No. 19-1080

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, et al.,
Petitioners-Appellees,

v.

REBECCA ADDUCCI, Director of the Detroit District
of U.S. Immigration and Customs Enforcement, et al.
Respondents-Appellants.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
D.C. No. 2:17-cv-11910

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DISCLOSURE OF CORPORATE AFFILIATIONS

Appellants are officers of the United States sued in their official capacities and are therefore not required to make these disclosures under Sixth Circuit Rule 26.1(a).

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants respectfully request oral argument. The issues in this case are important, and the Court's consideration of those issues would be aided by oral argument.

INTRODUCTION

In this case, the district court issued a flawed and damaging injunction, concluding that the immigration laws confer on criminal and other removable aliens a presumptive entitlement to release from immigration custody after six months of immigration detention. That injunction rests on serious errors of law: it is irreconcilable with the relevant statutes, it conflicts with Supreme Court caselaw, and it cannot be squared with the record in this case.

This is not the first time the district court issued such sweeping and grievously mistaken injunctive relief. This is the *third* such injunction in this very case. This Court vacated the first and second of those injunctions—but not before they inflicted profound damage. The district court first issued a nationwide injunction barring the government from effectuating petitioners' longstanding removal orders so that they could pursue last-minute motions to reopen their removal proceedings. That injunction was in place for 21 months before this Court vacated it on the ground that the district court never had jurisdiction to issue it. *Hamama v. Adducci*, 912 F.3d 869, 877 (6th Cir. 2018) *pet. for reh'g en banc denied* (April 2, 2019). While the first injunction remained in place, petitioners grew frustrated with the duration of their immigration detention and so they launched an attack on Congress's mandatory-detention provisions. The district court granted a second preliminary injunction, this time holding that the relevant

statutes required that petitioners be afforded bond hearings. That injunction was in place for 15 months before this Court vacated it—again on the ground that the district court never had jurisdiction to issue it. *Id.* at 880. Yet by the time this Court issued that decision petitioners had already sought still more: they asked the district court to order the release of all petitioners who remained detained—even though the reason that they remained detained was that they had been denied bond or failed to post bond—on the ground that their continued detention is unreasonable. The district court obliged again, issuing the injunction that led to this appeal.

In this third injunction, the court held that *Zadvydas v. Davis*, 533 U.S. 678 (2001)—which interpreted the Immigration and Nationality Act (INA) provision governing extended detention following the *completion* of removal proceedings and entry of a final removal order, 8 U.S.C. § 1231(a)(6), to expire when there is no longer a "significant likelihood of removal in the reasonably foreseeable future," 533 U.S. at 701—should be extended to presumptively require the release of all petitioners who remain detained longer than six months "[r]egardless of which [detention] provision" applies or whether they are awaiting a determination on their removability at all. Op. Granting Renewed Mot. for Prelim. Inj. Under *Zadvydas* (Op.), RE 490, PageID.14171 (Nov. 20, 2018). Relying on the canon of constitutional avoidance, the court held that 8 U.S.C. § 1226(a), which states that the government "may detain" an alien during the

course of removal proceedings, must be read as not authorizing indefinite detention beyond six months since "the record unquestionably demonstrates that there is no significant likelihood of repatriation in the reasonably foreseeable future." Op., RE 490, PageID.14171. The court then held that 8 U.S.C. §§ 1225(b) and 1226(c), which mandate detention during removal proceedings, would be unconstitutional if they permitted indefinite detention where there is no foreseeable removal. *See id.*, PageID.14179-82. The court held that petitioners' removal was unlikely in the reasonably foreseeable future based on its conclusion that Iraq had a policy of only repatriating Iraqi nationals willing to be returned, and due to the fact that "almost all [petitioners] who are currently detained have steadfastly refused to agree to voluntary removal to Iraq." *Id.*, PageID.14183. Finally, the court reached the same conclusion regarding likelihood of removal based on a sanction against the government for misconduct during discovery. *See id.*, PageID.14190.

The district court's latest injunction rests on serious errors of law and should be vacated.

First, this Court should vacate the injunction because it has no basis in the relevant statutes and rests upon a use of the constitutional-avoidance canon that the Supreme Court has rejected. Section 1226 governs the pre-removal-order detention of certain aliens, stating in section 1226(a) that its detention authority persists "pending a

decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Under section 1226(a), the government "may release" an alien "on bond ... or conditional parole." *Ibid.* For certain criminal aliens specifically, section 1226(c) provides that the government "*shall* take" the alien "into custody ... when the alien is released" from criminal confinement. *Id.* § 1226(c)(1)(emphasis added). For certain aliens seeking admission into the United States, section 1225(b) states that "the alien *shall* be detained" until certain proceedings have concluded. *Id.* §§ 1225(b)(1), (2). None of these statutes imposes the six-month temporal limitation that the district court imposed. The Supreme Court accordingly held in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), that 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) cannot be interpreted to include a temporal limitation on detention. *Id.* at 851 ("[N]othing in *any* of the relevant provisions imposes a 6–month time limit on detention."); *see also id.* at 846 ("[T]he conclusion of removal proceedings ... —and not some arbitrary time limit devised by courts—marks the end of the Government's detention authority under § 1226(c)."); *id.* at 843 ("*Zadvydas* ... provides no such authority" to "graft a time limit onto the text of § 1225(b)."). Finally, as the Supreme Court made clear, *Zadvydas*'s standard as to the likelihood of removal in the reasonably foreseeable future is the rule for *post*-removal-order detention under section 1231(a)—after a final removal order may be executed and efforts at removal of the individual can be conducted and, if necessary, evaluated

by a court after six months have passed. It is not suited for *pre*-removal-order detention under sections 1226(a), 1226(c) and 1225(b), when there is no final removal order and therefore no effort at removal of the individual has, or can, be initiated.

Second, this Court should vacate the preliminary injunction for independent reason that the district court lacked jurisdiction to issue the class-wide injunction relief that it ordered. Under 8 U.S.C. § 1252(f)(1), "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221-1231] ... other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). This Court already held, in a prior appeal in this very case, that "the district court lacked jurisdiction over" other of petitioners' detention-based claims "because § 1252(f)(1) unambiguously strips federal courts of the authority to enter class-wide injunctive relief." 912 F.3d at 880. The district court's preliminary injunction ordering release from detention on a class-wide basis for those held for six months or more is legally indistinguishable from the class-wide injunctive relief that this Court already rejected. As before, the district court's injunction places "limitations on what the government can and cannot do under the removal and detention provisions," *id.*, and thus effects the sort of enjoining or restraining of the INA that is precluded by section 1252(f)(1).

Third, this Court should vacate the preliminary injunction ordering release from detention after six months on the basis that petitioners' removal is not significantly likely to occur in the reasonably foreseeable future. The court's conclusion that removal was not reasonably foreseeable improperly relies on petitioners' unwillingness to be repatriated. *See* Op., RE 490, PageID.14183. That rationale is nonsensical: an alien who has sought relief or protection for removal will in most cases, *by definition*, object to being removed. That objection cannot possibly form the basis for making it improper to remove that alien in a class-wide determination. In any event, the reasoning was fundamentally flawed given the many removals that have occurred over time and since the start of this litigation. There is no sound basis for the district court's class-wide determination under either the INA or the Supreme Court's rationale for establishing the very likelihood of removal standard it established in *Zadvydas*.

Finally, this Court should conclude that the district court abused its discretion when it found, as a discovery sanction, that "[i]ndependent of what the record shows, Petitioners are entitled to *Zadvydas* relief because of the Government's discovery abuses." *Id.*, PageID.14190. The court erred in imposing an adverse inference that amounted to a default judgment against the government in response to delayed production of documents. The court also erred in attributing bad intent in the government's efforts to manage difficult discovery into delicate and ongoing foreign-

relations efforts relating to Iraq's cooperation on repatriating its citizens. Such a sanction is substantially disproportionate and unsupported by the record.

For these reasons, this Court should vacate the district court's injunction.

STATEMENT OF JURISDICTION

Petitioners' operative habeas petition invokes 28 U.S.C. § 2241, *et seq.*, as the basis for the district court's jurisdiction over the claims at issue in this appeal. *See* Second Am. Habeas Corpus Class Action Pet. and Complaint, RE 118, PageID.2963. The district court entered a preliminary injunction on November 20, 2018. The government filed a timely notice of appeal on January 18, 2019. *See* Fed. R. App. P. 4(a)(1)(B). The Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

This case presents four legal issues for review:

(1) Whether the district court erred on extending the release rule of *Zadvydas v. Davis*, 533 U.S. 678 (2001), to the context of detention during ongoing removal proceedings, holding that an alien presumptively must be released from such pre-removal-order detention if detention has lasted six months and there is no significant likelihood of removal in the reasonably foreseeable future.

(2) Whether 8 U.S.C. § 1252(f)(1) deprived the district court of jurisdiction to enter the class-wide injunction here regarding immigration detention.

(3) Whether the district court erred in concluding that there is no significant likelihood of removal to Iraq in the reasonably foreseeable future on a class-wide basis, and on the ground that Iraq has a policy of refusing to accept involuntary removals.

(4) Whether the district court abused its discretion in justifying the relief it granted as a sanction for litigation misconduct, that there is no significant likelihood of removal to Iraq in the reasonably foreseeable future.

STATEMENT OF THE CASE

A. Legal Framework

The INA provides procedures for determining whether an alien who is present in the United States is removable from the country and whether a removable alien is eligible for relief from removal. *See* 8 U.S.C. § 1229a (procedures governing removal proceedings). In general, aliens who are subject to removal after lawful admission to the United States, as well as certain aliens present in the country without having been admitted, are entitled to such removal procedures. *See id.* § 1229a. The Department of Homeland Security (DHS), exercises its prosecutorial discretion in deciding whether to initiate removal proceedings against an alien and (with some statutory exceptions) whether to detain a person for such proceedings. *See id.* § 1226(a). After the initiation of removal proceedings, an immigration judge determines whether an alien is removable and, if he is, whether to order him removed or to grant him relief or protection from

removal. A removal order becomes final "upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." *Id.* § 1101(47)(B).

The INA authorizes the government to detain an alien who falls into one of the categories described above, both during removal proceedings and after a final removal order has been entered. Several statutes authorize such detention. The procedures governing an alien's detention depend on (among other things) whether the alien is subject to a final removal order and whether the alien has committed certain crimes.

Four sources of detention authority are central to this appeal: 8 U.S.C. § 1225(b), 8 U.S.C. § 1226(a), 8 U.S.C. § 1226(c), and 8 U.S.C. § 1231.

Section 1225(b) authorizes the detention of certain aliens seeking to enter the United States as "an applicant for admission." Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. Section 1225(b)(2) is a catchall provision that applies to most other applicants for admission not covered by § 1225(b)(1). Under § 1225(b)(1), aliens are normally ordered removed "without further hearing or review," 8 U.S.C. § 1225(b)(1)(A)(i), but an alien indicating either an intention to apply for asylum or a credible fear of persecution, *id.* § 1225(b)(1)(A)(ii), "shall be detained" while that alien's

asylum application is pending, *id.* § 1225(b)(1)(B)(ii). Aliens covered by section 1225(b)(2) in turn "shall be detained for a [removal] proceeding" if an immigration officer "determines that [they are] not clearly and beyond a doubt entitled" to admission. *Id.* § 1225(b)(2)(A).

Section 1226(a) states that "an alien may be ... detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Section 1226(a) further provides that "[e]xcept as provided in subsection (c)" of section 1226, an immigration officer "may" release on bond an alien detained during removal proceedings, *id.* § 1226(a), and such an alien may be released on bond if he "demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding," 8 C.F.R. § 236.1(c)(8). Detention under section 1226(a) is thus discretionary. An alien who is denied bond (or who believes it was set too high) may, "at any time" during removal proceedings, ask an immigration judge for a redetermination of the officer's decision. *Reno v. Flores*, 507 U.S. 292, 309 (1993); *see* 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1). "The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond." *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *see In re Adeniji*, 22 I. & N. Dec. 1102, 1111-13 (B.I.A. 1999).

The Secretary of Homeland Security's authority to release an alien on bond does not apply, however, to criminal aliens detained under 8 U.S.C. § 1226(c). *See* 8 U.S.C. § 1226(a) (authority to release applies "[e]xcept as provided in subsection (c)"). Section 1226(c) instead mandates detention of certain criminal and terrorist aliens until their removal proceedings have been completed, without allowing release on bond. Under section 1226(c), the Secretary "shall take into custody any alien who" has committed an enumerated crime or act that presents a risk to national security "when the alien is released" from custody. *Id.* § 1226(c)(1). If section 1226(c) governs an alien's detention, the Secretary "may release" the alien during his removal proceedings "only if" release is "necessary" for witness-protection purposes and "the alien satisfies the [Secretary]" that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." *Id.* § 1226(c)(2). The Supreme Court sustained section 1226(c)'s mandatory detention requirement against a due-process challenge in *Demore v. Kim*, 538 U.S. 510 (2003).

If at the end of removal proceedings the alien is ordered removed, then authority to detain shifts to 8 U.S.C. § 1231. *See* 8 U.S.C. § 1231(a)(1)(A) (governing detention "when an alien is ordered removed"). Section 1231 provides that aliens with final removal orders must be detained during a 90-day "removal period." *See id.* § 1231(a)(2). The removal period begins on the last of three dates: (1) the date the alien's removal

order becomes administratively final; (2) if an order is judicially reviewed and the court enters a stay, the date of the court's final order; or (3) if the alien is detained (except under an immigration process), the date of release from detention. *Id.* § 1231(a)(1)(B). This initial removal period lasts for 90 days, and may be extended if "the alien fails or refuses to make timely application in good faith for travel" or "acts to prevent the alien's removal." *Id.* § 1231(a)(1)(C).

Once the presumptive 90-day removal period expires, section 1231(a)(6) provides that the Secretary of Homeland Security "may" continue to detain aliens who have been ordered removed because they have committed certain crimes or because they have been determined to be "a risk to the community or [are] unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6). In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court interpreted section 1231(a)(6)'s permissive detention scheme, in light of constitutional concerns with potentially indefinite detention when removal could not be effectuated, to presumptively allow detention for six months past the point of his final removal order. *Id.* at 701. After six months, if "the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must show that detention continues to be reasonable in aid of removal. *Id.* If the alien makes his showing and the government does not rebut it, the alien must be released. *Id.* "This 6-month presumption ... does

not mean that every alien not removed must be released after six months." *Id.* If an alien detained for six months does not satisfy the initial burden or if the government rebuts the alien's showing, the alien "may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

B. Factual Background

For years, the United States government had been unable to remove Iraqi national aliens with long-standing final orders of removal to Iraq because Iraq had refused to provide travel documents for their repatriation. As a result, those aliens—including many convicted criminals—were released from custody, *see Zadvydas*, 533 U.S. 678, and lived at large in the United States, often for years. *See* Removal Op., RE 87, PageID.2325. In 2017, Iraq changed its policy and agreed to issue travel documents to Iraqi nationals. *Hamama,* 912 F.3d at 872.

In June 2017, the government took many of the aliens into custody (in particular criminal aliens) to effectuate their removal. Op., RE 490, PageID.14145.

C. Procedural Background

Preliminary Injunction on Removal-Based Claims. In June 2017, petitioners filed a putative class-action habeas petition and a motion for a temporary restraining order in the Eastern District of Michigan, asking the district court to halt their removal to

Iraq, based on allegedly changed conditions in that country. *See* Habeas Petition, RE 1, PageID.1-26; TRO Motion, RE 11, PageID.45-80. Petitioners alleged that ISIS had taken over Iraq's second-largest city in June 2014, committing slaughter and atrocities and forcing the flight or forcible conversion of thousands of Christians and other residents. *See* Habeas Petition, RE 1, PageID.1-24; TRO Mot., RE 11, PageID.45-175.

After the district court entered a temporary stay of removal, *see* Order, RE 32, PageID.497-502, petitioners filed an amended habeas petition, in which they sought to represent a putative class of "all Iraqi nationals in the United States with final orders of removal, who have been, or will be, arrested and detained by ICE as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal." First Am. Habeas Corpus Class Action Pet., RE 35, PageID.538. The amended petition made four claims challenging the government's efforts to remove petitioners to Iraq before the conclusion of adjudication on petitioners' claims that they cannot lawfully be removed from the country because of changed country conditions in Iraq. *See id.*, PageID.541-44. Petitioners also moved for a preliminary injunction, asking the court to stay the removal of petitioners and putative class members so that they can file motions to reopen their immigration proceedings to pursue changed-country-conditions claims. *See* Pet'rs' Mot. Prelim. Inj., RE 77, PageID.1745.

In July 2017, the district court issued an opinion and order granting petitioners a nationwide preliminary injunction preventing the government from enforcing final removal orders against Iraqi nationals and requiring the government to produce extensive discovery. *See* Removal Op., RE 87, PageID.2355-56. The stay of removal continued through the final disposition of the putative class members' motions to reopen, relief applications, and all timely appeals. *Id.* The government appealed from that order in No. 17-2171.

Preliminary Injunction on Detention-Based Claims for Bond Hearings. While proceedings continued under the district court's preliminary injunction on removal, the government had detained affected Iraqi nationals primarily under the post-removal-order authority provided by 8 U.S.C. § 1231 to detain aliens who, in this instance, had either not filed or not yet prevailed on a motion to reopen immigration proceedings and who therefore remained subject to a final removal order. *See* 8 U.S.C. § 1231(a)(6). The government also had detained some Iraqi nationals under the authority provided by 8 U.S.C. § 1226(c)—those who had succeeded in having their removal orders reopened but have criminal convictions or qualifying activities that render them subject to mandatory detention pending a decision on removal. *See* 8 U.S.C. § 1226(c)(1).

In October 2017, petitioners filed a second amended habeas petition and class-action complaint, adding claims challenging their detention while their removals were

enjoined by the district court's first injunction. *See* Second Am. Habeas Corpus Class Action Pet. and Complaint, RE 118, PageID.2957.

In January 2018, the district court issued a second preliminary injunction, requiring bond hearings for class members detained for a period of six months under either 8 U.S.C. § 1231 or 8 U.S.C. § 1226(c). *See* Detention Op., RE 191, PageID.5318. The court "defer[red] ruling" on whether to grant petitioners injunctive relief on their *Zadvydas* claim that "they are being unlawfully detained because there is no significant likelihood of removal in the reasonably foreseeable future." *Id.,* PageID.5328-35. The court reasoned that the record at that time did not enable it to assess whether Iraq will accept repatriation of the class, so the court deferring ruling on the *Zadvydas* claim pending further discovery on whether Iraq will accept repatriation of the class—and thus whether there is a significant likelihood of removal in the reasonably foreseeable future, as necessary to resolve a *Zadvydas* claim. *See id.* Although the court did not reach that issue of release under *Zadvydas*, it did conclude that, even if their removal is reasonably foreseeable, the petitioners were nonetheless entitled to receive individualized bond hearings. *See* Detention Op., RE 191, PageID.5335-37, 5346-47. For those individuals whose removal proceedings had been reopened, the court the court construed section 1226(c) (which does not provide for bond hearings) to make criminal aliens exempt from mandatory detention unless the government takes him into

immigration custody "when the alien is released" from criminal custody, and thus deemed them to be detained under the permissive detention authority of section 1226(a) (which does provide for bond hearings). *See* Detention Op., RE 191, PageID.5339-41. The government appealed from this preliminary injunction in No. 18-1233.

On April 25, 2018, this Court heard oral argument in Nos. 17-2171 and 18-1233.

Preliminary Injunction On Detention-Based Claims for Release Under *Zadvydas*. On August 29, 2018, while the government's appeals from the injunctions on removal (No. 17-1271) and on detention (No. 18-1233) were pending in this Court, petitioners filed a renewed motion for a preliminary injunction under *Zadvydas*. *See* Renewed Mot. for Prelim. Inj. Under *Zadvydas* ("*Zadvydas* Mot."), RE 376. Petitioners argued that sections 1231(a)(6) and 1226(a) "must be interpreted as requiring release where removal is not significantly likely in the reasonably foreseeable future." *Id.*, PageID.8514. Petitioners argued that both statutes must be construed to contain a release requirement based on *Zadvydas*'s statement that "immigration detention statutes" should "be construed, if plausible, to avoid the grave constitutional concerns presented when civil detention becomes divorced from its ostensible regulatory purpose." *Id.*

On November 20, 2018, the district court granted petitioners' renewed motion, and issued the third preliminary injunction in this case. Op. and Order Granting

Renewed Prelim. Inj. ("Op."), RE 490, PageID.14200. Four rulings in the court's order are particularly relevant to the issues in this appeal.

First, the district court extended the Supreme Court's rule in *Zadvydas*—that the government must release an alien who is subject to a final removal order if more than six months have passed and there is no "significant likelihood of removal in the reasonably foreseeable future," 533 U.S. at 701—to the pre-removal-order detention context. *See* Op., RE 490, PageID.14177-82. That is, although *Zadvydas* itself establishes such a rule for *post*-removal-order detention under section 1231(a), the district court extended *Zadvydas* to *pre*-removal-order detention under sections 1226(a), 1225(b), and 1226(c). The court determined that section 1226(a) was susceptible to *Zadvydas*'s limiting construction, reasoning that detention under section 1226(a) is permissive (not mandatory) and that it would prompt grave constitutional concerns to detain a person for more than six months during removal proceedings when there is no significant likelihood of removal in the reasonably foreseeable future. *See* Op., RE 490, PageID.14171. The court reached this determination after concluding that section 1226(a) is "linguistically indistinguishable from the provision addressed in *Zadvydas* and must be interpreted in the same way." *Id.* The court primarily relied, Op., RE 490, PageID.14182, on this Court's statement in *Ly v. Hansen*, that "*Zadvydas* prohibits only one thing: permanent civil detention without a showing of a strong special justification

that consists of more than the government's generalized interest in protecting the community from danger." 351 F. 3d 263, 267 (6th Cir. 2003) (internal quotations omitted). The court went on to note that the Supreme Court in *Jennings v. Rodriguez*—which held that sections 1226(a), 1225(b), and 1226(c) cannot be plausibly interpreted as placing a six-month limit on detention or requiring bond hearings—"notably did not include section 1226(a) as a provision authorizing detention until the end of applicable proceedings." *Id.* Next, although the court acknowledged that "*Jennings* is clear that sections 1225(b) and 1226(c) authorize prolonged detention as a matter of statutory interpretation," Op., RE 490, PageID.14179, it concluded that indefinite detention under such provisions is unconstitutional here since "there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*, PageID.14182. The court thus concluded that regardless of whether a particular subclass member is detained under section 1231(a)(6), 1226(a), 1226(c) or 1225(b), "continued detention beyond six months is not permissible, because the record unquestionably demonstrates that there is no significant likelihood of repatriation in the reasonably foreseeable future." *Id.*, PageID.14171.

Second, the district court issued its injunction—requiring release from detention after six months—on a class-wide basis. Op., RE 490, PageID.14198-99 The district court nonetheless concluded that class-wide relief was appropriate merely because

"Petitioners are all seeking the same remedy—immediate release under *Zadvydas*," and "[d]enying Petitioners' preliminary injunction motion because [they] are situated somewhat differently would discard the substantial benefits of consolidated treatment." *Id.*, PageID.14198. That injunction requires: (1) all class members "who have been detained for more than six months" to be released on orders of supervision within 30 days; and (2) the government, going forward, to release any class member on an order of supervision no later than 30 days after such individual's period of detention reaches six months. *See id.*, PageID.14200. The district court carved out three exceptions to this directive: (1) the government need not release specific individuals if "there is a strong special justification, within the meaning of *Zadvydas*," to continue detention, so long as the government files a motion "alleging and substantiating" the justification prior to release and the court agrees that release is not required; (2) the government need not release an individual if the individual is removed prior to the time required for release; and (3) the injunction "will not apply to those on bond." *Id.*, PageID.14200-01. The injunction "remain[s] in place until there is a final determination on the merits of all of Petitioners' claims," but the order provided procedures for the parties to seek modification, supplementation, or clarification of the relief granted. *Id.*, PageID.14201.

Third, the district court applied *Zadvydas*'s rule against prolonged detention to hold that the petitioners detained under 1231(a)(6), 1226(a), 1226(c), and 1225(b) are

entitled to release, "[r]egardless of which [detention] provision applies," because "the record unquestionably demonstrates that there is no significant likelihood of repatriation in the reasonably foreseeable future." Op., RE 490, PageID.14171, 14182-90. The district court concluded that "the weight of the evidence actually uncovered during discovery shows that Iraq will not take back individuals who will not voluntarily agree to return." *Id.*, PageID.14144.

Fourth, independent of its conclusion that the record established petitioners' removal was not reasonably foreseeable, the court alternatively deemed such a finding to be established as a sanction for the government's purported litigation misconduct. *See id.*, PageID.14190-96. The court held that "Petitioners are entitled to *Zadvydas* relief because of the Government's discovery abuses." *Id.* The court determined that "the Government has acted ignobly in this case, by failing to comply with court orders, submitting demonstrably false declarations of Government officials, and otherwise violating its litigation obligations—all of which impels this Court to impose sanctions." *Id.*, PageID.14144-45. The court thereafter discounted the government's declarants' attestations regarding the repatriation agreement between the United State and Iraq, concluding that "the agreement has not evolved; it has devolved, back to the negotiation stage, and there does not appear to be a clear way forward to repatriate Iraqi nationals at this time." *Id.*, PageID.14188. Moreover, the court determined that its first

injunction—the injunction halting removals of petitioners—was not an impediment to removal, since numerous class members who are no longer subject to the stay remain detained despite having received Iraqi travel documents. *See id.*, PageID.14188-89. Despite acknowledging that some petitioners have been removed, the court concluded that petitioners had "offered a plethora of credible evidence in support of their position that there is no reasonable likelihood of removal in the reasonably foreseeable future." *Id.*, PageID.14189. The court also determined that the government "made no effort to comply" with Fed. R. Civ. P. 34's requirement to produce documents, or the court's order to produce records, *id.*, PageID.14192, which, the court believed, "demonstrates clear bad faith." *Id.*, PageID.14195. The court held that the government's actions delayed a determination on the merits of petitioners' *Zadvydas* issue for over a year, "which has benefitted the Government in that Petitioners remain in custody." *Id.* The court stated that "[t]he Government has used discovery to slow this case to its benefit" and that "[l]esser sanctions will not suffice in this case." *Id.* The court did not say whether its sanctions were being imposed under Rule 37 or its independent authority (or both), but it imposed an adverse inference and ordered that there is no significant likelihood of petitioners' removal in the reasonably foreseeable future. *Id.*, PageID.14196.

This timely appeal followed.

D. Intervening Sixth Circuit Decision

On December 20, 2018, after the district court entered its third injunction, this Court ruled in this case's consolidated appeals in Nos. 17-2171 and 18-1233 in a decision that vacated the district court's first and second injunctions.

In No. 17-2171, this Court vacated the injunction on petitioners' removal-based claims, holding that the district court lacked the jurisdiction to enter its preliminary injunction. *See Hamama*, 912, F.3d at 874-77. The Court held that section 1252(g)—which provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter"— divested the district court of jurisdiction. *Id.* at 875. The Court held that section 1252(g)'s "jurisdictional limitations do not violate the Suspension Clause," rejecting the district court's decision to the contrary. *Id.*

In No. 18-1233, this Court vacated the injunction on petitioners' detention-based claims for bond hearings, holding that "8 U.S.C. § 1252(f)(1) bars the district court from entering class-wide injunctive relief." *Id.* at 877. Relevant here, the Court rejected petitioners' claim that the district court was not enjoining or restraining sections 1226 and 1231—which section 1252(f)(1) prohibits—but rather *interpreting* them to ensure they are correctly enforced. *Id.* at 879-80. The Court held that "*Jennings* foreclosed any statutory interpretation that would lead to what Petitioners want," since the *Jennings*

Court "chastised" the adoption of "'implausible constructions of the ... immigration provisions.'" *Id.* at 879 (quoting *Jennings*, 138 S. Ct. at 850, 836). The Court deemed "implausible on its face" petitioners' contention that the district court was not enjoining or restraining the statutes, since the district court "ordered release of detainees," "created out of thin air a requirement ... that does not exist in the statute," "and adopted new standards that the government must meet." *Id.* at 879-80. The Court thus ruled that [i]f these limitations on what the government can and cannot do under the removal and detention provisions are not 'restraints,' it is not at all clear what would qualify as a restraint." *Id.* at 880.

SUMMARY OF THE ARGUMENT

The district court erred in granting a preliminary injunction. This Court should vacate that injunction and remand with instructions to vacate it.

I. The district court erred in holding that petitioners who are detained under the pre-removal-order detention authority of 8 U.S.C. §§ 1226 and 1225(b) presumptively must be released once their detention exceeds six months under either a constitutional or constitutional-avoidance theory. The district court's holding defies the statutory text, conflicts with Supreme Court precedent, is not compelled by the Due Process Clause, and makes no sense under *Zadvydas* itself. None of the relevant statutes contain the six-month detention limitation that the district court imposed here.

Sections 1225(b) and 1226(c) each impose mandatory detention for the duration of removal proceedings, and the district court agreed they could not be interpreted to include *Zadvydas* type procedures. Section 1226(a) also cannot be given such an atextual interpretation, contrary to the district court's holding. The district court read into this statute a six-month limitation on detention based on the canon of constitutional avoidance. But the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), rejected the proposition that constitutional-avoidance principles could justify imposing additional (extra-textual) limitations on discretionary detention under section 1226(a). *See Jennings*, 138 S. Ct. at 843 ("[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases.").

The district court was also incorrect to hold that Sections 1226(c) and 1225(b) are invalid to the extent they permit detention without making a *Zadvydas* inquiry after six months. The Supreme Court has held that with respect to statutes that provide for detention during the pendency of immigration proceedings, the Due Process Clause permits such detention. *See, e.g., Demore,* 538 U.S. at 523. And the Court has never suggested making a *Zadvydas*-type inquiry—with no analysis of flight risk or danger—during the time when immigration proceedings are ongoing. *Zadvydas* is about the reasonableness of post-removal-order detention—that is, detention in aid of removing an alien from the United States. The government cannot remove an individual alien—

or make efforts at removal—until there is a final removal order against that alien. The government sensibly does not commence steps for actual removal under there *is* a final removal order and a court cannot properly make an assessment of whether removal of the individual is likely until those steps are taken (for at least six months). Accordingly, it does not make sense to inquire into the likelihood of removal for a particular alien until there is a final removal order and the government is given a period of time to then effectuate removal, and the regime invented by the district court is both fundamentally flawed and not required by the Due Process Clause.

II. The district court's injunction should be vacated for an independent reason: the court lacked jurisdiction to issue the class-wide injunctive relief that it ordered. The text of 8 U.S.C. § 1252(f)(1) makes this plain: "Regardless of the nature of the action or claim ... no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221-1232], other than with respect to the application of such provisions to an individual alien against whom proceedings ... have been initiated." As this Court held when this case was last before it, section 1252(f)(1)'s text stripped the district court of jurisdiction to order the class-wide injunctive relief of the sort that it ordered here. *See Hamama v. Adducci*, 912 F.3d 869, 877 (6th Cir. 2018) ("8 U.S.C. § 1252(f)(1) bars the district court from entering class-wide injunctive relief for the detention-based claims."). Indeed, the district court's

injunction on detention at issue in No. 18-1233 enjoined the provision of section 1231 and 1226(c), two of the same statutory provisions it further enjoined in its third injunction at issue here. The district court's third preliminary injunction ordering release from detention under 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a)(6) for those held for six months or more is indistinguishable under section 1252(f)(1) from the same class-wide injunctive relief that this Court rejected in No. 18-1233. As before, the district court's injunction places "limitations on what the government can and cannot do under the removal and detention provisions," *id.*, and thus constitutes the sort of enjoining or restraining of the INA detention provisions that is precluded by section 1252(f)(1).

III. Even if the district court was correct to extend *Zadvydas*' post-removal-order standard to pre-removal-order detention, the district court's injunction should be independently vacated for the further reason that the district court erred in concluding that there is no significant likelihood of removal to Iraq in the reasonably foreseeable future. The court's reliance on an alien's unwillingness to be repatriated to conclude that there is no significant likelihood of removal cannot be squared with the INA or the Supreme Court's rationale for establishing the very likelihood of removal standard it established in *Zadvydas*.

IV. The district court's injunction should also be vacated to the extent that it grants petitioners relief on their *Zadvydas* claim as a sanction. There is no sound record basis for the district's court's finding that the government acted willfully and in bad faith to delay the district court proceedings to its benefit. When the government was unable to meet the court's document-production deadlines, it provided declarations concerning the technical and resource issues it faced. And even if the document production issues merited any sanction, the district court abused its discretion by not tailoring its sanction to address what the documents may have shown about the repatriation negotiations with Iraq. The court's sanction should thus be vacated as it imposed an adverse inference that entitles petitioners to the identical injunctive relief on the merits to which they are not entitled and which the district court was barred from issuing under section 1252(f)(1)'s jurisdictional bar.

STANDARDS OF REVIEW

The district court's decision to issue a preliminary injunction is reviewed for an abuse of discretion. *See S. Glazer's Distribs. of Ohio, L.L.C. v. Great Lakes Brewing Co.*, 860 F.3d 844, 854 (6th Cir. 2017). A district court necessarily abuses its discretion when it commits an error of law. *Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, L.L.C.*, 774 F.3d 1065, 1071 (6th Cir. 2014). District-court factual findings are reviewed for clear error. *See Max Trucking, L.L.C. v. Liberty Mut. Ins. Corp.*, 802 F.3d 793, 803 (6th Cir.

2015). A district court's issuance of sanctions is reviewed for an abuse of discretion. *See Sommer v. Davis*, 317 F.3d 686, 692 (6th Cir. 2003).

ARGUMENT

I. The district court erred in extending the post-removal-order release rule of *Zadvydas v. Davis*, 533 U.S. 678 (2001), to petitioners' pre-removal-order detention under 8 U.S.C. §§ 1225(b), 1226(a) and 1226(c).

The district court erred in holding that petitioners who are detained under the pre-removal-order detention authority of 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) presumptively must be released once their detention exceeds six months under either a constitutional or constitutional avoidance theory. *See* Op., RE 490, PageID.14171-82. The district court's holding defies the statutory text, conflicts with Supreme Court precedent, is not compelled by the Due Process Clause, and makes no sense under *Zadvydas* itself.

A. The district court read into section 1226(a) a six-month limitation on detention based on the canon of constitutional avoidance. But the text of the statute cannot support this radical revision by the district court.

The only limitation on the detention authority in section 1226(a) is that the Secretary has discretion to release an alien on bond. *See* 8 U.S.C. § 1226(a)(2) (the Secretary "may release" the alien on "bond ... or conditional parole"). Accordingly, if the Secretary exercises discretion to "continue to detain" the alien, section 1226(a)'s detention authority persists "pending a decision on whether the alien is to be removed

from the United States." *Id.* § 1226(a). Nothing in the text of section 1226(a) remotely suggests that the foreseeability of removal is relevant to the government's detention authority—and indeed the invocation of bond suggests that the only relevant considerations for an immigration judge to consider are danger and flight risk. This lack of textual support alone is a sufficient basis for rejecting the district court's conclusion. *See Jiminez v. Quarterman*, 555 U.S. 113, 118 (2009) ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute[.]").

Indeed, the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), rejected the proposition that constitutional-avoidance principles could justify imposing additional (extra-textual) limitations on discretionary detention under section 1226(a). As the Supreme Court has explained, the avoidance canon "permits a court to 'choos[e] between competing plausible interpretations of a statutory text'" when the text is ambiguous, but "does not give a court the authority to rewrite a statute as it pleases." *Jennings*, 138 S. Ct. at 843 (quoting *Clark v. Martinez*, 543 U.S. 371, 381 (2005)). Thus, for the district court's statutory ruling to be appropriate, it would need to be true that the pre-removal-order detention provisions at issue here "may plausibly be read to contain an implicit 6-month limit." *Id.* As explained above, those provisions cannot be plausibly read—none contains the durational limit (or any suggestion of the durational limit) that the district court imposed.

The district court reasoned that *Jennings* did not "consider whether *Zadvydas* relief was available in relation to the statutory provisions the Court did address"—including section 1226(a). Op., RE490, PageID.14178. Not so. *Jennings* expressly held that the Ninth Circuit "all but ignored the statutory text," *id.*, of the very pre-removal-order detention provisions at issue here, by choosing to read *Zadvydas* "as essentially granting a license to graft a time limit" onto the text of § 1226(a). *Jennings*, 138 S. Ct. at 843. The Supreme Court thus concluded that "*Zadvydas*, however, provides no such authority." *Id.; cf. also id.* ("Nothing in the text of § 1225(b)[] ... even hints that those provisions restrict detention after six months.").

The district court also reasoned that section 1226(a) requires similar treatment to that afforded to section 1231(a)(6) when the Supreme Court applied a durational limitation to that statute in *Zadvydas*. Op., RE 490, PageID.14177-79. The district court reached this similar-treatment conclusion based largely on this Court's decision in *Ly v. Hansen*. Op., RE 490, PageID.14178. *Ly* held that "when actual removal is not reasonably foreseeable, criminal aliens may not be detained beyond a reasonable period required to conclude removability proceedings." *Ly*, 351 F.3d at 273. This Court arrived at this "by constru[ing] the statute to include a reasonable time limitation in bringing a removal proceeding to conclusion" so as to avoid having to determine that "additional process would be required" as a constitutional matter. *Id.* The district court

drew from that holding the lesson that *Ly*'s reasoning applied to section 1226(a) because the Sixth Circuit "did not limit its holding to section 1226(c)." Op., RE 490, PageID.14178. But the constitutional avoidance analysis of *Ly* is flatly inconsistent with and does not survive *Jennings*. That decision therefore cannot be relied upon to graft a *Zadvydas* procedure onto the pre-removal detention scheme that has no such procedure.

Moreover, in *Ly* this Court was addressing mandatory detention—not detention under section 1226(a) where a bond hearing was available for an assessment of whether continued detention for removal proceedings was needed based on the individual aliens' danger or flight risk. *See* 351 F.3d at 267. It makes no sense to read *Ly* to require release even after a bond hearing has determined that release is not warranted, and this Court agreed that detention is appropriate for "a reasonable period required *to conclude removability proceedings*" not based on an inquiry into whether removal would later be possible. *Ly*, 351 F.3d at 273 . Here, since all petitioners detained under 1226(a) have already been afforded bond hearings, *Ly*'s reasoning cannot be extended to 1226(a).

B. The district court agreed that neither Sections 1225(b) or 1226(c) could be interpreted to require release after six months based on a *Zadvydas* theory. But it nonetheless rejected Congress's detention regime and imposed a six-month limitation on sections 1225(b) and 1226(c)'s mandatory detention authority based on its conclusion that such "indefinite detention ... offends the Fifth Amendment's Due

Process Clause." Op., RE 490, PageID.14180; *see also id.*, PageID.13179-82. That conclusion was wrong.

In sections 1225(b) and 1226(c), Congress imposed mandatory detention for the duration of removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(B)(ii) (certain aliens claiming a credible fear of persecution "*shall be detained* for further consideration of the application for asylum") (emphasis added); *id.* § 1225(b)(2)(A) (certain aliens "*shall be detained* for a [removal] proceeding") (emphasis added); *id.* § 1226(c)(1) (government "*shall* take" certain criminal aliens "into custody ... when the alien is released" from criminal confinement) (emphasis added); *id.* § 1226(c)(2) (Secretary "may release" certain criminal aliens "*only if* the [Secretary] decides" both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger or flight risk.) (emphasis added).

Under these provisions, there is no constitutionally imposed time limit on removal proceedings that would require release based on a *Zadvydas* theory. Indeed, the Supreme Court has long recognized that "detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process," and has consistently upheld the constitutionality of mandatory detention during ongoing removal proceedings without ever suggesting a six-month cap or a likelihood-of-removal standard. *Demore,* 538 U.S. at 523. Moreover, since *Zadvydas* made clear that limited mandatory "civil

detention, *without bond*, is constitutional as applied to deportable aliens," *Ly*, 351 F.3d at 267-68, it was improper to impose an outright release requirement that involves no inquiry into whether the constitutionally authorized purpose—ensuring aliens are present for removal proceedings—is being furthered. *See Demore*, 538 U.S. at 531 (Kennedy, J., concurring) ("the ultimate purpose" of section 1226(c) "detention is premised upon the alien's deportability.").

The Constitution simply does not impose a six-month limitation on detention under sections 1225(b) or 1226(c). To be sure, *Zadvydas* imposed a six-month presumption as to when inquiries would begin being made about likelihood of removal a matter of statutory interpretation, not as a constitutional mandate. 533 U.S. at 699. The justifications for adopting that presumption in *Zadvydas* are absent here because the two cases are "materially different," in that *Zadvydas* involved detention *after* removal proceedings had closed, whereas "the statutory provision[s] at issue" here, sections 1225(b) and 1226(c), govern detention of aliens "*pending their removal proceedings.*" *Demore,* 538 U.S. at 527 (emphasis in original). And the Court in *Zadvydas* did not suggest that the Due Process Clause itself imposed a six-month limitation on the duration of mandatory immigration custody as a general matter. Rather, the Court concluded that six months was a "presumptively reasonable" time during which detention after entry of a final removal order continued to serve the particular immigration purpose at issue

there: to effectuate the final order that the alien be removed. *Zadvydas,* 533 U.S. at 701. And even then, there was no rigid six-month rule or requirement of release. The alien could continue to be detained beyond that point, even without a bond hearing, if he failed to provide good reason to believe that there was no significant likelihood of removal in the reasonably foreseeable future. *Id.*

Nor does it make sense to extend *Zadvydas*, as the district court did, to the pre-final-removal-order context, under a due process theory or any other theory. *Zadvydas* is about the legality of post-removal-order detention—that is, detention in aid of removing an alien from the United States. *See Zadvydas*, 533 U.S. at 688-702. The government cannot remove an alien until there is a final removal order against that alien. The government sensibly does not commence steps for actual removal until there *is* a final removal order. It does not make sense to inquire into the likelihood of removal for a particular alien until there is a final removal order and the government is given a period of time to then effectuate removal. *Zadvydas* determined that the government should get at least six months after a removal order is final to engage in those efforts before there is any inquiry into the reasonableness of continued detention. And the crux of *Zadvydas* was the Supreme Court's determination that detention under section 1231(a)(6) had potentially no end point and that the statutory permission to continue detaining aliens should be implicitly limited to a reasonable time to prevent potentially

permanent civil detention. *See id.* at 699-701. But as the Supreme Court explained in *Jennings*, detention under sections 1225(b), 1226(a) and 1226(c) is fundamentally different because "it is *not* 'silent' as to the length of detention. [They] mandate detention until the conclusion of removal proceedings." *Jennings*, 138 S. Ct. at 847; *see id.* at 842. And, unlike section 1231(a), which has a 90-day removal period and is thus keyed to the passage of time itself, sections 1225(b), 1226(a) and 1226(c) have no reference to duration other than to say that the alien may be detained until removal proceedings are complete.

In sum, for the affected petitioners here who have been denied bond and thus remain detained under sections 1225(b), 1226(a), and 1226(c), the district court erred in imposing a presumptive release requirement at six months of immigration detention.

II. This Court should vacate the preliminary injunction because the district court lacked jurisdiction to issue class-wide injunctive relief.

Even if the district court were correct to extend *Zadvydas*'s post-removal-order standard to pre-removal-order detention, the district court's injunction should be vacated for the independent reason that the district court lacked jurisdiction to issue such class-wide injunctive relief.

A. In 8 U.S.C. § 1252(f)(1), Congress unambiguously stripped the district court of authority to enter class-wide injunctive relief regarding detention under sections 1225, 1226, and 1231

The district court's class-wide relief, *see* Op., RE 490, PageID.14198-99, 14200-01, is barred by 8 U.S.C. § 1252(f)(1)'s limitation on injunctive relief. Under section 1252(f)(1), "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221-1231] ... other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). "By its plain terms," section 1252(f)(1) is "a limit on injunctive relief." *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481 (1999) (*AADC*). That provision "prohibits federal courts from granting classwide injunctive relief against the operation of [8 U.S.C.] §§ 1221-1231, but specifies that this ban does not extend to individual cases." *Id.* at 481-82.

This Court has already held, in the appeal in No. 18-1233 in this very case, that section 1252(f)(1) barred the district court from entering a class-wide injunction requiring bond hearings for detained petitioners. *See Hamama*, 912 F.3d at 879–80. There, the Court held that the Supreme Court in "*Jennings* foreclosed any statutory interpretation that would lead to what Petitioners want" where the statutory interpretations at issue were "'implausible constructions of the ... immigration provisions.'" *Id.* at 879 (quoting *Jennings*, 138 S.Ct. at 850, 836). The Court held that

the district court was clearly restraining the statutes, since the court "ordered release of detainees," "created out of thin air a requirement ... that does not exist in the statute," "and adopted new standards that the government must meet." *Id.* at 879-80.

The district court's current injunction, presumptively requiring release from detention, is indistinguishable from the injunction on detention that this court concluded was barred under section 1252(f)(1)'s limit on class-wide injunctive relief. The district court's third injunction essentially "ordered release of detainees" and "created out of thin air a requirement ... that does not exist in the statute." *Id.* at 879. Under this Court's precedent, this sort of statutorily baseless injunction is an improper class-wide "restraint" of the immigration detention provisions that is barred by section 1252(f)(1). *Id.* at 880.

Accordingly, this Court should hold, as in No. 18-1233, section 1252(f)(1) barred the district court from entering class-wide injunctive relief on petitioners' detention-based claims, and therefore vacate the injunction for lack of jurisdiction.

B. The release rule and framework established in *Zadvydas* is not susceptible to class-wide treatment

Even if, despite section 1252(f)(1), the district court had jurisdiction to grant class-wide injunctive relief, the injunction would still be flawed because such class-wide relief cannot be afforded under *Zadvydas*.

Zadvydas's holding and framework rest on the understanding that the reasonableness of detention is a particularized issue specific to each particular alien. *Zadvydas* explained that the reasonableness of detention should be measured "in terms of the statute's basic purpose, namely, assuring *the alien's* presence at the moment of removal." 533 U.S. at 699 (emphasis added). *Zadvydas* thus erected a framework under which the "period reasonably necessary to secure removal" turns on "a set of *particular circumstances*." *Id.* (emphasis added). *Zadvydas* issues are therefore not suitable to class-wide consideration since the question of whether an alien's removal is reasonably foreseeable must be based on the unique factual circumstances surrounding each *individual* alien's removal.

The district court's injunction is irreconcilable with these principles. The court's approach—which led it to conclude that foreseeable removal was non-existent for all class members, regardless of whether they have a final order of removal (and despite the fact that some class members had already been repatriated to Iraq and others had travel documents and were simply awaiting flights)—would gut the underlying rationale of *Zadvydas*. This is due in part to the fact that petitioners' habeas inquiry must turn on the individual circumstances of each class member's removal, including, amongst other things, the length of each petitioners' detention and the factors influencing the timing of their removal. *See Ly*, 351 F.3d at 271 ("[C]ourts must examine the facts of each

case, to determine whether there has been unreasonable delay in concluding removal proceedings."). Such individualized characteristics render petitioners' habeas assessments inappropriate on a generalized, class-wide basis. By extension, a fair assessment of an individual's likelihood of removal cannot be made on the basis of the diplomatic generalizations upon which the district court relied. Finally, in line with issue I, *supra*, the *Zadvydas* inquiry is premature unless and until the individual alien possesses a final order of removal.

The district court believed that class-wide relief was appropriate merely because "Petitioners are all seeking the same remedy—immediate release under *Zadvydas*," and "[d]enying Petitioners' preliminary injunction motion because [they] are situated somewhat differently would discard the substantial benefits of consolidated treatment." Op., RE 490, PageID.14198. The proper test for class-wide relief here is whether the remedy petitioners seek can "sustain the class on its own." *Jennings*, 138 S. Ct. at 851. It is clear that it cannot. Indeed, petitioners have acknowledged that the habeas relief they seek specifically requires *individual* determinations. *See Zadvydas* Mot., RE 376, PageID.8515 ("Respondents must present actual evidence that Iraq has agreed to repatriation of *that specific class member*") (emphasis added); *id.* (asking the court to order petitioners' release from detention unless the government provides "*individualized evidence* that ICE has valid travel documents *for the detainee*")(emphasis added). Despite

recognizing that many of their habeas petition's "common questions" could not be "answered class-wide", petitioners were no less determined to achieve relief by any means necessary, to include instructing the court to "allow for *individualized* decisions" on their common questions or even "through *individual* habeas petitions." *Id.*, PageID.8569 n.17 (emphasis added). To be sure, the alternative relief petitioners sought to carve out, "individual habeas petitions," *id.*, is in fact the only relief that could be appropriate here.

The district court also erred, for an independent reason, in issuing of a class-wide injunction on the basis of likelihood of removal: the court was simply wrong in concluding that removals cannot happen. In fact, Iraq is repatriating its nationals for whom the district court has lifted the stay of removal and for whom there are no other impediments to removal. The court erred by not fully considering evidence establishing that Iraq had issued travel documents to 56 Iraqi nationals. *See* Respondents' Exhibit List, RE 442. The court also disregarded the government's assertion that "Iraq will take back all Iraqi nationals with final orders of removal regardless of whether they are volunteers, asylum seekers or otherwise." Response re Mot. for Sanctions, Ex. A, RE 417. Indeed, Iraq has issued travel documents for all individuals that it has determined to be Iraqi nationals. *See* Respondents' Opp. to Mot. for Sanctions, Ex. A, Declaration of John Schultz on Discovery, RE 417. Moreover, Iraq issued 15 travel documents to

ICE on July 13, 2018, and on September 5, 2018, for Iraqis who refused to express a voluntariness to returning to Iraq. *See* Opp. to Sanctions Mot., Exh. A, RE 417. This evidence establishes that the district court erred in concluding, as a categorical matter, that there is no significant likelihood of removal to Iraq in the reasonably foreseeable future.

III. The district court erred in concluding that there is no significant likelihood of petitioners' removal in the reasonably foreseeable future.

The district court's injunction turns on its conclusion that there is no significant likelihood of removal in the reasonably foreseeable future, which is primarily based on the court's determination that Iraq has a policy of refusing to accept involuntary removals. *See* Op., RE 490, PageID.14183 (concluding that Iraq "will not accept forced repatriations of its nationals," and that "almost all [petitioners] who are currently detained have steadfastly refused to agree to voluntary removal to Iraq."). *Id.*, PageID.14182-96. The court erred in this assessment.

First, the court erred in relying on an alien's unwillingness to be repatriated to conclude that there is therefore no significant likelihood of removal in the reasonably foreseeable future. This reliance cannot be squared with the Supreme Court's rationale for establishing this likelihood-of-removal standard in *Zadvydas*. *Zadvydas* indicated that even the absence of a current repatriation process does not *per se* mean removal is not reasonably foreseeable: it vacated the lower court's conclusion that the alien was entitled

to release because it "may have rested solely upon the 'absence' of an 'extant or pending' repatriation agreement without giving due weight to the likelihood of successful future negotiations." 533 U.S. at 702. Moreover, courts applying the *Zadvydas* standard in assessing an alien's "significant likelihood of removal in the reasonably foreseeable future," *id.* at 701, generally require only a showing that there are no institutional barriers to repatriation to the country of removal, which is evinced by the fact that the government has recently removed other aliens to that country, and that there is no clear impediment to an individual alien's similar removal. *See, e.g., Beckford v. Lynch*, 168 F. Supp. 3d 533, 539 (W.D.N.Y. 2016); *Joseph v. United States*, 127 F. App'x 79, 81-83 (3d Cir. 2005). Other courts have reached similar conclusions where the country of removal has specifically denied the government's request for travel documents and the government could show no progress in changing that determination. *See Shefqet v. Ashcroft*, No. 02 C 7737, 2003 WL 1964290, at *5 (N.D. Ill. Apr. 28, 2003). Against this backdrop, the district court erred in fashioning its sweeping conclusion that each and every class member possessed no reasonable likelihood of foreseeable removal to Iraq.

Second, the district court's rationale for establishing a lack of any likelihood of removal cannot be squared with the very statutory scheme that gave rise to *Zadvydas* in the first place, section 1231(a). The heart of the district court's ruling on the likelihood of removal was its determination that removals of the class members here would not

actually occur because Iraq purportedly has a policy of refusing to accept involuntary removals, *i.e.*, Iraqi nationals who do not agree to be removed to Iraq. *See* Op., RE 490, PageID.14183-88. The district court's conclusion that such a policy—coupled with an alien's opposition to removal—can serve as the basis for requiring an alien's release due a lack of any significant likelihood of removal is inconsistent with section 1231. The purpose of section 1231(a) is to effectuate the alien's removal *despite* his objection. *See* 8 U.S.C. § 1231(a)(1)(C) (providing for extension of mandatory removal period where the alien "conspires or acts to prevent" removal). Section 1231(a) expressly provides that the 90-day removal period—when detention is mandatory—is extended "if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal." *Id.* In other words, the statute expressly imposes a duty on the alien to cooperate with his removal and the consequence of extended detention for non-compliance. So there is no sound basis for the district court's re-interpretation of the *Zadvydas* standard to justify its sharp departure from Congress's express statutory command.

The district court's other reasons for concluding that petitioners' removal is unlikely in the reasonably foreseeable future lack merit. The court determined that petitioners' removal could not be deemed significantly likely on the basis that other

petitioners who had opted out of the Court's stay of removal continue to be removed to Iraq regardless of voluntariness. Op., RE 490, PageID.14183-88. The court concluded that the government's "representation" that fifteen class members were removed involuntarily "was cagey at best." *Id.*, PageID.14184. But the evidence establishes that, despite Iraq's public statements, Iraq was privately cooperating and had issued travel documents for individuals who had not "volunteered" to be removed. *See* Response re Mot. for Sanctions Ex. A, Declaration of John A. Schultz Jr., RE 466-1, PageID.12581 ¶¶ 45-48. Moreover, while the court acknowledged that the government filed declarations explaining the process, it discounted the statements based on findings of incredibility and lack of "documentary evidence." *See* Op., RE 490, PageID.14186–87. The court erred. Petitioners' *Zadvydas* motion itself acknowledged that the travel document issuance process was ongoing and had resulted in the issuance of travel documents. *See, e.g., See Zadvydas* Mot., Ex. 2, Fifth Declaration of Margo Schlanger, RE 457-62, PageId.11922-27 (acknowledging that consular interviews had occurred and that travel documents had been issued for certain class members). Indeed, petitioner's motion identifies six individuals who failed to attest to their voluntary removal and yet were nonetheless issued travel documents from the Iraqi government. *See id.*, PageID.11926. Accordingly, the record evidence establishes that the court erred in

concluding that petitioners' removal was not foreseeable on the basis of their voluntary return.

IV. This Court should vacate the order on sanctions because the government's conduct did not evidence bad faith and the sanction was disproportionate.

As an initial matter, the court's sanction should be vacated because it imposed an adverse inference that entitles petitioners to the identical injunctive relief on the merits to which they are not entitled, and which the court was barred from issuing under section 1252(f)(1)'s jurisdictional bar. *See* Issues I-III, *supra*. Additionally, the sanctions order was an abuse of discretion.

Imposition of severe sanctions may be an abuse of discretion depending on: (1) whether a party's failure to cooperate with discovery is the result of willfulness, bad faith, or fault; (2) whether the other side was prejudiced by the conduct; (3) whether the disobedient party was warned of the potential sanctions; and (4) whether less drastic sanctions were considered or imposed. *Universal Health Grp. v. Allstate Ins. Co.*, 703 F.3d 953, 956 (6th Cir. 2013). Because the record does not support the conclusion that the government acted in bad faith, that petitioners were prejudiced, or that the district court adequately considered a less drastic sanction, the district court abused its discretion in awarding severe sanctions.

A. The Government's Good Faith. The government's attorneys and officials acted in good faith to represent the United States throughout this highly contentious,

docket-heavy class action. The government provided pertinent information about Iraq's evolving repatriation processes while navigating limitations imposed by the district court's injunctions on removal and detention, challenges posed by discovery into sensitive foreign-relations efforts, and a burgeoning removal effort with Iraq that had just started anew when petitioners filed this lawsuit and sought and obtained immediate injunctive relief. Despite these challenges, counsel represented the government's interests faithfully and zealously, and did not neglect either the Federal Rules or the district court's orders. When the government did not meet the district court's document-production deadlines, it was transparent as to its limitations by providing declarations concerning the technical and resource issues it faced.

Nevertheless, the district court concluded that "Petitioners are entitled to *Zadvydas* relief because of the Government's discovery abuses." Op., RE 490, PageID.14190-93. After acknowledging the government's argument that problems in the first document production arose because of "technical difficulties and [ICE] was understaffed," the court minimized those issues and concluded that it "simply demonstrates improper prioritization of its litigation responsibilities, for which they must live with the consequences." *Id.,* PageID.14191, 14193. That is not credible. In response to petitioners' motion for sanctions, the government identified that it had provided "305,538 pages of discovery and court-ordered production" to petitioners.

Resp. Mem. re Disc. Sanc., RE 463, PageID.12420. The district court minimized the significance of the voluminous figure, however, because the vast majority of those pages represent the alien files and the record of proceedings that the government was required to produce to petitioners, and those materials "do not address the issue of whether there is a significant likelihood of removal in the reasonably foreseeable future." Op., RE 490, PageID.14191. Even so, the government was *required* to make those disclosures by the court's initial preliminary injunction. *See* Removal Op., RE 87, PageID.2356. And that obligation continued until April 2018, when this Court entered its mandate. Order, RE 533, PageID.14650 (requiring continuing production of files after this Court vacated the July 24, 2017 preliminary injunction). In short, the district court failed to consider or ignored the significant impact of its prior orders requiring production of these files and other non-discovery materials on the government's ability to simply reprioritize its litigation resources.

The district court also faulted the government for allegedly taking "seven months to make its first document production." Op., RE 490, PageID.14192 (purportedly calculating from January 2018 to July 2018). That is timeline is misleading. In early January 2018, petitioners notified the court that "amended discovery requests will make discovery more efficient" and that they "anticipate[d] serving the amended discovery requests shortly." Joint Statement of Issues, RE 198, PageID.5434-35. Petitioners also

proposed a process where the parties would meet and confer to attempt to resolve discovery objections, which the court adopted. *Id.*, PageID.5436; Order, RE 201, PageID.5453. If the parties were unable to reach agreement, they would "submit to the Court a joint statement of issues" and the court would "hold a status conference, if necessary, to address the discovery disputes." *Id,* PageID.5436. The parties submitted several of these joint statements, *see e.g,* JSI, RE 217, and the district court held multiple status conferences to address the disputes, *see e.g.,* Order, RE 221, PageID.5748. The process was time-consuming, and the parties disagreed over whether the government should have been producing documents despite these unresolved discovery disputes, but the district court's implication that the government was lying idle for months is belied by the record.

The district court's statement faulting the government for the alleged "glacial pace" of the first document production is also unwarranted. Op., RE 490, PageID.14191. In additional to the lengthy meet and confer process identified above, the government provided several declarations explaining both the technical and the attorney-resource limitations which complicated the process. Declaration of Manuel Ramirez, RE 463-1, PageID.12442; Declaration of Kobie Crawl, RE 463-2, PageID.12448; Declaration of Scott A. Whitted, RE 463-4, PageID.12457. The court acknowledged this evidence, homing in on the fact that the government "only assigned

the ten attorneys to review documents one day a week," Op., RE 490, PageID.14192, and seemingly disregarding that ICE had brought in attorneys from different parts of the agency (and country) to help meet the court's deadlines. Whitted Decl., RE 463-4, PageID.12460. The government completed that production in July 2018. Op., RE 490, PageID.14192.

Concerning the second document production, the district court stated that the government "made no effort to comply with Rule 34's requirements to produce documents by August 5, 2018, or the Court's order to produce records by August 20, 2018. Op., RE 490, PageID.14192. Both conclusions are belied by record. On July 18, 2018 the parties began a meet and confer process over the second set of requests for production. Resp'ts Opp. Sanct., RE 358, PageID.8132. Petitioners submitted revised discovery requests on July 31, 2018. *Id.,* PageID.8133. Given the amount of time the government predicted that it would take to complete this production, the parties discussed other options, such as whether the government could satisfy its discovery obligation by producing documents without metadata. *Id.*, PageID.8406. This issue was still unresolved after the district court held a status conference on September 5, 2018. Resp'ts Opp. Sanct., RE 463, PageID.12430. The parties continued discussion of solutions for a faster document production so that petitioners would have what they needed for the evidentiary hearing scheduled at the end of the month, but

were unable to reach agreement. *Id.*, PageID.12431. The government then attempted to use a discovery tool to complete the electronic production. *Id.,* PageID.12432. That process was unsuccessful, as was a subsequent attempt by the government to produce all of the potentially responsive (yet un-reviewed) documents to petitioners. *See* Order, RE 449, PageID.11244. On this record, however, the district court was wrong to conclude that the government had either "[put] this case on the back burners" or "needlessly prolonged the *Zadvydas* discovery." Op., RE 490, PageID.14193.

Similarly, the district court was wrong to conclude that the government "used discovery to slow this case to its benefit." *Id.*, PageID.14194. As an example, the court claims that the government "made demonstrably false statements to the Court designed to delay the proceedings." *Id.* The court presumably refers to its discussion of the cancelled removal flights. *Id.*, PageID.14157-61. The government disputes that those declarations, or anything the government has submitted in this case, were false or designed to mislead the court or petitioners. When petitioners filed their motion for a preliminary injunction on detention issues in November 2017, the government's opposition included the declaration of John Schultz, an ICE official directly involved with obtaining travel documents from Iraq. *See* Schultz Decl., RE 158-2, PageID.4129. Schultz's declaration explained the status of discussions with Iraq at that time and the grounds for his belief that ICE would be able to remove petitioners to Iraq (albeit after

further diplomatic negotiations) once the stay was lifted. *Id.*, PageID.4129-32. And, when questions arose during oral argument on petitioners' preliminary injunction, the government proffered a second declaration from Michael Bernacke, an assistant to Schultz, to address them. *See* Bernacke Decl., RE 184-2, PageID.5069-74.

Both Schultz and Bernacke were doing their level best to explain—in a few paragraphs—the background and status of repatriations to country where the entire process that been put on hold by the district court's stay of removal. And, when petitioners accused both of making false statements in their first motions for sanctions, both Schultz and Bernacke offered detailed supplemental declarations to addressed any contested points. *See* Shultz Decl., RE 466-1, PageID.12559-83; Bernacke Decl., RE 466-2, PageID.12585-93. Moreover, both Schultz and Bernacke were prepared to testify at the scheduled evidentiary hearing on petitioners' renewed *Zadvydas* preliminary-injunction and sanctions motions before the district court cancelled the hearing. *See* Resp'ts Am. Witness List, RE 443, PageID.11099.

The district court also suggests that government falsely represented "that the [Government of Iraq] was ready and willing to accept repatriation of its nationals without limitation, and that but for the Court's stay of removal, it would have done so." Op., RE 490, PageID.14194. Presumably the district court is referring to Iraq's alleged policy against forced repatriation. *See* Op., RE 490, PageID.14158-70. But the evidence

in the record shows that Iraq *is* taking back class members regardless of whether the individual is volunteering to return. *See, e.g.,* Resp'ts Supp. Resp., RE 489, PageID.14093. In fact, as of September 2018, Iraq had stopped asking Iraqi nationals if they wanted to return. *Id.,* PageID.14093-94. The district court also points to documents produced in discovery suggesting that at one time the government was considering sanctioning Iraq for being uncooperative with removals, Op., RE 490, PageID.14161, but there is no evidence that Iraq was ever sanctioned or that this factor had *any* impact on the class. The district court was wrong to substitute its own understanding of the communications between the governments of the United States and Iraq to conclude that removal was unlikely, and that the government was misrepresenting the facts. As the record shows, Iraq has issued travel documents for class members and is accepting them for repatriation.

The district court also appears to question whether government counsels' conduct was designed to delay the proceedings. *See* Op., RE 490, PageID.14194. This charge is similarly unfair and unsupported. The district court suggests that counsel are "befuddled by the entire discovery process." *Id.* As discussed above, the government had technical and logistical issues with its document production. Until the court entered this order, however, the court never chastised counsel for any conduct or suggested they were "befuddled" by the requirements of the Federal Rules or the court's order.

It is noteworthy that, in a case with over 550 docket entries as of this date, there is only a single motion to compel filed against the government that arose out of genuine dispute concerning the scope of interrogatories. Mot. Comp., RE 403, PageID.9532. The district court also now faults counsel for requesting an extension of time for making procedural objections to interrogatories that could have been made without an extension. *See* Op., RE 490, PageID.14194. Specifically, the government objected to answering beyond the 25 interrogatory limit in the Federal Rules of Civil Procedure. Fed. R. Civ. P. 33(a)(1). When the district court addressed the issue, however, it did not reject the government's argument or find that it had been made in bad faith, it simply ruled that there was good cause for *additional* interrogatives in a case of this nature. Order, RE 385, PageID.9392.

B. Lack of Prejudice to Petitioners. The record also does not support the court's conclusion that petitioners were harmed by the government's conduct in this case. The district court concluded that "prejudice to the Zadvydas subclass members is obvious" in that they were detained "well beyond the presumptively reasonable six-month period." Op., RE 490, PageID.14195. Significantly, this group of petitioners had already received bond hearings. *See* Detention Op., RE 191. If they were still detained at the time the court entered this injunction, they had either been denied release on bond by an immigration judge, or failed to post bond. Petitioners also were

not prejudiced in their presentation of their claim in this case to the extent that the district court agreed, albeit erroneously, that they had shown that "removal is not significantly likely in the reasonably foreseeable future." Op., RE 490, PageID.14190. Since petitioners ultimately received the relief that they sought on the preliminary injunction, despite strong evidence that Iraq is indeed repatriating Iraqi nationals, it is speculative that the documents not produced would have helped—rather than undermined—their claims.

C. A Far Narrower Sanction Could Have Been Imposed In Any Event.

Finally, the district court did not consider less severe sanctions and the sanction imposed was disproportionate to the severity of the offense. The court stated only that "[l]esser sanctions will not suffice in this case" because the purpose of the discovery was to determine whether there was a class-wide *Zadvydas* violation. Op., RE 490, PageID.14195. The court did not, therefore, consider a less severe sanction that would have served this same purpose. Rather than directing a finding on the ultimate legal issue, the court might have simply established that there was no concrete agreement between the United States and Iraq for the return of all 1400 class members. *See* Fed. R. Civ. P. 37(b)(2)(A)(i). A more limited sanction would not only have been relevant to the evidence sought throughout discovery, and have fulfilled the court's duty to consider less severe sanctions, *see Universal Health Group*, 703 F.3d at 956, but would also

not have required the court to ignore other evidence adduced in discovery regarding its *Zadvydas* determination (*e.g.*, that class members had been removed to Iraq). Considering that the case was at the preliminary injunction stage and proceedings had not progressed to the close of discovery or judgment on the merits, the court's sanction of finding for petitioners on the *Zadvydas* claim *in toto* was disproportionate to the offense. *See, e.g.*, *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 986 (6th Cir. 1988) (upholding discovery sanction that "was measured, gradual, and in proportion to the plaintiffs' misconduct").

For these reasons, this Court should vacate the sanctions order.

CONCLUSION

For the foregoing reasons, the district court's injunction should be vacated.

May 24, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 24, 2019, the above brief was served on all counsel of record through the Court's CM/ECF system.

/s/ Michael A. Celone
Trial Attorney

CERTIFICATE OF COMPLIANCE

I certify that the above brief contains 12,998 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that the above brief complies with the type size and typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure: it was prepared in a proportionally spaced typeface using Microsoft Word in Garamond, 14-point typeface.

/s/ Michael A. Celone
Trial Attorney

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Hamama, et al., v. Rebecca Adducci, et al.

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

Record Entry No.	Page ID #	Date Filed	Description
1	1-26	6/15/2017	Habeas Corpus Class Action Petition
11	45-175	6/15/2017	Petitioners' Motion for a Temporary Restraining Order and/or Stay of Removal
32	497-502	6/22/2017	Opinion and Order Staying Removal of Petitioners Pending Court's Review of Jurisdiction
35	538	6/24/2017	First Amended Habeas Corpus Class Action Petition and Class Action Complaint
77	1745	7/17/2017	Petitioners' Motion for a Preliminary Stay of Removal and/or Preliminary Injunction
87	2325; 2355-56	7/24/2017	Opinion & Order Granting Petitioners' Motion for Preliminary Injunction
118	2963; 2957	10/13/2017	Petitioners' Second Amended Complaint
158-2	4129-32	11/30/2017	Schultz Declaration, Exhibit to Respondents' Opposition to Petitioners' Motion for a Preliminary Injunction on Detention Issues
184-2	5069-74	12/22/2017	Bernacke Declaration, Exhibit to Supplemental Response to Petitioners' Motion for Preliminary Injunction

191	5318; 5328-35; 5339-41; 5346-47	1/2/2018	Opinion & Order Granting Petitioners' Motion for Preliminary Injunction
198	5434-36	1/10/2018	Joint Status Report
201	5453	1/18/2018	Order Regarding Further Proceedings
217	n/a	2/1/2018	Joint Statement of Issues
221	5748	2/2/2018	Order Regarding Further Proceedings
358	8132-33	8/6/2018	Respondents' Motion to Extend Discovery Deadlines
373	8406	8/27/2018	Joint Statement of Issues
376	8514-15; 8569	8/29/2018	Petitioners' Renewed Motion for Preliminary Injunction Under Zadvydas
403	9532	9/24/2018	Petitioners' Motion to Compel
417	n/a (filed under seal)	10/02/2018	SEALED RESPONSE Regarding Motion for Sanctions
442	n/a	10/15/2018	Respondents' Exhibit List
443	11099	10/15/2018	Respondents' Amended Witness List
449	11244	10/19/2018	Order Regarding Document Production, Depositions, and Evidentiary Hearing
457-62	11922-27	10/23/2018	Fifth Declaration of Margo Schlanger, Exhibit to Motion for Prelim. Inj.
463	12420; 12430-32	10/25/2018	Memorandum Regarding Sanctions for Discovery Violations
463-1	12442	10/25/2018	Ramirez Declaration, Exhibit to Memorandum Regarding Sanctions for Discovery Violations
463-2	12448	10/25/2018	Crawl Declaration, Exhibit to Memorandum Regarding Sanctions for Discovery Violations

463-4	12457; 12460	10/25/2018	Whitted Declaration, Exhibit to Memorandum Regarding Sanctions for Discovery Violations
466-1	12559-83	10/26/2018	Shultz Declaration, Exhibit to Response to Motion for Sanctions
466-2	12585-93	10/26/2018	Bernacke Declaration, Response to Motion for Sanctions
489	14093-94	11/19/2018	Respondents' STATEMENT in Response to Petitioners' Supplemental Statement ECF No 483
490	14144-45; 14157-61; 14171-96; 14198-14201	11/20/2018	OPINION AND ORDER granting Renewed Motion for Preliminary Injunction
533	14650	3/13/2019	ORDER Modifying the November 20, 2018 Opinion & Order Granting Renewed Motion for Preliminary Injunction