No. 17-2171/18-1233

IN THE UNITED STATES COURT OF APPEALS

FOR THE 6th CIRCUIT

USAMA JAMIL HAMAMA, ET. AL.,

Petitioners-Appellees,

v.

THOMAS HOMAN, Deputy Director and

Senior Official Performing the Duties of the Director,

U.S. Immigration and Customs Enforcement, et al.,

Respondent-Appellants.

AMICUS CURIAE BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS-APPELLEES' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE FORM:

I, Cynthia Nunez, attorney for amicus curiae, certify that the American Immigration Lawyers' Association is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Date: February 8, 2019

/s/ Cynthia Nunez
Cynthia Nunez
Attorney for Amicus Curiae

RULE 29(A)(4)(E) STATEMENT

Pursuant to FRAP 29(a)(4)(E), amicus curiae affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation or submission of this brief.

Date: February 8, 2019

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Amicus Curiae, AILA, does not request oral argument in this matter.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, the American Immigration Lawyers Association (AILA), files the following brief in support of Plaintiffs-Appellees. Fed. R. App. P. 29(a). All parties have consented to the filing of this amicus brief; therefore, no motion is required seeking leave of this Court. Fed. R. App. P. 29(a)(2).

AILA is a national association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and

naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. Members of AILA practice regularly before the Department of Homeland Security (DHS) and the Executive Office of Immigration Review, including the Board of Immigration Appeals (BIA) and immigration courts, as well as before United States District Courts, United States Courts of Appeals, and the United States Supreme Court. In light of the severe consequences faced by petitioners-appellees in this matter, AILA submits this brief in support of their position and with the hope of providing the Court with additional information regarding the mechanics of a Motion to Reopen in these matters.

INTRODUCTION

There is no more dire circumstance in immigration law than the moment an individual asks this government to review his removal, if that removal to his home country may result in his persecution, torture or, death. A Motion to Reopen Removal Proceedings based on changed country conditions, in order to seek review of, and cease the execution of, a removal order, is a time-consuming and complex legal process, in large part due to the government's own bureaucratic weight, the difficulty in obtaining and reviewing records and evidence particularized to each individual respondent, and (in cases such as this where multiple such motions become necessary at once) the sudden strain on a community affected by mass round-up of its members. The life of a non-detained individual with an outstanding removal order is often a supervised life. Immigration and Customs Enforcement (ICE) continues to supervise, through the years or decades, many of those persons whom it is unable to remove. Those who are compliant with ICE Orders of Supervision remain free from detention and are eligible to receive work permits; those whom become non-compliant, are re-detained. Prior to ICE's action in restarting deportations to Iraq and detaining the class members, there was no reason for the class members to believe that they were

at any risk for removal, and thus no reason for them to start the arduous process of seeking to reopen their removal orders.

SUMMARY OF ARGUMENT

The initial amicus curiae brief, filed February 9, 2018, by the American Immigration Lawyers Association (AILA) sought to advise this Court on Motions to Reopen by describing the "who, what, when, where, why, and how" of a Motion to Reopen. In this amicus brief, filed in support of the ACLU's Petition for Rehearing En Banc, AILA will primarily focus on the "when" of a "Motion to Reopen" since this seemed to be one significant distinction between the majority and dissenting opinions. *See* page 11-12 of ACLU Brief. The majority opinion ruled that Petitioners should have filed their Motions to Reopen sooner and cannot complain now that the government suddenly seeks their removal with no warning. The dissent points out the "Kafkaesque" taint of such a holding given the ineffectiveness of Motions to Reopen in these circumstances.

The mechanics of filing a Motion to Reopen with either the immigration court or the Board of Immigration Appeals (BIA) can be a highly-complex and time-consuming process even for the most-seasoned immigration attorney. While the statute, regulations, and case law set forth the elements of a Motion to Reopen based on "changed country conditions" or other changes in the law that affect an individual's removability, AILA practitioners know that the burdens of proof are

high, the evidentiary development demanding, and that it takes substantial time to gather the necessary supporting documents, many of which are in the possession of the Government. Before June 2017, these Petitioners were not removed despite final orders of removal due to a reported refusal on the part of Iraq to repatriate them. In June 2017, ICE officials announced, after arresting Petitioners en masse, that a new agreement between the U.S. and Iraq that would now permit their repatriation to Iraq.

Additionally, the life of a non-detained Respondent who has an outstanding removal order and is released on an ICE Order of Supervision is a life in which ICE demands, over the years or decades of supervision, compliance with many requirements. An ICE Order of Supervision provides ongoing contact over time during which ICE updates the Respondent on the status of their removal and confirms Respondent's compliance with the Order. A Respondent can request an administrative stay from ICE if ICE advises that his removal date may be drawing close. If a request for an administrative stay is denied, then a Respondent might take on the more onerous and costly task of filing a Motion to Stay Removal concurrently with a Motion to Reopen Removal Proceedings due to changed circumstances with the immigration court or Board of Immigration Appeals (BIA). A stay motion may not be considered by an immigration judge or the BIA unless removal is imminent. The adjudication of a Motion to Reopen can take several

months or years during the relevant period of time in this case. Until June 2017, the removal of Iraqis with outstanding removal orders from the United States was not imminent.

ARGUMENTS

A. THE "WHEN" OF A MOTION TO REOPEN

Generally, a Motion to Reopen must be filed within 90 days from the date of a final removal order; however, there are exceptions. 8 U.S.C. § 1229a(c)(6); 8 C.F.R. § 1003.2(c)(2); *Matter of Susma*, 22 I & N Dec. 947 (BIA 1999). A Motion to Reopen may occur beyond this 90-day time limit (1) if the filing is joint and agreed upon by all the parties, (8 C.F.R. §§ 1003.23(b)(1), 1003.2(c)(3)(iii)) (2) if the BIA or IJ decides to do so *sua sponte*, (8 U.S.C. §§ 1003.2(a); 1003.23(b)(1), respectively) (3) if ineffective assistance of counsel has equitably tolled this time limit, (4) if an *in absentia* order was entered and improper notice or exceptional circumstances were later determined, (8 U.S.C. § 1229a(b)(5)(C)) (5) if the government requests reopening due to fraud in the original proceedings or if a subsequent criminal conviction supports termination of asylum, (8 C.F.R. §§ 1003.23(b)(1), 1003.2(c)(3)(*iv*) and (6) if there are changed circumstances arising in the respondent's home country or country to which deportation has been ordered materially affecting a respondent's eligibility for asylum, withholding of removal,

and protection under the CAT. 8 U.S.C. § 1229a(c)(7)(C)(*ii*); *Id.*; 8 C.F.R. § 1003.23(b)(4)(*iv*).

The panel majority determined that Petitioners sat on their rights to file a Motion to Reopen Removal Proceedings based on changed country conditions and cannot complain now that there is little time left to effectively present their cases. But, while the federal government was unable or unwilling to remove Iraqi nationals to Iraq, it would have been a waste of time and resources for plaintiffs-appellees to file a Motion to Reopen when the federal government was making no efforts to effect their removal.

A similar situation was addressed in the Second Circuit with regard to Petitions for Review, in *In re Immigration Petitions for Review Pending in the U.S. Court of Appeals for the Second Circuit*, 702 F.3d 160 (2d Cir. 2012). There, the Court of Appeals for the Second Circuit developed a procedure to avoid adjudication of petitions for review that had no immediate need for determination given the government's lack of desire or ability to remove particular individuals (either as a matter of prosecutorial discretion or because of difficulty obtaining travel documents). As the Second Circuit stated, "it is wasteful to commit judicial resources to immigration cases when circumstances suggest that, if the Government prevails, it is unlikely to promptly effect the petitioner's removal." 702 F.3d at 160. Under those circumstances, the Second Circuit indicated that "the

adjudication of the petition will be merely an empty exercise tantamount to issuing an advisory opinion." *Id.* at 161. Petitioners here should not be punished for having failed to engage in such an "empty exercise" triggering "wasteful" use of immigration court or BIA resources at a time when adjudication of their motions would have been "merely an empty exercise tantamount to issuing an advisory opinion." *Id.* at 160-161.

The court below ordered that plaintiffs must be given 90 days from the receipt of their A-file and Record of Proceedings within which to file their Motions to Reopen. As discussed below, this outcome ensures that class members will have the opportunity to seek lasting relief to avoid removal from the United States.

B. WHY IT WAS UNREASONABLE OR IMPRACTICABLE FOR PETITIONERS TO HAVE FILED THE RELEVANT MOTIONS PRIOR TO JUNE 2017

This labyrinth of immigration law becomes more complex when a Motion to Stay Removal is added into the equation. ICE, under the authority of the Attorney General, can issue administrative stays of removal. 8 U.S.C. § 1231(c)(2); 8 C.F.R. § 241.6. This is different from stays of removal that immigration judges or the BIA may or may not issue. Prior to the mass-roundup by ICE in June 2017, Petitioners had been released from detention long ago and were living their lives under Orders of Supervision issued by ICE. 8 U.S.C. § 1231(a)(3). An Order of Supervision defines those terms and conditions under which an individual may

continue to live outside of a detention facility. For Petitioners who were under long-standing Orders of Supervision, it was likely that they had to report to the local ICE office once yearly, refrain from all criminal activity, advise ICE of any address changes, apply for and work under lawful employment authorization, and obtain a valid passport if possible. Compliance with an Order of Supervision is critical to remaining free from detention. If there was non-compliance, a person would be re-detained.

In many cases, a noncitizen with an outstanding removal order learns that the government would soon be seeking his removal while at a reporting session with ICE under this Order of Supervision. The noncitizen may then apply for an administrative stay of removal from ICE. *Id.* This may be one of the "multiple avenues" of relief referenced in the majority opinion. *See* Panel decision, at page 9. During the period of time relevant to these Petitioners, administrative stays were usually granted in six-month or yearly increments. For a period of time in past administrations, ICE might even discourage this administrative act as unnecessary if they had no plan to yet remove an individual pursuant to the outstanding removal order. Like the Second Circuit stated in *In re Immigrant Petitions for Review Pending in the U.S. Court of Appeals for the Second Circuit*, *supra*, ICE sought to eliminate unnecessary adjudications – if there were no plans to remove a person, why add to already-burdened workloads?

In some instances, individuals might seek administrative stays from ICE in order to secure a removal as orderly as possible – i.e., winding down their businesses, securing for a proper transfer of their property, planning with their family for separation or unified return to their native country. These administrative stays, though still voluminous, could be less costly in legal fees and could be less burdensome to both the individuals and the government.

Although individuals who are not granted administrative stays may opt to file a motion for a stay of removal with the immigration court, this is only possible in conjunction with a motion to reopen or motion to reconsider. *See* Immigration Court Practice Manual, § 8.3. And therein lies the problem. As discussed elsewhere, it takes months to gather the necessary documents to draft and file a motion to reopen, and under the circumstances of this case, the class members did not have months.

ICE might also detain an individual at a supervision appointment if it believes the individual is a flight risk. Although such detention may be proper in some limited circumstances where there is an imminent removal, it is difficult to see how individuals who have been living in the community, with families and businesses, and reporting regularly to ICE over a long-term period would present such risks.

The Government changed the status quo in Petitioners' cases by engaging in a surprise, mass round-up of individuals who were compliant with their Orders of Supervision or living under an administrative stay of removal. Once detained, it became a great deal more difficult for the Petitioners to take the actions necessary to protect their interests, such as locating counsel, obtaining copies of the administrative records, and obtaining evidence from home to support motions to reopen. Had Petitioners known that the government intended to change its policy regarding their cases, they surely would have taken action earlier. But absent intervention from the court below, members of the class with bona fide claims for relief would have been deported without the opportunity to avail themselves of their statutory right to seek reopening. The Petitioners filed the present action merely to preserve their statutory right to seek protection from harm in Iraq. The District Court's order here very likely saved at least one class member's life.

C.THE DISTRICT COURT'S LIMITED ORDER ENSURED THAT CLASS MEMBERS WERE AFFORDED THE OPPORTUNITY TO SEEK RELIEF DUE TO CHANGED COUNTRY CONDITIONS.

The district court's stay of removal provided a limited window of time for Petitioners to exercise their statutory right to seek relief through a Motion to Reopen due to changed circumstances or changed country conditions. Class members were not able to file their motions to reopen immediately upon being detained because of the difficulty of obtaining the records and supporting

documents, and any request for an emergency stay would have almost certainly been denied by the immigration court or BIA if the accompanying motion to reopen was not well-developed. As a result, ICE would have removed many class members before their motions could be adjudicated. Notably, applicants whose stays have been denied while their motions to reopen remain pending would not be able to seek a stay in conjunction with a petition for review because there would be no appealable final order. 8 U.S.C. § 1252(a)(1).

The district court's order provided a narrow and effective remedy given the unique facts of these cases to preserve the Petitioners' statutory right to seek meaningful relief.

SIGNED CONCLUSION

Amicus curiae, American Immigration Lawyers Association, respectfully request that this Honorable Court accept and consider this brief in the above-captioned matter and grant rehearing en banc.

Dated: February 8, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it is has, excluding the exempted portions, 2,200 words and 188 lines of text. The type-face is Times New Roman, 14-point.

/s/Cynthia M. Nunez
Cynthia M. Nunez
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Dated February 11, 2019

CERTIFICATE OF SERVICE

I, Cynthia M. Nunez, certify that I served "Amicus Curiae Brief of AILA in Support of Petitioners-Appellees' Petition for Rehearing En Banc" to all counsel of record through the CM/ECF system.

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Dated February 11, 2019