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

USAMA JAMIL HAMAMA,
ATHEER FAWOZI ALI,
ALI AL-DILAMI,
HABIL NISSAN,
JIHAN ASKER,
MOAYAD JALAL BARASH,
SAMI ISMAEL AL-ISSAWI, on behalf of themselves and all those similarly situated,

Petitioners,

v.

REBECCA ADDUCCI, Director of the Detroit District of Immigration and Customs Enforcement,

Respondent.

Case No. 2:17-cv-11910-MAG-DRG

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

Class Action

PETITIONERS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR A STAY OF REMOVAL

Local Rule 7.1(a)(1) requires petitioners to ascertain whether this motion is opposed. Petitioners' counsel Margo Schlanger spoke personally with Jennifer L. Newby, Assistant United States Attorney, Eastern District of Michigan, respondent's counsel, explaining the nature of the relief sought and seeking concurrence. Ms. Newby denied concurrence.

Petitioners are Iraqi nationals who came to the United States many years ago. Many, perhaps most, are Chaldean Christian. They have been subject to final orders of removal for years, but the government permitted them to reside in the community under orders of supervision. Recent political negotiation by the Trump administration led to Iraq's agreement to accept their repatriation, and so they were arrested in the past week. They now face imminent removal to Iraq. Indeed, the government's counsel has informed petitioner's counsel that removal will not take place today or tomorrow, but was unwilling to offer any other assurances—so that means that removal could be as early as **Saturday, June 17**. If removed to Iraq, under current conditions, petitioners face a grave danger of persecution, torture, and death.

1. Pursuant to Fed. R. Civ. P. 65, petitioners seek a Temporary Restraining Order and/or stay of removal that bars their removal until an appropriate process has determined whether, in light of current conditions and circumstances, they are entitled to mandatory protection from removal.

2. Petitioners also request the Court schedule oral argument for the afternoon of Friday, June 16, 2017.

WHEREFORE, for the reasons set forth in the accompanying brief, petitioners respectfully request this Court to grant the Temporary Restraining Order/stay of removal, and set the case for further briefing.

Respectfully submitted,

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PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR A STAY OF REMOVAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

PRIVILEGED DRAFT 9:45 am

TABLE OF AUTHORITIES
(Continued)

Statutes

PRIVILEGED DRAFT 9:45 am

TABLE OF AUTHORITIES
(Continued)

STATEMENT OF ISSUES PRESENTED

1. Whether the Court should issue an emergency order to preserve the status quo and prevent the imminent removal of petitioners to Iraq, where they face grave danger of persecution and torture.

Petitioners' Answer: Yes.

2. Whether petitioners are likely to prevail on their claims that their immediate removal would be unlawful under the Due Process Clause and immigration law because they have not had a meaningful opportunity to be heard on the issue of current country conditions.

Petitioners' Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Petitioners are entitled to a temporary restraining order to preserve the status quo

Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell, 467 F.3d 999, 1009 (6th Cir. 2006)

Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 226 (6th Cir. 1996)

Removal is unlawful where country conditions create a risk of persecution or torture

8 U.S.C. § 1229a(c)(7)

8 U.S.C. § 1231(b)(3)

8 C.F.R. §§ 208.16, .17, .18

Motions to reopen are allowed in light of changed country conditions

8 C.F.R. § 1003.2(c)(3)(ii)

Conditions in Iraq are dangerous for Christians

Yousif v. Lynch, 796 F.3d 622, 632 (6th Cir. 2015)

Petitioners submit this brief in support of their Motion for a Temporary Restraining Order and/or stay of removal.

INTRODUCTION

Petitioners are Iraqi nationals—many, perhaps most, Chaldean Christian—who have resided in the United States for many years. They have been subject to final orders of removal for years, but the government permitted them to reside in the community under orders of supervision. Recent political negotiation by the Trump administration led to Iraq's agreement to accept their repatriation, and so the government began arresting them this past week. They now face imminent removal to Iraq. Indeed, while the U.S. Attorney's Office has informed petitioners counsel that deportation will not take place today or tomorrow, the government has been unwilling to rule out deportation as early as **Saturday, June 17**. If removed to Iraq under current conditions, petitioners face a significant risk of persecution and torture. Yet the government has failed to provide them an opportunity to demonstrate their entitlement to protection from removal in light of the changed circumstances since their removal orders issued. The government's haste in seeking to remove them without affording them that opportunity deprives them of due process and violates U.S. law, which prohibits the removal of individuals to countries where they would face a likelihood of persecution or torture.

BACKGROUND

For many years, even when U.S. Immigration and Customs Enforcement (ICE) has obtained final orders of removal against Iraqi nationals, ICE has not actually carried out removals. Instead, ICE has had a policy and practice of releasing Iraqi nationals with final removal orders under orders of supervision. Russel Abrutyn Declaration (Ex. A). This approach had at least two rationales. First, Iraq generally declined to issue travel documents allowing repatriation. Second, in at least some instances, ICE acknowledged that humanitarian considerations weighed against removal, given the danger posed by removal to Iraq.

That danger has increased dramatically in recent years. Nonetheless, in the past several weeks, ICE abruptly abandoned its nonremoval policy. When the Trump administration redrafted its travel-ban Executive Order 13780, it entered into negotiations with Iraq to remove Iraq from the list of countries whose nationals are subject to the travel ban. In exchange for being omitted from the list of designated countries in the revised Executive Order, promulgated March 6, 2017, Iraq agreed to accept a large number of deportees from the United States.[1]

[1] See, e.g., Mica Rosenberg, *U.S. Targets Iraqis for Deportation in Wake of Travel Ban Deal*, REUTERS (June 12, 2017), https://www.reuters.com/article/us-usa-immigration-iraq-idUSKBN19326Z.

On or about Sunday, June 11, 2017, ICE began arresting Iraqi nationals in Michigan who had previously been released on orders of supervision. The change in practice came as a shock to a community where Iraqis with final orders have lived at large, sometimes for decades, with few restrictions apart from regular reporting requirements. Individuals who have been law-abiding and fully compliant with their conditions of supervision suddenly found themselves arrested and transferred hours away to the Northeast Ohio Correction Center, in Youngstown, Ohio.[2] During the course of a few days, more than 100 Iraqi nationals from Michigan were arrested and detained, for the purpose of effectuating their removal back to Iraq. Nora Youkhana Declaration (Ex. B). Others from other states were also swept up.

Many, perhaps most, of the Iraqis now held are Chaldean Christians, members of ethnic/religious minorities in Iraq whose persecution by the Iraqi authorities has been well documented. Others are Muslim; they too face grave danger. ICE has defended its decision to remove Iraqi nationals by trying to paint them as serious criminals.[3] In fact, as the Complaint demonstrates, many of those

[2] See *Dozens of Iraqi Nationals Swept Up in Immigration raids in Michigan, Tennessee*, WASH. POST (June 12, 2017), https://www.washingtonpost.com/national/dozens-of-iraqi-nationals-swept-up-in-immigration-raids-in-michigan-tennessee/2017/06/12/58e0524a-4f97-11e7-be25-3a519335381c_story.html.

[3] See, e.g., *Dozens of Iraqi Nationals Swept Up in Immigration raids in Michigan, Tennessee*, WASH. POST (June 12, 2017),

who have been detained and are facing imminent removal were convicted of relatively minor crimes. And many of their crimes took place years ago, followed by years and even decades of law-abiding behavior. For example, petitioner Jihan Asker, who is 41, pleaded under advisement to misdemeanor fraud in 2003. After she paid a fine of $150 and served six-months' probation, a judgment of acquittal/dismissal was entered. She has no other criminal record. Albert Valk Declaration (Ex. D). And petitioner Atheer Ali, who is 40, was convicted of breaking and entering two decades ago, and misdemeanor marijuana possession more recently. Ameer Salman Declaration (Ex. C). Petitioner Habil Nissan, who is 36, pleaded to misdemeanor destruction of property and two misdemeanor assault charges, over 10 years ago; the case was dismissed after twelve months of probation. Silvana Nissan Declaration (Ex. E). Sami Ismael Al-Issawi served less than a year of incarceration for an assault two decades ago, and has not had any other criminal involvement.

In any event, even for petitioners with more serious criminal histories, the changed country conditions in Iraq counsel against haste in removing petitioners. Notably, the Board of Immigration Appeals emphasized those changed country conditions just a few days ago when it granted two motions to reopen filed by

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https://www.washingtonpost.com/national/dozens-of-iraqi-nationals-swept-up-in-immigration-raids-in-michigan-tennessee/2017/06/12/58e0524a-4f97-11e7-be25-3a519335381c_story.html.

Chaldean Christians—including one by an Iraqi whose criminal conviction made him statutorily ineligible for withholding of removal under 8 U.S.C. § 1231(b)(3). The Board reasoned that the changed country conditions nonetheless justified reopening the case because, "[d]espite the respondent's criminal history, he would be eligible for the limited relief of deferral of removal under the Convention Against Torture. 8 C.F.R. § 1208.17." Decision of the Board of Immigration Appeals (Jun. 9, 2017) (Ex J).

The too-hasty march towards deportation threatens the petitioners' lives, and violates U.S. law. Due process requires that the petitioners receive an opportunity to have their claims to protection considered in light of current conditions, not the conditions that existed at the time their removal order was first issued. And substantive U.S. law forbids their removal into probable persecution and torture. A Temporary Restraining Order or stay of removal is imperative to preserve the status quo and give petitioners an opportunity to present their claims.

LEGAL STANDARD

Motions for temporary restraining orders are governed by a four-factor test (the same test as for preliminary injunctions): Courts consider whether petitioners have shown: (1) a likelihood of success on the merits, (2) that they are likely to suffer irreparable harm in the absence of such relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest. *Winter v. Nat.*

Res. Def. Council, 555 U.S. 7, 20 (2008); see also *Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006) ("'These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.' *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay. See id.").

ARGUMENT

I. PETITIONERS ARE LIKELY TO SUCCEED ON THEIR CLAIMS THAT THEIR IMMEDIATE REMOVAL WOULD BE UNLAWFUL

A. U.S. law forbids removal in the face of probable persecution and torture.

U.S. law forbids removal of foreign nationals into circumstances that pose a probability of persecution or torture by government authorities or with the acquiescence of a government actor. Many of the petitioners face such a probability, and all therefore need a chance to demonstrate their qualifications for individualized relief from removal.

The petitioners' individual situations vary. Some have been here since childhood (see, e.g., William Swor Declaration (Ex. G)); others arrived as adults. Many petitioners have available to them a variety of individual claims that depend on their immigration and family circumstances. E.g., Albert Valk Declaration (Ex.

D). More generally applicable, the U.S. law provides three separate potential bases for immigration relief for the petitioners. The first is asylum. Foreign nationals in the United States may qualify for asylum if they can establish that they have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" 8 U.S.C. § 1101(a)(42) (definition of refugee); 8 U.S.C. § 1158(b)(1)(A) (asylum eligibility). The Sixth Circuit has emphasized, however, that

> [a]sylum is discretionary relief, see 8 U.S.C. § 1158(b)(1)(A), meaning that it can be denied to an applicant—even if he likely will be persecuted if returned to his home country—for any number of reasons unrelated to the merits of his application, including if the application is filed too late, see 8 U.S.C. § 1158(a)(2)(B), if the applicant has committed certain crimes, see 8 U.S.C. § 1158(b)(2), or if the IJ determines that other 'egregious adverse factors' counsel against awarding asylum to an otherwise-eligible refugee, *Kouljinski*, 505 F.3d at 542 (citation omitted).

Yousif v. Lynch, 796 F.3d 622, 632 (6th Cir. 2015).

The other two sources of relief related to dangerous home-country conditions are, however, mandatory. The second, 8 U.S.C. § 1231(b)(3), "Restriction on Removal to a country where alien's life or freedom would be threatened," prohibits removing noncitizens to a country where their life or freedom would be threatened on the grounds of race, religion, nationality, membership in a particular social group or political opinion. It contains exceptions for individuals who assisted in persecution, pose a danger to national security, have committed a serious nonpolitical crime outside the United States, or have been

convicted of a "particularly serious crime that renders them a danger to the community." Apart from these exceptions, any individual who can demonstrate that it is more likely than not that he or she will be persecuted on one of the five protected grounds is statutorily entitled to protection. As the Sixth Circuit has explained, "[b]ecause § 1231(b)(3) implements the 'non-refoulement obligation' reflected in Article 33 of the Refugee Convention, the viability of a withholding claim ordinarily depends upon its merits rather than upon procedural prerequisites or the government's good graces." *Yousif*, 796 F.3d at 632.

The third relevant constraint on removal tracks the Convention Against Torture's prohibition on removal of noncitizens to countries where they would face torture. See U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, ¶ 1, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. Under the CAT, an individual may not be removed if "it is more likely than not that [the individual] would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). Torture, it is important to note, may be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1). Government acquiescence does not require actual knowledge or willful acceptance of torture; awareness and willful blindness will suffice. *Zheng v. Ashcroft*, 332 F.3d 1186, 1194–95 (9th Cir. 2003); *Amir v.*

Gonzales, 467 F.3d 921, 927 (6th Cir. 2006) ("We join the Ninth and Second Circuits in holding that *In Re S-V* directly conflicts with Congress's clear intent to include 'willful blindness' in the definition of 'acquiescence.'"). *See Nerghes v. Mukasey*, 274 F. App'x 417, 423 (6th Cir. 2008) ("'Willful blindness' is 'deliberate avoidance of knowledge.' Black's Law Dictionary (8th ed. 2004)."). The regulations implementing CAT provide for both withholding of removal and deferral of removal. Whereas withholding of removal is subject to the same exceptions as apply to § 1231(b)(3), deferral of removal contains no exceptions even for people with "particularly serious crimes." 8 C.F.R. § 1208.17. See also Eman Jajonie-Daman Declaration (Ex. F).

The legal prohibitions on removal are mandatory for anyone who satisfies the eligibility criteria set forth in the statute and regulations just cited. In addition, where country conditions change after an individual has been ordered removed, the immigration statute specifically allows motions to reopen a removal order in order to renew claims for protection in light of new facts. See 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii) (exempting from the deadlines and limitations on motions to reopen, those motions that are based on fear-based claims resulting from changed country conditions). Just this week, the Board of Immigration Appeals relied on changed conditions in Iraq to grant at least two motions to reopen filed by Iraqi Christians. Exhibit J.

B. Due Process

The Due Process clause guarantees fair procedures prior to deprivations of liberty or property—including removal. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."). And due process, of course, requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Petitioners have each had a past opportunity to be heard on their removal. But the government's recent actions, and evident plan to speedily remove the petitioners, are obviating petitioners' opportunity to be heard at a meaningful time—now—about current conditions. Removing the petitioners without giving them this opportunity violates the Fifth Amendment's Due Process Clause.

Petitioners' prior hearings did not afford them the process that is due, because Iraqi country conditions have substantially worsened—particularly since 2014. Declaration of Mark Lattimer (Ex. I). The extraordinary danger petitioners face now therefore presents a new set of facts that entitle them to a fair process for resolution. The change in circumstances has been acknowledged by both the immigration judges and immigration prosecutors. Immigration judges in Detroit, who hear many applications for asylum and withholding of removal filed by Iraqi Christians, frequently denied those applications in the past, but have in the most

recent several years granted them nearly universally when applicants meet other statutory eligibility requirements. Likewise, in recent Immigration Court cases, the Detroit Office of Chief Counsel has conceded that Iraqi Chaldeans have a greater than 50% chance of being persecuted in Iraq. Russell Abrutyn Declaration (Ex. A).

In this context, due process requires that petitioners get a chance to demonstrate that substantive immigration law forbids their current removal. But the government's actions, moving detainees far away from their communities, disrupting existing counsel relationships, and sprinting towards removal, are thwarting the orderly and fair operation of the immigration process. Even for those petitioners who have long-time immigration counsel, the transfer to Ohio has made it far more difficult for lawyers to consult with their clients and file appropriate petitions. They now must drive to Youngstown to meet. Community organizations have succeeded in recruiting dozens of volunteer attorneys to represent other petitioners—but those lawyers are from the Metro Detroit area and many have not yet, in the day or two since they agreed to take on the representation, been able to consult with their clients, detained over 200 miles away. Nora Youkhana Declaration (Ex. B); Eman Jajonie-Daman Declaration (Ex. F). Phone calls to detainees are cumbersome and difficult to schedule at best, and often unavailable. Eman Jajonie-Daman Declaration (Ex. F); Cynthia Barash Declaration (Ex. H). Attorneys need time to visit clients, interview them, gather documents, and draft

pleadings. This is not always straightforward. For example, some of the required documents—such as Immigration Judge or Board of Immigration Appeals decisions—may be decades old and take several weeks to obtain. Nora Youkhana Declaration (Ex. B); Russell Abrutyn Declaration (Ex. A). Accordingly, in the couple of days since their arrest, many or most petitioners and their immigration counsel (where such counsel have been retained) have not had sufficient time to file motions to reopen. Nora Youkhana Declaration (Ex. B).

Even when time is not of the essence, both ICE's due process obligations and its policy abridge the government's discretion to transfer detainees, if transfer interferes with detainees' access to counsel. *See Louis v. Meissner*, 530 F. Supp. 924, 927 (S.D. Fla. 1981) (finding the INS had thwarted detainees' statutory and regulatory rights to representation in their removal proceedings by transferring them to remote areas lacking in counsel and interpreters); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (holding the district court did not abuse its discretion by enjoining INS from transferring detainees irrespective of established attorney-client relationships); ICE Policy 11022.1, Detainee Transfers (Jan. 4, 2012), https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf. In this case, detention of petitioners far from their home states is compounding the due process violation, making it unlawfully uncertain that

petitioners will receive a meaningful opportunity to be heard, prior to their removal, on the issue of current country conditions.

What due process requires is that petitioners get a meaningful chance to demonstrate that substantive immigration law forbids their current removal. This could happen in one of two ways. This Court could itself hear the petitioners' claims under the INA/CAT. Alternatively, petitioners could be ensured time to confer with individual immigration counsel and then file a motion to reopen. Either way, this Temporary Restraining Order or stay of removal is essential to "preserve the status quo so that a reasoned resolution of a dispute may be had," *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226 (6th Cir. 1996). Resolving the issues—whether in this Court or by way of motions to reopen—will require substantial time—certainly more than the one day left before Friday, June 16, the date some petitioners have been informed is intended for their removal.

C. This court has jurisdiction to ensure that petitioners are not removed in violation of the Convention Against Torture, Due Process, and the Immigration Act.

In this TRO motion, petitioners seek some process where they may seek to demonstrate that their removal would violate due process and federal law, including most importantly the Convention Against Torture. This case thus presents questions under the Constitution and federal statutes raised by individuals detained in federal custody. Accordingly, the Court has, inter alia, habeas

jurisdiction. *See* 28 U.S.C. § 2241 (federal habeas statute). However, because the government often asserts that jurisdiction is lacking in immigration cases, petitioners briefly set forth responses to arguments that the government has made (unsuccessfully) in other cases.

1. The government often asserts that district courts lack jurisdiction to review a noncitizen's removal and that removal orders may be reviewed only in the courts of appeals by petition for review. That is generally true. *See* 8 U.S.C. §§ 1252(a)(1) and (5), and § 1252(b)(9).[4] But that general rule has no application here.

The general rule is based on two premises. First, the legality of a removal *must* be reviewable in *some* court to avoid a constitutional Suspension Clause violation. *INS v. St Cyr*, 533 U.S. 289, 300-01 (2001) (reaffirming that "some judicial intervention in deportation cases is unquestionably required" by the Suspension Clause) (citation and internal quotation marks omitted. Second, review in the court of appeals by petition for review will *generally* be feasible, thereby providing a federal forum and avoiding the Suspension Clause problem that would otherwise exist if no federal forum were available.

Recognizing these twin premises, the courts have made clear that the district courts *do* have review over removals where it would not have been possible to

[4] A petition for review is filed from an administrative removal order issued by the Board of Immigration Appeals.

assert the claims by petition for review in the court of appeals or where petitioners are not directly challenging their removal orders. That is precisely the situation here. Petitioners do not challenge their prior removal orders and, critically, are asserting claims that could *not* have been raised in the courts of appeals by petition for review when petitioners received their initial removal orders. Rather, as explained above, petitioners contend that their removal would *now* be unlawful in light of events that have occurred *after* they received their removal orders (in some cases years ago). Specifically, they contend that the government is seeking to remove them without any process or opportunity to show that they would be persecuted or tortured or removed given the *current* situation in Iraq.

Thus petitioners' claims could not possibly have been raised in a petition for review in the circuit court and may therefore be reviewed in the district court; indeed, the claims must be reviewable in this court to avoid the Suspension Clause violation triggered by the absence of *any* forum in which to assert their claims. See, e.g., *Jama v. INS*, 329 F.3d 630, 632-33 (8th Cir.), *aff'd sub nom Jama v. ICE*, 543 U.S. 336 (2006) (claims based on events that occurred after removal order; finding habeas jurisdiction to review challenge to agency's failure to adhere to mandatory *post*-order statutory requirements); *Kellici v. Gonzalez*, 472 F.3d 416, 419–20 (6th Cir. 2006) (habeas available to challenge the government's failure to provide notice of a petitioner's arrest *after* a removal order became final, also

stating that habeas is available where the court does not need to directly address "the final order"); *Liu v. INS*, 293 F.3d 36 (2d Cir. 2002) (habeas jurisdiction to review claim of ineffective assistance of counsel claim that arose *after* order of removal became final and after a petition for review could be filed).

2. In addition, even if this Court were to believe it lacked jurisdiction to review whether petitioners' removal would violate the Constitution and federal law, there is no question this Court may stay petitioners' removal to permit them time to raise their claims before the agency through motions to reopen. The government may assert (as it often does) that the Court lacks even that limited power in light of 8 U.S.C. § 1252(g), which bars "jurisdiction over a decision to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." But § 1252(g) has no bearing on this case.

As the Supreme Court has explained, § 1252(g) is an exceedingly narrow jurisdictional bar and is designed to deal with one particular situation: preventing the courts from reviewing an exercise of *discretion*. *Reno v. AADC*, 525 U.S. 471, 485 (1999) ("Section 1252(g) seems clearly designed to give some measure of protection to "no deferred action" decisions and similar discretionary determinations"). In particular, the government in some cases will exercise their

discretion and defer removal, often for humanitarian reasons. If the government decides at a later time to execute the removal order in the exercise of discretion, § 1252(g) generally will bar courts from reviewing that exercise of discretion. Thus, in line with the Supreme Court's decision in *AADC*, the Sixth Circuit has stressed that § 1252(g) should be interpreted "narrowly" as directed "against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017, 1021 (6th Cir. 1999) (quoting *AADC*, 525 U.S. at 485 n.9). *See also Order, Colotl v. Kelly*, No. 1:17-CV-1670-MHC (N.D. Ga. June 12, 2017) at 23 (interpreting 1252(g) narrowly), https://www.clearinghouse.net/chDocs/public/IM-GA-0010-0003.pdf.

Here, however, petitioners are not challenging the government's exercise of discretion. Rather, petitioners contend, among other things, that their removal would violate a *mandatory* duty on the government not to send someone back to probable torture, a duty imposed by the Convention Against Torture. The government simply has no discretion to ignore that duty and remove petitioners without giving them an opportunity to demonstrate that their lives will be in grave danger if they are sent back to Iraq. Accordingly, § 1252(g) has no application here. *See Jama*, 329 F.3d at 632 (1252(g) does not bar review of the Attorney General's non-discretionary "legal conclusions"); *Madu v. Attorney General*, 470 F.3d 1362, 1368 (11th Cir. 2006) (explaining that § 1252(g) "does not proscribe

substantive review of the underlying legal bases for those discretionary decisions and actions").

3. Finally, insofar as the Court has any doubts about its jurisdiction in this case, the Court should grant the TRO and order fuller briefing on jurisdiction, as there is no question that a federal court always has jurisdiction to determine its own jurisdiction. See, e.g. *Mustata*, 179 F.3d at 1019 (6th Cir. 1999) (district court has jurisdiction to issue stay in habeas proceeding); *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 622 (6th Cir. 2010) (citing *Mustata* approvingly for principle that stay is available remedy on federal habeas review); *Kumar v. Gonzales*, No. 107-CV-003, 2007 WL 708628, at *1 (W.D. Mich. Mar. 5, 2007) (temporary stay of removal on the day petitioner was scheduled to be deported in order to decide whether it had jurisdiction over petitioner's habeas petition); *Okoro v. Clausen*, No. 07-13756, 2008 WL 253041, at *1 (E.D. Mich. Jan. 30, 2008).

In sum, the Court has jurisdiction to (1) review whether petitioners' removal is consistent with due process, CAT and other federal statutes, because the basis for these claims arose *after* the initial removal orders were issued, making it impossible for petitioners to have filed petitions for review in the circuit on these claims; (2) prevent the government from removing petitioners to Iraq until such time as they can file motions to reopen before the agency to assert their new claims; and (3) preserve the status quo while it determines whether it has

jurisdiction based on fuller briefing (should the Court have any doubts about its jurisdiction in this case).

II. PETITIONERS WILL SUFFER IRREPARABLE HARM ABSENT EMERGENCY RELIEF

A. Harm to the petitioners is highly likely, grievous, and irreparable.

The harm from petitioners' removal is evident: While different petitioners have different avenues for immigration relief, depending on their immigration and criminal histories, they all face significant risk of persecution and torture if they are removed to Iraq. In a case in which there was "no dispute that [the petitioner] is a Chaldean Christian," the Sixth Circuit recently commented that "his status as a Christian alone entitles him to withholding of removal, given that there is 'a clear probability' that he would be subject to future persecution if returned to contemporary Iraq." *Yousif v. Lynch*, 796 F.3d 622, 628 (6th Cir. 2015). The same acknowledgement applies to the large number of petitioners who are Christian or members of other Iraqi religious or ethnic minorities.

A summary of Iraqi country conditions highlights the magnitude of the danger. In a travel warning updated June 14, 2017, the State Department explained that Iraq is "very dangerous" and that the terrorist group ISIS (Islamic State in Iraq

and Syria) is very active.[5] ISIS is effectively the government in large portions of Iraq—it took control of Iraq's second largest city, Mosul, in June 2014. ISIS has murdered or forced the religious conversion or flight of thousands of Christians.[6] The United States Commission on International Religious Freedom, an independent federal government commission, concluded in its 2016 annual report:

> Iraq's religious freedom climate continued to deteriorate in 2015, especially in areas under the control of the Islamic State of Iraq and the Levant (ISIL). ISIL targets anyone who does not espouse its extremist Islamist ideology, but minority religious and ethnic communities, including the Christian, Yazidi, Shi'a, Turkmen, and Shabak communities, are especially vulnerable. In 2015, USCIRF concluded that ISIL was committing genocide against these groups, and crimes against humanity against these and other groups.[7]

In July 2016, a consortium of human rights organizations published a report, supported by the European Union and tellingly titled "No Way Home: Iraq's Minorities on the Verge of Disappearance," which concluded that murder and other atrocities have left few members of religious minorities unharmed in Iraq.[8]

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[5] Iraq Travel Warning (last updated June 14, 2007), U.S. Department of State, https://travel.state.gov/content/passports/en/alertswarnings/iraq-travel-warning.html.

[6] See Declaration of Mark Lattimer (Ex. I); Moni Basu, *In Biblical Lands of Iraq, Christianity in Peril after ISIS*, CNN (Nov. 21, 2016), http://www.cnn.com/2016/11/20/middleeast/iraq-christianity-peril/index.html.

[7] United States Commission on International Religious Freedom, *2016 Annual Report* (Apr. 2016), http://www.uscirf.gov/sites/default/files/USCIRF%202016%20Annual%20Report.pdf.

[8] http://minorityrights.org/publications/no-way-home-iraqs-minorities-on-the-verge-of-disappearance/. See also Knights of Columbus and In Defense of Christians, *Genocide against Christians in the Middle East* (Mar. 9, 2016),

Indeed, the word often used to describe the prospects of Iraqi Christians and other religious and ethnic minorities is "extinction." Mark Lattimer Declaration (Ex. I). There can be no more serious harm.

For non-Christians, too, conditions in Iraq are dire. Muslims face grave danger based on their denomination (Shi'a[9] or Sunni[10]), their degree of religiosity, and other protected characteristics.[11] In fact, the U.N. High Commissioner for Refugees has recently concluded that it is terribly unsafe for any Iraqi nationals "who originate from areas of Iraq that are affected by military action, remain fragile and insecure after having been retaken from ISIS, or remain under control of ISIS"—that is, much of the country—to be forcibly returned to any part of Iraq. The UNHCR explains that "Such persons, including persons whose claims for

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http://www.stopthechristiangenocide.org/scg/en/resources/Genocide-report.pdf; Mark Lattimer Declaration (Ex. {}).

[9] See Ranj Alaaldin, *The Isis campaign against Iraq's Shia Muslims is not politics. It's genocide*, THE GUARDIAN (Jan. 5, 2017), https://www.theguardian.com/commentisfree/2017/jan/05/isis-iraq-shia-muslims-jihadis-atrocities; United Nations Office of the High Commissioner for Human Rights, *Report on the Protection of Civilians in Armed Conflict in Iraq* (July 6-Sept. 10, 2014), http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC_Report_FINAL_6July_10September2014.pdf.

[10] Liz Sly, *ISIS: A Catastrophe for Sunni*s, WASH. POST (Nov. 23, 2016), http://www.washingtonpost.com/sf/world/2016/11/23/isis-a-catastrophe-for-sunnis/?utm_term=.eb666f04461e

[11] *Report on the Protection of Civilians in Iraq*, *supra* note 7.

international protection have been rejected [i.e. rejected asylum seekers], should not be returned either to their home areas, or to other parts of the country."[12]

In short, harm to the petitioners is highly likely, grievous, and irreparable.

B. Classwide emergency relief is necessary.

ICE arrested over 100 Detroit area Iraqi nationals in June 11 and sent nearly all to Youngstown Ohio. Communication with immigration detainees is limited; for example, they cannot easily or reliably receive phone calls. Nora Youkhana Declaration (Ex. B). So in the days since, it has been difficult to get firm detailed information on each and every one of those detainees. Immigration law is complex, and each has a different immigration and criminal history. Variation in those histories will mean there is variation in what precise *immigration* relief is appropriate. But each and every one of them faces grave danger in Iraq, and each and every one is entitled to a meaningful chance to raise those claims and have them heard. And for each one, imminent removal to Iraq would eliminate that opportunity. Accordingly, classwide emergency relief is appropriate and necessary.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH HEAVILY IN FAVOR OF EMERGENCY RELIEF.

The balance of harms and public interest weigh strongly in favor of granting emergency relief. See Winter, 555 U.S. at 24. In contrast to the irreparable

[12] UNHCR, *Position on Returns to Iraq* (Nov. 14, 2016), ¶¶ 47-48, http://www.refworld.org/docid/58299e694.html.

injury—persecution, torture, potentially death—facing petitioners, little harm will accrue to the government from a brief pause while petitioners pursue available avenues of relief. The balance of equities is substantially more favorable to petitioners even than in the typical stay application for an ordinary immigration case: if petitioners are removed, they will not only be unable to make out the factual record they need and unable to consult with their attorneys, they face grievous and irreparable bodily harm.

Finally, the public interest also strongly favors a stay, because the public benefits from a fair immigration system, which means an immigration system that does not send people to their potential death without giving them a chance to explain the danger they face and why it entitles them to immigration relief.

This is precisely the situation in which a TRO is warranted: when "the balance of equities so heavily favors the moving party that justice requires the court to intervene to secure the positions until the merits of the action are ultimately determined, then there is cause to preserve the status quo." *Reid v. Hood*, No. 1:10 CV2842, 2011 WL 251437, at *2 (N.D. Ohio Jan. 26, 2011) (citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). Keeping Petitioners in the United States so that they can pursue their immigration remedies does just that. See *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226

(6th Cir. 1996) ("[T]he purpose of a TRO under Rule 65 is to preserve the status quo so that a reasoned resolution of a dispute may be had.").

CONCLUSION

The Court should grant the motion for a Temporary Restraining Order and/or a stay of removal.

Dated: June 15, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2017, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to Jennifer L. Newby, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants:

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