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

USAMA JAMIL HAMAMA, et al., Petitioners and Plaintiffs, v. **REBECCA ADDUCCI**, et al., Respondents and Defendants.	Case No. 2:17-cv-11910 Hon. Mark A. Goldsmith Mag. David R. Grand Class Action

PETITIONERS' MOTION FOR RELIEF ON ISSUES RELATED TO IMPLEMENTATION OF DETENTION ORDERS

Local Rule 7.1(a)(1) requires Petitioners/Plaintiffs (hereinafter Petitioners) to ascertain whether this motion is opposed. Petitioners' counsel Margo Schlanger communicated with William Silvis, counsel for Respondents/Defendants (hereinafter Respondents), via email on February 8, 2018, explaining the nature of the relief sought and seeking concurrence. Mr. Silvis stated that Respondents did not concur, in so far as they understood the relief requested; he did not respond to the further email clarifying that relief.

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As explained in more detail in the attached brief, Petitioners seek relief from this Court on four issues related to implementation of this Court's orders granting and clarifying its preliminary injunction with respect to detention issues, *see* Opinion and Order, ECF 191, Pg.ID# 5318–63; Order Regarding Further Proceedings, ECF 203, Pg.ID# 5456–64. Those issues are:

First, ICE is objecting to bond hearings for certain class members who have been detained more than six months without an impartial individualized assessment of flight risk or dangerousness. There are two groups:

1. ICE is objecting to bond hearings for some individuals whose motions to reopen have been granted, even though they have been detained more than six months without an impartial individualized assessment of flight risk or dangerousness, because the detention authority under which they are held is 8 U.S.C. § 1225, which is not referenced in the Mandatory Detention Subclass definition.

2. ICE is objecting to bond hearings for some individuals whose immigration cases have not yet been reopened, even though they have been detained more than six months without an impartial individualized assessment of flight risk or dangerousness, because, it seems, ICE asserts they are not members of the Detained Final Order Subclass.

This Court's January 2 Order (ECF 191) found that prolonged detention without an impartial individualized assessment of flight risk or dangerousness violates due process. Petitioners ask that the Court clarify its prior orders to ensure that class members held under 8 U.S.C. § 1225 are not subjected to prolonged detention without such an impartial individualized assessment. Petitioners further ask the Court to ensure that Respondents disclose information about **all** Iraqi detainees who had final immigration orders during the relevant time period (March 1, 2017 to June 24, 2017) but who are being denied bond hearings by clarifying the obligations in ECF 203, ¶ 9.d, Pg.ID# 5460-61, which requires such disclosures by February 21, 2018.

Second, Petitioners seek relief for class members who have been granted bond by an immigration judge (i.e. have been found to present neither a danger nor a flight risk that cannot be mitigated by bond), but who have nonetheless either not been released or have been taken back into custody after being released on bond. These class members are being held in custody as a result of either "automatic" stays that ICE can trigger simply by filing a form, or "discretionary" stays issued by the Board of Immigration Appeals (BIA) pending adjudication of ICE's underlying appeal of the immigration judge (IJ)'s bond decision. Automatic stays effectively allow ICE to override the IJ's decision that release is appropriate and allow detention to be prolonged for an additional 90 days without any review by an independent adjudicator. "Discretionary" stays do involve a decision by the BIA, but are extremely problematic because (a) the BIA frequently decides them without notice—much less briefing—from the detainee's counsel, (b) there is no standard for deciding whether a stay should be granted; and (c) there is no time limit for such stays, which remain in effect until the underlying bond appeal is adjudicated, a process that can take several months or longer. In addition, discretionary stays can be sought by Respondents at any time, which has led to the situation where individuals who have been released to their families after months in detention are suddenly rearrested and redetained because of Respondents' post-release decision to request a stay. Petitioners accordingly request this Court to order that where

immigration courts have granted release, the procedures by which Respondents can seek a stay of those orders comport with basic due process requirements.

Third, ICE is objecting to bond hearings for individuals who have been briefly held in criminal custody during their period of immigration detention. This occurs because ICE "resets" the six-month clock to start anew when the individual returns to ICE custody. Petitioners accordingly request clarification that time spent in immigration custody or while under an immigration hold counts towards the six-month clock, which is not reset simply because an individual is briefly transferred out of ICE detention and then back.

Fourth, in at least one instance, Respondents have denied a bond hearing to an individual whom ICE seeks to remove to Iraq, but who was born in another country. This Court should clarify that if an individual is sufficiently Iraqi that ICE is seeking removal to Iraq, the individual is also sufficiently Iraqi for class membership.

To address those issues, for reasons more fully explained in the accompanying brief, Petitioners respectfully request that the Court enter the following relief:

1. Amend the Mandatory Detention Subclass definition set out in this Court's Opinion and Order, ECF 191, ¶ 1.c., Pg.ID# 5360, to read: "All Primary Class Members whose motions to reopen have been or will be granted, who are

currently or will be detained in ICE custody under the authority of a mandatory detention statute, and who do not have an open individual habeas petition seeking release from detention."

2. Amend the Order Regarding Further Proceedings, ECF 203, ¶ 8, Pg.ID# 5459 to read: "Those Mandatory Detention Subclass members held under 8 U.S.C. § 1226 who have not yet been detained for six months are entitled to a bond hearing under ordinary scheduling practices, if they request one, under 8 U.S.C. § 1226(a)."

3. Clarify that the Respondents, in meeting their February 21 obligation to "identify each detainee whose time in detention has reached 180 days or more but whom the government does not consider eligible for a bond hearing, and the reason asserted for non-eligibility," ECF 203, ¶ 9.d, Pg.ID# 5460-61, shall include:

a. Information on individuals whom ICE does not consider eligible for a bond hearing, whether or not the bond hearing was scheduled and/or held.

b. For individuals whom Respondents argued before the immigration court were not eligible for a bond hearing, the decision of the immigration court on the individual's eligibility.

c. Information on individuals for whom ICE does not consider the "time in detention" to have reached six months, even though the individual has been in immigration or criminal custody for six months.

4. Clarify that Respondents, in meeting their biweekly obligation to disclose "if any appeal or stay has been filed and (if available) the outcome," ECF 203, ¶ 9.c, Pg.ID# 5460, should specify which type of stay they have sought and the outcomes for both.

5. Limit the duration of any automatic stays sought by Respondents under 8 C.F.R. § 1003.19(i)(2) to 10 business days—the time reasonably necessary to protect the government's ability to maintain detention of a *Hamama* class member while seeking/obtaining a discretionary stay under 8 C.F.R. § 1003.19(i)(1).

6. Order that if ICE seeks a discretionary stay of an immigration judge's decision granting bond to a *Hamama* class member:

a. Absent changed circumstances arising after the IJ's bond determination, ICE shall seek any discretionary stay of the bond decision within five days of the decision.

b. Respondents shall provide notice and a reasonable opportunity to respond to the class member, or if represented, the class member's counsel, when ICE has filed for a discretionary stay. ICE shall have two business days

to refile motions for any discretionary stay previously entered without notice and opportunity to respond; if ICE does not refile, the stay shall expire.

c. Discretionary stays under 8 C.F.R. § 1003.19(i)(1) shall be available from the BIA only if the BIA finds that ICE has demonstrated a "strong likelihood of success on the merits" of its bond appeal. *Ne. Ohio Coal. for Homeless and Serv. Emp. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006).

d. If the BIA does not grant the stay within five days of its filing, the class member shall be entitled to release under whatever terms and conditions were set by the immigration judge in the bond decision that is being appealed while bond adjudication continues. The five-day deadline can be extended if the detainee seeks an extension in order to allow additional time for responsive briefing, and any automatic stay shall be extended during that period as well.

e. If the BIA grants the stay, the stay will expire if the BIA does not adjudicate the underlying bond appeal within 30 days of the original bond determination, and the class member shall be entitled to release under whatever terms and conditions were set by the immigration judge.

7. Order that for purposes of calculating the six months of detention that trigger a bond hearing under this Court's orders, ECF 191 and 203, the entire period of detention while in immigration custody or under an immigration hold shall be counted towards the six months that are a prerequisite to a bond hearing or release under this Court's order.

8. Order that detained individuals who had final orders of removal at any point between March 1, 2017 and June 24, 2017 and whom ICE is seeking to remove to Iraq shall not be excluded from this Court's orders regarding detention (including ECF 191, 203, and any further orders regarding detention) because they were not born in Iraq.

Respectfully submitted,

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PETITIONERS/PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR RELIEF ON ISSUES RELATED TO IMPLEMENTATION OF DETENTION ORDERS

A. Introduction

This Court's January 2 Order requires Respondents by February 2 (or February 16, for some class members in Michigan and Ohio) to either (a) release detained class members held over six months, (b) provide bond hearings, or (c) object to bond hearings for specific detainees. Opinion and Order, ECF 191, Pg.ID# 5360-61. Respondents have chosen the second option. They have not returned any detainees to their pre-arrest status by releasing them under orders of supervision. And they have not filed any objections to bond hearings for specific detainees. Instead, they have been proceeding with bond hearings, while at the same time ICE has: 1) raised objections to bond hearings for specific detainees

before immigration judges (IJs), and 2) sought automatic and discretionary stays of IJ bond decisions.

Petitioners do not yet have full information on the bond hearings scheduled and their results. Respondents' first set of bi-weekly data disclosures was received at 9 p.m. yesterday, February 7, 2018, and Petitioners' counsel are only beginning to analyze it. Respondents have until February 21, 2018, to identify each detainee who has been in detention for six months but whom the government does not consider eligible for a bond hearing and the reasons asserted for non-eligibility. Order Regarding Further Proceedings, R. 203, ¶ 9.d, Pg.ID# 5460-61.

Class counsel anticipate that, after further information and analysis, counsel will be able to present the court with a more detailed picture of how the Court's order is being implemented. If it is then necessary for the Court to address additional issues, Petitioners will file an appropriate motion. However, several issues have already emerged, and this motion seeks the Court's assistance in resolving them. They are:

- The government has taken the position that certain class members who have won their motions to reopen and have been detained longer than six months are not eligible for bond hearings because they are detained under 8 U.S.C. § 1225 rather than § 1226(c). *See* Section B.1.

- The government also appears to be objecting to bond hearings for some detainees with final orders, although the basis for the government's arguments against such bond hearings is unclear. *See* Section B.2.

- In some cases where immigration judges have granted release, finding that the class member does not present a danger or flight risk that cannot be mitigated by bond, ICE has continued to detain the class member by obtaining either an "automatic" or "discretionary" stay of the IJ's bond decision pending appeal of the bond decision to the Board of Immigration Appeals (BIA). An "automatic stay" involves no independent review of ICE's stay request and can result in months of additional incarceration before the BIA ever considers the case. "Discretionary stays" are issued by the BIA without any standard for granting such stays, without any time limit for their duration, and often without notice to the detainee or counsel (much less briefing). Neither type of stay is consistent with this Court's order, which, in light of the due process concerns implicated by class members' prolonged detention, requires that they receive prompt individualized bond hearings. *See* Section C.

- ICE appears to be taking the position that if a class member is "writted out" to spend time in criminal custody while under an immigration hold, that resets the six-month clock, which then starts from zero when the class member is returned to immigration custody. *See* Section D.

- ICE has, in at least one instance, objected to bond hearings for individuals whom they are seeking to remove to Iraq on the basis that the individuals were not born in Iraq. *See* Section E.

B. Class Members Detained More Than Six Months Who Are Denied Bond Hearings

The "prolonged detention claim" at issue here—i.e. the argument that lengthy detention without an individualized assessment of flight risk or dangerousness violates due process—was brought by members of both the Detained Final Order Subclass and the Mandatory Detention Subclass. *See* Count V, 2d Am. Petition, ECF 118, ¶¶ 133-138, Pg.ID# 3024-25. The Court granted relief on that claim, ordering speedy bond hearings for members of both the

Detained Final Order Subclass and of the Mandatory Detention Subclass, if detention exceeds six months.[1] Opinion and Order, ECF 191, ¶ 2.a-b, Pg.ID# 5360-61. The Court explained: "Our legal tradition rejects warehousing human beings while their legal rights are being determined, without an opportunity to persuade a judge that the norm of monitored freedom should be allowed." *Id.* at Pg.ID# 5319.

Respondents, however, now take the position that certain class members are not covered by the January 2nd Order and can be subjected to prolonged detention in excess of six months without a bond hearing. In some cases, this approach has meant that bond hearings are not scheduled; in others, ICE has made the argument during the hearings. Because their arguments are different for members of the Mandatory Detention and Prolonged Final Order subclasses, these are separated below.

1. Mandatory Detention Subclass

Respondents' argument against bond for certain class members whose motions to reopen have been granted hinges on the fact that, because of the particular posture of their immigration proceedings, the detention of these class

[1] The Court also held that members of the Mandatory Detention Subclass who have not yet been detained for six months are entitled to a bond hearing on their statutory claim that 8 U.S.C. § 1226(c) does not apply in these circumstances. *See* Count VI, 2d Am. Petition, ¶¶ 139-143, ECF 118, Pg.ID# 3025-26; Opinion and Order, ECF 191, Pg.ID# 5337-41; Order Regarding Further Proceedings, ¶ 8, ECF 203, Pg.ID# 5459.

members is governed by 8 U.S.C. § 1225, rather than § 1226(c). *See* Randy Samona Declaration, Ex. 1; Kevin Piecuch Declaration, Ex. 2. But this is a distinction that has no bearing on the due process concerns which led this Court to conclude that prolonged detention must be justified by an individualized bond hearing. This Court recognized that the Constitution commands that "no person should be restrained in his or her liberty beyond what is reasonably necessary to achieve a legitimate governmental objective." Opinion and Order, ECF 191, Pg.ID# 5319. That principle does not turn on the exact statutory regime governing the person's detention. While individuals detained under 8 U.S.C. § 1225 are sometimes labeled "applicants for admission," such individuals (who in years past were referred to as "excludable aliens") are equally entitled to due process with respect to their detention. *See Rosales-Garcia v. Holland*, 322 F.3d 386, 409 (6th Cir. 2003) (en banc), *cert. denied sub nom. Snyder v. Rosales-Garcia*, 539 U.S. 941 (2003) ("We could not more vehemently disagree [with the government's assertion that 'excludable aliens' are not protected by the Constitution]. Excludable aliens—like all aliens—are clearly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.").

To understand the objections that ICE is asserting before the immigration courts about why bond hearings should not proceed in these cases, it is worth briefly recapping the statutory framework. All class members, when they were first

arrested, had been ordered deported, and were therefore subject to post-final-order detention under 8 U.S.C. § 1231. Once class members succeed on their motions to reopen, however, the authority for their detention shifts back to the detention regime that governs their removal proceedings. For most class members, detention after proceedings have been reopened is governed by 8 U.S.C. § 1226, which authorizes detention pending completion of removal proceedings. 8 U.S.C. § 1226(a) authorizes discretionary detention, whereas § 1226(c) authorizes mandatory detention—that is, without any opportunity for IJ adjudication of danger or flight risk—in certain circumstances.

However, there are a small number of class members who, because of the posture of their underlying removal cases, are deemed to be "seeking admission" to the United States once their removal proceedings are reopened, notwithstanding that they have in fact been living in the United States for years. For these individuals, Respondents take the position that their detention is governed by 8 U.S.C. § 1225, the statute authorizing detention of "applicants for admission,"[2]

[2] It is not entirely clear under what statutory authority Respondents are justifying these class members' detention without the opportunity for IJ bond hearings. Petitioners' best guess is that Respondents are relying on 8 U.S.C. § 1225(b)(2)(A), which provides:

> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a

and further take the position that the Court's January 2 Order does not require that they get bond hearings.

Respondents' argument that this Court's January 2 Order does not prevent class members detained under § 1225 from being held in prolonged detention without an individualized hearing appears to be the following: because the § 1225 detainees do not have a final order (as they have succeeded in reopening their cases) they are not members of the Final Order Subclass, and because they are not detained under § 1226(c), they are not members of the Mandatory Detention Subclass. Since they are not members of either subclass, they are not protected by this Court's January 2 Order and can be detained indefinitely without an individualized hearing.

In fact, the statutory label attached to detention without bond is substantively immaterial to this Court's prolonged detention ruling. Class members detained under § 1225 are, for all material purposes, identical to other class members. They entered the United States long ago. They were ordered to leave the country but could not be repatriated due to Iraq's unwillingness to accept them. They lived in the community for years until they were suddenly arrested. Protected by this

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> doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

Respondents may rely on other provisions as well. This will hopefully become clear once Respondents report on February 21 on what basis they are denying bond hearings to class members held more than six months.

Court's stay of removal, they have reopened their immigration cases and now await adjudication of those cases.[3] Their repatriation to face persecution, torture or death would violate the Immigration and Nationality Act (INA), *see* 8 U.S.C. § 1231(b)(3), or the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, codified by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, §2242, 112 Stat. 2681, 2681-82 (1998), codified at 8 U.S.C. §1231 note. They are now being held in detention, apart from their families and communities in this country, without an opportunity for impartial evaluation of the danger or flight risk justifying that detention; they have been incarcerated for six months or more. The only difference is that, due the complexities of immigration law and the specifics of their individual immigration histories, the detention regime that applies to them appears in a different section of the U.S. Code.

This Court's January 2 Order entitles detainees to bond hearings or release if their detention has become prolonged. Class members who are being detained under § 1225 are virtually identical to those mandatorily detained under § 1226 (and § 1231). The principles underlying this Court's decision apply with equal force regardless of the statutory basis for prolonged detention without an

[3] Three of the affected class members are profiled in the declarations of their lawyers. *See* Randy Samona Declaration, Ex. 1; Kevin Piecuch Declaration, Ex. 2; Albert Valk Declaration, Ex. 3.

opportunity to seek bond. Immigration law is complex: there are many different legal statuses upon entry and many different ways in which those statuses can be lost. But none of those complexities matter here because this Court has already answered the common question: can noncitizens be held in prolonged detention without the opportunity for an individualized, impartial determination of flight risk or dangerousness. The Court has said they cannot.

At the time class counsel drafted the subclass definition, class counsel was unaware that some class members whose motions to reopen are granted would be subject to detention under § 1225 rather than § 1226.[4] Now that this information has come to light during the bond proceedings, Petitioners respectfully request this Court to enter a non-substantive change to the Mandatory Detention subclass definition, to align it with the Court's reasoning and encompass all those class members similarly situated, namely all those who have succeeded in filing motions to reopen but nonetheless are being held in prolonged detention without an individualized review of flight risk or dangerousness.

The Mandatory Detention Subclass is currently defined as:

> "All Primary Class Members whose motions to reopen have been or will be granted, who are currently or will be detained in ICE custody under the authority of the mandatory detention statute, 8 U.S.C.

[4] Respondents did mention 8 U.S.C. § 1225(b) in their opposition to class certification (ECF 159). But there the reference was to an individual whose case had *not* been reopened.

> § 1226(c), and who do not have an open individual habeas petition seeking release from detention."

Just two sentences of this Court's prior orders need to be changed in light of this new information.

First, the Mandatory Detention Subclass definition should read:

> "All Primary Class Members whose motions to reopen have been or will be granted, who are currently or will be detained in ICE custody under the authority of ~~**the**~~ **a** mandatory detention statute, ~~8 U.S.C. § 1226(c),~~ and who do not have an open individual habeas petition seeking release from detention."

Second, the order that implements the Court's statutory ruling (ECF 203, ¶ 8) that 8 U.S.C. § 1226(c) has no application to reopened cases, needs an equally minor technical revision, adding the emphasized text:

> Those Mandatory Detention Subclass members **held under 8 U.S.C. § 1226** who have not yet been detained for six months are entitled to a bond hearing under ordinary scheduling practices, if they request one, under 8 U.S.C. § 1226(a).

This change reflects that fact that this Court's ruling on the statutory § 1226 claim (Count VI) applies only to those held under that provision, while the prolonged detention claim (Count V) applies to all types of prolonged detention without the opportunity for bond hearings.

2. Detained Final Order Subclass

ICE has also objected to the immigration court's jurisdiction in bond hearings where individuals *still had* final orders and are therefore part of the Final

Order subclass. For example, ICE argued in one case that the immigration court did not have jurisdiction to grant bond because a "determination to deport" is not a "removal order,"[5] and therefore the detainee was not a member of the Detained Final Order Subclass. This seems to be sophistry, but without a fuller explanation of the government's reasoning, it is not possible for Petitioners' Counsel to respond to their arguments here. The Court should require Respondents to provide complete information as part of their disclosure, due February 21, about individuals whom the government believes are not entitled to bond hearings. Petitioners will respond to arguments about why those individuals should not receive a bond hearing after the government presents those arguments.

C. Stays Pending Appeal

With respect to release and/or a bond hearing, the Court was clear in its January 2 Order:

[5] Exhibit 6 is ICE's position statement opposing a bond hearing for one detainee. It states:

> The Department previously submitted a position on bond indicating it did not believe the respondent qualified for a *Hamama* bond hearing because the respondent was admitted to the United States under the Visa Waiver Program. The Department continues to believe that the respondent is not eligible for a *Hamama* bond hearing, but clarifies it is because as a prior S Visa holder he is not subject to a removal order, rather a determination to deport has been made in accord with 8 C.F.R. § 242.26 [now defunct, but attached to the position statement].

> The Government shall be required to release, no later than February 2, 2018 [later amended to February 16 for Michigan and Ohio detainees], any detained member of the detained final order subclass and any member of the mandatory detention subclass who has been detained, as of January 2, 2018, for six months or more, unless a bond hearing for any such detainee is conducted on or before February 2, 2018 before an immigration judge; provided that neither release of a particular detainee nor a bond hearing for that detainee shall be required if the Government files with this Court a memorandum, by February 2, 2018, objecting to a bond hearing for any specific detainee and supplies evidence supporting the objection.
>
> At the bond hearing, the immigration judge shall release the detainee under conditions of release unless the immigration judge finds, by clear and convincing evidence, that the detainee is either a flight risk or a public safety risk.

Opinion and Order, ECF 191, Pg. ID# 5360-61 (as modified by ECF 203).

As this Order is being implemented, there are at least several cases in which an immigration judge has found the class member appropriate for release, but Respondents are continuing to detain him, pursuant to a stay of the immigration judge's custody decision. This is occurring under two different procedures: automatic stays and discretionary stays. *See* 8 C.F.R. § 1003.19(i)(1) (discretionary stays); § 1003.19(i)(2) and § 1003.6(c) (automatic stays); BIA Practice Manual, § 7.3 (describing procedures for appealing bond decisions).

An automatic stay is available, by regulation, in cases in which ICE had previously decided against release (or set a bond of $10,000 or higher). 8 C.F.R. § 1003.19(i)(2) Automatic stays remain in effect for up to 90 days, 8 C.F.R. § 1003.6(c)(4), meaning that they can greatly extend the already prolonged

detention of class members, even though the immigration judge has found that those class members are not a flight risk or danger and can safely be released on bond.

The process for obtaining an automatic stay does not require that an impartial adjudicator review ICE's request that the noncitizen remain incarcerated while ICE appeals the immigration judge's bond. Rather, the process is that if ICE files an "automatic stay" application—a form EOIR-43 (also called an E-43)—within one business day of bond being granted, the individual remains in custody. ICE then has 10 business days to file a notice of appeal with the BIA. Neither an immigration judge nor the BIA conducts any substantive review of the bond issue before the stay goes into effect. *See Matter of Joseph*, 22 I. & N. Dec. 660, 666 (BIA 1999) ("The filing of a Form EOIR-43 is a ministerial act."); BIA Practice Manual, § 7.3(a)(iv)(B) (describing "automatic stays," or "stays by regulation," which prevent release for 90 days, or until the BIA decides the underlying bond appeal, whenever the government files an E-43). The practical effect is that ICE can—simply by filing a form—keep a person in custody for three more months if ICE disagrees with the immigration judge's decision that the detainee is neither a flight risk or nor danger and can be released on bond.

Petitioners are aware of several cases where immigration judges have granted bond to *Hamama* class members, but those individuals were not released

because Respondents obtained automatic stays. The Court ordered Respondents to disclose their use of stays, *see* ECF 203, ¶ 9.c, Pg.ID# 5460 ("In the bi-weekly disclosures beginning February 7, 2018, the Government shall supply the following data to Petitioners: . . . If any appeal or stay has been filed and (if available) the outcome."). Respondents' February 7 disclosure did not, however, include the ordered information; it identified appeals but not stays. Automatic stays are inconsistent with both this Court's order and its reasoning which requires release unless an immigration judge finds that the detainee is a flight risk or danger.[6] Opinion and Order, ECF 191, Pg.ID# 5361. Here, at ICE's unilateral

[6] Because automatic stays clearly contravene this Court's order requiring release absent an individualized finding that detainee poses a flight risk or danger, the Court need not reach the question of whether such automatic stays are constitutional. Numerous courts, however, have struck down automatic stays of immigration bonds because they allow ICE to unilaterally subject noncitizens to prolonged detention without a finding of flight risk or danger, and indeed in contravention of a finding by the immigration judge that they are *not* a flight risk or danger. *See*, *e.g.*, *Bezmen v. Ashcroft*, 245 F.Supp.2d 446 (D. Conn. 2003); *Zavala v. Ridge*, 310 F.Supp.2d 1071 (N.D. Cal. 2004); *Zabadi v. Chertoff*, 2005 WL 1514122 (N.D. Cal. June 17, 2005); *Ashley v. Ridge*, 288 F. Supp. 2d 662 (D.N.J. 2003). *See also Uritsky v. Ridge*, 286 F.Supp.2d 842, 847 (E.D. Mich. 2003) (ordering the release of an immigrant detainee whose bond determination was automatically stayed: "under the Fifth Amendment, Petitioner is entitled to an individualized determination that his detention is necessary to further a sufficiently compelling governmental need. Because the Immigration Court, in fact, already has found that Petitioner's continued detention is not justified by such a need, the individualized determination requirement has been met."). Although these decisions predate a regulatory amendment that limited the duration of such stays to 90 days, 71 Fed. Reg. 57873-01 (Oct. 2, 2006), their reasoning continues to apply to the bond hearings this Court ordered, which affect only individuals who have

behest, automatic stays further prolong the detention of individuals who have been specifically found by an impartial decisionmaker *not* to pose a flight risk or danger.

The second type of stay is a "discretionary stay" of bond/release, which ICE has sought and obtained for several class members. *See*, *e.g.*, Bradley Maze Declaration, Exhibit 7. The regulations authorize ICE to seek this type of stay from the BIA either during the automatic stay period or at any other time while a bond appeal is pending. 8 C.F.R. § 1003.19(i)(1); § 1003.6(c)(5).

While discretionary stays do not suffer the same flaw as automatic stays of being available based on ICE's unilateral decision, they are deeply problematic for other reasons. Already, with only incomplete information available, three major defects are evident. First, after an immigration judge grants bond, the government can seek and obtain a decision from the BIA to stay release without ever providing notice to the detainee/detainee's counsel, much less an opportunity to respond. Detainees and their counsel may learn that the government has filed for and obtained a discretionary stay only after the BIA grants the government's stay request. *See* Bradley Maze Declaration, Ex. 7. Detainees who have *won* at their

---

already been subjected to more than six months of detention without a bond hearing. Likewise, although some of these decisions predate the Supreme Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003), which upheld the constitutionality of a *brief* period of mandatory detention, their due process analysis continues to apply here where class members have already been subjected to prolonged detention in excess of six months.

bond hearings are thus being subjected to additional incarceration without the basic due process requirements that they be given notice and an opportunity to respond.

Second, as far as Petitioners can discern, there is no announced standard for granting a discretionary stay. Normally, of course, a lower tribunal's decision is not stayed unless the party seeking the stay can demonstrate "strong likelihood of success on the merits." *Ne. Ohio Coal. for Homeless and Serv. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). Here, a standardless stay of release on bond for potentially an extended period of time is inconsistent with this Court's appropriate insistence that prolonged detention requires individuated justification.

Finally, once stays are granted, they can result in many additional months of incarceration. A discretionary stay has no regulatory time limit; it lasts as long as the bond appeal takes, which can be many months. *See* Maze Declaration, Ex. 7.

Petitioners do not dispute that the government, like detainees, has the right to appeal bond decisions, *see* Order Regarding Further Proceedings, ECF 203, ¶ 5, Pg.ID# 5459. Petitioners even concede that there can be a process for staying releases pending appeal. But given the fundamental liberty interests at stake, that process must comport with basic notions of procedural fairness: detainees must get notice and have an opportunity to be heard; the stay decision should be guided by an appropriate standard; and given the summary nature of the process, it should not

last more than the reasonable period of time needed to promptly adjudicate the underlying bond appeal.

Petitioners therefore respectfully request that the Court clarify its order allowing appeal of bond determinations in several ways:

- Automatic stays under 8 C.F.R. § 1003.19(i)(2) should be allowed only for the duration necessary to protect the government's ability to maintain detention while seeking/obtaining a discretionary stay under 8 C.F.R. § 1003.19(i)(1)—say, 10 business days after the immigration judge renders the contested bond decision.

- Discretionary stays under 8 C.F.R. § 1003.19(i)(1) should be available from the BIA only if:

  a. Absent changed circumstances arising after the immigration judge's bond determination, ICE seeks such a stay within a short time (Petitioners propose five days) of the bond decision it contests. This will ensure sufficient time for the class member to respond and for the BIA to adjudicate the stay request while the automatic stay is in effect, and will prevent class members from living in fear that their bond could be revoked at any time after they have been reunited with their families.

  b. Respondents provide notice and a reasonable opportunity to respond to the class member and his or her counsel that ICE is seeking a discretionary stay.

  c. The BIA finds that ICE has demonstrated a "strong likelihood of success on the merits" of its bond appeal. *Ne. Ohio Coal. for Homeless*, 467 F.3d at 1009.

- If the BIA does not grant the stay within five days of its filing, the class member should be entitled to release under whatever terms and conditions were set by the immigration judge in the bond decision under appeal, while the bond adjudication continues. The five-day deadline can be extended if the detainee seeks an extension in order to allow additional

time for responsive briefing, and any automatic stay should be extended during that period as well.

- If the BIA grants the stay, the stay will expire if the BIA does not adjudicate the underlying bond appeal within 30 days of the original bond determination, and the class member shall be entitled to release under whatever terms and conditions were set by the immigration judge.

- Any discretionary stay already granted should be readjudicated; Respondents should have two business days to refile the relevant motions.

D. Stints in Non-ICE Custody

The line between immigration detention and criminal custody is sometimes less than entirely clear. Obviously Respondents have authority only over immigration detention. Sometimes, however, an individual is detained by ICE for a period of weeks or months, then moved into criminal custody (e.g., to allow him/her to appear in a criminal proceeding), and then moved back into immigration detention. In those circumstances, the individual's criminal incarceration is subsidiary to his/her immigration detention: ICE maintains a "hold" on the individual to prevent release into the community by the criminal custodian, as such individuals might, for example, otherwise be released on bail. Sometimes the period in criminal custody is only a day or two; at other times, it can be a period of weeks or months.

To avoid the possibility of prolonged immigration detention in shifts, and of calendar "resets," when a class member has entered ICE detention, been shifted to

criminal detention for a brief period, and then shifted back, the entire period during which an individual is in immigration custody or under an immigration hold should be counted towards the six months that is a prerequisite to a bond hearing or release under this Court's order. The declaration of Eman Jajonie-Daman, Exhibit 4, describes just such a situation, and just such a resolution by the immigration court. As it demonstrates, ICE is taking the position that bond hearings need not even be scheduled in these circumstances. To avoid omission of required hearings in the future, the Court should clarify its order to cover this issue.

E. Class members born outside Iraq

The declaration of Dalia Kejbou, Exhibit 5, explains that for at least one class member, ICE is simultaneously seeking to deport him to Iraq but reading him out of class membership. This individual was born in Lebanon, in transit to the United States, to Iraqi parents. ICE has taken the position that Iraq would be an appropriate nation of removal. (Lebanon declines to recognize him as a Lebanese national.) Yet Respondents also have declined to schedule him for a bond hearing.

Petitioners respectfully ask that this court clarify: if an individual is sufficiently Iraqi that ICE is seeking removal to Iraq, he is sufficiently Iraqi for class membership. (Petitioners express no view on the actual Iraqi nationality of any individual born elsewhere; the issue is a complex one and well beyond the scope of this case.)

Respectfully submitted,

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Dated: February 8, 2018

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2018, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

By: */s/Kimberly L. Scott*
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EXHIBIT 1

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

USAMA JAMIL HAMAMA, et al.,

Plaintiffs/Petitioners,

v.

REBECCA ADDUCCI, et al.,

Defendants/Respondents.

Case No. 2:17-cv-11910
Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

DECLARATION OF RANDY SAMONA

I, Randy Samona, upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am an immigration attorney, currently the principal of the Law Office of Randy Samona, P.C., in the city of Sterling Heights, Michigan.

2. I am currently representing an individual, hereinafter referred to "Walid", who has been identified as a member of the primary class of persons within the class action suit *Hamama v. Adducci,* 2:17-cv-11910-MAG-DRG; Doc # 191.

3. Walid entered the United States as a refugee on December 4, 1997 as a refugee from Iraq, where he fled from persecution from the Iraqi Government. After one year of physical presence in the United States, Walid applied for permanent resident status and his application was granted.

4. Walid's father owned a restaurant and supermarket in Iraq. Iraqi police would come and take food and other perishables from them free of charge and Walid and his family had no option but to give them what they wanted. One day Walid's father went to the supermarket and found that everything was gone. Walid's father then asked a police officer if he saw what happened, and in response the officer thought Walid's father was accusing him of some wrongdoing or involvement. The police became furious and hit Walid's father with a weapon and he had to go to the hospital to have surgery. After this incident, Walid's family members were harmed again; two of his brothers were taken into police custody to a jail where they were beaten and tortured. After they were released the officers came to the family's home and told them that they had to leave the country. The next day they fled Iraq.

5. Walid and his family fled from Iraq and left everything behind. They left their house, cars, business, and went to northern Iraq. They stayed in northern Iraq for three months and then they made arrangements to leave Iraq for a refugee camp in Syria. They lived in the Syrian refugee camps for seven years before traveling to the United States as refugees.

6. Walid has continuously resided in the United States since 1997. In December of 1999, Walid's father was murdered at his place of business in Michigan. After his father's death, Walid became depressed, and he was saddened at the fact that until this day the police have not found his father's killer, and nobody has come forth with evidence. As a result, Walid made some poor decisions which ultimately led to his placement in removal proceedings in 2003.

7. Walid lives with his elder mother, a U.S. citizen, and cares for her as she has several medical conditions. Walid's siblings all reside in the United States and most are naturalized U.S. citizens. Walid is a humble man who cares for his mother and is committed to his family.

8. In 2003, Walid traveled abroad for a vacation in 2003 and was arrested for criminal conduct outside of the United States. Walid attempted to return to the United States from Aruba with a controlled substance affixed to his person and was arrested by Aruban authorities, who then turned him over to Canadian immigration authorities for transit purposes, where he was then turned over to U.S. immigration Authorities.

9. When Walid reapplied for admission to the United States as a returning resident, he was found to be inadmissible due to his criminal conduct while he was in Aruba. He was paroled into the U.S. as an "arriving alien" so that the U.S. Department of Homeland Security could initiate removal proceedings against him.

10. In the resulting removal proceedings, Walid sought asylum, on the basis of his fear of persecution in Iraq. That claim was never adjudicated. Instead, on August 3, 2006 Walid was ordered removed *in absentia* by the Immigration Court in Detroit, meaning that he was ordered removed due to his failure to attend his court hearing, which had been reset for one day earlier than previously scheduled. He never had a merits hearing.

11. Because Walid could not be repatriated to Iraq, he was released on an order of supervision, with which he has complied.

12. On June 11, 2017, Walid was arrested by ICE. He has been detained since then in Youngstown, Ohio, and after approximately three months he was transferred to the Chippewa County Jail in Sault Ste. Marie, Michigan, where he remains today, more than a five-hour drive from his family and his attorney.

13. Walid filed a motion to reopen on June 19, 2017. After much litigation and briefing, the immigration court granted that motion and reopened the case for consideration of deferral of removal pursuant to the Convention Against Torture Act. Walid's individual hearing is set for February 13, 2018 before the Honorable David H. Paruch at the Detroit Immigration Court.

14. As an "arriving alien," Walid is being held under mandatory detention pursuant to Section 235 of the Immigration and Nationality Act, 8 U.S.C. § 1225. He has no statutory right to a custody hearing before an immigration judge.

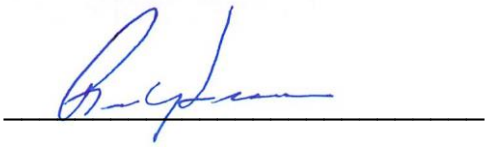
15. In response to the order in Hamama v. Adducci relating to bond hearings, the Immigration Court set a bond hearing for January 26, 2018. At that hearing, DHS took the position that Judge Goldsmith's orders from January 2 and January 19 do not provide for bond hearings for noncitizens detained under the authority of 8 U.S.C. § 1225.

16. Judge Jebson stated that he agreed, but he continued the hearing to February 8, 2018 at 1:00 PM. In the interim, I have filed a Motion to Continue Walid's bond hearing, explaining that I am awaiting direction from Judge Goldsmith with regards to the issue as to whether individuals in custody under 8 U.S.C. § 1225 are included in these special bond hearings. I have been ordered to appear at Walid's scheduled hearing on February 8th, where my Motion to Continue will be addressed in open court.

17. Walid has been in immigration detention for well over six months. He poses neither a flight risk nor a danger to the community. There is no justification for his prolonged detention.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on February 6, 2018 in Macomb County, Michigan.



Randy Samona

EXHIBIT 2

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

USAMA JAMIL HAMAMA, et al.,

Plaintiffs/Petitioners,

v.

REBECCA ADDUCCI, et al.,

Defendants/Respondents.

Case No. 2:17-cv-11910
Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

DECLARATION OF KEVIN PIECUCH

I, Kevin Piecuch, make this declaration under 28 U.S.C. § 1746 based upon my own personal knowledge, and if called to testify, I could and would do so competently as follows:

1. I am an attorney in good standing licensed to practice law in the State of Michigan and federal court. I have extensive experience in the area of immigration law.

2. I represent Firas Nissan, an Iraqi national, in his immigration case.

3. Mr. Nissan came to the United States in 2001 as an arriving alien.

4. He sought asylum, and was granted an individual hearing before an Immigration Judge in Detroit, Michigan.

5. In the resulting asylum proceeding, Mr. Nissan was ordered removed *in absentia* by an Immigration Judge on August 11, 2004 after failing to attend his merits hearing. Mr. Nissan was sick on the day of his hearing and provided the court documentation of his illness from his physician; however, his absence was not excused.

6. Because Mr. Nissan could not be repatriated to Iraq, he remained in the Detroit area, where he worked as a clerk in various retail establishments.

7. Mr. Nissan was arrested by ICE officers in June 2017. He has been in mandatory detention ever since, first in Florence, Arizona. He is currently detained in Calhoun County Jail, in Battle Creek, MI.

8. Shortly after his arrest, on June 20, 2017, Mr. Nissan filed a motion to reopen based on changed country conditions, together with a motion to stay his removal.

9. On August 15, 2017, Judge Paruch granted Mr. Nissan's motion to reopen where he is being considered for both withholding of removal and deferral of removal under the Convention against Torture.

10. Mr. Nissan's individual merits hearing was held on December 28, 2017. The Immigration Court has yet to issue a decision.

11. Since the *Hamama* litigation began, ICE has treated Mr. Nissan as a class member in it. For example, I understand that he has been included in court-ordered data disclosures to class counsel. He has received court ordered notice, and ICE has treated him as covered by the Court's July stay of removal.

12. In response to the order in *Hamama v. Adducci* concerning bond hearings, the immigration court set a bond hearing for Mr. Nissan on February 1, 2018, before Immigration Judge Jebson.

13. Before that hearing, on January 19, 2018, ICE filed a position statement with the immigration court stating that Judge Goldsmith's January 2 and January 19 orders do not apply to Mr. Nissan. (Exhibit A). ICE stated that Mr. Nissan is not a member of the detained final order subclass because he is not subject to a final order of removal; and that he is not a member of the mandatory detention subclass because he is being detained under INA section 235, 8 U.S.C. § 1225, rather than INA section 236(c), 8 U.S.C. § 1226(c).

14. After receiving this position statement, I communicated with class counsel for the *Hamama* litigation. They informed me that they are seeking a determination from Judge Goldsmith of whether class members in ICE custody under 8 U.S.C. § 1225 are to be afforded the classwide bond hearings ordered by Judge Goldsmith.

15. As a result, on January 29, 2018, I filed a motion with the immigration court to continue Mr. Nissan's bond hearing until sometime promptly after February 25, 2018. In the motion, I informed the immigration court that the reason for seeking the continuance was to allow time for Judge Goldsmith to consider and decide whether ICE could continue to detain class members such as Mr. Nissan for more than 6 months without providing them a bond hearing.

16. The Motion to Continue was granted and the hearing to determine custody re-scheduled for February 14, 2018.

17. Mr. Nissan has been in mandatory detention for almost eight months now, even though he does not present either a danger or a flight risk.

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

Executed this 8th day of February, 2018, in Wayne County, Michigan.

Kevin J. Piecuch

DETAINED

Catherine M. Pincheck
Chief Counsel

Michael H. El-Zein
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DETROIT IMMIGRATION COURT

In the Matter of:

Firas NISSAN

In removal proceedings

File No.: A[redacted]

Immigration Judge: Hon. David H. Paruch

Next Hearing: unknown

THE DEPARTMENT OF HOMELAND SECURITY'S
POSITION STATEMENT

POSITION STATEMENT

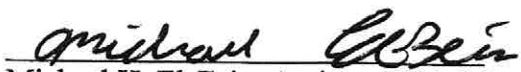
The Department of Homeland Security (Department) submits that the respondent is not eligible for a bond pursuant to the Order of the Honorable Mark A. Goldsmith in the United States District Court for the Eastern District of Michigan in the pending federal case of *Hamama, et al. v. Adducci*, No. 17-CV-11910, 2017 WL 2684477 (E.D. Mich., Jan. 2, 2018) (January Second Order). The respondent is not a member of the detained final order or mandatory detention subclasses, the only certified subclasses that qualify for what has been identified by the Court as a *Hamama* bond hearing pursuant to the January Second Order. *Id.* at 42-44.

The detained final order subclass consists of "All Primary Class Members with final orders of removal who are currently or will be detained in ICE custody, and who do not have an open individual habeas petition seeking release from detention." *Id.* at 43. The respondent in the instant matter is not subject to a final order of removal. The mandatory detention subclass consists of "All Primary Class Members whose motions to reopen have been or will be granted, who are currently or will be detained in ICE custody under the authority of the mandatory detention statute, 8 U.S.C. § 1226(c), and who do not have an open individual habeas petition seeking release from detention." *Id.* The respondent is an arriving alien being detained pursuant to the Department's authority under section 235 of the Act, not section 236(c).

Accordingly, this Court should proceed only with the respondent's previously requested custody hearing pursuant to 8 C.F.R. § 1003.19. As noted by the Department, the Court lacks jurisdiction to consider the respondent's request for bond because he is an arriving alien. 8 C.F.R. § 1003.19(h)(2)(i)(A); Exh. 1.

Respectfully submitted,

Catherine M. Pincheck, Chief Counsel

By: 

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(313) 568-6033

PROOF OF SERVICE

On January 19, 2018, the undersigned mailed a copy of this Department of Homeland Security's Position Statement to the respondent's attorney:

Kevin J. Piecuch, Esq.
174 Ridge Rd.
Grosse Pointe Farms, MI 48236

by regular mail specifically by placing such copy in my office's outgoing mail system in an envelope duly addressed.

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EXHIBIT 3

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

USAMA JAMIL HAMAMA, et al.,

Plaintiffs/Petitioners,

v.

REBECCA ADDUCCI, et al.,

Defendants/Respondents.

Case No. 2:17-cv-11910
Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

DECLARATION OF ALBERT H. VALK

I, Albert H. Valk, 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 an attorney in good standing licensed to practice law in the State of Michigan since 2004. I have practiced primarily in the area of immigration and nationality law since 2005.
2. I represent M.A.A., an Iraqi national who was ordered removed in 2005, in his immigration case.
3. In 1996, because of the danger he faced in Iraq, the U.S. military airlifted M.A.A. from northern Iraq to Guam. On arrival at the United States border, he was paroled into the country to allow him to seek asylum.
4. In 1997, the USCIS Asylum Office in San Francisco granted M.A.A. asylum, and he has lived in the United States ever since.

5. M.A.A. is married to a U.S. citizen; they have two U.S. citizen children.
6. M.A.A. is a Shia Muslim—a group that has frequently been targeted for brutal killings and other violent acts by the Islamic State in Iraq and both Sunni and Shia extremist paramilitary (PMF). M.A.A. is also a member of a small tribe and many members of M.A.A.'s tribe have experienced persecution on account of their tribal feud with another, much larger tribe closely associated with PMF forces in Iraq.
7. M.A.A. also fears returning to Iraq because he has provided assistance to the United States military on cultural training for many years at numerous training facilities. The training activities were aired internationally by TV France and Al-Jazeera, making his assistance well-known in Iraq.
8. M.A.A. further believes that his operation of a social media page supporting resettlement of Iraqi refugees in the United States, which has nearly 100,000 followers, would make him a target in Iraq. He has several times received threats as a result of the political beliefs he expresses on this page.
9. M.A.A. lost his asylee status in 2003 as a result of a criminal conviction; this rendered him potentially removable. In 2005, he was arrested by ICE and placed in removal proceedings. M.A.A. did not contest his removability, and the immigration court entered a removal order on September 28, 2005.

10. Because M.A.A. could not be repatriated to Iraq, ICE released him on an order of supervision; he has been reporting regularly under that order since 2005.

11. During a routine check in with ICE on August 8, 2017, M.A.A. was again detained; he is currently incarcerated by ICE at the Denver Contract Detention Facility in Aurora, Colorado.

12. On August 23, 2017, M.A.A. filed a motion to reopen with the Aurora Immigration Court based on changed country conditions and new law regarding of his criminal conviction that makes him eligible for relief.

13. The immigration judge granted M.A.A.'s motion, and reopened the case for consideration of all forms of relief. However, the Immigration Judge declined at that time to address bond, finding because M.A.A. was charged as an arriving alien on the original Notice to Appear (NTA), his detention was authorized by 8 U.S.C. § 1225(b); that meant his detention was mandatory and the immigration courts did not have jurisdiction to redetermine his custody.

14. ICE denied M.A.A.'s request to be released on parole on December 27, 2017.

15. At a hearing in immigration court on January 8, 2018, DHS conceded that under current law, the criminal conviction that had been deemed to bar him

from pursuing most relief from removal no longer has that effect. The Immigration Judge indicated that he was inclined to grant relief from removal. However, the background checks required for Immigration Judge to issue a decision have been pending for three months and there is no indication from ICE when it anticipates completion.

16. M.A.A. has been in continuous detention since August 8, 2017, even though he does not present either a danger or a flight risk.

17. As of February 5, 2018. M.A.A. has been detained by ICE for six months, a prolonged period of detention.

18. On January 30, 2018 at the M.A.A.'s most recent immigration court hearing, the immigration judge stated that he would conduct a bond hearing, on motion, once M.A.A. reaches 180 days in custody.

19. I have accordingly filed a motion for a bond hearing, and it is scheduled for February 13, 2018.

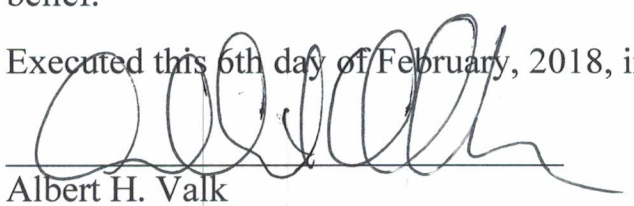
20. Based on the position I am aware ICE has taken in several other cases with similar postures involving Iraqi nationals with longstanding removal orders, it seems likely that at that hearing ICE will oppose the immigration court's jurisdiction to release M.A.A. on bond, taking the position that because he is detained under 8 U.S.C. § 1225 rather than 8 U.S.C. § 1226, he is not entitled to a bond hearing under this Court's January 2, 2018 order.

21. Since August, 2007 ICE has treated M.A.A. as a member of the class in *Hamama v. Adducci*. For example, I understand that his information has been disclosed to class counsel in that case. He received class notice. ICE also has acknowledged that the July 24, 2017 stay of removal prevents his current repatriation.

22. M.A.A.'s situation is not different in any material respect from the Petitioners discussed in the January 2, 2018 order. In order to ensure that he is treated like those other Petitioners, it would be helpful to get clarification from the Court on that order's reach.

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

Executed this 6th day of February, 2018, in Farmington Hills, Michigan.



Albert H. Valk

EXHIBIT 4

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

USAMA JAMIL HAMAMA, et al.,

Plaintiffs/Petitioners,

v.

REBECCA ADDUCCI, et al.,

Defendants/Respondents.

Case No. 2:17-cv-11910
Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

DECLARATION OF EMAN JAJONIE-DAMAN

I, Eman Jajonie-Daman, 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 an attorney in good standing licensed to practice law in the State of Michigan and federal court since 1992. I have been practicing immigration and nationality law exclusively for the past 15 years.
2. I represent Hadeel Khalasawi, a class member in the *Hamama* litigation, in his immigration case.
3. Mr. Khalasawi is an Iraqi national who has been subject to a final order of removal since April 9, 1997.
4. Mr. Khalasawi had been living in the community on an order of supervision since June 1997. He was detained by ICE on June 11, 2017, when he was at home with his family.

10. On December 22, 2017, Mr. Khalasawi was returned to ICE custody after he pled guilty to misdemeanor attempted larceny; he was sentenced by MCCC to 163 days in jail and was deemed to have satisfied his sentence through credit for 163 days served in ICE custody.

11. During the time that he was writted out to the Macomb County Jail, ICE never lifted the hold it had placed on Mr. Khalasawi.

12. As of January 2, 2018, Mr. Khalasawi had been detained for six months or more. Therefore, pursuant to the order in *Hamama v. Adducci* dated January 2, 2018, EOIR scheduled my client for a bond hearing on January 26, 2018.

13. On January 22, 2018, I received a call from the clerk of the immigration court stating that the government had cancelled Mr. Khalasawi's bond hearing. No reason was provided for the cancellation.

14. I placed several calls to DHS attempting to determine why my client's hearing had been cancelled. None of my calls were returned.

15. On January 23, 2018, I filed a motion in immigration court on my client's behalf, seeking a bond hearing and requesting the same date to be kept. My bond hearing was reset for January 26, 2018.

16. DHS counsel never filed any objections to my motion for bond hearing or any written document explaining why a bond hearing should not be granted. However, at the bond hearing before Immigration Judge Mark Jebsen, DHS

argued that Mr. Khalasawi was not entitled to a bond hearing under this Court's January 2 order because he had not come into ICE custody until, most recently, December 22, 2017, and therefore had not been in custody for 180 days.

17. After much argument, Judge Jebsen found that ICE's decision to temporarily writ Mr. Khalasawi out to MCCC did not toll or reset this Court's six-month clock. Because ICE detention began on June 11, 2017, Mr. Khalasawi was entitled to a bond hearing, which was duly held. Unfortunately, he was denied bond.

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

Executed this 6th day of February 2018, in Warren, Michigan.

Eman Jajonie-Daman

EXHIBIT 5

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

USAMA JAMIL HAMAMA, et al.,

Plaintiffs/Petitioners,

v.

REBECCA ADDUCCI, et al.,

Defendants/Respondents.

Case No. 2:17-cv-11910
Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

DECLARATION OF DALIA KEJBOU

I, Dalia Kejbou, 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 an attorney in good standing licensed to practice law in the State of Michigan and the Federal Courts. I have extensive experience in the area of immigration law.
2. I represent Paul Rasho in his immigration case.
3. Mr. Rasho was born in Lebanon, while his family was en-route to the United States. Both his parents were born in Iraq and therefore, citizens of Iraq.
4. Mr. Rasho is considered a citizen and national of Iraq.
5. Mr. Rasho came to the United States in 1975 as a conditional entry refugee.
6. On February 15, 2002, Mr. Rasho was ordered removed to Lebanon, his country of birth, by an immigration judge. On the record in that proceeding,

the immigration judge also mentioned Iraq as an alternate place of removal; however, only Lebanon in the final removal order.

7. Mr. Rasho was previously detained by ICE in 2008 and was released pursuant to an order of supervision dated March 8, 2008. An addendum attached to his Order of Supervision, dated April 8, 2008, required him to request travel documents from both Lebanon and Iraq.

8. Mr. Rasho complied with the terms of the order of supervision, but both Lebanon and Iraq denied his request for travel documents.

9. Lebanon did not accept his repatriation.

10. After complying with his order of supervision for years, Mr. Rasho was again detained by ICE on June 11, 2017, when ICE came to his home in the early morning hours.

11. It is my understanding, that ICE is currently attempting to deport Mr. Rasho to Iraq, based on the fact that he is an Iraqi national under the laws of Iraq. That's what his deportation officer has told him, and that is why ICE has insisted on his cooperation in seeking (so far unsuccessfully) to obtain travel papers from Iraq.

12. Since the *Hamama* litigation began, ICE has treated Mr. Rasho as a class member. To the best of my knowledge, he has been included in court-ordered data disclosures to class counsel. He has received court ordered

notice, and ICE has regarded him as covered by the Court's July stay of removal. He was part of the nationwide sweep that occurred on June 11, 2017, and was told that he would be deported to Iraq.

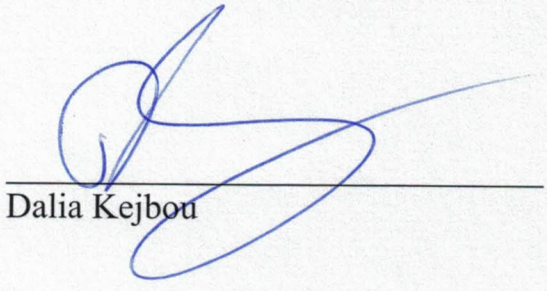
13. Although Mr. Rasho has been in ICE custody for more than 180 days, EOIR has not scheduled him for a bond hearing.

14. When I called the Immigration Court to find out why Mr. Rasho had not been scheduled for a bond hearing, I was told by the scheduling clerk, Summer, that Mr. Rasho had not been included on the bond hearing list because his information states that he was "born in Lebanon."

15. I believe Mr. Rasho is properly considered a *Hamama v. Adducci* Detained Final Order subclass member—his appeal on the Motion to Reopen is pending before the Board of Immigration Appeals. Therefore, he should be entitled to a bond hearing.

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

Executed this 7th day of February, 2018, in Bloomfield Hills, Michigan.



Dalia Kejbou

EXHIBIT 6

Catherine M. Pincheck
Chief Counsel

Tara L. Harris
Deputy Chief Counsel
U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement
333 Mt. Elliott, Second Floor
Detroit, MI 48207
(313) 568-6033

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DETROIT IMMIGRATION COURT

In the Matter of:

[redacted]

In removal proceedings

File No: A[redacted]

Immigration Judge: Paruch

Next Hearing: February 1, 2018

THE DEPARTMENT OF HOMELAND SECURITY'S AMENDED POSITION STATEMENT ON BOND ELIGIBILITY

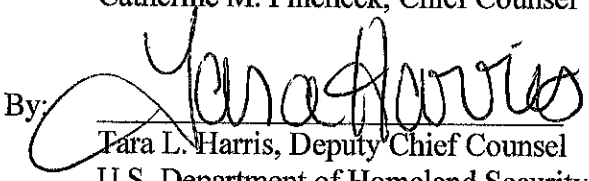
POSITION STATEMENT

The Department of Homeland Security (Department) submits that the respondent is not eligible for a bond pursuant to the Order of the Honorable Mark A. Goldsmith in the United States District Court for the Eastern District of Michigan in the pending federal case of *Hamama, et al. v. Adducci*, No. 17-CV-11910, 2017 WL 2684477 (E.D. Mich., Jan. 2, 2018) (January Second Order). The respondent is not a member of the detained final order or mandatory detention subclasses, the only certified subclasses that qualify for what has been identified by the Court as a *Hamama* bond hearing pursuant to the January Second Order. *Id.* at 42-44.

The detained final order subclass consists of "All Primary Class Members with final orders of removal who are currently or will be detained in ICE custody, and who do not have an open individual habeas petition seeking release from detention." *Id.* at 43. The mandatory detention subclass consists of "All Primary Class Members whose motions to reopen have been or will be granted, who are currently or will be detained in ICE custody under the authority of the mandatory detention statute, 8 U.S.C. § 1226(c), and who do not have an open individual habeas petition seeking release from detention." *Id.* The Department previously submitted a position on bond indicating it did not believe the respondent qualified for a *Hamama* bond hearing because the respondent was admitted to the United States under the Visa Waiver Program. The Department continues to believe that the respondent is not eligible for a *Hamama* bond hearing, but clarifies it is because as a prior S Visa holder he is not subject to a removal order, rather a determination to deport has been made in accord with 8 C.F.R. § 242.26. Tab A, 8 C.F.R. § 242.26. The respondent has no right to contest that determination and the respondent is aware of the same. Tab B, Form I-854. Moreover, 8 C.F.R. § 242.26(c)(2) directs that such respondents be immediately taken into custody.

Respectfully submitted,

Catherine M. Pincheck, Chief Counsel

By: 

Tara L. Harris, Deputy Chief Counsel
U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement
333 Mt. Elliott, Second Floor
Detroit, MI 48207
(313) 568-6033

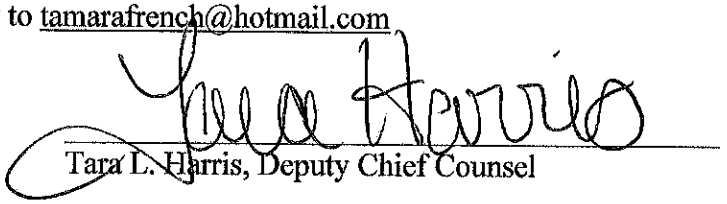
PROOF OF SERVICE

On January 31, 2018, the undersigned mailed a copy of this Department of Homeland Security's Amended Position Statement and any attached pages to the respondent's attorney:

Tamara French, Esq.
4632 Second Ave
Detroit, MI 48201

by regular mail specifically by placing such copy in my office's outgoing mail system in an envelope duly addressed.

Additionally, I e-mailed a copy to tamarafrench@hotmail.com



Tara L. Harris, Deputy Chief Counsel

the authority of a warrant of arrest issued by an officer listed in §242.2(c)(1) of this chapter. Pursuant to section 242(a)(2)(A) of the Act, the deciding Service officer shall not release an alien who has not been lawfully admitted. Pursuant to section 242(a)(2)(B) of the Act, the deciding Service officer may release an alien who has been lawfully admitted if, in accordance with §242.2(h) of this chapter, the alien demonstrates that he or she is not a threat to the community and is likely to appear at any scheduled hearings. The decision of the deciding Service officer concerning custody or bond shall not be administratively appealable during proceedings initiated under section 242A(b) of the Act and this section.

(h) *Record of proceeding.* The Service shall maintain a record of proceeding for judicial review of the Final Administrative Deportation Order sought by any petition for review. The record of proceeding shall include, but not necessarily be limited to: the charging document (Notice of Intent); the Final Administrative Deportation Order (including any supplemental memorandum of decision); the alien's response, if any; all evidence in support of the charge; and any admissible evidence, briefs, or documents submitted by either party respecting deportability or relief from deportation.

(i) Effective March 3, 1997, the Service will cease issuance of both Form I–851 and Form I–851A. The Service retains the authority to execute at any time Form I–851A that is final before March 3, 1997. The Service will resume the issuance of Form I–851 and Form I–851A after April 1, 1997, pursuant to regulations implementing section 238(b) of the Act, as amended by the Illegal Immigration Reform and Responsibility Act of 1996.

[60 FR 43961, Aug. 24, 1995, as amended at 61 FR 69020, Dec. 31, 1996]

EFFECTIVE DATE NOTE: At 61 FR 69020, Dec. 31, 1996, §242.25 was amended by adding a new paragraph (i), effective Mar. 3, 1997.

§242.26 Deportation of S–5, S–6, and S–7 nonimmigrant.

(a) *Condition of classification.* As a condition of classification and continued stay in classification pursuant to section 101(a)(15)(S) of the Act, nonimmigrants in S classification must have executed Form I–854, Part B, certifying that they have knowingly waived their right to a deportation hearing and right to contest, other than on the basis of an application for withholding of deportation, any deportation action, including detention pending deportation, instituted before lawful permanent resident status is obtained.

(b) *Determination of deportability.* A determination to deport an alien classified pursuant to section 101(a)(15)(S) of the Act shall be made by the district director having jurisdiction over the place where the alien is located.

(1) A determination to deport such an alien shall be based on one or more of the deportation grounds listed in section 241 of the Act based on conduct committed after, or conduct or a condition not disclosed to the Service prior to, the alien's classification as an S nonimmigrant under section 101(a)(15)(S) of the Act, or for a violation of, or failure to adhere to, the particular terms and conditions of status in S nonimmigrant classification.

(c) *Deportation procedures.* (1) A district director who determines to deport an alien witness or informant in S nonimmigrant classification shall notify the Commissioner, the Assistant Attorney General, Criminal Division, and the relevant LEA in writing to that effect. The Assistant Attorney General, Criminal Division, shall concur in or object to that decision. Unless the Assistant Attorney General, Criminal Division, objects within 7 days, he or she shall be deemed to have concurred in the decision. In the event of an objection by the Assistant Attorney General, Criminal Division, the matter will be expeditiously referred to the Deputy Attorney General for a final resolution. In no circumstances shall the alien or the relevant LEA have a right of appeal from any decision to deport.

(2) A district director, who has provided notice as set forth in paragraph (c)(1) of this section and who has been advised by the Commissioner that the Assistant Attorney General, Criminal Division, has not objected, shall issue a warrant of deportation. The alien shall immediately be arrested and taken into custody by the district director

initiating the deportation. An alien classified under the provisions of section 101(a)(15)(S) of the Act who is determined, pursuant to a warrant issued by a district director, to be deportable from the United States shall be deported from the United States to his or her country of nationality or last residence. The LEA who requested the alien's presence in the United States shall ensure departure from the United States and so inform the district director in whose jurisdiction the alien has last resided. The district director, if necessary, shall oversee the alien's departure from the Untied States and, in any event, shall notify the Commissioner of the alien's departure.

(d) *Withholding of deportation.* An alien classified pursuant to section 101(a)(15)(S) of the Act who applies for withholding of deportation shall have 10 days from the date the warrant of deportation is served upon the alien to file an application for such relief with the district director initiating the deportation order. The procedures contained in 8 CFR 208.2 and 208.16 shall apply to such an alien who applies for withholding of deportation.

[60 FR 44268, Aug. 25, 1995]

PART 243—DEPORTATION OF ALIENS IN THE UNITED STATES

Sec.

243.1 Final order of deportation.
243.2 Warrant of deportation.
243.3 Expulsion.
243.4 Stay of deportation.
243.5 Self-deportation.
243.6 Notice to transportation line.
243.7 Special care and attention for aliens.
243.8 Imposition of sanctions.

AUTHORITY: 8 U.S.C. 1103, 1253.

SOURCE: 26 FR 12113, Dec. 19, 1961, unless otherwise noted.

§ 243.1 Final order of deportation.

Except as otherwise required by section 242(c) of the Act for the specific purposes of that section, an order of deportation, including an alternate order of deportation coupled with an order of voluntary departure, made by the special inquiry officer in proceedings under part 242 of this chapter shall become final upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken; or, if such an order is issued by the Board or approved by the Board upon certification, it shall be final as of the date of the Board's decision.

§ 243.2 Warrant of deportation.

A Form I–205, Warrant of deportation, based upon the final administrative order of deportation in the alien's case shall be issued by a district director. The district director shall exercise the authority contained in section 243 of the Act to determine at whose expense the alien shall be deported and whether his/her mental or physical condition requires personal care and attention en route to his/her destination.

[54 FR 39337, Sept. 26, 1989]

§ 243.3 Expulsion.

(a) *Execution of Order.* Except in the exercise of discretion by the district director, and for such reasons as are set forth in § 212.5(a) of this chapter, once an order of deportation becomes final, an alien shall be taken into custody and the order shall be executed. For the purposes of this part, an order of deportation is final and subject to execution upon the date when any of the following occurs:

(1) A grant of voluntary departure expires;

(2) An immigration judge enters an order of deportation without granting voluntary departure or other relief, and the alien respondent waives his or her right to appeal;

(3) The Board of Immigration Appeals enters an order of deportation on appeal, without granting voluntary departure or other relief; or

(4) A federal district or appellate court affirms an administrative order of deportation in a petition for review or habeas corpus action.

(b) *Service of decision.* In the case of an order entered by any of the authorities enumerated above, the order shall be executed no sooner than 72 hours after service of the decision, regardless of whether the alien is in Service custody, *provided* that such period may be waived on the knowing and voluntary request of the alien. Nothing in this

EXHIBIT 7

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

USAMA JAMIL HAMAMA, et al.,

Plaintiffs/Petitioners,

v.

REBECCA ADDUCCI, et al.,

Defendants/Respondents.

Case No. 2:17-cv-11910
Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

DECLARATION OF BRADLEY MAZE

I, Bradley Maze, 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 an attorney in good standing licensed to practice law in the State of Michigan since 2006. I have practiced primarily in the area of immigration and nationality law since 2006.

Wisam Ibrahim

2. I have been retained as immigration counsel by Wisam Ibrahim, a class member in this litigation currently detained by U.S. Immigration and Customs Enforcement (ICE) at the Calhoun County Correctional Facility. I am representing Mr. Ibrahim pro bono.
3. I met with Mr. Ibrahim on February 7, 2018, and discussed his immigration case with him.

4. Mr. Ibrahim told me that while he had previously wanted to be removed to Iraq, he has changed his mind. He now wants to fight his immigration case and seek to stay in the United States.
5. Mr. Ibrahim agreed to a psychiatric evaluation by Dr. Debra Pinals, whom I understand has been recruited to do that evaluation by class counsel in this litigation.

A.S.

6. I am also immigration counsel for another class member in this litigation, whose initials are A.S.
7. Because he has been in immigration detention for over six months, on January 31, 2018, A.S. was the subject of a bond hearing held pursuant to this Court's order. Immigration Judge David Paruch granted A.S. release on a bond of $20,000, finding that he was not a danger to the community and that the bond amount would mitigate any flight risk.
8. At the hearing, ICE reserved appeal. A day later, an ICE lawyer told me on the phone that they would probably appeal. It appears that on February 5, 2018 ICE filed an Emergency Stay of the bond order by fax to the Board of Immigration Appeals (BIA). (I was not served by fax of this Stay request). It was only on February 6, 2018 when I received a call from the clerk's office at the BIA that I was informed a stay of the bond order had been

granted in A.S.'s case; that was when I found out that the appeal and stay motion had been filed. I was not verbally informed by ICE about this Emergency Stay filing and was only served with ICE's filings on February 7, 2018 two days after the Emergency Stay was filed with the BIA and one day after the BIA issued its stay. Of course ICE (and the Executive Office for Immigration Review) knew that I was counsel in the case. Thus, I had no chance to reply before the BIA issued its Stay order.

9. I had not filed a formal appearance in the BIA because, until ICE appealed, there was no case in the BIA in which to appear. I have now filed an appearance in the BIA in the case.

10. In my experience, it frequently happens in situations of "emergency" motions, such as motions seeking discretionary stays of bond releases, that the BIA rules before the responding party has time to file anything. That is what happened here.

11. If I had received ICE's appeal or its stay motion, I would have filed an opposition to the motion. Judge Paruch's bond decision was very reasonable, particularly in light of this Court's order allocating the burden of persuasion to the government, and adopting a clear and convincing evidence standard. Having not seen ICE's filing for an emergency stay, I did not know on what basis the government was appealing that decision and filing a stay of the

bond order. Now that I have received the filing, after the fact, I see that it does not ask for immediate evaluation of the facts by the BIA, but rather asks for a stay "*until* it [the BIA] has had an opportunity to meaningfully evaluate the facts and evidence of record and determine whether the respondent has shown that he does not pose a risk of danger to the community."

12. The BIA grants discretionary stays of bond releases pursuant to 8 C.F.R. § 1003.19(i)(1). No standard has been announced or applied for these stays. In my experience, BIA grants usually these motions out of what seems to be an overabundance of caution, not based on any particular features of the case. I am aware of several other attorneys representing *Hamama* class members where ICE sought an emergency stay without notice to the attorney and the BIA granted the stay before the attorney even knew that a stay request had been filed.

13. In my experience, bond appeals take at least four months for the BIA to decide, and often longer.

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

Executed this 8th day of February, 2018, in Southfield, Michigan.

Bradley Maze