

No. 17-2171

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, ET AL.
Petitioners-Appellees,

v.

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

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

BRIEF OF AMICI CURIAE
ANNE RICHARD, RYAN CROCKER,
PATRICIA BUTENIS, ROBERT FORD,
DAVID LITT, AND ANNE PATTERSON
IN SUPPORT OF PETITIONERS-APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 17-2171

Case Name: Hamama, et al. v. Homan, et al.

Name of counsel: Amy G. Doehring

Pursuant to 6th Cir. R. 26.1, Amici Curiae Anne Richard, et al.
Name of Party

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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.

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

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INTEREST OF AMICI CURIAE¹

Amici Curiae are former State Department officials and diplomats, including Anne Richard, Ambassador (ret.) Ryan Crocker, Ambassador (ret.) Patricia Butenis, Ambassador (ret.) Robert Ford, Ambassador (ret.) Anne Patterson, and Ambassador (ret.) David Litt.

Anne Richard served as the Assistant Secretary of State for Population, Refugees and Migration from 2012 to 2017, leading the U.S. Department of State's efforts to aid refugees and other victims of conflict. In that role, she was responsible for overseeing \$3.4 billion in refugee aid and the operations of the U.S. refugee admissions program. She was also a leading diplomat and spokesperson on humanitarian and migration policy. She previously served as Vice President of Government Relations and Advocacy at the International Rescue Committee (2004-2012) and held a number of other positions at the US Office of Management and Budget, Peace Corps headquarters, and the State Department earlier in her career.

Ambassador (ret.) Ryan Crocker has served as a United States Ambassador six times: Afghanistan (2011-2012), Iraq (2007-2009), Pakistan (2004-2007), Syria (1998-2001), Kuwait (1994-1997), and Lebanon (1990-1993). He has also served as the International Affairs Advisor at the National War College, where he joined

¹ Counsel for Appellants consented to the filing of this brief on February 9, 2018, and counsel for Appellees consented on February 10, 2018.

the faculty in 2003. From May to August 2003, he was in Baghdad as the first Director of Governance for the Coalition Provisional Authority and was Deputy Assistant Secretary of State for Near Eastern Affairs from August 2001 to May 2003. Since joining the Foreign Service in 1971, he also has had assignments in Iran, Qatar, Iraq and Egypt. Ambassador Crocker received the Presidential Medal of Freedom, the nation's highest civilian award, in 2009.

Ambassador (ret.) Patricia Butenis served as Deputy Chief of Mission at the U.S. Embassy in Baghdad from 2007 to 2009. She was also Deputy Chief of Mission at the U.S. Embassy in Islamabad. She has served as a United States Ambassador twice: to Bangladesh from 2006 to 2007 and to Sri Lanka and the Maldives from 2009 to 2012. Ambassador Butenis also served as Dean of the School of Professional and Area Studies at the Foreign Service Institute.

Ambassador (ret.) Robert Ford served as the deputy United States Ambassador to Iraq from 2008 to 2010 and as political counselor to the U.S. Embassy in Baghdad from 2004 to 2006. He also served as the U.S. Ambassador to Syria from 2011 to 2014, and in that role proposed and implemented policies and developed common strategies with European and Middle Eastern allies to try to resolve the Syria conflict. Previously he served as the U.S. Ambassador to Algeria from 2006 to 2008. From 2001 to 2004, Ambassador Ford served as Deputy Chief of Mission in Bahrain.

Ambassador (ret.) Anne Patterson is the former Assistant Secretary of State for Near Eastern Affairs (2013-2017). She also served as U.S. Ambassador to Egypt (2011-2013), Pakistan (2007-2010), Colombia (2000-2003), and El Salvador (1997-2000). Ambassador Patterson served as Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, as well as Deputy Permanent Representative to the United Nations, among other important assignments over the course of her more than four decades in the foreign service. In July 2017, she was appointed to the National Defense Strategy Commission, charged by Congress with conducting a bipartisan and independent review of the country's national security needs.

Ambassador (ret.) David Litt served for 34 years as a career U.S. diplomat, specializing in the Middle East and Southwest Asia. In 2005-2006 he was the third-ranking officer at the U.S. Embassy in Baghdad, with the title of Political-Military Counselor. In that role, Ambassador Litt provided policy advice to the U.S. Ambassador and served as liaison between the Embassy and the Multi-National Forces – Iraq. Ambassador Litt entered the Foreign Service in 1974 and served as the U.S. Ambassador to the United Arab Emirates from 1995 to 1998. From 1998 to 2004, Ambassador Litt was Political Advisor to U.S. Central Command and U.S. Special Operations Command at MacDill Air Force Base, Florida. While at the Department of State, Ambassador Litt served as the Director

of the Office of Northern Gulf Affairs (Iran and Iraq), and he also served as Desk Officer for Saudi Arabia.

As former high-ranking Department of State officials and diplomats with immense amounts of experience in Iraq and the Middle East, Amici possess relevant expertise that will be useful to the Court in resolving the issues presented by the appeal. Additionally, Amici have a strong interest in the outcome of this appeal. Through the experience developed in their former roles, Amici can provide the Court with a unique perspective on the conditions in Iraq and their significance within international humanitarian and migration policy.

SUMMARY OF THE ARGUMENT

The district court properly granted a preliminary injunction to Petitioners-Appellees in order to allow them to file motions to reopen their removal proceedings. Amici write in support of Petitioners-Appellees.

First, it is important for Petitioners-Appellees and similarly situated individuals to have the opportunity to file motions to reopen when country conditions have materially changed because the United States should not remove individuals to places where they face persecution, torture, or genocide.

Second, the District Court was correct to find that the conditions in Iraq have materially worsened in recent years. Additionally, since the July 2017 hearing, conditions in Iraq have deteriorated further.

I. BACKGROUND

The Petitioners-Appellees are Iraqi individuals who are subject to final orders of removal. *See Hamama v. Adducci*, No. 17-CV-11910, 2017 WL 2684477, at *1 (E.D. Mich. June 22, 2017). Many of the Petitioners-Appellees are members of various religious groups, including Christians, Kurds, Catholics, Shiites, Sunnis, and Chaldeans. *See* Index of Exhibits, ECF No. 77-1, Exhibit C: Declaration of Atheer Ali (Christian); Exhibit D: Declaration of Jihan Asker (Chaldean); Exhibit E: Declaration of Habil Nissan (Catholic); Exhibit N: Declaration of Abdulkuder Hashem Al-Shimmary (Kurdish); Exhibit CC: Declaration of Ali Al-Dilaimi (Shia). Despite living in the United States under orders of supervision for years, repatriation recently became possible after Iraq reached an agreement with the United States. *Hamama*, 2017 WL 2684477, at *1. After their arrests by U.S. Immigrations and Customs Enforcement officers, the Petitioners-Appellees faced immediate removal to Iraq. *Id.* On July 24, 2017, the District Court granted Petitioners-Appellees' motion for a preliminary injunction in order to allow them to file motions to reopen. *See Hamama v. Adducci*, No. 17-CV-11910, 261 F.Supp.3d 820 (E.D. Mich. 2017).

II. ARGUMENT

A. U.S. Immigration Law Evinces A Policy Of Broad Protection Against Removal Where Individuals Would Be Subject to Persecution

Individuals like Petitioners-Appellees should be given the opportunity to file motions to reopen their removal proceedings when country conditions have changed in order to not send people back to places where they face persecution, torture, or genocide. The breadth of the law and the statutory scheme that allows individuals to contest removal based on changed country conditions reflects a significant commitment to avoiding removal where it would likely result in serious harm.

First, “there is no time limit on the filing of a motion to reopen” if the motion is based on changed country conditions arising in the country to which removal has been ordered. 8 U.S.C. § 1229a(c)(7)(C)(ii); *see also* 8 C.F.R. § 1003.2(c)(3)(ii). The lack of a temporal limitation on these motions establishes a commitment to protecting these individuals. Congress has thus made a policy decision to protect vulnerable individuals as long as they face grave danger in the country of removal.

Second, the law governing adjudications of the merits of motions to reopen based on changed country indications confirms the broad policy of the United States of protecting vulnerable individuals. Indeed, a petitioner only needs to establish a *prima facie* case that she would be eligible for relief based on the

changed conditions—her petition does not need to be irrefutable. *See Agonafer v. Sessions*, 859 F.3d 1198, 1204 (9th Cir. 2017); *see also Salim v. Lynch*, 831 F.3d 1133, 1139-40 (9th Cir. 2016) (holding a motion to reopen “‘need only establish a prima facie case for relief, and need not conclusively establish that the petitioner warrants relief.’ A party demonstrates prima facie eligibility for relief ‘where the evidence reveals a reasonable likelihood that the statutory requirements for relief have been satisfied.’” (quoting *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003))).

The U.S. government’s protection of vulnerable individuals from removal under the Convention Against Torture (CAT) also demonstrates that U.S. policy supports allowing vulnerable individuals to file motions to reopen. Under the CAT, a petition will prevail on a claim for relief under the CAT if she shows it is more likely than not that she would be tortured in the country of removal. 8 C.F.R. § 208.16(c)(4). The preponderance standard indicates that the United States takes seriously its obligation to prevent removing individuals to places where they face grave harm, as the standard is not exceedingly demanding—it is more like civil legal standards than criminal standard, for instance. Because the purpose of having a standard is to indicate how certain a conclusion must be, the codification of a more lax standard when someone may be tortured if removed indicates that U.S. policy seeks to err on the side of being overly protective of vulnerable individuals.

Additionally, to demonstrate grounds for a preponderance finding under the CAT, the petitioner can marshal “[e]vidence of gross, flagrant or mass violations

of human rights within the country of removal.” *Id.* § 208.16. That means “country conditions alone can play a decisive role in granting relief under the Convention.” *Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011) (quoting *Kamalthas v. INS*, 251 F.3d 1279, 1280 (9th Cir.2001)). U.S. immigration policy therefore places immense importance on ensuring that the country of removal provides at least a baseline of safety to its residents. Inherent in that policy is a recognition that the U.S. would bear at least some responsibility for the outcome if an individual was removed to a dangerous place and subjected to torture or other persecution.

The breadth of the statutory scheme in place to prevent – or at least contest – potentially harmful removals indicates a reluctance to risk the sort of endangerment that Petitioners-Appellees would surely face if returned to Iraq. With human rights violations as pervasive and well-documented as those occurring in Iraq, Petitioners-Appellees’ circumstances are certainly covered under such an expansive scheme. Additionally, American foreign policy is strengthened when the United States protects individuals against removal to places where there is a serious risk of persecution or torture. America’s commitment to human rights bolsters American credibility abroad and is therefore crucial to U.S. foreign policy. Allowing individuals like the Petitioners-Appellees to reopen their removal proceedings would thus buttress America’s standing on the world stage.

B. The District Court Was Correct In Its Findings About Worsening Conditions in Iraq

1. The District Court's Findings

The district court's grant of the injunction was based partially on its determination that Petitioners' removal orders "largely predate the deteriorating conditions in Iraq." *Hamama*, 261 F. Supp. 3d at 825. The district court found that although the country's instability dates back to the U.S.-led invasion in 2003, "it was not until 2014 that conditions became especially dire for religious minorities." *Id.* According to the district court, the rise of the Islamic State in Iraq and Syria ("ISIS") led to significant persecution of religious minorities, including Christians, Shiite Muslims, and Yezidis. *Id.* at 825-26. In addition, the government backing of the Popular Mobilization Forces ("PMF") has allowed Shiite militia members to target Sunni Muslims with relative impunity. *Id.* at 826.

2. Country Conditions in Iraq

The district court's characterization of country conditions in Iraq as "deteriorating" is accurate.

Though ISIS was on the brink of collapse just a few years earlier, in June 2014 ISIS conquered Mosul, the second-largest city in Iraq at the time, declared itself a caliphate. Rebecca Collard, *ISIS: What We Have Learned Since The Declaration Of A Caliphate*, Time Magazine, June 25, 2015, available at <http://time.com/3933568/isis-caliphate-one-year/>. One made one of the

foundational goals of ISIS to “crush the injustice of disbelief and the iniquity of other religions.” Ahmed S. Hashim, *The Islamic State: From al-Qaeda Affiliate to Caliphate*, XXI Middle East Policy 4 (Winter), available at <http://www.mepc.org/islamic-state-al-qaeda-affiliate-caliphate>.

In light of ISIS’s brutal treatment of religious minorities and dissenters, then-Secretary of State John Kerry announced on March 16, 2016, that ISIS had committed and was committing genocide and carrying out ethnic cleansing against religious groups, such as Christians, Kurds, Shiites, and Sunnis. Declaration of Rebecca Heller (Heller Decl.) ¶ 32; John Kerry, *Remarks on Daesh and Genocide*, March 17, 2016, available at <https://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>. The Office of the United Nations High Commissioner for Human Rights calculated that between January 2014 and October 2015, ISIS caused over 55,000 civilian casualties and the internal displacement of 3.2 million people in Iraq. Alastair Jamieson, *ISIS Death Toll: 18,800 Killed in Iraq in 2 Years, U.N. Says*, NBC News, Jan. 19 2017, <https://www.nbcnews.com/storyline/isis-terror/isis-death-toll-18-800-killed-iraq-2-years-u-n499426>; see also United Nations High Commissioner for Refugees, *Iraq*, Flash Update, Feb. 6, 2018, available at <http://reporting.unhcr.org/sites/default/files/UNHCR%20Iraq%20Flash%20Update%20-%206FEB18.pdf>.

Within Iraq, Popular Mobilization Forces (PMFs) arose to provide security and combat ISIS after Iraqi military and police units proved to be inadequate. *Hamama*, 261 F. Supp. 3d at 826; Heller Decl. ¶ 16; Bill Roggio & Amir Toumaj, *Iraq's prime minister establishes Popular Mobilization Forces as a permanent 'independent military formation'*, Long War Journal, July 28 2016, available at <https://www.longwarjournal.org/archives/2016/07/iraqs-prime-minister-establishes-popular-mobilization-front-as-a-permanent-independent-military-formation.php>. Iraqi Prime Minister Haider al-Abadi formally approved of PMFs in February 2016, and Iraqi Parliament followed suit in November 2016, allowing them to become a permanent and independent security force. Roggio & Toumaj, *Iraq's prime minister establishes Popular Mobilization Forces as a permanent 'independent military formation'*, Long War Journal; see also Declaration of Daniel W. Smith, ECF No. 83-6 (Smith Decl.) ¶ 24.

Mosul fell to Iraqi military, PMF, and U.S. coalition forces in July 2017. Courtney Kube & Jon Schuppe, *U.S. and Iraq Declare Victory Over ISIS in Mosul*, NBC News, July 10, 2017, available at <https://www.nbcnews.com/news/world/u-s-iraq-declare-victory-over-isis-mosul-n781396>. After the fall of Mosul, PMFs carried out widespread executions and detained individuals in horrid conditions. *Hamama*, 261 F. Supp. 3d at 826; Heller Decl. ¶¶ 11, 20-21; Human Rights Watch, *Families with ISIS Relatives Forced into Camps*, Feb. 4, 2018, available at <https://www.hrw.org/news/2018/02/04/families-isis-relatives-forced-camps>;

Human Rights Watch, *Iraq: Dozens Found Handcuffed, Executed in, around Mosul*, June 4, 2017, available at <https://www.hrw.org/news/2017/06/05/iraq-dozens-found-handcuffed-executed-around-mosul>.

Though the Iraqi government declared victory over ISIS the following month in December 2017, ISIS has persisted in carrying out deadly attacks.

Rukmini Callimachi & Margaret Coker, *ISIS Claims Responsibility for Baghdad Bombings*, N.Y. Times, Jan. 17, 2018, available at

[https://www.nytimes.com/2018/01/17/world/middleeast/iraq-baghdad-isis-](https://www.nytimes.com/2018/01/17/world/middleeast/iraq-baghdad-isis-bombing.html)

[bombing.html](https://www.nytimes.com/2018/01/17/world/middleeast/iraq-baghdad-isis-bombing.html). Since losing much of its territory, ISIS has reverted to traditional

terror attacks, such as car bombings, suicide bombings, and kidnappings. Heller

Decl. ¶ 13; see also Michael P. Dempsey, *How ISIS' Strategy Is Evolving*, Foreign

Affairs, Jan. 18, 2018, available at

[https://www.foreignaffairs.com/articles/syria/2018-01-18/how-isis-strategy-](https://www.foreignaffairs.com/articles/syria/2018-01-18/how-isis-strategy-evolving)

[evolving](https://www.foreignaffairs.com/articles/syria/2018-01-18/how-isis-strategy-evolving); Elise Knutsen, *On the ground in Iraq, the war against ISIS is just getting*

started, Vox, Sep. 18, 2017, available at

[https://www.vox.com/world/2017/9/18/16309558/isis-iraq-kurds-trump-us-mosul-](https://www.vox.com/world/2017/9/18/16309558/isis-iraq-kurds-trump-us-mosul-syria-war-terrorism)

[syria-war-terrorism](https://www.vox.com/world/2017/9/18/16309558/isis-iraq-kurds-trump-us-mosul-syria-war-terrorism).

Because the “raison d’être” of ISIS is to “hold territory, govern and ultimately restore a Caliphate,” there is a serious risk of ISIS returning to its former glory as long as Iraq is wracked by sectarian turmoil and instability. Robin Simcox, *It's the Caliphate, Stupid*, The Weekly Standard, Feb. 6, 2018, available at

<http://www.weeklystandard.com/its-the-caliphate-stupid/article/2011475>. *See also Hamama*, 261 F. Supp. 3d at 839 (“[T]he uncertainty created by the ever-shifting fortunes of war means that areas that are not currently under ISIS control could very well be captured by that group after Petitioners are removed.”).

Of the estimated 100,000 PMF fighters in Iraq, about 80,000 are members of Iranian supported groups. *Defeating the Iranian Threat Network: Options for Countering Iranian Proxies, Hearing Before the Senate Committee on Foreign Relations*, (2016) (statement of J. Matthew McInnis, Resident Fellow, American Enterprise Institute), *available at* https://www.foreign.senate.gov/imo/media/doc/112916_McInnis_Testimony.pdf; *see also* Heller Decl. ¶ 16. Specifically, Iran’s Islamic Revolutionary Guard Corps (IRGC) is deeply involved in the PMFs. Abu Mahdi al Muhandis, a high-ranking official in the IRGC, serves as the official operations commander of the Iraqi PMFs. Amir Toumaj, *Iraqi Popular Mobilization Forces launch operation southwest of Mosul*, Long War Journal, April 29, 2017, *available at* <https://www.longwarjournal.org/archives/2017/04/iraqi-popular-mobilization-forces-launch-operation-southwest-of-mosul.php>. The U.S. government has designated al Muhandis as a terrorist. *See* U.S. Department of the Treasury, *Treasury Designates Individual, Entity Posing Threat to Stability in Iraq*, Press Center, July 2, 2009, *available at* <https://www.treasury.gov/press-center/press-releases/Pages/tg195.aspx>. The PMFs have sought to impose religious law on

Iraqis similar to the religious law imposed on Iranians by IRGC. The PMFs also have a culture where torture is prevalent. Smith Decl. ¶¶ 24, 26.

Because conditions in Iraq are uniquely horrific and materially worse than they were at the time of Petitioners' removal orders, the district court was correct in finding worsening conditions in Iraq in support of the grant of a preliminary injunction.

CONCLUSION

For the reasons explained above, the District Court's decision should be affirmed.

February 12, 2018

Respectfully Submitted

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CERTIFICATE OF SERVICE

I certify that on February 12, 2018, the above brief was served on all counsel of record through the Court's CM/ECF system.

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Amy G. Doehring

CERTIFICATE OF COMPLIANCE

I certify that the above brief contains 2,863 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that the above brief complies with the type size and typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure: it was prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point typeface.

/s/ Amy G. Doehring
Amy G. Doehring