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

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

PETITIONERS/PLAINTIFFS' MOTION FOR LEAVE TO FILE DOCUMENTS PUBLICLY AND REQUEST FOR PROVISIONALLY FILING UNDER SEAL

Local Rule 7.1(a)(1) requires Petitioners/Plaintiffs (hereinafter Petitioners) to ascertain whether this motion is opposed. Petitioners' counsel Wendolyn Richards communicated with William Silvis, counsel for Respondents/Defendants (hereinafter Respondents), via email on August 28, 2018, explaining the nature of the relief sought, providing a list of the documents Petitioners believe are not properly filed under seal, and seeking concurrence in this motion to file publicly. Petitioners have not received a response from Respondents as to whether they agree to public filing.

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Petitioners submit the following Motion for Leave to File Documents Publicly and Request for Provisionally Filing Under Seal. In support of this Motion, Petitioners state:

1. On November 11, 2017, Petitioners filed their Motion for Preliminary

Injunction on Detention Issues. ECF 138, PgID3338 *et seq.* In that Motion, Petitioners brought their "*Zadvydas* claim," asserting that detention of class members was unreasonably prolonged or indefinite as it remained unclear if Iraq would actually allow their repatriation—whether by issuing travel documents or making other arrangements to accept their removal—and if so, how long that process would take.

2. On January 2, 2018, this Court deferred ruling on Petitioners' *Zadvydas* claims because, based on the record presented by the government, including declarations executed by John Schultz, deputy assistant director for ICE's Asia and Europe Removal and International Operations Unit, and Michael Bernacke, ICE's unit chief for that same unit, the Court could not "make a determination regarding whether Iraq will accept repatriations of the class." ECF 191, PgID5332.

3. The Court further ordered that the parties could engage in discovery regarding the *Zadvydas* claim, including depositions of government personnel with knowledge of the Iraq repatriation agreement and program, and production of documents pertaining to that subject. ECF 191, PgID5362.

4. On June 19, 2018, pursuant to Fed. R. Civ. P. 26(c), the Court entered a Second Amended Stipulated Order for the Protection of Confidential Information (ECF 313) ("Protective Order").

5. That Order permits the parties to designate as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" certain categories of documents.

6. The Protective Order states that:

> A party seeking to file records with the Court that have been designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL shall coordinate with the designating party (if not the filing party) to provide to the Court, either by motion or proposed stipulated order, the parties' positions regarding sealing, including:
>
> i. the authority asserted for sealing;
> ii. an identification and description of each item proposed for sealing;
> iii. the parties' position on whether the record should be sealed is necessary;
> iv. the parties' position on whether means other than sealing are unavailable or unsatisfactory to preserve the interest advanced by the movant in support of sealing; and
> v. a memorandum of legal authority supporting each party's position.

Id. § IX, PgID7534.

7. The Protective Order further states that: "The designating party shall have the responsibility of establishing that sealing is necessary. A party shall not file or otherwise tender to the Clerk any item proposed for sealing unless the Court has granted the motion or entered the proposed stipulated order required by this section." *Id.*, PgID7534-35.

8. Respondents have designated documents and deposition testimony as "CONFIDENTIAL" and "HIGHLY CONFIDENTIAL" that relate directly to the Government of Iraqi's repatriation policies and the existence or nonexistence of

any agreement or understanding to accept the return of class members.[1] These documents are directly relevant to Petitioners' *Zadvydas* claim, as they bear on the likelihood of removal in the reasonably foreseeable future, and directly relevant to Petitioners' motion for sanctions, as they demonstrate that Respondents' representations to the Court were false or misleading.

9. Courts in this circuit afford a strong presumption in favor of openness of records. Pursuant to *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016), *Beauchamp v. Federal Home Loan Mortgage Corp.*, 658 Fed. App'x 202 (6th Cir. 2016), *Rudd Equipment Co. v. John Deere Construction & Forestry Co.*, 834 F.3d 589 (6th Cir. 2016), and E.D. Mich. LR 5.3, the party seeking to seal a document bears the burden of overcoming that presumption. *See also Woods v. U.S. Drug Enf't Admin.*, 895 F.3d 891 (6th Cir. July 18, 2018). A court that chooses to seal records must set forth specific conclusions and findings which justify sealing. *Shane*, 825 F.3d at 306.

10. Moreover, the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access. *See id.* at 305 (citing *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d

[1] All documents listed in Ex. A had been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" by Respondents, or references such material.

1165, 1179 (6th Cir. 1983)).

11. In class actions, the Sixth Circuit demands that "the standards for denying public access to the record 'should be applied with particular strictness.'" *Shane*, 825 F.3d at 305 (citing *Goldstein v. Forbes (In re Cendant Corp.)*, 260 F.3d 183, 194 (3d Cir. 2001)). Given the grave and fundamental issues at stake for members of the class, "the public has an interest in ascertaining what evidence and records the District Court and this Court have relied upon in reaching [their] decisions." *Shane*, 825 F.3d at 306 (quoting *Brown & Williamson*, 710 F.2d at 1181); *see also Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 546 (7th Cir. 2002). Indeed, this principle is even more applicable here, because the case involves statutory and legal questions that affect not just members of the class but other individuals facing similar circumstances.

12. Contemporaneously with this Motion, Petitioners filed their *Renewed* Motion for a Preliminary Injunction under *Zadvydas* (ECF 376), and accompanying exhibits, and their Motion for Sanctions under the Court's Inherent Authority (ECF 381). To effectively pursue these claims, protect class members, and preserve appellate rights, Petitioners must rely upon documents and testimony that Respondents have, on a blanket basis, designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pursuant to the Protective Order.

13. For the vast majority of the documents and testimony Respondents

have designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL", Petitioners do not believe those documents or testimony should be sealed or that pleadings referencing information from those documents or that testimony should sealed.

14. The Court has already found that limited redactions are appropriate for documents that contain sensitive personally identifiable information identified under Fed. R. Civ. P. 5.2, A-numbers and information restricted from public disclosure under the Privacy Act of 1974 (5 U.S.C. § 552a), as well as information described in ECF 338. Such limited redactions are all that is necessary to preserve confidentiality interests in accordance with Fed. R. Civ. P. 5.2 and this Court's prior orders.

15. While Petitioners do not believe the documents produced by the Respondents should be subject to sealing, Petitioners have filed their briefs and exhibits with redactions so that Respondents have the opportunity to make their argument about why these documents should be sealed. These filings are attached as Exs. D and E. Respondents, as the party seeking to shield these records from the public docket, have the burden, pursuant to *Shane* and the Protective Order, to demonstrate that sealing is proper.

16. Until the Respondents have an opportunity to present any argument they may have for why the pleadings and exhibits should be sealed, and Petitioners

have a chance to respond, Petitioners respectfully request this Court allow them to file the documents identified in Ex. A, which include their Renewed Motion for a Preliminary Injunction under *Zadvydas* (ECF 376), and accompanying exhibits, and their Motion for Sanctions under the Court's Inherent Authority (ECF 381), under seal pursuant to Fed R. Civ. P. 5.2(d) and Local Rule 5.3(b). The unredacted version of those briefs and exhibits are attached as Exhibits B and C. A proposed interim order for the temporary relief requested in paragraph (a) is attached as Exhibit F.

WHEREFORE, Petitioners request, pursuant to *Shane*, Fed R. Civ. P. 5.2(d) and Local Rule 5.3(b), that the Court:

a) Allow them to file provisionally under seal file the documents identified in Ex. A, which include their Renewed Motion for a Preliminary Injunction under *Zadvydas* (ECF 376), and certain accompanying exhibits, and their Motion for Sanctions under the Court's Inherent Authority (ECF 381), until Respondents have an opportunity to present any argument they may have for why those documents should be sealed, and Petitioners have a chance to respond.

b) After considering Respondents' argument and Petitioners' response on the appropriateness of sealing, enter an Order making public Petitioners' Renewed Motion for a Preliminary Injunction under

Zadvydas (ECF 376), and the accompanying exhibits, and Petitioners' Motion for Sanctions under the Court's Inherent Authority (ECF 381), except that sensitive personally identifiable information identified under Fed. R. Civ. P. 5.2, A-numbers and information restricted from public disclosure under the Privacy Act of 1974 (5 U.S.C. § 552a), as well as information described in ECF 338, shall be sealed and shall remain redacted in public filings in accordance with Fed. R. Civ. P. 5.2 and this Court's prior orders; and

c) Decide this motion prior to any hearing on the renewed preliminary injunction and sanctions motions, so that the Court and parties can address any concerns Respondents may have about holding argument on those motions or discussing the documents at issue in open court.

Respectfully submitted,

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Dated: August 31, 2018

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

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

BRIEF IN SUPPORT OF
PETITIONERS/PLAINTIFFS' MOTION FOR LEAVE
TO FILE DOCUMENTS PUBLICLY AND
REQUEST TO PROVISIONALLY FILE UNDER SEAL

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QUESTION PRESENTED

Should this Court allow class members and the public to have access to information of critical importance directly relevant to the statutory and constitutional rights at stake in Petitioners' *Zadvydas* claim and to Petitioners' motion for sanctions?

Petitioners' Answer: Yes.

Should this Court allow Petitioners provisionally to file their Renewed Motion for a Preliminary Injunction under *Zadvydas* (ECF 376) and accompanying exhibits, and their Motion for Sanctions under the Court's Inherent Authority (ECF 381) under seal, until Respondents have had an opportunity to make any argument for sealing and Petitioners have had a chance to reply?

Petitioners' Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Beauchamp v. Fed. Home Loan Mortgage Corp., 658 Fed. App'x 202 (6th Cir. 2016)

Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983)

Rudd Equip. Co. v. John Deere Constr. & Forestry Co., 834 F.3d 589 (6th Cir. 2016)

Shane Group, Inc. v Blue Cross Blue Shield of Mich., 825 F.3d 299 (6th Cir. 2016)

Woods v. U.S. Drug Enf't Admin., 895 F.3d 891 (6th Cir. July 18, 2018)

E.D. Mich. Local Rule 5.3

I. INTRODUCTION

After fourteen months of fighting for discovery relating to their *Zadvydas* claim, Petitioners were finally able to discover information that shows they are not significantly likely to be removed in the reasonably foreseeable future. This information goes directly to the heart of their claim, and thus continued detention is unreasonable. The information is of high public interest, and involves fundamental statutory and constitutional rights of class members and members of the public. The evidence filed in this Court in support of Petitioners' *Zadvydas* claim and their related motion for sanctions should be shared with all class members, their families, and the public, who deserve to know how this information affects them and the bases for decisions made by this Court.

II. BACKGROUND

On November 11, 2017, Petitioners filed their Motion for Preliminary Injunction on Detention Issues, ECF 138. In that Motion, Petitioners brought their "*Zadvydas* claim," asserting that it remained unclear if Iraq would actually allow their repatriation—whether by issuing travel documents or making other arrangements to accept their removal—and if so, how long that process will take. Without a showing that Iraq can and will promptly accept an individual for repatriation, that individual's detention is indefinite and unlawful under *Zadvydas*. Accordingly, Petitioners asked that this Court order that they be returned to the

community under orders of supervision unless the government could provide individualized evidence that they can be repatriated to Iraq.

On January 2, 2018, this Court deferred ruling on Petitioners' *Zadvydas* claims because, based on the record presented by the government, including three declarations executed by Messrs. Schultz and Bernacke, the Court could not "make a determination regarding whether Iraq will accept repatriations of the class." ECF 191, PgID5332. The Court further ordered that the parties could engage in discovery regarding the *Zadvydas* claim, including depositions of government personnel with knowledge of the Iraq repatriation agreement and program, and production of documents pertaining to that subject. ECF 191, PgID5362.

Following this order, the parties did engage in discovery pertaining to the *Zadvydas* claim. On June 19, 2018, pursuant to Fed. R. Civ. P. 26(c), the Court entered a Second Amended Stipulated Order for the Protection of Confidential Information (ECF 313) ("Protective Order"). The Protective Order permits the parties to designate as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" certain categories of documents.

The Protective Order specifies that any party or non-party from whom production is sought may designate the following as CONFIDENTIAL:

- documents, information, and discovery responses that the designating party or non-party reasonably believes not to be in the public domain;

- personal information covered by the Privacy Act, 5 U.S.C. § 552a and Federal Rule of Civil Procedure 5.2;
- an individual's birth date, social security number, tax identification number, alien registration number ("A number"), passport numbers, driver's license numbers, and any similar numbers assigned to an individual by a federal/national, state, or local government of the United States or any other country if not subject to privilege or other restrictions prohibiting disclosure even under protective order; and
- names, locations of, and any other identifying information which would allow the identification of the particular individual(s) to whom the information relates, or testimony on the record, of individuals not related to this litigation.

Protective Order § II, PgID7530.

Any party or non-party from whom production is sought may designate the following as HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY (referred to herein as "HIGHLY CONFIDENTIAL"):

- extremely sensitive documents, information and discovery responses, disclosure of which to another Party or non-party would create a substantial risk of serious harm that could not be avoided by less restrictive means, including information which, if disclosed, could adversely impact foreign relations or result in a party or material witness deciding not to testify out of fear of adverse immigration or criminal consequences;
- documents, information and discovery responses for which the Court has ordered produced under this designation;
- names, phone numbers and email addresses of federal employees unless subject to the law enforcement privilege; and
- travel document requests, drafts of flight manifests, sensitive communications with the Iraqi government if those communications relate to the removal process, and/or any document that contains information that is law enforcement sensitive, for instance, information which may be protected from public disclosure under the Freedom of Information Act, 5 U.S.C. § 552, et seq., and are not

> subject to the law enforcement privilege or other restrictions on disclosure.

Id. § III, PgID 7530-31.

While the parties have great leeway in the discovery context to designate documents and information as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," this leniency does not apply to documents filed with the Court during the adjudication stage. Regardless of whether a document is designated at "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" under the Protective Order, it must be filed publicly unless the Court finds that the standards for sealing are met.

The Protective Order states that:

> A party seeking to file records with the Court that have been designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL shall coordinate with the designating party (if not the filing party) to provide to the Court, either by motion or proposed stipulated order, the parties' positions regarding sealing, including:
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> i. the authority asserted for sealing;
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> iv. the parties' position on whether means other than sealing are unavailable or unsatisfactory to preserve the interest advanced by the movant in support of sealing; and
> v. a memorandum of legal authority supporting each party's position.

Id. § IX, PgID7534.

The Protective Order further states that: "The **designating party shall have the responsibility of establishing that sealing is necessary.** A party shall not file or otherwise tender to the Clerk any item proposed for sealing unless the Court has granted the motion or entered the proposed stipulated order required by this section." *Id.* § IX (emphasis added). This requirement is in line with Sixth Circuit precedent and E.D. Mich. Local Rule 5.3.

III. ARGUMENT

Courts have long recognized that "the public has a strong interest in obtaining the information contained in the court record." *Shane Group, Inc. v Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016) (quoting *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983). The public is entitled to assess for itself the merits of judicial decisions. *Shane*, 825 F.3d at 305. Therefore, there is a "strong presumption in favor of openness as to court records," including those in this litigation. *Id.* (internal quotation marks omitted).

The burden of overcoming that presumption is borne by the party that seeks to seal. The burden is a heavy one: "Only the most compelling reasons can justify non-disclosure of judicial records." *Id.* at 305 (internal quotation marks omitted). The proponent of sealing therefore must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Id.* at 305–06

(internal quotation marks omitted). *See also Beauchamp v. Fed. Home Loan Mortg. Corp.*, 658 Fed. App'x 202 (6th Cir. 2016); *Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589 (6th Cir. 2016); E.D. Mich. LR 5.3.

Not only must the party seeking to seal documents carry this burden, a court that chooses to seal records must set forth specific conclusions and findings which justify sealing. *Shane*, 825 F.3d at 306. *See also Rudd Equip. Co.*, 834 F.3d 589, 595; *see also Tri-Cty. Wholesale Distribs., Inc. v. Wine Grp., Inc.*, 565 F. App'x 477, 490 (6th Cir. 2012) (Gwin, J., concurring and dissenting in part) ("The First Amendment access right extends to court dockets, records, pleadings, and exhibits, and establishes a presumption of public access that can only be overcome by specific, on-the-record findings that the public interest's access to information is overcome by specific and compelling showings of harm.")

Moreover, the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access. *See Shane*, 825 F.3d at 305 (citing *Brown & Williamson*, 710 F.2d at 1179). This is particularly true where, as here, (1) there is a question as to "whether a right does or does not exist, or a statute is or is not constitutional," and (2) the decision involves a class action—"where by definition some members of the public are also parties to the case." *Shane*, 825 F.3d at 305 (internal quotation omitted). Further, the public interest is particularly strong where the information pertains to a government

agency action. *See Woods v. U.S. Drug Enf't Admin.*, 895 F.3d 891 (6th Cir. July 18, 2018). In these instances, the Sixth Circuit requires that "the standards for denying public access to the record 'should be applied with particular strictness.'" *Shane*, 825 F.3d at 305. Given the grave and fundamental issues at stake, "the public has an interest in ascertaining what evidence and records the District Court and this Court have relied upon in reaching [their] decisions." *Id.* (quoting *Brown & Williamson*, 710 F.2d at 1181).

Here, Respondents in discovery have provided blanket designations to documents and information, without taking the time to parse out in detail which aspects are truly sensitive. Indeed, when the facts support their position, they have in other contexts publicly disclosed the very same type of information they have designated, including the names of federal employees and the facts surrounding the Government of Iraq's willingness to accept detainees. For instance, Respondents have designated evidence concerning Iraq's *non*-willingness to accept repatriations as HIGHLY CONFIDENTIAL, but have introduced declarations of Messrs. Bernacke and Schultz as evidence that Iraq is willing to accept repatriations. Similarly, Respondents seek to hide from public view evidence of interactions between the government and Iraqi officials. Yet Respondents publicly submitted to this Court, without sealing, a letter from Mr. Bernacke to the Iraqi Ambassador describing requests for travel documents (including the names of six affected class

members), as well as the declaration of Detention and Deportation Officer James Maddox, ECF 311-3, PgID.7481-82, describing such interactions when Respondents found it useful to introduce those facts in opposition to Petitioners' Emergency Motion Regarding Coercion and Interference with Class Members. These documents contain exactly the same type of information that Respondents seek to hide from the public when the facts are not helpful for them. While aggressive blanket designations may serve a temporary interest in promoting fuller discovery initially, Respondents' blanket confidentiality designations cannot withstand the scrutiny required when a party seeks to seal documents in court proceedings. Respondents meet must their burden to show why these documents should be withheld from the public.

Respondents have designated several documents as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" that are critical to understanding the Government of Iraq's repatriation policies and the existence or nonexistence of any agreement or understanding to accept the return of class members. Petitioners, therefore, must rely upon those documents in their contemporaneously filed Renewed Motion for a Preliminary Injunction under *Zadvydas* (ECF 376) and their Motion for Sanctions under the Court's Inherent Authority (ECF 381).

Petitioners do not believe that their pleadings and the attached exhibits should be sealed under *Shane* and E.D. Mich. LR 5.3, particularly given the strong

public interest in access to this information. However, the Protective Order restricts Petitioners from disclosing it. Petitioners have contacted Respondents to seek their approval to file publicly, and have provided Respondents with the list of documents that Petitioners believe should not be filed under seal. As of this filing, Respondents have not yet agreed to public filing.

Therefore, Petitioners ask that this Court provisionally allow them to file their renewed *Zadvydas* motion and accompanying exhibits, and their sanctions motion under seal so that Respondents can respond with any arguments as to why those documents should be sealed. Petitioners do believe that limited redactions are needed to preserve confidential sensitive personally identifiable information identified under Fed. R. Civ. P. 5.2, A-numbers and information restricted from public disclosure under the Privacy Act of 1974 (5 U.S.C. § 552a), as well as information described in ECF 338. Such information is appropriately redacted in accordance with Fed. R. Civ. P. 5.2 and this Court's prior orders.

IV. CONCLUSION

Petitioners request that the Court, pursuant to *Shane*, Fed R. Civ. P. 5.2(d) and Local Rule 5.3(b):

a) Allow them to file provisionally under seal the documents identified in Ex. A, which include their Renewed Motion for a Preliminary Injunction under *Zadvydas* (ECF 376), and certain accompanying

exhibits, and their Motion for Sanctions under the Court's Inherent Authority (ECF 381), until Respondents have an opportunity to present any argument they may have for why those documents should be sealed, and Petitioners have a chance to respond;

b) After considering Respondents' argument and Petitioners' response on the appropriateness of sealing, enter an Order making public Petitioners' Renewed Motion for a Preliminary Injunction under *Zadvydas* (ECF 376), and the accompanying exhibits, and Petitioners' Motion for Sanctions under the Court's Inherent Authority (ECF 381), except that sensitive personally identifiable information identified under Fed. R. Civ. P. 5.2, A-numbers and information restricted from public disclosure under the Privacy Act of 1974 (5 U.S.C. § 552a), as well as information described in ECF 338, shall be sealed and shall remain redacted in public filings in accordance with Fed. R. Civ. P. 5.2 and this Court's prior orders; and

c) Decide this motion prior to any hearing on the renewed preliminary injunction and sanctions motions, so that the Court and parties can address any concerns Respondents may have about holding argument on those motions or discussing the documents at issue in open court.

Respectfully submitted,

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Dated: August 31, 2018

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

INDEX OF EXHIBITS

Exhibit A	Redacted Index of Documents *Request for Provisional Filing Under Seal*
Exhibit B	Unredacted ECF 376 *Request for Provisional Filing Under Seal*
Exhibit C	Unredacted ECF 381 *Request for Provisional Filing Under Seal*
Exhibit D	Redacted ECF 376
Exhibit E	Redacted ECF 381
Exhibit F	Proposed Order

EXHIBIT A
Redacted

INDEX OF DOCUMENTS

Exhibit 1 Chronology
Request for Provisional Filing Under Seal

Exhibit 1-1 Undated Memo titled, "[redacted]"
ICE-0270495 to 500
PII Redacted Pursuant to 5.2
Request for Provisional Filing Under Seal

Exhibit 1-2 October 25, 2016 Briefing Materials [redacted]
ICE-0298501 to 04
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

PETITIONERS/PLAINTIFFS' RENEWED MOTION FOR A PRELIMINARY INJUNCTION UNDER *ZADVYDAS*

Local Rule 7.1(a)(1) requires Petitioners/Plaintiffs (hereinafter Petitioners) to ascertain whether this motion is opposed. Petitioners' counsel Margo Schlanger communicated with William Silvis, counsel for Respondents/Defendants (hereinafter Respondents), via email on August 28, 2018, explaining the nature of the relief sought and seeking concurrence. Mr. Silvis reported that Respondents do not concur.

****

On January 2, 2018, this Court deferred ruling on Petitioners' *Zadvydas* claim, concluding that "a more developed record is necessary" to answer the "open question whether Iraq has agreed to accept classwide repatriation." Opinion, ECF 191, PgID5334-35. Discovery has established that Petitioners' removal is not significantly likely in the reasonably foreseeable future, and that their detention—which now for most extends well over a year—is unreasonable. *See Zadvydas v. Davis*, 533 U.S. 678 (2001); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Rosales-Garcia v. Holland*, 322 F.3d 386, 415 (6th Cir. 2003). Release is required as a

matter of statutory construction and constitutional law.

Because *Zadvydas* requires immigration detention statutes to be construed, if plausible, to avoid the grave constitutional concerns presented when civil detention becomes divorced from its ostensible regulatory purpose, both 8 U.S.C. §1231 and §1226(a)—the two statutes under which virtually all detained class members are held—must be interpreted as requiring release where removal is not significantly likely in the reasonably foreseeable future. Those same constitutional concerns support a constitutional ruling that unless Respondents can establish a significant likelihood of removal in the reasonably foreseeable future, a timeframe which is now very short, or some other sufficiently strong special justification for detention, Petitioners must be released.

WHEREFORE, for the reasons set forth in the accompanying brief and pursuant to Fed. R. Civ. P. 65, Petitioners respectfully request this Court to enter preliminary relief as follows:

1. FIND, for members of the *Zadvydas* subclass who have been detained longer than six months, that:

    a. The duration of Petitioners' detention is no longer presumptively reasonable for the purpose of effectuating their removal.

    b. Given the length of Petitioners' detention to date, what counts as the "reasonably foreseeable future" under *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001), and *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003), is now very short.

    c. Petitioners have provided good reason to believe that removal is not significantly likely in the reasonably foreseeable future, and therefore

Petitioners must be released unless the government "responds with evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 701.

d. In order to establish a significant likelihood of removal in the reasonably foreseeable future that would allow a class member's detention to be even further prolonged, Respondents must present actual evidence that Iraq has agreed to repatriation of that specific class member, not just generic facts about diplomatic negotiations. *Rosales-Garcia v. Holland*, 322 F.3d 386, 415 (6th Cir. 2003).

e. Respondents cannot detain Petitioners unless Respondents establish that *either* the class member's removal is significantly likely because Iraq has issued travel documents *or* there is another "sufficiently strong special justification" for detention, other than Respondents' desire to effectuate removal. *Zadvydas*, 533 U.S. at 690.

2. ORDER that members of the *Zadvydas* subclass who have been detained longer than six months be released under orders of supervision within 14 days unless Respondents by that date provide to the Court individualized evidence that:

   a. ICE has valid travel documents for the detainee; or

   b. There is another strong special justification for the individual's detention other than effectuating removal.

Respectfully submitted,

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Dated: August 29, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

PETITIONERS/PLAINTIFFS' BRIEF IN SUPPORT OF RENEWED MOTION FOR A PRELIMINARY INJUNCTION UNDER *ZADVYDAS*

QUESTION PRESENTED

Should members of the *Zadvydas* subclass be released because the presumptively reasonably period for their removal has passed, and their removal is not significantly likely in the reasonably foreseeable future?

Petitioners' Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Zadvydas v. Davis, 533 U.S. 678 (2001)

Demore v. Kim, 538 U.S. 510 (2003)

Jennings v. Rodriguez, 138 S. Ct. 830 (2018)

Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir. 2003)

Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003)

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I. INTRODUCTION

As this Court held more than seven months ago, "[o]ur legal tradition rejects warehousing human beings." Op., ECF 191, PgID5319. "[N]o person should be restrained in his or her liberty beyond what is reasonably necessary to achieve a legitimate governmental objective." *Id.* Today, some 120 class members remain detained, of whom 110 are members of the *Zadvydas* subclass. Ex. 2, Schlanger Decl. ¶10. By the time this motion is argued and decided, most will have been incarcerated almost a year and a half. It is highly uncertain that they can ever be removed, even assuming they lose their immigration cases, a process which could take years. Iraq has a longstanding policy against involuntary repatriations. Procuring travel documents for Iraqi nationals who do not wish to return is at best an arduous, unreliable process, contingent on intense diplomatic pressure. Petitioners' liberty interests far outweigh any conceivable governmental interest in incarcerating them for many more months or years so that—**if** they are ultimately found to be removable and **if** Iraq ultimately agrees to repatriation—they can then be removed.

II. FACTS

A. It Is Entirely Unclear Whether Iraq Will Ever Change Its Longstanding Opposition to Forced Repatriations, and Even if It Does, It Will Take Many Months or Years to Accomplish Any Involuntary Repatriations.

Iraq has long refused involuntary repatriations, reflecting humanitarian principles, the practical reality that forcible repatriations are extremely challenging

(particularly now that Iraq must also reintegrate nearly two million internally displaced persons), and political concern that forced returns from one country would set a precedent for other countries as well. Ex. 8, Smith Dec. ¶¶14-47. *See also* Ex. 1, Chronology ("Chron.") ¶¶1-7. Because Iraq refused Petitioners' repatriation, they spent years living in the community while ICE unsuccessfully tried to obtain travel documents. Now, however, ICE insists on incarcerating them while it continues to seek travel documents because, ICE says, Iraq has agreed to accept all Iraqi nationals with final removal orders, and only this Court's injunction prevents removal.[1] Discovery has shown this is untrue. The attached chronology (Ex. 1), drawn from dozens of documents, details ICE's repeated but failed efforts to force Iraq to change its policy on forced repatriations. Briefly, the facts are:

After President Trump, on January 27, 2017, issued Executive Order 13769, 82 Fed. Reg. 8977, barring admission of Iraqi nationals, Iraq [redacted] and to accept a charter flight of eight deportees (which departed in April 2017). Ex. 1, Chron. ¶¶8-18. In return, Iraq was deleted from the list of banned countries in Executive Order 13780, 82 Fed. Reg. 13209, on March 6, 2017. Ex. 1, Chron. ¶9. ICE, hopeful that Iraq's position had changed, *id.* ¶¶10-19, [redacted]. *Id.* ¶20. But Iraq [redacted]

[1] *See* ECF 184-2, PgID5072, Bernacke Decl. ¶8; ECF 158-2, PgID4130, Schultz Decl. ¶6; Ex. 17, North Decl. ¶53; Ex. 18, Pitman Decl. ¶31.

[redacted] *Id.* ¶¶20.h, 44, 45. Nevertheless, ICE proceeded to round up hundreds of Iraqi nationals in June. *Id.* ¶20.j.

On June 20, 2017, ICE learned that [redacted]. *Id.* ¶20.q. This Court's temporary restraining order was issued two days later, but at first covered only detainees who had been arrested/detained by ICE's Detroit field office—leaving ICE many possible deportees elsewhere. *Id.* ¶20.s. Despite high-level diplomatic pressure, [redacted] on the optimistic assumption that this Court's restraining order would not last long. *Id.* ¶¶20.q-20.v. By July, ICE [redacted]. *Id.* ¶¶23-24. All the while, Respondents represented to this Court that Iraq would accept class-wide repatriation. *Compare id.* ¶¶20.q-20.s, 21-22, 23.b, 24 *with* ECF 81-4, PgID2006, 7/20/2017[2] Schultz Decl. ¶5 ("[D]ue to renewed discussions between the United States and Iraq in recent months, Iraq has agreed, using charter flights, to the timely return of its nationals that are subject to final orders of removal."); ECF 86, 7/21/2017 Hr'g Tr. at 31.

[2] On July 20, the same day Schultz executed his declaration, Schultz [redacted]. Ex. 1-35; *see also* Ex. 1-36.

In September and October 2017, most of the detainees hit the 90-day threshold for post order custody reviews (POCRs). ECF 138, PgID3344-45, 3365-66, 3371-72; ECF 191, PgID5344-45. Under the regulations, continued detention requires a significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. §241.13. By the time of these reviews, ICE's internal assessment was that: "[redacted]" Ex. 1-24, ICE-0297770. Yet, ICE issued boilerplate POCR denials, which stated simply: "You have a final order of removal from the United States and ICE is actively pursuing your removal." ECF 138, PgID3344-45, 3365-66, 3371-72; ECF 191, PgID5344-45. Indeed, ICE issued boilerplate POCR denials even to individuals whom [redacted]. *Compare* ECF 138-6, PgID3447-48, Hamama Decl. ¶31 (received boilerplate POCR denial), *with* Ex. 1-18, [redacted]; *see also* Ex. 2, Schlanger Decl. ¶19 ([redacted]).

[redacted]

Ex. 1, Chron. ¶¶25-35. Nevertheless, in March 2018, Iraq's Ministry of Foreign

Affairs distributed a "circular," attaching a letter from the Ministry of Migration and Displacement reaffirming that Iraq "refuse[s] the principle of forced return of Iraqis abroad or any other nationals, because it conflicts with humanitarian laws and principles." Ex. 1, ¶¶36-37; Ex. 1-46; Ex. 7, Lopez Decl. p. 5; Ex. 8, Smith Decl. ¶¶21-26. The Foreign Ministry circular instructed "all our political and consular missions abroad" to "[k]indly take notice and the necessary action to coordinate with those countries to reduce this serious phenomenon that affects Iraqis abroad." Ex. 1-46; Ex. 7, Lopez Decl. p. 5.

In May 2018, ICE transferred about 40 Iraqis to Georgia for consular interviews. Ex. 1, Chron. ¶38; ECF 311-3, PgID7478-80, Maddox Decl. ¶¶6-10. Iraqi consular officials presented each detainee an Iraqi form asking to affirm his "desire to return voluntarily to Iraq" (ECF 311-3, PgID7489-90, Ex. B; ECF 307-2, PgID7325-27, Gilbert Decl. ¶¶5-18), a form ICE had [redacted]. Ex. 1, Chron. ¶¶30-31, 33. ICE and consular officials exerted considerable pressure on the detainees to sign the form, threatening them with prosecution or indefinite detention if they refused; that pressure underscores that an expressed desire to return is central to Iraq's repatriation process. *Id.* ¶¶39-40; ECF 307. Iraq then issued travel documents for those who signed, but not for those who refused. Ex. 1, Chron. ¶41. On July 13, 2018, after intense diplomatic pressure, Iraq issued travel documents for the six involuntary deportees, but [redacted]

[redacted]. *Id.* ¶¶42-43. [redacted]

[redacted] *Id.* ¶44. [redacted]

[redacted] *Id.* ¶47; Ex. 1-51.

Whether Iraq will agree to future involuntary repatriations is entirely unclear. Ex. 1, Chron. ¶¶44-52. Avoiding forced repatriations is very important to many power centers in Iraq. *Id.* ¶¶48-49. For example, in May 2017, when the United Kingdom pushed for forced returns, the Iraqi Parliament passed a resolution telling the Ministry of Foreign Affairs not to accept them. Ex. 8, Smith Decl. ¶31. The Ministry of Migration and Displacement's website states that Iraq's policy is "refusal of forcible returns." *Id.* ¶30. The Ministry reasserted this in a July 29, 2018 letter to the Ministry of Foreign Affairs:

> We received information showing that some of the countries in which Iraqis are located intend to return them forcibly, particularly the United States and the European Union. This is against the policy of the state and international laws and norms. Please emphasize to all our embassies and consulates in the countries of the world where Iraqis are, to ensure that they are not deported and forced to return.

Ex. 1, Chron. ¶49. The Minister also instructed the Ministry of the Interior (which has jurisdiction over entry procedures at airports/borders) and the Ministry of Transport (which has jurisdiction over airlines) to "take the necessary actions to ensure forcibly returned nationals are not taken in." *Id.* Iraqi diplomats have continued in July and August to say Iraq opposes forced repatriations. Ex. 1, Chron. ¶¶47-49.

What *is* clear is that Iraqi repatriations—even voluntary ones—are extremely time consuming. ECF184-2, PgID5072, Bernacke Decl. ¶9; ECF 184, PgID5063; ECF 81-4, PgID2006, 2008, Schultz Decl. ¶¶5, 8; Ex. 5, Bernacke Dep. at 59-61. Some detainees, increasingly desperate about their ongoing detention, have agreed to removal, and this Court established a process for lifting the stay in such cases. ECF 110, PgID2815-16. Yet even for those volunteering to return, ICE has struggled to get documents. Of the 37 class members for whom the stay has lifted, ICE has yet to obtain travel documents for between 6 and 8. Only 17 have actually been removed, some more than 5 months after the stay was lifted. The others have sat in detention for as much as 8 months after the stay was lifted. Ex. 2, Schlanger Decl. ¶¶49-50. Even where Iraq has provided documents to willing returnees, ICE has struggled to complete removals. *See* Ex. 9, Gonzalez Decl. ¶5 (ICE unable to remove prompt removal detainee due to problem with flight clearances); Ex. 2, Schlanger Decl. ¶¶50-51. Thus, even for willing repatriates, it can take many months to obtain the travel documents, and many more months to actually accomplish removal if documents are in fact issued.

B. Petitioners Are Suffering Severe Harm in Detention

Nearly all of the 110 *Zadvydas* subclass members will have been detained for over six months by October 1, 2018, the earliest this motion will be fully briefed. Ex. 2, Schlanger Decl. ¶10. Depending on the procedural posture of their

immigration cases, they face many months or years of detention until their cases are resolved. *Id.* at ¶13; Ex. 12, Piecuch Decl. ¶15; Ex. 15, Kaplovitz Decl. ¶13; Ex. 14, Gandhi Decl. ¶13. The detainees include individuals who did not receive bond hearings under this Court's January 2nd Order, ECF 191, who could not afford bond, or who were denied bond. Ex. 12, Piecuch Decl. ¶10; Ex. 14, Gandhi Decl. ¶10; Ex. 15, Kaplovitz Decl. ¶¶5, 8; Ex. 16, VanderWoude Decl. ¶12; Ex. 13, Moore Decl. ¶8. Some of the detainees have already **won** in immigration court, but remain incarcerated while ICE appeals those grants of immigration relief. Ex. 10, Bajoka Decl. ¶¶12-16. In addition, if the Sixth Circuit were to reverse this Court's decision to grant bond hearings, absent the relief requested here, ICE could re-detain almost all of the class members who obtained release under the January 2nd Order and whose cases are open. Ex. 2, Schlanger Decl. ¶9.

As detailed in the prior amicus brief of Detention Watch Network, ECF 177, Pg. ID# 4980-5003, the declaration of Michelle Brané, ECF 138-19, and the above cited attorney declarations, detention has devastating effects on both detainees and their families, damaging their physical and mental health, undermining their immigration cases, and depleting their financial and emotional resources. Space permits only three representative cases to be summarized here.[3]

Hassan Al-Atawna came to the U.S. in 2013 at the age of 16, fleeing

[3] *See also* Ex. 10, Bajoka Decl. ¶17; Ex. 15, Kaplovitz Decl. ¶12; Ex. 16, Vanderwoude Decl. ¶¶10-11.

violence in Iraq. Because [redacted], ISIS targeted the family: his [redacted] and he himself was close to being set on fire. Mr. Al-Atawna, who was overwhelmed and deeply depressed, got into trouble and was convicted of attempted assault. He received a suspended jail sentence, but was taken into ICE custody in January 2017. He received an immigration bond hearing in early 2018 pursuant to this Court's January 2, 2018 Order. The immigration judge found that he was neither a danger nor a flight risk, and granted him bond of $7,500, which he cannot afford. Mr. Al-Atawna has been detained 20 months, and has not seen his infant—now [redacted]—son, during that time. Mr. Al-Atawna [redacted]. Iraq officials informed ICE in May 2018 that they believe Mr. Atawna is Palestinian, and that Iraq will not accept him. He faces an additional year of detention until his immigration case is resolved, and cannot be removed to Iraq if he loses. Ex. 14, Gandhi Decl. ¶¶2-11; ECF 311-3, PgID7480-81, Maddox Decl. ¶11.d.ii, ECF 311-3.

Maytham Al Bidairi, who came to the U.S. with his family as a refugee in 2009, has been in ICE detention since May 2016. For over two years he has not seen his wife and three daughters, aged [redacted], because they cannot afford to travel from Louisville, Kentucky, to Jena, Louisiana, where he is detained. His wife is too frail to work. After his arrest, the family was evicted because they could

not afford rent. His wife and children lived for nearly a year in a mosque, surviving on the generosity of congregants until more suitable housing could be found. Mr. Al Bidairi himself has been hospitalized several times since being detained. He was denied bond at the immigration court bond hearing he received under this Court's order. Yet in 2016 the U.S. District Court for the Western District of Kentucky, where Mr. Al-Bidairi had pled guilty to making false statements for public benefits (based in part on the understanding that he could not be deported), had granted him pretrial release and subsequently sentenced him to probation, finding incarceration unwarranted. Mr. Al Bidairi faces at least another year of detention until his immigration case is resolved. Ex. 13, Moore Decl. ¶¶4-6, 11-16.

Firas Nissan, whose [redacted] son, [redacted] daughter, elderly parents, and five siblings are all U.S. citizens, came to the U.S. seventeen years ago after being threatened and detained in Iraq. He missed an asylum hearing in 2004 due to illness and was ordered removed, but lived in the community and complied with an order of supervision for 13 years. ICE arrested him in June 2017. He has been detained fifteen months. He potentially faces another two years of detention until his immigration case concludes. Because of his specific immigration status, he did not receive a bond hearing under this Court's January 2nd Order. He is locked in solitary confinement 21 hours a day, is not receiving needed medical care, can rarely see his family, and has not been able to provide for them,

though he was previously the family's breadwinner. Ex. 12, Piecuch Decl. ¶¶3-14.

C. Release Does Not Prevent ICE From Seeking Travel Documents, Nor From Proceeding With Removal If Travel Documents Issue.

ICE has pursued travel documents for non-detained Iraqi nationals in the past—including many class members in this case—and could do so here if Petitioners are released. [redacted]. Ex. 1, Chron. ¶20.e. ICE Unit Chief Michael Bernacke testified that when noncitizens are released on orders of supervision, it is "typical" for ICE to continue seeking travel documents: "at times [individuals] are released as a result of our inability to obtain a travel document and we may receive one at a later date, and then we will rearrest that alien as they were generally arrested once before." Ex. 5, Bernacke Dep. at 49-50. *See also* Ex. 11, 4th Abrutyn Decl. ¶¶5-10; Ex. 10, Bajoka Decl. ¶19.

Respondents have previously asserted that Petitioners' detention should continue, even though Iraq has not issued travel documents, because (1) if the stay of removal is lifted, removals can be accomplished through charter flights without the need for travel documents; and (2) ICE cannot request travel documents for individuals who are not currently repatriatable for fear of damaging the repatriation "agreement" with Iraq. ECF 184-2, PgID5071-73, Bernacke Decl. ¶¶6-7, 10, 12. Those assertions are false. Iraq will not accept repatriated individuals who lack travel documents, whether by charter or by commercial flights. Ex. 1, Chron. ¶¶14,

16-17, 20, 32. Moreover, ICE has repeatedly asked Iraq [redacted]. *Id.* ¶¶20; Ex. 2, Schlanger Decl. ¶¶16-17.

If class members are released, ICE will still be able to remove them, *if and when* ICE obtains both travel documents and final orders. Should ICE be concerned about flight risk, it can use any one of a broad spectrum of alternatives to detention (ATDs)—ranging from release to a responsible family member, to periodic reporting, to electronic monitoring—that ICE has employed for over 20 years.[4] ECF 138-19, PgID3539, Brané Decl. ¶11. ATDs are much less expensive than detention (ATDs cost 17¢ to $44 per day while detention costs $133-$319, *id.* PgID3540, ¶13) and are "extremely effective at ensuring compliance." *Id.* PgID3540-41, ¶14 (95-99% compliance); Ex. 11, 4th Abrutyn Decl. ¶¶5-11 (explaining supervision while ICE obtains travel documents); Ex. 17, North Decl.

[4] Purported public safety concerns cannot be used to prolong detention where removal is not reasonably foreseeable. *Zadvydas*, 533 U.S. at 690–91 (limits on preventive detention). Detainees who present a significant threat to national security or risk of terrorism, and for whom no conditions of release can reasonably be expected to avoid that threat or risk, can be further detained. 8 C.F.R. §241.14(d)(1). Unit Chief Bernacke testified that he did not recall any of the *Hamama* class members whose POCR decisions he reviewed as presenting such a "unique danger." Ex. 5, Bernacke Dep. at 83–85, 136. In any event, not only have the vast majority of class members been released on orders of supervision in the past, despite any criminal history, but as criminologist Kiminori Nakamura explains, for those who committed offenses years ago, the "risk of reoffending and engaging in criminal activity is extremely low." Ex. 19, Nakamura Decl. at 1-2; *see id.* at pp. 13-14 (based on age of convictions, for many Petitioners "the risk they pose is no greater than the risk posed by a member of the general public").

¶41 (ATD used for class member in September 2016).

III. LEGAL STANDARD

Preliminary injunctions are governed by the familiar four-factor test that examines: (1) likelihood of success on the merits, (2) irreparable harm in the absence of relief, (3) the balance of equities, and (4) the public interest. *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 20 (2008). These are "factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the strength of the other factors." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). A court may, for example, grant a preliminary injunction "where the plaintiff fails to show a strong or substantial probability of ultimate success on the merits of his claim, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *Id.* at 1229.

IV. LAW AND ARGUMENT

A. Petitioners Have a High Likelihood of Success

The issue before the Court is whether class members who remain in detention are significantly likely to be removed in the reasonably foreseeable future. For those detained pursuant to 8 U.S.C. §1231 or §1226(a), this standard arises from construing those statutes to avoid constitutional doubt. For those detained pursuant to 8 U.S.C §1225 (or §1226(c), if the Court of Appeals reverses this Court's decision that §1226(a) is the applicable detention authority), it is simply constitutionally

required. Whichever source applies, the evidence on this common question is clear: the government *hopes* to deport class members, and would *prefer* deportation sooner rather than later—but those hopes and preferences are running into the reality that Petitioners' cases are stretching on, and that Iraq is unwilling to accept their return because of its longstanding policy against involuntary repatriation. Given the many months of detention already, only a short time horizon is appropriately considered the "reasonably foreseeable future." Because removal during that short time is not "significantly likely," Petitioners are likely to succeed on the merits.

1. The Constitutional Framework for Petitioners' *Zadvydas* Claim

"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 v. Davis*, 533 U.S. 678, 690 (2001). Incarceration can be used to punish criminal acts, but may be imposed only after extensive procedural protections designed to ensure a person is not unjustly deprived of her liberty. *See Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) (describing fundamental right to jury trial, confront one's accusers, present witnesses in one's defense, remain silent, and be convicted by proof beyond all reasonable doubt).

Civil detainees, by contrast, "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 even 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) ("civil commitment for any purpose constitutes a significant deprivation of liberty"); *Rosales-Garcia v. Holland*, 322 F.3d 386, 414 (6th Cir. 2003). The Supreme Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty," and has therefore insisted that civil detention be "narrowly focused on a particularly acute problem in which the government interests are overwhelming." *Foucha*, 504 U.S. at 80-81 (quoting *Salerno*, 481 U.S. at 749–50). "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).

To ensure that civil detention does not become impermissible punishment, the Supreme Court has carefully limited its use, insisting on two core restrictions. First, not only must there be "special and narrow nonpunitive circumstances," *Zad-*

vydas, 533 U.S. at 690, but detention must "bear[] [a] reasonable relation to the purpose for which the individual [was] committed." *Id*. at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). *See also Foucha*, 504 U.S. at 79 ("[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed"); *id.* at 88 (opinion of O'Connor, J.) (requiring a "necessary connection between the nature and purposes of confinement"); *Seling v. Young*, 531 U.S. 250, 265 (2001). Unless civil detention is closely linked to its purpose, the state's interests cannot "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 82, and "linked to the stated purposes of the commitment." *Hendricks*, 521 U.S. at 363. Because the use and 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 becomes, 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 they are "excessive in relation to the alternative [non-punitive] purpose" used to justify them); *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).

Accordingly, in evaluating the constitutionality of civil detention, the Supreme Court has regularly focused on detention length, exemplifying the commonsense notion that the longer a person remains behind bars, the more compelling the "civil" justification for such detention must be. *Salerno* upheld pretrial detention because its duration was restricted "by the stringent time limitations of the Speedy Trial Act," 481 U.S. at 747 (maximum of 70 days), 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 ("the nature and *duration* of commitment [must] bear some reasonable relation to the purpose for which the individual is committed") (emphasis added); *Schall*, 467 U.S. at 270 ("detention is strictly limited in time," to a maximum of 17 days); *Hendricks*, 521 U.S. at 364 (sex offender entitled to immediate release if adjudged safe; if confinement exceeds one year, "a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement").

2. The Constitutional Standard: Immigration Detention Is Punitive, and Hence Unlawful, if Removal Is Not Significantly Likely in the Reasonably Foreseeable Future.

Immigration detention—like all civil detention—must be supported by a "sufficiently strong special justification." *Zadvydas*, 533 U.S. at 690. The justification is "effectuating an alien's removal." *Id.* at 697. To satisfy due process, de-

tention must "bear a reasonable relation" to that purpose, *id*. at 690, meaning that

> 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.

Id. 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 immigration authorities additional leeway, setting six months as the presumptively reasonable detention period. *Zadvydas*, 533 U.S. at 701. In other words, for the first six months of detention, the government's interest in ensuring the non-citizen's presence for removal presumptively outweighs the individual's liberty interest. But thereafter, the balance shifts, with the government's burden ever increasing the longer that removal is delayed:

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

Id. at 701. *See also Clark v. Martinez*, 543 U.S. 371, 377 (2005) (applying same 6-month presumption to "inadmissible aliens" and explaining that the government may "detain aliens ... only as long as 'reasonably necessary' to remove them").

The *Zadvydas* test thus incorporates the two core constitutional restrictions

on civil detention. First, removal must be "significantly likely," because otherwise detention becomes divorced from its purpose of ensuring the non-citizen's presence for removal. Second, to ensure that detention is not excessive in relation to that purpose, removal must occur "in the reasonably foreseeable future," a time period that shrinks the longer detention goes on.

As the Sixth Circuit explained in *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003), the touchstone of immigration detention jurisprudence is reasonableness.[5] *Ly* held that noncitizens in pre-order detention may be detained only

> for a time reasonably required to complete removal proceedings in a timely manner. If the process takes an unreasonably long time, the detainee may seek relief in habeas proceedings.

Id. at 268. The Court saw the "reasonableness limitation on the period of incarceration" as critical, explaining that this limitation serves to balance the individual's liberty interest in freedom from detention against the state's interest in ensuring the non-citizen's availability for removal. *Id.* at 270.

Turning to what constitutes a reasonable time limit, the Sixth Circuit found "Ly had been imprisoned for a year and a half with no final decision as to removability," and that even if he were ultimately ordered removed, his removal to Vietnam was not "reasonably foreseeable." *Id.* at 271. Unless actual removal is reason-

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

ably foreseeable, noncitizens "may not be detained beyond a reasonable period required to conclude removability proceedings without a government showing of a 'strong special justification,' constituting more than a threat to the community, that overbalances the alien's liberty interest." *Id.* at 273. In Ly's case, the "period of time required to conclude the proceedings was unreasonable." *Id.* at 273.

Although *Zadvydas* concerned post-order detention, and *Ly* concerned pre-order detention, the same constitutional principles apply to both, since both have the same basic purpose: assuring that removable noncitizens are available for removal. *See Zadvydas*, 533 U.S. at 690 (purpose of post-order detention is "assuring the alien's presence at the moment of removal"); *Demore v. Kim*, 538 U.S. 510, 528 (2003) (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 ("The goal of pre-removal incarceration must be to ensure the ability of the government to make a final deportation."). While public safety is also "a factor potentially justifying confinement," it is relevant only "within that reasonable removal period." *Zadvydas*, 533 U.S. at 700. Where removal is neither significantly likely nor reasonably foreseeable, 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." *Id.* at 690. (Indeed, the *Zadvydas* petitioners themselves were "proven [] dangers to society." *Demore*, 538 U.S. at 562 (Souter, J., dissenting).)

In sum, if removal is not significantly likely to occur in the reasonably foreseeable future, then detention is both divorced from and excessive in relation to the "strong special justification" of ensuring availability at the time of removal.

3. The Statutory Standard: §1231 and §1226(a) Detainees Must Be Released Unless Removal Is Significantly Likely in the Reasonably Foreseeable Future.

The vast majority of subclass members are held under either 8 U.S.C. §1231 or §1226(a). Under Supreme Court precedent, both must be interpreted to require release if removal is not significantly likely in the reasonably foreseeable future.[6]

Post-order detainees (e.g., those who have not yet filed motions to reopen, or whose motions are pending), are held under §1231. In *Zadvydas*, the Supreme Court provided an authoritative interpretation of that statute, construing it to avoid indefinite detention, which—for the reasons addressed above—would be unconstitutional. The Court reaffirmed that holding earlier this year in *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), which ratified *Zadvydas*'s interpretation of the

[6] While the statistics fluctuate, as of August 22, 2018, 55 detainees were held post-order and 55 were held pre-order. Ex. 2, Schlanger Decl. ¶11. Class members move back and forth between pre- and post-order detention based on adjudication of their motions to reopen and merits cases. *See id.*, ¶12; *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 945-46 (9th Cir. 2008) (describing shifting statutory detention authority as noncitizen goes through different phases of administrative and judicial review as a "moving target").

permissive language of §1231(a)(6). The Court explained that in *Zadvydas*, it had

> detected ambiguity in the statutory phrase "may be detained." "'[M]ay,'" the Court said, "suggests discretion" but not necessarily "unlimited discretion. In that respect the word 'may' is ambiguous."

Jennings, 138 S.Ct. at 843 (quoting *Zadvydas*). In light of this ambiguity, *Zadvydas*

> construed §1231(a)(6) to mean that an alien who has been ordered removed may not be detained beyond "a period reasonably necessary to secure removal," 533 U.S., at 699, and it further held that six months is a presumptively reasonable period, *id.*, at 701. After that, the Court concluded, if the alien "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the Government must either rebut that showing or release the alien. *Ibid.*

Jennings, 138 S.Ct. at 843. Regulations implementing *Zadvydas* provide for release of post-order detainees after six months of detention where there is "no significant likelihood of removal in the reasonably foreseeable future." 8 C.F.R. §§241.13(a), (c), (h)(1). Thus for all detainees held pursuant to §1231, what is before this Court is a straightforward application of *Zadvydas*.

Pre-order detention, i.e., detention *during* removal proceedings, is governed by §1225 and §1226. Only a handful of class members, who for various reasons are deemed "applicants for admission," are held under §1225.[7] Nearly all class members who have succeeded in reopening their immigration cases are held under

[7] 8 U.S.C. §1225(b)(2) provides: "Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title."

§1226, which provides generally for *discretionary* detention, *see* §1226(a), though detention of certain persons with criminal convictions is mandatory, *see* §1226(c). Respondents deemed some class members to be subject to §1226(a) and others to §1226(c) upon reopening. However, this Court held that "[b]ecause §1226(c) does not apply to those who have had their motions to reopen granted, or who were living in the community for years prior to their immigration detention, those purportedly being held under §1226(c) are deemed held pursuant to §1226(a)."[8] ECF 191, PgID5341. Therefore, the relevant detention authority for almost all detainees with reopened cases is §1226(a), which provides (emphasis added):

> (a) Arrest, detention, and release. On a warrant issued by the Attorney General, an alien *may be arrested and detained* pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
> (1) *may continue to detain* the arrested alien; and
> (2) *may release* the alien on—
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
> (B) conditional parole . . .

For §1226(a) detainees, *Zadvydas*'s reasoning dictates an interpretation analogous to that of §1231. Both use permissive language: §1231(a)(6) ("An alien ordered removed … *may* be detained beyond the removal period"); §1226(a): "an

[8] With some exceptions, an individual detained under §1226(a) is entitled to an immigration judge bond hearing; an individual detained under §1226(c) is not. This Court previously held that prolonged pre-order detention under these statutes, like prolonged post-order detention under §1231, is unlawful absent an individualized finding of danger or flight risk. ECF 191, PgID5335-46.

alien *may* be arrested and detained" and the government "*may* continue to detain the arrested alien" or "*may* release the alien") (emphases added). Therefore, both can and must be interpreted to avoid the same constitutional problem. As *Zadvydas* dictates, absent a clear "congressional intent to authorize indefinite, perhaps permanent, detention," 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 detention is no longer authorized by statute." *Id.* at 699.

Jennings reinforces this analysis because its outcome turned on the difference between the permissive statutory text analyzed in *Zadvydas*, and the mandatory language in the other statutory provisions at issue in *Jennings*. The *Jennings* Court held that because §1226(c) and §1225(b) contain language mandating detention, neither provision can plausibly be read to require bond hearings, even to avoid constitutional difficulty.[9] 138 S.Ct. at 844, 846 (focusing on the fact that

[9] In *Ly v. Hansen*, the Sixth Circuit held *Zadvydas*'s constitutional avoidance reading applied to §1226(c). That interpretation is now foreclosed by *Jennings*, but *Jennings* left untouched the Court of Appeals' discussion both on the constitutional issues at stake and on the need to interpret immigration detention statutes, where possible, to avoid constitutional concerns. *See Ly*, 351 F.3d at 270 (because the Supreme Court in *Zadvydas* "construed the post-removal detention statute to avoid the specter of permanent detention," it should "do the same[] by construing the pre-removal detention statute to include an implicit requirement that removal proceeding be concluded within a reasonable time"). *Ly* dealt with detention under §1226(c) but framed its holding generally. *See, e.g.*, *Yang v. Chertoff*, 2005 WL 2177097 (E.D. Mich. Sept. 8, 2005) (applying *Ly* to §1226(a)); *Parlak v. Baker*, 374 F.Supp.2d 551, 560 (E.D. Mich. 2005) (same), *vacated as moot, appeal dismissed sub nom., Parlak v. U.S. Immigration & Customs Enf't*, 2006 WL

§1225(b) requires that noncitizens "shall" be detained, a word that "[u]nlike the word 'may,' which implies discretion … usually connotes a requirement," and on the fact that §1226(c) allows release "only if" the Attorney General decides certain conditions are met). Unlike §1226**(c)**, and like §1231(a)(6), §1226**(a)**'s language is permissive, not mandatory.[10] *Zadvydas* thus mandates a statutory interpretation of §1231 and §1226(a) that requires those detainees be released absent a significant likelihood of removal in the reasonably foreseeable future.

To be clear, the Court will still need to undertake the constitutional analysis, because a handful of class members are detained under §1225, and *Jennings* does instruct that that provision cannot be interpreted in a way that resolves the const-

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3634385 (6th Cir. Apr. 27, 2006). *Ly*'s statutory holding as to §1226(c) has been overruled by *Jennings*, but it remains the law for §1226(a). As Judge Roberts explained in *Hall v. Eichenlaub*, 559 F.Supp.2d 777, 781–82 (E.D. Mich. 2008):

> Absent a clear directive from the Supreme Court or a decision of the Court of Appeals sitting en banc, a panel of the Court of Appeals, or for that matter, a district court, is not at liberty to reverse the circuit's precedent. *See Brown v. Cassens Transport Co.*, 492 F.3d 640, 646 (6th Cir. 2007). In the absence of Supreme Court precedent directly on point, a district court should decline to "underrule" established circuit court precedent. *See Johnson v. City of Detroit*, 319 F.Supp.2d 756, 771, n. 8 (E.D. Mich. 2004).

Ly's holding with respect to §1226(a) remains binding because it has not been overruled, including by *Jennings*.

[10] The *Jennings* Court did find that §1226(a)'s language could not support the procedural requirements that the Court of Appeals added to the initial bond hearing established in existing regulations. 138 S.Ct. at 847. But that finding does not bear at all on the issue here: the *Zadvydas*'s Court's interpretation of "*may be detained*" in §1231(a)(6) as not authorizing indefinite detention is necessarily likewise a "plausible" reading of the same language in §1226(a).

itutional issues presented by prolonged §1225 detention. *Jennings* similarly bars a constitutional avoidance reading of §1226(c). While there are currently no class members held under §1226(c), Respondents have appealed this Court's ruling that §1226(a) is the applicable detention authority,[11] ECF 191, PgID5325, and the Supreme Court will soon be deciding the import of §1226(c)'s "when released" language. *Nielsen v. Preap*, 138 S.Ct. 1279 (Mar. 19, 2018).

Here the statutory standard and the constitutional standard merge: both require release where removal is not significantly likely in the reasonably foreseeable future. The Court should address both.

4. Petitioners' Detention Has Become Unreasonably Prolonged.

In authorizing immigration detention, Congress anticipated both that removal proceedings would be expeditiously resolved, *Ly*, 351 F.3d at 269 (citing 8 U.S.C. §1229(d)(1))[12], and that non-citizens with final orders would be removed within 90 days, 8 U.S.C. §1231(a)(1)(A). The Supreme Court has likewise emphasized that immigration detention must be time-limited. Under *Zadvydas*, removal must not just be significantly likely, it must be significantly likely **in the reason-**

[11] If it were not for the Court's holding that reopened cases are covered by 8 U.S.C. §1226(a) rather than §1226(c), then most of the detainees with open cases would be detained under the latter statute. Ex. 2, Schlanger Decl. ¶9.

[12] *See also Uritsky*, 286 F.Supp.2d at 846-47 (granting habeas because 11-12 month pre-order detention "is well beyond the short period of detention pending a determination of removability that the Supreme Court assumed was typical when it decided *Kim*" and "also is far longer than the six month presumptively reasonable period of post-removal detention set forth by the Court in *Zadvydas*").

ably foreseeable future. The Court found six months to be a presumptively reasonable removal period. *Zadvydas*, 533 U.S. at 701. Similarly, *Demore* held mandatory pre-removal detention permissible based on the assumption that it usually "lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." 538 U.S. at 529 (2003) (average time for removal proceedings in unappealed cases is 47 days; 4 month average in appealed cases). *See also Reno v. Flores*, 507 U.S. 292, 314 (1993) (noncitizen youth in custody an average of 30 days).

Here, the presumptively reasonable period passed long ago.[13] By October, when this motion is fully briefed, it will be 16 months since the June 2017 raids. Accordingly, Petitioners may be detained only if removal is nonetheless significantly likely in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 701.

"[T]he reasonably foreseeable future" depends on how long detention has already stretched. "[F]or detention to remain reasonable, as the period of prior postremoval confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink.'" *Id.*; *see also id., on remand*, 285 F.3d 398 (5th Cir. 2002) (given how long Zadvydas had been detained, he had shown removal was not significantly likely in the reasonably foreseeable future).

[13] As of October 1, 2018, when this motion will be fully briefed, 96% of the *Zadvydas* subclass will have been in ICE detention for over six months, 81% for over a year and 35% for over 15 months. Ex. 2, Schlanger Decl. ¶10. Only 4 current subclass members will have been detained less than six months; they will be excluded from the requested relief until they pass the six month mark held presumptively reasonable in *Zadvydas*.

Here, given the length of Petitioners' detention to date, what counts as the "reasonably foreseeable future" is very short. *See, e.g.*, *Seretse-Khama v. Ashcroft*, 215 F.Supp.2d 37, 48, 50 (D.D.C. 2002) ("Under the sliding scale adopted in *Zadvydas*, the lengthy period of petitioner's post-removal confinement has certainly caused the 'reasonably foreseeable future' to shrink to the point that removal must be truly imminent . . . [W]hile the history of the Service's efforts to remove aliens to the country in question is one consideration to take into account in determining the likelihood of removal in the foreseeable future, this factor becomes increasingly less important the longer a country refused to provide travel documents for a particular removable alien."); *Abdulle v. Gonzales*, 422 F.Supp.2d 774, 778–79 (W.D. Tex. 2006) (because detention exceeded one year, "the amount of time considered the 'reasonably foreseeable future' has shrunk dramatically"); *Hajbeh v. Loiselle*, 490 F.Supp.2d 689, 693 (E.D. Va. 2007) (where petitioner had been confined nearly twenty-one months, "what counts as the 'reasonably foreseeable future' in this case is now exceedingly short"); *Jama v. Immigration & Customs Enf't*, 2005 WL 1432280, at *2, *3 (D. Minn. Apr. 7, 2005) (given length of detention to date, "the 'reasonably foreseeable future' is necessarily very short;" ICE has previously been unable to remove the petitioner, and "the government is not entitled to an unlimited number of chances to effect [his] deportation").

In sum, time matters. Petitioners have been detained far longer than any

presumptively reasonably period to conclude their removal proceedings and effectuate their removal. The "reasonably foreseeable" period by which to measure the likelihood of removal is therefore extremely short.

5. Petitioners Have Established Good Reason to Believe, and Respondents Cannot Rebut, That Removal Is Not Significantly Likely in the Reasonably Foreseeable Future.

a. Because Iraq Has a Long-Standing Policy of Refusing Involuntary Repatriations, There is Good Reason to Believe Removal is Not Significantly Likely in the Reasonably Foreseeable Future.

Petitioners have established good reason to believe their removal is not significantly likely in the reasonably foreseeable future because:

- The United States does not have a repatriation agreement with Iraq. Ex. 1, Chron. ¶¶24, 50-51; Ex. 1-44, No. 1; Ex. 1-54, No. 1; Ex. 1-55, No.1; Ex. 1-56, No. 1; ECF 184, PgID5062; ECF 184-2, PgID5070-71, Bernacke Decl. ¶4.
- Iraq has a long-standing policy against involuntary repatriations. Ex. 1, Chron. ¶¶2, 3, 4-7, 20.h, 30-31, 33, 36, 37, 48-51.
- Iraq's official position is that it "refuse[s] the principle of forced return of Iraqis abroad or any other nationals, because it conflicts with humanitarian laws and principles." *Id.* ¶¶36-37. It reaffirmed that policy as recently as July 29, 2018. *Id.* ¶49.
- Iraq [redacted]. *Id.* ¶¶20.q-20.v, 22-24.
- Iraq has [redacted]. *Id.* ¶¶2, 3, 6-7, 20.h.
- Even for individuals who desire to be repatriated, the process of obtaining travel documents is arduous and time-consuming; some individuals have been waiting as long as eight months since this Court lifted the stay of removal, and have still not been repatriated. Ex. 2, Schlanger Decl. ¶¶45-50; Ex. 9, Gonzalez Decl. ¶¶3-5.

Petitioners have met their initial burden under *Zadvydas*.[14]

b. Respondents Cannot Rebut Petitioners' Showing By Suggesting Negotiations with Iraq Could Potentially Lead to Repatriation.

Any presumptively reasonable period of detention to effectuate removal has ended. And Petitioners have established good reason to believe their removal is not significantly likely in the reasonably foreseeable future. Respondents must rebut that showing. *Zadvydas*, 533 U.S. at 701. They cannot.

Respondents will likely argue that ongoing negotiations are finally bearing fruit, and Iraq will accept back however many Iraqi nationals ICE wants to deport. Respondents made that same claim in their earlier *Zadvydas* briefing in November 2017. ECF 158, PgID4096-97; ECF 158-2, PgID4130-31, Schultz Decl. ¶¶4, 7-9;

[14] Although this case is now in its 14th month and discovery began months ago, due to Respondents' stonewalling and delay tactics, discovery is still not complete. Given that each day the *Zadvydas* claim remains unresolved is a day that the detainees suffer behind bars, and given that the evidence already produced establishes the illegality of their detention, counsel can wait no longer to file this motion. However, Petitioners expressly reserve the right to supplement the record here or to return with a subsequent motion based on yet-to-be-completed discovery. Moreover, pursuant to this Court's order, ECF 366, PgID8323, Respondents had until August 20, to respond to Petitioners' second set of discovery requests. Instead of doing so, Respondents once again sought to delay discovery by refusing to answer all but one interrogatory, producing no documents despite the Court's order to do so, and claiming they will need more than three months to supplement their discovery with records dated March 2018 to the present. *See* Exs. 20-23, Respondents' August 20, 2018 discovery responses. Respondents should be barred from responding to this motion with any previously undisclosed evidence; should they do so, Petitioners will ask the Court for appropriate relief.

ECF 184, PgID5063-64; ECF 184-2, PgID5071-73, Bernacke Decl. ¶5, 11-12.[15] It was untrue then and it is untrue now. ICE has long been aware that a precondition for repatriation to Iraq is that the Iraqi national express a desire to return—a constraint conspicuously absent from Respondents' prior filings and interrogatory responses. Ex. 1, Chron. ¶¶1-7, 20.h, 30-31, 33-34, 36-42, 48-51. Indeed, precisely because ICE knew of this precondition, ICE has gone to extraordinary lengths to coerce class members into expressing such a desire to return, including threatening detainees who participated in consular interviews with prosecution or years of incarceration if they did not sign Iraqi forms. *See id.* ¶¶38-40. Petitioners' never-ending detention is itself a coercive act seeking to undermine their resolve and compel them to "agree" to return to Iraq. After Petitioners sought relief from coercion and highlighted that Iraq had not issued travel documents for six interviewees who withstood that coercion and refused to sign the forms, Respondents placed [redacted] Ex. 1, Chron. ¶¶41-42. As a result [redacted]

[15] ICE has told other federal courts the same thing, even in cases where Iraq has specifically refused repatriation. *Compare* Ex. 17, North Decl. ¶¶53-54 ("ICE will remove Petitioner [Hussain Al-Jabari] to Iraq in the reasonably foreseeable future once the Stay of Removal for Iraqi nationals is dismissed or the Plaintiff is removed from the class" and the "Government of Iraq has already demonstrated its willingness to accept back Iraqi nationals with final orders of removal from the United States.") *with* Ex. 1-18, [redacted] *See also* Ex. 18, Pitman Decl. ¶¶31-32.

[redacted]. *Id.* ¶43. Critically, however, [redacted]. *Id.* ¶¶50-51. To the contrary, the Ministry of Migration and Displacement, on July 29, 2018 issued a new statement, reiterating that embassy staff should not facilitate involuntary repatriations. *Id.* ¶49.

Even if one accepts Respondents' claims about the negotiations as true—and the Court should be skeptical given the history here—the most Respondents can show is that the U.S. will continue to negotiate, and that Respondents hope that if the State Department exerts extraordinary diplomatic pressure, Iraq might at some point in the indeterminate future dole out a few more travel documents, notwithstanding Iraq's clear policy against involuntary repatriations. That does not constitute a significant likelihood of removal in the reasonably foreseeable future.

Under *Rosales-Garcia*, 322 F.3d at 415, a detainee's removal is neither significantly likely, nor reasonably foreseeable, absent a clear assurance that the receiving country is willing to accept that individual for repatriation. There the Sixth Circuit reversed the denial of habeas petitions for Cuban detainees held longer than six months, holding that the government failed to meet its burden because once a non-citizen has been incarcerated for the presumptively reasonable period, detention cannot be prolonged even further by pointing to ongoing diplomatic negotiations. "Although the government presented evidence of our

continuing negotiations with Cuba over the return of Cuban nationals excluded from the United States, neither [of the petitioners] is currently on a list of persons to be returned." *Id.* at 415. Thus, generalized avowals that the U.S. is negotiating with another country about repatriation are insufficient to establish a significant likelihood of removal. The receiving country must have indicated a willingness to accept the specific detainee. Here, ICE's promises that Iraq will issue travel documents do not meet this standard, particularly in light of Iraq's repeated refusals to provide travel documents even after it allegedly changed its policy in March 2017.

Rosales-Garcia harkens back to *Zadvydas* itself, which firmly rejected the Fifth Circuit's approach of allowing detention as long as good faith efforts to effectuate detention continue and removal is not impossible. As the Supreme Court said, the question is not whether there is "*any* prospect of removal," but whether it is significantly likely to occur in the relatively near future. *Zadvydas*, 533 U.S. at 702 (original emphasis). Indeed, the Ninth Circuit, finding habeas relief appropriate for the other *Zadvydas* petitioner on remand, explained:

> Our conclusion that there was no likelihood of Ma's removal in the reasonably foreseeable future was based, and is based, not only on the fact that there was no "extant or pending" repatriation agreement but also on the fact that there was an insufficient showing that future negotiations were likely to lead to a repatriation agreement within the reasonably foreseeable future.

Ma v. Ashcroft, 257 F.3d 1095, 1099 (9th Cir. 2001). The Court further noted that negotiations were in the "embryonic stage," that relevant discussions had been

going on for four or five years, and that Cambodia had still not announced a willingness to enter into a repatriation agreement. *Id.* at 1099, 1115. Given that "Ma's detention has already lasted well beyond the six-month 'presumptively reasonable' period established by the Supreme Court in *Zadvydas* … the INS may not detain Ma any longer." *Id.* at 1115. There, as here, the absence of a repatriation agreement, particularly where a country has a long history of resisting repatriation, weighed heavily towards release after the presumptively reasonable removal period elapses. *See also Thai v. Ashcroft*, 366 F.3d 790, 792 (9th Cir. 2004) (highlighting lack of repatriation agreement in foreseeability analysis).

This case is also very similar to *Younes v. Lynch*, 2016 WL 6679830 (E.D. Mich. Nov. 14, 2016), where this Court granted release to an immigrant detained for eight months because "no travel documents have yet been produced, and the Lebanese consulate has not suggested any date by which they will be produced," perhaps because of "the need for multiple domestic government agencies in Lebanon to sign off on her authorization to return." *Id.* at *2.

> [The government of Lebanon has not said "no," but likewise it has not said "yes," and no one can say when an answer will be forthcoming... Despite diligent efforts by the ICE deportation officer, the government has not been able to furnish any evidence that the government of Lebanon will issue travel documents in the discernable future. And although there is no hard evidence either way in the question when or if travel documents will issue, there is a suggestion in the record that bureaucratic complications in Lebanon will delay (or possibly prevent) issuance of the documents "in the reasonably foreseeable future".

Id. at *2, *3. Exactly the same thing is true here.

Other courts agree. In *Abdel-Muhti v. Ashcroft*, 314 F.Supp.2d 418, 426 (M.D. Pa. 2004), where the petitioner had been detained long past the presumptively reasonable period, the court held that ICE's evidence about diplomatic progress toward repatriation did not rebut petitioner's showing, particularly where the government did not know "whether removal will be available under the agreement in one month or in one year." Similarly, in *Elashi v. Sabol*, 714 F.Supp.2d 502, 506 (M.D. Penn. 2010), for five months, the Department of State had been pressuring the Palestinian Authority to accept the petitioner. The court granted habeas, rejecting the government's claim that "removal remains reasonably foreseeable because attempts to effect [] removal remain ongoing." *Id.* "[T]he Government is required to demonstrate the likelihood of not only the existence of untapped possibilities, but also a probability of success in such possibilities." *Id. See also Hajbeh*, 490 F.Supp.2d at 693 ("the government cannot continue to rely on claims of 'best efforts' and promises that removal is just around the corner"); *Seretse-Khama*, 215 F.Supp.2d at 49 (rejecting argument that detention should continue because Liberia had repatriated a few citizens in recent years and might repatriate the petitioner: "this Court must determine whether there is evidence of a significant likelihood of removal in the reasonably foreseeable future, not whether the INS efforts will be futile"); *Jama*, 2005 WL 1432280, at *2, *3 (ordering release of a Somali national

where ICE has previously "proposed elaborate, but ultimately unsuccessful, plans" for repatriation, and now had new plans for accomplishing repatriation).

The Supreme Court recognized that habeas courts may face "difficult judgments" in considering how long it is reasonable "to grant the Government appropriate leeway" to pursue repatriation. *Zadvydas*, 533 U.S. at 700. That is precisely why the Court established a presumptively reasonable six-month period where the government's interest in continued diplomatic negotiations outweighs the individual's liberty interest. *Id.* at 701. *See also Uritsky v. Ridge*, 286 F.Supp.2d 842, 845 (E.D. Mich. 2003) (*Zadvydas* established presumptive 6-month period as guide for determining when removal is no longer reasonably foreseeable). Since here that period has long since passed, since what counts as "reasonably foreseeable" is now exceedingly short, and since it is unlikely that—or at best highly uncertain whether or when—Iraq will accept Petitioners, they must be released absent individualized proof that Iraq has issued travel documents or there is some other special justification for their detention.

c. The Length of Removal Proceedings, When Coupled with the Uncertainty of Removal, Requires Release.

Not only have most *Zadvydas* subclass members already been incarcerated well over a year, but given the posture of their immigration cases, many could face years of further detention, even though they may well ultimately prevail on the merits. *See* Ex. 2, Schlanger Decl. ¶13. Indeed, even detainees who have won

immigration relief or protection are being detained while ICE appeals or seeks to deport them to countries other than Iraq. *See, e.g.*, Ex. 10, Bajoka Decl. ¶¶12-16 (detainee granted asylum in January, but detained until BIA dismissed government appeal in July); ECF 312-3, PgID7511-13, Vakili Decl. ¶¶6-10 (immigrant, who was found likely to be tortured but was detained for over a year *after* winning that relief, agreed to removal because he despaired of ever being released).

In January this Court decided (based on necessarily cursory briefing, given the number of issues before the Court) that the length of time it will take for immigration cases to conclude could not by itself form the basis of a *Zadvydas* claim "where the *only* barrier to removal is ongoing immigration proceedings." ECF 191, PgID5334 (emphasis added). Here, the length of those proceedings is coupled with great uncertainty about whether removal will ever be possible, implicating the core constitutional principles that the length of civil detention must be carefully limited to serve the purposes of that detention and the duration of detention must be reasonable. *See* Section IV.A.1. The Supreme Court noted in *Flores*, 507 U.S. at 314–15, that detention's duration for noncitizen youth "is inherently limited by the pending deportation hearing," but emphasized that these proceedings "must be concluded with 'reasonable dispatch' to avoid habeas corpus," which is the appropriate remedy where "alien juveniles are being held for undue periods" due to the length of immigration proceedings. *See also Jennings*, 138 S.Ct. at 868

(Breyer, J., dissenting) ("It is immaterial that the detention here is not literally indefinite, because while the [] removal proceedings must end eventually, they last an indeterminate period of at least six months and a year on average, thereby implicating the same constitutional right against prolonged arbitrary detention that we recognized in *Zadvydas*.").

The Sixth Circuit in *Ly* stressed that the "entire process . . . is subject to the constitutional requirement of reasonability." 351 F.3d at 272. It found that the length of proceedings was unreasonable where Ly "had been imprisoned for a year and a half with no final decision as to removability." *Id.* at 271. In *Ly* the question was not whether there is a definite end point to immigration proceedings—Ly's proceedings like all such proceedings had an endpoint (a month after the grant of habeas)—but whether the amount of time spent in detention until that end point was reached was reasonable, particularly given questions about whether Ly could be repatriated. The Court recognized that under *Demore*, brief detention during removal proceedings is permissible, but explained that *Demore* "is undergirded by reasoning relying on the fact that [§1226(c) detainees] 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." *Id.* at 271. The Court thus found habeas relief proper for Ly "[b]ecause there is no strong special justification in this case, because the period of time required to conclude the proceedings was

unreasonable, and because actual removal was not foreseeable." *Id.* at 273. The fact that Ly was not removable made "a year-and-a-half imprisonment awaiting removal proceedings [] *especially* unreasonable." *Id.* at 271-72 (emphasis added).

Exactly the same is true here. It is unreasonable to subject Petitioners—who will soon hit *Ly*'s 18-month mark—to years of further detention while their cases wend their way through the immigration courts, particularly given the utter uncertainty about whether Iraq will accept them for repatriation if they lose. Because their removal litigation has become prolonged, Petitioners' liberty interest in freedom from detention outweighs the government's interest in detaining them so that they will be available at some future date **if** they are found to be removable and **if** Iraq then agrees to repatriation. Given that Petitioners have been detained so long already that the "reasonably foreseeable future" is now very short, "the period of time required to conclude the proceedings [is] unreasonable." *Id.* at 273.

The present case is like *Abdulle v. Gonzales*, where a nationwide injunction prevented removal of Somalis, a fact the district court considered in finding that the petitioner was not likely to be removed in the reasonably foreseeable future. 422 F.Supp.2d at 779. The court rejected the government's argument that detention was lawful because it was attributable to the injunction: "Respondents' instant argument is remarkably similar to the contention that continued detention be lawful so long as good faith efforts to effectuate [removal] continue, a rationale the

Zadvydas Court expressly rejected." *Id*. Similarly, in *Koussan v. Department of Homeland Security*, 2015 WL 6108303 (E.D. Mich. Oct. 16, 2015), this Court found the indeterminate length of ongoing legal proceedings dispositive, regardless of the availability of travel documents. Noting that the detainee had a Sixth Circuit appeal pending, that "it is not known when it will be resolved" and that the case could be sent back to the BIA for further proceedings, the court rejected ICE's argument that removal was reasonably foreseeable because the government would—if the detainee lost—be able to remove him when proceedings concluded:

> Even though ICE has a travel document to remove Koussan, ICE cannot act on that document due to the stay of removal by the Sixth Circuit and Koussan's pending appeal. . . Under these circumstances, he faces detention for an unknown period of time. *Zadvydas* prohibits such continued detention.

Id. at *3. *See also Oyedeji v. Ashcroft*, 332 F.Supp.2d 747, 752–54 (M.D. Pa. 2004) (granting habeas relief because "[t]he price for securing a stay of removal should not be continuing incarceration"). Petitioners here should not be punished with years of detention simply because they are exercising their legal right to oppose removal to a nation where torture and death awaits.

6. Respondents' Past Misrepresentations to the Court Further Undermine the Reasonableness of Detention.

Respondents have, throughout this litigation, repeatedly represented that Iraq is willing to accept repatriation of Iraqi nationals without limit, that it was this Court's injunction (rather than Iraq's refusal) that prevented the June 2017 flight,

and that large-scale removals can be accomplished through charter flights without the need for travel documents. Discovery has now revealed what the government sought to hide: clear evidence that, absent an Iraqi national's expressed desire to return to Iraq, it is extremely difficult, and perhaps impossible, for him to be repatriated. Discovery has also revealed that Respondents knew this all along, and misled the Court. Petitioners will shortly be filing a motion for sanctions.

As a result of the government's falsehoods, over 100 people have been incarcerated unlawfully since January, when this Court, relying on Respondents' declarations, concluded that it could not "make a determination regarding whether Iraq will accept repatriation of the class" without discovery. ECF 191, PgID5331-32. Even more appalling, virtually every week additional detainees give up their rights because of the toll of detention. The reasonableness of Petitioners' ongoing detention must be evaluated in light of the reasonableness of their past detention—detention that was based on Respondents' misrepresentations to the Court. Petitioners have languished in detention as winter became spring, then summer, and now soon fall, separated from their families and communities, increasingly desperate. That their past suffering has been predicated on falsehoods weighs heavily against the reasonableness of allowing their suffering to continue.

B. The Irreparable Harm, Balance of the Equities, and Public Interest Factors Favor Petitioners.

This Court has already decided that the final three injunctive factors—

irreparable harm, balance of equities and public interest—overwhelmingly support Petitioners, who seek nothing more than a return to a pre-detention status quo. ECF 191, PgID5346-47. "Detention has inflicted grave harm … for which there is no remedy at law." *Id.* at PgID5346. "The balance of equities tips decidedly in favor of preliminary relief": absent relief, the detainees will continue to suffer that grave harm, while "the Government does not substantiate any claim that it will suffer any harm if enjoined." *Id.* at PgID5346-47. "Finally, the public interest requires preliminary relief" because "[o]ur Nation has a long history of resisting unreasonable governmental restraints." *Id.* at PgID5347.

In balancing the four injunction factors, it is critical to remember that civil detainees "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). *See also Flores*, 507 U.S. at 319 (O'Connor, J., concurring) (focusing on confinement conditions in assessing constitutionality of detaining noncitizen youth). Judicial acceptance of civil detention is premised on the notion that civil confinement conditions are less severe than criminal imprisonment. *See, e.g.*, *Salerno*, 481 U.S. at 747–48; *Hendricks*, 521 U.S. at 363; *Schall*, 467 U.S. at 271. In practice, however, Petitioners are being held in penal conditions; over half are held in jails, alongside pretrial and sentenced prisoners. Ex. 2, Schlanger Decl. ¶¶14-15; *Chavez-Alvarez v. Warden York Cty.*

Prison, 783 F.3d 469, 478 (3d Cir. 2015) ("[W]e cannot ignore the conditions of confinement. Chavez-Alvarez is being held in detention at the York County Prison with those serving terms of imprisonment as a penalty for their crimes. Among our concerns about deprivations to liberties brought about by [immigration detention] is the reality that merely calling a confinement 'civil detention' does not, of itself, meaningfully differentiate it from penal measures.").

Petitioners' detention has ceased to be reasonable; their powerful liberty interest in freedom from incarceration easily outweighs the government's interest in ongoing detention for an indeterminate time to procure travel documents that may never even issue. There is no reason Petitioners cannot resume their lives under orders of supervision (which many of them were on for decades), subject to any appropriate restrictions. ECF 138-19, Brané Decl. ¶¶10-11, 13-25. "The choice … is not between imprisonment and the alien living at large. It is between imprisonment and supervision under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696 (citation and quotation marks omitted). Monitored freedom is reasonable here, and that is all Petitioners seek. If and when Respondents succeed in obtaining travel documents, along with final orders, the government can take Petitioners back into custody.

C. The Relief Requested

As this Court found in its January 2nd certification order, there are "multiple

common questions of law and fact" related to Petitioners' *Zadvydas* claim, ECF 191, PgID5351, questions which they now ask this Court to answer. Specifically, Petitioners ask the Court to find that for members of the *Zadvydas* subclass who have been detained longer than six months (a) the duration of their detention is no longer presumptively reasonable for the purpose of effectuating their removal; (b) what counts as the "reasonably foreseeable future" under *Zadvydas* and *Ly* is now very short, given the length of Petitioners' detention to date; (c) Petitioners have provided good reason to believe that removal is not significantly likely in the reasonably foreseeable future, and therefore Petitioners must be released unless the government "responds with evidence sufficient to rebut that showing;" *Zadvydas*, 533 U.S. at 701; (d) under *Rosales-Garcia*, 322 F.3d at 415, Respondents cannot rebut Petitioners' showing by pointing to ongoing diplomatic negotiations, particularly given how short the "reasonably foreseeable future" now is, but must present actual evidence that Iraq has agreed to repatriation of a specific class member if that class member's detention is to be further prolonged; and (e) Respondents cannot continue to detain Petitioners unless Respondents establish that *either* the class member's removal is significantly likely because Iraq has issued travel documents, *or* there is another "sufficiently strong special justification" other than effectuating removal that justifies continued detention. *Zadvydas*, 533 U.S. at 690.

To operationalize this relief, the Court should order that members of the

Zadvydas subclass who have been detained longer than six months be released under orders of supervision within 14 days unless Respondents by that date provide individualized evidence that (i) ICE has valid travel documents for the detainee,[16] or (ii) there is another strong special justification for the individual's detention other than effectuating removal. The procedure will allow the Court, having answered the common legal and factual class-wide questions,[17] to address any individual facts that might justify continued detention in particular cases.

V. CONCLUSION

Given the length of time Petitioners have already spent behind bars and the great uncertainty whether Iraq will ever accept them, their ongoing detention is not reasonable in relation to the government's goal of effectuating removal. Their detention is unlawful, and they must be released absent individualized evidence that Iraq is willing to accept their repatriation.

[16] The one-way *laissez passer* travel documents Iraq issues are valid for six months. Ex. 1-58. If ICE obtains a travel document, but is unable to accomplish removal before the document expires, the class member would then be released.

[17] Should the Court believe that any of the common questions cannot be answered class-wide, the Court should allow for individualized decisions on those questions, either through the process proposed above or through individual habeas petitions—in which case the Court should make clear that its decision does not preclude class members from seeking relief in individual habeas petitions.

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Dated: August 29, 2018

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2018, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

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EXHIBIT E

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

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

PETITIONERS/PLAINTIFFS' MOTION FOR SANCTIONS

Local Rule 7.1(a)(1) requires Petitioners/Plaintiffs (hereinafter Petitioners) to ascertain whether this motion is opposed. Petitioners' counsel Margo Schlanger communicated with William Silvis, counsel for Respondents/Defendants (hereinafter Respondents), via email on August 28, 2018 explaining the nature of the relief sought and seeking concurrence. Mr. Silvis responded that "Respondents deny that any false or misleading statements have been made to the Court, but without knowing which statements Petitioners are referencing Respondents are not in a position to provide the answer required under LR 7.1(2)(A)."

* * *

On January 2, 2018, this Court deferred ruling on Petitioners' *Zadvydas* claim, based principally upon factual representations by Respondents regarding the likelihood that Iraq would accept Petitioners for repatriation. ECF 191, PgID5328-35. Relying on declarations from John Schultz, deputy assistant director for ICE's Asia and Europe Removal and International Operations Unit, and Michael Bernacke, ICE's acting deputy assistant director for that same unit, the Court found that it is "still an open question whether Iraq has agreed to accept class-wide

repatriation" and that "a more developed record is necessary to answer this question." *Id.* at PgID5334. The Court pointed specifically to statements that "the Government's negotiations have resulted in Iraq's agreement to cooperate in removal of Iraqi nationals from the United States;" that "ICE had scheduled charter flights to depart in both June and July;" that "there is no numeric limit on the number of removals;" that the reason "very few travel documents have actually been provided" was that "these documents are being sought only for those not subject to the stay of removal;" and that "if the injunction is lifted, large-scale removals can be arranged via charter flights, without the need for travel documents." *Id.* at PgID5331-32 (citing Schultz and Bernacke declarations).

Once the Court allowed discovery, Respondents – who had successfully prevented discovery during all of 2017 – sought to thwart it at every turn through delay and objection. When they did respond, they provided incomplete and misleading interrogatory responses designed to obscure, *inter alia*, the fact that Iraq has a long-standing and continuing policy against involuntary repatriations, and that Iraq has repeatedly refused repatriation of class members, absent their expressed desire to return. Discovery is still incomplete. Most recently, after Respondents sought yet another extension and the Court ordered that they respond to discovery requests, including production of documents by August 20, 2018, Respondents again failed to produce documents, meaning that only Respondents –

and not Petitioners nor the Court – have access to documents that post-date March 2018.

Critically, however, the documents that Petitioners have obtained in these hard-fought discovery battles show that the Respondents' sworn declarations contained both highly misleading and demonstrably false information – information that was the basis for this Court's January 2nd ruling. Moreover, the Respondents knew at the time they submitted those declarations that the statements were misleading or false. Documents obtained in discovery also show that Respondents knowingly withheld critical facts from the Court. At no point have Respondents made any efforts to rectify the situation by notifying the Court or class counsel that prior court filings and discovery responses contained false and misleading information, or that Respondents had failed in their court filings to mention facts central to resolution of the *Zadvydas* claim. The truth is:

- there is no agreement with Iraq for class-wide repatriation;
- ICE sought [redacted];
- Iraq had and continues to have a longstanding policy of opposing forced repatriation and it is unclear whether or when Iraq will ever accept Iraqi nationals who do not wish to return;
- Iraq has long required potential deportees to express their desire to return to

Iraq, and has used a standard form to document that desire in writing;

- Iraq has [redacted];
- Iraq will not accept Iraqi nationals on charter flights without travel documents;
- [redacted]
- Iraq [redacted] by the time when this Court's nationwide injunction issued; and
- by the time Respondents' opposed the first preliminary injunction in July 2017, ICE [redacted].

Respondents not only failed in their duty to reveal those facts to the Court, but affirmatively misrepresented them.

WHEREFORE, pursuant to this Court's inherent powers and for the reasons set forth in the accompanying brief, Petitioners request that this Court, as sanctions and remedies for Respondents' misrepresentations, bad faith and misconduct:

1. ORDER that members of the *Zadvydas* Subclass who have been detained

longer than six months be released under orders of supervision within 14 days unless Respondents by that date provide to the Court individualized evidence that:

a. ICE has valid travel documents for the detainee; or

b. There is another strong special justification for the individual's detention, other than effectuating removal.

2. STRIKE from the declarations of John Schultz Jr. and Michael Bernacke language that is false or misleading and that is contained in the following paragraphs of those declarations, as highlighted in Exhibits A, B and C:

- Schultz Dec. 7/20/2017, ECF 81-4, ¶5;
- Schultz Dec. 11/30/2017, ECF 158-2, ¶¶4, 6, 7, 8 and 9;
- Bernacke Dec. Doc# 184-2, ¶¶4, 5, 6, 7, 8, 10, 11 and 12.

3. ORDER that in any individual immigration and habeas proceeding, whether in immigration court or federal court, in which the Schultz and Bernacke declarations have been offered as evidence, Respondents file a notice stating that this Court has stricken portions of those declarations, provide each presiding judge in such a proceeding with this Court's order and opinion explaining why credence is not due the declarations and what portions of the declarations have been stricken, and report to this Court on those filings.

4. ORDER Respondents to pay Petitioners' counsel their reasonable attorneys' fees and costs for conducting discovery related to Petitioners' *Zadvydas*

claim, for filing and litigating this Motion for Sanctions, and for filing and litigating Petitioners' Renewed Motion for Preliminary Injunction Under *Zadvydas*, ECF 376.

5. GRANT whatever other relief the Court deems appropriate to sanction and remedy the government's actions.

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Dated: August 31, 2018

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

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

PETITIONERS/PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS

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STATEMENT OF ISSUES PRESENTED

1. Should this Court enter relief granting Petitioners' claims for release under *Zadvydas v. Davis*, 533 U.S. 678 (2001), where this Court's earlier decision to defer ruling on that claim was secured by Respondents' misrepresentations and omissions of material facts?

Petitioners' Answer: Yes

2. Should this Court strike misleading or false portions of the declarations of John Schultz Jr. and Michael Bernacke, and require Respondents to inform immigration courts or federal courts where those misleading and false declarations have been used in individual proceedings of that fact?

Petitioners Answer: Yes.

3. Should this Court order Respondents to pay Petitioners' fees associated with (a) discovery conducted for their *Zadvydas* claim, (b) Petitioners' renewed motion for relief under *Zadvydas*, and (c) this motion for sanctions?

Petitioners' Answer: Yes

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Michigan Rule of Professional Conduct 3.3

Michigan Rule of Professional Conduct 4.1

Chambers v. NASCO, Inc., 501 U.S. 32 (1991)

Hutto v. Finney, 437 U.S. 678 (1978)

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INTRODUCTION

In *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984), the court vacated the conviction of Fred Korematsu, a conviction which four decades earlier led to the Supreme Court's decision upholding the internment of Japanese-Americans. *See Korematsu v. United States*, 323 U.S. 214 (1944). The district court in 1984 focused on the fact that the federal government had presented only information justifying detention of the Japanese, when "there was critical contradictory evidence known to the government and knowingly concealed from the courts." *Korematsu,* 584 F. Supp. at 1417.

> [T]he government deliberately omitted relevant information and provided misleading information in papers before the court. The information was critical to the court's determination, although it cannot now be said what result would have obtained had the information been disclosed. Because the information was of the kind peculiarly within the government's knowledge, the court was dependent upon the government to provide a full and accurate account. . . . The judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court.

Id. at 1420. Regardless of "[w]hether a fuller, more accurate record would have prompted a different decision," relief was justified because "relevant evidence has been withheld." *Id.* at 1419. Had the government, and its attorneys, been honest with the court, this shameful chapter in our history might have been avoided.

More than 70 years have passed, but the government's obligation to be forthright with the court has not changed. Nor, unfortunately, has the government's

behavior which has, yet again, led to unjustified detention.

When this Court deferred ruling on Petitioners' *Zadvydas* claim, it did so based on Respondents' representation of facts only they then knew. Discovery has now shown both that those representations were false, and that the government knowingly concealed key information demonstrating the falsehoods. The cost of Respondents' misconduct here is measured in the pain it inflicted on Petitioners – in separated families, in months of human life spent unlawfully behind bars, and in the desperation of some 37 class members who, unable to stand the toll of detention, have given up and agreed to removal, despite the danger of persecution, torture, or even murder in Iraq. While that harm cannot be undone, Petitioners ask this Court to use its inherent authority to release the *Zadvydas* subclass members and rectify, to the extent possible, the consequences of Respondents' misconduct. Petitioners also ask the Court to strike the misleading and false portions of Respondents' declarations, to require Respondents to acknowledge error in other proceedings where those declarations were used, and to pay attorneys' fees.

BACKGROUND AND FACTS

I. RESPONDENTS KNOWINGLY PRESENTED FALSE AND MISLEADING INFORMATION.

In January this Court deferred ruling on the *Zadvydas* claim, concluding that it could not "make a determination regarding whether Iraq will accept repatriations of the class." ECF 191, PgID5332. In ruling, the Court was forced to rely on the

government's one-sided rendition of the facts, because the government had vigorously opposed any discovery. Discovery has now shown that a) the government's sworn facts were misleading and false, b) the government knew they were false, and c) the government withheld material, critical information.

A. Respondents' Declarations Stated There Was an Agreement Under Which Iraq Would Accept Unlimited Repatriations Via Charter Flights.

The government's first declaration related to the purported US-Iraq "agreement" was from John Schultz, ICE Deputy Assistant Director with primary responsibility for obtaining Iraqi cooperation with repatriations, dated July 20, 2017. ECF 81-4. The declaration stated "Iraq has agreed, using charter flights, to the timely return of its nationals that are subject to final orders of removal." *Id.* ¶5.

In their response to Petitioners' preliminary injunction motion on detention, ECF 158, Respondents relied on another declaration, dated November 30, 2017, from Mr. Schultz, ECF 158-2, which was based on his purported "professional knowledge," as well as "information obtained from other individuals employed by ICE, and information obtained from DHS records."[1] *Id.* ¶3.[2] He testified:

[1] The declaration was central to Respondents' argument. *See* Response, ECF 158, PgID4103-04 (declaration "establishes that, but for the stay in place in this case, ICE would obtain travel documents for the detained Petitioners"); 12/20/2017 Hrg. Trans., at 47, 115-16 (counsel stated that charter flights stopped by injunction and that ICE was in the process of obtaining travel documents for each person).

[2] The Court has appropriately questioned why Respondents' declarations are *Continued on next page.*

- "Recent negotiations between the governments of the United States and Iraq have resulted in increased cooperation in removal of Iraqi nationals." *Id.* ¶4.

- "ICE originally had a charter flight scheduled in June 2017 that was rescheduled for July 2017 in view of the court's original order; however, ICE was not able to effectuate that flight due to the Court's July 24th order." *Id.* ¶6.

- "ICE expects to receive travel documents for all individuals that ICE has requested to remove to Iraq." *Id.* ¶7.

- "To minimize the risk of having to ask a foreign government to re-issue or extend an expired travel document, ICE waits until there are no impediments to request a travel document. Thus, ICE currently does not have travel documents for all detained final order detainees. ICE believes that the central government of Iraq in Baghdad will issue travel documents should the court lift the injunction." *Id.* ¶8.

After the Court asked about the terms of the purported Iraqi agreement during the detention motion hearing, 12/20/2017 Transcript, at 47-48, 122-23, Respondents submitted a declaration from Michael Bernacke, ECF 184-2, that:

- vouched for earlier statements made by Mr. Schultz under oath (ECF 81-4) that there was an agreement with Iraq, though finally admitted that it was "not memorialized in any written document or treaty" (ECF 184-2, ¶4);

- asserted that the Iraqi Agreement "does not contemplate any numeric limitation on the number of removals in total or on an annual basis" (*id.* ¶5);

- asserted that Iraq had agreed to accept removals via charter flights and without the need for travel documents being issued by Iraq (*id.* ¶¶6-7);

- claimed that ICE cancelled the June 2017 flight "[a]s a result of the injunction in the above-captioned case." (*id.* ¶8); and

- attested that "ICE believes that the central government of Iraq in Baghdad will permit the entry of detained Iraqi nationals . . . if the injunction is lifted"

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not based on personal knowledge, as required. ECF 191, PgID5332.

> using charter flights and the "injunction is the only impediment to ICE to resuming charter flights to Iraq." (*Id.* ¶12).[3]

The Court relied on Schultz's and Bernacke's declarations in deferring adjudication of the *Zadvydas* claim, rather than ordering release, ECF 191, PgID5331-32:

> Schultz states that the Government's negotiations have resulted in Iraq's agreement to cooperate in removal of Iraqi nationals from the United States. [Schultz Decl.] ¶ 4. As evidence of this cooperation, Schultz notes that, prior to this Court's rulings enjoining removal, ICE had scheduled charter flights to depart in both June and July. *Id.* ¶6.
>
> * * *
>
> In his declaration, Bernacke states that the agreement between the United States and Iraq is not memorialized in writing, but is instead the product of ongoing negotiations. [Bernacke Decl.] ¶ 4. Bernacke also states that "the agreement does not contemplate any numeric limitation on the number of removals," and that if the injunction is lifted, large-scale removals can be arranged via charter flight, without the need for travel documents. *Id*. ¶¶5-6.

B. Respondents Knew The Declarations Were Untrue.

Discovery has shown not only that Respondents' account was inaccurate, but also that they knew the true story at the time. Respondents' misrepresentations fall into four main categories: 1) statements that the U.S. reached an agreement with Iraq in 2017, and that Iraq was willing to accept the return of all Iraqi nationals

[3] The declarations did not attest to personal knowledge and were carefully hedged to allow the declarants to disclaim responsibility. In some instances where a declarant had personal knowledge of adverse facts, a different declarant was used to tell a false story. For example, Mr. Schultz who testified at his deposition that he had abandoned efforts to use manifests for the June charter flight, ECF 376-64, Schultz Dep. at 47, 123, does not discuss that in his declaration. Mr. Bernacke's declaration makes the exact opposite claim. ECF 184-2, Bernacke Dec. ¶6.

with final orders of removal without limitation; 2) claims that ICE could secure travel documents for all Iraqi nationals but did not attempt to do so because of the preliminary injunction; 3) statements that Iraq will accept charter flights using manifests rather than requiring travel documents; and 4) statements that the June and July 2017 flights were cancelled as a result of this Court's injunctions.

1. Respondents said Iraq agreed to the return of all Iraqi nationals with final orders of removal, knowing that was untrue.

The government has consistently and without qualification asserted that in 2017 the U.S. and Iraq reached an agreement for the return of all Iraqi nationals with final orders of removal. While Iraq agreed to accept a charter flight with eight deportees in April 2017, in return for its removal from the first travel ban, [redacted] ECF 376-2, ¶10. [redacted] *Id.* ¶20; ECF 376-62 ¶¶21-22, 30. Instead, Iraq [redacted] ECF 376-2, ¶20.h. [redacted] *Id.* ¶¶20-21, 23. By July 19, [redacted]

[redacted]

Id. ¶24. On July 20, Mr. Schultz [redacted]. *Id.* ¶24.b. That same day, Respondents opposed an injunction barring removal of Iraqis (ECF 81), relying on Mr. Schultz' sworn declaration that "Iraq has agreed… to the timely return of its nationals that are subject to final orders of removal." ECF 81-4, ¶5.

On July 26, 2017, Mr. Schultz' Deputy Chief of Staff [redacted] ECF 376-2, ¶24.d. ICE [redacted]

[redacted] *Id.* ¶24.f. [redacted] . *Id.* ¶¶25-28. Indeed, [redacted] [4] Nonetheless, Respondents submitted declarations stating that Iraq will accept "**all individuals** that ICE has requested to remove to Iraq", ECF 158-2, 11/30/2017 Schultz Decl. ¶7, "Iraq agreed to the timely return of its nationals subject to a final order of removal," and "the United States planned to schedule the return of **all** Iraqi nationals with final orders of removal." ECF 184-2, 12/22/2017 Bernacke Decl. ¶¶4-5 (emphasis added).

2. Respondents said ICE could secure travel documents, but has not attempted to do so because of the injunction, knowing that was untrue.

Respondents, having claimed that Iraq would accept deportees without limit-

[4] *See, e.g.*, ECF 376-2, [redacted]

ation, had to explain why ICE nonetheless did not have travel papers. They said:

> To minimize the risk of having to ask a foreign government to re-issue or extend an expired travel document, ICE waits until there are no impediments to request a travel document. Thus, ICE currently does not have travel document for all detained final order Iraqis.

ECF 158-2, 11/30/2017 Schultz Decl. ¶8. ICE also said that requesting travel documents prematurely "has the potential to jeopardize the present agreement and our ability to effect future removals to Iraq." ECF 184-2, Bernacke Decl. ¶10. In fact, ICE [redacted] ECF 376-2, ¶20; ECF 376-62, ¶21. Significantly, [redacted] despite ICE's assertion that doing so would jeopardize the present agreement. *Id.* ¶33.

3. Respondents said Iraq agreed to accept charter flights without formal travel documents, knowing that was untrue.

Respondents also highlighted the ease of return pursuant to the supposed "agreement" between the United States and Iraq, claiming that:

> The government of Iraq agreed to accept these removals via charter mission. As a charter mission, rather than a removal conducted via commercial airline flight, formal travel documents are not required. Instead, ICE submits a proposed manifest for the charter flight to Iraqi officials for approval.

ECF 184-2, Bernacke Decl. ¶6. In fact, as Mr. Schultz admitted in his deposition, the plan to use manifests "never came to fruition" and was not even used for the April flight. ECF 376-2, ¶17. Thereafter ICE abandoned any hope of using the simpler manifest procedure for later flights, ECF 376, Ex. 4 at 123:

> Q: At any time, did ICE try to effectuate the June 2017 flight by submitting a flight manifest versus obtaining travel documents?
> A: No. It was my intention to get travel documents for the individuals on the flight.

4. ICE said that the June and July 2017 flights were cancelled as a result of this Court's injunction, knowing that was untrue.

A memo drafted by Respondents [redacted]

ECF 376-3. The longer version tells the same story, showing problems with the June flight from the start. A June 12 [redacted]

ECF 376-2, ¶20.k. ICE first learned on June 20 [redacted] on June 21. *Id.* ¶20.q-20.r. The next day, June 22,

this Court entered the initial TRO. ECF 32. Because that TRO only covered Detroit-area deportees, and because there were plenty of non-Detroit-area deportees to fill a flight, on June 23 [redacted] ECF 376-2, ¶20.t. [redacted] *Id.* On June 26 [redacted] *Id.* ¶20.u. In short, by the time this Court entered a nationwide injunction on June 26, ECF 43, the June flight had failed because [redacted]. Respondents, however, provided sworn testimony blaming this Court's injunction for the failure. *See* ECF 158-2, 11/30/2017 Schultz Dec. ¶6; ECF 184-2, Bernacke Dec. ¶8.

ICE also represented that it rescheduled the June flight for July, and that the preliminary injunction thwarted the July flight. ECF 158-2, 11/30/2017 Schultz Dec. ¶6. ICE had requested a flight for [redacted]. ECF 376-2, ¶23.c. [redacted] *Id.* ¶23.d-20.e. [redacted] *Id.* ¶23.g. But [redacted] on July 18, Iraqi officials [redacted]

[redacted] *Id.* [redacted] July 19 [redacted] *Id.* ¶24. As of July 24, when the injunction was entered, Iraq [redacted] *Id.* ¶24.c.

C. The Government Withheld Material Information.

The above affirmative misrepresentations, and the fact that neither Respondents nor their counsel ever returned to the Court to correct them, are only part of the story. As in *Korematsu*, "[b]ecause the information was of the kind peculiarly within the government's knowledge, the court was dependent upon the government to provide a full and accurate account." 584 F. Supp. at 1420. This Court naturally believed that the government would act with candor. Indeed, when Petitioners sought discovery in advance of their initial *Zadvydas* motion, the Court denied that request, relying on the government's promise that "it would [] disclos[e] in its response to Petitioners' motion . . . information that may be of utility to Petitioners to meet the Government's response." ECF 153, PgID3936. *See id.* (suggesting government promised disclosures may obviate need for discovery).

The government did not disclose the key material facts – facts then known only to the government – that showed there was no significant likelihood of removal in the reasonably foreseeable future. Those undisclosed facts included:

- As a result of [redacted] ECF 376-2, ¶24.
- Iraq has a longstanding policy against accepting involuntary repatriations of its nationals, a position it [redacted]. *Id.* ¶¶36-37, 48-49, 53.
- Iraq [redacted] and required potential deportees to execute a form attesting to their desire for repatriation (a form that has [redacted] *Id.* ¶¶3-6, 20.h, 33, 38-41.

II. THE GOVERNMENT'S CONDUCT THROUGHOUT THIS LITIGATION HAS BEEN DESIGNED TO HIDE THE TRUTH.

Respondents' conduct during the past 14 months – which at first appeared to be garden variety obstruction and discovery abuse – can in hindsight be recognized for what it was: an effort to prevent Petitioners and this Court from learning the truth. Three themes emerge. First, the government's misrepresentations have infected this entire case. Had Petitioners and the Court known the truth back in July 2017 – when ICE was simultaneously [redacted] while opposing the first preliminary injunction with sworn testimony that there was a U.S.-Iraq agreement for return of all Iraqi nationals – the course of this litigation would have been utterly changed. Both the removal and detention issues would

have been litigated very differently, with the absence of a repatriation agreement becoming a central issue in the summer of 2017, rather than the summer of 2018.

Second, the government has only admitted to its misrepresentations when caught. It was not until after the Court questioned the government about the terms of the purported Iraqi agreement that Respondents admitted that there is no written agreement. 12/20/2017 Hrg. Trans., at 47-48, 122-23; ECF 184-2, Bernacke Decl. ¶4. It was not until Petitioners were forced to seek emergency relief when ICE coerced class members into signing Iraq's repatriation form, ECF 307, that Respondents admitted that a deportee's expressed desire to return is an essential step in the issuance of Iraqi travel documents.[5] ECF 311-3, Maddox Decl. ¶¶8, 11, 13, 14.

Third, Respondents have routinely ignored both the Federal Rules and this Court's orders to avoid discovery, to the point where the Court had to warn 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. *See* Fed. R. Civ. P. 37(b)(2)(A)." ECF 320, PgID7608. The latest

[5] In response to an interrogatory asking for "each criterion an Iraqi National must meet before Iraq will accept an Iraqi National for repatriation", ICE notably omitted that Iraq's criteria include a desire to return. ECF 376-56, ICE's Response to Interrogatory No. 2; ECF 376-57, ICE Supplemental Response to Interrogatory No. 2. Nor did ICE mention the form, although ICE [redacted] ECF 376-2, ¶¶4-5, 33.

violation – ignoring the August 20 document production deadline, ECF 366, PgID8323 – seems likely to be an effort to ensure that when Respondents oppose the *Zadvydas* motion with their version of the facts, Petitioners will not have any "critical contradictory evidence known to the government and knowingly concealed from the courts." *Korematsu*, 584 F. Supp. at 1417.

III. RESPONDENTS' MISCONDUCT HAS CAUSED PETITIONERS SEVERE HARM.

Over 100 class members are still suffering in detention. Had the government been honest about Iraq's refusal to accept involuntary repatriations, they should have been released during post-order-custody reviews. Had the government not created a false narrative of easy deportations impeded solely by this Court's orders, they would have been released in January when this Court ruled on the *Zadvydas* claim. Instead, they remain incarcerated in terrible conditions, subjected to prolonged lock-downs, given inadequate medical care, and separated from their families. *See, e.g.* Op. on Coercion, ECF 370 (describing mistreatment in Calhoun jail). Their suffering, set out in more detail in Petitioners' renewed *Zadvydas* motion and supporting declarations, is directly attributable to the government's misconduct.

The government's use of Mr. Bernacke's and Mr. Schultz's declarations in class members' immigration bond hearings compounded the harm. ICE argued, based on the declarations, that removal was imminent, but for the *Hamama* stay, and that the detainees were therefore flight risks. ECF 376-70, Bajoka Decl., ¶¶3-7.

For example, after ICE introduced the declarations at the bond hearing of Salman Saiyad, a 63-year-old man who had been complying with an order of supervision for 20 years, the immigration judge set a $100,000 cash bond, which Mr. Saiyad is unable to pay. Mr. Saiyad remains detained. ECF 376-75, Kaplovitz Dec. ¶¶5-8.

ARGUMENT

IV. THIS COURT HAS INHERENT AUTHORITY TO SANCTION AND REMEDY THE GOVERNMENT'S LITIGATION MISCONDUCT.

Courts are vested with 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). Courts have inherent power to sanction "acts which degrade the judicial system," *id.* at 32; where "fraud has been practiced upon [the court]", *id.* at 44; where a litigant is "misleading and lying to the court," *id.* at 42; 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). *See also Railway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980); *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 511-12 (6th Cir. 2002); *Murray v. City of Columbus*, 534 F. App'x 479, 484 (6th Cir. 2013). While courts should exercise their power with restraint and discretion, *Chambers*, 501 U.S. at 44, "[t]he exercise of inherent authority is particularly appropriate for impermissible conduct that adversely impacts the entire litigation." *Marietta*, 307 F.3d at 516.

In imposing sanctions the court determines whether there was bad faith con-

duct, or conduct that is tantamount to bad faith.[6] *Id.* at 517. "It goes without saying that lying to the court constitutes bad faith." *Graham v. Dallas Indep. Sch. Dist.*, 2006 WL 507944, at *4 (N.D. Tex. Jan. 10, 2006). "[N]o one needs to be warned not to lie to the judiciary." *Ayoubi v. Dart*, 640 F. App'x 524, 529 (7th Cir. 2016). "[T]hose 'who lie, evade and fail to tell the ***whole*** truth obviously enjoy an advantage over honest litigants. The victimized opponent winds up ... consuming substantial resources to respond to and 'undo' the victimizer's lies and distortions.'" *Forsberg v. Pefanis*, 634 F. App'x 676, 680 (11th Cir. 2015) (emphasis in original).

Misrepresentations constitute a fraud on the court. As this Court held in *Plastech Holding Corp. v. WM Greentech Automotive Corp.*, 257 F. Supp. 3d 867, 872 (E.D. Mich. 2017), where it dismissed a suit as a sanction for submitting fraudulent evidence, a party commits a fraud upon the court where it adopts tactics

> "…calculated to interfere with the judicial system's ability to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (citing cases); *see also New York Credit & Fin. Mgmt. Grp. v. Parson Ctr. Pharmacy, Inc.*, 432 Fed. App'x. 25 (2d Cir. 2011) (same); *Almeciga v. Ctr. for Investigative Reporting, Inc.*, 185 F. Supp. 3d 401, 427 (S.D.N.Y. 2016) ("[T]he essence of fraud upon the Court is when a party lies to the court and his adversary intentionally, repeatedly, and about issues that are central to the truth-finding process.").

[6] While a party must receive "fair notice and an *opportunity* for a hearing on the record," an evidentiary hearing is not required. *Metz*, 655 F.3d at 491.

There are of course special ethics rules governing attorneys.[7] Under Michigan Rule of Professional Conduct 4.1, "a lawyer shall not knowingly make a false statement of material fact or law to a third person." Rule 3.3 imposes a duty of candor to the court and opposing counsel, bars attorneys from making false statements and requires them to correct any false statements previously made. An advocate "must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." Comment, Rule 3.3. "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(a)(3). *See* Rule 3.3(e) (conflict between duties of candor and confidentiality).

"There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." Comment, Rule 3.3. In *First Bank of Marietta*, 307 F.3d at 525, the Sixth Circuit found bad faith where a plaintiff withheld a document knowing it undermined its cause of action. As this court has said:

> The handling of a lawsuit and its progress is not a game. There is an absolute duty of candor and fairness on the part of counsel to both the Court and opposing counsel. At the same time, counsel has a duty to zealously represent his client's interests. That zealous representation of interest, however, does not justify a withholding of essential information . . .

Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983). *See also Williamson v. Recovery Ltd. P'ship*, 826 F.3d 297, 304 (6th

[7] This Court has adopted the Michigan Rules. E.D. Mich. L.R. 83.22(b).

Cir. 2017) (misrepresentations not innocent where party "willfully blind" to evidence); *In re Bavelis*, 563 B.R. 672, 687 (S.D. Ohio 2017) (misrepresentations intentional where party knew of key evidence); *Laukus v. Rio Brands, Inc.*, 292 F.R.D. 485, 489 (N.D. Ohio 2013) (dismissing complaint because plaintiff "knowingly offered (or allowed to be offered) arguments before this Court and on appeal that were not supported by-and contrary to-the record" and "failed to correct discovery responses they knew to be inaccurate, misleading or false").

V. THIS COURT HAS INHERENT AUTHORITY TO FASHION APPROPRIATE REMEDIES TAILORED TO THE HARM CAUSED BY THE GOVERNMENT'S MISCONDUCT.

Once a court determines sanctions are warranted, it must decide what form of sanctions should be imposed. *Marietta*, 307 F.3d at 517. 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." *Chambers*, 501 U.S. at 44-45 (emphasis added). While "the less severe sanction of an assessment of attorney's fees" is most common, the court has discretion to impose "a particularly severe sanction" where that is the appropriate remedy. *Id.* at 45. Severe sanctions include "outright dismissal of a lawsuit," *id.*; vacating prior judgments, *Demjanjuk v. Petrovsky*, 310 F.3d 338 (6th Cir. 1993); setting aside a jury verdict, *Fuery v. City of Chicago*, --- F.3d ----, 2018 WL 3853742 (7th Cir. Aug. 14, 2018); barring witness testimony, *Beard v. City of Southfield*, 2016 WL 6518490 (E.D. Mich. Nov. 3, 2016); entering an injunction, *Lamie v. Smith*, 2013

WL 12109526 (W.D. Mich. Feb. 14, 2013), *report and rec adopted by* 2013 WL 12109421 (W.D. Mich. Mar. 6, 2013); or striking claims or defenses, *Robert Bosch LLC v. A.B.S. Power Brake, Inc.*, 2011 WL 1790221 (E.D. Mich. May 10, 2011)[8].

VI. BECAUSE RESPONDENTS SECURED DEFERRAL OF PETITIONERS' *ZADVYDAS* CLAIM THROUGH MISCONDUCT, THE APPROPRIATE SANCTION IS PETITIONERS' RELEASE.

The government's false assertion that the preliminary injunction was the only thing standing between the Petitioners and return to Iraq was critical for this Court's ruling on the *Zadvydas* claim. Had the government honestly presented the facts, Petitioners would have met their burden to show a likelihood of success on the merits. Instead, the government dissembled. The supposed "agreement" to accept all Iraqis with final orders never existed. The June plane was cancelled because [redacted] yet the government swore that it was the result of this Court's TRO. ICE never [redacted], yet it again blamed the litigation. Although ICE [redacted], it told this Court the opposite. And the government simply omitted key facts, including that 1) Iraq [redacted]; and 2) in July 2017 [redacted]

[8] *See also, e.g., Barnhill v. United States*, 11 F.3d 1360, 1367 (7th Cir. 1993) ("Moreover, pursuant to this power, a court may impose the severe sanction of dismissal with prejudice (or its equivalent, judgment) if the circumstances so warrant."); *Monsanto Co. v. Ralph*, 382 F.3d 1374, 1382 (Fed. Cir. 2004) (entering judgment); *Oliver v. Gramley*, 200 F.3d 465, 466 (7th Cir. 1999) (dismissal).

[redacted]

No amount of wordsmithing – which one can expect in the government's response – can hide the fact that Respondents have not been remotely candid with this Court. Any post hoc rationalization leaves unanswered the question of why the government's original factual assertions—so unconditioned and unambiguous—are not supported by the contemporaneous record.

The duty of candor—which every party and attorney owes to a court—applies with particular force to the government:

> The Department of Justice wields enormous power over people's lives, much of it beyond effective judicial or political review. With power comes enormous responsibility, moral, if not legal, for its prudent and restrained exercise; and responsibility implies knowledge, experience, and sound judgment, not just good faith.

United States v. Van Engel, 15 F.3d 623, 629 (7th Cir. 1993), *abrogated on other grounds by United States v. Canoy*, 38 F.3d 893 (7th Cir. 1994). And it is even more apt here, as the government prevented Petitioners from securing any discovery before the hearing on the *Zadvydas* claim by promising to provide the relevant information in its responsive pleadings. Whatever duty to disclose that was not imposed as a matter of law was assumed by the government based on that promise; a promise this Court expressly relied upon in denying discovery at that time.

The real question for this Court is not whether there was misconduct – based on the record set out above there clearly was – but rather how the Court can here

"fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44-45. While there is "no requirement that the district court find prejudice" when imposing sanctions, the Court should consider "the impact or effect that the [improper] conduct had on the course of the litigation" when fashioning an appropriate remedy." *Fuery*, 2018 WL 3853742 at *10.

There is no way for the Court to give the Petitioners what they were wrongfully deprived of: release back in January. What the Court can do, however, is prevent that wrong from continuing any longer by ordering release, at long last. The government's misconduct is both a supplemental reason to grant Petitioners' renewed *Zadvydas* motion, ECF 376, and an independent reason for the same relief.

This Court's earlier *Zadvydas* ruling was premised on false evidence. The Court has the inherent power to amend its earlier decision "upon proof that a fraud has been perpetrated upon the court."[9] *Chambers*, 501 U.S. at 44. That power "is necessary to the integrity of the courts, for 'tampering with the administration of

[9] In addressing misconduct, courts have expansive power to revise earlier decisions. For example, in *Demjanjuk*, 310 F.3d at 351-52, the Sixth Circuit vacated an earlier extradition order, concluding that acts and omissions by Department of Justice attorneys, particularly the failure to disclose evidence, constituted fraud on the court, and that the court had the inherent power to grant such relief to protect the integrity of the judicial process. Similarly, in *Fuery*, 2018 WL 3853742 at *10, the Seventh Circuit held that the district court had authority to set aside a jury verdict for the plaintiff as a sanction for the plaintiff's misconduct.

justice in [this] manner ... involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public.'" *Id.*

VII. THE COURT SHOULD STRIKE FALSE AND MISLEADING LANGUAGE FROM THE DECLARATIONS AND REQUIRE RESPONDENTS TO INFORM OTHER TRIBUNALS WHERE THE DECLARATIONS WERE USED OF THAT FACT.

The Court should strike the false and misleading language in the Schultz and Bernacke declarations (as set out in Exhibits A-C). The Court should also order Respondents to file a notice in any individual immigration and habeas proceedings, whether in immigration or federal court,[10] in which the declarations have been offered as evidence, and provide proof of those filings. *See Chambers*, 501 U.S. at 56-57 (court can sanction misconduct before other tribunals); *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 148 (2d Cir. 2012) (court could require sanctioned lawyers to submit its sanction order with any future *pro hac vice* applications).

The government is using the declarations in Petitioners' underlying immigration cases as proof of ICE's ability to remove them, which affects how bond is set and whether class members are released. *See* ECF 376-70, Bajoka Dec. ¶¶2-7, ECF 376-77; Kaplovitz Dec. ¶7 The government is also filing the declarations in individual habeas cases to argue, falsely, that removal is significantly likely in the

[10] Federal court cases would include both habeas proceedings and petitions for review to the Court of Appeals in immigration cases.

reasonably foreseeable future.[11] The notice to the other tribunals should state that this Court has stricken portions of the declarations, and should provide each presiding judge with this Court's opinion. This will allow class members to take appropriate steps to remedy any decisions that relied on those declarations, and alert both the immigration courts other federal courts that the government is presenting false evidence.

VIII. PETITIONERS SHOULD BE AWARDED ATTORNEYS' FEES AND COSTS.

Attorneys' fees are an appropriate sanction for bad faith conduct. *Chambers*, 501 U.S. at 45-46; *Metz*, 655 F.3d at 489. The Court also has inherent authority to impose attorneys' fees where a litigant's "actions were taken, at the very least, in the face of an obvious risk that he was increasing the work on the other party without advancing the litigation." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 647 (6th Cir. 2006). Attorney's fees serve the dual purposes of "vindicat[ing] judicial authority" and "mak[ing] the prevailing party whole for

[11] While Petitioners do not know every case where the declarations have been filed, they include *Al Jabari v. U.S. Attorney General*, 4:17-cv-01972 (N.D. Ala.); *Al-Hallaf v. U.S. Attorney General*, 4:17-cv-02068 (N.D. Ala.); *Arthur v. Session*, 1:17-cv-23343 (S.D. Fla.); *Mirza v. Hassell*, 4:17-cv-02039 (N.D. Ala.); *Saiyad v. Adducci*, 1:17-cv-00995 (W.D. Mich.); *Yousif v. Adducci*, 1:17-cv-01038 (W.D. Mich.). In the *Al-Jabari* case, ICE submitted an additional declaration attesting to the likelihood of removal, even though Mr. Al-Jabari was [redacted]. *Compare* ECF 376-77, North Decl. ¶¶53-54, *with* ECF 376-20, [redacted]

expenses" caused by his opponent. *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978).

Here, Respondents' misrepresentations, their failure to provide information known exclusively to the government and promised in lieu of discovery, and their delays, concealment, and obstruction when discovery finally commenced forced Petitioners to engage in protracted discovery. The government's actions also necessitated both this motion and the renewed *Zadvydas* motion. None of this labor should have been necessary. All fees and expenses incurred as a result of the government's misconduct should be awarded to Petitioners.

CONCLUSION

"[E]xtraordinary injustices require extraordinary relief." *Korematsu*, 584 F. Supp. at 1413. More than 100 human beings remain behind bars as a direct result of the government's misconduct. They should be released, the record cleansed of the government's falsehoods, and Petitioners reimbursed for the many months of work it has taken to uncover the truth. Respondents may believe that they can violate this Court's orders, disregard the Court Rules, and dissemble without consequence.[12] The Court should make clear that they cannot.

[12] ICE's disregard of this Court's order is not an isolated incident, but rather part of a pattern of misconduct. *See, e.g.*, *Grace v. Sessions*, 2018 WL 3812445 (D.D.C. Aug. 9, 2018) (ordering ICE to return deported asylum seeker and her daughter, who had been removed despite ICE's representation to the court that no removal would occur before hearing, and warning of possible contempt sanctions against Attorney General Sessions, DHS Secretary Nielsen, and other Defendants).

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Dated: August 31, 2018

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

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EXHIBIT F

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

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

[PROPOSED] INTERIM ORDER GRANTING IN PART PETITIONERS/PLAINTIFFS' MOTION FOR LEAVE TO FILE DOCUMENTS PUBLICLY AND REQUEST FOR PROVISIONALLY FILING UNDER SEAL

The Court has reviewed Petitioners' Motion for Leave to File Documents Publicly and Request for Provisionally Filing Under Seal ("Motion"), by which Petitioners seek to file publicly their Renewed Motion for a Preliminary Injunction under *Zadvydas* (ECF 376) and accompanying exhibits, and their Motion for Sanctions under the Court's Inherent Authority (ECF 377), but ask the Court to provisionally allow these documents to be filed under seal. These briefs contains references to certain information or documents designated by Respondents as "confidential" or "highly confidential" under the Second Amended Stipulated Order for the Protection of Confidential Information (ECF 313), and the exhibits include documents, or information derived from documents, that were likewise

designated as "confidential" or "highly confidential". Respondents have not yet had an opportunity to present their arguments for sealing.

Accordingly, Petitioners shall be allowed to provisionally file under seal the documents listed on their Ex. A to their Motion, until Respondents have responded to Petitioners' Motion setting out any basis for sealing, Petitioners have replied, and this Court has determined whether sealing is appropriate. Copies of the briefs and exhibits redacting the information covered by the Protective Order have already been filed to the public CM/ECF system.

To ensure that this matter can be resolved prior to a hearing on Petitioners' motion, the Court sets the following briefing schedule: _____. The Court reserves a decision on the propriety of sealing until the matter is fully briefed.

SO ORDERED.

Date:
Detroit, Michigan

_____
MARK A. GOLDSMITH
United States District Judge