

No. 18-1233

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

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**APPELLEES' REPLY IN SUPPORT OF  
MOTION FOR JUDICIAL NOTICE**

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On April 13, 2018, Petitioners-Appellees filed a motion asking this Court to take judicial notice of the Declaration of Margo Schlanger, which supplements and updates information already in the record. *See* First Schlanger Declaration, R. 138-2, Pg.ID# 3401-10; Second Schlanger Declaration, R. 174-3, Pg.ID# 4915-26; Third Schlanger Declaration, R. 263-2, Pg.ID# 6343-48. The most recent declaration contains updated statistics on (1) class members' procedural progress in their immigration cases (the outcomes of motions to reopen and merits immigration cases); (2) processing times for motions to reopen; (3) the results of the bond hearings that occurred after the district court's January 2 Preliminary Injunction (R.191, Pg.ID#5318-63); (4) detention and release information; (5) repatriations; and (6) the current procedural status of the named Petitioners' immigration cases.

Respondents-Appellants oppose the Motion for Judicial Notice primarily on the grounds that where EOIR or ICE data was unclear or ambiguous, Ms. Schlanger sought to confirm that data through contacts with class members' immigration counsel. Resp. to Mot. at 2–3. Specifically, Respondents object that “there is no indication . . . of how much of the [EOIR] data was ‘unclear or ambiguous,’ to allow this Court to determine whether it would be judicially noticing government records,” *id.* at 3 (quoting Schlanger Decl. ¶ 8), as compared to noticing information that was corroborated with immigration counsel.

To address Respondents' concerns, Ms. Schlanger has revised her declaration to indicate what data disclosed by ICE or EOIR was confirmed with class members' immigration attorneys. Ms. Schlanger has also added citations showing that much of the information obtained from immigration attorneys (e.g. immigration attorney's inability to obtain immigration files when filing motions to reopen prior to the District Court's first Preliminary Injunction; the types of merits relief that class members are winning, etc.) is already in the record. The Revised Declaration of Margo Schlanger is attached as Exhibit A.

WHEREFORE, Petitioners-Appellees respectfully request that this Court take judicial notice of the information set forth in Exhibit A.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I certify that on April 24, 2018, the above brief was served on all counsel of record through the Court's CM/ECF System.

By: /s/ Kimberly L. Scott

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## CERTIFICATE OF COMPLIANCE

I certify that the above brief contains 1,123 words, excluding portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that the above response brief complies with the type size and typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure: it was prepared in proportionally spaced typeface using Microsoft Word in Time new Roman, 14-point typeface.

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# EXHIBIT A



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D.C. No. 2:17-cv-11910

**REVISED DECLARATION OF MARGO SCHLANGER**

I, Margo Schlanger, make this declaration based upon my own personal knowledge and if called to testify, I could and would do so competently as follows:

1. I am counsel for Petitioners/Plaintiffs and am one of the designated class counsel for the certified subclasses in the above captioned case.
2. I am the Wade H. and Dores M. McCree Collegiate Professor of Law at the University of Michigan Law School. I have longstanding professional expertise in quantitative empirical analysis. For example, I am the former Chair of the Association of American Law School's Section on Law and the Social Sciences. I have taught a law school class titled "Empirical Inquiries in Civil Litigation." I also have published quantitative empirical papers in both law reviews and peer-reviewed journals such as the Journal of Empirical Legal Studies.
3. Because of my expertise in quantitative data and methods, one of my roles in this litigation has been to supervise and direct the litigation team's maintenance, use, and analysis of the data disclosed by the Respondents/Defendants pursuant to the Court's Preliminary Injunction and other Orders. I also have had responsibility for directing the gathering of additional systematic information, described below.
4. This declaration addresses 6 topics:

- Class members' procedural progress as they file motions to reopen their immigration cases (MTRs) and pursue protection/relief after cases are reopened
- Processing times for MTRs
- Bond hearing results
- Detention statistics
- Repatriations
- Individual named plaintiffs/petitioners and their particular situations

***Available Data***

5. By court order in this case, ICE has provided biweekly disclosures of current detention locations for Iraqi nationals who had a final order of removal at any point between March 1 and June 24, 2017. The precise disclosures ordered have shifted over time, but not in ways that matter for this declaration.
6. Also by court order, the Executive Office for Immigration Review (EOIR), a component of the Department of Justice, has provided information about Iraqi nationals with final orders of removal, including the following procedural history:
  - Date and immigration court of the most recent final order of removal (or, for recently reopened cases, date of reopening).
  - Date, immigration court, disposition, and disposition date of the most recent stay of removal application in immigration court.
  - Date, immigration court, disposition, and disposition date of the most recent motion to reopen in immigration court.
  - Date, disposition, and disposition date of the most recent motion to reopen in the Board of Immigration Appeals.
  - Date, disposition, and disposition dates of the most recent appeal in the Board of Immigration Appeals.
7. The scope of EOIR's disclosures has varied over time. From July through the end of September 2017, disclosures covered all Iraqi nationals who had final orders of removal as of June 24, 2017. Beginning October 4, 2017, with the Court's permission, EOIR's disclosures were reduced to cover only currently detained individuals. Then beginning March 21, 2017, the disclosures were augmented to include Iraqi nationals who had a final order of removal at some point between March 1 and June 24, 2017, if they had been detained at any point since March 1, 2017. We have checked the EOIR-disclosed data with the class members' lawyers for EOIR disclosures that were ambiguous or unclear, and for bond hearing dates, because there were many rescheduled bond hearings. Any information below that depended on this check is marked with an asterisk (\*) immediately after the sentence containing such information. Paragraphs 19, 20, 25, 26, and the hearing date column in Table 5 (as well as one other marked item in Table 5) contain information where such checks

were done. In addition, the information in ¶13 is already in the record in this case. Schlanger Decl., ¶¶ 14-16, R. 138-2, at Pg.ID# 3405-06. It was gathered, months ago, from detainees' counsel. Except where indicated below, the information in the declaration is derived solely from EOIR and ICE data.

8. EOIR's court-ordered disclosures do not track merits adjudication after a Motion to Reopen is granted. For this, our source has been the Executive Office for Immigration Review (EOIR) 1-800 number (1-800-898-7180), which allows the public to find out limited information about ongoing proceedings in Immigration Court, if the user knows the A-number of the noncitizen of interest. Where the EOIR data is unclear or ambiguous, we have checked with class members' lawyers for clarification. Again, any information below that depends on those checks is marked with an asterisk (\*).
9. We have systematically tracked Iraqi nationals' cases in the federal court system, as well, looking for Court of Appeals Petitions for Review. These can be located online using the individuals' A-numbers, because the A-number is included in the Court of Appeals docket.

### ***Class Members' Procedural Progress***

10. Although this is an as-yet uncertified class, I refer to Iraqi nationals with removal orders as "class members" if they have been detained during the pendency of this litigation, including after they are released. There have been 324 class members who are or have been detained since July 2017, when Respondents first disclosed detention information.
11. Using the EOIR data, we are able to determine how many class members have so far filed Motions to Reopen (MTRs), and the progress and outcomes of those motions. The most recent data was received April 4, 2018; its information is a few days older than that. 264 have filed motions to reopen: 201 in Immigration Court, and 63 in the Board of Immigration Appeals.<sup>1</sup>
12. Of the MTRs filed by class members with the Immigration Court, immigration judges (IJs) have granted 112 and denied 65. Twenty-four remain pending. ICE filed a number of interlocutory appeals challenging the reopening in some of these cases, but it appears the BIA denied each such appeal.
13. Of the 65 cases in which IJs denied MTRs, over half were filed prior to the district court's stay of removal preliminary injunction, on July 24, 2017; these cases were filed in an emergency situation, generally by lawyers who did not have their clients' files and had not been able to assemble the evidence of changed country conditions that accompanied later filings. (This information is already in the record. *See* Schlanger Decl., ¶¶ 14-16, R. 138-2, at Pg.ID# 3405-06.)

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<sup>1</sup> A few class members have filed MTRs in both the immigration court and the BIA, apparently unsure about which forum has jurisdiction. I have counted those in whichever was the forum of the second filing, because that seems more likely to be procedurally correct.

14. Of the 65 IJ denials, the BIA has so far reversed 7 and has not affirmed any. Most are pending before the BIA. (Five individuals did not appeal the MTR denials to the BIA; for 15, there was, as of the last report, still time to appeal.)
15. Of the 63 MTRs filed directly in the BIA, the BIA has decided fewer than half: it has granted/remanded 19 and denied 7; 36 are pending. (1 was withdrawn.)
16. Table 1 summarizes most of the quantitative information in ¶¶11-15, above:

**Table 1: MTR Filings by *Hamama* Class Members**

|                              | Total      | Forum of Initial Filing |           |
|------------------------------|------------|-------------------------|-----------|
|                              |            | IJ                      | BIA       |
| a. All Class Members         | <b>324</b> |                         |           |
| b. Filed MTRs                | <b>264</b> | <b>201</b>              | <b>63</b> |
| c. Outcome in Initial Forum: |            |                         |           |
| Grant                        |            | 112                     | 19        |
| Deny                         |            | 65                      | 7         |
| Pending                      |            | 24                      | 36        |
| Withdrawn                    |            |                         | 1         |
| d. Outcome on Appeal to BIA: |            |                         |           |
| Grant                        |            | 7                       |           |
| Deny                         |            | 0                       |           |
| Pending                      |            | 38                      |           |
| Still time for appeal        |            | 15                      |           |
| No appeal taken              |            | 5                       |           |

17. All told, 264 of the class members (81%) have filed MTRs in one or the other forum: 138 have been granted (131 in the initial forum and 7 on appeal); 12 have been finally denied within the immigration court system (that is, denied by the BIA, or denied by an IJ with no remaining time for appeal); and 113 are pending or have time for appeal. Thus the current administrative grant rate for decided MTRs is 92% (138/(138+12)).
18. As just tallied, 138 cases have been reopened on the merits. Information on subsequent developments is not included in the government's biweekly disclosures. But the EOIR 1-800 number has information about them. Using this source, we have confirmed that of the 138, 49 have reached a conclusion in immigration court (though most of these are pending on appeal).
19. Using both the 1-800 information and information obtained from immigration counsel, we have ascertained that class members obtained protection or relief from removal in 25 of the cases—that is, just over half—that have concluded in immigration court.\* ICE has appealed 6 of these, and so far, has won a vacatur and remand in just one, which is now pending in the immigration court. ICE's other appeals are pending before the BIA. The non-citizens have so far appealed 16 of their 24 losses; these are all pending before the BIA. Time remains for 6 additional appeals; the loss has

become final for just 2. (The record already contains information about class members' success in their merits proceedings, although that information is now dated. *See Schlanger Decl.*, ¶¶ 22-23, R. 138-2, at Pg.ID# 3406-07.)

20. Of the 25 cases class members won in the immigration court on the merits, we are aware of several different types of relief, including asylum, withholding and deferral under the Convention Against Torture; cancellation of removal; and termination of removal proceedings on grounds that the individual was not actually deportable.\* *See also Schlanger Decl.*, ¶ 23, R. 138-2, at Pg.ID# 3407.
21. There are 60 individuals who have been detained at some point during the pendency of this case who have not so far filed MTRs. Some of these individuals are not fighting their immigration cases. Others were only recently detained, and have not yet received the A-files and Records of Proceedings they need to prepare their MTRs. Others have recently received the files, but have not yet passed their MTR deadline under the District Court's July 24, 2017 preliminary injunction; that deadline gives them until 90 days after they receive their immigration file from the Government to file an MTR. About 25 have not filed MTRs within the 90 days after they received their immigration files.

### ***Processing Times for MTRs***

22. While many of the MTRs have been processed quickly in immigration court, the cases pending in the BIA have now been there for many months; over 70% of the cases pending in the BIA were filed over 6 months ago. There are over 40 cases pending in the BIA for which the MTR was filed over 8 months ago.

### ***Bond Hearings***

23. On January 2, 2018, the District Court entered a preliminary injunction requiring the Government to either release class members, hold a bond hearing for them, or explain to the District Court why they should not have a bond hearing. The Government is required to disclose the resulting bond hearings and their outcomes to class counsel. According to those disclosures, from January through the first few days of April (the end date is a little bit unclear), the Government held 227 bond hearings for class members that reached a conclusion.
24. All told, out of the 227 bond hearings that have been disclosed, there have been 22 releases on the detainees' own recognizance, 120 grants of bond, and 85 denials of release by immigration judges.<sup>2</sup> The bond amounts have varied between \$1,500 and \$100,000.

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<sup>2</sup> In a prior declaration filed in the district court in this case, see ECF #263-2, Pg.ID#6344-45, I reported larger numbers of bond hearings. In preparing that declaration, I failed to realize that the government had disclosed bond hearings for Hamama class members that were held *prior* to the January 2 preliminary injunction, pursuant to other authority. This declaration corrects that mistake.

25. Immigration judges have included various other conditions of release, including requiring monthly check-ins with ICE, electronic monitoring if ICE chooses to impose it, and other ICE-determined conditions. For at least several of the individuals released, ICE has imposed or reimposed formal Orders of Supervision.\*
26. ICE has appealed 10 of the bond orders allowing detainee release, and in each one has sought and obtained a stay of the bond order from the BIA. For either 6 or 7 of these cases, the detainee had already been released, and therefore was redetained by ICE after the BIA issued a stay.\* *See also* Third Schlanger Declaration, R. 263-2, Pg.ID# 6343-48.
27. Of the bond hearings, an analysis of the disclosed data shows the following, also summarized in Table 2:
  - 174 bond hearings were for members of the certified Detained Final Order subclass who had not yet reopened their immigration cases. Of these individuals, 20 were ordered released on recognizance and 89 on bond. One additional hearing was for a detainee whose immigration case *had* been reopened, but who had then won deferral of removal and was waiting in detention for further developments. He too was a member of the Detained Final Order subclass; he was ordered released on recognizance. Of the 110 individuals granted release on recognizance or on bond, 6 cases were appealed by ICE and stayed by the BIA. Nearly all the rest have managed to post bond and have therefore been released. But 13 remain in detention, presumably because they lack the financial resources to post the authorized bond.
  - 52 bond hearings were for detainees whose immigration cases were pending after reopening, and were therefore almost all members of the certified Mandatory Detention subclass held under the purported authority of 8 U.S.C. § 1226(c). (It is possible that a very small number of these individuals were detained under 8 U.S.C. § 1226(a), and therefore were not members of the Mandatory Detention subclass.) Of these individuals, 1 was ordered released on recognizance and 31 on bond. Of the 32 individuals granted release on recognizance or on bond, 4 cases were appealed by ICE and stayed by the BIA. Nearly all the rest have managed to post bond and have therefore been released. But 2 remain in detention, presumably because they lack the financial resources to post the authorized bond.

**Table 2: Bond Hearings for *Hamama* Class Members**

|   | Total |      | Forum of Initial Filing |           |
|---|-------|------|-------------------------|-----------|
|   | #     | %    | Post-Order              | Pre-Order |
| a. All Hearings   | 227   | 100% | 175                     | 52        |
| <b>Results</b>  |       |      |                         |           |
| b. Detainee win   | 142   | 63%  | 110                     | 32        |
| Ordered released on recognizance                                | 22    | 10%  | 21                      | 1         |
| Ordered released on bond  | 120   | 53%  | 89                      | 31        |
| c. ICE win (denied bond)  | 85    | 37%  | 65                      | 20        |
| <b>Subsequent Procedure/Detention for Detainees Won Release</b> |       |      |                         |           |
| d. Out of detention   | 117   |      | 91                      | 26        |
| e. Appealed by ICE/Stayed by BIA                                | 10    |      | 6                       | 4         |
| f. Otherwise remain in detention                                | 15    |      | 13                      | 2         |

***Detention Statistics***

28. As of the most recent disclosure, there remain 151 detained class members. 95 of these lost their bond hearings or had bond stayed; 15, as just described, presumably lack the money needed to make their bond. The other 41 are in detention for a variety of reasons. Some have sought continuances or waived bond hearings. Some have not yet been detained long enough to qualify for a hearing under the January 2 order. Some are not eligible for a bond hearing under that order because their cases have been reopened and they have the immigration status of “arriving aliens.” A few elected to proceed with individual habeas actions and therefore do not meet the subclass definitions.
29. The 151 class members currently in detention are incarcerated in 29 different detention facilities. The facilities with 5 or more class-member detainees are set out in Table 3:

**Table 3: Detention Locations as of 4/4 ICE Disclosure**

| Facility  | Number |
|---|--------|
| Calhoun Co. ♦ (Battle Creek, MI)                      | 34     |
| Northeast Oh. Correct. (Youngstown, OH)               | 12     |
| St. Clair County Jail ♦ (Port Huron, MI)              | 11     |
| Chippewa Co. Jail ♦ (Sault Ste. Marie, MI)            | 8      |
| Pine Prairie ICE Processing Center (Pine Prairie, LA) | 8      |
| Denver Contract Det. Fac. (Aurora, CO)                | 7      |
| Etowah County Jail ♦ (Gadsden, AL)                    | 7      |
| Lasalle ICE Processing Center (Jena, LA)              | 7      |
| Otay Mesa Detention Center ♦ (San Diego, CA)          | 6      |
| Farmville Detention Center (Farmville, VA)            | 5      |

♦ Facility is a jail that also houses criminal defendants and/or convicts.

An additional 29 facilities all over the country each house one to four class members. The 39 facilities are, altogether, in 23 states.

### **Repatriation**

30. The District Court has established a process for class members who wish to agree to repatriation to Iraq. Under that process 16 individuals have so agreed and, on the parties' stipulation, had the stay of removal lifted as to them. ICE has not repatriated these individuals quickly; some have now been waiting for months, as set out in Table 4.

**Table 4: Volunteers for Prompt Removal**

| <b>Number</b> | <b>Initials</b> | <b>Date Stay Lifted</b> | <b>Removal date</b> |
|---------------|-----------------|-------------------------|---------------------|
| XXX-XXX-876   | HAR             | 7/21/2017               | 8/8/2017            |
| XXX-XXX-267   | WY              | 10/16/2017              | 11/28/2017          |
| XXX-XXX-443   | JM              | 10/25/2017              | 1/22/2018           |
| XXX-XXX-245   | BAZ             | 11/16/2017              | waiting             |
| XXX-XXX-155   | NAAS            | 11/20/2017              | 1/30/2018           |
| XXX-XXX-510   | IP              | 12/4/2017               | 12/19/2017          |
| XXX-XXX-847   | OAT             | 12/14/2017              | waiting             |
| XXX-XXX-156   | RG              | 12/14/2017              | waiting             |
| XXX-XXX-585   | DAS             | 12/14/2017              | waiting             |
| XXX-XXX-804   | HHAS            | 1/4/2018                | waiting             |
| XXX-XXX-681   | SAAM            | 2/15/2018               | waiting             |
| XXX-XXX-844   | IN              | 2/15/2018               | waiting             |
| XXX-XXX-237   | AJSAB           | 3/6/2018                | waiting             |
| XXX-XXX-723   | AJAM            | 3/6/2018                | waiting             |
| XXX-XXX-142   | JK              | 3/6/2018                | waiting             |
| XXX-XXX-798   | SAJA            | 3/6/2018                | waiting             |

### **Individual Plaintiffs/Petitioners.**

31. The district court, in deciding Petitioners' Motion for a Preliminary Injunction on Detention Issues, had available to it information about the procedural status of each of the named Petitioners/Plaintiffs at that time. ECF 138-27, Pg.ID# 3684. Table 5 sets out updated information about the named Petitioners/Plaintiffs.



Table 5: Named Petitioners/Plaintiffs

| Name             | Date Detained | MTR                         |                |               | Bond                          |                   |             | Current Merits Status                      | Current Detention             |
|------------------|---------------|-----------------------------|----------------|---------------|-------------------------------|-------------------|-------------|--|-------------------------------|
|                  |               | Filed Date (Where)          | Current status | Decision date | Hearing Date*                 | Status at hearing | Out-come \$ |  |                               |
| Ali Al-Dilaimi   | 6/11/2017     | 7/3/2017 (IJ) (BIA Appeal)  | Pending        |               | 1/24/2018 Post-order          | Grant             | 5,000       | MTR Pending                                | Out on bond                   |
| Sami Al-Issawi   | 6/12/2017     | 6/13/2017 (IJ)              | Grant          | 8/21/2017     | Pre-order, 9/18/2017 1226(a)  | Grant             | 8,000       | Merits Pending                             | Out on bond                   |
| Qassim Al-Saedy  | 6/6/2017      | 6/22/2017 (IJ) (BIA Appeal) | Pending        |               | 1/22/2018 Post-order          | Grant             | 25,000      | MTR Pending                                | Detained (can't afford bond)* |
| Abbas Al-Sokaini | 6/20/2017     | 2/23/2018 (IJ)              | Grant          | 3/1/2018      | 1/31/2018 Post-order          | Grant             | 1,500       | Merits Pending                             | Out on bond                   |
| Atheer Ali       | 6/12/2017     | 5/18/2017 (BIA)             | Grant          | 10/12/2017    | Pre-order, 1/26/2018 1226(c)  | Grant             | 5,000       | Won asylum; ICE appeal pending             | Out on bond                   |
| Jihan Asker      | 6/11/2017     | 6/15/2017 (IJ)              | Grant          | 6/16/2017     | Pre-order, 8/21/2017 1226(a)  | Grant             | 5,000       | Merits Pending                             | Out on bond                   |
| Moayad Barash    | 6/12/2017     | 6/21/2017 (BIA)             | Pending        |               | 1/26/2018 Post-order          | Grant             | 10,000      | MTR Pending                                | Out on bond                   |
| Janni Derywosh   | 7/20/2017     | 8/15/2017 (BIA)             | Pending        |               | 1/25/2018 Post-order          | Grant             | 2,500       | MTR Pending                                | Out on bond                   |
| Anwar Hamad      | 6/12/2017     | 6/20/2017 (IJ)              | Grant          | 8/16/2017     | Pre-order, 2/1/2018 1226(c)   | Deny              |             | Lost CAT deferral; appeal pending          | Detained (no bond)            |
| Usama Hamama     | 6/12/2017     | 6/26/2017 (BIA)             | Pending        |               | 2/1/2018 Post-order           | Grant             | 100,000     | MTR Pending                                | Out on bond                   |
| Jony Jarjiss     | 7/13/2017     | 10/23/2017 (BIA)            | Grant          | 4/4/2017      | 1/31/2018 Post-order          | Grant             | ROR         | Merits Pending                             | Out on OR                     |
| Mukhlis Murad    | 7/27/2017     | 10/19/2017 (IJ)             | Grant          | 12/13/2017    | Pre-order, 1/9/2017 1226(a)   | Grant             | 3,000       | Merits Pending                             | Out on bond                   |
| Habil Nissan     | 6/12/2017     | 6/16/2017 (IJ)              | Grant          | 7/24/2017     | Pre-order, 12/20/2017 1226(a) | Grant             | 7,500       | Merits Pending                             | Out on bond                   |
| Adel Shaba       | 6/12/2017     | 6/23/2017 (BIA)             | Pending        |               | 1/30/2018 Post-order          | Grant             | 20000       | MTR Pending                                | Out on bond                   |
| Kamuran Taymour  | 6/12/2017     | 6/13/2017 (IJ)              | Grant          | 8/28/2017     | NA                            |                   |             | Won cancellation of removal; no ICE appeal | Out; won case                 |

Pursuant to 28 U.S.C. § 1746, I state under penalty of perjury under the laws of the United States that the above statements are true and correct to the best of my knowledge, information, and belief.

Date: April 24, 2018



A handwritten signature in blue ink that reads "Margo Schlanger". The signature is written in a cursive style and is positioned above a solid horizontal line.

Margo Schlanger