UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LIA DEVITRI, *et al.* Petitioners/Plaintiffs, v. CHRIS CRONEN, *et al.*, Respondents.	)	C.A. No. 17–CV–11842–PBS STATEMENT ON JURISDICTION

INTRODUCTION

At this Court's request, Defendants/Respondents submit this brief on subject-matter jurisdiction.[1] At a minimum, this Court lacks subject-matter jurisdiction over nearly all of the First Amended Complaint filed by Plaintiffs/Petitioners and should dismiss this case in full.

This Court plainly lacks subject-matter jurisdiction over Plaintiffs' first two claims. Federal law provides that "no court shall have jurisdiction to hear *any* cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to . . . execute removal orders against any alien." 8 U.S.C. § 1252(g) (emphasis added). Plaintiffs are aliens subject to removal orders, this case arises because of DHS's "decision[s] or action[s]" to "execute removal orders" against them, and Plaintiffs' first two claims squarely challenge those "decision[s] or action[s]." Section 1252(g) unambiguously bars this Court from exercising jurisdiction over those claims. That is consistent with the Constitution because Congress created a separate avenue of relief for Plaintiffs in the immigration courts and ultimately in the federal courts of appeals. But

[1] Defendants respectfully reserve the right to raise other grounds for dismissal and affirmative defenses later. Defendants understand from the September 26, 2017 hearing that the Court's principal initial concern is whether it possesses subject matter jurisdiction over the case.

they may not seek relief in this Court. A district court ruled to the contrary in *Hamama v. Adducci*, Civ. No. 17–cv–11910-MAG, --- F.Supp.3d ----, 2017 WL 3124331 (E.D. Mich., July 24, 2017). But that decision cannot be reconciled with governing legal principles, and in any event involved different circumstances that do not call for the same outcome here.

The Court also lacks jurisdiction over Plaintiffs' third claim as pleaded by 23 of the 24 Plaintiffs. That claim challenges Plaintiffs' allegedly unlawful detention. But only one Plaintiff is detained. The other 23 Plaintiffs lack standing to bring this claim. And there is no sound basis for keeping this suit alive in this court for the one Plaintiff in: he has separately filed his own habeas petition with this Court. His claims should be made in that case. What is more, most of them do not even reside in this district, so this Court lacks personal jurisdiction over them.

This case should be dismissed for lack of jurisdiction.

BACKGROUND

Plaintiffs are, as of their operative complaint, 24 Indonesian nationals subject to final orders of removal. First Am. Compl. (FAC), ECF No. 22 ¶¶ 15–38. No Plaintiff alleges to reside in Massachusetts. *See generally id.* Plaintiffs remained in the country despite their removal orders. *See id.* ¶¶ 2, 50; *see also* Stevens Decl., "Op. Indonesian Surrender Filing" Ex. C ¶ 3.[2] In 2010, in response to inquiries from representatives of the Indonesian community, U.S. Immigration and

[2] Defendants augment Plaintiffs' factual allegations in the operative complaint by citing to documents produced per Court order regarding "Operation Indonesian Surrender," and attach declarations from Assistant Chief Immigration Judge Jull H. Dufrese and Board of Immigration Appeals (BIA) attorney team leader Christopher Gearin, to challenge the sufficiency of their asserted basis for jurisdiction under the Suspension Clause. *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001).

Customs Enforcement (ICE) officials conducted a time-limited operation for Indonesians who were subject to final orders of removal to be placed under an Order of Supervision for a specified period of time.[3] Stevens Decl. ¶¶ 3–5; *see also* FAC ¶ 50.

Beginning in February 2017, ICE notified Plaintiffs that it would not grant additional temporary stays of removal[4] to Plaintiffs and that ICE would start removing them. *See* FAC ¶¶ 16, 19; Stevens Pls.' Decls, "Op. Indonesian Surrender Filing" Exs. D–Z. Only one Plaintiff, Terry Rombot, alleges he was taken into detention pending his removal. FAC ¶ 22; *see also* Stevens Decl. ¶ 31. He filed a habeas petition challenging his detention. *See Rombot v. Moniz*, Civ. No. 17-cv-11577 (D. Mass.). Thereafter, 11 Plaintiffs filed this putative class action on September 26, 2017, *see* ECF No. 1, along with a motions for a temporary restraining order (TRO) and for a preliminary injunction, *see* ECF No. 4. On September 28, Plaintiffs amended their complaint to add 13 plaintiffs.

Plaintiffs allege three claims. *First*, they claim that removing them would violate the Immigration and Nationality Act (INA) and international treaties such as the Convention Against Torture (CAT) if they are not given "a fair opportunity to raise" claims that they would be persecuted or tortured if they are removed to Indonesia. FAC ¶ 77; *see also id.* ¶¶ 42, 74–77. Plaintiffs contend that country conditions in Indonesia have changed since their removal orders

[3] 8 of the 24 named Plaintiffs were, in fact, never identified as part of "Operation Indonesian Surrender," but nonetheless granted discretionary stays of removal that are made available to qualifying individuals of all nationalities. Stevens Decl. ¶¶ 17, 23.

[4] Plaintiffs do not specifically plead that ICE issued temporary stays of removal to them in conjunction with their OSUPs, but Defendants infer as much from the complaint, since Plaintiffs state that ICE began issuing "Denials of Stays of Removal." FAC ¶ 54; *see also* Stevens Decl. ¶¶ 4, 8; 8 C.F.R. § 241.6 (a) (describing ICE's procedure for issuing administrative stays of removal).

were issued, and that the INA entitles them to move to reopen their removal orders in light of these "new facts." FAC ¶ 76. *Second*, based on those same allegations, Plaintiffs claim that removing them without providing an opportunity to raise claims based on changed circumstances in Indonesia "violates [the] due process guarantee of the Fifth Amendment" because "they have not received their core procedural entitlement . . . to have their claims heard at a meaningful time and in a meaningful manner." *Id.* ¶ 81; *see also id.* ¶¶ 77–81. *Third*, Plaintiffs allege that "[t]he government's detention of Petitioners/Plaintiffs bears no reasonable relationship" to its purposes and thus constitutes unlawful detention. *Id.* ¶ 84; *see also id.* ¶¶ 82–84.

Plaintiffs allege that that "[t]his Court has habeas corpus jurisdiction pursuant to 28 U.S.C. § 2241 *et seq.*, and Art. I § 9 cl. 2 of the United States Constitution (Suspension Clause)." FAC ¶ 11. They also allege that "[t]his Court may also exercise jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (mandamus statute), 5 U.S.C. § 701 *et seq.* (Administrative Procedure[] Act); Art. III of the United States Constitution; Amendment V to the United States Constitution; and the common law." *Id.* According to Plaintiffs, "[t]his Court may grant the relief requested herein pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the All Writs Act, 28 U.S.C. § 1651. *Id.* Plaintiffs further allege that they are "in custody" for the purposes of habeas jurisdiction because they are subject to Orders of Supervision (OSUPs). FAC ¶ 12. Finally, they state that this action is not barred by 8 U.S.C. § 1252(b)(9)—which generally consolidates judicial review of removal orders into the federal courts of appeal—because "[t]he present action does not challenge the underlying orders of removal." *Id.* ¶ 13.

On September 26, the Court granted Plaintiffs a TRO staying the removal of the 11 Plaintiffs named in the original complaint. ECF No. 17. After Plaintiffs amended their complaint to add 13

Plaintiffs, they requested that the Court extended the TRO 11 to those individuals. ECF No. 23. The Court granted that request. ECF No. 28.

ANALYSIS

The Court lacks jurisdiction over Plaintiffs' claims attacking their removals because Congress expressly stripped the federal courts of jurisdiction to hear such claims. The Court also largely lacks jurisdiction over Plaintiffs' unlawful-detention claim due to (among other reasons) lack of standing and lack of personal jurisdiction, since 23 of the 24 Plaintiffs are not detained and most do not even reside in this district. The remaining Plaintiff's unlawful-detention claim does not provide an adequate basis for exercising jurisdiction over this case, as he has an individual habeas action pending with this court.

I. Congress deprived this Court of jurisdiction over Plaintiffs' first two claims.

Plaintiffs' first two claims arise from the Government's decision to execute their removal orders. Congress barred district courts from exercising jurisdiction over such claims. The relief sought in those claims may be sought only through the administrative immigration process—immigration court and the Board of Immigration Appeals (BIA), with any available judicial review in the federal courts of appeals—not in federal district court.

a. Section 1252 prohibits this Court from exercising jurisdiction over Plaintiffs' first two claims.

Congress made two rules clear in 8 U.S.C. § 1252. *First*, courts lack jurisdiction over claims attacking the Government's decision to enforce a final removal order. Under section 1252(g), "*no court* shall have jurisdiction to hear *any* cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to . . . execute removal orders

against any alien."[5] 8 U.S.C. § 1252(g). This jurisdictional bar applies "notwithstanding any other provision of law (statutory or nonstatutory)"—"[e]xcept as" otherwise "provided in" section 1252. *Id.* This unequivocal language protects the Government's discretionary authority over whether and when to execute a removal order, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999), and shows that "Congress knows how to bar claims in the immigration context when it desires to."[6] *Aguilar v. U.S. Immigration and Customs Enf't*, 510 F.3d 1, 11 n.2 (1st Cir. 2007); *Ishak v. Gonzales*, 422 F.3d 22, 28 (1st Cir. 2005) ("[T]he Real ID Act . . . in the plainest of language, deprives the district courts of jurisdiction in removal cases.").

Second, aliens can obtain review of, reopening of, or stays of removal orders—but *only* through the established regulatory administrative procedure, with judicial review in the federal courts of appeals. Immigration courts and the BIA are vested with authority to adjudicate motions to reopen removal proceedings on the basis of "new facts," 8 C.F.R. § 1003.23(b)(3), and to grant stays of the execution of removal, *id.* § 1003.23(b)(1)(iv). Section 1252 provides that claims arising from the removal process, including a claim seeking review of a final removal order, must first be exhausted administratively and then ultimately channeled to the federal courts of appeals through petitions for review. 8 U.S.C. § 1252(d)(1). That section specifies that a petition for review is the "*sole and exclusive* means for judicial review of an order of removal." 8 U.S.C. § 1252(a)(5)

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[5] The Attorney General once exercised this authority, but that authority has been transferred to the Secretary of Homeland Security. *See Clark v. Martinez*, 543 U.S. 371, 375 n.1 (2005). Many of the INA's references to the Attorney General are now understood to mean the Secretary.

[6] In *Goncalves v. Reno*, 144 F.3d 110, 120 (1st Cir. 1998), the First Circuit concluded that 8 U.S.C. § 1252(g) did not bar judicial review of habeas claim a brought under 28 U.S.C. § 2241. Congress abrogated that holding in 2005 by amending section 1252(g) to make clear that its bar applies regardless of any other statute—"*including section 2241 of Title 28*, or any other habeas corpus provision." Pub. L 109-13, Div. B, sect. 106(a)(3) (2005) (emphasis added).

(emphasis added).The section provides further that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment." 8 U.S.C. § 1252(a)(4). That holds true "[n]otwithstanding any other provision of law (statutory or nonstatutory)." *Id.*; *see also Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009). Section 1252(b)(9) adds that review of "all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available *only* in judicial review of a final order under this section." *Id.* § 1252(b)(9) (emphasis added).

Section 1252 precludes this Court from exercising jurisdiction over Plaintiffs' first two claims. Plaintiffs concede that they are subject to validly issued removal orders, but challenge the execution of them. *See* Claim 1, FAC ¶¶ 74–77; Claim 2, *see* FAC ¶¶ 77–81. Plaintiffs are aliens with "removal orders against" them, this case arises because of DHS's "decision[s] or action[s]" to "execute removal orders" against them, and Plaintiffs' first two claims squarely challenge those "decision[s] or action[s]." 8 U.S.C. § 1252(g). Section 1252(g) directs that "no court shall have jurisdiction" to hear these "claim[s]." *Id.*

Plaintiffs must instead seek relief in accordance with the established administrative procedure. There, Plaintiffs can move both to reopen their removal proceedings based on changed country conditions and to stay their removals. 8 C.F.R. § 1003.23. To the extent that Plaintiffs ultimately seek judicial review of their claims against their "order[s] of removal," their "sole and exclusive means for judicial review" is a petition for review filed with a federal court of appeals seeking review of any administratively exhausted motion-to-reopen result. 8 U.S.C. §§ 1252(a)(5), (d)(1); *see also id.* § 1252(a)(4) (same for CAT claims); *id.* § 1252(b)(9) (emphasizing the breadth of this

rule). They cannot seek such review in this Court.[7] Although that process has been available since Plaintiffs' removal orders became final, only two of them have filed motions to reopen with the BIA since 2010—and they were filed after September 21, 2017.[8] Stevens Decl. ¶ 15.

Plaintiffs contend that section 1252 does not bar their first two claims because they seek to challenge not their removal orders but rather the "conditions of the[ir] custody, i.e., the[ir] Orders of Supervision, which w[ere] abruptly ended." ECF No. 4, at 11. That is unavailing: "[A]n alien cannot evade § 1252(g) by attempting to recharacterize a claim that, at its core, attacks the decision to execute a removal order." *Albarran v. Wong*, 157 F. Supp. 3d 779, 784 (N.D. Ill. 2016), *appeal dismissed* (Apr. 13, 2016). That is what Plaintiffs are attempting. Plaintiffs cite *Ali v. Napolitano*, No. CIV.A. 12-11384-FDS, 2013 WL 3929788, at *5 (D. Mass. July 26, 2013), for the proposition that release on an OSUP constitutes custody for the purposes of a habeas petition. But the petitioner in *Ali* challenged a term in his OSUP as unlawful custody. *Id.* Plaintiffs, by contrast, do not

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[7] *See, e.g.*, *Tejada v. Cabral*, 424 F.Supp.2d 296, 298 (D. Mass. 2006) ("Congress made it quite clear that all court orders regarding alien removal—be they stays or permanent injunctions—were to be issued by the appropriate court of appeals."); *Aziz v. Chadbourne*, No. CIV.A.07-11806-GAO, 2007 WL 3024010, at *1 (D. Mass. Oct. 15, 2007) (denying a plaintiff's emergency motion for a stay of removal because "[a]ny stay of the final order of removal would squarely interfere with the "execut[ion]" of the removal order, which is prohibited by Section 1252(g)).

[8] Plaintiffs allege that the urgent relief of a TRO was needed in part because Plaintiffs Freddy and Poppy Sombah received a denial of stay of removal on September 18, 2017 "without explanation" and ordered to report to the Manchester sub-office with a plane ticket to depart the United States on September 27. FAC ¶¶ 24–25. In fact, they received stay denials in February 2017. *See* "Op. Indonesian Surrender" Filing Ex. VV, at 10, Ex. WW, at 5. ICE informed them on August 1 that they needed to return to the Manchester, NH ICE office by September 1, with plane tickets for departure. *See* "Op. Indonesian Surrender" Filing Exs. X, Y. Petitioners purchased their own plane tickets on August 27, 2017 and returned on September 1, 2017. *Id.* On September 1, Plaintiffs filed a new request for a stay of removal, which was denied on September 18. *See* "Op. Indonesian Surrender" Filing Ex. VV, at 11, Ex. WW, at 4. Neither of the Sombahs sought relief from their removal orders before the immigration courts between their February 17 notice of stay denial and their September 25, 2017 filings in this Court. *See* Stevens Decl. ¶ 15.

challenge any term in their OSUPs as unlawful custody; rather, Plaintiffs appear to challenge the "end[]" of their OSUPs, ECF No. 4, at 11, which, in any event, does not appear to have occurred. *See* 8 U.S.C. § 1231(a)(3)(A) (describing an OSUP as remaining in place "pending removal"); FAC ¶¶ 15–38. To the extent that Plaintiffs attack the ever-present condition in their OSUPs that they "appear in person at the time and place specified, upon each and every request of the Service, for . . . deportation or removal," *see, e.g.*, "Op. Indonesian Surrender" Filing Ex. VV, at 3, that lawful request is part and parcel of the Government's discretionary authority to execute removal orders, and 8 U.S.C. § 1252(g) bars this Court's review of such claims. *Mendonca v. I.N.S.*, 52 F. Supp. 2d 155, 161 (D. Mass.), *aff'd*, 201 F.3d 427 (1st Cir. 1999) (although petitioner was "in custody" for the purposes of 28 U.S.C. § 2241, petitioner did not "present the kind of claim that the First Circuit has held is cognizable on habeas review under [8 U.S.C. § 1252's] new judicial review provisions.").

Plaintiffs actually appear to be challenging ICE's discretionary decision to deny their stays of removal, which is separate from their OSUPs. FAC ¶¶ 54, 59; 8 C.F.R. § 241.6(a) (specifying ICE's discretionary authority to grant stays of removal). This too is barred under section 1252(g). *Albarran*, 157 F. Supp. 3d 779, 784–87 (section 1252(g) barred review of ICE's denial of an administrative stay of removal). Indeed, in this case there is no daylight between ICE's decision to execute a removal order and ICE's decision to decline to renew a temporary stay of removal and instead order individuals subject to final removal orders to prepare and report for removal. The latter is a specific example of the former.

b. Section 1252's bar of Plaintiffs' first two claims is constitutional.

Beyond arguing that section 1252 does not bar this Court from hearing this case, Plaintiffs assert that this Court has jurisdiction over their claims under the Suspension Clause. FAC ¶ 11.

Plaintiffs are wrong. The Suspension Clause does not create jurisdiction where there is an adequate substitute to habeas relief. In any event, Plaintiffs' first two claims do not even make a cognizable habeas claim. Although another district court has concluded that applying section 1252(g) to certain aliens subject to final removal orders would have violated the Suspension Clause, that case involved materially different circumstances and was wrongly decided.[9] Applying section 1252(g) here is appropriate and constitutional.

i. The Administrative Motion to Reopen Process is Adequate.

Congress can, consistent with the Suspension Clause, foreclose a habeas remedy if it provides an adequate substitute. *See Boumediene v. Bush*, 553 U.S. 723, 772 (2008). To be adequate, the substitute proceeding "must have the means to correct errors that occurred during the" proceeding that is being challenged. *Id.* at 786. The administrative-review process, under which a Plaintiff can move an immigration court to reopen his removal proceeding and stay removal pending that consideration, is adequate to address Plaintiffs' challenges to their removal orders.

The administrative review process is adequate because it provides comprehensive procedures that include "the means to correct errors," including in exigent circumstances. *Boumediene*, 553 U.S. at 786. After a removal order is final and enforceable, an alien may file a motion to reopen before the immigration court or BIA if circumstances have changed. 8 C.F.R. § 1003.23. There are no time or numerical limits for motions based upon materially changed country conditions in the country to which the alien will be removed. 8 U.S.C. § 1229a(c)(7)(C)(ii). The requirements for the motion are not elaborate. The motion need only "state the new facts that will be proven" and include evidence relating to those facts. *Id.* § 1229a(c)(7)(B); *see* 8 C.F.R. §. §§ 1003.2(c)(1),

[9] The Government has appealed the order. *Hamama et al.*, v. *Homan et al.*, 17-2171 (6th Cir.).

1003.23. The BIA allows for the submission "of supplemental evidence." Board Practice Manual § 5.2(f); *see also* Dufresne Decl. (Imm. Ct. Decl.), Ex. A ¶ 16 (stating that where removal is imminent the immigration court will take into account that the stay request and motion to reopen may have been prepared without sufficient time for the alien to submit all appropriate evidence).

Once a motion to reopen is filed, the alien may seek a stay of removal from the immigration court or the BIA. *See* 8 C.F.R. §§ 241.6(a)–(b), 1241.6(a)–(b); *see generally* Im. Court Decl. The immigration courts and the BIA consider emergency stay requests on an expedited basis. The immigration courts, in turn, are, "to the greatest extent practicable, dedicated to issuing decisions in a timely manner so that no alien with a pending motion is removed from the United States prior to receiving an adjudication of his or her stay request and/or motion to reopen." Imm. Ct. Decl. ¶ 13 And the BIA has created the Emergency Stay Unit (Unit) designed for exactly the type of circumstances presented here, "to achieve the timely adjudication of every [stay request] it receives." Gearin Decl. (BIA Decl.), Ex. B ¶ 17.

Just as in this Court, the traditional stay standards are relevant in immigration courts. These standards also apply in the federal appellate courts, *see Nken*, 556 U.S. at 433–34, where Plaintiffs may turn after exhausting administrative remedies. 8 U.S.C. §§ 1252(a)(5), (d)(1). And, like this Court, federal appellate courts are can act on an expedited basis in these circumstances. *See*, *e.g.*, *Khan v. Attorney General*, 691 F.3d 488, 491 (3d Cir. 2012) (panel "granted the petitioners a temporary stay of removal" in case where petitioner alleged that BIA had not "adjudicated their motion" that was filed "within hours of [the alien's] scheduled removal").

Given these procedures, every court of appeals to address the issues raised here have concluded that the administrative process provides an adequate substitute for habeas. The Sixth Circuit has held that "[b]ecause a petition for review provides an alien with the availability of the same scope

of review as a writ of habeas corpus, . . . facially, the limitation on habeas corpus relief in the REAL ID Act [codified at 8 U.S.C. §§ 1252(a)(5), 1252(b)(9), and 1252(g)] does not violate the Suspension Clause." *Muka v. Baker*, 559 F.3d 480, 485 (6th Cir. 2009). Other courts of appeals are in accord. *See Iasu v. Smith*, 511 F.3d 881, 893 (9th Cir. 2007) ("[A] potential motion to reopen at the administrative level and the possibility of judicial review thereafter provides the necessary process to alleviate Suspension Clause concerns."); *Alexandre v. U.S. Atty. Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006) ("Th[e] procedure [of moving the BIA to reopen or reconsider its previous ruling and filing a petition for review in the court of appeals] offers the same review as that formerly afforded in habeas corpus . . . . Since the substitute remedy of a petition for review offers the same scope of review as a habeas remedy, it is adequate and effective.") (internal citations omitted); *Luna v. Holder*, 637 F.3d 85, 97 (2d Cir. 2011) (ruling that the motion to reopen process "provides Petitioners with an adequate and effective substitute for habeas"); *cf. Enwonwu v. Gonzales*, 438 F.3d 22, 33 (1st Cir. 2006) (finding no merit to the petitioner's argument that the REAL ID Act violates the Suspension Clause because the court of appeals could fully review the questions of law raised in the case at bar on a petition for review).

Plaintiffs make several arguments for why the motion-to-reopen process is inadequate. None has merit. *First*, Plaintiffs contend that motions to reopen "require substantial time and resources." FAC ¶ 60. But a request for preliminary relief also requires time and the support of evidentiary materials of at least a similar quality. *See* Fed. R. Civ. P. 65(a) (discussing "evidence that is received on the motion"). Habeas rules require a similar showing. *See* 28 U.S.C. § 2241(c)(3) (petitioner must show "custody in violation of the Constitution or laws or treats"); Habeas Rule 2 (habeas petition must "specify all the grounds for relief" and "state the facts supporting each ground"). Plaintiffs have failed to take any action on their immigration cases, even after being

notified—some as early as February of this year—that their stay requests were denied and being provided sixty days in which to purchase tickets and depart the United States. *See* Stevens Pls. Decls. "Op. Indonesian Surrender" Filing Exs. D–Z.

Indeed, the available processes in the administrative forum are *better* suited than those in a federal court. To start, the BIA has a Unit to handle stay requests. *See generally* BIA Decl. That Unit is designed to ensure consideration of stay requests before an alien is removed. The immigration courts regularly address these issues; they are familiar with the timing of stay requests and the equities in individual cases. *See* Imm. Ct. Decl. ¶¶ 13–16. Each claim for relief turns on an individual circumstances, and the immigration courts and the BIA are best suited (and mandated by law) to consider those individual circumstances, not this Court. Finally, the immigration courts are more familiar and better equipped to review an individual case's facts and procedural history, *see* Imm. Ct. Decl. ¶ 15, information that is not readily available in district court.[10]

Second, Plaintiffs state that they must obtain their "complete immigration files" kept by DHS. ECF No. 4, at 10; *see also* FAC ¶ 61. Plaintiffs do not allege that they have ever made any attempts to seek their files during the many years in which they have been present in the United States. And

[10] There is one difference between the process this Court may provide and the process available to every petitioner in the immigration courts and the courts of appeals: this Court may have authority to certify a class and grant class-wide relief. *See* Fed. R. Civ. P. 23. There is considerable debate as to whether class action procedures may be used in habeas cases. *Cf. Schall v. Martin*, 467 U.S. 253, 260 n.10 (1984) ("[w]e have never decided" whether Rule 23 "is applicable to petitions for habeas corpus relief"). But that kind of relief is particularly inappropriate where the right to relief—here, reopening of a removal order based upon allegations of future treatment—depends on an individual's specific circumstances that are relevant to that possible treatment. The administrative reopening process is far better suited to consider those facts in each individual case before the circuit court of appeals may judicially review any challenged result. 8 U.S.C. § 1252(d)(1). Given the fully adequate administrative process available to Plaintiffs, the Court need not wade into that debate here.

their claims turn on allegedly changed circumstances in Indonesia—facts that of necessity must be new and thus will not be in the files kept by DHS. Moreover, the challenge in obtaining evidence applies to proceedings in this Court as well and does not suggest that the motion to reopen process is inadequate. Those concerns are especially misplaced given the nature of a motion to reopen. Regardless of forum, an alien should know the procedural history of his case and would be uniquely aware of new facts relating to her potential treatment upon return to Indonesia.

Third, Plaintiffs allege that ICE's decision to decline to renew Plaintiffs' applications for temporary removal came without warning and deprived Plaintiffs of "a reasonable opportunity . . . to research and understand their rights and seek appropriate relief in appropriate forum." FAC ¶ 54. Plaintiffs do not explain how this allegation bears on any Suspension Clause claim. And these allegations cut against allowing Plaintiffs to proceed in this Court. ICE's initial discretionary decision to issue stays of removal permitted Plaintiffs to lawfully stay in the United States for a specified period, allowing them time to apply for the very motion to reopen relief they now seek.

While that path was, and is still, available to Plaintiffs in the immigration courts, it is telling that all but two Plaintiffs sat on these rights and, even then, waited until September 21, 2017—four days prior to the commencement of this litigation—to file motions to reopen with the BIA. Stevens Decl. ¶ 15. Plaintiffs do not allege that ICE promised never to remove Plaintiffs or to automatically renew their temporary stays of removal and orders of supervision. Neither ICE's temporary stays nor the OSUPs invalidated Plaintiffs' final removal orders, and there is no basis to reasonably believe that those actions gave rise to a "settled position" of permanent relief from removal. 8 U.S.C. § 1231(a)(3)(A) (OSUPs); 8 C.F.R. § 241.5 (same); 8 C.F.R. § 241.6 (a)

(discretionary stays of removal from ICE). ICE commonly issues temporary stays of removal in their discretion, and also commonly revokes them or declines to renew them.[11]

In sum, the forum that Congress created as the exclusive one for Plaintiffs' first two claims—the immigration courts and BIA—possess the authority to address exigent circumstances and provide complete adjudication of Plaintiffs' claims. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii) (no time limit for motions to reopen based on changed country conditions). It is adequate and consistent with the Suspension Clause in directing claims to that forum.

ii. Plaintiffs do not plead a cognizable habeas claim.

Even if the motion-to-reopen process were inadequate, that would not present any problem under the Suspension Clause because that Clause protects against denying a forum for rights properly cognizable in habeas. "Habeas is at its core a remedy for unlawful executive detention," and "[t]he typical remedy for such detention is, of course, release." *Munaf v. Geren*, 553 U.S. 674 (2008); *see, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he traditional function of the writ is to secure release from illegal custody."). Yet, in their first two claims, Plaintiffs seek a stay of removal, not release from illegal custody. Therefore, Plaintiffs do not request a traditional exercise of this Court's habeas jurisdiction that is protected by the Suspension Clause. Nor would such a suit be cognizable in a statutory habeas action under these precedents.

Plaintiffs invoke habeas jurisdiction not to pursue release, but rather to *halt* to their upcoming removal. ECF No. 4, at 7 (Plaintiffs "seek[] to vindicate [their] rights to fairly and fully seek

[11] *See, e.g.*, *Rodriguez-Guardado v. Smith*, No. CV 17-10300-RGS, 2017 WL 4225626, at *1–*3 (D. Mass. Sept. 22, 2017) (El Salvadorian national with a final order of removal had received discretionary stays from ICE from 2012–2016 before being denied a stay in March of this year and subsequently filing a motion to reopen and an emergency stay of removal with the BIA).

protection against religious persecution through the filings of motions to reopen with the Immigration Court and/or Board of Appeals."). That is not a traditional habeas protection. "[P]etitioners invoking habeas jurisdiction must assert claims that sound in habeas," *Aamer*, 742 F.3d at 1033; habeas is not a place holder to exercise some different statutory or procedural right.

Nor is such a novel use of habeas consistent with the statute, which confers jurisdiction to review a claim of "custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(b)(3). As the Supreme Court explained in *Munaf*, "the writ of habeas corpus could not be used to enjoin release." 553 U.S. at 682; *see Preiser*, 411 U.S. at 484 (1973); *Martin*, 391 F.3d at 714 (no habeas jurisdiction to over transfer claim). Because the claims do not seek to end unlawful detention, they are invalid habeas claims and cannot undermine Congress's path for review and clear bar on a claim to halt the "execut[ion of] removal orders."[12] 8 U.S.C. § 1252(g).

Finally, to the extent that 8 U.S.C. § 1252(g) eliminates the authority of this court to consider classwide relief, that does not violate the Suspension Clause. Whatever the precise contours of the "core" habeas rights protected by the Suspension Clause, they do not include this type of modern class action. *See Harris*, 394 U.S. at 294 n.5.

In sum, Plaintiffs' use of a habeas remedy to halt their removals is not encompassed by section 2241 nor so inherent in traditional habeas as to require invalidation of Congress's statutorily prescribed and adequate method to review such claims.

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[12] Further, the Suspension Clause does not apply to override Congress's chosen framework for evaluating CAT claims. "Congress limited judicial review under the [CAT] to claims raised in a challenge to a final order of removal." *Kiyemba*, 561 F.3d at 514 (citing 8 U.S.C. § 1252(a)(4)). That statute makes clear that the CAT—which is not self-executing—provides enforceable rights only in the administrative removal proceedings authorized by Congress. *See* 8 U.S.C. § 1252(a)(4). The CAT therefore cannot form the basis of a habeas claim under statute, much less allow one to invoke the Suspension Clause and invalidate the procedure Congress has crafted.

c. Plaintiffs' reliance on Hamama v. Adducci is misplaced.

In arguing that applying section 1252(g) would violate the Suspension Clause, Plaintiffs rely on *Hamama* v. *Adducci*, --- F. Supp. 3d ----, No. 17–cv–11910, 2017 WL 3124331 (E.D. Mich. July 24, 2017). That decision was wrong and should not be extended beyond what the court there viewed as "extraordinary circumstances" that drove its holding. *Id.* at *1.

Hamama arose after ICE detained for removal Iraqi nationals with longstanding final removal orders that ICE had been long unable to execute, due to Iraq's general refusal to accept the return of most such individuals. The plaintiffs moved the district court for an emergency stay of removal until they had had the chance to file motions to reopen and until the immigration courts (and the federal courts of appeals, if necessary) had a chance to adjudicate their protection claims. *Id.* at *2.

The *Hamama* court agreed with the Government that "if constitutional, 8 U.S.C. § 1252(g) would apply because the plaintiffs' claims arose out of the Attorney General's decision to execute their final orders of removal." *Id.* at *7; *see also id.* at *8. But the court concluded that enforcing section 1252(g)'s bar "in the present circumstances violates the Constitution's Suspension Clause." *Id.* The court recognized that the INA prescribed the administrative remedy of motions to reopen for aliens with final orders of removal to challenge the lawfulness of their removal orders and to raise changed country conditions, but it found that "the compelling confluence of grave, real-world circumstances present in this case" meant that remedy could offer no relief. *Id.* at *9.

This Court should not embrace *Hamama*. First, *Hamama* was wrongly decided because it disregarded the availability of the motion to reopen process to address individual CAT claims, and instead erroneously assumed that most class members would face torture and persecution if removed. *Id.* at *9. But *every* case involving a motion to reopen citing changed country conditions alleges that removal would result in torture or persecution. Assuming that to be true for every class

member, as the court did in *Hamama*, evades the requirements of the statute and regulations implementing the United States' obligations under the CAT that an individual establish a threat in that person's own individual circumstances within the immigration court procedure. *See* 8 U.S.C. § 1252(a)(4). That type of class-wide presumption of torture is not warranted factually and eviscerates congressional channeling of review for these types of allegations into the administrative process that is uniquely well-suited to consider such individual claims.

Second, *Hamama*'s holding was driven by circumstances that are materially different from those here. Extending its holding based on what the *Hamama* court believed to be "extraordinary circumstances" to Plaintiffs' allegations would be inappropriate. To start, Plaintiffs are, with a sole exception, not detained, rendering inapplicable the concerns in *Hamama* about the plaintiffs being unable to adequately litigate their motions to reopen due to being arrested and placed in detention facilities. In *Hamama*, the court found that the decision to transfer detainees to different locations within the country made it more difficult for the detainees to file motions to reopen. 2017 WL 3124331, at *11. Here, however, Plaintiffs provide no allegations of being hindered from filing motions to reopen due to their detention and/or transfer; nor could they. *See generally* FAC. To the extent Plaintiffs have not already filed motions to reopen, it is because they continue to sit on their rights, not because any detention and/or transfer between detention facilities allegedly may have hindered their ability to do so, as alleged in *Hamama*.

The court in *Hamama* also found that by the time Iraq's country conditions worsened in 2014, the plaintiffs reasonably believed it was unlikely they would be removed, given that Iraq had generally refused to accept removals from the United States for over a decade, an unusual circumstance. *Hamama*, 2017 WL 3124331, at *10. Here, however, Plaintiffs do not allege that Indonesia had refused to accept their return, thus rendering their removals a remote possibility, *see*

generally FAC; rather, they allege that ICE allowed them temporary stays of removal—a common occurrence that should not be presumed to be a permanent state of relief from removal.

II. But for one Plaintiff, the Court lacks jurisdiction over Plaintiffs' unlawful-detention claim and should dismiss that claim in full.

Plaintiffs' third claim "challenge[s] any actual or anticipated detention, which bears no reasonable relationship to any legitimate purpose." FAC ¶ 8. This Court has held that 8 U.S.C. § 1252 does not preclude habeas challenges to immigration detention. *Hernandez v. Gonzales*, 424 F.3d 42, 42–43 (1st Cir. 2005). But this claim lacks jurisdiction over this claim as to all but one Plaintiff, who has a separate habeas petition pending in this Court, because they are undetained.

Dismissal is warranted because the 23 non-detained Plaintiffs lack standing. Those Plaintiffs do not allege that they are detained, let alone detained in Massachusetts. *See* FAC ¶¶ 15–38. Rather, they state that they subject to OSUPs. *Id.* An individual subject to an OSUP is not in immigration detention. *See Zadvydas v. Davis*, 533 U.S. 678, 696, 700 (2001) (distinguishing between detention and supervised release subject to conditions). These 23 Plaintiffs cannot show an actual or imminent injury-in-fact, because they do not establish that detention has occurred or is "certainly impending." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

Their claim is also unripe because they have failed to allege any specific facts regarding their detention that would be capable of judicial review. "[A] claim is ripe only if the party bringing suit can show both that the issues raised are fit for judicial decision at the time the suit is filed and that the party bringing suit will suffer hardship if court consideration is withheld." *Labor Relations Div. of Constr. Indus. of Massachusetts, Inc. v. Healey*, 844 F.3d 318, 326 (1st Cir. 2016). Plaintiffs' claim has not "ripen[ed]" into an actual "dispute," and instead remains "only hypothetical," thus unfit for judicial decision at this time. *Reddy v. Foster*, 845 F.3d 493, 505 (1st

Cir. 2017). Further, Plaintiffs also fail to demonstrate "direct and immediate harm" from detention, thus falling short in establishing hardship in the absence of court consideration of their claim. *Labor Relations Div.*, 844 F.3d at 330. And of course, the orders of supervision are entirely lawful.

Further, most Plaintiffs do not establish the Court's personal jurisdiction over their habeas claims, because even if they were detained—which they are not—none allege that they, and most do not appear to, reside in the District of Massachusetts.[13] Stevens Decl. ¶ 7 (stating that the operation was conducted in Manchester, New Hampshire); *see* Stevens Pls. Decls. Exs. D–Z; *Rumsfeld v. Padilla*, 542 U.S. 426, 446–47 (2004) (jurisdiction exists only in the district where the petitioner is confined).

One Plaintiff does allege that he is detained, but his presence in this case does not counsel against dismissal. Terry Rombot has filed his own habeas petition challenging his allegedly unlawful detention. *Rombot v. Moniz*, Civ. No. 17-cv-11577 (D. Mass.). His claim can be addressed in that first-filed action. There is no sound basis for allowing Plaintiffs' putative class action to proceed on the unlawful-detention claim when that claim is obviously not ready for judicial resolution, let alone this venue, for the overwhelming majority of Plaintiffs.

CONCLUSION

This Court should dismiss this case for lack of jurisdiction.

[13] Further, of the three plaintiffs within the District of Massachusetts, two did not participate in the 2010 operation that serves as the basis for Plaintiffs' claims, and the third already has a habeas petition pending before this Court. Stevens Decl. ¶¶ 17–19. Six of the New Hampshire plaintiffs also were not part of the 2010 operation. Stevens Decl. ¶¶ 17, 23.

Respectfully submitted,

Dated: October 3, 2017

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

Dated: October 3, 2017

/s/ Vinita B. Andrapalliyal
VINITA B. ANDRAPALLIYAL
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U.S. Department of Justice

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LIA DEVITRI, et al., Plaintiffs-Petitioners, v. **CHRIS M. CRONEN,** et al., Defendants-Respondents.	Civil Action No. 17-11842-PBS **DECLARATION OF THE HONORABLE JILL H. DUFRESNE**

1. I serve as an Assistant Chief Immigration Judge ("ACIJ") for the Executive Office for Immigration Review ("EOIR"). As ACIJ, I have oversight responsibility for the Batavia, Boston, Buffalo, Elizabeth, Hartford, and Newark Immigration Courts. I have served in this position since November 2009.

2. I work for the Office of the Chief Immigration Judge, which provides overall program direction, articulates policies and procedures, and establishes priorities for the 58 immigration courts throughout the nation.

3. I am submitting this declaration in connection with the Government's response to the above captioned lawsuit. I understand that the Plaintiffs/Petitioners in this lawsuit are seeking to certify a class of "Indonesian nationals within the jurisdiction of the Boston ICE Field Office, with final orders of removal, who have been or will be arrested detained, or removed by ICE after having participated at any time in Operation Indonesian Surrender." *See Devitri, et. al. v. Cronen, et. al.*, First Amended Complaint, No. 17-cv-11842-PBS, Dkt. 22 at 31 (D. Mass. Filed Sept. 28, 2017). I further understand that Plaintiffs/Petitioners are seeking an order, in part, enjoining Immigration and Customs Enforcement ("ICE") from removing them until they have been granted sufficient time to file motions to reopen and seek stays of removal from the immigration court. *See id.*

4. I understand that some of the Plaintiffs/Petitioners may be filing motions to reopen and stay requests with the Boston Immigration Court; however, at this point, court staff is not aware of any recent motion to reopen or stay request having been filed with the Boston Immigration Court by Plaintiffs/Petitioners or members of the putative class.

5. The purpose of this declaration is to explain the Boston Immigration Court's procedures for promptly adjudicating motions for an emergency stay filed in conjunction with a motion to reopen or reconsider in a timely and informed manner.

6. Through my supervisory role of the Boston Immigration Court, I have knowledge of the facts stated in this declaration.

A. Background: Stays of Removal and Motions to Reopen in Immigration Court

7. A stay prevents the Department of Homeland Security ("DHS") from executing an order of removal, deportation, or exclusion.

8. Stays are automatic in some instances and discretionary in others.

9. I understand that the above captioned lawsuit concerns aliens subject to final orders of removal. Where an alien is subject to a final removal order, federal regulations authorize immigration judges to exercise discretion to stay the execution of the order pending adjudication of an alien's pending motion to reopen the removal decision. 8 C.F.R. §§ 1003.2(f), 1003.23(b)(1)(v).[1] The Immigration Court Practice Manual supplements the regulations and provides detailed guidance to assist parties filing stay requests. *See* Office of the Chief Immigration Judge, *Immigration Court Practice Manual*, Chap. 8 (available at https://www.justice.gov/eoir/office-chief-immigration-judge-0).

10. Although the mere filing of a motion for a discretionary stay of an order of removal does not prevent execution of the order, the Immigration Court Practice Manual addresses situations where execution of a removal order is imminent. Specifically, the

[1] In some circumstances, the Board of Immigration Appeals ("BIA") has jurisdiction over a motion to reopen and a corresponding stay request. 8 C.F.R. § 1003.23(b)(1). In those circumstances, any motion to reopen and motion for a stay must be filed with the Board.

Immigration Court Practice Manual states that when removal is imminent an alien may designate the stay motion as an "emergency motion to stay removal," *see id.*, which serves to bring the motion to the immigration court's immediate attention and allows an Immigration Judge to consider and rule on the motion on an expedited basis.

11. For each stay request, an Immigration Judge makes a case-by-case determination whether to grant or deny a stay based on considerations including, but not limited to, the facts and circumstances of the alien's case and the basis for the alien's motion to reopen.

12. An alien may appeal to the BIA and file a motion with the BIA requesting a stay in the event that an Immigration Judges denies a motion to reopen. The regulations also permit an alien to request a stay from the Immigration Court while an alien's appeal to the BIA from the Immigration Judge's denial of a motion to reopen is pending. 8 C.F.R. § 1003.6(b). Accordingly, an alien has multiple avenues to seek a stay of imminent removal pending the Immigration Judge's and the BIA's decision on the motion to reopen.

B. The Boston Immigration Court's Process for Adjudicating Stay Requests

13. The Boston Immigration Court prioritizes the timely adjudication of emergency stay motions and is, to the greatest extent practicable, dedicated to issuing decisions in a timely manner so that no alien with a pending motion is removed from the United States prior to receiving an adjudication of his or her stay request and/or motion to reopen.

14. Stay requests received by the Boston Immigration Court are typically filed by detained aliens. The Boston Immigration Court has two Immigration Judges assigned to its detained docket and is supported by a Court Administrator and court staff.

15. Court staff assigned to the detained docket at the Boston Immigration Court take immediate action when an alien files an emergency motion for a stay of removal in conjunction with a motion to reopen or reconsider. [2] Specifically, court staff retrieves the

[2] The Boston Immigration Court provides aliens (or their legal representatives) with two avenues to file a motion to reopen in conjunction with a motion to stay a removal order. The Immigration Court will accept a properly completed motion through mail or in person filing on the court. The court accepts in person filings at the clerk's office from 8:00 a.m. - 4:00 p.m. (Monday-Thursday) and until 3:30 p.m. (Friday).

Record of Proceeding ("ROP"), which is EOIR's administrative file associated with the alien's removal case, and provides the motion, the stay request, and the ROP to the Immigration Judge. If the ROP is not located at the Immigration Court, court staff orders the ROP but does not delay providing the motion and stay request to the Immigration Judge. Moreover, the Immigration Judges assigned to the detained docket will not delay ruling on a stay request in the event that the ROP is not immediately available.

16. Immigration Judges at the Boston Court decide whether to grant or deny stays on a case-by-case basis. The Immigration Judges generally consider the basis for the motion to reopen and whether removal is imminent when ruling on a stay-request; however, they do take into account the possibility that a stay request or motion may have been prepared and submitted without the alien (or his or her attorney) having sufficient time to obtain the ROP and all appropriate evidence in support of the stay request or motion to reopen.

17. Based on my conversations with court staff and Immigration Judges at the Boston Immigration Court, they estimate that an Immigration Judge generally rules on all emergency stay requests within one to three days of receipt. When the alien includes a scheduled removal date in a motion for an emergency stay, the Immigration Court does all it can to adjudicate the request before the anticipated removal date.

18. When an Immigration Judge grants a stay request, court staff immediately sends a copy of the stay order to the appropriate officials at DHS.

19. As discussed above, stay requests received by the Boston Immigration Court are typically filed by detained aliens; however, the Immigration Judges and court staff at the Boston Immigration Court are aware that some of the above named Plaintiffs/Petitioners and putative class-members may soon be filing motions to reopen and stay requests with the Court even if they are not yet detained. Accordingly, the Court Administrator has instructed court staff to be watchful for stay motions accompanied by a motion to reopen and to bring any such motion and stay request to an Immigration Judge's attention immediately. And the Immigration Judges will continue to treat any such motions as an utmost priority in light of the urgency and potential gravity of such requests.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 3rd Day of October 2017 in Virginia.

Jill H. Dufresne

Jill H. Dufresne
Assistant Chief Immigration Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LIA DEVITRI, et al., Plaintiffs-Petitioners, v. **CHRIS M. CRONEN**, et al., Defendants-Respondents.	Civil Action No. 17-11842-PBS **DECLARATION OF CHRISTOPHER GEARIN**

1. I serve as an attorney team leader for the Executive Office for Immigration Review's ("EOIR") Board of Immigration Appeals ("Board"). The Board is the highest administrative body for interpreting and applying the immigration laws. 8 C.F.R. § 1003.1.

2. In this role, I directly supervise and manage a team of paralegals, whose duties include the Board's Emergency Stay Unit. I have managed the Emergency Stay Unit ("ESU") since April 2013.

3. The purpose of this declaration is to explain the Board's procedures for promptly adjudicating discretionary motions for stay of a removal order.

4. I have knowledge of the facts stated in this declaration.

Background

5. By regulation, the Board may enter a stay of an order of removal, deportation, or exclusion.

6. Stays are discretionary in some instances and automatic in others. Automatic stays attach to timely and properly filed direct case appeals and certain other issues. 8 C.F.R. § 1003.2(a). The Board has discretion to grant a stay of a removal order in other circumstances. 8 C.F.R. § 1003.6(b).

7. The Board may grant an alien's written request for a stay of removal in the exercise of its discretion (a discretionary stay) pending the Board's adjudication of the underlying matter before it. The Board's Practice Manual provides detailed guidance to parties on the process and requirements for filing a stay request with the Board. *See* Board of Immigration Appeals, *Practice Manual*, Chap. 6 (*available at* https://www.justice.gov/sites/default/ files/pages/attachments/2017/02/03/biapracticemanualfy2017.pdf).

8. The Board determines based on the facts of each case whether the request qualifies as an "emergency" or "non-emergency" stay.

9. The Board will deem a stay request as an emergency if removal is imminent. An emergency stay request will be processed immediately if: 1) a motion to reopen or reconsider a prior Board decision, or an appeal of an Immigration Judge's denial of a motion to reconsider or reopen has been entered and received by the Board's Clerk's Office; 2) a written motion for a stay of removal has been entered and received by the Board's Clerk's Office; 3) the Department of Homeland Security's ("DHS") scheduled removal of the alien is imminent; 4) the DHS has confirmed a specific removal date and time, and 5) the alien is in the physical custody of the DHS.

10. If the Board decides that a stay request is "non-emergency," the Board will not rule immediately on the request but will instead consider it during the normal course of adjudication. If the alien or the alien's attorney informs the Board that removal is imminent, the Board will then treat a pending stay request as an emergency stay request if the alien's case meets the above mentioned requirements. In those circumstances, the alien does not need to file a new request.

11. Once a stay request is deemed an emergency, the stay request is prepared for adjudication. It is the responsibility of the ESU to expeditiously process stay requests in cases where removal is truly imminent.

B. The Emergency Stay Unit

12. The ESU responds to stay inquiries and processes emergency stay requests when removal is imminent. The ESU is composed of Board legal staff, including trained

paralegals, who prepare the record for Board Member adjudication of emergency stay requests. As stated above, I supervise the ESU. The ESU appreciates the urgency of imminent removal and strives to process emergency stay requests as quickly as possible.

13. When an alien or alien's attorney contacts the ESU, the ESU explains the requirements and procedures for filing emergency stays. The ESU telephone line at (703) 306-0093 is staffed Monday – Friday, during normal business hours. Messages can be left at any time and will be returned.

14. All stay requests must be in writing. Generally, stay requests should accompany the matter pending before the Board. When that is the case, the Board will treat it as an emergency if all the requirements are met. If no stay request was included in the underlying matter before the Board, the ESU staff will authorize the request to be filed by fax. In most cases, a DHS deportation officer will contact the ESU to inquire whether the alien has filed a stay request in a specific case. If the alien has filed one, the deportation officer will provide the ESU a removal date. The ESU will enter the alien's information and removal date onto the "pending stay list." As the removal date approaches, the ESU will process the alien's stay request for a Board Member's review.

15. If, however, the alien (or his or her attorney) contacts the ESU believing that removal is imminent, and all filing criteria for an emergency stay request have been met, the ESU requests certain information from the alien (or his or her attorney) including the name and contact information of the alien's assigned DHS deportation officer. The ESU then immediately contacts the DHS deportation officer to determine the date and time that DHS has scheduled the alien for removal. Once the removal information is confirmed, the ESU prepares the stay request for immediate delivery to a Board Member for prompt adjudication. Where there is uncertainty and the ESU cannot confirm the removal date with the DHS, the ESU will process the request to a Board Member to decide. Once the Board Member signs the stay order, the ESU immediately contacts the parties by telephone. The ESU will then fax a copy of the signed and dated stay order to DHS and the alien's counsel (if any) and thereafter will serve a copy by mail.

16. If the ESU is advised that removal is not imminent after contacting the appropriate DHS officer, the ESU does not treat the request as an emergency. However, the ESU will ask the officer if a removal date has been set. If it has, the ESU retains the alien's information and removal date on the "pending stay list." If the deportation officer does not have a removal date, the ESU asks the deportation officer to notify the ESU when the date is set. In any event, an alien or his or her attorney can always contact the ESU if removal later becomes imminent.

17. The Board's ESU is comprised of dedicated professionals who understand the gravity and urgency of the requests they process, and our Board Members treat these cases as an utmost priority. When removal is imminent and the criteria for an emergency stay are met, the ESU does all that it can to achieve the timely adjudication of every request it receives.

I declare under penalty and perjury that the foregoing is true and correct to the best of my information and belief.

Executed this 3rd Day of October, 2017 in Virginia.

Christopher Gearin