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 RESPONSE IN OPPOSITION TO PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Petitioners' preliminary-injunction motion seeks to circumvent Congress's immigration framework. The Court should deny the motion. Petitioners are not likely to succeed on the merits. This Court lacks jurisdiction over their claims, and Petitioners do not state any plausible claims anyway. Petitioners also fail to establish irreparable harm absent injunctive relief: they do not show that they are likely to be removed before the immigration courts can adjudicate their motions to stay their removals—let alone that they are each likely to face torture or death as a result of removal. And no other factor supports the extraordinary relief that Petitioners seek.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Petitioners are 51 Indonesian nationals subject to final orders of removal. Second Am. Compl. (SAC), ECF 34 ¶¶ 15–65. Petitioners stayed in the country despite those orders. *See* Decl. of Timothy J. Stevens, ECF 37-2, at 16 ¶ 3. In 2010, U.S. Immigration and Customs Enforcement (ICE) officials conducted a time-limited operation to place certain Indonesians subject to final removal orders under Orders of Supervision (OSUPs) for specified periods of time. *Id.* ¶¶ 3–5.

ICE initially indicated its intent to move forward with execution of the removal orders in February 2017. *See* SAC ¶¶ 16, 19; *see also, e.g.*, ECF 37-2, at 91. On August 1, ICE instructed certain Petitioners at check-in appointments to return within 30 days with a plane ticket to depart

the country within 30 days thereafter. *See, e.g.*, Stevens Decl., ECF 37-2, at 33. Then, 11 Petitioners filed this putative class action on September 26, *see* ECF 1, along with motions for a temporary restraining order (TRO) and for a preliminary injunction, *see* ECF 4. On September 28, Petitioners amended their complaint to add 13 Petitioners. ECF 22. Terry Rombot was the only Petitioner who was taken into immigration detention. *See* SAC ¶¶ 15–65; Stevens Decl. ¶ 31. This Court later granted his individual habeas petition challenging his detention. *See Rombot v. Moniz*, Civ. No. 17-cv-11577 (D. Mass.), ECF 52.

The Operative Complaint. Petitioners 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. SAC ¶ 104; *see also id.* ¶¶ 69, 71, 102–04. Petitioners contend that conditions in Indonesia have changed since their removal orders were issued, and that the INA entitles them to move to reopen their removal orders in light of these "new facts." *Id.* ¶ 103. *Second*, based on those same allegations, Petitioners claim that removing them without providing an opportunity to raise claims based on changed country conditions "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.* ¶ 108; *see also id.* ¶¶ 106–08. *Third*, Petitioners allege that their detention "bears no reasonable relationship" to its purposes and thus constitutes unlawful detention. *Id.* ¶ 111; *see also id.* ¶¶ 109–11.

Petitioners allege 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)." SAC ¶ 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 Petitioners, "[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.* Petitioners further allege that they are "in custody" for the purposes of habeas jurisdiction because they are subject to OSUPs. SAC ¶ 12. And they state that this action is not barred by 8 U.S.C. § 1252(b)(9)—which generally channels judicial review of removal orders into the federal courts of appeals—because "[t]he present action does not challenge the underlying orders of removal." *Id.* ¶ 13.

TRO. On September 26, the Court granted a TRO that stayed the removal of the Petitioners named in the original complaint. ECF 14. Petitioners twice amended their complaint to add Petitioners. ECF 22, 44. The Court twice extended the TRO to the added Petitioners. ECF 28, 61.

Preliminary-Injunction Motion. In their preliminary-injunction motion, Petitioners ask the Court to: (1) "[a]ssume jurisdiction over this matter;" (2) "[i]ssue a preliminary injunction and stay of removal, temporarily prohibiting Petitioners'[] removal, and that of all putative class members, until this action is decided"; (3) order Respondents "to provide Petitioners'[] counsel with a list of all class members and copies of their A files" and various documents "relating to 'Operation Indonesian Surrender'"; (4) enjoin Respondents "from removing Petitioners[] and all putative class members to Indonesia without first providing them with sufficient opportunity to establish that, in light of current conditions . . . they are entitled to protection against . . . removal"; (5) enjoin Respondents "from removing Petitioners[] and all putative class members to Indonesia" for "four months to file their motions to reopen, starting when the Government provides a copy of the individual's A-file and the Record of Proceedings," and, if a Petitioner files a motion to reopen,

until the immigration court and Board of Immigration Appeals (BIA) "adjudicate the motion, and the Petitioner has had the opportunity to file a petition for review and seek a stay with the Court of Appeals"; (6) enjoin Respondents "from transferring Petitioners[] and all putative class members outside of the jurisdiction of the Boston Field Office"; (7) order Respondents "to release all Petitioners[] and all putative class members from detention absent an individualized determination . . . that their detention is justified"; and (8) "[g]rant such other . . . relief as is just and equitable." Prelim. Inj. Mot. (Mot.), ECF 3, at 3–4.

The Court's Order. On November 27, the Court issued an order ruling that it has subject matter jurisdiction over Counts One and Two of the SAC and continuing its TRO. ECF 65, at 22 (Order).[1] The Court first concluded that Petitioners were "in custody" for the purposes of habeas jurisdiction because they were under subject to final orders of removal as well as OSUPs. *Id.* at 7–8. The Court next ruled that while Petitioners received no promises that they could stay in this country indefinitely, *id.* at 5, they were "reasonable in relying on their protected status so long as they complied with the terms of their OSUPs." *Id.* at 20. "The Court [found] that the August 1, 2017 notification that the protected status would terminate triggered the obligation to file motions to reopen." *Id.* (August 1 was when some "program participants were told" "to report to ICE at their next 30-day check in with tickets to depart for Indonesia 30 days later." *Id.* at 6.)

In finding jurisdiction, the Court stated that "[d]espite the jurisdiction-stripping language of 8 U.S.C. § 1252(g)," jurisdiction was proper "under both 28 U.S.C. § 2241 [habeas] and 28 U.S.C. § 1331 [federal question jurisdiction] to ensure that there are adequate and effective alternatives to habeas corpus relief in the circumstances of this case." *Id.* at 15. It concluded that

[1] The Court dismissed Count Three without prejudice because it was "addressed in the companion case," *Rombot v. Souza*, Civ. No. 1:17-cv-11577-PBS (D. Mass.). ECF 65, at 22. Therefore, Respondents do not address that claim in this briefing.

"[i]f the jurisdictional bar in 8 U.S.C. § 1252(g) prevented the Court from giving Petitioners an opportunity to raise their claims through fair and effective administrative procedures, the statute would violate the Suspension Clause as applied." *Id.* In reaching this conclusion, the Court appeared to rely on 8 U.S.C. § 1229a, in which "Congress codified the right to file a motion to reopen, 'transform[ing] the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien.'" *Id.* at 11 (quoting *Dada v. Mukasey*, 554 U.S. 1, 14 (2008)).

The Court found "that the Immigration Court's *procedures* typically are an adequate and effective administrative alternative to habeas corpus relief consistent with the Suspension Clause," and "will also likely be adequate" for Petitioners if "they receive from this Court a reasonable time period for filing the motions to reopen to which they are entitled." Order 19. The Court stated that "[t]he statue seems to suggest that 90 days from August 1, 2017 might be an appropriate minimum timeframe for assembling a motion to reopen." *Id.* at 21. But the Court stated that "[w]ithout a better record, [it] is not prepared to rule that the BIA's procedures are an adequate and effective administrative alternative to habeas corpus relief for non-detained persons." *Id.*

LEGAL STANDARD

"A preliminary injunction is an 'extraordinary and drastic remedy.'" *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 32 (1st Cir. 2011) (quoting *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)). In deciding a preliminary-injunction motion, the Court "must consider: (1) the plaintiff's likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing an injunction will burden the defendants less than denying an injunction would burden the plaintiffs; and (4) the effect, if any, on the public interest." *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 79 (1st Cir. 2009) (internal citation and quotation marks omitted). "The party seeking the preliminary injunction bears the

burden of establishing that these four factors weigh in its favor." *Esso Std. Oil Co. (Puerto Rico) v. Monroig-Zayas*, 445 F.3d 13, 18 (1st Cir. 2006). Where, as here, a movant asks for a mandatory preliminary injunction, a heightened standard applies. "Because a mandatory preliminary injunction alters rather than preserves the status quo, it normally should be granted only . . . when the exigencies of the situation demand such relief." *Braintree Labs., Inc. v. Citigroup Glob. Markets Inc.*, 622 F.3d 36, 41 (1st Cir. 2010) (internal citation and quotation marks omitted).

ARGUMENT

The Court should deny Petitioners' preliminary-injunction motion. Petitioners are not likely to succeed on the merits. This Court lacks jurisdiction over their claims, and even if the Court had jurisdiction, Petitioners fail to plead plausible claims for relief. Further, Petitioners fail to establish that they are likely to suffer irreparable harm without injunctive relief. They do not prove that they are likely to face persecution or torture upon removal without an opportunity for their stay motions to be administratively decided. And the remaining factors cut against Petitioners.

I. Petitioners do not have a likelihood of success on the merits of their claims.

Petitioners are unlikely to succeed on the merits. They bring claims that are expressly barred by federal law. And that bar does not violate the Suspension Clause. Petitioners' claims do not sound in habeas, and even in they did, the administrative motion-to-reopen process and the judicial review available in a petition for review provide an adequate substitute for habeas relief. Further, even if the Court had jurisdiction, their claims fail on the merits.

a. The Court lacks jurisdiction over Petitioners' claims.

Congress has barred federal district courts from exercising jurisdiction over Petitioners' claims. In 8 U.S.C. § 1252, Congress made two rules clear. First, federal district courts lack subject-matter jurisdiction over claims attacking the federal government's decision to enforce a

final removal order. Under section 1252(g), except as otherwise provided in section 1252, "*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) (emphases added).[2] Instead, judicial review is provided through the familiar petition-for-review process in the federal courts of appeals, and the immigration courts, the BIA, and courts of appeals have ample authority to halt the execution of a removal order. *See id.* §§ 1252(a)(1), (b)(3)(B). Section 1252(g)'s 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 authority to make "discretionary determinations" over whether and when to execute a removal order, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999), and reaches constitutional claims. *See Ishak v. Gonzales*, 422 F.3d 22, 28 (1st Cir. 2005) ("the Real ID Act . . . in the plainest of language, deprives the district courts of jurisdiction in removal cases").

Second, 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 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." *Id.* § 1252(a)(5) (emphasis added); *Ishak*, 422 F.3d at 28. Aliens can obtain review, reopening, or stays of removal orders, *see* 8 C.F.R. §§ 1003.2(f), 1003.6(b), 1003.23(b)(1)(v)—but only through the established administrative process, with judicial review available in the courts of appeals. The immigration courts and the BIA can adjudicate motions to

[2] 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. *See id.*

reopen removal proceedings on the basis of "new facts," 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3), and grant stays of removal, *id.* §§ 1003.2(f), 1003.23(b)(1)(iv).

Section 1252 further provides 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 CAT. 8 U.S.C. § 1252(a)(4). This holds true "[n]otwithstanding any other provision of law (statutory or nonstatutory)." *Id.* Even the courts of appeals may review a cognizable claim "only if [] the alien has exhausted all administrative remedies available as of right." *Id.* § 1252(d)(1). Section 1252(b) 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). In extraordinary circumstances, the forum for judicial review is through this process, not through habeas. *See, e.g.*, *Khan v. Att'y Gen.*, 691 F.3d 488, 491 (3d Cir. 2012) ("grant[ing] the petitioners a temporary stay of removal" where they alleged that the BIA had not yet "adjudicated their motion" that was filed "within hours of [the alien's] scheduled removal").

These statutes preclude this Court from exercising jurisdiction over Petitioners' claims. Petitioners challenge the execution of their final removal orders. *See*, *e.g.*, Mot. 4 (requesting a stay that "bars Respondents/Defendants from removing Petitioners/Plaintiffs"). Petitioners are thus aliens with "removal orders against" them, this case arises because of DHS's "decision[s] or action[s]" to "execute [those] removal orders," and Petitioners' claims challenge those "decision[s] or action[s]." 8 U.S.C. § 1252(g). "[N]o court shall have jurisdiction" to hear these "claim[s]" in the first instance. *Id.* Petitioners must instead seek relief in the immigration courts and before the BIA, where they can move to reopen their removal proceedings based on changed country conditions and move to stay their removals. 8 C.F.R. §§ 1003.2, 1003.23. To the extent that

Petitioners ultimately seek judicial review regarding their removal orders, they must file petitions for review with the federal courts of appeals. 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).

In its order, the Court seemed to agree that section 1252(g) would ordinarily bar Petitioners' claims. Order 10 ("Petitioners concede, as they must, that this Court has no jurisdiction to review the decision to execute their jurisdictional orders . . . ."); *see also id.* at 13. But the Court stated that "[i]f the jurisdictional bar in 8 U.S.C. § 1252(g) prevented the Court from giving Petitioners an opportunity to raise their claims through fair and effective administrative procedures, the statute would violate the Suspension Clause as applied." *Id.* at 15.

Section 1252(g) does not violate the Suspension Clause here, for two reasons.

1. Petitioners do not raise a cognizable habeas claim.

Several defects preclude Petitioners from raising a cognizable habeas claim.[3] First, in moving for an injunction, they do not seek release from custody, but rather an order enjoining their removal. Mot. 4. This is not a traditional habeas claim. The Suspension Clause protects core applications of the writ of habeas corpus. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (explaining that "at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789" and then analyzing the protections of the writ "[a]t its historical core"). "Habeas is at its core a remedy for unlawful executive detention," and "[t]he typical remedy for such detention is, of course, release."[4]

[3] The Court addressed some arguments raised here when it continued its TRO; those decisions are not binding here. *See W Holding Co. v. AIG Ins. Co.-P. R.*, 748 F.3d 377, 386 (1st Cir. 2014).

[4] Before the INA's enactment in 1952, habeas review was the only mechanism to challenge a deportation order, *St. Cyr*, 533 U.S. at 306. To avoid a scenario where the Executive could exclude or deport aliens based on wholly arbitrary or capricious reasons or procedures, the Supreme Court adopted the principle that the statute "had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 234–35 (1953). Importantly, though, in the traditional challenge to a deportation order,

Munaf v. Geren, 553 U.S. 674, 693 (2008); *St. Cyr*, 533 U.S. at 301 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."). Thus, even if Petitioners are in ICE custody through their orders of supervision, they seek, in effect, an order *continuing* their custody, since such custody would necessarily terminate upon removal. "[H]abeas is not [an] appropriate" hook for Petitioners' claims. *Munaf*, 561 F.3d at 693.

Second, Petitioners have not exhausted available remedies. It is fundamental that before seeking relief under the habeas writ, administrative remedies must be exhausted. *See Boumediene v. Bush*, 553 U.S. 723, 793 (2008) ("in other contexts and for prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief"); *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) ("federal courts normally will not entertain habeas petitions . . . unless all available . . . remedies have been exhausted"). An exhaustion requirement "is in no sense a suspension of the writ of habeas corpus" *Gusik v. Schilder*, 340 U.S. 128, 132 (1950). Petitioners have sought relief in this Court instead of using the process available in the immigration courts, BIA, and federal appeals courts.

Third, Petitioners' claims are based on allegedly changed factual circumstances, *see* Mot. 2, which is not a core use of habeas. Petitioners claim that unless the Court halts their removals, they are be unable to allege changed country conditions in motions to reopen filed in immigration court. Mem. 7–8. Even if Petitioners were correct (and they are not, *see infra*), factual review is not a traditional role for a habeas court in immigration cases. *St. Cyr*, 533 U.S. at 305–06. Under

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the alien argued that his removal was not permitted, and thus that his detention in aid of that removal was unlawful and he was entitled to be released into the country—*i.e.*, traditional habeas relief. *See, e.g.*, *Heikkila*, 345 U.S. at 230 (holding that the statute authorizing the alien's deportation was unconstitutional). That is not what Petitioners seek.

traditional immigration habeas jurisdiction, "other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive." *Id*. at 306. This is because at "its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention," *id.* at 301, not the factual justification for removal. Thus it is not a traditional use of habeas to halt the execution of a valid removal order for factual claims to be raised in a separate forum.[5] *See, e.g.*, *id*. (at ratification, habeas "encompassed detentions based on errors of law").

Thus, the Court lacks jurisdiction over Petitioners' non-cognizable habeas claims.

2. The motion-to-reopen and petition-for-review process is constitutionally adequate.

Even if Petitioners' claims were properly brought through habeas, Congress's comprehensive review scheme provides Petitioners with a fully adequate, and, thus, constitutional, procedure to reopen their proceedings based on changed country conditions.

Congress can, consistent with the Suspension Clause, foreclose a habeas remedy if it provides an adequate substitute. *See Boumediene*, 553 U.S. at 772. Here, that substitute—the procedure of pursuing relief in the immigration courts and then review in the federal courts of

[5] Petitioners' effort to seek class-wide relief falls also outside the traditional use of habeas. The only power a modern habeas court arguably has that the petition-for-review scheme lacks is the ability to provide class-wide relief.[5] *See* Fed. R. Civ. P. 23; However, aliens cannot "dodge the channeling machinery of section 1252(b)(9) simply by draping individual claims in the mantle of a class action. . . . . [C]ourts must always be wary of strategic behavior designed to sidestep exhaustion requirements. That caveat has obvious relevance when aliens seek to employ the class action format to evade the INA's channeling requirements." *Aguilar*, 510 F.3d at 16–17.

Further, the "applicability to habeas corpus of the rules concerning . . . class actions has engendered considerable debate," *Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969), and the Supreme Court has "never decided" whether Rule 23 "is applicable to petitions for habeas corpus relief," *Schall v. Martin*, 467 U.S. 253, 260 n.10 (1984). Given that debate, Congress cannot be said to have suspended the traditional writ when it created an alternate process that is fully adequate to consider individual claims but does not include a mechanism for hearing class claims.

appeals—has been widely held to be adequate and constitutional.[6] This allows Petitioners to move to reopen their removal proceedings, even years after their orders are final, if circumstances have changed. 8 C.F.R. § 1003.23; *see also* 8 U.S.C. § 1229a(c)(7)(C)(ii) (no time or numerical limits for motions based on materially changed conditions in the country to which alien will be removed). Those courts can stay removal in exigent circumstances and are experts in addressing those issues.

The Court's prior jurisdictional ruling appeared to base its conclusion that the motion-to-reopen and petition-for-review processes may be constitutionally inadequate on the following presumptions: that (1) because the motion-to-reopen process was codified by statute, and does not include a time limit for moving to reopen based upon changed country conditions, Petitioners had a right to have their removals stayed in district court notwithstanding section 1252(g); (2) Petitioners did not incur an obligation to file a motion to reopen until August 1, 2017, Order 20; and (3) the record did not support a conclusion that "the BIA's procedures are an adequate and effective administrative alternative to habeas corpus relief for non-detained persons." *Id.* at 19.

These presumptions are mistaken. First, while section 1229a does not contain a time limit on moving to reopen based upon changed country conditions, this provision was not designed to allow "aliens [to] repeatedly reopen[] their removal proceedings based on changes that are within

[6] *See Muka v. Baker*, 559 F.3d 480, 485 (6th Cir. 2009) ("[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 does not violate the Suspension Clause."); *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. Att'y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006) (motion-to-reopen procedure with judicial review in courts of appeals "offers the same review as that formerly afforded in habeas corpus" and therefore "is adequate and effective") (internal citations omitted); *Luna v. Holder*, 637 F.3d 85, 97 (2d Cir. 2011) (similar); *Kolkevich v. Att'y Gen. of U.S.*, 501 F.3d 323, 332 (3d Cir. 2007) (similar); *cf. Enwonwu v. Gonzales*, 438 F.3d 22, 33 (1st Cir. 2006) (finding no merit to argument that REAL ID Act violates Suspension Clause, because court of appeals could fully review the questions of law raised in on a petition for review).

their control . . . . even if the change in personal circumstances will expose the alien to persecution in his home country." *Ming Chen v. Holder*, 722 F.3d 63, 66 (1st Cir. 2013); *see also Rei Feng Wang v. Lynch*, 795 F.3d 283, 287 (1st Cir. 2015). Here, Petitioners focus their litigation around the date that their removals became imminent—a personal, not country-related, circumstance that does not implicate the right that section 1229a is designed to protect.

Indeed, section 1229a does *not* automatically stay the removal of all who file motions to reopen based on changed country conditions, despite doing so for other categories of motions to reopen. *See* 8 U.S.C. § 1229a(b)(5)(C). This suggests that Congress did not view the right to reopen one's removal proceedings on the basis of changed country conditions to necessarily include the right to halt the execution of a valid final removal order. Further, section 1229a was enacted in 1996. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L 104–208, Div. C, § 304, 110 Stat. 3009–546 (1996). Section 1252(g), on the other hand, was last substantively amended in 2005, to add the language "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "notwithstanding any other provision of law." REAL ID Act, Pub. L 109–13, § 106, 119 Stat. 231 (2005). That language broadens section 1252(g)'s jurisdictional bar to more clearly include claims that could otherwise implicate the previously enacted section 1229a.

Second, the Court erred in concluding that Petitioners were not obligated to move to reopen their removal proceedings until August 1, 2017. Order 20. According to Petitioners' expert, conditions in Indonesia for religious minorities began deteriorating in 2008, *id.* at 3, which predates the operation in question. *See* Stevens Decl., ECF 37-2 at 19. At that time, Petitioners were all either: (1) under final removal orders and evading immigration authorities, during which time they were certainly responsible for seeking to apply for any available relief from removal; *or* (2) had

not yet received final orders of removal and, thus, could have raised country-conditions claims in their underlying removal proceedings. Further, the Court has already found that Petitioners were not promised "that they could remain in this country indefinitely," Order 5, and their OSUPs did not invalidate their final removal orders. *See* 8 U.S.C. § 1231(a)(3)(A); 8 C.F.R. § 241.5. There is no basis to conclude that ICE's grants of temporary stays of removal gave rise to: (1) a settled position of permanent relief from removal; or (2) the right to notice of removal to allow each Petitioner "four months to file their motions to reopen, starting when the government provides a copy of the individual's A-file and the [ROPs]" and enough time for the immigration court and BIA to "adjudicate the motion, and the Petitioner has had the opportunity to file a petition for review and seek a stay with the Court of Appeals," Mot. 3, when no law requires *any* such notice. Petitioners have been subject to final removal orders for years and, unless they obtain legal relief from removal, they are—like anyone else under such orders—removable at ICE's discretion. It is thus mistaken to conclude that Petitioners were reasonably expected to move to reopen only after removal became imminent, instead of once they believed they had a claim to do so.

Third, as the Court has already found, "[t]he Immigration Court's *procedures* typically are an adequate and effective administrative alternative to habeas corpus relief consistent with the Suspension Clause." Order 19. Petitioners must establish that, assuming the Suspension Clause could even apply to their claims, the motion-to-reopen and petition-for-review process is so inadequate as to violate the Suspension Clause as applied to them. They do not make that showing.[7]

[7] The Court appears to have also concluded that if it lacks jurisdiction over this petition, Petitioners may be removed prior to having their motions to reopen adjudicated and that, once removed, their motions to reopen would be deemed withdrawn. Order 14; *see also id.* 12–14 (citing 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1)). But the First Circuit has concluded that "the post-departure bar [regulation] cannot be used to abrogate a noncitizen's statutory right to file a [timely, first] motion to reopen" removal proceedings. *Perez Santana v. Holder*, 731 F.3d 50, 61 (1st Cir. 2013).

Petitioners rely on an affidavit of an immigration attorney who has practiced immigration law for nearly twenty years and has communicated with over 100 attorneys regarding "stay-related" issues. Decl. of Trina Realmuto ¶¶ 2–3, ECF 49-5. The attorney relates, secondhand, only a *single* specific instance in which an immigration court failed to adjudicate a stay motion prior to removal and which appeared to occur only because ICE moved up the date of removal to a date earlier than the one it had provided to the BIA. *Id.* ¶ 21. On the other hand, Respondents have offered evidence of the efforts made by the immigration courts to adjudicate stay motions as quickly as possible.[8] Decl. of Jill Dufresne, ECF 36-1; Decl. of Chris Gearin, ECF 36-2.

Further, Petitioners have now had about nine years since conditions in Indonesia began to decline, Order 3; ten months since ICE began to notify them that it would no longer stay their removals, *id.* at 6; nearly five months since ICE began to notify them of when they would be removed, *id.* at 20; and nearly three months since the Court's first TRO, to seek reopening. ECF 14. Petitioners have not shown that the Suspension Clause mandates the exercise of jurisdiction. Nor can they do so now, given the ample time they have had to request relief in the proper forum. *See* Order 21 (suggesting that 90 days from August 1 to be a suitable period to assemble a motion to reopen). Indeed, only five Petitioners have motions to reopen currently pending, Declaration of Lamont Taylor, Ex. A ¶ 6, suggesting that Petitioners continue to sit on their rights.

Given the evidence that the administrative courts diligently work to decide all stay motions as quickly as possible, the dearth of specific evidence establishing the inadequacy of the motion-

[8] The Court requested that the Government "inform the Court whether Petitioners, who are not detained, will have access to emergency procedures if they must file their original motions with the BIA." Order 19. Emergency stay motions filed by non-detained individuals are evaluated on a case-by-case basis. Here, Petitioners had up to 60 days between learning the timetable for their removal dates, which they could choose, *see, e.g.*, Stevens Decl. ECF 37-2, at 91, and, again, Petitioners fail to present evidence that the existing procedures are constitutionally inadequate.

to-reopen and petition-for-review process as applied, and the abundance of time that Petitioners have had to seek to reopen their removal proceedings, the Suspension Clause does not provide jurisdiction over Petitioners' claims.

b. Petitioners' claims would not succeed on the merits.

Even if the Court had jurisdiction, Petitioners' claims would fail on the merits.[9]

Count One. Petitioners lack Article III standing to bring their claim under the CAT, as implemented through 8 C.F.R. §§ 1208.16(c)–.18, and the INA's withholding of removal provision, 8 U.S.C. § 1231(b)(3), because this Court cannot redress any such injury. To have standing, a "[p]laintiff must have suffered an injury in fact" which "has to be fairly traceable to the challenged action of the defendant, and . . . it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations and quotations omitted).

Even accepting as true Petitioners' well-pleaded allegations, they could not obtain relief from this Court for any violation of law regarding CAT, asylum, or withholding of removal, and thus the redressability element is absent. *See id.* The CAT is not a self-executing treaty, and the INA specifies that the only enforceable CAT or statutory rights are available in removal proceedings or in a petition for review from those proceedings. *See supra*; 8 U.S.C. § 1252(a)(4); *Ishak*, 422 F.3d at 28. District courts lack jurisdiction to review issues arising from removal proceedings through this mechanism. 8 U.S.C. § 1252(b)(9); *see Aguilar v. U.S. Immig. & Customs*

[9] Respondents have not filed a motion to dismiss the operative complaint. On September 26, the Court ordered Respondents to file a jurisdictional brief and submit documents on the Operation within a week. ECF 19. On October 5, the Court set Petitioners' date to reply, and deferred preliminary-injunction briefing. Now that the Court has issued a preliminary jurisdictional ruling and set a preliminary-injunction briefing schedule, Respondents respectfully request the opportunity to file a motion to dismiss within 14 days of any preliminary-injunction order.

Enf't Div. of Dep't of Homeland Sec., 510 F.3d 1, 9 (1st Cir. 2007). Moreover, even the court of appeals may review any otherwise cognizable case "only if [] the alien has exhausted all administrative remedies available as of right." 8 U.S.C. § 1252(d)(1). Petitioners failed to exhaust their asylum, withholding, and/or CAT claims through filing motions to reopen their removal proceedings prior to bringing this suit, and, indeed, only five Petitioners currently have any motions to reopening currently pending. Taylor Decl. ¶ 6. Because the Court cannot provide Petitioners with relief under CAT, this claim fails for want of standing. *See Lujan*, 504 U.S. at 561.

Count Two. Petitioners 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." SAC ¶ 108. This claim fails: the procedures available to Petitioners are fully adequate, and they have suffered no prejudice. "Even if a shortfall is shown, prejudice is an essential element of a viable due process claim in this context." *Pulisir v. Mukasey*, 524 F.3d 302, 311 (1st Cir. 2008) (internal citation and quotation marks omitted) "A court will find such prejudice only when it is shown that an abridgement of due process is likely to have affected the outcome of the proceedings." *Id.* Petitioners fail to make this showing.

Petitioners' assertions do not support a plausible inference of prejudice. They could have filed motions to reopen at any time if they thought that conditions in Indonesia had changed so as to warrant protection from removal. 8 U.S.C. § 1252(a)(5), (b)(9), (g). Petitioners allege fear of return because of "persecution, torture, or death due to their Christian faith," SAC ¶ 1, but they do not, and could not, plausibly allege that such risks became apparent only after they received notice of the timeline for their removals. Further, Petitioners fail to plausibly assert that the Government's adherence to the existing procedures unlawfully prevent them from filing motions to reopen.

Nor have they established prejudice that justifies class-wide relief. Each Petitioner presents

a unique set of facts and circumstances with regard to the ultimate viability of their claims, as Petitioners concede, *see* Mem. 12, which underscores that it is inappropriate for this Court to grant class-wide relief under the Due Process Clause. *See* Fed. R. Civ. P. 23(a)(2). Count Two thus fails.

II. Petitioners fail to establish irreparable harm in the absence of the requested relief.

Petitioners do not show that they would be irreparably harmed without relief. Irreparable harm requires "more than conjecture, surmise, or a party's unsubstantiated fears" about the future. *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004). Yet that is all Petitioners offer. Petitioners identify their irreparable harm as "facing a significant risk of persecution and torture if they are removed to Indonesia." Mem. 12. They plead no specific allegations as to any individual Petitioner. Rather, they rely upon (1) generalized affidavits and (2) reports of "targeted acts of violence by militant groups" and general actions taken by law enforcement. *Id.* at 12–14. The only specific governmental action they cite in their motion involves the prosecution of a Christian politician under an anti-blasphemy law. *Id.* at 14.

These assertions of irreparable harm are insufficient. To start, a Petitioner who has filed a motion to reopen and a motion for a stay in the immigration courts—which she has now had nearly five months from August 1 to do—would be removed in the absence of a preliminary injunction only if the administrative court fails to adjudicate or denies her stay motion. If the motion has been denied, she has nonetheless received an adequate remedy at law, in the form of administrative review. *See Charlesbank Equity Fund*, 370 F.3d at 162 ("Irreparable harm most often exists where a party has no adequate remedy at law."). As to the possibility of being removed without having the stay motions adjudicated, Petitioners only offer a single, secondhand instance of a stay motion that was ruled upon after to the individual's removal, due to ICE's decision to remove the individual earlier than the date it had previously provided. Realmuto Decl, ¶ 21. This lone instance

does not make Petitioners' removal immediate or likely, especially in the face of the evidence that the administrative courts attempt to adjudicate stay motions as quickly as possible. Dufresne Decl., ECF 36-1; Gearin Decl., ECF 36-2. "A threat that is either unlikely to materialize or purely theoretical will not do." *Matos ex rel. Matos v. Clinton Sch. Dist.*, 367 F.3d 68, 73 (1st Cir. 2004).

Even if they are removed, Petitioners' generalized evidence of Indonesia's conditions do not prove that persecution or torture is immediate or likely for each Petitioner. As they concede, "different Petitioners[] have different avenues for immigration relief, depending on their immigration histories." Mem. 12. Their assertion that "all face a significant risk of persecution and torture if removed to Indonesia" is unsupported by facts that relate to any specific Petitioner.

Further, Petitioners fail to show irreparable harm in the absence of a mandatory preliminary injunction requiring Respondents to produce A-files and ROPs for each Petitioner. As the Court has observed, "the need for the A-file is not necessarily persuasive unless an individual can show a specialized need." Order 21. Locating, copying, scanning and producing over 50 paper A-files and ROPs imposes an unwarranted burden, because the A-files provide very little (if any) benefit to the vast majority of Petitioners. To successfully move to reopen removal proceedings, each Petitioner must show "changed country conditions arising in the country of nationality [where] such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. § 1229a(c)(7)(C)(ii). Neither a Petitioner's A-file, which includes her historical immigration data, nor her ROP, which is a record of her earlier removal proceedings, contains new information regarding changed conditions.[10] There is thus no basis to

[10] And any files that an alien could conceivably need—e.g., the final removal order, applications for relief filed by the alien, and any findings made during prior removal proceedings—may already be in the alien's possession, as the alien was present for his or her removal proceedings

continue this unwarranted production,[11] especially given that Petitioners have had ample time to collect the information they could need to reopen their removal proceedings.[12]

III. The balance of the harms and the public interest favor the Government.

The public interest and the Executive Branch's interest in its enforcement of the immigration laws, which merge here, also requires rejection of the injunction. *Nken v. Holder*, 556 U.S. 418 (2008). "There is always a public interest in prompt execution of removal orders." *Id.* at 436. Further, whenever the Government "is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The public interest should only be outweighed, and congressional will negated, based on an individual presenting circumstances that would justify a stay based on harm to that person. Basing an injunction on general country conditions contravenes the principle that "a court asked to stay removal cannot simply assume that '[o]rdinarily, the balance of hardships will weigh heavily in the applicant's favor.'" *Id*. The Court should allow the robust administrative process to operate as Congress intended.

CONCLUSION

For the foregoing reasons, Petitioners' preliminary injunction motion should be denied.

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and was able to submit any admissible evidence during those proceedings and receive all evidence upon which DHS sought to rely in litigating the matter. 8 C.F.R. §§ 1003.32, 1240.7, 1240.11.

[11] Congress has made clear which documents an alien in removal proceedings is entitled to receive. *See* 8 U.S.C. § 1229b(c)(2)(B) (an alien trying to prove he is "lawfully present . . . pursuant to a prior admission" can access a specified set of relevant documents); *id.* § 1229b(b)(4)(B) (an alien in removal proceedings "shall have a reasonable opportunity to examine the evidence against" him). BIA precedent affirms that there is no formal discovery process in such proceedings. *See Matter of Khalifah*, 21 I&N Dec. 107, 112 (BIA 1995) ("[T]here is no right to discovery in deportation proceedings . . . ."); *Matter of Magana*, 17 I&N Dec. 111, 115 (BIA 1979) (similar).

[12] There is certainly no basis for a Petitioner to receive a stay of removal in this Court based on failure to receive an A-file through this litigation, unless that Petitioner has made an individualized showing as to why she needs the file. *See* Order 21.

Respectfully submitted,

Dated: December 20, 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: December 20, 2017

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