

No. 17-2171

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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USAMA JAMIL HAMAMA,  
ET AL., ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED,  
*Petitioners–Appellees,*

v.

THOMAS HOMAN,  
SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR, U.S. IMMIGRATION  
AND CUSTOMS ENFORCEMENT, ET AL.  
*Respondents–Appellants*

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On Appeal from the United States District Court for the  
Eastern District of Michigan, Case No. 2:17-CV-11910  
Before the Honorable Mark A. Goldsmith

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**BRIEF FOR THE CHALDEAN COMMUNITY FOUNDATION  
AS AMICUS CURIAE SUPPORTING APPELLEES**

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February 12, 2018

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 v. Homan

Name of counsel: Carl M. Levin and Gabriel E. Bedoya

Pursuant to 6th Cir. R. 26.1, The Chaldean Community Foundation  
*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 12, 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.

s/Carl M. Levin  
660 Woodward Avenue Suite 2290  
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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.

**CERTIFICATION**

I hereby certify that I have made personal contact with attorneys for Petitioners-Appellees and Respondents-Appellants, requesting concurrence in the filing of this motion. Both parties concurred in the Chaldean Community Foundation's filing of this amicus brief.

Dated: February 12, 2018

/s/ Gabriel E. Bedoya  
Gabriel E. Bedoya

## **ISSUES PRESENTED**

1. Whether Petitioners should be removed to Iraq.

*The CCF answers “No.”*

2. Whether Petitioners should be provided the opportunity to review the U.S. Government’s agreement with the Iraqi Government regarding the removal of Iraqi nationals because of its bearing on the propriety of removal of Petitioners to Iraq.

*The CCF answers “Yes.”*

3. Whether Appellants violated Petitioners’ Due Process rights by threatening removal to Iraq with knowledge of the extreme danger Petitioners would be subjected to.

*The CCF answers “Yes.”*

4. Whether Petitioners may seek asylum pursuant to 8 U.S.C. § 1101(a)(42)(A).

*The CCF answers “Yes.”*

5. Whether Petitioners are entitled to the relief afforded to non-citizens for withholding of removal and present their individual cases to the Attorney General under 8 U.S.C. § 1231(b)(3)(A).

*The CCF answers “Yes.”*

## **MOST APPROPRIATE AUTHORITIES**

1. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)
2. *Yousif v. Lynch*, 796 F.3d 622 (6th Cir. 2015)
3. 8 U.S.C. § 1101(a)(42)(A)
4. 8 U.S.C. § 1231(b)(3)(A)

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

The Chaldean Community Foundation (“CCF”) is a nonprofit organization based in Southeast Michigan dedicated to addressing the needs of the Chaldean-American community. The CCF provides refugees with acculturation training, mental health services, healthcare and disability assistance, language courses, immigration and naturalization services, career assistance, scholarship programs, and auto loan programs.

In 2015, the CCF served more than 18,000 individuals, approximately 85% of whom are Chaldean. In 2016, the CCF provided services to more than 22,000 individuals, and, in 2017, the CCF served 26,000 individuals.

The CCF works with Iraqi refugees on a daily basis and helps them with skills and resources. The CCF has a unique perspective regarding the threats and danger that Chaldeans—and other Iraqi immigrants—would face if removed to Iraq.

## I. INTRODUCTION

Despite recognizing that Iraq is highly dangerous, particularly for religious and ethnic minorities, on June 11, 2017, U.S. Immigration and Customs Enforcement (“ICE”) began arresting and detaining a large number of Iraqi nationals—most of whom are Chaldeans—in preparation for deportation. On July 24, 2017, the District Court for the Eastern District of Michigan issued a preliminary injunction barring the government from executing removal orders against Petitioners. On November 22, 2017, ICE filed an appeal before this Court, challenging the issuance of a preliminary injunction.

The Court should deny the appeal and affirm the injunction. In January 2018, the U.S. Department of State issued a four-tier travel advisory for foreign travel and placed Iraq in “Level 4: Do not travel.” Given the extremely dangerous conditions in Iraq, Petitioners should have the opportunity to demonstrate their eligibility for the constitutional and statutory protections described herein.

Appellants claim that, since 2014, “Petitioners had the notice and opportunity to be heard that due process required,” when the “‘changed country conditions in Iraq started to become apparent,’ with the rise of ISIS and other groups.” App. Br. at 39. Appellants accordingly allege that Petitioners failed “to preserve any rights that they had to reopen their removal proceedings based on the conditions in Iraq....” *Id.* at 41. Not so.

Petitioners did not have any reason to reopen their removal proceedings before being threatened with removal. Appellants themselves admit that “[f]or many years it was difficult for the government to remove Iraqi nationals to Iraq” and that, from 2009 to 2016, “Iraq would accept only those of its nationals who had unexpired passports and only those returning via commercial flights. As a result, many Iraqi nationals who have been ordered removed remained in the United States under the supervision of [ICE].” *Id.* at 6.

The U.S. government suddenly reversed course in 2017, when the United States and Iraq allegedly reached an agreement (the “U.S.-Iraq Agreement”), through which the Iraqi government agreed to accept the forced repatriation of Iraqi nationals. The U.S.-Iraq Agreement served as the sole basis and impetus behind Petitioners’ arrest and detention.

The Court should affirm the district court’s ruling and allow Petitioners the opportunity to reopen their removal proceedings and challenge the constitutionality of their potential removal to a highly dangerous location. Petitioners should also be provided the opportunity to review the terms of the U.S.-Iraq Agreement to determine whether there are appropriate security provisions in the event Petitioners are forcibly removed to Iraq.

## II. ARGUMENT

### A. Chaldean Iraqis Are Religious and/or Ethnic Minorities Highly Likely to Suffer Serious Harm or Death if Removed

#### 1. Sectarian Violence Makes Iraq Unstable and Dangerous

Iraq today faces upheaval and violence, as clashing factions fight over political power and control of territory and resources, with battle lines drawn on religious and ethnic grounds.<sup>1</sup> From the 1980s until Saddam Hussein was overthrown in 2003, many of these divisions were buried just below the surface.<sup>2</sup> In the ensuing years, sectarian fault lines reopened,<sup>3</sup> increasing ethnic, religious, and political violence, and introducing the terrorist organization, the Islamic State of Iraq

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<sup>1</sup> Congress has recognized the violence and upheaval in Iraq and has described the atrocities against religious and ethnic minorities as “includ[ing] war crimes, crimes against humanity, and genocide.” H.R. Con. Res. 75, 114th Cong. (2016). Indeed, the U.S. State Department has also recognized the ethnic cleansings, crimes against humanity, and genocide against Yazidis, Christians, Shia Muslims, Sunni Muslims, Kurds, and other minorities. U.S. Dep’t of State, *Atrocities Prevention Report* (March 17, 2016), <https://www.state.gov/j/drl/rls/254807.htm>; *see generally* Kenneth Katzman & Carla E. Hummud, Cong. Research Serv., RS21968, Iraq: Politics and Governance (2016); *see also* Dkt. 77-10, Declaration of Mark Lattimer (hereinafter “Lattimer Dec.”) ¶¶ 7-8; Pg ID 1789; Dkt. 84-6, Declaration of Daniel W. Smith (hereinafter “Smith Dec.”) ¶¶ 4, 35; Pg ID 2243, 2249 .

<sup>2</sup> National Geographic, *What Does It Mean to Be Iraqi Anymore?*, NATIONAL GEOGRAPHIC (last visited June 17, 2017), <http://news.nationalgeographic.com/news/special-features/2014/08/140801-iraq-sunni-shiite-baghdad-caliphate-saddam-hussein-al-qaeda-infocus/>.

<sup>3</sup> Katzman & Hummud, *supra* note 1, at 7.

and the Levant (“ISIL”).<sup>4</sup> The power-vacuum ultimately led to widespread sectarian violence between Shi’a and Sunni Muslims, with Iraqi Christians and Kurds targeted for violence.<sup>5</sup> After the U.S. withdrew from Iraq in 2011, a fragile power-sharing arrangement quickly unraveled, plunging the country into further sectarian violence.<sup>6</sup>

In January 2018, the U.S. Department of State developed a four-tier travel advisory for foreign travel and placed Iraq in “Level 4: Do not travel.” The Department of State’s Iraq Travel Advisory bluntly states “Do not travel to Iraq due to **terrorism and armed conflict.**”<sup>7</sup> Citing the “high risk of violence and kidnapping,” the Department of State recognizes that “[n]umerous terrorist and insurgent groups are active in Iraq and regularly attack both Iraqi security forces and civilians.”<sup>8</sup> In addition, the Department of State travel advisory also advises that

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<sup>4</sup> *Id.* at 22. For example, while Saddam Hussein empowered Iraq’s Sunni population, the Prime Minister elected in 2005, Nuri Kamal al-Maliki, favored the Shi’a population. This reversal “created division and distrust in Iraq and helped contribute to the rise of extremist groups such as ISIS.”

<sup>5</sup> *Id.* at 33; *see also* Dkt. 77-10, Lattimer Dec. ¶¶ 8, 10; Pg ID 1789-790 ; Dkt. 84-6, Smith Dec. ¶¶ 24-26, 35; Pg ID 2247, 2249.

<sup>6</sup> *Id.* at 14, 22; *see also* Dkt. 77-10, Lattimer Dec. ¶¶7-8; Pg ID 1789.

<sup>7</sup> United States Department of State, *Iraq Travel Advisory* (January 10, 2018), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/iraq-travel-advisory.html> (emphasis original).

<sup>8</sup> *Id.*; *see also* Dkt. 77-13, Supp. Lattimer Dec. ¶ 8; Pg ID 1806.

“[a]ttacks by improvised explosive devices (IEDs) occur frequently in many areas of the country, including Baghdad.”<sup>9</sup>

The Department of State’s Human Rights Report has further documented numerous human rights violations occurring in Iraq, including

unlawful killings; torture and other cruel punishments; poor conditions in prison facilities; denial of fair public trials; arbitrary arrest; arbitrary interference with privacy and home; limits on freedoms of speech, assembly, and association due to sectarianism and extremist threats; lack of protection of stateless persons; wide-scale governmental corruption; human trafficking; and limited exercise of labor rights.<sup>10</sup>

These violations have been perpetuated by groups including ISIL, Iraqi government security and law enforcement personnel, and Shiite militias. In sum, Iraq today is unsafe, unstable, and rife with human rights violations.

The safety and security of Iraq’s Christian and other religious minority populations is of extremely grave concern.<sup>11</sup> The rise of ISIL in June 2014 has only exacerbated inter-community tensions and violence, and ISIL itself has carried out

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<sup>9</sup> United States Department of State, *Iraq Travel Advisory* (January 10, 2018), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/iraq-travel-advisory.html>; *see also* Dkt. 77-13, Lattimer Dec. ¶ 8; Pg ID 1806.

<sup>10</sup> United States Department of State, *Iraq 2015 Human Rights Report* (2015), <https://www.state.gov/documents/organization/253137.pdf>.

<sup>11</sup> Katzman & Hummud, *supra* note 1, at 33; *see also* Dkt. 77-10, Lattimer Dec. ¶¶ 8-10, 13; Pg ID 1789-790; Dkt. 84-6, Smith Dec. ¶¶ 4, 17, 36, 37; Pg ID 2243, 2245, 2249.



waves of violence against Christians, Muslims, and other religious groups.<sup>12</sup> Of great significance and concern, in May of 2017, Sheikh al Moussawi, an official responsible for all Shi'a religious sites, declared that Iraqi Christians were infidels and called for jihad against them.<sup>13</sup> If such a powerful government official incites the persecution of Christians, it surely puts in doubt the willingness of the Iraqi government to provide religious minorities with reasonable security.

## **2. Chaldeans Face a Particularly High Risk of Violence and Persecution in Iraq**

While the instability in Iraq threatens many religious and ethnic minorities, Chaldeans are at particular and heightened risk of violence. As religious and ethnic minorities, Chaldeans face extreme persecution in Iraq.<sup>14</sup> Although ethnic and

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<sup>12</sup> See generally Amnesty International, *Banished and Dispossessed: Forced Displacement and Deliberate Destruction in Northern Iraq* (2016), [https://www.amnestyusa.org/files/banished\\_and\\_dispossessed\\_-\\_forced\\_displacement\\_and\\_deliberate\\_destruction\\_in\\_northern\\_iraq.pdf](https://www.amnestyusa.org/files/banished_and_dispossessed_-_forced_displacement_and_deliberate_destruction_in_northern_iraq.pdf) (hereinafter, Amnesty International, *Banished and Dispossessed*); Amnesty International, *Ethnic Cleansing on a Historic Scale: Islamic State's Systematic Targeting of Minorities in Northern Iraq* (2014), [https://www.es.amnesty.org/uploads/media/Iraq\\_ethnic\\_cleansing\\_final\\_formatted.pdf](https://www.es.amnesty.org/uploads/media/Iraq_ethnic_cleansing_final_formatted.pdf) (hereinafter, Amnesty International, *Ethnic Cleansing on a Historic Scale*).

<sup>13</sup> “Convert or die, says Shia leader to Iraqi Christians,” THE NEW ARAB (May 16, 2017).

<sup>14</sup> See, e.g., United States Commission on International Religious Freedom, 2016 Annual Report, at p. 101: “In August 2015, Iraqi Defense Minister, Khaled al-Obeidi reported that ISIL had killed 2,000 Iraqis in the largely Christian Nineveh Plains between January and August 2015, and that more than 125,000 Christians fled

religious minorities such as Chaldean Christians, Assyrian Christians, Turkmen Shi'a, Shabak Shi'a, Yezidis, Kakai and Sabeen Mandaean have lived together in some regions of Iraq for centuries, this dynamic is currently under siege.<sup>15</sup> Today, areas that are home to these minorities, such as the Nineveh province, have been under siege by terrorists.<sup>16</sup> Amnesty International has found that ISIL has systematically targeted non-Arab and non-Sunni Muslim communities, killing or abducting hundreds, or possibly thousands, and forcing more than 830,000 others to flee the areas it has captured since June 10, 2014.<sup>17</sup> Northern Iraqi provinces and towns from which most Chaldean Americans came are particularly dangerous. Since 2014, hundreds of men from towns and villages in this northern region were captured and shot in cold blood.<sup>18</sup> Amnesty International's field investigations have

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to the KRG for protection.” *See also* Dkt. 77-10, Lattimer Dec. ¶¶ 8-10, 13; Pg ID 1789-790.

<sup>15</sup> Amnesty International, *Ethnic Cleansing on a Historic Scale*, *supra* note 12, at 4; *see* Dkt. 84-6, Smith Dec. ¶ 35, Pg ID 2249.

<sup>16</sup> Amnesty International, *Ethnic Cleansing on a Historic Scale*, *supra* note 12, at 4; *see* Dkt. 77-10, Lattimer Dec. ¶¶ 10, 12; Pg ID 1789-790.

<sup>17</sup> Amnesty International, *Ethnic Cleansing on a Historic Scale*, *supra* note 12, at 4.

<sup>18</sup> *Id.* at 7 (One witness to the mass killings described them thusly: “A white Toyota pick-up stopped by the house of my neighbour, Salah Mrad Noura, who raised a white flag to indicate they were peaceful civilians. The pick-up had some 14 IS men on the back. They took out some 30 people from my neighbour’s house: men, women and children. They put the women and children, some 20 of them, on the back of another vehicle which had come, a large white Kia, and marched the

concluded that ISIL systematically and deliberately carried out a program of ethnic cleansing in the areas under its control, which include the area of origin for the majority of Chaldean Iraqis.<sup>19</sup>

**B. The Court Should Provide Petitioners the Opportunity to Review the U.S.-Iraq Agreement**

Appellants have cited to the U.S.-Iraq Agreement as the sole reason why Iraqi nationals—who have lived in this country peacefully and productively for decades—are now being detained for removal. Appellants have refused to provide a copy of or a complete description of the U.S.-Iraq Agreement to the undersigned counsel,<sup>20</sup> or even to the United States Congress.<sup>21</sup> Based on what is publicly reported on, the U.S.-Iraq Agreement may not provide any assurances or representations to address the chief concern for Chaldean Iraqis: that deporting them to Iraq—a location the U.S. Department of State has classified as “Level 4: Do not travel”—would place them in danger of serious harm or death. This Court should, *sua sponte*, order

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men, about nine of them, to the nearby wadi [dry river bed]. There they made them kneel and shot them in the back. They were all killed; I watched from my hiding place for a long time and none of them moved. I know two of those killed: my neighbour Salah Mrad Noura, who was about 80 years old, and his son Kheiro, aged about 45 or 50.”).

<sup>19</sup> *Id.*

<sup>20</sup> On October 16, 2017 the Chaldean Community Foundation sent a FOIA Request to U.S. Department of Homeland Security.

<sup>21</sup> On June 14, 2017 Congressional Representatives sent a letter to (then) U.S. Secretary of Homeland Security John F. Kelly, which remains unanswered.

Appellants to produce a copy of the U.S.-Iraq Agreement, or a detailed report of its terms, as there is apparently no agreement in writing.

For the detained Iraqi nationals, the contents of the Agreement, or the absence of any provisions regarding their safety if forcibly returned, could very well be the difference between life and death. At the most basic level, justice requires that the Appellants produce the U.S.-Iraq Agreement, or a detailed report of its terms. As other courts have found, the Court has the inherent authority to review material that was not before the district court if the interests of justice so require. *See Schwartz v. Million Air, Inc.*, 341 F.3d 1220, 1225 n.4 (11th Cir. 2003) (holding that the court has equitable power to supplement record with new material if, in the interests of justice, the material aids the court in making an informed decision); *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986) (noting that the court has the “inherent equitable authority” to supplement the record on appeal with material that was not before the district court); *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993) (allowing new evidence into the record before considering a motion for a preliminary injunction in a trademark infringement suit based on the “interests of justice”).<sup>22</sup>

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<sup>22</sup> The Court may also “supplement” the record with new information or documents if they are material to either party. *See* Fed. R. App. P. 10(e)(2) (“If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental

## **1. The U.S. Government Reversed Its General Policy Against Deporting Iraqi Nationals Based on the U.S.-Iraq Agreement**

On January 27, 2017, President Trump signed Executive Order No. 13769 (“EO-1”), titled “Protecting the Nation From Foreign Terrorist Entry Into the United States.” EO-1 consisted of several substantial changes to the United States’ immigration policy. First, it blocked for a period of 90 days the entry into the United States of any person from seven countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen. (*See* Dkt. 29-2, Executive Order 13769, at Section 3(c), Pg ID 384.) EO-1 also suspended the U.S. Refugee Admissions Program (“USRAP”) for 120 days and limited the total number of refugees for fiscal year 2017 to 50,000. (*Id.* at Sections 5(a), 5(d).)

Following legal challenges before the Ninth Circuit Court of Appeals, *see, e.g. Washington v. Trump*, No. 17-35105, 2017 WL 469608 (9th Cir. Feb. 9, 2017), President Trump signed a second Executive Order No. 13780 (“EO-2”) on March 6, 2017. EO-2 made several changes to the original text of EO-1. Most importantly for the present dispute, Iraq was removed from the list of countries from which nationals would not be admitted to the United States. EO-2 provided that Iraq

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record may be certified and forwarded ... by the court of appeals.”); *United States v. Aulet*, 618 F.2d 182, 186 (2d Cir. 1980) (relying on a previous version of Rule 10(e) to “supplement” the record with new material); *Ross*, 785 F.2d at 1476 n.16 (allowing new material based on the court’s “inherent equitable authority” but acknowledging that the Second Circuit has relied on a different mechanism – Rule 10(e) – to supplement the record).

presented a “special case” justifying its removal from the list of prohibited countries in EO-2. (*See* Dkt. 29-3, Executive Order 13780, Section 1(g), Pg ID 392-93). U.S. government officials have since confirmed that Iraq was removed from the banned-country list in EO-2 because Iraq “agreed” to accept the return of Iraqi nationals. (*See, e.g.*, Dkt. 29-4, “U.S. targets Iraqis for deportation in wake of travel ban deal,” Pg ID 402-04; Dkt. 29-5, “Trump’s first victory in deportation feud is Iraq,” Pg ID 407 (“Iraq has agreed to the timely return and repatriation of its nationals who are subject to final orders of removal. That is a *very, very important provision.*” (emphasis added))).

## **2. It is Unknown Whether the U.S.-Iraq Agreement Addresses Significant Threats That Would be Faced by Petitioners**

The terms of the U.S.-Iraq Agreement are highly relevant, since the Agreement has resulted in a threat to Petitioners’ fundamental rights to life and security. However, as the district court made clear, Appellants have provided “insufficient evidence in the record” to allow Petitioners—or the Court—to examine its terms. (*See* Dkt. 191, Jan. 2, 2018 E.D. Mich. Op. & Order at 7, Pg ID 5324). Although the district court acknowledged the two declarations that Appellants submitted, which clarified that the U.S.-Iraq Agreement had *not* been documented in writing, the court found that Appellants provided nothing more than “vague representations” about the Agreement and Iraq’s “supposed willingness to relax its policies regarding issuance of travel documents.” *Id.* at 14.

Despite providing little information regarding the sudden reversal in U.S. policy, Appellants claim that Petitioners waived their rights by failing “to pursue a motion to reopen earlier if they believed they were entitled to relief from their removal orders....” App. Br. at 46. This line of reasoning fails to account for the fact that Petitioners were not being detained or threatened with the risk of detention or removal until *after* the alleged agreement was reached. The conditions of Iraq may have been known for years, but they did not constitute a threat to Petitioners until they were arrested. It would have been an exercise in futility for Petitioners to file a motion to reopen their cases, when there was no threat of removal. Indeed, “Iraq’s refusal generally to accommodate removals led Petitioners . . . to reasonably conclude that filing a motion to reopen was an academic exercise,” and, because of that, “it was reasonable not to incur the prohibitive cost of filing a motion to reopen, which can reach up to \$80,000 in a case of this nature.” (*See* Dkt. 87, July 24, 2017 E.D. Mich. Op. & Order at 20, Pg ID 2342 (internal citations and quotations omitted)).

Petitioners should be provided the opportunity to review the terms of the U.S.-Iraq Agreement, whether or not it is in writing, and determine what, if any, protections the Iraqi government has agreed to provide upon Petitioners’ forced repatriation. This information is extremely relevant to Petitioners’ constitutional claims, as well as their potential claims for asylum and withholding of removal.

### **C. The Court Should Enforce Petitioners' Constitutional and Statutory Rights**

The U.S. Constitution entitles all persons who live in the United States to due process of law. *Amadou v. INS*, 226 F.3d 724, 726-27 (6th Cir. 2000). Accordingly, a non-citizen threatened with removal from the United States is entitled to a full and fair hearing. *Id.* U.S. statutory law provides additional protection to two categories of non-citizens: refugees and likely victims of torture. If threatened with removal from the United States, a refugee may apply for asylum under 8 U.S.C. § 1158(a)(1), or alternatively for withholding of removal under 8 U.S.C. § 1231(b)(3)(A).

#### **1. Appellants Are Violating the Due Process Rights of the Detained Iraqi Nationals**

Appellants threatened to violate the due process rights of the detained Iraqi nationals by seeking to forcibly remove them to a highly dangerous location. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) (“[T]he Fifth Amendment entitles aliens to due process of law in deportation proceedings.”); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (noting that due process requires an opportunity to be heard “at a meaningful time and in a meaningful manner.”). In *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989), the United States Supreme Court found that, “in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.” *Id.* at 198. The Supreme Court found that the government was required to prohibit cruel



and unusual punishment when the relevant parties were deprived of their liberty and ability to protect themselves. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976); *Youngberg v. Romeo*, 457 U.S. 307 (1982). Indeed, “when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and *reasonable safety*—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.” *DeShaney*, 489 U.S. at 200 (emphasis added). “The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.” *Id.*

To show a state-created danger, this Court has held that a party must show the following:

- 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state’s actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered [the party].

*Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003). Here, Petitioners have satisfied this standard. By threatening Chaldean Iraqi nationals with involuntary removal to Iraq, Appellants are endangering Petitioners’ basic due

process rights by exposing them to serious threats of violence. Petitioners would not face such a threat had Appellants not threatened them with removal. What's more, Appellants are fully aware of the danger they are exposing Petitioners to, since, as recently as January 2018, the U.S. Department of State issued a four-tier travel advisory for foreign travel and placed Iraq in "Level 4: Do not travel." In short, the dangers Chaldeans would face in Iraq are precisely those identified by the *DeShaney* and *Cartwright* Courts. While failing to show that the detained Iraqi nationals pose any threat to the United States, Appellants have endangered Petitioners' life and liberty by threatening their removal to a highly dangerous environment.

Appellants have further violated Petitioners' due process rights by arbitrarily imposing an "executive abuse of power as that which *shocks the conscience*" and seriously threatens Petitioners' right to bodily integrity with their potential forced repatriation to Iraq—a country where the U.S. Department of State itself cautions against travel. *Cty. Of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (emphasis added); *see also Albright v. Oliver*, 510 U.S. 266, 272 (1994) ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and *the right to bodily integrity.*") (emphasis added).

The Court should preserve Petitioners' substantive due process rights and affirm the preliminary injunction, as issued by the district court.

## 2. The Court Should Permit Chaldean Iraqis to Apply for Asylum

U.S. law entitles refugees to seek asylum, defined by 8 U.S.C § 1101(a)(42)(A). An asylum applicant must establish both subjective and objective fear of persecution in his country of origin. *Mapouya v. Gonzalez*, 487 F.3d 396, 412 (6th Cir. 2007). Fear of persecution is objectively reasonable if the applicant establishes at least a ten percent chance that he will be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion in her country of origin. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 439-40 (1987). Ineligibility for asylum may be overcome with proof of extremely unusual hardship.<sup>23</sup> 8 C.F.R. § 1212.7(d).

It is clear that many Chaldean Iraqis, currently detained by the United States government, are refugees within the definition of 8 U.S.C § 1101(a)(42)(A), and may seek asylum. The Court should permit them to assert their well-founded fears of persecution and grave danger in Iraq. Even if the detained Iraqis had committed crimes that might bar relief under 8 U.S.C. § 1158(b)(2)(A), they have a right to produce evidence that deportation would burden them (or their families) with

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<sup>23</sup> If the Immigration Judge finds that an alien, having been convicted of a particularly serious crime, is a danger to the United States, or if there are reasonable grounds for regarding the alien as a danger to the security of the United States, the judge should not extend relief to the asylum applicant. 8 U.S.C. § 1158(a)(1). “Serious crimes” include aggravated felonies for which an alien serves at least five years in prison.

extremely unusual hardship. Those who have committed crimes – and became subject to deportation – did so several years or even decades ago. Since then, they have lived as peaceful, productive, and law-abiding citizens; they have established deep roots in the United States, paid taxes, and served their communities; and appeared for their scheduled meetings with ICE. In addition, many are the sole source of income and support for their families. This Court should accordingly permit them to seek the appropriate relief before an Immigration Judge by deferring removal.

**3. The Court Should Permit Petitioners to Apply for Withholding of Removal**

U.S. law also affords discretionary relief to non-citizens seeking withholding of removal when they establish a “clear probability” of persecution. The Attorney General may order the removal of an alien who has “been convicted by a final judgment of a particularly serious crime and is a danger to the community of the United States,” *id.* at § 1231(b)(3)(B)(ii). However, the Attorney General is given discretion to withhold removal “if he decides that the alien’s life or freedom would be threatened in [the county where the alien is removed to] because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(A). The detained Iraqi nationals surely must be given the opportunity to seek the exercise of the Attorney General’s discretion.

This Court has held that, based entirely on country conditions in Iraq, the “status as a Christian alone entitles a [non-immigrant alien] to withholding of removal, given that there is ‘a clear probability’ that he would be subject to future persecution if returned to contemporary Iraq.” *See Yousif v. Lynch*, 796 F.3d 622, 628 (6th Cir. 2015). In *Yousif*, the Sixth Circuit noted that the U.S. Department of Homeland Security “conceded that, as a Chaldean Christian, [the detainee] was entitled to withholding of removal due to extant country conditions,” and that the Immigration Court granted his application for withholding of removal, notwithstanding the denial of his application for asylum. *Id.* at 626–27. Indeed, the Court found that there was “a pattern or practice of persecution against Chaldeans and Christians in Iraq at that particular time” and emphasized that “the respondent, as a Chaldean Christian, would be more likely than not to be persecuted upon his return to today’s Iraq.” *Id.* at 627.

Under the findings of the *Yousif* Court, Petitioners should be allowed to present their case before the Attorney General, who can then exercise his discretion.

### **III. CONCLUSION**

For the reasons stated herein, the Chaldean Community Foundation respectfully requests that this Court grant Petitioners’ Motion for Preliminary Injunction.

Dated: February 12, 2018

Respectfully Submitted,

/s/ Carl M. Levin

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was served on the attorneys of record in this matter by e-filing on February 12, 2018.

The statement above is true to the best of my knowledge, information and belief.

/s/ Carl M. Levin  
Carl M. Levin