ROPs) to Class Members

This Court ordered that a 90-day period for filing such motions commences upon "Respondents' transmittal to the class member of the A-file and ROP pertaining to that class member." Preliminary Injunction Order, ECF 87, Pg.ID 2355. The Court further ordered that:

> As soon as practicable, Respondents shall transmit to each class member that class member's A-file and ROP, unless that class member advises Respondents that he or she will seek to terminate this preliminary injunction as to that class member.

Id. at PgID 2356.

Respondents' Position

Petitioners presume that providing A-files and ROPs is a simple matter of printing copies. This is untrue, both legally and practically. Petitioners' allegations that Respondents have failed to act on the Court's order are also untrue. Respondents are still primarily a paper-based agency – compliance with this request includes locating all A-files, some of which are in storage with USCIS, the custodial agency for A-files; scanning all of the files, many of which are hundreds of pages; and uploading each of them into internal data systems for review and redaction in coordination with several other government agencies. The files are currently located in a number of jurisdictions nationwide. Respondents have begun the process of locating and scanning files for the review and redaction process. Respondents

anticipate files will be produced on a rolling basis. Further, the government has a finite amount of time and resources for handling this production order. Respondents have had to reassign personnel to handle this project in addition to their regular duties. Respondents' efforts in this case must be undertaken in conjunction with other cases with discovery deadlines, FOIA actions requiring review and production of large numbers of documents, and other litigation obligations. Respondents are working to scan files as quickly as possible and have made regular progress since the Court's order, but anticipate that it will be several more weeks before any A-files will be ready for production, as files must be reviewed, redacted, finalized, and then sent to the appropriate field office for service. Respondents are using their best efforts to comply with the order as quickly as possible, but the number of variables, particularly the difference in redactions that would be necessary under Petitioners' proposal and the issues Respondents require the Court to address to obtain clarity on those points, prevents Respondents from providing an exact date for production at this time.

Respondents have informed Petitioners that Respondents are subject to a number of privacy and disclosure laws with respect to A-file production. Petitioners' position and the Court's order make no exception for classified documents, confidential information, or information subject to executive privileges to include

attorney work product, attorney-client privilege, deliberative process, and the law enforcement privilege.

The current order, which does not recognize any of the above mentioned exceptions, demonstrates why ordering the production of an entire A-file is improper without accounting for whether the documents are *considered* to be confidential. *See Dent v. Holder*, 672 F.3d 365, 374 (9th Cir. 2010) (quoting section 240(c)(2) of the Immigration and Nationality Act for the proposition that release of documents is limited to "those not considered by the Attorney General to be confidential").

A-files commonly include confidential information along with information over which Respondents would assert an executive privilege or which would be covered by common law privileges to include attorney work product, attorney-client privilege, and the law enforcement privilege. For example, A-files almost always include attorney notes taken in preparation for litigation and during hearings before EOIR. Respondents would assert the attorney work product privilege over these notes. Further, A-files often contain documents or information that Respondents would withhold pursuant to the law enforcement privilege, including information regarding law enforcement procedures and techniques that are not commonly known to the public.

In addition, A-files also commonly include documents that may contain confidential third-party information subject to independent protections that expressly prohibit disclosure. For example, certain information in A-files is governed by the Privacy Act, 5 U.S.C. § 552a. Additionally, other legal restrictions on release will also apply in certain cases. These restrictions on release include, but are not limited to, the personally identifying information of a third party;[1] information relating to asylum or refugee applications;[2] applications under the Violence Against Women Act (VAWA);[3] information relating to Special Agricultural Worker (SAW) or Legalization claims;[4] information relating to an

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[1] *See, e.g.*, 5 U.S.C. § 552a(b); *see also generally DePlance v. Califano*, 549 F. Supp. 685 (W.D. Mich. 1982) (holding that the Privacy Act prevented the Social Security Administration from disclosing address information regarding a man's children contained in his file and organized and retrievable under his Social Security number because it was neither about the requestor nor did it pertain to him).

[2] *See* 8 C.F.R. §§ 208.6, 1208.6.

[3] *See* 8 U.S.C. § 1367. A-files may contain copies of protection orders, police reports, and other documents relating to crimes of domestic violence, stalking, child abuse, and violations of protection orders. *See* INA § 237(a)(2)(E). Those documents will often contain personally identifying information of the victims. *Cf. Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (reversing lower court ruling "that defense counsel must be allowed to examine all of the confidential information" because, *inter alia*, "[t]o allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child-abuse information").

[4] *See* INA §§ 210(b)(6), 245a(c)(5).

individual's Temporary Protected Status (TPS);[5] and information relating to nonimmigrant S visas[6] and nonimmigrant T or U visas.[7] Importantly, the Privacy Act and certain restrictions of the INA carry criminal and/or civil penalties for disclosure violations. *See, e.g.*, *Cooper v. FAA*, 596 F.3d 538 (9th Cir. 2010), *amended by and reh'g denied* 622 F.3d 1016 (9th Cir. 2010) (addressing damages under Privacy Act).

The law recognizes the documents and information discussed above as confidential and privileged and therefore not subject to automatic disclosure, whether during the course of litigation or in response to a FOIA request. Further, the Respondents routinely deem the documents and information discussed above as confidential and privileged and consistently withhold such information from public disclosure whether during the course of litigation or in response to a FOIA request.

Thus, before any A-files can be produced, Respondents must conduct the appropriate review and redactions. The amount and type of information to be

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[5] *See* 8 C.F.R. §§ 244.16, 1244.16.
[6] *See generally* 28 U.S.C. § 16.26(b)(4)–(5) (prohibiting disclosures that would reveal a confidential source or information or records relating to law enforcement investigations).
[7] *See* 8 U.S.C. § 1367.

redacted depends on the party to whom the information is to be disclosed. For example, asylum information can be produced directly to an alien or counsel of record without redaction. For production to *any* other party, including putative class counsel, this information must be redacted unless the individual waives in writing the confidentiality provisions of the asylum regulations. Respondents have a privacy waiver form that respondents can complete (attached as Exhibit B), but appropriate boxes for disclosures of any applicable information must be checked before information can be released. Such a process would also necessitate individualized review, with potentially a different set of redactions needed for every individual file. Respondents would also be unable to begin review and redaction of an individual's file until the waiver form was returned. This Court's order clearly requires production to class members and Respondents are willing, where practicable, to provide the documents to immigration counsel of record, meaning a current and accurate Form G-28 is on file, instead of service upon the alien. For production to any other parties, including putative class counsel, putative class members must specifically waive privacy rights and any other applicable confidentiality provisions, or Respondents will need to conduct different, and more substantial, redactions. Petitioners' proposed procedure adds substantial amounts of time to what Respondents already anticipate will be a somewhat lengthy process. With respect to

detainees, applicable detention standards permit detainees to retain legal documents at the facility and to mail legal documents; Respondents can address any issues with respect to directly serving detainees, such as if the detainee wishes to mail the file elsewhere after service, if and when they arise.

With respect to Immigration Court ROPs, Respondents do not have custody or control over those files. EOIR is the custodian of those files, and Respondents are in communication with EOIR about this Court's order, but can make no representations regarding production other than to state that Respondents currently expect that they will be produced somewhat contemporaneously with the A files.

E. Production of Detention Information and Modifications to Injunction's Reporting Requirements to Include Detention Issues

Respondents' Position

As discussed in detail above, Respondents are subject to a number of privacy and confidentiality laws and regulations limiting disclosures, particularly to third parties such as opposing counsel. Respondents do not, as Petitioners allege, object solely on the basis of creating delay. Respondents have equal, if not more pressing, interests in ensuring this process moves forward to minimize detention times. Respondents provide individual aliens with a copy of post-order custody review decisions which the alien may share with his or her counsel if they so choose. Providing individual information would necessitate case-by-case reviews;

Respondents do not have "class-wide" tracking capabilities for POCR reviews, nor are the associated orders electronically available. Respondents have been providing information, as part of their biweekly production, when individuals have been released since the last reporting date. Respondents likewise do not have electronic capability to provide contact information.

With respect to bond information, as Petitioners note, only individuals who are no longer subject to final orders of removal would potentially be eligible for bond hearings and, even in those cases, not all aliens are held under the same custody authority. Respondents are unable to provide bond information not only because such proceedings are conducted before EOIR, but also because individuals whose motions to reopen have been granted are subject to different custody authorities and processes than those who remain subject to final orders. The latter complication further exemplifies why an alien should be excluded from the class once his or her motion to reopen is granted. Respondents anticipate that this issue will be further addressed in its response to Petitioners' motion for class certification.

F. The Status of Iraq's Agreement to Accept Class Members

Respondents' position

Respondents have provided evidence that Iraq is accepting its nationals, even when a valid passport is not available. Indeed, it is primarily individuals for whom

Iraq had not previously been issuing new documents that Iraq recently agreed to accept without the time and expense involved in reissuing new documents solely for removal. In its opposition to Petitioners' Motion for a Preliminary Injunction, Respondents provided a sworn affidavit from ERO Deputy Assistant Director John A. Schultz, which stated that Iraq had agreed to return of such nationals via charter flights. To the extent Petitioners are now requesting specific agreements or information, Respondents believe this information may be subject to privilege. To the extent Petitioners are requesting information from the Iraqi government, Respondents do not possess, nor could they produce, any documents belonging to a foreign government.

G. Communications by ICE with Class Members Regarding This Litigation

Respondents' Position

Despite their requests to Petitioners for specifics, Respondents are presently unaware of any circumstances in which individuals have been coerced or harassed in relation to this litigation. If provided with information sufficient to conduct a review, Respondents would investigate any specific allegations and address any issues, if found. Respondents cannot, as a practical matter, be barred from any interaction with class members, nor have Respondents issued any communications to putative class members regarding this litigation. As discussed above, Respondents

approached Petitioners about a joint paper process for individuals to request exclusion from the class, as Respondents' preference is to minimize substantive oral communications regarding this litigation, to avoid exactly the type of generalized allegations Petitioners are now making.

III. Parties Proposals Regarding Next Steps In This Litigation

A. Pending Motions

Petitioners' motion for class certification is pending, with Respondents' response due on September 11, 2017, and Petitioners' reply due on September 25, 2017.

B. Sequencing of Next Steps in Litigation

Respondents' Position

Respondents reiterate, again, that they have not in any way delayed A-file or ROP production and that they are working as quickly as possible to comply with the Court's orders Petitioners mis-state the applicable legal standard for post-order custody (which, as noted above, differs for aliens who are no longer subject to a final order of removal) in citing simply to danger and flight risk. Individuals who are subject to a final order of removal are detained pursuant to INA section 1231 and the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 671 (2001), which provides that a six month post-order custody period is presumptively

reasonable and states the standard for continued detention is whether there is a significant likelihood of removal in the reasonably foreseeable future. This determination must be made on an individualized basis and is inappropriate for class relief. This issue is also not best addressed, in the first instance, at a joint status conference scheduled to address issues concerning the court's July 24, 2017 order, not new legal issues in the case. Respondents' position at the present time is that this issue is unripe for review, particularly as Respondents and Petitioners have requested that the Court modify the class definitions, and should be addressed before this Court in separate briefing at a later time.

Dated: August 30, 2017

Respectfully submitted,

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Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing Respondents' Status Report to be served via CM/ECF upon all counsel of record.

Dated: August 30, 2017

Respectfully submitted,

/s/ William C. Silvis
WILLIAM C. SILVIS

Counsel for Respondents

Index of Exhibits

Exhibit A – Respondents' Information Packet and Request for Prompt Removal

Exhibit B – Privacy Waiver Form

Information for Iraqi nationals in ICE detention about
Hamama v. Adducci, No. 17-cv-11910 (E.D. Mich.)

These attached four pages are provided regarding *Hamama v. Adducci*, No. 17-cv-11910 (E.D. Mich.). There are two documents attached:

1. Know Your Rights under *Hamama v. Adducci*, provided by the ACLU (3 pages).

2. Detainee Request for Prompt Removal to Iraq, provided by ICE (1 page). You should **only** fill out this form if you want to be removed to Iraq. Do **not** fill out this form if you want to stay in the United States.

Please read them carefully.

KNOW YOUR RIGHTS
FOR IRAQIS WITH REMOVAL ORDERS

Information about Hamama v. Adducci, No. 17-cv-11910 (E.D. Mich.)
From the American Civil Liberties Union (ACLU) of Michigan (Aug. 17, 2017)

What is the *Hamama* case about?

The *Hamama* case asks the federal court to **delay deportation** of Iraqi nationals with final orders of removal until you have the chance to hire an immigration lawyer, seek to reopen your immigration case, and demonstrate to the immigration court or Board of Immigration Appeals that you should not be deported to Iraq because you face a likelihood of persecution, torture, or death there.

What has happened in the case so far?

On July 24, 2017, *Hamama*'s district court judge issued a stay of removal which allows you time to fight your removal order in the immigration court system. The stay will apply only for a limited time. So it will help you only if you *also* take action to protect your own rights. **The stay applies 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.** Here's what it says:

1. Under the court order, before deporting an Iraqi national under a final order of removal, the government must provide that person with their A-File and Record of Proceedings. The A-File contains your immigration history and the Record of Proceedings contains your legal history in immigration court. Your lawyers will need those papers in order to fight your removal.
2. Starting from the day the government sends you (or your lawyer) the A-File and Record of Proceedings, you have 90 DAYS to file a Motion to Reopen your immigration case.
3. ***If*** you file the Motion to Reopen within the 90 day period, the court's stay of removal will remain in place until the immigration court or Board of Immigration Appeals considers your motion AND it will continue to protect you from deportation if you appeal to the Board of Immigration Appeals or Court of Appeals.

The *Hamama* case alone WILL NOT stop your deportation to Iraq. The *Hamama* stay of removal is **TEMPORARY**. Should you choose to fight your final order of removal within the immigration court system (the immigration court and the Board of Immigration Appeals), you will need to file:

1. A Motion to Reopen,
2. A request for a Stay of Removal, and
3. The application for underlying relief (example: Asylum I-589)

What you need to do if you want to take advantage of the stay:

- You SHOULD hire an immigration lawyer to advise you and assist with filings in the immigration court/Board of Immigration Appeals/court of appeals.

- You will **NOT** BE PROTECTED BY THE STAY OF DEPORTATION **if**:
  a. You do not file a Motion to Reopen within the 90-day period, OR
  b. You fail to file an Appeal to the Board of Immigration Appeals or Court of Appeals within the appeal deadlines.

IMPORTANT: It is possible that the government will appeal the district court decision to a higher court. If that happens, the terms of the stay could be changed. Or the higher court could end the stay and ICE could then deport you if you do not have a stay in your individual case from the immigration court system.

How can I be deported if Iraq has never given me travel documents?

Even if you have not received a travel document in the past, you still could be deported. Recently, the Iraqi government agreed to the return of Iraqi nationals even if they do not have travel documents.

What is a Motion to Reopen?

A motion to reopen gives you an opportunity to have your immigration case heard again. Generally, these types of motions must be filed within 90 days of the final order of removal, but there are some exceptions. Most relevant here, you are allowed to file a motion to reopen after the 90 days if you are seeking asylum, withholding from removal, or protection under the Convention Against Torture based on changed country conditions in the country to which you were ordered deported. Because of the recent changes in county conditions in Iraq, some people have had success reopening their immigration cases on this basis. The motion has to state new facts that you will prove at a hearing if the motion is granted, and has to be supported by affidavits and other evidence.

You may be able to reopen your immigration case based on these grounds or others so long as you meet certain eligibility requirements. Because the law has changed a lot over time, you may also be able to file a motion to reopen on the basis of the change in law, or other circumstances, that have rendered you no long deportable or at least entitle you to another hearing on that question.

Your immigration attorney will need to look at your individual situation and any criminal history you may have to see what kinds of immigration relief you are eligible for. You will need copies of your A-file, your immigration court Record of Proceedings, and your criminal history records to file your motion to reopen.

What if I *want* to return to Iraq?

First, you should talk with an immigration lawyer about your options for staying in the United States, what risks you face if deported to Iraq, and what deportation would mean for your ability to return to the U.S. or pursue other kinds of immigration relief. You should be fully aware of your rights before you make the decision. If you still decide that you want to voluntarily leave the U.S., please have your lawyer contact both ICE by calling the ICE Detroit Office of Chief Counsel and asking to speak to the duty attorney and the lawyers in the *Hamama* case by emailing hamama@aclumich.org.

If you do not have counsel and you want to return to Iraq, ICE is providing you with the attached Detainee Request for Prompt Removal to Iraq that you can send in. **Do NOT fill out this request if you want to stay in the United States.** This request tells both ICE and the ACLU that you wish to be removed to Iraq. The ACLU and other lawyers in the *Hamama* litigation will then try, but cannot guarantee, that they will locate an attorney who can meet with you and advise you (without cost to you) on this important decision. The lawyer can give you advice about your individual options for challenging your deportation and about your chances of getting out of detention.

What can I do to get out of detention while I'm challenging my deportation?

So far, the attorneys in the *Hamama* case have focused on preventing your deportation. The *Hamama* case also includes a claim about release from detention, and we are now talking to ICE about this issue.

According to the law, ICE generally has the authority to detain people after a final order of removal for up to 90 days while it attempts to remove them from the United States. ICE believes that this law applies even if you were released into the community after the final order of removal was issued. ICE will conduct a custody review to determine if you can be released after 90 days and again after 180 days. You will have an opportunity to present documents in support of release and may even be interviewed. The Florence Immigrant and Refugee Rights Project has prepared a guide to assist individuals in preparing for their 90-day review, which can be found at: http://firrp.org/media/90-Day-Custody-Review-Guide-2013.pdf. Or to get a copy by mail, write to: Florence Project, P.O. Box 654, Florence, Arizona 85132.

Release at the 90 day point is not automatic. If you were detained by ICE in the past, you may have been released at some point because ICE was not able to obtain travel documents to Iraq. **But now the only thing stopping your removal may be either the stay issued by the district court in the *Hamama* case or a stay issued in your case by the immigration court**. If your motion to reopen has not been granted, ICE may decide to hold you past 90 days. Depending on your criminal history, it is also possible that ICE will use this as a basis to argue that you are a danger.

You should consult with your immigration lawyer about your particular situation and explore any special circumstances that can help you advocate for release, such as medical issues. It is possible you could bring a case in federal district court challenging the legality of your continued detention, especially if you can show that your case is not going to be decided for at least another few months and that ICE cannot remove you during this time.

If your motion to reopen is granted, a different law applies and you may be eligible for bond. Depending on your criminal history, the government may argue that you are subject to mandatory detention. However, there are also arguments why mandatory detention may not apply to you. Talk to your lawyer about whether you should request a hearing to challenge your detention.

What if I don't have a lawyer and can't afford one?

The National Immigrant Justice Center is working to assist Iraqi nationals in finding legal representation.

If you need an immigration lawyer, please contact the National Immigrant Justice Center (NIJC), (312) 263-0901, between 11 am and 2 pm Central Standard Time (CST). 208 S. LaSalle St., Suite 1300, Chicago, IL 60604. Or ask a family member to fill out the form available at https://refugeerights.org/iraqi-deportation-resources/.

Please note that contacting NIJC is for informational and potential referral purposes only and does not guarantee legal representation in your individual case.

How can I find out what is happening in the *Hamama* case?

You or your family members will be able to learn more up-to-date information about the *Hamama* case at the ACLU's website: https://www.aclu.org/cases/hamama-v-adducci.

This fact sheet is not intended to substitute for legal advice regarding your own individual immigration case or any other matter outside of the context of the *Hamama* lawsuit. We advise you to seek independent legal advice about your own individual immigration case and the impact of the *Hamama* lawsuit on your case.

NOTE: ICE/ERO did not prepare this handout and is not responsible for its contents.

DETAINEE REQUEST FOR PROMPT REMOVAL TO IRAQ

August 17, 2017

You are an Iraqi national who had a final order of removal from the United States as of June 24, 2017, and you are currently detained pending removal to Iraq.

You are currently covered by a court order in a federal lawsuit, *Hamama v. Adducci*, No. 17-cv-11910 (E.D. Mich.),that temporarily prevents the government from removing you to Iraq. Further details regarding your rights under the court order are available in the attached information sheet from the American Civil Liberties Union (ACLU), counsel in the litigation.

This form is for you to use if you wish to request prompt removal to Iraq—that is, if you want to request that the existing court order preventing removal to Iraq not apply to you. Note: This form does *not* waive any rights. It will be sent to both ICE and the ACLU.

If you wish to remain in the United States, do NOT fill out this form.

If and only if you want to be removed to Iraq:

If you have an immigration attorney, you **must** contact your attorney to discuss the matter, and request that he or she inform ICE by calling the ICE Detroit Office of Chief Counsel and asking to speak with the duty attorney and inform the ACLU by emailing hamama@aclumich.org. **Do not fill out this form if you have an immigration attorney.**

If you do *not* have an immigration attorney, but wish to consult an attorney regarding this decision, please see the attached information sheet from the ACLU for information on obtaining assistance in locating an attorney who may meet with you and advise you (without cost to you) on this important decision. **Do not fill out this form if you wish to speak with an attorney.**

If you do not have an attorney, do not wish to consult with an attorney regarding this decision, and wish to be removed to Iraq as promptly as possible, please complete the fields below, tear off the portion below, and follow the instructions to return to ERO.

Tear Here----------

REQUEST FOR PROMPT REMOVAL TO IRAQ

I have read and understand this notice and the attached information sheet regarding the court's order in *Hamama v. Adducci*, 17-cv-11910 (E.D. Mich.). I wish to be removed to Iraq as promptly as possible. I do not wish to further consult with an attorney. I understand that requesting exclusion from the class will result in my removal from the United States to Iraq as promptly as possible. I understand this notice, request for class exclusion, and attached information sheet because: (Check "A" or "B")

☐ A. This notice and attached information sheet was read to me in _____, a language that I fully understand.

(or)

☐ B. I read this notice and attached information sheet without assistance because I am capable of reading and understanding English.

_____ _____

Print Detainee Name A Number

_____ _____

Detainee Signature Date

Mail to: LEGAL MAIL FOR ICE
Enforcement and Removal Operations
333 Mt. Elliott
Detroit, MI 48207
ATTN: Hamama v. Adducci Litigation

DO NOT WRITE BELOW THIS LINE - FOR ERO USE ONLY

_____ _____

Print Name and Title of ERO Officer Accepting Request Date

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

PRIVACY WAIVER AUTHORIZING DISCLOSURE TO A THIRD PARTY

Use this form to authorize the U.S. Department of Homeland Security ("DHS") to disclose information and/or records about you to a third party. Taking this action is entirely voluntary; you are under no obligation to consent to the release of your information to any third party. **Authority:** Privacy Act of 1974 (5 U.S.C. § 552a); DHS Privacy Act Regulations (6 C.F.R. § 5.21(d)).

STEP 1 Provide information about yourself and identify the third party that you intend to receive your information and/or records (the "Recipient").

Your Full Name:	Your Alien Registration Number (if applicable):
Your Current Address:	Date of Birth: Country of Birth:
Recipient's Name:	Recipient's Phone Number:
Recipient's Mailing Address (required if requesting disclosure by mail):	
Recipient's Organization, if the waiver will apply to it (e.g. news media, congressional office, law firm):	

STEP 2 Specify what information and/or records DHS is authorized to share with the Recipient.

☐ Identifying Data (Date of Birth, etc.) ☐ Family Data ☐ Travel/Border Crossing
☐ Immigration Case ☐ Detention Information ☐ Medical Information
☐ Alien File (A-File) ☐ Criminal History ☐ Criminal Case

AND/OR

☐ The following information/records (describe): _____

_____

OR

☐ ALL information and/or Records Requested by the Recipient

For Aliens Only: If you have applied for or received any of the immigration benefits below, you are legally entitled to confidentiality. (See reverse for more information.) If you want DHS to share information about these benefits with the Recipient, you must waive your confidentiality rights by checking the appropriate boxes below. Waiver of these rights is not required; however, if you do not waive these rights DHS may be unable to disclose to the Recipient some or all of the information you identified above.

I waive my right to confidentiality and authorize disclosure to the Recipient regarding these immigration benefits:

☐ Temporary Protected Status (TPS) ☐ T Visa (for trafficking victims) ☐ U Visa (for victims of certain crimes)
☐ Seasonal Agricultural Worker ☐ Battered Spouse/Child Seeking Hardship Waiver ☐ Violence Against Women Act (VAWA)
☐ Asylum (confidentially applies even if petition is denied)

STEP 3 Sign the statement below authorizing DHS to disclose your information and/or records to the Recipient.

I certify under penalty of perjury that the information above is accurate. I authorize DHS, its components, offices, employees, contractors, agents, and assignees, to disclose the information or records specified above to the Recipient. I understand this may include and is not limited to reports, evaluations, and notes of any kind, contained in any record keeping system maintained by or on behalf of DHS; that DHS retains the discretion to decide if particular records or information are within the scope of this Waiver; and that DHS has no control over how the Recipient will use or disseminate my information. I agree to release and hold harmless DHS, its components, offices, employees, contractors, agents, and assignees, from any and all claims of action or damages of any kind arising from, or in any way connected to, the release or use of any information or records pursuant to this Waiver.

Your Signature:	Witness Signature:
Date:	Witness Name:

*Privacy Waiver is valid for 90 days from date of signature

*Witness may not be the Recipient or employed by Recipient's employer

Explanation of Immigrant Benefits

If you have applied for or received any of the immigration benefits below, you may be legally entitled to confidentiality regarding these benefits. An explanation of these benefits is provided below to help you identify whether you have applied for such benefits. If you have applied for or received these benefits and you want DHS to share information about these benefits with the Recipient, you must waive your confidentiality rights by checking the appropriate boxes in Step 2 of this form (reverse). You are not required to waive confidentiality regarding these benefits; however, if you do not waive these rights DHS may be unable to disclose to the Recipient some or all of the information you identified above.

Temporary Protected Status (TPS) - 8 U.S.C. § 1254a(c)(6). TPS is for foreign nationals currently residing in the U.S. whose homeland conditions are recognized by the U.S. government as being temporarily unsafe or overly dangerous to return to (e.g., war, earthquake, flood, drought, or other extraordinary and temporary conditions). ICE may disclose information related to TPS to a third party with the consent of the alien.

T Visas and U Visas - Public Law 106-386, Section 701(c)(1)(C). A T visa allows certain victims of human trafficking to remain in the United States for a period of time. A U visa allows certain victims of crimes to remain in the United States for a period of time. ICE may disclose information related to T and U visas to third parties with the consent of the alien.

Legalization Claims, including Seasonal Agricultural Worker (SAW) Claims - 8 U.S.C. § 1255a(c)(4) and (5) and 8 U.S.C. § 1160(b)(5) and (6). Individuals who have applied for legalization, including those individuals employed in agricultural work of a seasonal or temporary nature who have made SAW Claims, may permit ICE to disclose information related to their claim to a third party with the individual's consent.

Battered Spouse or Child Information - 8 U.S.C. § 1186a(c)(4)(C). This provision applies to a battered alien or child who has applied for a hardship waiver from removal under the INA. ICE may disclose information the alien provided to ICE in support his or her request for waiver to a third party with consent of the alien.

Information Relating to Violence Against Women Act (VAWA) Claimants - 8 U.S.C. § 1367(a)(2). This provision applies to a person who has filed a claim under the VAWA. ICE may disclose information related to a person's claim to a third party with the consent of the person.

Asylum Information - 8 C.F.R. § 208.6. This provision applies to individuals who have applied for asylum, and confidentiality regarding the asylum claim applies even if the claim is ultimately denied. ICE may disclose information related to an individual's asylum claim to a third party with the consent of the person.

Revocation of Privacy Waiver

This Privacy Waiver is valid for 90 days from the date of signature unless you have otherwise specified on this form. You may revoke this Privacy Waiver at any time by contacting the ICE Privacy Office (202-732-3300 or ICEPrivacy@dhs.gov) or the relevant ICE office handing this matter or case. Certain information about you may be requested to confirm your identity and you may be asked to revoke the waiver in writing.