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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA J. HAMAMA, et al,

Petitioners,

-v-

Case No. 17-cv-11910

REBECCA ADDUCCI, et al,

Respondents.

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PETITIONERS' RENEWED MOTION FOR
PRELIMINARY INJUNCTION & MOTION FOR SANCTIONS

BEFORE THE HONORABLE MARK A. GOLDSMITH

Detroit, Michigan, Wednesday, October 24th, 2018.

APPEARANCES:

- FOR THE PETITIONERS: MARGO SCHLANGER
ACLU FUND OF MICHIGAN
625 South State Street
Suite LR910
Ann Arbor, MI 48109

- FOR THE PETITIONERS: MIRIAM J. AUKERMAN
American Civil Liberties Union
1514 Wealth Street, SE
Grand Rapids, MI 49506

- FOR THE PETITIONERS: KIMBERLY L. SCOTT
MILLER, CANFIELD
101 North Main Street
7th Floor
Ann Arbor, MI 48104

1 (Appearances, continued):

2 FOR THE PETITIONERS: WENDOLYN W. RICHARDS
3 MILLER, CANFIELD
4 150 West Jefferson Avenue
Suite 2500
5 Detroit, MI 48226-4415

6 FOR THE PETITIONERS: DAVID BRIAN JOHNSON
7 573 Hawksnest Drive
South Haven, MI 49090

8 FOR THE RESPONDENTS: WILLIAM C. SILVIS
9 JOSEPH A. DARROW
U.S. DEPARTMENT OF JUSTICE
10 Civil Division
P.O. Box 868
11 Ben Franklin Station
Washington, DC 20044

12
13
14 David B. Yarbrough, CSR, RMR, FCRR
15 Official Court Reporter
(313) 234-2619
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WITNESSES:

NONE

EXHIBITS

1 Detroit, Michigan.

2 Wednesday, October 24th, 2018

3 At or about 9:17 a.m.

4 -- --- --

5 THE CLERK OF THE COURT: All rise. The United States
6 District Court for the Eastern District of Michigan is now in
7 session, the Honorable Mark Goldsmith presiding. You may be
8 seated. The Court calls the case number 17-11910, Hamama
9 versus Adducci. Counsel, please state your names and
10 appearances for the record.

11 MS. SCHLANGER: Margo Schlanger here for petitioner,
12 your Honor.

13 MS. AUKERMAN: Miriam Auckerman here for the
14 petitioners.

15 MS. SCOTT: Kimberly Scott from Miller Canfield for
16 the petitioners.

17 MS. RICHARDS: Wendolyn Richards, Miller Canfield,
18 for the petitioners.

19 MR. JOHNSON: David Johnson for the petitioners.

20 THE COURT: Okay, good morning.

21 MR. SILVIS: Good morning, your Honor. William
22 Silvis, Department of Justice, for the respondents.

23 MR. DARROW: Good morning, your Honor. Joseph
24 Darrow, Department of Justice, for the respondents.

25 THE COURT: Good morning. All right, we are here on

1 the petitioners' motion for preliminary injunction the Zadvydas
2 claim and there's also a motion for sanctions and I read your
3 submissions. I did not read the submission that came in late
4 yesterday afternoon regarding government noncompliance. I know
5 there's going to be a government response to that later this
6 week and then I believe the petitioners have until early next
7 week to reply to that, but I know you may want to reference
8 matters that transpired last weekend and before in connection
9 with what the government did or did not do and how that relates
10 or doesn't relate to the motion for preliminary injunction
11 and/or the motion for sanctions so you can certainly refer to
12 that, but that was a late-breaking development in terms of our
13 schedule so the briefing on that has necessarily been extended
14 beyond our hearing date. I didn't want to move our hearing
15 date so that's why we're at this point now. We're going to
16 start with the petitioners? Each side has an hour and you can
17 take up the motion for sanctions or preliminary injunction in
18 whatever order that you care to. Go ahead, Ms. Schlanger.

19 MS. SCHLANGER: Thank you, your Honor. The way that
20 we're going to do this just to orient you to how we're going to
21 split it up is I'm going talk about the facts and the story
22 that has emerged over time and I'm going to talk about the law
23 on the sanctions motion and then Ms. Auckerman will talk about
24 the law under Zadvydas.

25 So the basic story of this case has at long last

1 emerged. There's actually two very different stories. There
2 is one that's not true that ICE has produced for this Court's
3 consumption and then there's a true one which is, has emerged
4 from contemporaneous documents and contemporaneous statements.
5 The former for-this-Court-only story is that since March 2017,
6 everything except this Court's actions has created a smooth
7 path towards mass removal of Iraqis and that Iraq has been
8 completely cooperative and all the class members are on a fast
9 track to repatriation just as soon as they're done with their
10 immigration cases or the stay in this case is lifted and ICE
11 wishes that that were true, but it isn't. The true story is
12 that Iraq has held to and reiterated its longtime policy
13 against involuntary repatriations, has slow-walked its response
14 to very heavy ICE pressure and has given ground only
15 occasionally and in millimeters, not the miles that ICE wishes
16 and has told this Court is the case.

17 So the result of that is that in December 2017 and
18 January 2018 there was no significant likelihood of removal in
19 the reasonably foreseeable future. It just didn't exist.
20 There was no path. That's what ICE hid and that's the topic of
21 the sanctions motions and we have clarity on that, on those
22 points at this stage of the litigation because we've gotten
23 discovery through early July 2018 and I'm going to talk about
24 that in a minute, but after that, things get a little bit
25 muddy. ICE's failure to provide discovery since then means

1 that there's a lot less contemporaneous, non-litigation
2 documentation that we can compare against what ICE has produced
3 to this Court. Even from July 2018 on, even right this minute,
4 even looking at the tiny sliver of disclosures that we've
5 received, it looks like ICE is once again shading the story
6 offering its hopes rather than the true state of affairs. The
7 murky mixed evidence is that, is that there are major obstacles
8 to repatriation of the class members that remain and that again
9 there is no like -- significant likelihood of their removal in
10 the reasonably foreseeable future which period of time has
11 shrunk because we're many, many months in. In any event, the
12 murky mixed evidence is not enough to meet the government's
13 burden under Zadvydas in light of the prolonged detention.

14 On the facts, if we look right now at ICE's hopes for
15 speedy repatriations for all the class members, what you should
16 remember and what I'm going to talk about is that we've seen
17 this movie before. We've seen that ICE says yep, we're good,
18 we're going able to remove everybody, there are no obstacles
19 and we've seen that ICE's expectations or beliefs or
20 descriptions are not credible and therefore particularly
21 because we've got no discovery relating to all of this and all
22 we have is just a summation by ICE and where their summation
23 the last time was false, umm, their past performance really
24 should inform how you evaluate what is, what is currently
25 before you and their denial, their unilateral refusal to allow

1 us to have the discovery that this Court has ordered should
2 mean that you're particularly suspicious. Okay, so that's kind
3 of the overarching frame and here's the story.

4 During spring 2017, Iraq, under pressure from the
5 U.S. government that had to do with the travel ban, took some
6 steps towards allowing repatriations that it had previously
7 denied. Now there was no agreement just to be clear by any
8 real understanding of the world agreements. There was no
9 signed document. There was no agreed upon subscription. There
10 were no stable terms. There was a letter to the U.S.
11 government by another part of the U.S. government, by the state
12 department, a letter saying we had a good meeting and here's
13 what happened to that meeting. Now Iraq never signed off on
14 that. We don't know if that's exactly what happened, but
15 that's what we've got. We've got a letter from the U.S.
16 government to the U.S. government saying yeah, we had a pretty
17 good meeting and in -- and we don't doubt that, that ICE had a
18 good meeting and in light of that meeting they were able to
19 repatriate a small number of people on a small charter plane in
20 April, 2017, but after that tiny charter went, took off, after
21 it landed and after Iraq was no longer on the travel ban, Iraq
22 started to push back and since -- and so this is described to
23 you, I mean in many documents, but Iraq's policy and why they
24 were pushing back is described to you this Daniel Smith's
25 declaration which you have. Since April 2017, what we have

1 been seeing is slow walk, obstacles, hurdles. ICE and the
2 State Department officials noted contemporaneously that there
3 was no durable solution to the repatriation problem than was
4 this after this much vaunted meeting and this letter from the
5 State Department describing that meeting.

6 So put the April 2017 charter to one side because we
7 don't know very much about the people on that, on that plane
8 and there were only a few of them. From May 17 through July
9 2018, over a year, Iraq declined to issue travel documents for
10 anyone who was unwilling to acquiesce to his own removal. They
11 repeatedly denied such travel documents. They denied
12 permission of a charter plane in June, 2018; denied it. They
13 issued a blanket denial of a couple dozen travel document
14 requests in July -- did I, I'm sorry, I said -- I said, the
15 denial of the charter plane was in June 2017, not 2018. They
16 did a blanket denial of travel documents in July 2017. Now ICE
17 hoped that they were going to push back on the push back and
18 get, umm, and get mass repatriations, but that hope didn't come
19 to fruition. Iraq had not agreed at the moment that the stay
20 in this case mooted things out, but the period of time right
21 around the stay is really important. The stay itself did not
22 stop the plane in June. The plane in June was stopped by Iraq
23 the day before this Court entered a stay and even after --
24 entered a stay for just Detroit in the first TRO in this case.
25 Iraq announced that it was not going take that plane on the

1 21st and this Court entered that TRO on the 22nd of June.

2 In the period of days after that, there was still the
3 possibility of a plane leaving because that was a Detroit-only
4 order and Iraq was pushed and pushed and pushed and pushed and
5 before this Court made that TRO nationwide, Iraq said nope,
6 we're still not going to do it and they turned that plane down.
7 Even for the July plane, a postponed plane, ICE takes the
8 position that Iraq would have agreed, but that's a would have
9 agreed. In all of those days that they had when they were
10 pushing and planning for that plane, Iraq did not agree and so
11 in the end, the Court mooted the issue out by entering a stay,
12 but before that, before the nationwide stay, Iraq had not
13 agreed.

14 Okay, so that's mask deportations and then the stay
15 of removal makes mass deportations hard after that, but at that
16 point ICE keeps going and they say well we can do these onesie
17 twosie, we can't do a mask deportation, but we can do them
18 onesie twosie and they go to Iraq and they say we want do some
19 individual removals and all the way through January and March,
20 they push and push and push and Iraq resists scheduling
21 interviews, much less granting travel documents, says no to the
22 interviews and when they do grant the interviews, says no to
23 the travel documents.

24 So now we're at March. I'm going to come back to the
25 declarations and how they contradict the story, but that's the

1 story. Now there was one individual whose case was very
2 interesting. His name is Al Shakarchi. You've got some
3 documents about him and we've got a few more now and so when
4 you order post-trial briefing we'll describe this a little bit
5 more, but there was one individual who had been in detention
6 for a very long time who is not a member of this class. He had
7 no stay. He had nothing, no obstacle. He had a final order.
8 He had no obstacle to his removal except that he was
9 involuntary and ICE tried to remove him and Iraq declined.
10 Iraq wouldn't even talk to him. When they finally talked to
11 him, he said no and they wouldn't issue a travel document so
12 the field office in this case released him under Zadvydas.
13 They said we can't remove him and there is some interchange
14 back and forth where somebody says wait, why are you releasing
15 him and the field office says 'cause we couldn't remove him.
16 Now that's the actual, authentic facts that he was, he was the
17 person where ICE was following its normal process. For our
18 class members, ICE did not follow its normal process. Instead,
19 what they did was they kept hoping and wishing and knowing if
20 they released people, they were going to be in trouble when
21 they came before this Court and so they didn't release our
22 class members under Zadvydas, but they should have because
23 there was no likelihood of their removal in the reasonably
24 foreseeable future.

25 Okay, so in June, 2018, ICE finally succeeded in

1 strong-arming Iraq into doing a large number of interviews and
2 Iraq, against ICE's repeated request, continued to say we want
3 to know if they're voluntary, continued to give them a form
4 that they were supposed to sign if it was voluntary or declined
5 to sign if it was involuntary and continued to care about that
6 and that was in June, 2018. If the decision to allow
7 involuntary repatriations had been long since made as ICE would
8 have it now in March of 2017, what was going on at all of those
9 meetings? How could that possibly be? Why was everybody
10 wasting their time and why was there so much pressure needed to
11 be put on Iraq at that time, demarches and diplomatic notes and
12 meetings and meetings in Iraq and meetings here and just a
13 tremendous amount of pressure?

14 Now finally in the face of all of that pressure, in
15 the face of all of that pressure, in July, July 2018, Iraq said
16 okay, six, I'll give you six travel documents for involuntary
17 repatriations, six and awhile later another nine and that's it.
18 That's it so far. So maybe that means that -- and just to be
19 clear, the most recent round of interviews, in the most recent
20 round of interviews, a new obstacle has emerged. Iraq has
21 declined to give travel documents to anyone who doesn't have a
22 travel itinerary and what we've seen over the past couple of
23 months because some of your orders have given us greater
24 visibility into this is that the travel itineraries are not so
25 easy. In fact, it can take months and months and months and

1 months and repeated tries and maybe we've got people who have
2 been waiting around to get deported, no -- a final order, no
3 stay, travel documents for months and months and months and yet
4 they can't be repatriated. Now Zadvydas doesn't say that there
5 has to be significant likelihood of travel documents in the
6 reasonably foreseeable future, it says there has to be
7 significant likelihood of removal in the reasonably foreseeable
8 future and so this travel document obstacle is a little bit of,
9 it's not a red herring, it's only obstacle number one. Next
10 comes the itineraries and ICE tells us that Iraq has now said
11 nobody gets travel documents until they have an itinerary and
12 so that's where we are right now.

13 THE COURT: What exactly defines an itinerary?

14 MS. SCHLANGER: We don't know, your Honor because we
15 don't have discovery on this point. We have only an
16 interrogatory answer and so we don't really know. I take it
17 ICE has hopes to do a charter, a small charter in a few weeks
18 and I take it a charter counts and a travel itinerary. I
19 imagine that another kind of travel itinerary is, you know,
20 commercial aircraft, you're going to go to here and then there
21 and to Bahrain and then to whatever, like that's the path that
22 people have been following, but another thing that we've seen
23 is that even when they have the itinerary, it turns out to be
24 cancelled and we've seen repeated examples of that at this
25 point. There are more cancellations than there are

1 repatriations, even for people who have travel documents and
2 have those itineraries, but I'm a little murky on all of that
3 because we haven't gotten the discovery we need to understand
4 it.

5 So, but the point is that at this point ICE hopes,
6 ICE hopes that they will be able to do mass repatriations.
7 They hope to have a charter plane with a few people on it. I
8 will note even the charter plane has a list of eight passengers
9 and then a list of another 10 alternates because ICE knows that
10 things happen and repatriations that are planned often fall
11 through. So ICE hopes to do a small charter plane and maybe
12 that will work out, maybe it will, but we should be very
13 skeptical. You should be very skeptical of ICE's hopes at this
14 point because their hopes are what they're telling you and if
15 we look at the internal documents where they actually encounter
16 the obstacles and talk about how to get past them, they're very
17 clear that these obstacles are very high and that this path is
18 very steep and they're not telling you that, but they're
19 telling each other.

20 Now I will say even when we get discovery on all of
21 this, I don't know if they're still telling each other that
22 because at this point they know that we're seeing their
23 internal communications and it's quite possible that they're
24 using the kind of friend of all people subject to ongoing
25 discovery which is to say the telephone, right, and we don't

1 know what they're telling each other now. We may get less
2 insight into the true state of affairs when we finally do get
3 discovery, but in any event we haven't gotten the discovery.
4 For all we know, Iraq said to ICE about this charter we'll let
5 you do this one, but we're not going to let you do anymore or
6 perhaps when they agreed to the last round of travel documents,
7 they said this is enough for 2018, no more until 2019 or no
8 more until 2025. We have no idea. We have no idea. All we
9 have is that ICE hopes and that over and over and over again
10 they have mis-described events, failed to disclose negative
11 information, failed to include caveats, shaded the truth and
12 offered the most optimistic version of events and even on that
13 version, we know that Iraq has now declined to issue travel
14 documents until there's an itinerary and we know that
15 itineraries are very, very hard to come by.

16 So let me, umm, one more point and then I want to
17 talk about the declarations for a minute which is that this
18 kind of lack of candor and even outright falsehood is not
19 limited to this case. So there's a, umm, one of our primary
20 class members has a habeas case, had a habeas case pending in
21 the District of Massachusetts and there ICE pushed back and
22 defeated his habeas case. It was dismissed without prejudice
23 in September. How did they do that? They told the district
24 court which didn't have the benefit of all of the discovery
25 that we've gotten and all the evidence that we've given to you,

1 they told the district court that he was going to get travel
2 documents. They, they said that it was going work out. The
3 thing is Iraq had already told ICE that they considered this
4 particular individual, Jomaa Al Essa, they had already said
5 that they consider him bidoon which is a word for stateless,
6 that they did not think he was Iraqi. He was born in Kuwait to
7 Iraqi parents and they didn't think that was good enough and
8 ICE was confident they said to the district court in
9 Massachusetts they were going to be able to push back, give
10 more information and they believed that a travel document would
11 issue, but a travel document didn't issue and not only that,
12 they filed that stuff, they filed it and then they proceeded to
13 have dealings with Iraq about this particular individual where
14 it became more and more evidence that Iraq wasn't going to take
15 him and they never went back to the district court in
16 Massachusetts and said you know what, we've got some new
17 information. And so they never, they never fully disclosed,
18 they never explained what was going on, they just said we
19 believe. Well, that belief like all these other beliefs turns
20 out not to be the case and the habeas case was dismissed.

21 Now finally, when Iraq finally came back and said you
22 know what, we're not doing it, when they finally came back and
23 said definitively, they could have gone to the Court, but then
24 ICE waited still more and on the day before the end of the
25 90-day period after the stay got lifted so on day 89 as far as

1 we know, we're not, we're not totally clear on this but,
2 because we don't know the exact date, but it looks like right
3 as they ran up against the deadline, they let him out. They
4 didn't tell the true story to the judge, but they did let him
5 out which is great for him, but it's something that the rest
6 the class needs as well.

7 So the point is we don't have the full documentary
8 record to point at all the ways in which ICE's current hopes
9 may fail. We don't have it. The hope failed in June, 2017.
10 The hope failed in January, 2018. The hope failed in March,
11 2018 and we have all of that. We don't know why the hope will
12 fail now, but if we had the discovery, we might very well have
13 that and in any event as Ms. Auckerman will explain, at this
14 point in this case hope is not enough and so that's the story.

15 All right, let me take just a couple more minutes to
16 talk about the declarations and why they are sanctionable.
17 There's three at issue. There's a July declaration by
18 Mr. Schultz, there's a November declaration by Mr. Schultz and
19 there's a December declaration by Mr. Bernacke. These are
20 three sworn statements all produced for this litigation, all
21 relied on by this Court in its prior orders, all wrong at the
22 time and known by the declarants to be wrong at the time.

23 So first, there was a statement in both the November
24 and December declarations that said that the flight that was
25 scheduled for June, 2017 was cancelled or postponed or

1 rescheduled, like they used different words, but whatever, that
2 it was cancelled or postponed because of this Court's order and
3 that was simply false and they both know it. We've produced
4 all kinds of evidence, but let me point you to one piece of
5 evidence in particular.

6 So the government's Exhibit 26 and I have to -- I
7 don't actually know, I'm a little confused about Exhibit 26 to
8 what. It's Exhibit 26 I believe to Mr. Bernacke's declaration,
9 but I don't know if they filed that declaration in the Zadvydas
10 motion or in the sanctions motion because they weren't, they
11 weren't labeled, they weren't -- you know, they were under seal
12 so they don't have ECF numbers, but it's Exhibit 26 and this is
13 a document that Mr. Bernacke said he consulted prior to writing
14 that declaration and so we know what's in it and we know that
15 he consulted it and this Exhibit says, it's got a timeline.
16 It's repeated over and over I have to say. This is a briefing
17 document and there's like six, six or seven different versions
18 of it in the documents, they used same language every time they
19 briefed it up which makes sense, that's how you do briefing
20 documents, but here's one that says he consulted and it says
21 ERO was notified on June 21st, 2017 that I Iraq would not
22 accept the charter scheduled to arrive on June 29th, 2017. On
23 June 22nd, 2017, the U.S. District Court for the Eastern
24 District of Michigan temporarily stayed the removal of 114
25 Iraqis nationwide -- excuse me, of Iraqi nationals, not

1 nationwide, it was Detroit only. So he consulted a document
2 that had the time frame right and Mr. Schultz of course was
3 intimately involved in the event so he knew if first hand, but
4 even Mr. Bernacke who swore to a later, he consulted a document
5 that had the time frame right and he swore that you stopped
6 that plane, but you didn't stop that plane, Iraq stopped that
7 plane. So that's, that's the June flight.

8 False statements that Iraq would accept nationals,
9 its own nationals without travel documents because it was being
10 done by charter, so again this is in Mr. Bernacke's
11 declaration. He said the government of Iraq agreed to accept
12 these removals via charter mission and therefore it was being
13 done with manifests rather than travel documents. Now the
14 depositions make clear that charters are mostly done with
15 travel documents, not manifests so even just this description
16 of kind of how routinely things work is wrong, but be that as
17 it may, in this particular instance it's also wrong and they
18 now admit that it was wrong, but they say well he was mistaken
19 and it wasn't in bad faith, but once again if we look at
20 Exhibit 26, the Exhibit that he consulted before he wrote that
21 declaration, it says a list of 280 travel document requests
22 were submitted by ICE to the U.S. embassy. So it doesn't say a
23 manifest with 280 names on it, it says 280 travel document
24 requests because the whole thing was being done by travel
25 document request.

1 Now ICE now comes back and says this is immaterial,
2 who cares, doesn't matter if it's a manifest or travel
3 documents, but the thing is they offered you that evidence for
4 a reason. They offered it to you because -- they say it's
5 inconsequential now, but they offered it to you to show you
6 that your order was getting in their way, that if they could do
7 this as a mass deportation, they were going to be able to
8 deport people quickly and easily by manifest, but instead of
9 the slow and laborious process of travel documents, but that's
10 false. That's false. The requirement of travel documents came
11 from Iraq. It had nothing to do with the way you were running
12 this case, it came from Iraq. They told you that for a reason.
13 Now they say they had no reason to care, but they're the ones
14 that put it in issue and if it is true, if it is true that
15 travel documents are -- that there's no functional difference,
16 then even that is a lack of candor and itself a lie because if
17 there's no functional difference, why were they trying to
18 persuade you that there was a functional difference? Okay, so
19 that's the second set of false statements.

20 Third, the March, 2017 agreement and I'm using the
21 scare quotes to allow repatriation of everyone with final
22 orders. Well, I've spent a while talking about that, right?
23 There's this idea that there was an agreement in March, 2017
24 that the entire run of the entire case belies. If the
25 agreement was reached in March, 2017, why was there so much

1 activity after that trying to persuade people? Why were there
2 demarches and diplomatic notes? Why did Iraq say no all those
3 times and all those times when we look at all of the traffic
4 with Iraq and we've seen a bunch of letters to Iraq and e-mails
5 to Iraq and like all kinds are things, not once, not once in
6 any of those does anybody from the U.S. government say but you
7 promised. Not one time. That's because there was no
8 agreement. There was no agreement. They point to the
9 International Civil Aviation charter, I think it's a charter,
10 but there's a document called ICAO and they point to that and
11 they said look, under that you should be saying yes to us.
12 Never once do they point to a prior agreement and that's 'cause
13 there was NO agreement. There was a letter from the State
14 Department to the U.S. government saying hey, we had a good
15 meeting. That's what there was, a good meeting. There was no
16 agreement and we know that because ICE itself the day, the day
17 that you got the declaration saying hey, everything's
18 honky-dory, there's an agreement, Mr. Schultz's staff prepared
19 a visa sanction package. Now it's a visa sanction package that
20 didn't end up going all the way through the visa sanction
21 process, but they proposed to sanction Iraq for violating, for
22 being recalcitrant about accepting repatriations. Never once
23 in that package by the way did it say hey, there was an
24 agreement, but what it said was ICE considers Iraq to be among
25 the most recalcitrant countries and ICE believes it has

1 exhausted all means at its disposal to secure cooperation from
2 the government of Iraq consistent with its international
3 obligation to promptly facilitate the return of its nationals.
4 Now that was in a visa package that didn't end up being used
5 and so the point is not oh there were visa sanctions, the point
6 is that ICE officials wrote that package. They wrote it not in
7 anticipation of litigation like the declarations for you, but
8 because it was a real problem that they were really hoping to
9 solve and that's what happened.

10 So again my favor of the Exhibit, Exhibit 26 on the
11 first page includes this. This is a talking point for
12 discussion with an Iraqi official. It says we also request
13 that for aliens who indicate an unwillingness to return to
14 Iraq, that travel documents still be issued to such aliens
15 despite them expressing their reticence. The point being Iraq
16 was not agreeing at the time of those declarations to return
17 unwilling repatriates. They simply were not agreeing to it.

18 Okay, same thing. It's the same evidence about
19 Iraq's purported willingness to issue travel documents. Again,
20 I've gone through this evidence already, right? Iraq had
21 cancelled the June, 2017 flight and then a quote from Exhibit
22 127 to our Zadvydas motion, "ICE was not even able to get a new
23 tentative date for the flight." So Iraq cancelled it with
24 nothing to do with this case and then pushed and pushed and
25 pushed and could not get a new tentative date for the flight.

1 ICE's deputy director's staff, his deputy chief of staff
2 e-mailed Mr. Schultz and said there is no defined way forward
3 as to Iraq and the current -- excuse me, and the current travel
4 document issuance problems we're facing. Over and over and
5 over, over and over there's signs that Iraq was not issuing
6 travel documents to unwilling repatriates.

7 Okay, so I'll end with this. The recent declarations
8 by Mr. Schultz and Mr. Bernacke where they try to rehabilitate
9 their prior declarations are some combination of actually not
10 exculpating, right, they say well I thought this and then they
11 give you evidence that goes to the other direction and some --
12 and simply not credible. So the very documents they point to
13 in support of their attempted rehabilitation of themselves
14 disproves the things they say they prove. Mr. Bernacke points
15 to Exhibit 26 and it point by point rebuts his own declaration.
16 Mr. Schultz says for example that the 24, umm, the 24 blanket
17 denials that were issued in June of 2017 were unrelated to the
18 sort of process of all of this, umm, of all of this back and
19 forth which is just, it just strains credulity. After all, the
20 24 denials that were received on the grounds that they were not
21 willing repatriates, those 24 denials in the spring of 2017,
22 every one of them was on ICE's we'd like to remove list that
23 was submitted to Baghdad, every one of them. They submitted 20
24 percent of the nation's Iraqis with final orders on that list
25 to Baghdad. Every one of the 24 that they got back a nope,

1 they're unwilling we're not going to do this was on that list.
2 The idea that those two lists were not related is just, it's
3 just not credible and more to the point, if you look at the
4 documents that he cites, that Mr. Schultz cites all the way
5 throughout, you'll see that they don't support what he is
6 arguing.

7 All right, I'm, umm, I'm running out of time and I
8 wanted to say -- I've lost my notes. Oh, well. I wanted to
9 say a tiny bit about law and the thing about, umm, the thing
10 that I want to say about the law is this. You have abundant
11 inherent authority to grant the kinds of sanctions remedies
12 that we are asking for. All the case law confirms that. The
13 Supreme Court case law, the Sixth Circuit case law. It's all
14 cited in our briefs. You have abundant authority and Ms.
15 Auckerman is going to talk about the Zadvydas remedy, but on
16 sanctions itself, if the true state of affairs if you had known
17 it, if the declarations had been honest, if the government had
18 complied with its obligation of candor to you, if you would
19 have done something different back on the Zadvydas motion from
20 the get go, then that alone is reason enough to release the
21 class members.

22 Now there's a whole lot of reasons why we think we
23 win this request for relief and Ms. Auckerman's going to talk
24 about more of them, I just -- that alone, in addition obviously
25 the attorney's fees and the cost of all of this wasted effort

1 and wasted energy trying to, trying to uncover all of this,
2 it's just in the actual center of what kinds of sanctions are
3 available and finally, we'd really like to ask you those same
4 declarations, those same misstatements are being used all over
5 the country against our class members and to be honest, against
6 other Iraqis, too, to oppose their Zadvydas motions and to
7 oppose their bond and we'd like to ask that if you find that
8 they were false, that there be some obligation on the
9 government to work, work -- working with us to figure out a
10 remedial kind of a statement that can be made in all of those
11 other fora so that people are not prejudiced outside of this
12 courtroom as they have been inside of this courtroom. So with
13 that, I'm going to cede the floor to Ms. Auckerman. Thank you.

14 THE COURT: Okay, thank you.

15 MS. AUKERMAN: Good morning, your Honor.

16 THE COURT: Good morning.

17 MS. AUKERMAN: As Ms. Schlanger said, there are
18 actual, there's three separate and independent reasons why the
19 petitioners should be released. The first of those and the one
20 that want to focus on is the Zadvydas claim and you just heard
21 my colleague go through the evidence on that and despite the
22 fact that the government has repeatedly defied your orders to
23 produce --

24 THE COURT: Can you just step back a little bit or
25 move the microphone? You're popping.

1 MS. AUKERMAN: Yep, is that better? Despite the fact
2 that the government has repeatedly defied your orders to
3 produce evidence, the evidence we have gotten establishes that
4 whether or when the petitioners can be removed is entirely
5 uncertain and therefore they must be released. The second
6 reason is the sanction for misrepresentations to the Court that
7 Ms. Schlanger just talked through. The remedy should fit the
8 misconduct. The Court cannot give our class members back the
9 many months of their lives that they have lost as a result of
10 the government's falsehoods to this Court, but it can stop that
11 harm from continuing and then the third and you haven't had a
12 chance to look at this yet is as a sanct -- is that we were
13 asking the Court to issue sanctions with respect to the
14 discovery abuses and failures to comply with this Court's
15 order. There's been really a pattern of delay, denial and
16 deceit and as you'll see in what we filed yesterday, we believe
17 that the Court should deem it established that there's no
18 significant likelihood of removal in the reasonably foreseeable
19 future or strike the government's responsive pleadings or both
20 and obviously if that occurs, the petitioners would need to be
21 released, but to be clear, we're asking you to sanction that
22 conduct, that misconduct and that repeated defiance of your
23 orders because it is sanctionable, but we don't need that to
24 win this case. We win under option one which is the
25 straight-up Zadvydas claim and that's what I'd like to focus on

1 and then what I'd like to do is talk about that a bit and then
2 move to talking about relief and also the question you asked on
3 Sunday which is sort of where this case is going and sort of
4 the next steps should you grant relief.

5 So the Constitutional framework here really is that
6 immigration detention is incarceration without trial. Normally
7 when we lock people up, we do it as a punishment for a crime.
8 The Constitution recognizing the gravity of depriving people of
9 their liberty and requires extensive procedural protections
10 before a person can be sentenced to imprisonment as you know
11 from handling cases day in and day out. The legal
12 justification for locking immigrants up without trial without
13 those protections is that this is not punishment. Certainly
14 feels like punishment. If you're behind bars and you're in the
15 same cell with someone whose being punished for a crime, if
16 you're separated from your family, If your every move is
17 controlled by jailers, it sure feels like you're being
18 punished, but legally this is civil detention, not criminal
19 detention and civil detention is only permissible when there is
20 a sufficiently strong, special justification for putting people
21 behind bars and there's two basic requirements that apply to
22 civil detention. The one is that it must be related to a
23 sufficiently strong, special justification where the
24 government's interest outweighs the individual's interest in
25 liberty and what Zadvydas says is that immigration detention is

1 permissible, but only for the purpose of assuring the alien's
2 presence at the moment of removal. That's the sufficiently
3 strong special justification.

4 The second big restriction on civil detention is that
5 it needs to be, the duration, the time has to be strictly
6 limited and linked to the purpose of confinement and so what
7 Zadvydas does there is it says okay, there's a time limit here,
8 presumptively six months and then the balance shifts from the
9 government's interest to the individual's interest, that's when
10 the balance shifts and after that you really start looking at
11 how much more can go on, does it continue to be reasonable and
12 so the Court says that -- what Zadvydas says is the role of the
13 habeas court is to look at whether the detention in question
14 exceeds a period reasonably necessary to secure removal and Ly
15 applies that same principle to preorder detainees who may also
16 only be detained for a time reasonably required to comply -- to
17 complete removal proceedings in a timely manner and Ly says if
18 the process takes an unreasonably long time, the detainee may
19 seek relief. So that's the sort of Constitutional framework.

20 Now there's a statutory argument here as well for
21 most, but not all of the detainees. The 1231 final order
22 detainees that's just straight up simple application of
23 Zadvydas which of course construed the whole language of that
24 statute focusing on the word may to say that there is this
25 reasonable limitation, the significant likelihood of removal in

1 the reasonably foreseeable future. 1226(a) and of course this
2 Court has said that the other detainees are held not under
3 1226(c), but under 1226(a), that statute also uses that same
4 word may. It focuses on the permissive and because of that it
5 should be interpreted in the same way as 1231 with that focus
6 on construing the statute to avoid what Zadvydas says is to
7 avoid a serious Constitutional threat. So under both 1231 and
8 1226(a), there is this requirement that this implicit
9 limitation for reasonableness.

10 So under Zadvydas or Ly, the key constraint is this
11 reasonableness inquiry. The amount of time that has passed is
12 the driving factor and the more time that passes, the more the
13 individual's interest in liberty outweighs the government's
14 interest in a person pending removal which is why Zadvydas not
15 only says there's this six-month sort of presumption and after
16 that things change, but Zadvydas also makes clear that the
17 longer detention lasts, the shorter, the shorter the reasonably
18 foreseeable future must be, it becomes smaller and smaller. We
19 are 16 months into this case and fundamentally what we're
20 asking this Court to recognize is that the balance has shifted.
21 The reasonably foreseeable future right now under Zadvydas is
22 very, very short. Summer has become fall, then winter, then
23 spring, then summer again and now fall and soon it's going to
24 be winter and these individuals are still locked up.

25 THE COURT: How many people and I know this is a

1 moving target, but right now how many people would be
2 repatriatable at this point?

3 MS. AUKERMAN: So there are about, again the numbers
4 move all the time and people shift back and forth. As of a
5 couple of weeks ago when Ms. Schlanger last did the numbers,
6 about two-thirds of the detainees are still pursuing their
7 immigration cases, so they either are, have had their motions
8 to reopen granted in which case there's an automatic stay. It
9 could take years for those cases to complete and ironically I
10 would say the government's position is that even though
11 Zadvydas applies before you have your motion to reopen granted,
12 once you have your motion to reopen granted and you're less
13 likely to be removed, then Zadvydas doesn't apply at all. So
14 that's about, there's about two-thirds, some of those, some of
15 that two-thirds is also individuals who have pending MTRs so
16 they're still waiting for an adjudication on that. There's
17 roughly a third that we think may be finished with their
18 immigration cases, right? Do I have that right, Margo? Yeah,
19 okay. So that's roughly the breakdown and to be clear and your
20 question sort of anticipates this. For that two-thirds,
21 they're not going to be done any time soon, right? There's
22 just no, I mean, they're pursuing their cases. It could take
23 for --

24 THE COURT: You said a third of about 110 people? Is
25 that right?

1 MS. AUKERMAN: Yes, there's about 110 in the Zadvydas
2 subclass. I think we're around 106, Margo? Yeah, it's 110 so
3 it's about a third of those would be, you know, have
4 potentially, have finished, we think finished their immigration
5 cases. Now to be clear, there is a process for the lifting of
6 the stay here for individuals. The Court set that out because
7 the government said well, you know, these individuals have
8 exhausted their immigration options. They haven't utilized
9 that process. The Court has set one out for how that works,
10 but they haven't used it and that's why the stay is still in
11 effect and of course we don't know if the stay lifts whether or
12 not the Court -- whether or not they can even be repatriated,
13 but I think what's important to understand is that the
14 government isn't even making the argument in their brief.
15 They're not even making the argument that that two-thirds of
16 people, that the people who are still fighting their
17 immigration cases, that those individuals have a likelihood of
18 being removed any time soon 'cause everybody knows it's
19 going --

20 THE COURT: I understand. I want to focus on the
21 numbers for a moment. So roughly 35 could be sent back to Iraq
22 at this point if Iraq was ready to accept them; is that right?

23 MS. AUKERMAN: I think that's roughly right, if Iraq
24 was willing to take them because they have, umm, exhausted
25 their immigration. Now to be clear, a lot of them don't have

1 travel documents, right? So, you know, but in theory, in
2 theory if Iraq was doing what the government says it's doing
3 which it says, you know, please come over any time, fill up the
4 plane, right, then theoretically those individuals could be
5 repatriated, but so that's actually really -- I think it's
6 important to understand there are factual arguments and there
7 are legal arguments. The factual arguments about what Iraq
8 will do really only applied to this subset, this one-third
9 subset of people. The other arguments are legal arguments from
10 the government which are Zadvydas shouldn't even apply, yes
11 they've reopened their cases and now that they're less likely
12 to be removed, they should be incarcerated whereas the people
13 who haven't succeeded yet, they're the ones for whom Zadvydas
14 applies. Doesn't really make a lot sense, but that's how -- so
15 those are the legal arguments. Factual arguments that Ms.
16 Schlanger laid out, those really only apply to that one-third
17 and I think it's really important to understand that, that that
18 subsection is the only group that's really affected by the
19 factual argument.

20 I want to move on to relief, your Honor, and talk
21 about that. The government has been promising for 16 months
22 that removal is going to happen really soon and the time has
23 come for the government to either make good on its promise or
24 let people go and the relief here is very simple. What we're
25 asking is that the government, that you order the government

1 can release people on orders of supervision which is of course
2 what they were on before or the government can show you within
3 14 days that the person can actually be removed and has travel
4 documents and ICE then gets another 30 days to actually
5 complete the removal or if they can't, then the person gets
6 released and to be clear, under Zadvydas the reasonably
7 foreseeable future is now very short and under Rosales-Garcia,
8 only concrete plans for removal will do, so Rosales-Garcia, the
9 government footnote three says, you know, there's ongoing
10 negotiations. Sixth Circuit says no, there is no evidence that
11 Cuba has any particular intention to repatriate Mr. Rosales or
12 Mr. Carballo (phonetic), the two petitioners in that case. So
13 there has to be, the future has to be very short and plans have
14 to be very concrete and so the way we've set the relief is to
15 address that.

16 So at this late stage, after this much time in
17 detention, uncertainty is not enough to justify detention. If
18 the government can actually accomplish removals, then they can
19 do so under the relief that we're requesting, but if they
20 cannot, then petitioners should not remain locked up based on
21 ICE's hopes that some day although notably they have no idea
22 when, they have no predictions when this would occur and as Ms.
23 Schlanger said, we have been down this road before, based on
24 ICE's hopes that they can break Iraq and make Iraq take people
25 back that Iraq does not want to take back. So that's the basic

1 parameters of the relief, either release people on orders of
2 supervision or show you within 14 days that the person can
3 actually be removed has travel documents and then they get
4 another 30 days to remove.

5 I'll note there's one small, there's a handful of
6 people and that your questions sort of anticipated this,
7 there's a handful people who have exhausted their immigration,
8 we think have exhausted their immigration options where the
9 stay is in effect and what the government needs to do is
10 utilize the process that you have set out to lift the stay.
11 There might be circumstances where it's not appropriate, we
12 don't necessarily know everybody's individual immigration case,
13 but once that's resolved, that should resolve that issue and if
14 there's any sort of outstanding individuals still who aren't in
15 one of these two buckets at the end of that, then we can
16 address those on down the road, but that's just the sort of,
17 umm, there's a handful of people in that position.

18 I'd like to --

19 THE COURT: Before you move away from that point, I
20 want to make sure I stand because you were talking about
21 roughly 35 who would be removal at this point if the government
22 of Iraq was willing to accept them and then you're referring
23 also to a handful of people. So you're not talking about 35 or
24 so people, you mean somebody who falls into another bucket,
25 right?

1 MS. AUKERMAN: Well, yeah, so some the individuals
2 have -- some of the individuals have, umm, arguably it is the
3 stay that is what is preventing removal because they've,
4 they've already exhausted all of their immigration options.
5 There's individuals who have a final order who may not, you
6 know, they have a pending MTR, right? So they still have a
7 final order, but they're still seeking release and as we've
8 briefed for you, the fact that someone is seeking relief should
9 not be a reason to keep locked up, right? You don't lock --
10 when you ask for legal relief, you don't lock your own jail
11 cell shut, but there are some individuals who are done who are
12 no longer seeking release and for them the government needs to
13 use that process to, umm, to determine whether the stay should
14 be lifted for those individuals.

15 THE COURT: So that's what you mean by the handful of
16 people?

17 MS. AUKERMAN: Yes, right. I --

18 THE COURT: I was trying to find out initially how
19 many are all done exhausting their efforts through the
20 immigration court system and petitions for review to the courts
21 of appeals, how many at this point would be ready to be put on
22 a plane and go back to Iraq who for whatever reason are not
23 going back yet, but they've exhausted all of their legal
24 efforts in the American court system?

25 MS. AUKERMAN: I'm going to let Ms. Schlanger answer

1 that because she's the master of the numbers.

2 THE COURT: Okay.

3 MS. SCHLANGER: Yes, so it's -- it's a moving target
4 so as of the last time I really tried to pin it down, there's
5 39 people we believe who are all done, but so some of them
6 didn't file an MTR, some of them lost their MTRs, some of them
7 lost their cases, right, but whatever, they're all done. It
8 was 39 people the last time we counted and the handful that Ms.
9 Auckerman is talking about, they actually have travel documents
10 for, so, umm, so for the rest of the 39-ish and, you know,
11 today it could be 40 or 41, but for the rest of the three
12 dozen-ish, they don't have travel documents, they can't be
13 removed anyway, but for this handful they have travel
14 documents, they're done with their immigration cases, but the
15 stay is in effect because the stay, the government hasn't
16 followed the process for lifting the stay.

17 THE COURT: All right and when you say handful, give
18 me a rough number.

19 MS. SCHLANGER: Seven. I just, I don't like to,
20 particularly when we're calling out on exactness, right? Like
21 if I'm forced to give a number, my number would be seven.

22 THE COURT: I understand, okay.

23 MS. AUKERMAN: Your Honor --

24 THE COURT: And the balance are in some stage of
25 pursuing relief through the immigration courts and/or the

1 courts of appeals; is that right?

2 MS. SCHLANGER: Some of them haven't yet filed an MTR
3 because their 90 days isn't done yet. Some of them have
4 pending MTRs. Some of them have MTRs that have been granted
5 and their cases are pending so they're different in terms of do
6 they have a final order or a non-final order, but yes they're
7 all not yet done, correct.

8 THE COURT: Good. Go ahead.

9 MS. AUKERMAN: And so for anybody who's still in the
10 process of seeking immigration release, those individuals are
11 looking at months, potentially years of detention until their
12 cases get resolved.

13 I'd like to talk a little bit about the question you
14 asked us on Sunday, your Honor, about kind of the next steps in
15 this case should you grant relief. Our overriding concern here
16 has been to end the suffering and to get these detainees home
17 to their families as soon as possible and that's why we moved
18 for a preliminary injunction. The government again and again
19 failed to comply with the discovery orders as you know, but as
20 soon as and it took us awhile, but as soon as we managed to pry
21 enough documents out of the government to prove our Zadvydas
22 motion, we moved for preliminary relief. We could not leave
23 our class members incarcerated any longer in the face of the
24 government's endless delay, denial and deceit and so that's
25 also this imperative to get people home is also the reason that

1 we initially opposed an evidentiary hearing fearing that it
2 would result in delay and it's also that imperative to get
3 people home is the reason that why when the government insisted
4 on an evidentiary hearing, you granted that and that is why we
5 moved heaven and earth as you know over the last two weeks to
6 try to make that happen and the government is solely
7 responsible for the fact that right now we are here in oral
8 argument rather than hearing witness testimony because of their
9 repeated noncompliance with your orders.

10 Now the Court has expressed an interest in the final
11 resolution of the Zadvydas claim. We believe that if the Court
12 grants the relief that we have requested, that same relief
13 could be granted as a permanent injunction without the need for
14 further discovery or trial. I'll note that the government
15 seems to think so, has said that it thinks so as well. The
16 government argued in its opposition to the preliminary
17 injunction motion that because the relief we're requesting is
18 the same relief as one gets on the merits of a Zadvydas
19 petition which is to say release, today's hearing should have
20 been, should be a hearing on the merits. That's what they said
21 in their opposition to the Zadvydas motion, preliminary
22 injunction motion. Essentially what the government was asking
23 the Court to do is to make it a final determination on the
24 petition rather than a preliminary one and that's at their
25 response on pages four and five. The government pointed out at

1 that time that this is how individual habeas petitions are
2 normally handled, not as a preliminary injunction, but as a
3 decision on the petition. It was only later that the
4 government suggested that the decision should be based on an
5 evidentiary hearing, but that initial argument that they made
6 was that the Court should simply decide the merits rather than
7 as a preliminary injunction and of course as they point out,
8 that's how a standard individual habeas petition would be
9 adjudicated; is there at the time of the adjudication of the
10 petition a significant likelihood of removal in the reasonably
11 foreseeable future.

12 We have established the facts that we need for that
13 petition to be granted. Even despite the obstacles that we've
14 faced, despite the government's delay, denial and deceit, we
15 have established those facts. We've established there's a
16 presumptively reasonable six-month period; that's passed. That
17 was easy to prove. We've also established that there's good
18 reason to believe that removal is not significantly likely in
19 the reasonably foreseeable future and the government then needs
20 to respond with evidence sufficient to rebut that showing and
21 they have not done so. They have not done so regardless of
22 whether you strike their answer and their pleadings.

23 So to grant a permanent injunction or to grant the
24 actual petition, it's the exact same legal question as
25 confronts you on a preliminary injunction. The factors of

1 course for a permanent injunction are very similar to a
2 preliminary injunction; irreparable harm, balancing of the
3 equities. So the question I think before you is can you enter
4 a final judgment on the petition and grant a permanent
5 injunction? I think there's three considerations that the
6 Court should think about in deciding whether this should be a
7 permanent or preliminary injunction. The first question is is
8 there still a need for discovery. So of course it's a basic
9 concept in litigation that a court should not render a final
10 judgment against a party that has not had an adequate
11 opportunity for discovery and that's the Supreme Court's
12 Liberty Lobby case. It would be therefore improper for this
13 Court to enter a final judgment against the petitioners because
14 as we all know the government has failed again and again and
15 again to comply with your Court's discovery orders, but if the
16 petitioners are granted the full relief that we are requesting,
17 we don't anticipate needing further discovery because of course
18 we would have gotten the relief that we want. It's hard to
19 know exactly what you'll order, but if you ordered the full
20 relief, we would not anticipate needing further discovery.

21 The corollary of Liberty Lobby, so Liberty Lobby says
22 you can't render final judgment against a party that hasn't had
23 an opportunity for discovery, but the corollary is that you can
24 enter a final judgment against a party that had an opportunity
25 for discovery and didn't do any, right? So respondents have

1 had an opportunity for discovery. The Court permitted
2 discovery on the Zadvydas claim starting in January and the
3 government declined to pursue it.

4 You can also enter final judgment where further
5 discovery would not have changed the legal and factual
6 deficiencies in a party's case and that is the Maki v. Laakko,
7 L-a-a-k-o, case out of the Sixth Circuit. So here, the
8 information is entirely lopsided. The government has virtually
9 all of the documents because they're the ones negotiating with
10 Iraq about removal. The government has never been able to
11 articulate what discovery it needs related to the Zadvydas
12 claim which is probably why they've never done any. So while
13 discovery is critical for petitioners, it's hard to imagine
14 what discovery the government could do that would change its
15 case and so it's hard to imagine how they would be harmed if
16 they couldn't, you know, they've had the chance, they haven't
17 done it, it's hard to imagine what they would do and so if the
18 Court were to grant relief, you can't -- basically the Court
19 cannot -- they would not be prejudiced if the Court grants
20 permanent injunction, grants the petition based on our request.

21 So in sum, if you rule for the petitioners, no more
22 discovery is needed. If you rule against us, we still do need
23 discovery, so that's the first question in terms of whether or
24 not a permanent injunction would be proper in granting the
25 petition.

1 The second question is does there have to be a trial
2 before judgment enters and this is a habeas case. A court in
3 habeas has tremendous discretion. In Boumediene v. Bush, the
4 Supreme Court focused on the Court's ability to conduct a
5 meaningful review OF the petition for the writ, is there a
6 meaningful review and in Harris v. Nelson, the Supreme Court
7 said that the writ provides the ability to quote "cut through
8 barriers of form and procedural mazes." So the writ itself
9 gives this Court tremendous flexibility about how it wants to
10 adjudicate that.

11 The second thing is the statutory, habeas as a
12 statutory matter so Eight U.S.C. 2243 grants federal courts
13 power to quote "dispose of habeas corpus petitions as law and
14 justice requires." So that's a great deal of flexibility and
15 Section 2246 allows courts to take evidence orally by
16 deposition or by affidavit, so you have a lot of flexibility
17 about what you want to do and then the habeas rules which are
18 the rules for 2254 cases that apply here again give you great
19 flexibility, so Rule 7 says, lists a series of evidence that
20 you can consider and Rule 8 says the Court has discretion to
21 hold an evidentiary hearing, but it is discretionary. You
22 don't have to hold an evidentiary hearing to grant a writ.
23 What matters for the purpose of the granting a writ is whether
24 the Court believes it has sufficient information to conduct a
25 meaningful review of the petitioners' claim. If you think you

1 have the evidence you need to grant the writ once and for all,
2 you can do so.

3 The Court I will note gave the government the
4 opportunity for an evidentiary hearing here. You made it
5 possible for them at their request and they squandered that
6 opportunity by refusing to comply with the Court's orders that
7 were designed to make that hearing possible. It would be hard
8 for the government to complain that it was denied a chance to
9 put on evidence when the government is the reason that evidence
10 is not being put on right now.

11 I'll also note that another reason why permanent
12 injunction would be appropriate is that if the relief is
13 granted here as a preliminary matter and then you essentially
14 let the government do a do-over and continue forward, we're
15 going to be just back where we've been in the last nine months
16 with these continued -- it's become clear the government's not
17 going to comply with discovery. They're going to continue to
18 hide things hoping against hope that Iraq will change and that
19 the facts will become more favorable and that they're going to
20 keep things under wraps as long as they can. You should not
21 reward their pattern of delay, delay, delay by striking
22 evidence at the PI stage and then allowing it to come back in
23 down the road.

24 So the and then the third factor is really this
25 question of whether Iraq's position is clanging. We don't

1 know, but that is the case, this sort of evolution is the case
2 in any Zadvydas situation. The facts are always evolving and
3 the proposed relief accounts for that. It says if the
4 government succeeds in getting travel documents and a final
5 order and can actually remove the person, they can take them
6 back into custody and remove them and so for all of those,
7 those are sort of the factors that we think the Court should
8 consider.

9 So in terms of what we would recommend or suggest as
10 how to proceed, you know, the government initially said it want
11 a decision on the merits of the petition, but the parties
12 concededly have not fully briefed that issue and we believe
13 that briefing would be appropriate on that question. There's a
14 couple of ways you could do that. You could grant the
15 preliminary injunction and then order briefing on I think the
16 questions would be whether the preliminary injunction should be
17 converted to a permanent injunction and what discovery or other
18 proceedings, if any, would be needed before it could be
19 converted or alternately you could direct the parties to file
20 briefs after today on essentially the same questions, whether
21 there's any reason why if the writ is granted the same relief
22 couldn't be granted now as a final judgment. The only request
23 that we have, it's whatever the Court prefers, but the only
24 request that we have is that however you want to address that
25 question, that it not delay the release of our petitioners.

1 What we don't want, we don't want to have extended briefing
2 that is going to keep our petitioners locked up while those
3 issues get resolved. They need to go home now.

4 So I'll just conclude, your Honor, by saying that,
5 you know, we're at, umm, we're at a sort of show me the money
6 moment. Which will it be, release or removal? I'm haunted
7 personally by the words of one of our class members, Revan
8 Mansoor, on whom an individual immigration judge found was
9 likely to be tortured if he was sent to Iraq, but whom ICE kept
10 in prison for over a year even after he won release and he
11 wrote despite the fact that I've expressed that -- the
12 pronoun's a little odd here, but despite the fact that he
13 expressed his fears for returning to an unstable Iraq, this
14 prolonged detention has left him no other option but to seek to
15 be free in Iraq even if it means his demise than to languish
16 hopelessly in this environment that is similar to a
17 concentration camp. No one should be forced to make the choice
18 that Mr. Mansoor made between indefinite imprisonment here and
19 deportation to a country where persecution, torture or even
20 death awaits. The writ of habeas corpus is designed to relieve
21 executive detention without trial and we ask that you grant it.
22 Thank you, your Honor.

23 THE COURT: Okay, thank you. Mr. Silvis?

24 MR. DARROW: Actually I'll start off.

25 THE COURT: All right. Go ahead, Mr. Darrow.

1 MR. DARROW: Thank you. May it please the Court,
2 I'll address the Zadvydas motion and then my colleague,
3 Mr. Silvis, will address the sanctions motion. The Court
4 should deny plaintiffs' third request for preliminary
5 injunctive relief because they cannot show a likelihood of
6 success on the merits or that the other equitable factors weigh
7 in their favor. Petitioners simply cannot establish a Zadvydas
8 violation as a class-wide matter. On the basis of the
9 evidence, the Court cannot answer the questions common to the
10 class except in the government's favor. Yes, there is an
11 agreement in place between the United States and Iraq to remove
12 all Iraqi nationals with removal orders who cannot -- who can
13 be established to be Iraqi nationals. Now the day-to-day
14 execution of this agreement has evolved based on legal and
15 logistic realities that have emerged in the past year
16 and-a-half, however the basic commitment is in place and has
17 been in place since March, 2017 and the parameters of that
18 basic agreement have not changed and the performance of the
19 parties pursuant to that agreement illustrates that it exists
20 and it has created a reliable process for the removal of Iraqi
21 nationals and the evidence also shows that the government has
22 and continues to obtain travel documents and remove Iraqi
23 nationals under this agreement showing that it exists and it
24 has created this reliable process.

25 At most, the petitioners' claim amounts to an

1 argument that ICE has removed some eligible Iraqis so far and
2 is still in the process of removing others. This timing
3 difference on its own is wholly insufficient to show that there
4 is no significant likelihood of removal in the reasonably
5 foreseeable future for the class as a whole and in fact shows
6 the opposite. Removal of eligible class members is currently
7 happening and projected to continue.

8 Now the petitioners present a narrative of how this
9 case has developed, but I think your Honor will find that that
10 narrative is not supported by the weight of the facts. The
11 essential facts for this Court to consider are that
12 approximately 72 travel documents have been issued for members
13 of -- for class members in fiscal year 2018. 22 class members
14 have already been removed to Iraq and that's in addition to the
15 seven Iraqi nationals who were removed to Iraq in April 2017
16 before this case arose and the stay went into place and as
17 petitioners admit, the government of Iraq has issued travel
18 documents for Iraqi nationals who refused to sign the voluntary
19 return form when that was still in use. It is no longer in
20 use, but the government of Iraq issued travel documents for 15
21 such Iraqis who refused to sign that form.

22 THE COURT: You said 70 travel documents in fiscal
23 2018?

24 MR. DARROW: Yes.

25 THE COURT: How many were actually removed in fiscal

1 2018?

2 MR. DARROW: We have removed or ICE rather has
3 removed 22 class members total. Name the sure if all of those
4 were within fiscal year 2018. I can obtain that information
5 though and get the yearly breakdown.

6 Petitioners just talked a minute ago about roughly a
7 third the class members, detained class members who are under
8 their view immediately removable, I'm not sure exactly where
9 they're getting that number from. They had produced a chart,
10 Table A on the Schlanger declaration attached to the reply
11 motion that lists 18 quote "primary class members detained who
12 have no stay of removal." Granted this was when they filed
13 their reply a few weeks ago, but I don't believe that any
14 members have been removed from, class members have been removed
15 from out from under the stay in that period and that is only 18
16 and now on that chart, there are -- it breaks it down by when
17 the stay was lifted and when the travel documents were obtained
18 and when the person has been scheduled for removal. There
19 are -- at the time that this chart was filed by petitioners,
20 there were several detainees listed at more than 38 days since
21 the travel document had been obtained from Iraq for their
22 removal for whom no flight was scheduled yet or no removal had
23 been accomplished. That is no longer the current information.
24 Now, all but one of the petitioners listed in this chart who
25 have been detained more than 38 days, umm, since ICE received

1 the travel document for them are scheduled for removal by the
2 final week in November, several much sooner and some in fact
3 have already been removed.

4 There simply are no 35 remaining class members who
5 have a stay of removal lifted according to the government's
6 estimation who are still waiting to be removed. There could be
7 some for whom their proceedings have been completed and they
8 have yet to litigate the removal of their stay and certainly we
9 would like to help, petitioners can help us in that process in
10 getting the stay lifted, but based on petitioners' own chart,
11 ICE is moving expeditiously to remove these people that it has
12 identified as having travel documents obtained within the past
13 few months.

14 THE COURT: Well, let me ask you this. With respect
15 to those who have exhausted whatever efforts they either did
16 make or could make in the immigration courts and the courts of
17 appeals, would the government have any objection to setting a
18 time limit by a certain date those people need to be either
19 repatriated or released on orders of supervision?

20 MR. DARROW: I think it would be difficult to
21 establish any particular timeline. I mean, ICE is trying to do
22 it quickly, but there are limitations on how many people can be
23 moved to Iraq in any given period based on factors that are
24 difficult to determine from the outset, whether we're going to
25 have enough people at one time to use charter flights or

1 whether it has to be through commercial airlines. When you,
2 umm, currently it's difficult to do any more than four people
3 per week through commercial airlines because U.S. airlines
4 can't fly directly into Iraq and they have to go through a
5 third-party routing country and right now they're going through
6 Bahrain and there's a limit on how many Iraqi removals can go
7 through at any particular time. So it would be difficult to
8 come up with a baseline parameter of how long removal's going
9 to take in any particular case to use as a litmus test or a
10 loadstar across the board. And I think --

11 THE COURT: Wouldn't that just mean that some people
12 would be released while the logistics are being worked out to
13 get those folks back to Iraq?

14 MR. DARROW: Yes, but when you release people,
15 there's the danger that they will abscond. Petitioners talked
16 at length about Mr. Al Shakarchi if I'm saying his name correct
17 who's not a class member, but who was released on a post-order
18 custody review and he failed to abide by his order of
19 supervised release and according to ICE there's reason to
20 believe he absconded. That's one good example of how when you
21 release a petitioner who and this is a different case than back
22 when they were on supervised release before the March 27
23 agreement, 2017 agreement came into place and Iraq agreed to
24 start accepting back the removals. There, there was very
25 little concern that removal would actually happen. Now as it

1 becomes clear that yes, these particular aliens that we're
2 talking about in this hypothetical, they have travel documents,
3 there -- concrete plans are being laid for their removal.
4 Their incentive to abscond is incredibly high.

5 THE COURT: All right, so if somebody were
6 repatriatable today and given whatever the backlog is of people
7 who would fit into that category, can you tell me now how long
8 it should take to get that person back to Iraq? Is that two
9 weeks? Is it four weeks? Is it six weeks? Is it eight weeks?

10 MR. DARROW: I, I, I don't think there's a
11 one-size-fits-all answer to that. I do know that as more
12 people are coming out from under the stay, as more people are
13 completing their proceedings, ICE is looking to use charter
14 flights more and the commercial carriers less to the extent
15 that it's economically feasible which will allow for more
16 people to go in a group faster, however it's difficult to
17 estimate exactly how long would be required. Even when a
18 flight is scheduled, sometimes it has to be cancelled and
19 rescheduled for another day and that depends on a number of
20 factors involving the third country through which the flight is
21 flying or the ability to obtain Depart of State transit
22 approval to go through that country or having an ICE handler on
23 hand to supervise that flight.

24 THE COURT: All right, I understand life isn't always
25 tidy and sometimes things don't work out exactly as you plan,

1 but can you give me an outside date by which we could
2 reasonably expect somebody who is repatriatable today would be
3 back in Iraq?

4 MR. DARROW: Well, I mean, the, the chart that I just
5 spoke about, we, umm, there are a number of people there who
6 have had their stay lifted and travel documents obtained for a
7 varying period of time, but those who have had the travel
8 documents longest, they're going to be, umm, they're scheduled
9 for removal before the final week in -- by the final week in
10 November. I think it's very difficult and I think this
11 high-lights the unwieldy nature of dealing with this issue on a
12 class-wide basis. To do it on a class-wide basis, you need to
13 be able to declare that there is no significant likelihood of
14 removal for everybody or nobody at all and as the facts, that's
15 possible. Some people have been moved, some people are
16 imminently going to be removed and others are -- ICE is still
17 in the process of scheduling flights.

18 THE COURT: Well, I could issue an order that would
19 apply to everybody that is currently repatriatable, that person
20 needs to be, every one of those folks needs to be back in Iraq
21 by X date. Some will go sooner, some will go later, but one
22 could issue an order that would provide class-wide relief as
23 least as to that segment of the class. Why couldn't I issue an
24 order saying everyone who's currently repatriatable has to be
25 back in Iraq say within 30 days or 45 days or the 60 days or

1 the 90 days and it's up to you, the government, to figure out
2 how to do that whether it means adding more flights or talking
3 more to the Iraqi government about increasing the number of
4 people who can be accepted at a particular time. Why wouldn't
5 that be appropriate class-wide relief as to that segment of the
6 class?

7 MR. DARROW: Well, your Honor, a few reasons. I
8 don't think that that is consistent with Zadvydas. In
9 Zadvydas, the Supreme Court resisted applying a hard and fast
10 timing backstop. Certainly said there's a six month
11 presumptive period, but even once that presumptive period is
12 reached, the essential inquiry the Court must undergo is
13 whether there's a significant likelihood of removal in the
14 reasonably foreseeable future. The timing on its own isn't
15 dispositive and here I think setting a hard and fast rule that
16 removal must be accomplished based in one month or two months
17 or four months would be to undermine the Court's recognition
18 there that this is an individualized determination. It's based
19 on logistical realities and that the ability to remove within a
20 reasonably foreseeable time is what matters, not based on
21 meeting some of arbitrary deadline that doesn't conform to the
22 legal and logistic realities of removing people to foreign
23 countries.

24 THE COURT: I guess it depend on what you consider
25 individualized. All of these people have been in detention for

1 more than six months, much longer than six months and the
2 government isn't saying there's something special about a
3 particular class member that's delaying that person's
4 repatriation. You're pointing to difficulties the government's
5 having putting together sufficient flights on some kind of
6 economical basis or logistical issues with the government of
7 Iraq. You're not saying there's something special about a
8 particular class member that requires this person to wait two
9 months and the next person has to wait six months beyond the
10 period of detention to put them on a plane to get them back to
11 Iraq. Am I right about that or am I missing something?

12 MR. DARROW: I mean, I think generally the process is
13 the same. There would be some nuances for some class members
14 for whom it takes longer to determine their Iraqi nationality
15 if that's not immediately apparent. Otherwise it's, the fact
16 is we can't move all available people all at once and I think
17 the problem is that the significant likelihood of removal
18 analysis comes out differently based who you ask. So all
19 petitioners have not been detained more than six months now
20 because we have removed some. Some have been removed. Others
21 were mother recently removed. Others will be removed within
22 the next few weeks. It's -- I don't know how the Court can say
23 that as a class-wide matter, they no significant likelihood of
24 removal that would justify this entry of injunctive relief when
25 in fact that wouldn't be true for several class members and for

1 other class members we have specific dates where their travel
2 is planned and so you also couldn't say that it wasn't seeable,
3 reasonably foreseeable in the future.

4 THE COURT: So is it the government's position that
5 as long as some people are going back, there can't be a
6 Zadvydas claim here? Because the petitioners' view is there
7 are some people going back, but it's a painfully small number
8 and it's taking an extraordinary amount of time. So is it the
9 government's view that as long as some people are going back,
10 that's good enough to defeat the Zadvydas claim?

11 MR. DARROW: As a class-wide matter, yes. Simply
12 because a Rule 23(b)(2) class has to be, umm, the common
13 questions have to be answered in a way that finds a violation
14 as to everybody or as to nobody and if you look at the evidence
15 and this isn't just in class-wide cases, this is the evidence
16 that courts are normally -- if you look at the run of Zadvydas
17 cases across the country, this is the evidence that the
18 government is normally providing to show the likelihood of
19 removal, that there is an agreement in place and that other
20 members, other nationals of that country are being removed in
21 accordance with that agreement regularly and that the
22 government is taking A, B and C steps with regard to this
23 particular alien who's at issue in this case and that's what
24 we've showed here, but even more so in the fact that this is a
25 class, a class-wide case that has to be answered as relates to

1 the entirety the class.

2 THE COURT: Well, take away the class dimension.
3 What if we had just one petitioner/plaintiff here, wouldn't we
4 be having the same discussion; a single petitioner plaintiff in
5 detention for well beyond six months and you're at this point
6 telling me you don't know exactly when this person can go back.
7 Some people similarly situated have gone back, but lots of
8 people are still in detection just like this single petitioner
9 and you have no idea when that person who has exhausted all of
10 his efforts in the immigration courts would be on a plane back
11 to Iraq. Wouldn't we be with the same Zadvydas issue
12 regardless of class dimension?

13 MR. DARROW: We would, but there then we would be
14 able to talk about the concrete realities of that particular
15 case. Here, the Court is essentially asked to render an
16 advisory opinion on what it means to have significant
17 likelihood of removal generally and then the petitioners will
18 take that and try and use that to shape it to individual habeas
19 cases. This the reason why habeas is very difficult to do as a
20 a class-wide matter to begin with. If we were doing an
21 individual case, we could look to the particular petitioner and
22 say where he is in proceedings, what particular steps have been
23 taken to advance his remove or not and I think we would quibble
24 with the fact that there are, I mean, there are certainly a lot
25 of petitioners in detention, but the those that ICE can

1 actually remove, I think a large number of those have been
2 removed or are in the process of being removed. That's a small
3 number that has come out from under the stay and, you know, the
4 other petitioners who are either, they've reopened their
5 removal orders or they're still adjudicating their motions to
6 re-order. There is no free and clear way for ICE to affect
7 their removal right now, but even so, even if it was an
8 individual case we would be making that argument in front of
9 you and I think the Court to some extent already addressed this
10 back in its January order when it dealt with certifying the
11 classes and resolving the government's motion to dismiss when
12 it noted the precedent from other circuits saying that where
13 the resolution of immigration proceedings is the only obstacle
14 standing in the way of removal, that that does not indicate
15 indefinite removal or represents a Zadvydas violation. The
16 Court also noted at that time that it wanted to see evidence of
17 whether there was the capability for class-wide repatriation to
18 Iraq and the I think the evidence that has been established
19 since that point shows that as a class-wide matter, yes,
20 members of the class can and are being removed to Iraq. To the
21 extent that there are individuals for whom it might be talking
22 longer than others, I think that that is more appropriately
23 resolved in individual cases where we can talk about why it
24 would be taking longer for this particular person.

25 THE COURT: So how would we resolve it in an

1 individual case? Let's say I broke this case up to 100
2 separate cases and I said today we're going to take up the case
3 of Mr. A, what would be the individualized Zadvydas treatment
4 for Mr. A? What would we be looking at?

5 MR. DARROW: I think we'd be looking at largely the
6 same factors we've discussed here, but we don't need to talk
7 about them as broad numbers, we can talk about them as, you
8 know, where is Mr. A in his proceeding, umm --

9 THE COURT: No, he's repatriatable. He's exhausted
10 all of his legal efforts in the immigration courts. He's been
11 in detention for well beyond six months. Aside from the issue
12 of whether or not he's really an Iraqi national, what other
13 individualized issue would we have to deal with with Mr. A?

14 MR. DARROW: Well, why has he been in detention for
15 longer than six months? Is it, umm, was he in detention all
16 that time under Section 1231 or was he adjudicating a reopened
17 removal order that he subsequently lost?

18 THE COURT: Would that make a difference for
19 Zadvydas? If he's exhausted all of his efforts and he is now
20 in a position to be repatriated, why would we care what he did,
21 what section of the statute he was detained under?

22 MR. DARROW: Well, if a portion -- if a portion and
23 perhaps a large portion of that time he didn't have a final
24 order of removal, there's very little incentive for ICE to be
25 taking active efforts to obtain removal plans for him if it's

1 not even clear whether there's going to be a final order of
2 removal. I mean, as we noted, travel documents expire after a
3 certain period of time of and ICE doesn't really have an
4 incentive to try and obtain travel documents for somebody that
5 it doesn't think can be removed before their expiration date
6 and as several courts have noted, the purpose of the detention
7 under different authorities is different. When you're detained
8 under Section 1231, the purpose of that is to provide the
9 government with an opportunity to put all removal details into
10 place. When you're detained preorder, the government's not
11 going to be doing that because it's still litigating whether or
12 not you're removable.

13 THE COURT: Well, how long does it take to get travel
14 documents?

15 MR. DARROW: It, umm, it varies based on when the,
16 umm, process, on what part of the process we're in.

17 THE COURT: Well, right now you have people who have
18 exhausted all of their efforts in the American court system to
19 challenge removal, they're ready to go back. How long will it
20 take you to get travel documents for those people? I'm told
21 there's roughly 35 or so of those people.

22 MR. DARROW: Umm, 35 although and not all have been
23 lifted from underneath the Court's stay.

24 THE COURT: I understand, but they've done anything
25 they can to challenge their removal from this country so

1 they're now in a position to be sent back to Iraq, so how long
2 would it take you to get travel documents for them?

3 MR. DARROW: Well, your Honor and I don't mean to not
4 answer your question, but there are several moving pieces. I
5 could speak with ICE and see if I could get a better sense, but
6 the issue, one the major issues right now is that there have to
7 be interviews conducted by the Iraqi consulate and those are
8 scheduled based on groups, when, you know, when a number of
9 detainees can be brought to a particular facility and they can
10 be facilitated with the Iraqi consulate's schedule. So that
11 needs to be laid out and then recently the process has been
12 that pretty soon after the interview, Iraq can indicate to the
13 United States whether or not that person would be eligible for
14 a travel document. That part doesn't take too long. My
15 understanding is the real time is taken up in scheduling and
16 conducting the interviews. I can see, you know, what, if we
17 had an estimate of time, although I think that that's difficult
18 when you have moving pieces that depend on a foreign sovereign
19 as well.

20 THE COURT: All right, so they need an interview and
21 then what else?

22 MR. DARROW: Well, related to the interview is
23 preparing the packet which is something within ICE's control
24 and so that's not really an X factor, the packet that provides
25 limited biographical information that they send over with the

1 cover letter in advance of the interview and then, umm, and
2 there might be other parts of the process that I'm omitting,
3 but in my knowledge the significant parts of the process are
4 having the interview, Iraq determines whether they're an Iraqi
5 national or not and indicates whether they will pre-approve
6 them for removal and then it's just a matter of scheduling the
7 flight which on its own can be another process because that has
8 several moving pieces. You need to work with the third country
9 through which you're flying. You need to work with the, umm,
10 embassy of Iraq to ensure that there's a delegation of Iraqis
11 available in Iraq when the removal plane lands in Iraq to
12 accept and repatriate the Iraqi nationals who are going back to
13 Iraq. There are a number of moving pieces that are somewhat
14 outside of ICE's control is it my point so it's difficult to
15 say how long any particular document would take and I think in
16 an individual case, this could be answered more concretely and
17 then more easily because we wouldn't just be saying well, you
18 know, this person might be in this round of interviews or they
19 might be in this round of interviews or they might be, you
20 know, detained at this place. We can say this person is
21 detained here, they will be able to have their interview on
22 this date. Based on that, we think that we can get them on a
23 charter flight on this date. When you have your individual,
24 you can speak in concretes like that that it's very difficult
25 to do here where we're talking about the class as a whole.

1 THE COURT: All right. So if I broke this case up
2 today from a class to individual cases and issued an order
3 saying for the people who are ready to go back, tell us when
4 the consulate interview will take place and tell us when they
5 are likely to receive travel documents. You're saying the
6 government could do that?

7 MR. DARROW: I -- I -- I mean, I think we could make
8 predictions or at least if given enough time, umm, I don't
9 think we could do that immediately for everybody in the class,
10 but I think that that would be the sort of evidence that a
11 court would be liking at in an individual habeas petition. If
12 the petitioners were making the argument that, you know, they
13 have travel documents and they're not going to be removed or
14 they don't have travel documents, that's the sort of
15 information that we would be obtaining for are individual.

16 THE COURT: Well, we've had consulate interviews for
17 at least a few months. How long does it typically take then to
18 set up a consulate interview? Once the American government
19 says we have people ready to go back, how long does it take the
20 government of Iraq to set up consulate interviews? Is it a
21 week? Is it two weeks? Is it 30 days?

22 MR. DARROW: I don't know how long it takes to set
23 up. I know we've had them pretty regularly. We've had four
24 sets of interviews and they've been spaced out a few months
25 each, I would say about three to four months they've been

1 spaced out and they've interviewed groups at a time. There's
2 another round of interviews we've set up for the beginning of
3 November. I don't know if they've been, umm, if there's one
4 set time period that's taken to schedule those interviews, but
5 again that's an estimate. If the Court wants it, I could come
6 up with, umm, I just know that the process so far has been,
7 umm, you know, we've had a few and they've been spaced out by a
8 few months and I think that that, one of the reasons there is
9 just that not some people were eligible in the beginning
10 because not a lot of had opted out of the state at that point
11 and that is a more groups come out, opt out of the stay, it,
12 you know, it's not always feasible to have an interview of just
13 one individual based on the time resources of the embassy of
14 Iraq and I mean I don't know that for a fact, but I can imagine
15 that that's why they're grouped so that you have the Iraqi
16 consulate able to interview several at once and not to just
17 make a long trip to talk to one or two people.

18 If I can note that the petitioners talked about how
19 they've been languishing in detention throughout the course of
20 these proceedings and the government doesn't deny that many of
21 them are still detained, however it notes that those who are
22 still detained, that's largely as a result of the fact they
23 couldn't establish that they were not a danger or flight risk
24 in front of an immigration Judge, an independent immigration
25 Judge based on the order that this Court already entered and on

1 a pretty favorable standard that requires that the government
2 establish by clear and convincing evidence that the person is a
3 danger or a flight risk or else they'd be released.

4 THE COURT: I thought some were given a bond, but
5 couldn't make the bond.

6 MR. DARROW: Umm, yes. I believe some also --

7 THE COURT: So those aren't people who are dangerous
8 or flight risks, is it?

9 MR. DARROW: I think the, umm, the determination of
10 bond is -- the immigration judge is, umm, in setting the bond
11 amount the immigration judge is still taking into account those
12 factors, but I think more to the point that if the alien had a
13 dispute with the grant of bond or a particular -- the size of
14 the bond, their recourse was to appeal that to the BIA and the
15 regulations allow for that, allow for BIA to consider bond
16 issues.

17 THE COURT: Well, what's the connection to the
18 Zadvydas analysis? If someone has been granted a bond, but
19 can't make it, that might mean the immigration Judge thought
20 the person was, umm, something about flight risk, that person
21 was a danger to the community, I don't think a bond would have
22 been set at all, but let's say that represents some judgment
23 about flight risk. What does that have to do with our analysis
24 here about whether someone has been in detention beyond the
25 presumptively reasonable duration of six months?

1 MR. DARROW: Well, I mean, of course the SLRFF, the
2 significant likelihood of removal analysis was not taken into
3 account in those bond hearings, but the point is that the fact
4 that they are still in detention, that's more directly
5 traceable to the fact that the immigration court has already
6 determined that matter. They've already decided, I mean, and
7 some people there is a bond --

8 THE COURT: Well, they're in detention because they
9 were picked up. That's why they're in detention; isn't that
10 right? It's not because of what some judge did or didn't do at
11 a bond hearing. The original cause for their being detained is
12 that they were arrested, right?

13 MR. DARROW: Yes, but the proximate cause, if you
14 will, is that they had an opportunity to obtain release and
15 they couldn't establish that they qualified based under the
16 very favorable standard that the Court entered.

17 THE COURT: Is there authority that says that's
18 appropriate for me to consider on a Zadvydas claim, that they
19 had an opportunity to try to make bond and for whatever reason
20 they didn't?

21 MR. DARROW: No, it doesn't directly relate to the
22 Zadvydas standard.

23 THE COURT: So why are you telling me about it?

24 MR. DARROW: Because it affects the case in a number
25 of ways. I think there's an argument to be made that their

1 continued detention is related to the determination of a third
2 party not before the Court and if they could have established
3 that they were entitled to release under the favorable
4 standard, they wouldn't be here, but I think the larger issue
5 is that this speaks to the balance of equities, that the
6 petitioners who had, who had, you know, a free and clear
7 entitlement to release, they're already out on release. A lot
8 of the ones who are still detained are still detained because
9 an immigration judge determined that they couldn't be released
10 and that speaks to the balance of equities and the public
11 interest in not releasing these people under a different theory
12 when they are a danger and likelihood of fleeing has already
13 been passed on by the immigration courts. I think we're
14 running long in time, so I'm going switch over to Mr. Silvis.

15 THE COURT: Okay, thank you.

16 MR. DARROW: Thank you.

17 MR. SILVIS: Good afternoon your Honor or good
18 morning. I just spilled a little bit. I apologize here. May
19 it please the Court, your Honor, I just wanted to note that the
20 petitioners' motion for sanctions was filed yesterday and it
21 was -- I hadn't had an opportunity to review that. I think it
22 was filed yesterday at one, the more recent motion for
23 sanctions so I've not incorporated that into the argument here
24 today. This argument here focuses on the motion for sanctions
25 that was filed before and that the government understood it

1 would be the Court, what this argument would be focused on so
2 our limited, our argument is limited to that motion. Also note
3 that the government had asked to have the witnesses present,
4 Mr. Schultz and Mr. Bernacke for the evidentiary hearing on
5 this sanctions motion and just wanted to note that the
6 petitioners had not opposed that request.

7 So I'll be moving on now to the sanctions motion that
8 was pending for consideration for the Court today. The Court
9 should deny the motion for sanctions because Schultz's and
10 Bernacke's statements were true when they made them and the
11 undisputed evidence shows that Iraq is working with the United
12 States to repatriate its class members just like Schultz and
13 Bernacke said they would. The motions, the petitioners'
14 sanction motion before the Court now deals with the
15 declarations filed by Schultz and Bernacke that were filed
16 after this Court entered its stay of removal on July 24th,
17 2017, but before this Court ruled on the first PI motion on
18 detention issues.

19 In this motion the petitioners are claiming that
20 there are certain statements made by Schultz and Bernacke were
21 false or misleading and that the Court relied on those
22 statements, denied the Zadvydas relief and as a result
23 didn't -- didn't deny Zadvydas relief I should say, postponed
24 relief on that and as a result they remained detained longer
25 than they should have. So as relief, the petitioners here are

1 seeking a release on Zadvyd as a sanction as opposed to
2 showing that claim on the merits and they are also asking for
3 costs for having to bring this motion and for discovery and et
4 cetera, so I'll note that this Court has addressed that on this
5 motion, the petitioners have the burden. They must show that
6 the conduct was intentional or reckless and amounting to fraud
7 on the Court and in borrowing language from this Court's
8 decision in Plastech Holding v. WM Greentech Automotive which
9 is 257 F. Supp. 3d 867 in the Eastern District of Michigan,
10 2017. That would amount to conduct that sets in motion some
11 unconscionable scheme calculated to interfere with the judicial
12 system's ability to adjudicate a matter by improperly influence
13 the trier of the fact or unfairly hampering the presentation of
14 the opposing partie's claims or defense. Your Honor, I'll also
15 submit that this motion falls well short of that standard that
16 this Court set for judicial fraud on the Court or anything that
17 would amount to this Court excising its inherent authority to
18 enter a sanction.

19 The motion fails because the statements made by
20 Schultz and Bernacke were truthful when they were made and to
21 the extent that any actually turned out to be inaccurate or
22 complete, there's no -- petitioners haven't made any showing
23 that they were intentional, reckless or in any way amounted to
24 fraud on the Court under the standards set forth by this Court
25 in Plastech.

1 I think looking at the individuals, going back to the
2 Court's order that was entered in January, 2017 and looking
3 back to the statements that the Court seemingly relied on by
4 stating them, you can step through each of them and you will
5 see that what the petitioners were saying -- what the witnesses
6 were saying was actually truthful and it's corroborated by
7 contemporaneous documents and subsequent evidence in this case.

8 Starting with Mr. Schultz, there is a statement and
9 referring back to the Court's order which is docket entry 191,
10 I'll paraphrase a little bit from the statements, but they
11 were, umm, the first statement the Court noted from
12 Mr. Schultz's declaration was about the recent negotiations
13 between the U.S. and Iraq leading to increased cooperation of
14 removal of Iraqi nationals and that document, it's cited
15 several places in the petitioners' motions and their response.
16 In Mr. Schultz's most recent declaration it's Exhibit number
17 one and it's ICE 0271130. That's the first page of it and it's
18 a several page readout hearing from the Department of State who
19 is the government entity who is mostly engaged on these
20 agreements with Iraq in actually setting forth the parameters
21 of those agreements and it's a several-page readout of a
22 meeting about how the agreement is to take place and how the
23 removal of 1,400 Iraqi nationals with removal orders will take
24 place and that's exactly the agreement and statement of
25 cooperation as Schultz has agreed to that he was discussing in

1 there and that's a contemporaneous document. It was, umm, it's
2 discussing a March 7th, 2017 meeting, but the e-mail I think is
3 a couple days later. Looks like March 12th, 2017 so that
4 document's in the record. It corroborates what Mr. Schultz was
5 saying what the agreement was. It sets forth certain
6 requirements that will happen and as experience shows out and
7 as the evidence plays out in this case, those are the same
8 required steps that Iraq is requiring and following for the
9 removal of the class members in this case.

10 Moving on to the second statement, there's -- the
11 Court also noted the discussion about the charter flights that
12 had been scheduled in June and July of 2017 and there's been a
13 lot of testimony about those and there's the declarations.
14 Both sides have submitted the contemporaneous e-mails that were
15 happening between that period of time about this agreement was
16 to have the charter flights and what was happening during the
17 period of time which was also the period of time when the Court
18 had entered the first TRO. That only was limited to the
19 Detroit area of operation and then was extended I guess to a
20 nationwide class and I encourage the Court to look through
21 those, look at Mr. Schultz's supplemental declaration and it's
22 to see exactly what was happening at that time and to see the
23 impact, but the purpose of offering that testimony or that
24 statement in the declaration before the Court considered the
25 first PI wasn't to blame the Court for the inability to remove

1 or that, it was to show, that was five months, about five
2 months after the Court had entered the preliminary injunction
3 and the purpose of that was to show SLRFF, to show what the
4 plan had been before the preliminary injunction came into place
5 and those contemporaneous document show a clear agreement in
6 cooperation between Iraq and the United States to get these
7 large scale charter flights off the ground. I think it's
8 undeniable when you look through those statements. It says,
9 these were really the first large charter flights that the
10 United States and Iraq had agreed to since the March, 2017
11 statement of agreement or cooperation and it's not surprising
12 that there would be details to iron out, but what you can tell
13 from those e-mails is a clear commitment and agreement that
14 these would go forward and that there would be flights that
15 could handle the removals as Mr. Bernacke and Mr. Schultz
16 actually testified about or offered testimony about. The
17 petitioners refer to this as sort of wishful thinking, but I
18 think if you look through those documents and e-mails, you can
19 tell it's more than wishful thinking. There was a commitment
20 to do so and the parties were very much working towards that
21 process.

22 There's also as part of that the charter flights that
23 were going to go later in July. It wasn't the June flight
24 there was a discussion of whether it was cancelled. It was
25 postponed initially and then it was eventually cancelled so

1 there was a June flight that was postponed and then it was
2 eventually cancelled and then when it became clear when the TRO
3 was extended to more of a nationwide and then eventually a
4 preliminary injunction that these flights wouldn't go forward
5 anymore, but so there was one flight that was cancelled there,
6 but during that period of time I mean, just show the level of
7 commitment of cooperation between the United States and the
8 government of Iraq. The consulate sent individuals out to
9 Arizona to interview the class members and now that's a
10 required step under the agreement that you have to have a
11 consular interview, but they went to Arizona and they conducted
12 interviews I believe of 80 class members as part of that, so
13 that's further evidence that this wasn't merely a hope, a faint
14 hope or just wishful thinking of the government. There's
15 actions demonstrated by those e-mails and by the actual conduct
16 of the government of Iraq to make those flights happen and
17 unfortunately it didn't happen, but again the point of offering
18 those wasn't to say when exactly they were cancelled or to
19 blame the Court for the cancellation of flights, but just to
20 demonstrate SLRFF based on the conduct of what was happening
21 between the United States and Iraq during that period of time.
22 Again, several months after the injunction had gone into play.

23 There's also a statement the Court cited in its
24 order, ECF 191, about, from Mr. Schultz, about ICE waiting
25 until there are no impediments to removal before a request a

1 travel document. And again, that was the case at the time.
2 What they're explaining at that point why the court, government
3 couldn't just at that point go forward and get travel documents
4 for everybody. Again, this was several months after the Court
5 had entered the preliminary injunction on July 24th, 2017 and
6 what they were explaining at that point is why they couldn't
7 proceed, there had been 280 travel document requests paid at
8 that point with the idea that these two charter flights were
9 going to go forward. What Mr. Schultz is explaining at that
10 point is why they couldn't just simply go forward and get all
11 of those travel documents just to show to this Court that there
12 was SLRFF at that point and what they were explaining is that
13 to do that, to push these travel documents through when there's
14 an injunction in place and they weren't sure that they would be
15 able to use those 'cause these travel documents expire within
16 six month would sort of a waste of resources and they stopped
17 pressing them after the preliminary injunction went to place.
18 And petitioners have cited later evidence that the government
19 subsequently I think several months after the Court entered the
20 preliminary injunction on detention issues, that the government
21 did in fact seek travel documents for people who still had
22 their preliminary injunction attached to them or they were
23 still covered by the preliminary injunction, but that was a
24 totally different scenario months later and those were people
25 who the government believed or had reason to believe that the

1 preliminary injunction might no longer be covering them before
2 that travel document expired, so I think it's been cited as
3 some reason that the government would not pursue travel
4 documents with someone covered by the injunction and we've
5 explained truthfully why they weren't doing it at the time and
6 that's what Schultz's testimony was offered to show, but the
7 fact that they later changed that practice when it became clear
8 some people at least would no longer be covered by this Court's
9 preliminary injunction, then they went forward and then pushed
10 some of those travel documents there as well.

11 There's also a statement that Mr. Schultz said that
12 this Court cites about ICE believing that Iraq will continue to
13 issue travel documents for all Iraqis with final orders and
14 Schultz's statement again is based on that statement of
15 cooperation where it listed that they would receive 1,400 Iraqi
16 nationals or Iraqi nationals with deportation orders, his
17 statement is based on that, but petitioners point out two parts
18 and say in an attempt to argue that that's not true or sort of
19 undermine that statement. They state that there's 280 travel
20 documents that ICE had tried to get for the June and July
21 charter flights, but they stop, but they ultimately weren't
22 able to get and what the government's response to that is after
23 that point when it was clear that those charters weren't going
24 forward and that any travel document that they got would likely
25 expire before it was able to use, they stopped pursuing them.

1 So a travel document request isn't something you put in and
2 it's automatically granted. It does take, the consular review
3 step is a necessary step and then there's no really point in
4 issuing one or pursuing a travel document that you're not going
5 to be able to use. So the point that the government at some
6 point before had put in 280 travel document requests, but they
7 weren't granted doesn't mean that they were denied, it means
8 that ICE stopped pursuing them once it was clear they weren't
9 going to be able to use them.

10 Similarly, there's petitioners make a point about
11 these 24 travel document requests that were denied and they
12 said this was, those travel document requests were entirely
13 covered by the 280 that had been requested before that had been
14 requested as part of the charter flights and then they were
15 denied. I think the point that they're not making exactly
16 clear on that is that it's the same people. They are not the
17 same chart -- they're not the same travel document request,
18 they cover the same individuals, but as Mr. Schultz sets forth
19 in his updated declaration or more recent declaration, from
20 what we could tell from what ICE was able to determine, those
21 were travel document requests that were made years before the
22 2017 agreement with Iraq. They weren't part of the ones that
23 ICE was pursuing as part of the removals of this class and also
24 some them look like they were sent to different consulates and
25 not sent as part of this request. So, you know, it doesn't

1 undermine at all the fact -- the fact that those were denied
2 doesn't undermine the fact that his statement, Schultz's
3 statement at all that Iraq -- that ICE is confident that Iraq
4 will ultimately issue all the travel documents. As it has been
5 shown, the only travel documents to date that have been denied
6 that ICE is pursuing are travel documents where the individual
7 turns out not to be Iraqi. They turned out after a consular
8 interview there are circumstances where someone turns out to be
9 a different nationality and that conflicts with what's in the
10 removal papers, but those are the only ones Iraq has not
11 provided when ICE has asked for them, so that's why he stands
12 by that statement as true.

13 Turning to the Bernacke's declaration, there were a
14 couple of statements that were cited as well by this Court's
15 opinion. The first statement is about that the agreement is
16 not memorialized, but it's a product of ongoing diplomatic
17 negotiation. That's simply a statement he's explaining that
18 there's not a memorandum of understanding, there's not a
19 repatriation agreement in the formal sense, there's just this
20 agreement, there's the statement of cooperation and then
21 there's the subsequent fine-tuning or working out the processes
22 with Iraq. So there is the statement that's written, but what
23 Mr. Bernacke's saying is that it's not, like some countries
24 will have a repatriation agreement. Some countries will have a
25 memorandum of understanding. That's not what the U.S. has with

1 Iraq at this point, but what he's explaining is that these are
2 worked out through negotiation as issues come up and, I mean,
3 this is really still at the time and still a fairly new process
4 since the statement of cooperation and they're still ironing
5 out the details, but the results are there. I mean, if you
6 look at the requests made and Iraq is issuing the travel
7 documents to those people found to be Iraqi citizens,
8 nationals.

9 There's also a statement in Mr. Bernacke's
10 declaration about that the agreement has no numerical
11 limitations on the number of removals in total or on an annual
12 basis and again you point back to the statement of cooperation.
13 There's no limitation in there at all and there's no limitation
14 to anyone and the petitioners have speculated that there could
15 be one, but we haven't seen anything indicating that there is
16 one or that any travel document request has been denied because
17 or repatriation has been denied for anyone because Iraq is at
18 their limit. I turned back to the statement of cooperation
19 where they said they would take back all 1,400 and there's been
20 no evidence so far that there's any limitation on that or if
21 there is a limitation, that ICE has gotten anywhere to meeting
22 that.

23 THE COURT: You mean a numerical limitation?

24 MR. SILVIS: Right. I mean, all Bernacke said --

25 THE COURT: There is evidence that Iraq won't take

1 back people who will not voluntarily agree. Isn't there some
2 evidence in the record to effect?

3 MR. SILVIS: Well, it's not in the statement of
4 cooperation. There's other statements from ambassadors and
5 other officials with concerns. There's a lot of evidence that
6 the petitioners are offering about countries that are having
7 trouble with the forced repatriation or asylum seekers, but
8 that hasn't been -- it's proven not to be true for this class.
9 They are taking back people regardless of whether they
10 volunteer or not. Part of this I think stems in there's a new
11 process in place about submitting a cover letter with a request
12 for travel documents that explain very clearly to the
13 government of Iraq that this individual is done with their
14 proceedings in the United States, they don't have an open
15 asylum claims, they're not legal residents and they don't have
16 any, you know, pending claims here that could be adjudicated.
17 I think that's very much part of the concern that was expressed
18 in those e-mails because and the reason why you know that
19 that's the case is because when we've been submitting those
20 cover letters as part of this new procedure, the travel
21 documents are being granted and there's no concern whether --
22 to our knowledge they're not even asking whether people are
23 volunteers or not and I think the Iraqi government is just
24 looking for some assurance that we're not removing people who
25 still have open immigration-related claims, but your Honor's

1 correct. The statement Bernacke made in his declaration that
2 the Court had cited was about numerical limitations and there
3 was no indication that there were any numerical limitations in
4 the agreement with Iraq.

5 The third point which I think is one that the
6 petitioners focused I think the most attention on is the
7 charter missions and that the statement that Mr. Bernacke made
8 that formal travel documents are not required for the charter
9 missions. Your Honor, this issue is really a red herring. At
10 the point that he provided his statement he was under the
11 impression that ICE would be proceeding under that, under this
12 model that has been used with other countries before including
13 Mexico where you can submit, umm, I don't even know if a travel
14 document request is required or what paperwork is required for
15 these countries as it hasn't been related to the record of this
16 case, but that a formal -- that that would not have been
17 required in this case because the April of 2017 charter that
18 went forward successfully, initially that was going to be a
19 charter flight that did not require travel documents, but I
20 think on the eve, I think the evening before the travel that
21 flight actually took off, the travel documents were issued so
22 and the government says it's a red herring because if a
23 charter -- whether a charter flight takes off with travel
24 documents or on a manifest -- or based on a flight manifest,
25 there's no material difference if it leaves on the same date.

1 I think he what under the impression at the time and notes that
2 in his updated declaration that was a difference of opinion on
3 how that flight was actually going to go forward, but if the
4 agreement to Iraq is to provide the travel documents before the
5 flight takes off to the consular interview, is essentially the
6 same thing because even before a manifest flight would go on
7 manifest, the agreement calls for some sort of consular
8 interview with the Iraqi national so there really is no
9 functional difference between that and both Bernacke and
10 Schultz try to explain why there was that misunderstanding,
11 but --

12 THE COURT: Can you give me a little better
13 background on a manifest? Is that a document that is just
14 created by the American side as opposed to anything coming from
15 the Iraqi side?

16 MR. SILVIS: That's my understanding, your Honor. It
17 would be pretty much the same situ -- same you would be telling
18 them, you're providing -- I don't even know if it's a true
19 flight manifest that you might see on a commercial airline, but
20 what you're telling them is here are the individuals who are
21 coming on the flight, you're getting approval for that, these
22 individuals and instead of actually having the travel document
23 in hand, you've gotten sort of the pre-approval to land without
24 one. So you couldn't use that on a commercial flight and that
25 would be limited to a charter flight because a commercial

1 flight's still going to require a travel document, but if
2 there's agreement --

3 THE COURT: When you say pre-approval, I'm not
4 understanding. If it's a document created by the American
5 government, where is the approval on the side from Iraq?

6 MR. SILVIS: Yes, I understand your question, your
7 Honor. You would be sending that manifest ahead of time
8 telling the Iraqi government who's on the flight and then they
9 would be saying yes, okay, that's fine, they can come based on
10 that.

11 THE COURT: All right. So they somehow sign off on
12 that, whether it's on that document itself or another document
13 saying it's all right for these folks to be sent to Iraq and
14 we'll accept them; is that right?

15 MR. SILVIS: Right and it's hard to know exactly how
16 that would have worked out in this case because it didn't
17 actually occur and Mr. Bernacke was under the mistaken
18 impression that that was the model that they were going to
19 follow. I guess I can't even say mistaken impression because
20 again the flight never went forward. I mean, he was
21 actually -- that was his understanding of what the plan would
22 have been, but Schultz clarified that the expectation at ICE
23 after the memorandum of understanding that travel documents
24 would be issued for all of these flights, but again the
25 government's point is that this is a red herring because if

1 prompt travel document requests are offered for a flight at the
2 same time a flight would have gone forward on a manifest,
3 there's really no functional difference between the two.

4 THE COURT: And in the case of travel documents in
5 the form of let's say passports, one-time passports, are those
6 issued by the government of Iraq directly to the deportees or
7 are those travel documents that are sent to the American
8 government for use by the deportees once they board the plane?

9 MR. SILVIS: For class members in this case?

10 THE COURT: Yes.

11 MR. SILVIS: So and we've been providing that as
12 pursuant to the Court's order to the petitioners, but in this
13 case those travel documents are provided directly to ICE
14 officials and the travel documents are held until the flight is
15 ready. I mean, the process has changed at various times with
16 different countries. Sometimes the travel documents are sent
17 back to the fields and then the field actually is in charge of
18 scheduling a flight and making it happen and, but in this case
19 I think they're all held by ICE in Washington until the
20 flight's ready and then they're distributed out, but yeah,
21 they're delivered directly to the government and then for the
22 detainees -- for the class members here. I'm not saying that
23 that would happen in every case. I think outside of it perhaps
24 a travel document would be sent to an individual, I'm not sure.
25 I believe it's always something that's sent directly to ICE.

1 In this case it's sent to ICE in Washington, D.C. In other
2 cases those travel documents with other countries might be sent
3 directly to, umm, the field, but Iraqi's headquarters the only
4 country where the headquarters in D.C. is one whose
5 coordinating all of these travel document requests so I believe
6 that they would all to go D.C. first before they're
7 distributed.

8 I wanted to point out, too, there was a specific
9 document that Ms. Schlanger mentioned in the opening about
10 Mr. Bernacke and it's sort of the allegation there is that this
11 document shows that he, you know, his testimony is untruthful
12 and that the very briefing documents he's providing show the
13 exact opposite. It's Exhibit 26 to Schultz's updated
14 declaration and what this is is it's, the Court can have an
15 opportunity to look at it, is a briefing memo for a January
16 9th, 2018 meeting between officials with the Iraqi embassy
17 regarding the litigation volunteers and it seems to be their
18 claim or the argument is that in some way demonstrating that
19 Mr. Bernacke's testimony is false is that somewhere in that
20 document it says specifically that the June -- that these June
21 charter flights why cancelled before the Court entered that
22 preliminary injunction and the TROs and if the Court looks at
23 that document, it doesn't say any such thing or at least the
24 government doesn't see where it says that anywhere. It says
25 ERO was notified on June 21st, 2017 that Iraq would not accept

1 the charter scheduled to arrive on June 29th, 2017, but and
2 that's it. I mean, it's just sort of a brief summary of what
3 had been happening to date in the case between Iraq. So, you
4 know, about three or four paragraph summary sort of as meeting
5 a briefing prep, but if the Court and we've already submitted,
6 both sides have actually submitted the full story there with
7 the documents between Iraq and the United States on what was
8 happening with those charter flights that I was discussing
9 earlier and it's clear that that doesn't -- first of all it
10 doesn't say that the flight was cancelled, it just, it's sort
11 of the very first step there and we both, both sides know that
12 there were a lot more conversations back and forth and e-mail
13 communications about trying to salvage and keep that June 28th
14 flight and that there were more, umm, that it was actually
15 postponed and not cancelled until much later, until July and
16 also to the extent that they're saying, they're sort of
17 pointing to evidence about Mr. Bernacke's lack of truthfulness
18 because that's the document he's relying on, a closer
19 inspection of his most recent declaration says, he said that
20 he's reviewed briefing documents, but it also says he talked to
21 other officials who were involved in the repatriation process
22 to get him up to speed so I think that just goes to show that
23 there's a little bit of picking and choosing evidence to try to
24 demonstrate, you know, the lack of truthfulness in a way to
25 somehow show that as a litigation sanction the Court should

1 grant the Zadvydas relief that they otherwise can't show on
2 their motion, on their PI motion.

3 There's also a bit of testimony that was discussed
4 earlier about the visa sanctions issue. This is addressed in,
5 umm, I know I'm getting close on time if I have haven't gone
6 over so if you'll allow me a couple of minutes on these last
7 points. There's a bit of testimony about visa sanctions and
8 that this in some way shows that the government was being
9 untruthful because at the same time we're saying this agreement
10 is moving forward, there's this packet of visa sanctions and
11 this is discussed in Mr., in our opposition to the motion for
12 sanctions, but also in the updated declaration of Mr. Schultz,
13 but this was an exercise that is conducted, I think it's a
14 couple times a year for countries that you would consider for
15 sanctions, but that it was never presented for Iraq and, you
16 know, in many ways I don't see how that would be surprising
17 that that country would still be at least considered based on
18 the fact that this was just after the agreement came forward,
19 so I would point the Court to that and that it in no way
20 underlines the agreement that was in place at the time.

21 I spoke briefly about this and this is just the last
22 point about the volunteers because the Court asked a question
23 about that. The issue of volunteers is nowhere in the
24 agreement. The government, U.S. government's moving forward on
25 the idea that that's not part of it, that that was not a

1 limitation and is proven not to be when the actual removals
2 have gone forward and we've gotten travel documents regardless
3 of whether people opted to be a volunteer or not so it's
4 really -- that's why we say it's not part of the agreement,
5 it's not going to be a limitation in any way for the
6 repatriation of this class.

7 Because the petitioners failed to show that any of
8 the statements were intentionally false or misleading or
9 reckless, they have not met their burden of showing fraud on
10 the court so we would respectfully ask the Court to deny the
11 sanctions motion.

12 THE COURT: Okay, thank you. We're going to take a
13 break at this point and we'll get back together at 10 minutes
14 to 12.

15 THE CLERK OF THE COURT: All rise. Court is in
16 recess.

17 (Recess taken at 11:26 a.m.)

18 (Reconvened at 11:59 a.m.)

19 THE CLERK OF THE COURT: All rise. Court is now back
20 in session. Please be seated.

21 THE COURT: All right. We're going to have the
22 second round. Who's going to argue for petitioners?

23 MS. SCHLANGER: Thank you, your Honor. I have a
24 couple points about Zadvydas and a couple of points about the
25 sanctions motion, so let me start with the sanctions motion.

1 Something that Mr. Silvis said really struck me. He said that
2 both sides have submitted the full story. That's really
3 interesting because I agree that we've submitted the full story
4 and the government at this point has conceded a fair amount of
5 the story that we've submitted. What is important is that at
6 the time that the challenged declarations were put into
7 evidence, they did not tell the full story and I think the fact
8 that the government itself says all this context is necessary
9 to understand what they were getting at demonstrates the
10 misleading nature of those declarations which did not tell a
11 complex story, but a very simple one; this Court stopped
12 deportations that would have happened. Again, Mr. Silvis said
13 that the statement of cooperation was as he said it, an e-mail
14 from the State Department to the government. ICE never saw it,
15 so I think that the story, the true story is much less
16 contested at this point, but the crucial point for sanctions is
17 that that's because petitioners got discovery because we
18 produced the documents to you, we showed you what they meant
19 and then with their feet held to the fire like that, ICE had to
20 concede it, but they didn't do it when they had sole possession
21 of the evidence. Instead, they told you a misleading account.

22 One other point. The government said that we did not
23 oppose taking evidence from Mr. Schultz and Mr. Bernacke and
24 there was a moment when we said yep, we'd be prepared to go
25 forward with an evidentiary hearing if it's limited to the

1 period of time that we've gotten an appropriate discovery on
2 which was up through about June and the government insisted
3 that if there was going to be an evidentiary hearing, that it
4 had to, had to, had to include the summer and fall and that we
5 opposed and very strenuously and we think you quite properly
6 said that there was no way to do that in a way that was fair
7 and so the absence of an evidentiary hearing was entirely on
8 the government because they didn't produce all of that
9 evidence. So those are my two points about sanctions.

10 A couple points about Zadvydas. The first one is
11 that I think that Mr. Barrow's (sic) recitation of the current
12 state of affairs essentially concedes the Zadvydas point. He
13 said it would be difficult to establish a timeline even for the
14 individuals who are done with their immigration cases, have
15 travel documents and have no stay of removal, even for them it
16 would be difficult to establish a timeline and the table that
17 he pointed to which was in my declaration, in my sixth
18 declaration and it's Table A is people in that category.
19 They're done with their immigration cases, they have a travel
20 document, umm, well, except one that got declined and two that
21 got approved, but not issued, but they have no stay of removal
22 and if you look at that table and I want to be clear, Table A
23 does not relate in a completely straight forward way to table B
24 because Table B is class members and Table A is primary class
25 members in certain circumstance and some of them have

1 individual habeas petitions which means they're not in the
2 Zadvydas sub-class. Nonetheless, these 19'ish people as you
3 can see from them, we've got one guy whose stay was lifted 298
4 days before this document was signed. Travel document was
5 obtained 126 days before this declaration was signed. Now of
6 course it's more and still the government cannot commit to a
7 timetable. These are the folks who they say they've been
8 prioritizing, trying really hard to get them through the
9 process. Some of them now have scheduled removal dates and the
10 government tells us right now that, I wasn't sure if it was all
11 or nearly all have scheduled removal dates, but you can see on
12 this very chart if you looked that the scheduled removal dates
13 previously have come and gone without removal. There's a guy
14 scheduled to be removed on August 13th, still in detention as
15 of the date of this declaration. There's another guy scheduled
16 for removal on September 10th. Another one scheduled for July
17 31st. The scheduled removal date which is all that the
18 government was willing to commit to at this point is that it's
19 scheduled, so like scheduled is very nice, but what Zadvydas
20 requires is that they be removed or released, not scheduled or
21 released.

22 If, if in the end the government is able to remove
23 these folks, then the relief that we're asking for will not
24 come into play. They will be removed rather than released, but
25 if it turns out as we have every reason to predict that they're

1 not able to remove them, then push has come to shove and it is
2 time to get them out of detention.

3 So you asked a bunch of questions that, about the
4 folks who were still in pro -- I'm sorry, the folks who were
5 all done, who were all done with their process and so I want to
6 just request that if you're inclined to slice the relief, if
7 you find for us and you're inclined to slice the relief that
8 way, folks who are still in process, folks who are not still in
9 process, that you remember that that's not quite the same as
10 final order of removal because of course somebody can have a
11 time order and be pursuing their MTR, so we've got the folks
12 who are all done and as to them, there may or may not, for some
13 of them there's no stay standing in their way. For some of
14 them, the stay remains. That said, there is -- the government
15 has not pursued that process vigorously at all. It worked with
16 us and we did a JSI and you did an order about how they were
17 supposed to go forward on that and they haven't actually
18 pursued it.

19 We think that the right answer is to give them --
20 well, I'm sorry. We think that the right answer is the -- we
21 like the relief as we've proposed it in our papers, but if
22 you're inclined to say for people who are all the way done with
23 their immigration cases I want a date certain, give them a date
24 certain. Make it 30 days from the issuance of their order and
25 if they can remove them, they can remove them. If they can't

1 remove them, let them out.

2 Okay, a couple of other small points and then I'm,
3 I'm done. The government spends a while talking, spends a
4 little while talking when during argument about this idea of
5 basically preventive detention, that individuals who are
6 dangerous should not get Zadvydas relief because they're
7 dangerous and, umm, A, this is wrong on the law, the Court made
8 that very clear, the Supreme Court in Demore and in Zavydas
9 itself and B, there's a stipulated order in this case where we
10 had some evidence about how past crimes, particularly long past
11 crimes are not a good indicator of current danger and kind of
12 how that all works and the government wanted, the government
13 conceded that they weren't going to challenge that issue
14 because they said it was irrelevant to the Zadvydas
15 determination and so we stipulated to the withdrawal of that,
16 umm, of that evidence or to not using it at an evidentiary
17 hearing because it was concededly not relevant and then my
18 final point, nobody, not one person has been through the
19 current process.

20 The government's vision of what has happened in the
21 past is not entirely complete. In January and in March in
22 particular, Iraq turned down class members because they were
23 not voluntary. In January and March, not in a mass
24 deportation, but onesie twosie they turned some down so it is
25 not the case that Iraq has not turned anybody down, so that's

1 one thing. So that was the past process and it was not, it did
2 not lead to repatriations for everybody. The current process
3 seems to be although we haven't done discovery and we don't
4 entirely understand it, but the current process seems to be
5 that Iraq is denying travel documents until there's a flight
6 itinerary and then perhaps because we haven't seen it yet when
7 there's an itinerary, they will come through and perhaps they
8 will issue those travel documents and perhaps that flight will
9 take off. We have not seen it. Nobody has been through that
10 process.

11 Iraq interviewed a number of people in early
12 September and on every one of them, what they said was we are
13 not going to approve this travel document yet. Now they didn't
14 turn it down all together, I'm not trying to say that they did,
15 but there is a process where not -- the government calls this
16 pre-approval. I don't know what pre-approval is. We've not
17 seen it. We've not seen documents. We've not deposed anybody.
18 We don't really understand it. Whatever it is, it's not travel
19 documents. Those people are not ready to fly. Maybe they will
20 be ready to fly; maybe they won't be ready to fly. We don't
21 know. Nobody has been through the current process and so when
22 the government says it's all working, that's why I say that
23 that is hope rather than evidence.

24 THE COURT: All right. With respect to the people
25 who have gone back or who are in a process to send them back,

1 those were all people who I've lifted the stay for? Is that
2 right?

3 MS. SCHLANGER: For class members, yes, your Honor,
4 except for one, Muneer Subaihani who got sent in violation of
5 your order.

6 THE COURT: Right.

7 MS. SCHLANGER: So with that one exception, now when
8 you say process though, that's not quite right. The travel
9 document process, the government has been pursuing it
10 vigorously including for people for whom you've not lifted the
11 stay so they've been take as the cutoff it seems just based on
12 who's been going to the consular interviews, they've been
13 taking people who have technically final orders. Some of those
14 people are brand new in detention. They haven't even gotten
15 their documents yet, their A files and so on. They haven't
16 filed MTRs. They are quite likely to file MTRs and then they
17 won't have final order anymore probably, right? So they're not
18 all people who have been through, but the people for whom -- so
19 the consular interview and the travel document process has been
20 applied to anybody who has a final order and the result if you
21 look at Table B in my most recent declaration --

22 THE COURT: The most recent is the fifth declaration?

23 MS. SCHLANGER: Sixth actually, your Honor. It's
24 with the reply, October 12.

25 THE COURT: All right, hold on one second.

1 (Pause)

2 THE COURT: Okay. Which table now?

3 MS. SCHLANGER: Table B. It's on the last page of
4 the declaration.

5 THE COURT: Okay.

6 MS. SCHLANGER: So this shows the procedural
7 progress, the stay situation and the travel document progress
8 status for the entire class. That's what this is and so what
9 you can see is that like for example in row two, there's a guy
10 who hasn't yet filed his MTR, but it's still timely and his
11 travel document process is approved, but not issued, right? So
12 that's that pre-approval. Then there's, umm, there's a few
13 with MTRs pending who are approved, not issued. There's two
14 with merits pending where it says interview pending. That's
15 what the government tells us. I don't entirely understand that
16 because I thought that Iraq wouldn't interview anybody who has
17 a pending merits case. Are we on the same document? Yeah,
18 okay, and five who are issued. So if you have five people with
19 pending merits cases who have travel documents, how did that
20 happen? Well, it happened because what ICE did was it got them
21 a consular interview prior to their MTR getting granted and
22 then since then their MTR has been granted so now they have
23 pending merits cases. So they're running this process for
24 people, anybody who has a technically final order without
25 regards to respect to whether they're done in the terms of this

1 case, but they are focusing I will say in it on the people who
2 are done -- they're focusing more on the people who are done in
3 this case and they've been doing that for longer so the people
4 who are done is the bulk of it and that's the last, you know,
5 six, seven lines, so this kind of explains where everybody is.

6 The consular interviews, I mean, there have been
7 consular interviews since May. There haven't been every three
8 or four months. I don't know if that's what colleague from ICE
9 meant to say, but they've been about every month since May.
10 There have been a few sets of them and they've been about every
11 month since May; late May, June, July, I think there were some
12 in August and there were definitely a couple in September, a
13 bunch in September. So they've been happening and those
14 consular interviews the government says have been leading to
15 travel documents and super duper cooperation, well, then it's
16 time to -- if those people are deportable and some of them are
17 all the way done here, quite a lot of them, all the ones in
18 rows eight -- rows 10 through 16, they're all done here, then
19 they can be deported and if they can't be deported, then what
20 are they doing in detention?

21 Your Honor, I neglected to give you the docket number
22 on the Nakamura stipulated order which is 407, sorry about
23 that. You seemed very interested in the numbers and I love
24 talking about the numbers so I want to just make sure if you
25 have any other questions about that, that I can address those.

1 THE COURT: Not right now.

2 MS. SCHLANGER: Okay. Thank you, your Honor.

3 THE COURT: Okay, all right. That's it for the
4 petitioners' side round two?

5 MS. SCHLANGER: Yes, it is.

6 THE COURT: All right. Anything further from the
7 government?

8 MR. DARROW: Thank you, your Honor. I'll address a
9 few factual points pretty briefly and then Mr. Silvis will
10 finish up if that's all right. Just to start with the last
11 point that opposing counsel made, our -- the evidence that we
12 received that I was informed that we've had four rounds of
13 consular interviews since May of 2018 so it's possible that
14 those rounds are broken down into more discrete sets of
15 interviews, but the information I have is that there were four
16 rounds that have been conducted since May of this year.

17 The -- it is news to us that people have, that any
18 significant number of people have been denied travel documents
19 based on refusal to sign the voluntary consent form. If you
20 look at the updated Bernacke declaration attached to our
21 opposition to the Zadvydas motion, paragraphs 15 and 18 address
22 that. In paragraph 15, Mr. Bernacke discusses how the six
23 people at that time who refused to sign the voluntary consent
24 form, ICE followed up with Iraq and was still able to obtain
25 travel documents for those people and then paragraph 18 talks

1 about how there are only four people to ICE's knowledge who ICE
2 believes to be Iraqi for whom Iraq thus far has not yet given a
3 travel document. One is not a class member, that's Mr. Al
4 Shakarchi who as I said before we believe absconded. Two have
5 had their motions to reopen granted so ICE is not pursuing the
6 travel documents at this point and the last is Mr. George
7 Arthur for whom there is a significant, umm, he wasn't able --
8 there's a lack of evidence as to what country he really belongs
9 to, but that is it according to ICE's knowledge, just those
10 four people and that includes the realm of people who refused
11 to sign the voluntary consent form. As I mentioned before, 15
12 travel documents have been issued for people who signed the
13 voluntary consent form and now to our knowledge Iraq isn't even
14 asking about voluntary consent because it's not using the form
15 at the interviews.

16 The pre-approval issue, that is not a question about
17 the removability of the individual who's being interviewed,
18 that is a logistical issue that has arisen with Iraq because
19 they need to ensure that they have delegation at the airport to
20 receive the Iraqis when their removal flight actually happens
21 and the connection from the third country is made and the
22 pre-approval just means we're going to give you a travel
23 document, we just wanted to see your itinerary to make sure we
24 can coordinate it with our people and finally, I would just
25 like to emphasize the limited number of people that we're

1 talking about here when petitioners say that there's this pool
2 of people whom ICE could be removing and it simply has been
3 unable to. That chart on Table A that we were talking about
4 before that lists 18 people, of those 18 people, all but five
5 have now been removed or have removal dates scheduled within
6 the next five weeks leading up to the final week in November.
7 We're talking about a very small number of class members, there
8 are just five and as petitioners sort of noted in going through
9 their Table B chart which talked about the general breakdown of
10 the overall Zadvydas class members, more than half of those,
11 your Honor, 54 have had their removal orders reopened and so
12 they no longer have final removal orders and as we've argued
13 before, but just I think the Supreme Court's recent opinion in
14 Jennings reiterates that the scope of detention under Section
15 26, be it Section 1226(a) or Section 1226(c) only extends
16 pending a determination on whether the individual's to be
17 removed from the United States and Section 1226(a) of course
18 there's a regulation that allows an initial bond hearing, but
19 the Supreme Court in Jennings was pretty clear that there are
20 no other implicit limitations that can be read into either
21 Section 1226(a) or Section 1226(c) which reading a significant
22 likelihood of removal limitation into would be a violation of.
23 And I think that that is, that is the conclusion of my point.
24 I'll yield to Mr. Silvis.

25 THE COURT: Before you step away, Ms. Schlanger's

1 Table B in her sixth declaration, I'm adding up looks like 42
2 are done the way she characterizes it in rows 10 through 16 if
3 you add those up, I think.

4 MR. DARROW: Yes.

5 THE COURT: So of those 42, how many have now
6 actually gone back? Any of those?

7 MR. DARROW: There have been -- I'm not sure which
8 particular those, aliens those numbers speak to although the
9 stay's only been lifted for, it looks according to this chart
10 for 12 of those people so we would only have, I'd imagine we
11 only would have sought to remove the 12 for whom the stay has
12 been lifted.

13 THE COURT: Are those folks back in Iraq, those 12?

14 MR. DARROW: I don't know which, which 12 of that
15 number -- well, the one who's been approved and not issued, I
16 know that whoever has been approved and not issued or at least
17 I'm fairly certain that since that that's the most recent
18 process after the September round -- excuse me, the most recent
19 round of interviews in October, that that person has probably
20 not likely been removed, but the others with the issue date, to
21 the extent that they correspond to the Table A chart, I'm not
22 sure which people are there, but some of them to the extent
23 that those eight are part of the people, the 18 listed in Table
24 A, some have been removed and others are, most others are
25 scheduled for removal soon.

1 THE COURT: Okay, thank you.

2 MR. DARROW: And actually and one last point, I just
3 remembered something. Petitioners seem to criticize the
4 government for attempting to obtain travel documents for people
5 who then had their cases reopened. I don't think the
6 government should be criticized for trying to move
7 expeditiously on everybody who we think at any given time is
8 removable and if, you know, the motion's granted and their case
9 is reopened, then they can't be removed of course, but I think
10 that shows that ICE is trying, is using the available resources
11 and trying to work on the petitioners it thinks it can remove
12 quickest.

13 THE COURT: All right, thank you. Mr. Silvis?

14 MR. SILVIS: Thank you, your Honor. Just briefly, a
15 couple points. Ms. Schlanger in her rebuttal remarks
16 mentioned, drew further questions or tried to question whether
17 this statement of cooperation was something that, characterizes
18 the e-mail and asked whether it was something that ICE had even
19 seen, so I would just direct the Court to the exhibits that
20 were submitted in support of Mr. Schultz's most recent
21 declaration which is tab one and it's ICE 027119 which is the,
22 sort of the e-mail chain where it's with the, umm, where this
23 readout from the meeting on March 12th, 2017 is sort of
24 forwarded and Mr. Schultz's comments on that e-mail are I
25 quote, "huge possible --" let me strike that. Our quote

1 "possible huge breakthrough in Iraq," end quote. So it's
2 pretty clear from the record that he actually saw it and that I
3 saw it.

4 There's also some comments about a statement I made
5 about the full record on the June and July flights and it's
6 comments seem to be directed at the fact that ICE, that the
7 petitioners didn't have the full record and that only after the
8 full record came through, you know, they were able -- they
9 brought this motion, but the point there is that the full
10 record supports what Bernacke and Schultz were saying at the
11 time as true. So whether the documents were produced later or
12 whether the documents were produced contemporaneously with the
13 statements that were made before there was discovery back in
14 November and December of 2017, the same conclusion is true. It
15 supports exactly what they were saying about the flights and it
16 shows, that full record shows the efforts of the United States
17 and Iraq to work on these charter flights that never actually
18 went forward, but they were definitely in stages of working
19 together to make those happen.

20 One point about the, there's been a couple statements
21 by petitioners' counsel about the process, that there's some
22 individual class members who, whose proceedings are done and
23 that the government hasn't moved to set aside the preliminary
24 injunction for them and as Court might even remember and the
25 petitioners I'm certain remember there was a process that we

1 hashed out at one the status conferences for how that would be
2 done and the government had actually suggested a much more
3 streamlined process and the petitioners wanted one that
4 required the government to notify, you know, several steps of
5 notification that would take a lot of time so I think it's a
6 bit disingenuous to say that it's the government's the reason
7 that we haven't moved forward on these. The government does
8 have to start that process, but the government wanted a much
9 more streamlined process and now this is a several-step thing.

10 There also any individual whose immigration
11 procedures are done always has the opportunity to voluntarily
12 opt out at that point. If they're still detained and they've
13 lost their proceedings, they're not -- they don't need to wait
14 for the government to opt out. We've had several people in the
15 past whose attorneys, whose immigration attorneys have gone and
16 opted out on their own of the preliminary injunction, so it's a
17 bit disingenuous to say this is all on the government. People
18 can do that. They can do it by themselves. Their immigration
19 attorneys can also opt out of it, so the procedure we set
20 forward isn't the only procedure for doing so and I'll also
21 note, I think your order, I think it's ECF number 87 says that
22 by stipulated order of any of these events that the PI could be
23 lifted so we have developed a procedure for that, but if the
24 petitioners came forward with people that they wanted the PI
25 lifted because they were done with their proceedings, we'd be

1 happy to entertain that with them as well. We know there's a
2 procedure in place for how it will happen for maybe where
3 there's no agreement, but if there's anyone that they identify
4 who wants out of the preliminary injunction because, you know,
5 they're proceedings are over and they no longer want to be
6 detained, we're happy to do that and we wanted a much more
7 streamline procedure and frankly with everything going on, we
8 haven't been able to go through the longer one for most of
9 these, but we're happy to do anything, but the idea that
10 anyone's waiting on the government and that there's no other
11 way to have their preliminary injunction lifted is just, that's
12 just not accurate.

13 Finally, we would just ask for a couple things
14 related to some of the exhibits that have been offered for this
15 hearing. First, there's a chron that's been offered,
16 chronology that's been offered for the preliminary injunction
17 and for and there's also a supplement that was offered as a
18 reply and the chronology is not, it's not just a compilation of
19 documents. What it is, it's sort of a chronology of things
20 that have happened and then there's documents attached to it
21 and these are all as an Exhibit, this is not in the body of
22 brief and the chronology, it's not just simply a list of what
23 all the document are. There's counsel's argument and counsel's
24 characterization of the facts of that so to the extent the
25 Court is going to consider, we don't -- the government doesn't

1 have any objection to the Court considering underlying
2 documents, but to the extent that the Court reviews the chron,
3 we would just ask that the commentary about that not be
4 considered because that really should have been in the body of
5 the brief. That is just sort of circumventing any page limits
6 or the local rules on how briefs are put together, but that's
7 really the chronology that they've offered is more a part of a
8 statement of facts than it is a true exhibit and we'd ask the
9 Court just not to consider any of the commentary in the
10 chronology or the supplement.

11 And finally there was an expert report that was
12 offered for the first time in respond -- in the supply brief in
13 support of the preliminary injunction. That expert reports has
14 to do I think for heads from released detention and that was
15 not an issue, umm, to my knowledge and anyone can correct me if
16 I'm wrong, that we made a point in our opposition brief so that
17 should not be considered for the first time in the reply.

18 THE COURT: All right. Anything else?

19 MR. SILVIS: That's it, your Honor. Thank you.

20 THE COURT: All right. I do want to meet with the
21 attorneys back in my jury room. Did you have anything else,
22 Ms. Schlanger?

23 MS. SCHLANGER: If, if you'll humor me, I do have a
24 very brief couple of things.

25 THE COURT: Go ahead.

1 MS. SCHLANGER: Thank you. I misspoke when I said
2 that ICE didn't see it. I meant to say that Iraq didn't see
3 the cable in question so forgive me. I didn't mean to question
4 ICE seeing it, I'm quite sure they did so that was one point.

5 Another point is that we know from the government's
6 own evidence that everybody for whom they sought a travel
7 document in January and March of 2018 who did not volunteer,
8 all of them were denied. Now some of them, they're no longer
9 seeking travel documents for, but everybody who didn't
10 volunteer in January and March which was, you know, while they
11 were doing that, everybody got denied and I don't think the
12 government contests that. We know that from their own
13 evidence. Number three is Mr. Al Shakarchi who didn't abscond,
14 he self-deported so he's not at large in the United States,
15 he's in Canada.

16 Number four, out of the folks who are identified as
17 having no stay and travel documents and have they been removed,
18 the answer's one or two only. Nearly all of them remain here.
19 I don't know if it's one or two, but it's one of those numbers.
20 One or two have been removed. Everybody else stays here and
21 the fact that they have a date written as a prospect for
22 removal is not much comfort to them as they're in detention.

23 On the, umm, on Ms. Brianna's declaration, that was
24 previously before you. We just re-offered it so that it would
25 be available to you in the record here. We had filed it

1 previously in the detention motion, but in addition, the
2 government talked about irreparable harm in their opposition to
3 the PI and so we thought that we needed some of evidence going
4 to irreparable harm and that's what it goes to. I think that
5 actually is everything.

6 THE COURT: Okay.

7 MS. SCHLANGER: Thank you, your Honor.

8 THE COURT: All right. Anything else for the
9 government?

10 MR. SILVIS: No, your Honor.

11 THE COURT: All right. Well, that will conclude our
12 hearing. I do want to see the attorneys back in my jury room.
13 I have another matter I have to take up on the record which I
14 don't think will take too much time. If it's going to take
15 more time than I expect, I'll send word to you, but I hope to
16 be able to see you within the next 10 to 15 minutes. So if you
17 want to take a break now and then just make your way to the
18 jury room by 12:45, that would be fine. So that concludes our
19 hearing at this point. Thank you.

20 MS. SCHLANGER: Thank you, your Honor.

21 MS. AUKERMAN: Thank you.

22 THE CLERK OF THE COURT: All rise. Court is in
23 recess.

24 (Hearing concluded at 12:32 p.m.)

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I, David B. Yarbrough, Official Court Reporter, do hereby certify that the foregoing pages comprise a true and accurate transcript of the proceedings taken by me in this matter on Wednesday, October 24th, 2018.

10/25/2018

Date

/s/ David B. YarbroughDavid B. Yarbrough,
(CSR, RPR, FCRR, RMR)
231 W. Lafayette Blvd.
Detroit, MI 48226