No. 19-1080

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, et al.,

Petitioners-Appellees,

v.

REBECCA ADDUCCI, Director of the Detroit District of United States Immigration and Customs Enforcement, et al.,

Respondents-Appellants.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

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

PETITIONERS-APPELLEES' BRIEF

ORAL ARGUMENT REQUESTED

Miriam J. Aukerman (P63165)
American Civil Liberties Union
Fund of Michigan
1514 Wealthy Street SE, Ste 260
Grand Rapids, MI 49506
(616) 301-0930
maukerman@aclumich.org

Counsel for Appellees

Judy Rabinovitz (NY Bar JR-1214)
Lee Gelernt (NY Bar LG-8511)
Anand Balakrishnan (Conn. Bar 430329)
American Civil Liberties Union
Foundation Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2618
jrabinovitz@aclu.org
lgelernt@aclu.org
abalakrishnan@aclu.org

Margo Schlanger (P82345)
Cooperating Attorney, ACLU Fund of Michigan
625 South State Street
Ann Arbor, Michigan 48109
734-615-2618
margo.schlanger@gmail.com

Counsel for Appellees

Nadine Yousif (P80421)
Cooperating Attorney, ACLU Fund of Michigan
Code Legal Aid Inc.
27321 Hampden St.
Madison Heights, MI 48071
(248) 894-6197
nadinek@codelegalaid.com

Counsel for Appellees

Counsel for Appellees
Kimberly L. Scott (P69706)
Wendolyn Wrosch Richards (P67776)
Cooperating Attorneys, ACLU Fund of Michigan
Miller, Canfield, Paddock & Stone, PLC
101 N. Main St., 7th Floor
Ann Arbor, MI 48104
(734) 668-7696
scott@millercanfield.com
richards@millercanfield.com

Counsel for Appellees

William W. Swor (P21215)
William W. Swor & Associates
1120 Ford Building
615 Griswold Street
Detroit, MI 48226
wwswor@sworlaw.com

Counsel for Appellee Usama Jamil Hamama

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-1080 Case Name: Usama Hamama, et al. v. Rebecca Adducci, et al.

Name of counsel: Kimberly L. Scott

Pursuant to 6th Cir. R. 26.1, Petitioners-Appellees
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on August 2, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Kimberly L. Scott
101 N. Main Street
Ann Arbor, MI 48104

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

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Petitioners-Appellees (hereinafter Petitioners) respectfully request oral argument. The issues in this case are important and the Court will be aided by the opportunity to question counsel about the legal issues and voluminous record.

INTRODUCTION

U.S. Immigration and Customs Enforcement (ICE) detained hundreds of Iraqis in June 2017. The district court ordered their release eighteen months later, unless Respondents showed a justification for continued detention. The order has two independent bases:

First, "because the record unquestionably demonstrates that there is no significant likelihood of repatriation in the reasonably foreseeable future," Op., R.490, Pg.ID#14171, the court concluded that Petitioners' continued incarceration violated constitutional and statutory limits on prolonged immigration detention.

Second, the court ordered release to sanction Respondents' misconduct, finding that "[f]rom the earliest stages of this case, the Government made demonstrably false statements to the Court designed to delay the proceedings," "withholding documents adverse to its position in the hope that its situation will improve in the future," and willfully failing to comply with court orders. *Id.*, Pg.ID#14194-96. The misconduct "deprived [Petitioners] of more than a year of their lives with their families and their communities." *Id.*, Pg.ID#14195.

Either basis fully justifies the release order. This Court should affirm.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under 28 U.S.C. §1292(a)(1).

STATEMENT OF ISSUES

1. Did the district court err in holding that Petitioners cannot be detained indefinitely, and were its factual findings—that Petitioners provided good reason to believe removal was not significantly likely in the reasonably foreseeable future and Respondents failed to rebut that showing—clearly erroneous?
2. Did the district court clearly err in finding that Respondents knowingly presented false evidence, purposefully obstructed discovery, and acted in bad faith, and did it abuse its discretion in determining an appropriate sanction?
3. Did 8 U.S.C. §1252(f)(1) eliminate the district court's authority to grant class-wide habeas relief, sanctions, or declaratory relief, and did the district court abuse its discretion in finding that Petitioners' *Zadvydas* claim presents common legal and factual questions that can be answered on a class-wide basis?

STATEMENT OF THE CASE

I. Procedural History.

Respondents' account of the procedural history is largely correct, with several additions:

On 11/7/2017, Petitioners sought preliminary relief on three detention-

related claims, including the *Zadvydas* claim, as well as class certification. R.138, Pg.ID#3338-3733; R.139, Pg.ID#3734-3836. On 1/2/2018, the Court certified a *Zadvydas* Subclass, defined as "[a]ll Primary Class Members, who are currently or will be detained in ICE custody, and who do not have an open individual habeas petition seeking release from detention."[1] Op., R.191, Pg.ID#5348. The court deferred decision on Petitioners' *Zadvydas* claim, finding that "[i]t is still an open question whether Iraq has agreed to accept class-wide repatriation" and "a more developed record is necessary to answer this question." *Id.*, Pg.ID#5334.

A protracted discovery battle followed. On 8/29/2018, Petitioners filed a renewed motion for *Zadvydas* relief, refiled at R.473, and a motion for sanctions, refiled at R.476. The court scheduled an evidentiary hearing, but converted it to oral argument after Respondents failed to comply with discovery orders. Order, R.452, Pg.ID#11266.

There has been no further development of the record; substantive proceedings have been stayed. Order, R.532, Pg.ID#14639.

Simultaneously with federal proceedings, individual class members have pursued relief in immigration court, filing motions to reopen and related appeals,

[1] The Primary Class is "[a]ll Iraqi nationals in the United States who had final orders of removal at any point between March 1, 2017 and June 24, 2017 and who have been, or will be, detained for removal by U.S. Immigration and Customs Enforcement." 2d Class Cert. Op., R.404, Pg.ID#9569.

and upon reopening, litigating the merits and related appeals. The entire process can take years. *See* Schlanger Decl., R.138, Pg.ID#3373-75; 5th Schlanger Decl., R.473-62, Pg.ID#13309.

II. Factual Basis for the *Zadvydas* Order.

By the time the district court finally decided Petitioners' *Zadvydas* claim, "[t]he *Zadvydas* subclass [had] been detained well beyond the presumptively reasonable period of six months." Op., R.490, Pg.ID#14182. The court's factual findings thus focused on the next steps under *Zadvydas*'s burden-shifting framework: whether Petitioners "provide[d] good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future," and whether Respondents had presented "evidence sufficient to rebut that showing." *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). The court's findings were based on a voluminous record, summarized in a chronology. Fact Chron., R.473-2, Pg.ID#12904-23; Updated Fact Chron. R.479-2, Pg.ID#13919-922.

The court found "[t]he United States has had difficulty repatriating Iraqi nationals for many years." Op., R.490, Pg.ID#14153. An estimated 1,400 Iraqi nationals with final orders of removal had thus lived in the United States for years, even decades, under orders of supervision. *Id.*, Pg.ID#14160. Respondents claimed that all changed in 2017. The district court found that the record did not support that assertion.

On 1/27/2017, President Trump issued Executive Order 13769 barring admission to the U.S. from seven countries, including Iraq. *Id.*, Pg.ID#14155. In February 2017, Iraq agreed to accept eight deportees, after being informed by ICE that "accepting this flight would be an encouraging sign of progress [and] could help remove Iraq from sanctions in future Executive Orders." *Id.* In March, President Trump signed a second version of the Executive Order, and a senior U.S. official announced Iraq was no longer covered in part because Iraq had agreed to repatriations. *Id.*, Pg.ID#14155-56.

A March 2017 cable from the U.S. Embassy in Baghdad summarized the U.S.'s understanding of future repatriation processes. *Id.*, Pg.ID#14156. But the court noted the lack of any confirmation that this was also Iraq's understanding. *Id.* The court also noted that although ICE removed eight deportees to Iraq on 4/17-19/2017, the first charter since 2010, an internal ICE memorandum stated that the process employed was not repeatable. *Id.*, Pg.ID#14157.

"Encouraged by the successful April 2017 flight", the U.S. submitted approximately 280 travel document requests to Iraq in May and June 2017 and scheduled a flight for 6/28/2017 for up to 75 deportees. *Id.* However, on 6/7/2017, Iraq issued a blanket denial for 24 nationals because they "did not express orally and in writing a willingness to return to Iraq voluntarily." *Id.* By 6/12/2017, "ICE started receiving indications that [Iraq] may back out of the [June] charter flight

and that there was no agreement between [Iraq] and the United States regarding repatriation." *Id.*, Pg.ID#14157-58.

As the court found, Iraq cancelled the 6/28/2017 flight. *Id.*, Pg.ID#14158. ICE set a tentative new flight date for 7/25/2017, contingent on both the lifting of the TRO and Iraq's approval. *Id.*, Pg.ID#14160. However, ICE was unsuccessful in *both* contingencies. By the end of July, ICE officials were describing Iraq in writing as "among the most recalcitrant countries" with respect to repatriations. *Id.*, Pg.ID#14161. ICE officials were so frustrated that they began drafting documents urging visa sanctions against Iraq. *Id.*, Pg.ID#14161-62.

The court found that thereafter "[t]his endless cycle of potential removals, but with dubious results, continued." *Id.*, Pg.ID#14162. Even as Iraqi officials promised cooperation, ICE's travel document requests went unanswered. *Id.*, Pg.ID#14162-63. Iraq insisted removals be voluntary, requiring would-be deportees to sign a form so agreeing. *Id.*, Pg.ID#14163. On 6/15/2018, a year after the initial round-ups, ICE was still beseeching Iraq to issue travel documents. *Id.*, Pg.ID#14164.

As the court noted, "there is 'no international agreement in force, nor any written agreement in effect, between the governments of Iraq and the United States regarding repatriation,'" Op., R.490, Pg.ID#14167 (quoting Respondents' interrogatory responses), reflecting the fact that Iraq has long opposed forced

repatriation for "principled, practical, and political reasons". *Id.*, Pg.ID#14153, 14168-69. In finding Iraq had a policy against forced repatriations, the court also cited voluminous contemporaneous evidence of Iraqi governmental policy and practice, including many Iraqi official statements and expert-provided context. *Id.*, Pg.ID#14164-70.

The court, in concluding that Petitioners had "provided ample evidence showing that their removal is unlikely in the reasonably foreseeable future," summarized the facts: "[e]ven under significant pressure from the United States," Iraq only agreed to repatriate eight Iraqi nationals, thereafter "cancelled the next charter flight," "has delayed scheduling any more charter flights," and "has issued official statements that it will not accept forced repatriation." *Id.*, Pg.ID#14183. Contrary to Respondents' assertion that there was a "'reliable process for… removal,'" *Id.*, Pg.ID#14186 (quoting 10/24/2018 Hr'g Tr.), the record reflects, at best, "ongoing negotiations"; it was questionable "whether Iraq will accept forced repatriation at all." *Id.*, Pg.ID#14188.

The court further found that Respondents had failed to rebut that showing. While Respondents proffered declarations that Iraq would repatriate its nationals regardless of voluntariness, the court found those declarations "not a credible indicator" based on the court's "prior experience" with the government's "demonstrably false statements to the Court." *Id.*, Pg.ID#14185-86. The court

rejected Respondents' claims of yet another shift in Iraqi practice in late 2018; Respondents' refusal to comply with discovery orders meant no recent documents were available, rendering Respondents' declarations untestable. *Id.*, Pg.ID#14186-87.

The court also rejected Respondents' claim that but for the court's stay of removal, detainees would have been removed to Iraq, finding that "[a]t least eighteen class members have had the Court's stay lifted, some almost a year ago, and have yet to be removed," and that ICE had similarly been unable to remove an Iraqi non-class member not covered by the stay. *Id.*, Pg.ID#14188-89. While recognizing that "some Petitioners have been removed, the Government has not explained under what circumstances the removals took place and has steadfastly refused to meet its discovery obligations, which would allow for a more robust picture of any repatriation dialogue with Iraq." *Id.*, Pg.ID#14189.

III. Factual Basis for the Sanctions Order.

Independent of the factual record, the court found "the Government has acted ignobly in this case, by failing to comply with court orders, submitting demonstrably false declarations of Government officials, and otherwise violating its litigation obligations—all of which impels this Court to impose sanctions." *Id.*, Pg.ID#14144-45, 114190. The opinion outlines Respondents' misconduct (*id.*, Pg.ID#14147-53, 14190-93), the history of which is detailed in a chronology, filed

as R.455, Pg.ID#11343-62.

A. The Government Presented False Information that Persuaded the District Court to Defer Ruling on the *Zadvydas* Claim, Leaving Over a Hundred Class Members Detained.

In response to Petitioners' motion seeking a stay of removal, Respondents submitted the declaration of John Schultz, who attested on 7/20/2017 that "Iraq has agreed, using charter flights, to the timely return of its nationals that are subject to final orders of removal." Schultz Decl., R.81-4, ¶5 Pg.ID#2006. This was false. That very same day, Schultz's office began the process of seeking visa sanctions against Iraq because Iraq was "recalcitrant"—unwilling to accept repatriations. Fact Chron., R.473-2, ¶¶24(a-b) Pg.ID#12914-15; Op., R.490, Pg.ID#14161-62.

Petitioners initiated discovery to prosecute their *Zadvydas* claim in October 2017. Order, R.115, Pg.ID#2943-44. Respondents objected, claiming the discovery was burdensome. To secure a discovery stay, Respondents promised they "would [] disclos[e] in [their] response to Petitioners' motion...information that may be of utility to Petitioners to meet the Government's response." Order, R.153, Pg.ID#3936. Relying on that commitment, the court stayed discovery. Op., R.490 n.1, Pg.ID#14148. But the Government's response merely contained a second Schultz declaration claiming that:

- The scheduled June 2017 repatriation flight could not proceed due to the court's TRO, and the July flight was cancelled solely because of the preliminary injunction. Schultz Decl., R.158-2, ¶ 6, Pg.ID#4130.

- "Recent negotiations [with Iraq] have resulted in increased cooperation in removal of Iraqi nationals." *Id.* ¶ 4, Pg.ID#4130.

As explained below, the first bullet was a lie, and the second was at best an overstatement omitting critical context.

To respond to the court's questions, 12/20/2017 Hrg. Tr., R.188, Pg.ID#5134-56, 5209-10, Respondents submitted an additional declaration from Michael Bernacke, R.184-2. He attested:

- ICE cancelled the June 2017 flight "[a]s a result of the injunction." *Id.* ¶8, Pg.ID#5072.
- The "injunction is the only impediment to ICE to resuming charter flights to Iraq." *Id.* ¶12, Pg.ID#5073.

Again, both assertions were false. *See* Part III.B.

Based principally on Schultz's and Bernacke's statements, the court deferred ruling on Petitioners' *Zadvydas* claim, concluding that it could not "make a determination regarding whether Iraq will accept repatriations of the class" and allowing discovery. Op., R.191, Pg.ID#5332, 5335. After all, if the injunction was the sole impediment to deportation, removal could very well be reasonably foreseeable.

B. Discovery Exposed that Respondents' Sworn Statements Were False.

First, crucial to Respondents' opposition to Petitioners' *Zadvydas* motion was the claim that the court's stay of removal, not Iraqi recalcitrance, prevented mass deportations. The documents not only tell a different story; they show that

Respondents knew their sworn testimony was untrue. The district court found that ICE learned on June 20—two days before the TRO—that Iraq would not accept the flight. Op., R.490, Pg.ID#14158-60. The court likewise found that the injunction was not the reason the July flight failed. *Id.*, Pg.ID#14160-61. The district court was indisputably correct that "Schultz and Bernacke's respective statements are demonstrably false." *Id.*, Pg.ID#14158.

Second, Respondents asserted without qualification that in 2017 the U.S. and Iraq reached an agreement for the return of all Iraqi nationals. Op., R.87, Pg.ID#2323, 2325, 2350 (relying on Schultz declaration); Respondents' Motion, R.96, Pg.ID#2582-83; Respondents' Reply, R.173, Pg.ID#4882; Respondents' Suppl. Response, R.184-2, ¶¶5, 10, Pg.ID#5071; ICE Interrogatory Response, R.473-56, Pg.ID#13220-21; DHS Interrogatory Response, R.473-57, Pg.ID#13240-43. Discovery demonstrated that this too was false. While Iraq did accept eight deportees in April 2017, ICE recognized "this process to repatriate Iraqi nationals with final orders of removal was not repeatable." Op., R.490, Pg.ID#14157. Again, the court provided pages of detail demonstrating that Iraq did *not* agree to mass repatriations. *Id.*, Pg.ID#14157-70. In fact, by July 19, ICE was so frustrated by Iraq's refusals to cooperate that it initiated a visa sanction process against Iraq. *Id.*, Pg.ID#14161. On July 20, Schultz received a proposed sanctions package. *Id.*, Pg.ID#14162. That same day—"surprisingly," the district court

understatedly noted—Schultz signed a sworn (false) declaration that "Iraq has agreed… to the timely return of its nationals…." *Id.* (citing R.476-2).

The court's opinion and the chronology of events detail ICE's subsequent—and unavailing—efforts to convince Iraq to take more deportees. *Id.*, Pg.ID#14157-67; Fact Chron. R.473-2, Pg.ID#12904-23. In the thick of those unsuccessful efforts, Respondents submitted false declarations stating that "'Iraq will take back all Iraqi nationals…regardless of whether they are volunteers,'" "'Iraq agreed to the timely return of its nationals,'" and "'[t]he U.S. reached an agreement with Iraq in 2017 where Iraq expressed their willingness to accept the return of all Iraqi nationals…without limitation.'" Op., R.490, Pg.ID#14185.[2] Because discovery was stayed based upon Respondents' promise to disclose the germane facts, Petitioners could not rebut Schultz's and Bernacke's assertions. As the court found, Respondents' representations "that [Iraq] was ready and willing to accept repatriation of its nationals without limitation, and that but for the Court's stay of removal, it would have done so" were "demonstrably false statements to the Court designed to delay the proceedings." Op., R.490, Pg.ID#14194. The Court further found that Respondents "omitt[ed] key information such as Iraq's requirement that

[2] *See also* Schultz Decl., R.158-2, ¶7, Pg.ID#4130 ("ICE expects to receive travel documents for **all individuals** that ICE has requested to remove to Iraq.") (emphasis added); Bernacke Decl., R.184-2, ¶¶4-5, Pg.ID#5070-71 ("Iraq agreed to the timely return of its nationals").

Petitioners sign forms indicating their willingness to be returned to Iraq." *Id.*, Pg.ID#14148. *See also* Chron., R.455, Pg.ID#11347, ¶¶10, 25, 35, 37 (detailing missing material information).

C. Respondents Violated Discovery Orders, Notwithstanding the Court's Repeated Warnings of Possible Sanctions.

Discovery recommenced in January 2018. Order, R.191, ¶2.d, Pg.ID#5362. The court described in detail Respondents' many failures to respond, incomplete responses, and unreasonable excuses. Op., R.490, Pg.ID#14147-53; *see also* Chron., R.455, Pg.ID#11343-62. Delay piled on delay, poor excuse on poor excuse. On 6/12/2018, the court made clear it was running out of patience: "[f]ailure to produce documents on this schedule will be construed, presumptively, as bad faith, unless Respondents can establish by clear and convincing evidence that there is exceptional good cause for not meeting the schedule." Order, R.304, ¶G.1, Pg.ID#7240. The court further warned, "[i]f Respondents fail to conduct a reasonable inquiry, respond with information within their control or otherwise obtainable by them, provide an appropriate verification, or fully and completely respond to the interrogatories, Respondents may be sanctioned, including the exclusion of that information in motions, in hearings, at any evidentiary hearing, and at trial." *Id.*, ¶H, Pg.ID#7242.

But as the court later found, Op., R.490, Pg.ID#14149-50, despite its warnings, Respondents continued their noncompliance. Respondents sought again

to modify the schedule, but the court determined they had not demonstrated exceptional good cause for failing to produce documents that were months overdue.[3] Order, R.320, Pg.ID#7605-08. The court again warned that "[f]ailure to comply with the Court's order may be cause for the Court to direct that the facts necessary to support Petitioners' *Zadvydas* claim are established, or prevent the Government from opposing the *Zadvydas* claim, or issue other appropriate relief." *Id.*, Pg.ID#7608. Seven months after service, Respondents finally completed the production on the first set of document requests; ICE produced only 1,508 records, evidencing a processing rate of about seven records per day. DHS produced a mere 123 pages. Op., R.490, Pg.ID#14150.

After Petitioners served a second set of discovery requests, Respondents obtained an extension; the court made clear that no further extensions would be granted. Order, R.366, Pg.ID#8323. On the due date, however, Respondents served written responses to production requests rather than documents; they refused to answer most of the interrogatories. The court found that Respondents' request for an extension, and subsequent blanket objection, "evidenced bad faith." Op, R.490, Pg.ID#14150-51.

[3] Petitioners informed the court and Respondents on 6/18/2018 that they would file the *Zadvydas* motion "in the near term" and on 7/6/2018 that the motion would be filed in August. R.455, ¶¶36, 42, 47, Pg.ID#11350, 11353. Petitioners continued seeking Respondents' discovery even after the motion was filed on 8/29/2018.

D. The Government Continued to Disregard Discovery Orders.

At Respondents' request, the court scheduled an evidentiary hearing for 10/23/2018. Op., R.490; Pg.ID#14151. On 10/12/2018, with the hearing fast approaching and the extended discovery production date of 8/20/2018 long past, the court ordered Respondents to produce the outstanding documents by 10/16/2018. Chron., R.455, Pg.ID#11357 Respondents did not. *Id.* At an emergency status conference on 10/17/2018, the court ordered production that day. *Id*. Respondents produced 1,330 pages, consisting of multiple copies of the same documents and redactions of third-party information (such as recent negotiations), and omitting attachments to emails. Chron., R.455, ¶60, Pg.ID#11357-58. Only a handful of documents post-dated mid-July. *Id.*

Two days later, the court allowed yet another extension but warned that the interim relief was "without prejudice to any further relief that may be ordered," including sanctions. *Id.*, Pg.ID#14152. Respondents did not produce any new documents, only the same records produced on 10/17/2018 without third-party redactions. Respondents made numerous excuses for their failures to provide discovery, all rejected by the district court. Op., R.490, Pg.ID#14152.

At another emergency conference on Sunday, 10/21/2018—two days before the scheduled hearing—the court assessed whether interim relief might allow Petitioners the evidence needed to evaluate and rebut Respondents' testimony and

documents. *Id.*, Pg.ID#14152-53. Respondents refused to commit to *any* production date. Chron., R.455, ¶65, Pg.ID#11362. The court therefore shifted the hearing from evidence to argument because "an evidentiary hearing—at which the Government would present witnesses and documents of its choosing without full production of the documents ordered by the Court—would be unfair to Petitioners." Op., R.490, Pg.ID#15153.

In place of live testimony, Respondents offered still more declarations by Schultz and Bernacke about events that purportedly took place after July 2018, the period for which Respondents refused to produce records. Schultz Decl., R.478-1, Pg.ID#13789-813; Bernacke Decl., R.478-2, Pg.ID#13815-23. The court was unimpressed: "Based on prior experience, the Court finds Schultz's and Bernacke's representations not worthy of belief—especially without supporting documentation, which has not materialized." Op., R.490, Pg.ID#14186. Petitioners still have not received documents that would allow evaluation of Respondents' factual assertions.

SUMMARY OF ARGUMENT

The district court's conditional release order rests on two independent bases: (1) a factual determination under *Zadvydas* that removal is not significantly likely in the reasonably foreseeable future; and (2) a sanction for Respondents' misconduct. Each is correct and independently justifies class-wide relief.

Zadvydas Order: The district court did not abuse its discretion in ordering conditional release (absent an individualized showing that continued detention was warranted), where removal was not significantly likely in the reasonably foreseeable future. The district court's factual findings—that Petitioners provided good reason to believe that removal was not significantly likely in the reasonably foreseeable future and Respondents failed to rebut that showing—are not clearly erroneous. Given those findings, for post-order detainees held under 8 U.S.C. §1231, release was required under *Zadvydas*.

For pre-order detainees held under 8 U.S.C. §1225 or §1226, release was required by *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003). While *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), foreclosed *Ly's* statutory interpretation of §1226(c) and any comparable interpretation of §1225(b), *Jennings* left untouched *Ly*'s discussion of constitutional principles, which held that pre-order detainees, like post-order detainees, cannot be indefinitely detained. *Ly*'s analysis reflects the core constitutional restraints on civil detention: it must be reasonably related to a "special and narrow nonpunitive" purpose and the duration of confinement may not be excessive in relation to that purpose. *Zadvydas*, 533 U.S. at 690. The purpose of immigration detention—whether pre- or post-order—is to ensure availability for removal. When pre-order detention becomes prolonged and is no longer reasonably related to that purpose, release is required.

For section §1226(a), because §1226(a)'s language mirrors §1231(a), a constitutional avoidance reading is required—the statute must be interpreted to incorporate the *Zadvydas* standard.

Sanctions Order: The district court found that Respondents knowingly presented false evidence, purposefully obstructed discovery, and acted in bad faith. Faced with a situation where the government's misconduct resulted in a year of incarceration for more than 100 people, the district court ordered release: "Lesser sanctions will not suffice." Op., R.490, Pg.ID#14195-96.

Reviewing courts afford great deference not just to a district court's decision to sanction, but also to its determination of what sanction is appropriate. Respondents cannot show that the court clearly erred in assessing the evidence or imposing a sanction.

Class-Wide Relief: Respondents contend that class-wide relief is barred by 8 U.S.C. §1252(f)(1), an argument they never made below. This Court should remand with instructions to consider the impact of §1252(f)(1), as explicated in *Hamama I*. Alternatively, it should affirm the class-wide relief.

As this Court found in *Hamama I*, 912 F.3d at 879, §1252(f)(1) bars only injunctive relief and does not preclude class-wide habeas relief. The district court's conditional release order sounds in habeas, and should be affirmed on that basis. Similarly, §1252(f)(1) does not bar class-wide sanctions for misconduct; sanctions

are an independent basis for relief here. Section 1252(f)(1) also does not bar class-wide declaratory judgments, as *Nielsen v. Preap*, 139 S.Ct. 954, 962 (2019), made clear. Finally, §1252(f)(1) does not preclude an order implementing a statute; for detainees held under §1231 or §1226(a), the district court was ordering proper operation of the statute, not enjoining or restraining it.

Respondents' challenge to commonality is not properly before this Court because Respondents did not seek interlocutory review of the district court's decision that there are "multiple common questions of law and fact" related to the *Zadvydas* claim. Op., R.191, Pg.ID#5351. Regardless, the district court did not abuse its discretion by answering those common legal and factual questions on a class-wide basis, rather than in hundreds of individual cases.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Ordering Release Because Removal Was Not Significantly Likely in the Reasonably Foreseeable Future.

A. Standard of Review

The district court's factual findings are reviewed for clear error; legal conclusions are reviewed de novo. *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 858 (6th Cir. 1992). The court's ultimate determination weighing the preliminary injunction factors is reviewed for abuse of discretion. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014).

B. The District Court Correctly Applied *Zadvydas* to Post-Order Detainees.

As the district court noted, "[t]he Government does not dispute that *Zadvydas* applies to class members with final orders of removal detained under section 1231(a)." Op., R.490, Pg.ID#14177. Respondents' brief here does not discuss post-order detainees. Because the district court's factual findings on the likelihood of removal were not clearly erroneous, *see* Part I.D., relief for post-order detainees was required under *Zadvydas*.

C. The District Court Correctly Found that Pre-Order Detainees Cannot Be Detained Indefinitely.

1. The Constitutional Limits on Civil Immigration Detention Apply Equally to Pre- and Post-Order Detention.

Respondents' argument that *Zadvydas* should not apply to pre-order detainees boils down to a position that there are *no* limits, constitutional or statutory, on pre-order detention. Respondents neither attempt to argue that removal is likely anytime soon for pre-order detainees, nor present a reasoned basis for affording them lesser due process rights. Instead, they argue that although *Zadvydas* covers such detainees **before** they win reopening, their very success in demonstrating changed country conditions and winning reopening—making removal *even less likely*—means they can be held indefinitely.

This Court has already rejected that argument, holding in *Ly* that when "actual removal is not reasonably foreseeable," pre-order detainees, like post-order

detainees, "may not be indefinitely detained without a government showing of a strong special justification." 351 F.3d at 273. Because "the time of incarceration is limited by constitutional considerations, and must bear a reasonable relation to removal," pre-order detention is permissible only "for a time reasonably required to complete removal proceedings in a timely manner." *Id.* at 268-69. *Ly* recognized that under *Demore v. Kim*, 538 U.S. 510 (2003), brief detention during removal proceedings is permissible, but explained that *Demore* "is undergirded by reasoning relying on the fact that [§1226(c) detainees] will normally have their proceedings completed within a short period of time and will actually be deported or will be released. That is not the case here."[4] *Id.* at 271.

Ly also forecloses Respondents' argument that *Zadvydas* is inapplicable because when removal proceedings conclude, the pre-order phase of detention ends. Ly's immigration proceedings had a definite endpoint: his removal order became final seven months after the district court granted habeas. *Id.* at 266. But this Court did not countenance Ly's prolonged pre-order detention because it had an end point; rather, this Court focused on whether the length of detention was reasonable, particularly given questions about whether Ly could be repatriated: the "entire process…is subject to the constitutional requirement of reasonability," and

[4] *Demore* assumed pre-order detention usually "lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." 538 U.S. at 529 (average time in unappealed cases is 47 days; 4-month average in appealed cases).

"[i]f the process takes an unreasonably long time, the detainee may seek relief in habeas proceedings." *Id.* at 268, 272.[5] This Court found that Ly's detention was unreasonable because "Ly had been imprisoned for a year and a half with no final decision as to removability," and even if he were ultimately ordered removed, his removal to Vietnam was not "reasonably foreseeable." *Id.* at 271, 273. *Ly* makes clear that when litigation takes too long, continued detention during the pendency of that litigation becomes unreasonable.

Ly thus recognized that detainees have the same liberty interests, whether held pre- or post-order. "[T]he length of the detention—not the stage of the proceeding—drives the constitutional concern." Op., R.191, Pg.ID#5341. *See also Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 222 (3d Cir. 2018) ("[w]e see no substantial distinction between the liberty interests" of detainees held pre- and post-order); *Diouf v. Napolitano*, 634 F.3d 1081, 1087 (9th Cir. 2011) ("Regardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention.").

Respondents attempt to distinguish *Ly*, arguing that because §1226(c) and §1225(b) cannot be interpreted to avoid the constitutional issue post-*Jennings*, the district court was wrong to rely on *Ly*'s constitutional analysis. Not so. The district

[5] *See also Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011) (reasonableness of pre-order detention "is a function of whether it is necessary to fulfill the purpose of the statute").

court recognized that *Jennings* foreclosed *Ly's* statutory interpretation of §1226(c), and any comparable interpretation of §1225(b). Op., R.490, Pg.ID#14179. But *Jennings* left untouched *Ly*'s discussion of constitutional principles. While *Ly* was a constitutional avoidance ruling, its constitutional framework sets the parameters for the constitutional analysis here.

Ly's analysis reflects long-standing constitutional limits: "In our society, liberty is the norm," and detention is the "carefully limited exception." *United States v. Salerno,* 481 U.S. 739, 755 (1987). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. Incarceration is used to punish crimes, but only after extensive procedural protections designed to protect against unjust deprivations of liberty. *See Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring).

Civil detainees "may not be punished." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2475 (2015). Accordingly, the constitutional constraints on civil detention are higher than in the criminal context: "detention violates that [Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and narrow nonpunitive circumstances, where a special justification...outweighs the individual's constitutionally protected interest in

avoiding physical restraint." *Zadvydas*, 533 U.S. at 690. *See also Addington v. Texas*, 441 U.S. 418, 425 (1979) ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty"); *Rosales-Garcia v. Holland*, 322 F.3d 386, 414 (6th Cir. 2003). "The bar for involuntarily removing someone from society against her will is high—quite understandably and quite legitimately so," and thus there is a "heavy presumption" against such "a massive curtailment of liberty." *Howell v. Hodge*, 710 F.3d 381, 385, 387 (6th Cir. 2013).

Two core restrictions ensure that civil detention does not become impermissible punishment. First, detention must "bear[] [a] reasonable relation to the purpose for which the individual [was] committed," and that purpose must be a narrow, non-punitive one. *Zadvydas*, 533 U.S. at 690. *See also Foucha*, 504 U.S. at 79. Only when civil detention is closely linked to its purpose can the state's interests "outweigh[] the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690.

Second, the "duration of confinement" must be both "strictly limited," *Foucha*, 504 U.S. at 81, and "linked to the stated purposes of the commitment." *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997). Because the duration of detention may not be excessive in relation to the special, non-punitive reason that justifies civil detention, *Salerno*, 481 U.S. at 747, the longer confinement lasts, the more it tilts toward impermissible punishment rather than permissible civil detention. *See*

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (ostensibly civil restrictions constitute punishment if "excessive in relation to the alternative [non-punitive] purpose"); *Schall v. Martin*, 467 U.S. 253, 269 (1984) (same); *Kingsley*, 135 S.Ct. at 2469 (same); *Zadvydas*, 533 U.S. at 701 (as detention increases in length, time until removal must shrink); *Reno v. Flores*, 507 U.S. 292, 314-15 (1993) (immigration proceedings for detained youth "must be concluded with 'reasonable dispatch' to avoid habeas corpus," which is the appropriate remedy if youth are "held for undue periods" due to lengthy proceedings).

Accordingly, in evaluating the constitutionality of civil detention, the Supreme Court has regularly focused on detention length. *Salerno* upheld pretrial detention because its duration was restricted "by the stringent time limitations of the Speedy Trial Act," 481 U.S. at 747 (70-day maximum), whereas *Foucha* faulted the statute there for not imposing a comparable limitation. *Foucha*, 504 U.S. at 82. *See also Jackson*, 406 U.S. at 738 ("[D]uration of commitment [must] bear some reasonable relation to the purpose for which the individual is committed").

In the immigration context, detention must "bear a reasonable relation" to the purpose of "effectuating an alien's removal." *Zadvydas*, 533 U.S. at 690, 697. The government's interest is the same pre- or post-order. *See Demore*, 538 U.S. at 528 (purpose of pre-order detention is "preventing deportable criminal aliens from

fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed"); *Ly*, 351 F.3d at 271 (pre-order detention's goal is "to ensure the ability of the government to make a final deportation").[6] Thus, pre- or post-order,

> the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely, assuring the alien's presence at the moment of removal.

Zadvydas, 533 U.S. at 699.

Congress contemplated that removals will be completed within 90 days and provided for detention during that period. 8 U.S.C. §§1231(a)(1)(A), 1231(a)(2). The Supreme Court gave additional leeway, setting six months as the period during which governmental interests in securing removal presumptively outweigh individual liberty interests. *Zadvydas*, 533 U.S. at 701. Thereafter, the balance shifts:

> After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior postremoval confinement grows,

[6] Where removal is insufficiently likely, concerns about possible dangerousness do not constitute "special and narrow nonpunitive circumstances where a special justification...outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690. Indeed, the *Zadvydas* petitioners were "proven [] dangers to society." *Demore*, 538 U.S. at 562 (Souter, J., dissenting).

> what counts as the "reasonably foreseeable future" conversely would have to shrink.

Id. at 701.

Here, the presumptively reasonable period passed long before the court ruled. Petitioners were released in December 2018, *18 months* after the June 2017 raids. It was unreasonable to subject Petitioners to years of further detention while their cases wended through the immigration courts, particularly given the court's findings about the uncertainty of Petitioners' repatriation if they lose. Because detention had become prolonged, Petitioners' liberty interest outweighed the government's interest in detaining them so that they would be available at some future date **if** they are found to be removable and **if** Iraq then agrees to repatriation. Petitioners were detained so long that "the period of time required to conclude the proceedings was unreasonable." *Ly*, 351 F.3d at 273.

Against this wealth of law Respondents argue only that pre-order detainees can be incarcerated forever because the relevant statutes do not provide an end-point. While the statutes may be silent, the Constitution is not.

2. §1226(a) Must Be Interpreted To Incorporate the *Zadvydas* Standard.

Although *Ly* considered pre-order detention in the context of §1226(c), its analysis makes clear that the constitutional prohibition on indefinite detention applies to all pre-order detention. For §1226(a), however, a constitutional

avoidance reading is required—the statute must be interpreted to incorporate the *Zadvydas* standard. The district court correctly held that §1226(a), "linguistically indistinguishable" from §1231(a), is best interpreted to incorporate the same presumptive six-month limit, with release when there is no significant likelihood of removal in the reasonably foreseeable future.[7] Op., R.490, Pg.ID#14171, 14177-79.

Section 1226(a) provides that the government "may" detain a noncitizen "pending a decision on whether the alien is to be removed." While *Zadvydas* dealt with post-order detention under §1231, its reasoning dictates the analogous interpretation of the pre-order detention statute, §1226(a), as both use permissive language. *Compare* §1231(a)(6) ("An alien ordered removed…*may* be detained beyond the removal period") *with* §1226(a) ("an alien *may* be arrested and detained" and the government "*may* continue to detain the arrested alien" or "*may* release the alien") (emphases added). Absent clear "congressional intent to authorize indefinite, perhaps permanent, detention," *Zadvydas*, 533 U.S. at 680, detention statutes must be construed "to avoid a serious constitutional threat," meaning that "once removal is no longer reasonably foreseeable, continued

[7] For most class members, pre-order detention is governed by §1226. Some are held under §1226(a), others under §1226(c), which mandates detention for people with certain convictions. Approximately 800 of the 1,400 Iraqis have criminal records, although not all convictions trigger §1226(c). Op., R.490, Pg.ID14160.

detention is no longer authorized by statute." *Id.* at 699. *Jennings* reinforces this analysis. There the Court distinguished between Congress's use of the words "shall" and "may": "[u]nlike the word 'may,' which implies discretion…'shall' usually connotes a requirement." 138 S.Ct. at 844.

D. The District Court's Factual Findings Were Not Clearly Erroneous.

Respondents cannot dispute that *Zadvydas*'s presumptive six-month limit had long passed. Nor can Respondents show that the district court clearly erred in determining that Petitioners provided good reason to believe that removal was not significantly likely in the reasonably foreseeable future, and Respondents failed to rebut that showing. The high bar of clear error is particularly appropriate here, given that the district court is far more familiar than this Court with the extensive record.

Respondents do not attempt to describe, much less counter, the district court's extensive factual findings, focusing instead on three narrow issues. First, Respondents mischaracterize the court's decision as "relying on an alien's unwillingness to be repatriated." Appellants' Br. at 50. The district court based its findings on *Iraq's* unwillingness to accept involuntary repatriates: it never held that class members can escape detention by objecting to removal.[8] For years these

[8] As encapsulated in a court order, Respondents previously acknowledged that Petitioners cannot be forced to express a desire for deportation. Order, R.316, ¶¶F-

individuals were living in the community because Iraq would not accept forced repatriation—not because they did not want to go. And it was Iraq's refusal to change that policy, rather than Petitioners' desires, that led the district court to order release.

Second, Respondents suggest that the absence of a repatriation agreement should not be determinative. *Id.* at 51-52. But the district court did not rely solely on the absence of a repatriation agreement, instead devoting 25 pages to canvassing the voluminous record, considering the history of failed flights, Iraq's failure to respond to travel document requests, ICE's consideration of visa sanctions, public statements by Iraqi officials and private U.S.-Iraq communications, evidence on the reasons for Iraq's opposition to involuntary repatriations, and data on removals, including evidence that for specific individuals not covered by the court's stay of removal, it took many months to obtain travel documents and—even after travel documents were obtained—ICE was unable to effect removal. Op., R.490, Pg.ID#14153-70, 14182-90.

The court properly considered all of these circumstances. Under *Zadvydas*, while a decision should not rest "solely" on the absence of a repatriation

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G, Pg.ID#7576-77. That order resulted from emergency motions to prevent ICE's coercion of class members, who were threatened with prosecution or years of incarceration if they did not sign forms attesting to their desire to return to Iraq. Mot. for Access, R.297; Coercion Mot., R.307; Ex. to Coercion Mot., R.308.

agreement, the mere existence of "good faith efforts to effectuate…deportation" is insufficient. 533 U.S. at 702. Respondents ignore that holding, as well as this Court's decision in *Rosales-Garcia*, 322 F.3d at 415 (evidence of "continuing negotiations" insufficient to justify continued detention). Respondents instead cite a motley assortment of district court cases, two of which the court easily distinguished, Op., R.490, Pg.ID#14189, and the third of which, *Shefqet v. Ashcroft*, 2003 WL 1964290 (N.D. Ill. Apr. 28, 2003), supports Petitioners' position.

Finally, Respondents argue that, despite the voluminous evidence that removal was not reasonably foreseeable, the court should have relied on Schultz's September 2018 declaration attesting Iraq had issued a small number of travel documents to involuntary repatriates. Appellants' Br. at 53. But "based on prior experience," the district court found Schultz "not worthy of belief." Op., R.490, Pg.ID#14186. Moreover, the court noted that "the Government's document production largely concludes in July 2018," *id.*, Pg.ID#14188, making it impossible to assess Respondents' assertions. Documents and testimony from July 2018 show Iraq was resisting U.S. pressure to accept involuntary repatriations, and ICE faced other obstacles to mass repatriations. R.473-2, ¶42, Pg.ID#12921. *See also* R.454-3, 454-4, Pg.ID#11340; R.584. The court found that "[t]he Government has not met its burden of rebutting" Petitioners' showing that removal was not

significantly likely in the reasonably foreseeable future: "Although some Petitioners have been removed, the Government has not explained under what circumstances the removals took place and has steadfastly refused to meet its discovery obligations, which would allow for a more robust picture of any repatriation dialogue with Iraq." Op., R.490, Pg.ID#14187, 14189.

In sum, Petitioners provided a mountain of evidence showing that ICE was unable to accomplish its planned mass removals due to Iraq's unwillingness to accept involuntary repatriations, and the court found that Respondents failed to rebut that showing through a declaration from a discredited witness covering a period of time for which Respondents had refused to provide court-ordered discovery. This Court owes great deference to the district court's credibility determinations, *United States v. Bradshaw*, 102 F.3d 204, 210 (6th Cir. 1996), and to its decision not to accept Respondents' account of facts after the summer of 2018, because the government had willfully refused to provide discovery that would have shown the true state of affairs. Because Respondents misled the court, the limited documents produced showed Respondents' representations about Iraq's position to be false; and Respondents refused to provide current documents, the district court did not clearly err in rejecting Respondents' self-serving account.

II. The District Court Did Not Abuse Its Discretion in Ordering Release as a Sanction Where Respondents Presented False Declarations and Willfully Refused to Comply with Discovery Orders.

The second basis for the court's release order was Respondents' misconduct: "Independent of what the record shows, Petitioners are entitled to *Zadvydas* relief because of the Government's discovery abuses." Op., R.490, Pg.ID#14190. Because "the Government has acted ignobly in this case, by failing to comply with court orders, submitting demonstrably false declarations of Government officials, and otherwise violating its litigation obligations," the court "order[ed] it established that there is no significant likelihood of Petitioners' removal in the reasonably foreseeable future." *Id.*, Pg.ID#14144, 14196.

A. Standard of Review and Legal Framework.

A court's imposition of sanctions is reviewed for abuse of discretion. *Sommer v. Davis*, 317 F.3d 686, 692 (6th Cir. 2003). Reviewing courts afford great deference because, "[f]amiliar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard[s]." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 402 (1990). "Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them." *Id.* at 404.

The district court cited both Rule 37 and its inherent authority as bases for

sanctions. Op., R.490, Pg.ID#14193-94. Rule 37 grants authority to issue any "just orders" necessary to sanction discovery abuses, including directing "facts be taken as established," "prohibiting…claims or defenses," "striking pleadings," "dismissing the action," or "rendering a default judgment." Fed. R. Civ. P. 37(b)(2)(A), (d)(3). Separately, courts have inherent power to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991), and may sanction "acts which degrade the judicial system"; where "fraud has been perpetrated upon the court"; where a litigant is "misleading and lying to the court," *id*. at 41-44; or where a litigant engages in bad-faith conduct or conduct that is "tantamount to bad faith." *Metz v. Unizan Bank*, 655 F.3d 485, 489 (6th Cir. 2011).[9]

B. The District Court's Assessment of the Evidence Was Not Clearly Erroneous.

Respondents allege no legal errors and must therefore show the district court's sanctions ruling was based on a "clearly erroneous assessment of the evidence." *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 510 (6th Cir. 2002). The gravamen of Respondents' complaint is that their repeated

[9] Courts regularly impose class-wide sanctions, including finding adverse facts, precluding evidence/defenses, or entering judgment. *See, e.g.*, *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162 (9th Cir. 2012); *Li v. A Perfect Day Franchise, Inc.*, 281 F.R.D. 373 (N.D. Cal. 2012); *Moore v. Napolitano*, 723 F.Supp.2d 167 (D.D.C. 2010); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81 (D.N.J. 2006).

failures to provide discovery and their false or misleading declarations were all innocent errors that did not justify the sanctions issued.

The district court, drawing on the Rule 37 test to assess the severe sanction imposed, considered:

> (i) whether a party's failure to cooperate with discovery is the result of willfulness, bad faith, or fault; (ii) whether the other side was prejudiced by the conduct; (iii) whether the disobedient party was warned of the potential sanctions; and (iv) whether less drastic sanctions were considered or imposed. Universal Health Grp. v. Allstate Ins. Co., 703 F.3d 953, 956 (6th Cir. 2013).

Op., R.490, Pg.ID#14194. Respondents dispute the court's factual findings on willfulness, prejudice, and consideration of less drastic sanctions.

Willfulness/Bad Faith/Fault: While willfulness, bad faith, and fault are not necessary to impose sanctions, *Marietta*, 307 F.3d at 517 n.13, 519, they are frequently considered. *See, e.g., Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990). The court here found:

> The Government has used discovery to slow this case to its benefit. From the earliest stages of this case, the Government made demonstrably false statements to the Court designed to delay the proceedings….[T]he Government's conduct is of its own making and demonstrates clear bad faith.

Op., R.490, Pg.ID#14194-95.

The record fully supports the court's assessment that Respondents both knowingly presented false evidence and purposefully obstructed discovery. *See* Chron., R.455. Respondents engaged in a course of conduct that can be summed up

as delay, deny, and deceive. Respondents possessed virtually all the information needed for the court to adjudicate the *Zadvydas* claim but hid and misrepresented the facts. Petitioners had to drag out the truth, bit by bit, while Respondents brazenly ignored deadlines set by the rules or court orders.

To support their claim that removal was reasonably foreseeable, Respondents submitted declarations in 2017 attesting to a supposed agreement by Iraq to accept forced repatriation and advancing the dramatic story of a flight grounded at the eleventh hour by the court's TRO. Once documents were produced, belatedly, the falsity of these claims was manifest. On appeal Respondents argue the 2017 declarations were truthful because approximately a year later, in September 2018, Iraq allegedly stopped asking Iraqi nationals about their willingness to return and, subsequently, a few unwilling returns were accomplished. The ability of the district court, or this Court, to evaluate any of Respondents' assertions about facts after July 2018 is fatally undermined by Respondents' failure to produce records for that period. Op., R.490, Pg.ID#14186-87. Regardless, assertions about events in 2018 do not undermine the district court's finding that "[c]ontrary to the Schultz and Bernacke declarations, the June 2017 charter flight was cancelled for reasons other than the Court's injunction." Op., R.490, Pg.ID#14160.

Respondents also fail to establish that the court clearly erred in finding that

the government purposefully obstructed discovery. The court was intimately familiar with discovery, having supervised an intense, year-long battle over discovery requiring **23** status/joint statements, **33** (sometimes day-long) status conferences or hearings (including multiple emergency conferences over the seven-day period prior to the evidentiary hearing scheduled for 10/23/2018[10]), and **40** opinions/orders, and review *in camera* of thousands of pages of disputed documents.[11] *See Fuery v. City of Chicago*, 900 F.3d 450, 464 (7th Cir. 2018) (rejecting efforts to "counter the district court's catalogue of infractions by attempting to unravel each violation and demonstrate its inconsequential nature...[because] it is the district court who can evaluate the whole ball of wax"). The district court, based on the countless hours it spent managing discovery, identified that Respondents' conduct was a concerted effort to prevent Petitioners and the court from learning the truth. R.490, Pg.ID#14195 ("The Government has delayed a determination on the merits . . . which has benefitted the Government in that Petitioners remain in custody.").

Attempting to meet their heavy burden of proving this finding clearly

[10] Respondents complain that Bernacke and Schultz were prepared to testify. Appellants' Br. at 60. A full evidentiary hearing is not required before sanctions are imposed, merely "fair notice and an *opportunity* for a hearing." *Id*. (original emphasis). Respondents squandered that opportunity by yet again failing to produce documents. Chron., R.455, ¶¶50-66, Pg.ID#11355-11362.

[11] Related record cites noted on the Designation of Relevant District Court Documents.

erroneous, Respondents suggest that they failed to follow discovery orders because they were busy producing A-files. This excuse makes no sense: the vast majority of A-files were produced by 11/27/2017, Order, R.115, Pg.ID#2943, with a few more produced by 1/10/2018. Order, R.195, Pg.ID#5377. The court did not even permit *Zadvydas* discovery until 1/2/2018. Op., R.490, Pg.ID#14147-48 n.1.

Respondents' other objections are equally meritless. Where, for example, Respondents obtained an extension to respond to interrogatories, only thereafter to object to the number of interrogatories, Chron., R.455, ¶¶41-49, Pg.ID#11353-55, objections "that could have been easily made without an extension," the court did not clearly err in "draw[ing] the reasonable inference that the Government is withholding documents adverse to its position in the hopes that its situation will improve in the future." Op., R.490, Pg.ID#14194, 14196.

Prejudice: Sanctions are "particularly appropriate for impermissible conduct that adversely impacts the entire litigation." *Marietta,* 307 F.3d at 516. Here, the court's initial January 2018 ruling deferring the *Zadvydas* claim was premised on the government's false assertion that the preliminary injunction was the only thing standing between the Petitioners and removal to Iraq. Op., R.191, Pg.ID#5331-5332. Then Respondents, by refusing to comply with discovery orders, further stalled adjudication of that claim for nearly a year, resulting in the very evil *Zadvydas* sought to prevent: prolonged incarceration without justification. The

court did not clearly err in finding that prejudice is "obvious," because class members "have been deprived of more than a year of their lives with their families and communities." Op., R.490, Pg.ID#14195.

Respondents argue that Petitioners were not harmed because some (but not all) had bond hearings. But as the district court found, *Zadvydas* relief is "different in kind than relief under a bond," since the latter "provides an *opportunity* for release" while the former "*requires* that release be granted in order to prevent further unlawful confinement." *Id.*, Pg.ID#14197.

The court's refusal to consider Respondents' claims about alleged new developments in fall 2018 was likewise based on prejudice: Respondents wanted to present their version of the facts while simultaneously denying Petitioners documents to test those facts. Past experience established that Respondents' untested version could not be trusted.[12]

Consideration of Less Severe Sanctions: The court explicitly found:

> Lesser sanctions will not suffice in this case….The Government has delayed a determination of the merits for over a year, which has benefited the Government in that Petitioners remain in custody….Petitioners should not be subject to indefinite detention

[12] Respondents now ask this Court to consider evidence after July 2018—evidence the district court rejected as unreliable because Petitioners had not had the court-ordered discovery needed to test the assertions and prior assertions were false and misleading. This Court cannot consider "new material that was never considered by the district court." *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1012 (6th Cir. 2003).

> because of the Government's indefinite discovery delays. The Court finds that the Government has failed to comply with the Court's discovery orders and has done so willfully.

Op., R.490, Pg.ID#14195-96. The question is not whether the court "could have" imposed some lesser sanction,[13] Appellants' Br. at 63, but whether it considered and rejected that option. It clearly did.

The Supreme Court has emphasized that a "primary aspect of [the court's] discretion is the ability to fashion an *appropriate* sanction for conduct which abuses the judicial process," which can include "a particularly severe sanction." *Chambers*, 501 U.S. at 44-45 (emphasis added). "The question, of course, is not whether [the Supreme] Court, or whether the Court of Appeals, would as an original matter have [imposed that same sanction]; it is whether the District Court abused its discretion in so doing." *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (reinstating dismissal and warning against the "natural tendency on the part of reviewing courts…to be heavily influenced by the severity" of dispositive sanctions). *See also Herron v. Jupiter Transp. Co.*, 858 F.2d 332, 337 (6th Cir. 1998) ("district court had…intimate knowledge of the facts and the credibility of the litigants and was, therefore, more qualified" to assess

[13] Respondents' proposed alternative "sanction"—a finding that there was no repatriation agreement, *see* Appellants' Br. at 63—is not a sanction, but simply a fact that Respondents themselves admit. ICE's Interrog. Resp., R. 473-56, Pg.ID#13220-22, 13224, 13231.

need for sanctions).

When litigants lie, flout court orders, and abuse the discovery process, courts clearly have authority to impose severe sanctions, including barring evidence or witness testimony[14] and striking claims or defenses.[15] Courts also have authority to impose dispositive sanctions, including dismissing the litigation,[16] or entering judgment or an injunction.[17] "[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence

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[14] *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 986-87 (6th Cir. 1988) (striking expert witness affidavit as sanction even though it ultimately led to summary judgment); *Caudell v. City of Loveland*, 226 F.App'x 479, 481–82 (6th Cir. 2007) (excluding eyewitness affidavit was proper sanction).

[15] *Bentkowski v. Scene Magazine*, 637 F.3d 689, 697 (6th Cir. 2011) (striking complaint as a sanction); *Chevron Corp. v. Donziger*, 833 F.3d 74, 143-49 (2d Cir. 2016) (affirming striking of personal jurisdiction defense as sanction). *See also Fencorp Co. v. Ohio Kentucky Oil Corp.,* 675 F.3d 933, 942 (6th Cir. 2012) (entering finding as discovery sanction that voided preemption defense and resulted in judgment).

[16] *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-32 (1962); *Reg'l Refuse Sys., Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 154 (6th Cir. 1988) (noting presumption "that, if a party has the ability to comply with a discovery order and does not, dismissal is not an abuse of discretion").

[17] *Guggenheim Capital, LLC v. Birnbaum*, 722 F.3d 444, 451-53 (2nd Cir. 2013) (affirming entry of default judgement after willful discovery abuses); *Donziger*, 833 F.3d at 143-49 (2d Cir. 2016) (upholding injunction barring recovery of multibillion-dollar judgment as sanction where injunction applied against defendants due to striking of personal jurisdiction defense); *SEC v. China Infrastructure Inv. Corp.*, 189 F.Supp.3d 118, 130–36 (D.D.C. 2016) (awarding injunction after granting default judgment as sanction).

of such a deterrent." *Nat'l Hockey League*, 427 U.S. at 643.

There was no way for the court to give Petitioners back what Respondents' misconduct cost them: release in January 2018. The sanctions it implemented—foreclosing new and untested evidence, disbelieving discredited witnesses, finding adverse facts, and entering the release order—were well within its discretion. They were, in fact, carefully calibrated to address the very harm caused by the discovery abuses—prolonged detention.

III. The District Court Properly Granted Class-Wide Relief.

A. Standard of Review

Respondents challenge class-wide relief on two grounds: that 8 U.S.C. §1252(f)(1) bars such relief and there are no common questions under *Zadvydas* warranting class-wide treatment. The standard of review of the first issue is de novo. *United States v. Parrett,* 530 F.3d 422, 429 (6th Cir. 2008). The second issue is not properly before the court (*see* Part III.E). If it were, the question would be whether the court "abuse[d] its discretion in finding commonality." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012).

B. This Court Should Remand So the District Court Can Consider the Impact of *Hamama I* on §1252(f)(1) in the First Instance.

8 U.S.C. §1252(f)(1), "Limit on injunctive relief," provides:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the

> operation of the provisions of part IV of this subchapter…other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

Respondents never raised §1252(f)(1) before the district court. On 12/20/2018, a month after the district court's decision, this Court decided *Hamama I*, holding that §1252(f)(1) prohibited the class-wide bond injunction. Respondents could have asked the district court to modify or dissolve its order, allowing the district court to consider *Hamama I*'s analysis of §1252(f)(1) in the first instance. *See* Fed. R. Civ. P. 23(c)(1)(C), 60(b). Instead, Respondents appealed, R.517, and now ask this Court to vacate that order for reasons never presented below.

The Court should decline to bypass ordinary appellate procedure and should remand with instructions to consider the impact of §1252(f)(1), as explicated in *Hamama I*, on the relief granted. This Court is a "court of review, not of first view." *Jennings*, 138 S.Ct. at 851. While, as shown below, the district court's order can appropriately be affirmed as it stands, the court should have the opportunity to consider how to modify its orders in light of *Hamama I* and §1252(f)(1).

C. §1252(f)(1) Governs Only Injunctions.

The Supreme Court has explained of §1252(f)(1) that "[b]y its plain terms, and even by its title, that provision is nothing more or less than a limit on injunctive relief." *Reno v. AADC*, 525 U.S. 471, 481 (1999). *See Hamama I*, 912 F.3d at 877. *Hamama I* held that §1252(f)(1) does not preclude class-wide habeas

relief. For similar reasons, it does not foreclose class-wide sanctions. And the Supreme Court made clear last term that it does not cover class-wide declaratory relief.

1. §1252(f)(1) Does Not Preclude Class-Wide Habeas Relief.

Following the instructions in *AADC* that §1252(f)(1) is "nothing more or less than a limit on injunctive relief," 525 U.S. at 481, *Hamama I* held that this provision does not undermine the availability of class-wide habeas relief. While rejecting Petitioners' defense of the court's bond order, *Hamama I* emphasized that "there is nothing [in §1252(f)(1)] barring a class from seeking a traditional writ of habeas corpus (which is distinct from injunctive relief)." 912 F.3d at 879. To explain what distinguishes "a traditional writ of habeas corpus" from injunctive relief, *Hamama I* cites Justice Thomas's *Jennings* concurrence, which canvasses both form and substance. As to form, Justice Thomas said the *Jennings* plaintiffs "do not seek habeas relief"; their complaint "is not a habeas petition." 138 S.Ct. at 858. But in this case, Petitioners *did* file a habeas petition. 2d Am. Habeas Corpus Class Action Pet. & Class Action Compl., R.118. As to substance, the *Jennings* class obtained an injunction that, Justice Thomas noted, "looks nothing like a typical [habeas] writ" because it "is not styled in the form of a conditional or unconditional release order." *Jennings*, 138 S.Ct. at 858. The order here, by

contrast, *is* a conditional release order,[18] directing release within 30 days for *Zadvydas* subclass members who have been detained over six months, unless the government demonstrates, individually, that continued detention is warranted. Op., R.490, Pg.ID#14200.

Hamama I's conclusion that class-wide habeas relief is not barred by §1252(f)(1) was entirely correct. Section 1252(f)(1) makes no reference to habeas relief. "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299 (2001). *See also Demore*, 538 U.S. at 517; *Pak v. Reno*, 196 F.3d 666, 673 (6th Cir. 1999) ("[A]bsent a clear statement from Congress, we decline to interpret [a statute] as also repealing general habeas jurisdiction"). The failure even to mention habeas corpus in §1252(f)(1) is particularly telling given Congress's express reference to habeas in other subsections of §1252, which use the phrase "[n]otwithstanding any other provision of law (statutory or nonstatutory), *including section 2241 of Title 28, or any other habeas corpus provision*" to describe their scope. 8 U.S.C. §§1252(a)(2)(A)-(C), 1252(a)(4)-(5), 1252(g) (emphasis added). *See Ramadan v. Gonzales*, 479 F.3d 646, 650-54 (9th Cir. 2007) (explaining enactment history of REAL ID Act, which amended several provisions of §1252 to

[18] *See* Hertz & Liebman, 2 Fed. Hab. Corp. Practice and Procedure §33.3.

explicitly limit habeas jurisdiction).[19] By failing to mention habeas corpus in §1252(f)(1) while repeatedly addressing habeas in neighboring subsections, Congress made clear its intention *not* to apply §1252(f)(1)'s limitations to habeas actions. *See Nken v. Holder,* 556 U.S. 418, 430-431 (2009).

Class-wide habeas is particularly appropriate here because of practical obstacles to adjudicating hundreds of individual habeas cases presenting the same factual and legal questions. As the Supreme Court emphasized in *Harris v. Nelson*, 394 U.S. 286, 291 (1969), courts have always "jealously guarded" the "scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes….The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *See also Boumediene v. Bush*, 553 U.S. 723, 783 (2008) (scope of habeas review particularly broad when reviewing executive detention, which occurs without trial); *Ziglar v. Abbassi*, 137 S.Ct. 1843, 1862-63 (2017) (flagging that habeas may provide remedy in putative class action challenging prolonged detention on immigration violations). The court's class-wide order, addressing common questions while allowing the government to justify detention in individual cases,

[19] Section 1252(a)(5) provides that, throughout the statute, "the terms 'judicial review' and 'jurisdiction to review' include habeas corpus." But §1252(f)(1) does not use the terms "judicial review" or "jurisdiction to review."

reflects just such a flexible use of the writ.

True, the district court—operating without the benefit of this Court's *Hamama I* decision or briefing on the availability of class-wide habeas but not injunctive relief under §1252(f)(1)—labeled the order on appeal a "preliminary injunction." Op., R.490, Pg.ID#14200-01. But both functionally and procedurally, the release order sounds in habeas. This Court should affirm on this basis. Alternately, should this Court believe the release order should be more clearly denoted a writ of habeas corpus, it can remand for reissuance of the order in that form.

2. §1252(f)(1) Does Not Foreclose Class-Wide Sanctions.

Respondents' discussion of §1252(f)(1) merely mentions but does not address one of the two bases for the district court's order—its inherent and Rule 37 authority to impose class-wide sanctions for Respondents' misconduct. Such sanctions do not "enjoin or restrain" the INA but rather remedy misconduct. Even if this Court finds that the district court lacked authority to issue class-wide injunctive relief, the district court had an independent power to impose class-wide sanctions because the "interest in having rules of procedure obeyed…does not disappear upon a subsequent determination that the court was without subject-matter jurisdiction." *Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992). Rather, "a court's jurisdiction to issue sanctions…is ever present." *Red Carpet Studios Div. of*

Source Advantage, Ltd. v. Sater, 465 F.3d 642, 645 (6th Cir. 2006). *See also River City Capital, L.P. v. Board of Cty. Com'rs*, 491 F.3d 301, 310 (6th Cir. 2007) ("Just because a federal court is later found to lack subject matter jurisdiction in a particular matter does not give litigants a free pass with respect to any and all prior indiscretions they may have committed before the court."). Thus, even if §1252(f)(1) barred all class-wide relief on the merits—and it does not—this Court should affirm class-wide sanctions. *See Fharmacy Records v. Nassar*, 379 F.App'x 522, 523 (6th Cir. 2010) (affirming dismissal as discovery sanction and declining to address merits); *Pope v. Krueger,* 762 F.App'x 347, 349 (7th Cir. 2019) (same).

While "the exercise of the inherent power of lower federal courts can be limited by statute and rule," the Supreme Court has explained, "we do not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power." *Chambers*, 501 U.S. at 47 (quotations omitted). *See, e.g.*, *Link*, 370 U.S. at 630-32 (abrogation of sanction authority requires "clear[] expression of purpose"). "For Congress to displace or repudiate the lower federal courts' inherent powers, the Supreme Court has demanded something akin to a clear indication of legislative intent." *Armstrong v. Guccione*, 470 F.3d 89, 102 (2d Cir. 2006).

No such intent is evident in §1252(f)(1)—which, again, is "nothing more or less than a limit on injunctive relief," *AADC*, 525 U.S. at 481, not sanctions

authority. "[A]t least in the absence of very clear words from Congress, we do not presume that a statute supersedes the customary powers of a court to govern the practice of lawyers in litigation before it." *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241, 1245 n.6 (11th Cir. 2009). Judicial authority to sanction litigation misconduct is not readily abridged,[20] and there is no evidence Congress intended to abridge it here.

3. §1252(f)(1) Does Not Preclude Declaratory Relief.

Finally, the Supreme Court this term held that §1252(f)(1) does not apply to class-wide declaratory judgments. *See Nielsen v. Preap*, 139 S.Ct. 954, 962 (2019) (citing §1252(f)(1) and commenting, "[w]hether the *Preap* court had jurisdiction to enter such an injunction is irrelevant because the District Court had jurisdiction to entertain the plaintiffs' request for declaratory relief").[21]

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[20] *See, e.g.*, *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011) (Foreign Sovereign Immunities Act did not limit inherent authority to impose sanctions); *Scott v. Clarke*, No. 3:12-CV-00036, 2014 WL 1463755 at *1, *3–5 (W.D. Va. Apr. 15, 2014) (declining to apply Prison Litigation Reform Act (PLRA) restrictions to fees awarded as discovery sanctions); *Davis v. Rouse*, No. WDQ-08-cv-3106, 2012 WL 3059569 at *3 (D. Md. July 25, 2012) (PLRA does not apply to sanctions); *Edwin G. v. Washington*, No. 97-1177, 2001 WL 196760 at *1–2 (C.D. Ill. Jan. 26, 2001) (same).

[21] In *Hamama I*, this Court noted it was "skeptical" that §1252(f)(1) allows declaratory relief because "[t]he practical effect of a grant of declaratory relief as to Petitioners' detention would be a class-wide injunction against the detention provisions, which is barred by §1252(f)(1)." 912 F.3d at 879 n.8. Even if skepticism was a conclusion—which it is not—noted the issue was "not before [it]." *Id.* Its dicta is inconsistent with the subsequent holding in *Preap* and *Gooch v.*

The rationale for this holding is strong. As the Third Circuit explained in *Alli v. Decker*, 650 F.3d 1007, 1012-13 (3d Cir. 2011):

> A closely adjacent provision, §1252(e)(1)(A), precludes courts from entering 'declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien....' This provision is compelling evidence that Congress knew how to preclude declaratory relief, but chose not to in §1252(f)(1). See *INS v. Cardoza–Fonseca*, 480 U.S. 421, 432 (1987) ("'[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))). In *Nken v. Holder*, the Supreme Court followed this presumption in interpreting §1252(f)(2), immediately adjacent to the provision at issue here, and noted that the presumption was "particularly true ... where [the] subsections ... were enacted as part of a unified overhaul of judicial review procedures." See *Nken v. Holder*, 129 S.Ct. 1749, 1759 (2009).

The district court has not yet ruled on Petitioners' request for declaratory relief—among the reasons why remand is appropriate.

D. §1252(f)(1) Does Not Preclude An Order Implementing a Statute.

By its express terms, §1252(f)(1) deprives courts of authority to "enjoin or

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Life Inv'rs Ins. Co. of Am., 672 F.3d 402, 428 (6th Cir. 2012), which explained that class-wide declaratory relief is a "separable and distinct type of relief" appropriate where it "will resolve an issue common to all class members." In addition, clear distinctions exist between a declaratory judgment and an injunction; the latter but not the former constitutes a "personal command," requires a showing of irreparable harm, and is enforceable by contempt. *See* Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 697 (1990); *Steffel v. Thompson*, 415 U.S. 452, 471-72 (1974); *Morrow v. Harwell*, 768 F.2d 619, 627 (5th Cir. 1985); *Clark v. United States*, 691 F.2d 837, 841 (7th Cir. 1982); *PGBA, LLC v. United States*, 389 F.3d 1219, 1228 n.6 (Fed. Cir. 2004).

restrain the operation of [referenced] provisions" of the INA—but *not* of authority to *interpret* those provisions and issue appropriate orders in light of that interpretation. That was the basis for class-wide injunctive relief in *Jennings*, where the district court "had [the noncitizens'] statutory challenge primarily in mind," 138 S.Ct. at 851. While *Jennings* rejected that statutory challenge, it did not dispute that class-wide relief on successful statutory claims would be proper under §1252(f)(1).

Numerous courts have found that class-wide injunctive relief is available on statutory claims to ensure proper application of the INA.[22] The legislative history confirms that such claims are outside the reach of §1252(f) because they do not seek "to enjoin procedures *established by Congress* to reform the process of removing illegal aliens from the U.S." H.R. Rep. No. 104-469, Pt. 1, at 161 (1996)

[22] *See Rodriguez,* 591 F.3d at 1120-21 (§1252(f) "prohibits only injunction of 'the operation of' the detention statutes, not injunction of a violation of the statutes"); *Ali v. Ashcroft*, 346 F.3d 873, 886-87 (9th Cir. 2003), *withdrawn on reh'g on other grounds*, *Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005) ("§1252(f)(1) is inapplicable because Petitioners seek not to enjoin the *operation* of §1231(b) but *violations* of the statute and 'to ensure that the provision is properly implemented.'"); *Diaz v. Hott*, 297 F.Supp.3d 618, 627–28 (E.D. Va. 2018) ("Petitioners are not seeking an injunction 'against the operation of' the INA but are instead seeking an injunction requiring respondents to comply with the terms of the INA, as interpreted by this Court."); *R.I.L-R v. Johnson*, 80 F.Supp.3d 164, 184 (D.D.C. 2015) (same).

(emphasis added).[23] Moreover, even the government has not—in either this case or before the Supreme Court, in *Preap*, where the Supreme Court interpreted 8 U.S.C. §1226(c)—argued that §1252(f)(1) presents a barrier to class-wide injunctive relief in statutory cases. *See* Petitioners' Brief & Petitioners' Reply Brief, *Nielsen v. Preap*, 139 S.Ct. 954 (2019) (No. 16-1363), 2018 WL 2554770; 2018 WL 4275546.

In *Hamama I*, this Court rejected Petitioners' argument that the district court's bond order, R.191, *was* interpreting the INA. Rather, the Court held, *Jennings* (which post-dated the district court's bond decision) "foreclosed any statutory interpretation that would lead to what Petitioners want." 912 F.3d at 879. *Hamama I* implicitly recognized that relief based on the faithful application of the statute is permissible under §1252(f)(1).

The order here on appeal meets this test. The Supreme Court itself has interpreted §1231 to require precisely the relief ordered by the district court: release after six months where removal is not significantly likely in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 701. The same analysis applies under §1226(a). Thus the district court was ordering proper operation of both §1231 and §1226(a), not enjoining or restraining them.

[23] The report referred to §306 of the proposed Immigration in the National Interest Act (proposed new subsection (g) to 8 U.S.C. §1252). In 1996, IIRIRA enacted this same provision as §1252(f)(1). Pub. L. No. 104-208, 110 Stat. 3009-546.

As to §1225(b) and §1226(c), the court's order is premised on a finding of unconstitutionality, since *Jennings* held that those provisions, unlike §1231(a), are not susceptible to a constitutional avoidance interpretation. Op., R.490, Pg.ID#14179-82. As argued above, the ordered relief for §1225(b) and §1226(c) detainees is available in habeas, as a sanction, or as declaratory relief. But if it were not, that would mean only that the district court's order was overbroad, and should have reached only the Detained Final Order Subclass, since such relief simply ensures the proper operation of §1231, as definitively interpreted by the Supreme Court in *Zadvydas*.

E. Respondents' Commonality Objections Are Not Properly Before the Court, and in Any Event Petitioners' *Zadvydas* Claim Raises Common Questions.

Under Fed. R. Civ. P. 23(f), Respondents had 45 days to seek leave to appeal class certification.[24] They failed to do so. The result is that this Court lacks appellate jurisdiction over Respondents' argument that the *Zadvydas* claim is not suited to class-wide treatment because there are no common questions to answer on a class-wide basis.

In any event, the district court's commonality finding was entirely correct. The court found that "[t]he *Zadvydas* subclass has multiple common questions of

[24] *See Nutraceutical Corp. v. Lambert*, 139 S.Ct. 710, 716 (2019) (court of appeals cannot forgive failure to follow Rule 23(f)'s deadlines).

law and fact," including factual questions about Iraq's policies around repatriations and legal questions about how *Zadvydas* applies here. Op., R.191, Pg.ID#5351. At oral argument, when the court pressed Respondents on whether the analysis would be any different if "I broke this case up to 100 separate cases and I said today we're going to take up the case of Mr. A," the government conceded that "we'd be looking at largely the same factors."[25] 10/24/18 Tr., R.461, 58:1-6, Pg.ID#12359.

The district court appropriately emphasized the "substantial benefits of consolidated treatment" and "'the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.'" Op., R.490, Pg.ID#14198 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). The legal and factual questions decided by the district court and now by this Court (e.g., Can pre-order detainees be detained indefinitely? What is Iraq's position on repatriation?) are common to the class.[26]

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[25] *See* 10/24/18 Tr., R.461, 54:1-13, Pg.ID#12355.
Court: [T]he government isn't saying there's something special about a particular class member that's delaying that person's repatriation. You're pointing to difficulties the government's having putting together sufficient flights on some kind of economical basis or logistical issues with the government of Iraq. You're not saying there's something special about a particular class member…"
Respondents: I think generally the process is the same.

[26] Should this Court believe it would be analytically cleaner to grant the same relief to the Detained Final Order Subclass (detainees held under §1231(a)), and the Mandatory Detention Subclass (pre-order detainees held under §1226(c)), that would have almost the same effect, although a small number of individuals would be excluded. Op., R.191, Pg.ID#5318-28, 5347-62.

Had hundreds of detained Iraqis filed individual habeas petitions, rather than a class action, the court would, as a matter of docket management, have had to consolidate cases to decide those common questions. *Phan v. Reno*, 56 F.Supp.2d 1149 (W.D. Wash. 1999) (en banc), a pre-*Zadvydas* case where the court faced over 100 habeas petitions from non-citizens ordered deported to countries that refused them admittance, is instructive. "Due to the great number of cases currently pending in this district that raise the same issue," and "recogniz[ing] the need to adopt a consistent legal framework," the court designated five lead cases to decide "issues common to all petitioners," namely whether their continued detention violated due process. *Id.* at 1151. The district court did essentially the same thing here.

Moreover, the district court was not just deciding common legal questions, but managing complex discovery over common factual ones. The discovery battles necessary to reveal information about Iraq's position on repatriations were difficult enough in one case. Similar discovery in hundreds of individual habeas cases would have been entirely unmanageable. The practical reality is that only in a class action could Petitioners effectively challenge Respondents' misrepresentations.

Courts frequently use the district court's approach, addressing common questions on a class-wide basis, while allowing individualized answers to

individual ones.[27] *See, e.g., Young*, 693 F.3d at 543 (finding commonality even though "Defendants will have some individualized defenses against certain policyholders"); *Brown v. District of Columbia*, 928 F.3d 1070, 1082 (D.C. Cir. 2019) (commonality satisfied where court could provide common answers to common questions based on common proof, that would then set framework for services to disabled individuals). The district court, which had "'inherent power to manage and control its own pending litigation,'" *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497, 504 (6th Cir. 2015), did not abuse its discretion in crafting an order that answered common legal questions on a class-wide basis, found on the facts that Petitioners had provided good reason to believe removal is not significantly likely in the reasonably foreseeable future, and allowed the government to rebut that showing in individual cases.

CONCLUSION

The Court should affirm with respect to both *Zadvydas* relief and sanctions. In the alternative, the Court should remand so that the district court can consider the impact of *Hamama I* in the first instance.

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[27] Respondents misrepresent Petitioners' district court brief. Appellants' Br. at 48. Petitioners asked the court to address the common question of what rebuttal evidence the government must introduce on the third step of the *Zadvydas* analysis, i.e. whether generic facts about diplomatic negotiations are sufficient or whether there must be evidence of Iraq's willingness to repatriate that class member, as this Court held in *Rosales-Garcia*, 322 F.3d at 415.

Respectfully Submitted,

Miriam J. Aukerman (P63165)
American Civil Liberties Union
Fund of Michigan
1514 Wealthy Street SE, Suite 260
Grand Rapids, MI 49506
maukerman@aclumich.org

Counsel for Appellees

By: */s/Kimberly L. Scott*
Kimberly L. Scott (P69706)
Cooperating Attorneys, ACLU Fund
of Michigan
Miller, Canfield, Paddock & Stone, PLC
101 N. Main St., 7th Floor
Ann Arbor, MI 48104
(734) 668-7696
scott@millercanfield.com
Counsel for Appellees

Dated: August 2, 2019

CERTIFICATION OF COMPLIANCE

I certify that the above brief contains 12,968 excluding portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that the above response brief complies with the type size and typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure: it was prepared in proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point typeface.

By: */s/ Kimberly L. Scott*
Kimberly L. Scott
Cooperating Attorney, ACLU Fund of Michigan
Miller, Canfield, Paddock, & Stone PLC
101 N. Main St., 7th Floor
Ann Arbor, MI 48104
Tel: (734) 668-7696
scott@millercanfield.com

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2019, 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*
Kimberly L. Scott (P69706)
Cooperating Attorneys, ACLU Fund of Michigan
MILLER, CANFIELD, PADDOCK
& STONE, PLC
101 N. Main St., 7th Floor
Ann Arbor, MI 48104
(734) 668-7696
scott@millercanfield.com

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Hamama, et al., v. Adducci, et al., Case No. 19-1080

Eastern District of Michigan, Case No. 17-cv-11910

Record entry numbers reflect the most recent public filing and the original filing under seal, where applicable. There are several instances where the parties refiled documents in response to district court orders regarding unsealing of records. In those instances, the former record entry number is noted in the first column.

Record entries noted with an * refer to the entries discussed in Appellees' Brief at n. 11.

Record Entry Number	Page ID #	Date Filed	Description
1	1–26	6/15/2017	SEALED Habeas Corpus Class Action Petition
11 to 11-15	45–175	6/15/2017	Petitioners' Motion for a Temporary Restraining Order and/or Stay of Removal
32	497–502	6/22/2017	Opinion & Order Staying Removal of Petitioners Pending Court's Review of Jurisdiction
35	509–48	6/24/2017	First Amended Habeas Corpus Class Action Petition and Class Action Complaint for Declaratory, Injunctive, & Mandamus Relief
36 to 36-6	549–615	6/24/2017	Plaintiffs/Petitioners' Emergency Motion to Expand Order Staying Removal to Protect Nationwide Class of Iraqi Nationals Facing Imminent Removal to Iraq
43	671–677	6/26/2017	Opinion & Order Granting Petitioners'/Plaintiffs' Motion to Expand Order Staying Removal to Protect Nationwide Class (Dkt. 36)

Record Entry Number	Page ID #	Date Filed	Description
51 to 51-9	746–835	6/29/2017	Plaintiffs/Petitioners' Motion for Expedited Discovery of Class Member Information
54	850–861	6/30/2017	Respondents' Consolidated Brief in Opposition to Petitioners' Motion to Expedite Briefing Schedule for Plaintiff/Petitioners' Motion for Preliminary Injunction and to Extend Order Staying Removal (Dkt. #50) and Petitioners' Motion to Expedite Discovery of Class Member Information (Dkt. #51)
56*	881	7/3/2017	Notice of Motion Hearing regarding July 5, 2017 Status Conference (ECF 50, 51)
59*	886–924	7/6/2017	Transcript of the July 5, 2017 Hearing of Petitioners/Plaintiffs' Motion for Expedited Briefing Schedule for Plaintiffs/Petitioners' Motion for Preliminary Injunction and to Extend Order Staying Removal
61	1195–1197	7/6/2017	Order Extending Stay of Enforcement of Removal Orders Pending Court's Review of Jurisdiction
65*	1249–1250	7/11/2017	Order Regarding Status Conference
70*	1493–1553	7/13/2017	Hearing Transcript of July 13, 2017 Status Conference
77 to 77-30	1703–1915	7/17/2017	Petitioners/Plaintiffs' Motion for Preliminary Stay of Removal and/or Preliminary Injunction *Sealed Versions of Declarations at R. 11, 14, 30, 36*
79*	1917–1919	7/17/2017	Status Conference Order
81 to 81-17	1951–2055	7/20/2017	Respondents' Response in Opposition to Petitioners' Request for Preliminary Injunction
86	2269–2322	7/24/2017	Transcript of July 21, 2017 Hearing of Petitioners/Plaintiffs' Motion for Preliminary Stay of Removal and/or Preliminary Injunction

Record Entry Number	Page ID #	Date Filed	Description
87*	2323–2357	7/24/2017	Opinion & Order Granting Petitioners' Motion for Preliminary Injunction
95*	2522–2555	8/30/2017	Petitioners' Status Report
96*	2556–2595	8/30/2017	Respondents' Status Report
100*	2599–2661	9/1/2017	Hearing Transcript August 31, 2017 Status Conference
101*	2662–2663	9/7/2017	Order Regarding Further Proceedings
107*	2700–2811	9/15/2017	Joint Status Report
110*	2815–2820	9/25/2017	Order Regarding Further Proceedings
111*	2821–2852	9/26/2017	Joint Status Report
115*	2943–2944	9/29/2017	Order Regarding Further Proceedings
118	2956–3033	10/13/2017	Second Amended Habeas Corpus Class Action Petition and Class Action Complaint for Declaratory, Injunctive, and Mandamus Relief
126*	3073	10/26/2017	Order Granting Respondents' Consented-To Motion for Enlargement of Time
127*	3074–3094	10/27/2017	Petitioners' Objections to Respondents' First Set of Interrogatories to Named Plaintiffs
128*	3095-3104	10/27/2017	Petitioners' Objections to Respondents' First Set of Requests for Production of Documents and Things to Named Plaintiffs
129*	3015–3124	10/27/2017	Respondents' Objections to Petitioners' First Set of Interrogatories to Respondent Elaine C. Duke
130*	3125–3150	10/27/2017	Respondents' Objections to Petitioners' First Set of Requests for Production of Documents and Things
131*	3151–3186	10/27/2017	Respondents' Objections to Petitioners' First Set of Requests for Admission
132*	3187–3202	10/27/2017	Respondents' Objections to Petitioners' Notice of Rule 30(b)(6) Deposition
133*	3203–3248	11/1/2017	Petitioners'/Plaintiffs' Status Report for November 3, 2017 Status Conference

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136*	3318–3335	11/6/2017	Response to Petitioners'/Plaintiffs' Status Report for the November 3, 2017 Status Conference
138 to 138-33	3338–3733	11/07/2017	Petitioners/Plaintiffs' Motion for Preliminary Injunction on Detention Issues *Sealed Version of Exhibits at R. 220*
139 to 139-5	3734–3836	11/07/2017	Petitioners/Plaintiffs' Amended Motion for Class Certification
140*	N/A	11/8/2017	Notice of November 13, 2017 Telephonic Status Conference
141*	N/A	11/13/2017	Notice of November 20, 2017 Telephonic Status Conference
146 to 146-1	3880–92	11/20/2017	Petitioners/Plaintiffs' Notice Regarding Pending Discovery Requests and Proposed Stipulated Facts
148	3901–3904	11/20/2017	Response to Petitioners'/Plaintiffs' Notice Regarding Pending Discovery Requests and Proposed Stipulated Facts
152*	3929–3934	11/21/2017	Amended Order Regarding Production of A-Files and Records of Proceedings and Other Matters
153*	3935–3937	11/22/2017	Order Regarding Discovery
158 to 158-2	4083–4132	11/30/2017	Respondents' Opposition to Petitioners' Motion for Preliminary Injunction on Detention Issues
166*	4240–4241	12/8/2017	Order Denying Petitioners' Motion for Discovery (Dkt. 160)
171*	4802–4827	12/12/2017	Rule 26(f) Report and Discovery Plan
184 to 184-2	5062–5074	12/22/2017	Supplemental Response to Plaintiffs' Motion for Preliminary Injunction

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188	5088–5236	12/27/2017	Transcript of December 20, 2017 Hearing of Petitioners/Plaintiffs' Motion for Class Certification, Petitioners/Plaintiffs' Motion for a Preliminary Injunction on the Detention Issues and Respondent/Defendants' Motion to Dismiss Second Amended Class Petition
191*	5318–5363	1/2/2018	Opinion & Order Denying in Part Respondents' Motion to Dismiss (Dkt. 135), Granting in Part Petitioners' Motion for Preliminary Injunction (Dkt. 138), and Granting in Part Petitioners' Amended Motion to Certify Class (Dkt. 139)
192*	5364	1/2/2018	Notice to Appear January 11, 2018 Status Conference
195	5372–5377	1/4/2018	Order Regarding Production of Alien Files and Records of Proceedings
198*	5391–5443	1/10/2018	Joint Statement of Issues
199*	5444	1/11/2018	Notice to Appear January 17, 2018 Telephonic Status Conference
200*	5445	1/18/2018	Notice to Appear January 19, 2018 Telephonic Status Conference
201*	5446–5454	1/18/2018	Order Regarding Further Proceedings
203*	5456–5464	1/19/2018	Order Regarding Further Proceedings
213*	5498–5499	1/26/2018	Order Granting Temporary Stay of Removal with Respect to Aalan Kamal Pending Further Proceedings (Dkt. 212)
217 to 217-4*	5550–5650	2/1/2018	Joint Statement of Issues
221*	5748–5749	2/2/2018	Order Regarding Further Proceedings
235 to 235-3*	5992–6093	2/16/2018	Joint Statement of Issues
254*	6222–6239	3/13/2018	Order Regarding Further Proceedings
266 to 266-1*	6451–6463	3/30/2018	Respondents' Status Report
267*	6464–6467	4/6/2018	Respondents' Status Report

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272 to 272-1*	6596–6604	4/20/2018	Respondents' Status Report
282*	6702	5/8/2018	Order Regarding Further Proceedings
284	6710–6733	5/11/2018	Respondents' Motion for a Stay of Discovery Pending Resolution of the Interlocutory Appeals
286*	6754–6831	5/15/2018	Joint Statement of Issues
289 to 289-22	6847–7091	5/21/2018	Petitioners/Plaintiffs' Opposition to Respondents' Motion for a Stay of Discovery Pending Resolution of the Interlocutory Appeals
290	7092–7100	5/21/2018	Ex. H to R.289, Petitioners/Plaintiffs' Opposition to Respondents' Motion for a Stay of Discovery Pending Resolution of the Interlocutory Appeals
295*	7149–7156	5/31/2018	Order Regarding Respondents' Privilege Memorandum (Dkt. 264)
297 to 297-2	7160–7178	6/4/2018	Plaintiffs/Petitioners' Emergency Motion for Immediate Access to Class Members and Stay of Pending Access
298*	7179	6/4/2018	Notice to Appear June 5, 2018 Telephonic Status Conference
304*	7234–7243	6/12/2018	Order Regarding Further Proceedings
307 to 307-16	7280–7395	6/13/2018	Plaintiffs/Petitioners' Emergency Motion Regarding Coercion and Interference with Class Members
308		6/13/2018	SEALED Exhibit 7 to Plaintiffs/Petitioners' Emergency Motion Regarding Coercion and Interference with Class Members (R.307)
311 to 311-4	7444–7494	6/15/2018	Respondents' Opposition to Petitioners' Emergency Motion Regarding Coercion and Interference with Class Members
315 to 315-1	7559–7573	6/20/2018	Respondent ICE's Motion for Modification of the Court's Discovery Order (ECF 304)

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316	7574–7578	6/20/2018	Order Regarding Petitioners' Emergency Motion Regarding Coercion and Interference with Class Members (ECF 307)
320*	7605–7608	6/22/2018	Order Denying Respondents' Motion for Modification of the Court's Discovery Order (No. 315)
321	7609–7610	6/25/2018	Order Denying Petitioners' Emergency Motion for a Stay of Removal as to Aalan Kamal (Dkt. 212) as Moot
326*	7641–7642	7/3/2018	Order regarding July 3, 2018 Telephonic Status Conference
333*	7746–7750	7/11/2018	Opinion & Order Sustaining In Part and Overruling In Part Respondents' Assertion of Deliberative Process Privilege
345*	7880–7886	7/18/2018	Opinion and Order Denying Respondents' Motion for a Stay of Discovery Pending Resolution of the Interlocutory Appeals (Dkt. 284)
347*	7895	7/20/2018	Notice to Appear August 31, 2018 Status Conference
358 to 358-4	8131–8209	8/6/2018	Respondents' Motion for an Extension of the Discovery Deadline for Petitioners' Revised Second Set of Discovery Requests
363			Plaintiffs/Petitioners' Response in Opposition to Respondents' Motion for an Extension of the Discovery Deadline and Request for Expedited Reply *Filed Under Seal at 583*

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366*	8323–8224	8/14/2018	Order Granting Respondents' Motion to Extend (Dkt. 358), Granting Respondents' Motion to Seal (Dkt. 359), Granting Petitioners' Motion to File Certain Documents with Redactions Pending a Decision on Sealing (Dkt. 364); and Directing Parties to Submit a Joint Statement of Outstanding Discovery Disputes
373*	8396–8428	8/27/2018	Joint Statement of Issues
374	8428–8503	8/29/2018	SEALED Transcript of the June 18, 2018 Emergency Motion to Prevent and Redress Coercion of and Interference with Class Members
378 to 378-7	9012–9157	8/29/2018	Petitioners/Plaintiffs' Motion for Leave to File Documents Publicly and Request for Provisionally Filing Under Seals
385*	9391–9393	9/6/2018	Order Regarding September 5, 2018 Status Conference
386*	9394–9402	9/7/2018	Opinion & Order Sustaining In Part and Overruling In Part Respondents' Assertions of the Deliberative Process Privilege, the Law Enforcement Privilege, and Non-Responsiveness
387*	9403–9423	9/7/2018	Petitioners' Statement Regarding Schedule for Resolution of Petitioners' Renewed Motion For Preliminary Injunction Under Zadvydas (ECF 376), Motion for Sanctions (ECF 381), and Motion for Leave to File Documents Publicly (ECF 382)
388*	9424–9427	9/7/2018	Defendants/Respondents' Position on Discovery, the Need for an Evidentiary Hearing, and Revised Briefing Schedule
389*	9428–9431	9/7/2018	Second Order Regarding September 5, 2018 Status Conference

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390*	9432–9439	9/12/2018	Petitioners/Plaintiffs' Supplemental Statement Regarding Evidentiary Hearing on Petitioners/Plaintiffs' Motion for Sanctions (ECF 381)
391*	9440–9442	9/12/2018	Order Regarding Discovery Disputes Based on the Assertion of the Attorney-Client Privilege and the Work Product Doctrine
392*	9443–9450	9/12/2018	Respondents/Defendants' Supplemental Statement Regarding Evidentiary Hearing on Petitioners/Plaintiffs' Motion for Sanctions (ECF 381)
395*	9483–9484	9/14/2018	Third Order Regarding September 5, 2018 Status Conference
400*	9508–9509	9/21/2018	Order Revising Briefing Schedule Regarding Petitioners' Motion for Leave to File Documents Publicly (ECF 382); Setting Expedited Schedule for Interrogatory Answer Dispute; Requiring Joint Statement on Coercion Issue
401*	9510–9513	9/21/2018	Order Regarding Procedure to Resolve Disputes Concerning Attorney-Client Privilege and Work Product Protection
403	9532–9551	9/24/2018	Petitioners' Motion to Compel
404	9552–9569	9/26/2018	Amended Second Opinion and Order Denying Respondents' Motion to Dismiss (Dkt. 135), and Granting Petitioners' Amended Motion to Certify Class (Dkt. 139)
412*	9746–9760	10/1/2018	Order Granting Petitioners' Motion to Compel (Dkt. 403)
413*	9761–9769	10/1/2018	Petitioners/Plaintiffs' Position in Response to ECF 400
414*	9770–9776	10/1/2018	Respondents'/Defendants' Position in Response to ECF 400

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417	13762–13896	11/1/2018	SEALED Respondents'/Defendants' Opposition to Petitioners'/Plaintiffs'Motion for Sanctions (ECF 381)
418	13697–13761	11/1/2018	SEALED Respondents' Opposition to Petitioners' Renewed Motion for a Preliminary Injunction under *Zadvydas*
419		10/2/2018	SEALED Respondents/Defendants' Response to Petitioners/Plaintiffs' Motion to Compel (ECF 403)
420	13635–13696	11/1/2018	SEALED Petitioners/Plaintiffs' Motion for Sanctions
421	13635–13696	11/1/2018	SEALED Petitioners/Plaintiffs' Motion for Sanctions
423	10790–10791	10/5/2018	Order Regarding October 23, 2018 Hearing
427*	10848–10849	10/10/2018	Order Setting Deadline for Petitioners to Provide Deposition Topics; For The Parties' to Submit Witness Lists; For Parties to Submit Exhibit Lists; Respondents to Answer the Second Amended Petition; Setting a Status Conference; And Granting in Part Respondents' Motion to Extend (Dkt. 425)
431*	10871–10872	10/12/2018	Order (i) Granting Petitioners Leave to Take the Deposition of James Maddox, (ii) Granting Petitioners Leave to Take Rule 30(b)(6) Depositions, (iii) Setting Respondents' Deadline to Complete Document Production, (iv) Setting Deadline to Submit Briefing on Witness Sequestration, and (v) Ordering Respondents to File an Amended Witness List

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440*		10/15/2018	SEALED Petitioners' Statement Regarding Consolidation of Preliminary Injunction Hearing with a Trial on the Merits
442	11090–11098	10/15/2018	Respondents' Exhibit List
443	11099–11011	10/15/2018	Respondents' Amended Witness List
445	13996–14022	11/2/2018	SEALED Petitioners'/Plaintiffs' Reply in Support of Motion for Sanctions
446	13897–13995	11/2/2018	SEALED Petitioners' Reply Brief on Renewed Motion for a Preliminary Injunction under *Zadvydas*
449*	11244–11247	10/19/2018	Order Regarding Document Production, Depositions, and Evidentiary Hearing
450 to 450-1*	11248–11261	10/19/2018	Notice of Non-Compliance with ECF 449
451	11262–11265	10/20/2018	Consent Motion to Strike ECF Nos. 450, 450-1
452*	11266–11267	10/22/2018	Order Resetting the Hearing on Petitioners' Motion for Preliminary Injunction and Motion for Sanctions, and Ordering Briefing on Potential Sanctions for the Government's Noncompliance with Discovery Deadlines and Discovery Orders
453	11268–11280	10/23/2018	Opinion and Order Granting in Part Petitioners' Motion for Leave to File Documents Publicly (Dkt. 382)
454 to 454-5	11281–11341	10/23/2018	Petitioners' Memorandum Regarding Sanctions for Respondents' Discovery Violations *Filed Under Seal at 584*
455 (formerly 454-2)	11342–11362	10/23/2018	Ex. 1 to Plaintiffs/Petitioners' Motion for Sanctions for Discovery Violations-Refiled to Conform with Court's Order ECF 453 *Filed Under Seal at 584*

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456 to 456-4	11363–11442	10/23/2018	Petitioners/Plaintiffs' Motion for Leave to File Memorandum Regarding Sanctions for Respondents' Discovery Violations Provisionally under Seal and to File Documents Publicly
461			Transcript of October 24, 2018 Hearing for Preliminary Injunction and Motion for Sanctions
462*	12409–12417	10/25/2018	Opinion & Order Sustaining Respondents' Assertions of the Attorney-Client Privilege and the Work Product Doctrine
463 to 463-5	12418–12465	10/25/2018	Respondents' Response to Petitioners' Memorandum Regarding Sanctions for Respondents' Discovery Violations *Filed Under Seal at 583*
469 to 469-4	12793–12825	10/29/2018	Petitioners' Reply Memorandum Regarding Sanctions for Respondents' Discovery Violations
470*	12826–12829	10/29/2018	Order Denying Respondents' Request to Redact a Portion of Their Response to Petitioners' Motion for Sanctions and the Declaration in Support of Their Response Brief
471*	12830–12831	10/31/2018	Order on Privilege as to June 26, 2018 Broadcast Email
472	12832–12833	11/1/2018	Order Striking Documents from the Record and Directing the Parties to Refile Redacted Documents
473 to 473-83 (formerly 376 & 457)	12834–13629	11/1/2018	Plaintiffs/Petitioners' Renewed Motion for a Preliminary Injunction under *Zadvydas* *Filed Under Seal at 420*

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474	13630–13632	11/1/2018	Sealed Ex. [*01-14*] to *Filed Under Seal Pursuant to ECF 453* re 473 MOTION for Preliminary Injunction
475*	13633–13634	11/1/2018	Order Granting Motion For Leave To File Memorandum Regarding Sanctions For Respondents' Discovery Violations Provisionally Under Seal and To File Documents Publicly
476 to 476-4 (formerly 377, 381, & 459)	13635–13696	11/1/2018	Petitioners/Plaintiffs' Motion for Sanctions *Filed Under Seal at 421*
477 to 477-2 (formerly 465)	13697–13761	11/1/2018	Respondents' Opposition to Petitioners' Renewed Motion for a Preliminary Injunction under *Zadvydas* *Filed Under Seal at 418*
478 to 478-28 (formerly 417, 466)	13762–13896	11/1/2018	Respondents'/Defendants' Opposition to Petitioners'/Plaintiffs'Motion for Sanctions (ECF 381) *Filed Under Seal at 417*
479 to 479-11 (formerly 432, 467)	13897–13995	11/2/2018	Petitioners' Reply Brief on Renewed Motion for a Preliminary Injunction under *Zadvydas* *Filed Under Seal at 446*
480 to 480-3 (formerly 430, 468)	13996–14022	11/2/2018	Petitioners'/Plaintiffs' Reply in Support of Motion for Sanctions *Filed Under Seal at 445*
481*	14023–14024	11/5/2018	Order Regarding November 5, 2018 Status Conference
483 to 483-1	14029–14042	11/7/2018	Petitioners Supplemental Statement in Support of Renewed Motion for a Preliminary Injunction under *Zadvydas* (ECF 473)

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487*	14058	11/15/2018	Notice of November 16, 2018 Telephonic Conference
489 to 489-2	14091–14143	11/19/2018	Respondents/Defendants' Response to Plaintiffs/Petitioners' Supplemental Statement in Support of their Renewed Motion for Preliminary Injunction under *Zadvydas* (ECF No. 483)
490	14144–14202	11/20/2018	Opinion and Order Granting Petitioners' Renewed Motion for Preliminary Injunction (Dkt. 473)
492	14208–14220	12/5/2018	Petitioners' Supplemental Brief Regarding Application to Non-Detained Class Members of Order Granting Renewed Motion for Preliminary Injunction (ECF 490)
493	14221–14228	12/14/2018	Respondents'/Defendants' Response to Petitioners'/Plaintiff's Supplemental Brief (ECF 492) Regarding Order Granting the Renewed Motion for a Preliminary Injunction
494 to 494-3	14229–14255	12/17/2018	Petitioners' Reply Brief Regarding Application to Non-Detained Class Members of Order Granting Renewed Motion for Preliminary Injunction (ECF 490)
517	14451–14453	1/18/2019	Notice of Appeal
529*	14568–14603	2/14/2019	Joint Statement of Issues
532*	14638–14647	3/12/2019	Order Staying Case and Addressing Outstanding Issues
533*	14648–14650	3/13/2019	Order Modifying the Court's November 20, 2018 Opinion & Order Granting Renewed Motion for Preliminary Injunction

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583		8/2/2019	SEALED Plaintiffs/Petitioners' Response in Opposition to Respondents' Motion for an Extension of the Discovery Deadline and Request for Expedited Reply
584		8/2/2019	SEALED Petitioners' Memorandum Regarding Sanctions for Respondents' Discovery Violations