

EXHIBIT 1

REFILED TO CONFORM WITH COURT'S ORDER ECF 453

CHRONOLOGY

July 2017 to December 2017 –Efforts to Obtain Discovery from Respondents

1. **June 22, 2017.** The Court granted a temporary restraining order staying the Detroit Field Office’s removal of Petitioners. ECF 32.
2. **June 26, 2017.** The Court expanded the June 22 TRO to cover a nationwide class. ECF 43.
3. **June 29, 2017.** Petitioners sought expedited discovery to obtain information necessary to support their request for preliminary injunction, ECF 51, which was opposed by the government, ECF 54.
4. **July 20, 2017.** The government opposed Petitioners’ Request for Preliminary Injunction, ECF 81, filed July 17, 2017, submitting the declaration of John Schultz, ECF 81-4), who attested, “Iraq has agreed, using charter flights, to the timely return of its nationals that are subject to final orders of removal” (¶ 5) and described the process for submitting travel document requests directly to the Iraqi Ministry of Foreign Affairs (¶ 6). At that time, Petitioners had not taken discovery of the government, and did not know that Mr. Schultz omitted the following material information from his declaration:
 - a. The Department of State had submitted 280 travel document requests in May and June 2017 to the Iraqi Ministry of Foreign Affairs, and Iraq did not issue any travel documents in response to those requests. *See* ECF 376-2, ¶¶ 20.e, 20.g.
 - b. Iraq refused the June 2017 flight *two days before* this Court entered the first TRO and was unable to obtain an alternative date for a flight. *Id.*, ¶¶ 20.q, r and v.
 - c. Iraq told the government that it would not allow “enforced repatriations.” *Id.*, ¶¶ 20.u, 23.b, 23.e.
 - d. Frustrated by its inability to accomplish removals, Schultz’s own staff had drafted a memo on July 19 describing Iraq as “among the most recalcitrant countries” with respect to repatriations.” *Id.*, ¶ 24.a. They recommended sanctions: “ICE has been unsuccessful in securing cooperation from the Government of Iraq in the acceptance of its nationals subject to final orders of removal and has determined that implementing visa sanctions . . . is the only remaining avenue to secure cooperation” *Id.*

- e. The *same day* that Mr. Schultz submitted his declaration opposing a stay of removal, he received several memos in draft initiating the visa sanction process. *Id.*, ¶ 24.b. ICE staff continued to work on sanctions at least through August 4, 2017. *Id.*, ¶ 24.f.
5. **September 26, 2017.** Petitioners sought the Court's permission to take discovery on the government's SLRRFF determinations and the terms of any repatriation agreement with Iraq. ECF 111, PgID 2825-41. The government opposed the discovery. *Id.*, PgID 2841-45.
6. **September 29, 2017.** The Court granted Petitioners' request to serve discovery. ECF 115.
7. **October 27, 2017.** The parties exchanged objections to discovery requests. ECF 127-132. ICE objected to every request, provided no substantive response to any interrogatory or request for admission, did not produce a single document, and did not indicate it would produce any documents in the near future.
8. **November 3, 2017.** The Court held a status conference to determine if discovery should proceed. The government opposed discovery in advance of Petitioners' initial request for preliminary injunction on detention issues, ECF 138, filed November 7, 2017, but promised that the government "would [] disclos[e] in its response to Petitioners' motion . . . information that may be of utility to Petitioners to meet the Government's response." ECF 153, Pg.ID# 3936.
9. **November 22, 2017.** The Court denied the discovery, relying on the government's promise. ECF 153, PgID 3936. The Court reasoned: "the Government's response to Petitioners' motion for preliminary injunction may supply information that would obviate the need for the significant effort that Petitioners seek to require the Government to undertake." *Id.*
10. **November 30, 2017.** The government filed its opposition to Petitioners' Motion for a Preliminary Injunction on the Detention issues (ECF 158), submitting the second declaration of John Schultz, who attested, among other things:
 - a. "Recent negotiations [with Iraq] have resulted in increased cooperation in removal of Iraqi nationals" ECF 158-2, PgID 4130, ¶ 4.
 - b. The June 2017 flight could not proceed due to the court's TRO, and the July flight was cancelled solely because of the preliminary injunction. *Id.* ¶ 6.

- c. “ICE believes the removal of these detainees is significantly likely in the reasonably foreseeable future.” *Id.* ¶ 9.

Absent from Mr. Schultz’s declarations were representations from the government of Iraq that it could not accept involuntary repatriations, facts regarding Iraq’s rejection of the June flight and failure to issue travel documents for the July flight, that ICE (in July and August) considered Iraq recalcitrant and recommended sanctions, or that Iraq required class members to sign a form attesting that they were returning to Iraq voluntarily. ECF 376-2, ¶¶ 20.h, 20.u., 23.b, 23.e, 24.

11. **December 12, 2017.** The parties filed their Rule 26(f) Report and Discovery Plan, ECF 171, which the Court ordered, recognizing timely discovery was warranted: it was “prudent for the parties to conduct a [Rule 26(f)] conference . . . given the time sensitivities of the detention issues raised by Petitioners.” ECF 153, PgID 3936.
12. **December 20, 2017.** At oral argument on Petitioners’ preliminary injunction, the Court questioned the government about the terms of the purported Iraqi agreement. December 20, 2017 Hrg. Trans., at 47-48, 122-23. The government’s counsel could not respond. *Id.*
13. **December 22, 2017.** To address the Court’s questions about the existence of a purported agreement with Iraq, the government supplemented the record with the declaration of Michael Bernacke (ECF 184-2). The government finally admitted that there was no written agreement: “The agreement between the United States and the Iraqi Ministry of Foreign Affairs (MFA) is not memorialized in any written document or treaty. It is a product of ongoing diplomatic negotiations.” *Id.*, PgID 5070-71, ¶ 4. Mr. Bernacke made other statements under oath, which were proven to be inaccurate only after Petitioners obtained discovery from the government in June and July 2018. See ECF 381.
14. **January 2, 2018 Order.** The Court deferred ruling on Petitioners’ *Zadvydas* claim, based principally upon factual representations by the government regarding the likelihood that Iraq would accept Petitioners for repatriation. ECF 191, PgID 5328-35. Relying on declarations from John Schultz, ICE’s deputy assistant director in charge of the Asia and Europe Removal and International Operations Unit, and Michael Bernacke, on Schultz’s staff, the Court found that it was “still an open question whether Iraq has agreed to accept class-wide repatriation” and that “a more developed record is necessary to answer this question.” *Id.* at PgID 5334.

January 2018 to June 2018 – Petitioners’ First Set of Discovery Requests

15. **January 5, 2018.** The parties met and conferred regarding the discovery issued in October 2017. In response to the government’s objections, Petitioners agreed to narrow and reissue the discovery. ECF 198, PgID 5434-35. The government opposed any discovery, arguing, among other things, that discovery was unnecessary since it had “provided multiple declarations detailing the removal process for Iraqi nationals and has actually removed Iraqi nationals who have asked to be excluded from the stay in this case.” *Id.*, PgID 5438-39. Much later in discovery, Petitioners were to uncover that those declarations were misleading and inaccurately depicted the removal process.
16. **January 14, 2018.** Petitioners served their first set of *Zadvydas* discovery requests. See ECF 217-2, 217-3, 217-4.
17. **January 19, 2018.** The parties conferred to discuss Petitioners’ discovery requests.
18. **January 25, 2018.** The parties again conferred to discuss the discovery requests.
19. **February 1, 2018.** The parties filed a Joint Statement of Issues addressing the government’s objections to the discovery disputes. ECF 217.
20. **February 6, 2018.** The parties conferred again on the discovery.
21. **February 13, 2018.** Under Federal Rule of Civil Procedure 34, the government should have produced documents and written responses or objections. They did not. After the deadline passed, the government insisted that a court-ordered “meet and confer” process altered the typical discovery schedule. ECF 321, PgID 7606.
22. **February 16, 2018.** The parties filed another Joint Statement of Issues identifying discovery disputes, foremost the government’s failure to respond to any discovery requests. ECF 235.
23. **March 7, 2018.** The Court held a status conference to discuss, among other things, the government’s failure to produce documents or written responses to interrogatories and requests for production.
24. **March 13, 2018 Order.** The Court ordered the government to:
 - a. begin production of documents no later than March 30, 2018, and to respond to the interrogatories no later than March 23, 2018 (ECF 254, PgID 6229-30, ¶ 20, 22);

- b. disclose the names and titles of the custodians for whom the government collected records and other information response to Petitioners' discovery requests (*id.*, PgID 6235-36, ¶ 31); and
 - c. answer the interrogatories as written (*id.*, PgID 6235-36, ¶ 32).
- 25. **March 23, 2018.** The government responded to the interrogatories. Copies of the government's responses were attached to the Court's hand-delivered copy of the Joint Statement of Issues dated May 15, 2018 (ECF 286).
 - a. Despite repeatedly telling the Court that the United States had an agreement with Iraq for repatriation, ICE disclosed there "has been no international agreement in force, nor any written arrangement in effect, between the governments of Iraq and the United States regarding the repatriation of Iraqi nationals."
 - b. DHS responded similarly, disavowing its previous representations to the Court of the existence of an agreement and stating – for the first time – it did not have sufficient knowledge to have previously represented that Iraq would take back its nationals: "DHS is unaware of any written agreement or arrangement between the governments of Iraq and the United States regarding repatriation of Iraqi Nationals. Upon information and belief, DHS understands that Iraq has agreed in principle to repatriate Class Members and that requests for repatriation could be coordinated by [ICE] through the Government of Iraq."
 - c. Both DHS and ICE redacted the names of U.S. and Iraqi officials who met during 2017 and 2018, in violation of the Court's order.
 - d. Neither DHS nor ICE disclosed key facts discovered later by Petitioners once the government finally produced documents in June and July 2017. For instance, the government of Iraq requires Iraqi nationals to sign a document declaring they are returning to Iraq voluntarily and that ICE submitted that form to Iraqi nationals to sign as part of the repatriation process ECF 311-3, PgID 7479, 7481-82, Maddox Decl. ¶¶ 8, 14. The government did not disclose this requirement until *after* Petitioners filed a motion alleging the government was coercing class members into signing such a form. ECF 307. Neither disclosed that in July and December 2017, the Iraqi government qualified which class members it would accept for repatriation, such non-asylum seekers, ICE still has not disclosed the limitations; DHS partially disclosed on June 19, 2018 that Iraq had informed it of these limitations during meetings attended by both DHS

and ICE in June and December 2017 (*see* ECF 376-46, Interrogatory Response No. 1).

26. March 30, 2018.

- a. The government informed the Court that DHS intended to start its document production on March 30 and anticipated completing production on April 27. ECF 266-1, PgID 6456. But ICE submitted a status report to the Court claiming it could not produce records due to technology issues with its Relativity database. ECF 266-2.
 - b. The government produced three documents totaling four pages—DHS produced a heavily redacted one-page document, and ICE produced two documents (consisting of three pages) purporting to represent the April and June 2017 flight manifests of Iraqi nationals. Two of the three documents were not copies of original documents that existed in Respondents’ files but, rather, records created by Respondents’ counsel for this litigation that contain self-serving statements to support Respondents’ defenses. ECF 286, PgID 6786-87.
- 27. April 6, 2018.** ICE reported to the Court that it “began its production on March 30” (even though it had only produced two documents), that it had identified 20,000 potentially responsive records, and that it anticipated it would take four months (or until July 2018) to complete its production. ECF 267, PgID 6464.
- 28. April 13, 2018.** Respondents had promised another status report updating the Court on the status of their delayed document production, but missed the deadline without any explanation, and ignored inquiries from Petitioners’ counsel as to when a report would be forthcoming. *See* ECF 266, PgID 6452; ECF 286, PgID 6785-89.
- 29. April 16, 2018.** DHS produced 46 pages of non-responsive documents as a single PDF: letters sent in June 2017 from members of Congress, Michigan’s House of Representatives, the United States Conference of Catholic Bishops, and the Evangelical Immigration Table to President Trump, DHS, and John Kelly questioning DHS’s detention and anticipated repatriation of Iraqi nationals; and copies of the exact same response sent by Acting ICE Director Homan on August 16, 2017, to each signatory of the letters explaining in general terms ICE’s enforcement policies, immigration processes, and the arrests of class members. This PDF contained no information responsive to Petitioners’ document requests, which were limited to very specific documents. ECF 286, PgID 6788-89.

30. **April 20, 2018:** Seven days after the promised April 13 status report, ICE reported that its problems with its discovery platform, Relativity, had been largely resolved as of April 19, 2018, reported that 15,000 records would be reviewed and estimated that it would take 11 weeks to complete the production. See ECF 272-1, Decl. of Scott Whitted, PgID 6603 ¶ 12.
 - a. ICE disclosed its staffing for the document review: ICE “has assigned attorneys from DCLD, other divisions, and field offices nationwide to work on the discovery” in this case, stating that ICE “presently has approximately ten individuals . . . who are available to assist” with the review. ECF 272-1, Pg.ID# 6602, ¶ 10.
31. **May 11, 2018.** The government filed a motion to stay discovery pending resolution of the Sixth Circuit appeals. ECF 284.
32. **May 15, 2018.** The parties filed a Joint Statement of Issues concerning the government’s failure to produce documents, its redaction of information the Court ordered to be produced, and its failure to respond to the interrogatories as written. ECF 286. At that time the government had produced only 49 pages of documents, ECF 286, PgID 6790, and had served evasive and non-responsive interrogatory responses. ECF 286, PgID 6798-6825.
33. **May 25, 2018.** The Court held a status conference, at which the government represented it would not start producing a substantial number of records until the Second Amended Protective Order was entered, ECF 320, PgID 7607, even though it eventually produced every single document under the “Highly Confidential” designation without making any individual assessment (on a document-by-document basis) as to the appropriateness of the designation.
34. **June 4, 2018.** Despite representations on April 20 that the government had started reviewing documents for production to Petitioners, the government disclosed—for the first time—that its review did not begin until June 4, 2018, after the second amended protective order was issued. ECF 315-1, Pg.ID #7570-71, Whitted Decl. ¶¶ 7-8 (“Until the Second Amended Protective Order were resolved [sic], reviewers could not be given guidance for how to mark documents during review.”).
35. **The June 12, 2018 Order.** The Court addressed the government’s failure to respond timely to Petitioners’ discovery requests, and:
 - a. ordered ICE to produce documents on a rolling basis – 1,000 pages on June 19, June 26, July 3 and July 10, with the balance of documents to be produced on July 17 (ECF 304, PgID 7239-40, ¶ G.1);
 - b. ordered DHS to finalize its production by June 25 (*id.*);

- c. ordered the government to provide written responses and objections to Petitioners' requests for production by June 12, 2018 (*id.*, ¶ 2);
 - d. declared that Respondents had failed to comply with an earlier order (ECF 254, PgID 6235-36, ¶ 31) to disclose the names and titles of document custodians, and again ordered Respondents to produce the information unredacted (ECF 304, PgID 7240, ¶ G.3);
 - e. warned the government it would be sanctioned if it violated the order: "Failure to produce documents on this schedule will be construed, presumptively, as bad faith, unless Respondents can establish by clear and convincing evidence that there is exceptional good cause for not meeting the schedule." *Id.*, ¶ G.1.
 - f. instructed the government to supplement its interrogatory responses by June 19, 2018, or be sanctioned: "If Respondents fail to conduct a reasonable inquiry, respond with information within their control or otherwise obtainable by them, provide an appropriate verification, or fully and completely respond to the interrogatories, Respondents may be sanctioned, including the exclusion of that information in motions, in hearings, at any evidentiary hearing, and at trial." *Id.*, PgID 7241-42, ¶ H.
36. **June 18, 2018.** Petitioners informed the Court and the government they intended to file their *Zadvydas* motion in the near term. June 18 Hearing Tr. At 67-68; ECF 351 at 123-125.
37. **June 19, 2018.** The government failed to produce the 1,000 pages of documents ordered by the Court. Instead, it produced 25 documents totaling 150 pages. Whitted Decl. ¶ 7, ECF 315-1, Pg.ID #7570 ¶ 7. The government supplemented the interrogatory responses and finally disclosed that the Iraqi government used a "GOI form" to determine if an individual's repatriation was voluntary; this disclosure, however, came only after Petitioners filed a motion that the government was coercing class members into signing the form, and themselves providing a photographed copy of the form to the Court. ECF 307. The earlier interrogatory responses, provided on March 23, 2018, did not mention this requirement when responding to questions regarding the criteria and processes for repatriation. The government also failed to disclose that it had meetings with Iraqi officials in May 23, 2018. ICE's verification was signed by Mr. Schultz. DHS supplemented its interrogatories with information that clarified that, contrary to statements by Messrs. Schultz and Bernacke, that Iraq would not accept "all" Iraqi nationals. ECF 376-46, Response to Interrogatory No. 1.

38. **June 20, 2018.** ICE sought yet another extension of the document production deadlines, ECF 315, which this Court denied, finding that the resources ICE had devoted to discovery were “insufficient given the significance of the issues at stake, and the five months that Petitioners have already waited for production. The failure to assign a sufficient number of personnel and hours to this discovery indicates to the Court that other matters have been prioritized over this case. It is worth noting that any burden faced in complying with the Court’s requirement is far outweighed by Petitioners’ right to basic discovery.” ECF 320, Pg.ID# 7608.
39. **The June 22, 2018 Order.** The Court denied the government’s request to amend the production schedule set out in its June 12, 2018 Order (ECF 304, PgID 7239-40, ¶ G.1). The Court found that ICE had failed to comply with Court’s previous order:

The Court finds that ICE has not demonstrated exceptional good cause for failing to meet the Court’s production deadline. A review of the Government’s conduct in response to Petitioners’ document requests make plain why the Government should not be further excused from its discovery obligations. Petitioners’ document requests were served on January 14, 2018; under Federal Rules of Civil Procedure 34, production of the documents, as well as any written responses or objections, were due by February 13, 2018. **This deadline was not met** in light of the Government’s insistence that [the] Court’s “meet and confer” process altered the typical discovery schedule. After the Government’s failure to respond was discussed at a March 7, 2018 status conference, the Court ordered the Government to begin document production by March 30, 2018. *See* 3/13/2018 Order (Dkt. 254). On March 30, 2018, the day document production was ordered to begin, the Government informed the Court that it could not produce documents due to technological issues with its e-discovery platform (Dkt. 266). Petitioners state that on that same day, the Government provided them with four pages of documents.

* * *

The Court [] conducted a status conference on May 25, 2018, during which the Government stated that it would begin producing a significant number of documents following entry of the second amended protective order. Petitioners state that since that order was entered on June 19, ICE has only produced 150 pages of documents,

well short of the 1,000 page requirement set forth in the Court's June 12, 2018 order.

* * *

While the Government now insists that its production was delayed until the second amended protective order was entered, **the Court does not find this justification persuasive.** As noted by Petitioners, the language of the protective order is meant to address a small subset of documents at issue; nothing was preventing ICE from conducting its review of documents that would not be designated as confidential.

* * *

The Court declines to adopt ICE's proposed amended schedule for future document production. **The Court issued its production order in response to the Government's continued failure to meaningfully respond to Petitioners' longstanding discovery requests.** Any burden faced by ICE in producing documents can be alleviated by temporarily designating additional personnel to meet the Court's deadline, or temporarily increasing the hours for those already assigned to the project in order to comply with the Court's order. ICE has stated that it has assigned twelve individuals to work ten hours per week; **this is insufficient given the significance of the issues at stake, and the five months that Petitioners have already waited for production.** The failure to assign a sufficient number of personnel and hours to this discovery indicates to the Court that other matters have been prioritized over this case. It is worth noting that any burden faced in complying with the Court's requirement is far outweighed by Petitioners' right to basic discovery.

* * *

Failure to comply with the Court's order may be cause for the Court to direct that the facts necessary to support Petitioners' Zadvydas claim are established, or prevent the Government from opposing the Zadvydas claim, or issue other appropriate relief. (ECF320, PgID 7606-08 (emphasis added).)

40. On July 17, 2018, the government finally claimed to have completed its document production in response to Petitioners' first set of discovery requests – more than 7 months after the discovery was issued. ICE produced only 1,508 records and DHS produced a mere 4 PDFs consisting of 123 pages. The

government produced very few records for February 2018 or March 2018.¹ This left Petitioners with very little information about the current status of the government's repatriation efforts.

July 2018 to Present – Petitioners' Second Set of Discovery Requests

41. **July 6, 2018.** Petitioners issued a second set of interrogatories and document requests, based largely on new, highly fact-intensive issues involving Iraq's unwillingness to repatriate class members (the *Zadvydas* issue), prompted by Respondents' piecemeal responses to the first set of discovery. The requests were served so that Petitioners would receive the most current information about Iraq's repatriation policy prior to Petitioners filing their renewed *Zadvydas* motion.
42. **July 19, 2018.** During a hearing, Petitioners informed the Court and the government that they would file their *Zadvydas* motion "some time in August." ECF 351 at 124.
43. **August 6, 2018.** Under the Federal Rules of Civil Procedure, the government's responses to Petitioner's second round of discovery requests were due on August 6. Knowing Petitioners' timelines, the government sought an extension of the discovery deadline, and rejected Petitioners' offer to significantly narrow the second set of discovery requests in order to get the information more quickly. *See* ECF 358. Petitioners objected to the extension

¹ The Court ordered Respondents to submit declarations disclosing their document custodians, ESI, and hard copy document sources and search methodologies. ECF 254, Pg.ID# 6235-36. Respondent ICE submitted the declaration of John Schultz disclosing that he collected records from his files for the period January 2017 to March 2018; however other custodians' records were only collected up to some unspecified date in February 2018, and Mr. Schultz did not disclose the dates used for other key custodians, including Michael Bernacke (who submitted a declaration in December 2017 in opposition to Petitioners' preliminary injunction on detention issues) and Marlen Piñero, the ICE Assistant Director who supervises Messrs. Schultz and Bernacke. Respondent DHS submitted the declaration of David Palmer that did not disclose the dates the records were collected. A review of Respondents' production reveals very few records were produced for February 2018 or March 2018, and no records for April, May, June, or July 2018.

request, reminding the Court and the government that Petitioners needed the information for the *Zadvydas* motion to be filed in August.

44. **August 14, 2018.** The Court ordered “Respondents [to] serve their responses to Petitioners’ second set of discovery requests, **including production of documents**, on or before August 20, 2018. No further extension shall be granted.” ECF 366, Pg.ID# 8323 (emphasis added).
45. **August 20, 2018.** The government served its responses to the second set of discovery requests, but failed to produce any documents. The government answered only the first interrogatory and, for the first time, objected to the other interrogatories as exceeding Rule 33’s presumptive limit of 25 per party. They made this objection even though the second set of interrogatories were posed by a different petitioner than the first and the parties had agreed, in their Rule 26(f) Report, that both sides could issue 25 interrogatories **per party** (not per side, as the parties agreed for depositions). See ECF #121, Pg.ID 4820, 4821. That objection could have been made without requiring an extension; its late assertion served only to delay disclosure.
46. **August 23, 2018.** During the parties’ meet-and-confer, the government’s counsel indicated ICE had estimated it would take approximately three months to complete the review process for potentially responsive documents covering the period March 2018 to the present. The government was unwilling to provide information about what, if any, efforts had been taken to search for documents. ECF 373.
47. **August 27, 2018.** Petitioners argued in the Joint Statement of Issues that the government continued delaying discovery, summarizing the government’s extensive history of delays. ECF 373. Petitioners also argued the government’s delay forced Petitioners to decide between two evils – bring their *Zadvydas* claim without current information about Iraq’s repatriation or delay bringing the motion thereby extending the class members’ detention. ICE agreed to supplement its responses to Petitioners’ first set of requests for production (the January 2018 discovery) to cover the period March 2018 to the present, but for only three custodians (Schultz, Bernacke and Maddox), and agreed to produce documents in response to select (but not all) requests from Petitioner’s second set of documents requests (the July 2018 discovery, (ECF 373, PgID 8406-07). Petitioners disagreed with the unilateral limitations ICE put on the scope of discovery. The government did not produce the documents.
48. **August 29, 2018.** Petitioners filed their Renewed Motion for a Preliminary Injunction Under *Zadvydas* (ECF 376) and Motion for Sanctions (ECF 377,

refiled on August 31, 2018 at ECF 381). At this point, the government had not 1) supplemented its document production with records from March 2018 to the present that were responsive to Petitioners' first set of document requests, 2) produced any documents responsive to Petitioners' second set of document requests, or 3) responded to Petitioners' second set of interrogatories other than to the first interrogatory.

49. **September 6, 2018.** The Court held a status conference to address Respondents' failure to provide discovery. ECF 385, PgID 9391. The Court overruled the government's interrogatory objections and ordered responses to be served on or before September 19, 2018. The Court expressly ruled that the interrogatories were appropriate: "The Court has reviewed Petitioners' second round of interrogatories and finds that in light of the complex issues presented in this matter, the important liberty interests at stake, and the great public interest in the issues raised by the parties, the July 6, 2018 **interrogatories are relevant and proportional to the needs of this case.**" ECF 385, PgID 9392 (emphasis added).
50. **September 7, 2018.** The government asked the Court to hold an evidentiary hearing on both the Zadvydas and sanctions motions, and asked that the *Zadvydas* hearing be converted to a merits hearing. ECF 388. Petitioners opposed any evidentiary hearing, stating they were prepared to stand on the record. ECF 390. The government's brief, by contrast, urged the Court to hold an evidentiary hearing, arguing that the Court should hear about current events regarding "the repatriation of Iraqi nationals which is constantly evolving." It supported the request for an evidentiary hearing as follows, ECF 392, PgID 9443-44:

Petitioners' [sanctions] motion is premised on the testimony of two ICE employees, John Schultz and Michael Bernacke, which Petitioners allege is false and/or materially misleading at the time it was submitted to the Court. The testimony at issue relates to ongoing removal efforts as well as the agreement between the United States and Iraq concerning the repatriation of Iraqi nationals which is constantly evolving. Accordingly, by holding an evidentiary hearing where both witnesses can testify, this Court will not only be able to hear testimony about the past statements to determine if they were false or misleading when provided, but it will also be able to determine the entire context of this relationship with Iraq, including current efforts at repatriating Iraqis . . . , which is critical to Petitioners' renewed motion for a preliminary injunction

51. **September 14, 2013.** The Court notified the parties that the hearing on the *Zadvydas* and sanctions motions would be held on October 23, 2018, and reserved decision on whether the hearing would include testimony or oral argument only. ECF 395.
52. **September 19, 2018.** Respondents served responses to the July 6 interrogatories. Respondents raised new and untimely objections, partially answered some interrogatories, did not respond to others, and provided answers to others that were not responsive. Relevance/burden objections were raised despite this Court’s prior determination that the interrogatories “are relevant and proportional to the needs of this case.” ECF 385, PgID 9392.
53. **September 20, 2018.** A status conference was held to discuss, among other things, the government’s continued failure to answer the interrogatories.
54. **September 21, 2018.** The Court ordered an expedited briefing for any motions to compel discovery matters, “[i]n light of the pending motions, and the potential significance of the interrogatory responses”. ECF 400, PgID 9508.
55. **September 24, 2018.** Petitioners filed a motion to compel the government to provide substantive responses to the interrogatories. ECF 403.
56. **October 1, 2018.** The Court ordered the government to “answer fully and completely” the interrogatories on or before October 5, 2018. ECF 412.
57. **October 2, 2018.** The government filed its response in opposition to Petitioners’ *Zadvydas* and sanctions motions. ECF 417, 418. With 21 days before the hearing on the motions, the government disclosed—for the first time—that the Iraqi government, starting in September 2018, purportedly did not ask Iraqi nationals to sign the form indicating they were returning to Iraq voluntarily. ECF 418, pp. 16-17. Messrs. Schultz and Bernacke – both of whom submitted false declarations earlier in the litigation – were the sole source for the government’s assertion that Iraq was no longer refusing nationals who are returning involuntarily. (ECF 418, Schultz Decl. ¶¶ 43, 48-49 and Bernacke Decl. ¶ 15.) The government prevented Petitioners from obtaining discovery to substantiate or refute this claim.
58. **October 5, 2018.** The government supplemented its interrogatory responses:
 - a. For the first time—with less than 18 days before the evidentiary hearing—ICE disclosed: “Beginning with the September 2018 interviews, the GOI will either pre-approve a travel document or refuse to issue a travel document. If the GOI determines an individual is approved for a travel document, it emails ICE to inform them of its

pre-approval. ICE will then secure a travel itinerary for the individual and provide it to the GOI before the GOI will issue a travel document.” ECF 432-8, Response to Interrogatory No. 1.a.6.

- b. ICE also finally responded to the interrogatories served on July 6, providing details about the process for securing commercial and charter flights, including the cooperation needed from third or transit countries. Those answers, as well as the fact that some class members have not been removed even though the stay of removal was lifted for them many months ago, suggest that there are serious logistical issues with repatriation and detention can continue for prolonged periods even when Iraq does issue a travel document. *Id.*, at No. 1.h.
 - c. On the same day, the Court granted the government’s request for an evidentiary hearing on the *Zadvydas* and sanctions motions, allowing the parties to call witnesses if a party so chooses. ECF 423.
59. **October 12, 2018.** The Court held a status conference to discuss outstanding discovery disputes. The Court ordered the government to “**complete document production with respect to all outstanding requests on or before October 16, 2018.**” ECF 431, PgID 10871 (emphasis added). In light of the new information belatedly disclosed in the interrogatory responses, the Court also granted Petitioners leave to take the deposition of James Maddox on or before October 19 and the government’s Rule 30(b)(6) witness(es). ECF 431, PgID 10871. Those depositions were scheduled for October 18 and 19 in Washington D.C. and Phoenix, Arizona. The schedule – while extremely tight – was designed to allow Petitioners to review what was anticipated to be thousands of documents for approximately 36 hours before the depositions were to start.
60. **October 17, 2018.** The Court held another status conference, and the government reported that it had failed to produce the documents on October 16 as ordered. ECF 449, PgID 11244 (“On October 17, 2018, the *parties* reported that Respondents had failed to meet the court-ordered document production deadline”) (emphasis added). The Court orally ordered the government “to produce all responsive documents covered by the prior order, in digital format on October 17, 2018.” ECF 449, PgID 11244.

Because no documents had been produced, the depositions were rescheduled to occur Monday, October 22, in Michigan (which was memorialized in a later order, ECF 449).

Despite not having produced documents dated after March 2018, , the government produced a little more than 680 documents (even though the

government said there were 22,275 documents with the term “Iraq” or bearing an email domain of an Iraqi government official). Only a handful of documents postdated mid-July 2018, and no documents were produced with a date after August 31, 2018. The majority of attachments to documents were produced. The majority of the production consisted of duplicate copies of various records. All told there seem to have been only about 200 unique documents. Some of the documents were redacted for “third party.” No privilege log was produced (although the government later disclosed that a significant number of the documents identified as responsive under the TAR (technology assisted review) process were withheld based on claims of attorney client or work product privilege). Although Petitioners had been requesting the TAR parameters for a week, those parameters were not provided with the production.

61. **October 18, 2018.** Petitioners notified the Court of the deficiencies, and the Court held a second on October 18, followed by a third status conference on October 19. ECF 449, PgID 11244.
62. **October 19, 2018.** The Court issued an order granting Petitioners’ interim relief for the government’s failure to comply with the Court’s order to produce documents responsive to all outstanding document requests. The Court warned the government that the interim relief was “without prejudice to any further relief that may be ordered” and stated that the “issue of monetary sanctions will be addressed at later proceedings.” ECF 449, PgID 11244, 11247.
 - a. The Court ordered the government to produce by noon on October 19:
 - i. all of the 22,275 documents – unredacted other than for assertions of attorney-client privilege or work product doctrine – the government claimed to have collected in response to Petitioners’ second set of requests for production (ECF 449, PgID 11245) (the government would not comply with this order);
 - ii. unredacted versions all records produced on October 17, 2018 which were redacted with the marking “third party” (ECF 449, PgID 11245);
 - iii. a privilege log for the above document productions justifying the government’s assertions of attorney-client privilege or work product doctrine (ECF 449, PgID 11245) (the government would not comply with this order); and

- iv. the 20 documents used to train the governments' TAR process that was used to determine the responsive documents produced on October 17 (the government would not comply with this order) (ECF 449, PgID 11246).
 - b. The Court ordered the government to produce by 5 pm on October 20, 2018:
 - i. documents for the period August 31, 2018 to September 30, 2018, withholding records only on the basis of attorney-client privilege or work product doctrine (ECF 449, PgID 11245) (the government would not comply with this order);
 - ii. a privilege log of the government's assertions of attorney-client privilege or work product doctrine (ECF 449, PgID 11245) (the government would not comply with this order); and
 - iii. the documents reviewed by, shown to, or consulted by each of the three witnesses that were scheduled to be deposed prior the evidentiary hearing (ECF 449, PgID 11245).
 - c. Finally, the order noted that the three depositions from October 18 and 19 had been rescheduled to October 22 so Petitioners had some (but not much) time to review the anticipated document productions for use in the depositions and evidentiary hearing. ECF 449, PgID 11246. The Court also rescheduled the evidentiary hearing from 9 am on October 23, 2018 to 1 pm on October 23, with it continuing at 9 am on October 24. ECF 449, PgID 11246.
- 63. **October 19, 2018.** By noon, the government had not produced a single document or any privilege log. The government did not give advance notice that it would miss the deadline, offered no alternatives (such as a rolling production) to lessen prejudice to Petitioners, or give any explanation for the failure to produce. After Petitioners inquired about the status of the production, the government emailed Petitioners at 12:37 pm, stating it would file a notice with the Court regarding the status of the productions.
 - a. At 6:23 pm, the government sent a document production – the same production made on October 17. Ex. 2, C. Alsterberg email dated 10/19/2018; ECF 449, PgID 11245. It removed the redactions for “third party” communications, which revealed the government redacted multiple copies of the same email revealing the government's acknowledgement that Iraq would [REDACTED]

Ex. 3, ICE-0304709 to 0304710.

- b. At 7:02 pm on October 19 – 7 hours after the Court’s deadline (ECF 449, PgID 11245) – the government sent an email with what it represented was the non-privileged documents from the 22,275 documents ordered to be produced. Ex. 2, C. Alsterberg email dated 10/19/2018. At 9:34 pm, Petitioners’ counsel notified the government’s counsel that it had not, in fact, produced any documents; rather the production load file was incomplete and no images were produced. *Id.* The government confirmed the next day “that there are errors in its production . . .” ECF 451, PgID 11262. To this day, the government has not provided Petitioners with a copy of this production.
- c. More than 2 hours after this notification, the government submitted an affidavit with the Court stating the government had produced 7,000 records. ECF 450-1, PgID 11258, A. Loiacono Decl. ¶ 13. The government later asserted that the affidavit had been signed prior to Petitioners’ notification that the production had failed, but the notice to which the affidavit was attached did not correct the information.
- d. The government admitted that the October 17 production did not include the September 2018 records that were the subject of the Court’s earlier order. ECF 450, PgID 11248. The government also memorialized that it had not meet the October 19 noon deadline and would not be able to meet the October 20 deadline to produce responsive records for the period August 31, 2018 to September 30, 2018. *Id.*, PgID 11248.
- e. To explain the government’s failure to comply with the Court-order production, the government submitted the affidavit of A. Loiacono, the Deputy Principal Legal Advisor for Enforcement and Litigation for the Office of the Principal Legal Advisor of U.S. Immigration and Customs Enforcement. ECF 451-1, PgID 11252-61. Mr. Loiacono explained the fiscal and staffing constraints placed on his department. Absent from his declaration are the typical statements required to establish any burden with complying with discovery – the steps taken to comply with the request for production when it was issued in July 2018, what steps were taken to comply after the Court granted the extension to August 20 reply, the number of individuals assigned to the project, the number of hours each individual was expected to work, any metrics about the records to be reviewed (such how many records contain privileged terms, the

average number of pages per document, whether any culling methodologies had been applied to reduce the number of records to be reviewed), or the expected date of production. Instead, Mr. Loiacono simply attested that the department “has assigned a number of attorneys . . . to review the ongoing discovery” but these attorneys were also assigned to meet other competing discovery orders. *Id.*, PgID12260, ¶ 17. He further qualified the assignment of attorneys: “I have instructed all available [] attorneys who are not currently working on another immediate discovery deadline to review the documents required for production in this case and to prioritize it above any non-emergent work.” *Id.*, PgID 12261, ¶ 19. He concluded that “ICE will work to produce the required documents as soon as practicable in light of available resources.” *Id.* At no time after this disclosure did ICE inform the Court or Petitioners as to when the records would be produced.

- f. Mr. Loiacono’s declaration also disclosed for the first time that an additional 20,000 records were inadvertently omitted from the TAR review, *id.*, PgID 11259, ¶ 15, bringing the total number of potentially responsive records (those with the term “Iraq” or an Iraqi government email domain) to over 40,000 records that the government has not produced.
64. **October 20, 2018.** Eleven hours later, the government moved to strike the notice and Mr. Loiacono’s declaration. ECF 451. The government has provided no other explanation as to its failure to comply with the Court’s order.
- a. The government never produced the 20 documents used in the TAR review process to determine what is responsive to Petitioners’ discovery, as ordered at ECF 449.
 - b. The government never produced any privilege log, as ordered at ECF 449.
 - c. The government never supplemented its interrogatory responses, as ordered by the Court at ECF 449.
 - d. The government produced documents that purported to be the records reviewed by, shown to, or consulted by each of the three witnesses that were scheduled to be deposed on October 22. ECF 449, PgID 11245. Those documents show [REDACTED]

The

production regarding these issues, however, was limited to a handful of pages. Ex. 4, Electronic Country Clearance Updates and Restrictions.

65. **October 21, 2010.** The Court held a status conference on Sunday morning to assess if there was any interim relief it could grant that would allow Petitioners the evidence needed to rebut testimony and documents that the government would present at the evidentiary hearing about events that took place after March 2018 (and, in particular in September 2018) but which the government had not produced in discovery. The government, however, would not provide a date when it would produce the outstanding discovery ordered by the Court to be produced. The Court informed the parties by email that it would no longer hold an evidentiary hearing, but would hear oral argument on the *Zadvydas* motion and motion for sanctions. The Court also ordered briefing on the appropriate sanctions for the government's discovery abuse. The Petitioners informed Respondents that the depositions scheduled for October 22, 2010, were cancelled. Petitioners' witness, Daniel Smith, was en route from Iraq, and landed in the United States later that afternoon.
66. **October 22, 2018.** The Court entered an order setting out the relief ordered the day before. ECF 452.