May 4, 2018

Ms. Deborah S. Hunt
Clerk of Court
United States Court of Appeals for the Sixth Circuit
100 East Fifth Street
Potter U.S. Courthouse
Cincinnati, OH 45202-3988

ACLU Michigan

State Headquarters
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6800
aclumich.org

West Michigan Regional Office
1514 Wealthy SE
Suite 242
Grand Rapids, MI 49506
(616) 301-0930

Legislative Office
115 West Allegan Street
Lansing, MI 48933
(517) 372-8503

Re: *Hamama v. Adducci*, Case Nos. 17-2171 /18-1233

Dear Ms. Hunt,

The panel invited the parties to provide letter briefs addressing three issues raised during oral argument. *See* No. 17-2171, Doc. 81-2. Please accept this letter brief filed by Petitioners-Appellees in response to the panel's invitation.

Sincerely yours,

ACLU Fund of Michigan

By: */s/ Kimberly L. Scott*
Kimberly L. Scott
Cooperating Attorney
ACLU Fund of Michigan

Attachments

cc: Counsel of record

I. DOES REMOVAL JURISDICTION IMPACT DETENTION JURISDICTION?

Jurisdiction over the detention claims is entirely unaffected by whatever jurisdictional ruling this Court makes on the removal claims. As reaffirmed in *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), the statutes channeling to the immigration courts and federal courts of appeals claims "arising from" removal actions, 8 U.S.C. §1252(b)(9), or from actions "to commence proceedings, adjudicate cases, or execute removal orders," 8 U.S.C. §1252(g), simply do not affect a district court's jurisdiction to hear detention claims.[1] Addressing both provisions, the *Jennings* Court explained that detention does not "'aris[e] from' the actions taken to remove these aliens," and that in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482-83 (1999) (hereinafter *AADC*), "[w]e did not interpret [§1252(g)] to sweep in any claim that can technically be said to 'arise from' the three listed actions." 138 S.Ct. at 840-41. Reading "arising from" expansively "in the sense that if those actions had never been taken, the aliens would not be in custody … would lead to staggering results," and "cramming judicial review of those questions into the review of final removal orders would be absurd." *Id.* at 840. *See also id.* at 876 (Breyer, J., dissenting) (jurisdiction-stripping provisions inapplicable because plaintiffs challenged detention, not removal orders).

Jennings pointed out that "[i]nterpreting 'arising from' in this extreme way would also make claims of prolonged detention effectively unreviewable. By the time a final order of removal was entered, the allegedly excessive detention would have already taken place." 138 S.Ct. at 840. Neither the INA nor immigration regulations provide for immigration court review of constitutional challenges to prolonged mandatory detention, so, absent district court jurisdiction, potentially unlawful detention would be unchallengeable until a federal court of appeals considers a final order. 8 U.S.C. §1252(d). By then, Petitioners could have spent years in detention. *See* Detention Op., R.191, Pg.ID#5333 (detention could last

[1] *Jennings* is just the latest of a long line of cases rejecting arguments that the INA's jurisdictional provisions limit review of detention. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001) (amendments limiting jurisdiction over removal left district court review of detention untouched); *Demore v. Kim*, 538 U.S. 510, 517 (2003) (jurisdiction exists over "challenges [to] the statutory framework that permits [] detention without bail"); *Ly v. Hansen*, 351 F.3d 263, 266 (6th Cir. 2003) (§1252(g)'s jurisdictional limits do not bar review of §1226(c) prolonged detention challenge). *Cf. H.R. Conf. Rep. No.* 109-72 (May 3, 2005), 2005 WL 1848528, at *175 ("[REAL ID Act] would not preclude habeas review over challenges to detention that are independent of challenges to removal orders.").

three years); Prelim. Inj. Mot., R.138, Pg.ID#3373-75 (summarizing evidence). And those who prevail in the administrative system will *never* get review of detention because they will never file a petition for review.

As for the argument that without the district court stay, Petitioners would not be detained, *Jennings* rejected this kind of "but for" reasoning as a basis for finding that detention challenges "arise from" actions relating to removal and are thus unreviewable. 138 S.Ct. at 840 (rejecting argument that "if those actions had never been taken, the aliens would not be in custody"). Moreover, if (as the government argues) Petitioners could have obtained timely stays in immigration court, Petitioners would have been detained just as they were in fact. If instead (as Petitioners argue) immigration court stays were not realistically available, the district court had jurisdiction to issue the stay under the Suspension Clause. Either way Petitioners would be detained. The source of any stay is immaterial to district court jurisdiction over Petitioners' detention claims. (Furthermore, detainees whose cases have been reopened cannot be removed regardless of whether there is a stay, because they have no final removal order.)

In any event, the jurisdictional question "is not whether *detention* is an action taken to remove the alien but whether *the legal questions* in this case arise from such an action." *Jennings*, 138 S.Ct. at 841 n.3 (original emphasis). The legal questions here are: (1) can Petitioners be held in prolonged detention without any determination of dangerousness or flight risk; and (2) does §1226(c) or §1226(a) apply to Petitioners long ago released from criminal custody? These questions arise from detention, not from any stay of removal. For example, if this Court vacates the first injunction, and the government then detains the 1100 Iraqis not initially arrested and not covered by the district court's stay of removal, those new detainees would, like detainees previously covered by the July stay of removal, be able to bring claims challenging the applicability of mandatory detention under §1226(c) or, if detention becomes prolonged, the absence of bond hearings. There is district court jurisdiction over both the new and old detainees' claims.

II. ADMINISTRATIVE/PETITION-FOR-REVIEW VS. HABEAS STAYS

1. The district court found that administrative stays were not a realistic possibility. Juris. Op., R.64, Pg.ID#1231-32, 1243-47; PI Op., R.87, Pg.ID#2330-34, 2337-40. To obtain an emergency administrative stay prior to removal, Petitioners would have had to prepare not just stay motions, but motions to reopen, each accompanied by a complete application for the underlying relief—something the district court found was virtually impossible to do here. *See* Appellees' Brf., No. 17-2171 Doc.32, Pg.27 (summarizing district-court findings); Realmuto Decl., ¶¶5-13, R.77-26, Pg.ID#1887-89 (describing complexity of required filings, which can take months to prepare); Reed Decl., ¶¶1213, R.77-12, Pg.ID#1800 (to file for stay and reopening, one must obtain and provide travel documents; immigration, criminal and medical records; certified translations, which can take weeks; full information on country conditions; and complete legal analysis of relief eligibility); AILA Brf., No. 17-2171 Doc.34 (explaining motion to reopen requirements). Moreover, stay motions require original signatures, thus necessitating in-person visits; the district court found Petitioners' rapid transfers around the country made obtaining signatures difficult, a problem compounded by the mass arrests, which taxed the capacity of the immigration bar. Juris. Op., R.64, Pg.ID#1245.[2]

Additionally, even if the named Petitioners and the hundreds of others detained in the June sweeps managed to pull together such complex tri-partite filings (i.e. emergency stay motions, motions to reopen, and applications for underlying relief), there was a real danger that they would be removed before an administrative decision on the stay. *See, e.g.*, Free Decl., ¶14, R.77-15, Pg.ID#1833-34 (emergency stay motion for non-removable petitioner filed 6/15/17 was still undecided on 6/23/17). The system for obtaining emergency stays from immigration judges or the Board of Immigration Appeals (BIA) "is not reliable and does not ensure that meritorious stay motions will be heard and adjudicated while a motion to reopen is pending." Realmuto Decl., ¶ 4, R.77-26, Pg.ID#1886. The BIA and the immigration courts have not promulgated any stay standard. *Id.*, ¶15, Pg.ID#1889. Moreover, the BIA will consider a stay only if removal is imminent and a specific removal date is confirmed. BIA Fact Sheet (March 2018), https://www.justice.gov/eoir/page/file/1043831/download. But neither the detainee nor counsel can reliably get timely information on planned removal dates. "[I]t can easily happen that a detainee's removal is effectuated without the BIA ever considering a pending motion to stay, because the BIA never finds out that the removal is imminent." Samona Decl., ¶23, R.77-23, Pg.ID#1872. The problem of

[2] The suggestion that Petitioners should have filed earlier is factually and legally wrong. Conditions in Iraq were evolving. PI Op., R.87, Pg.ID#2342. Moreover, once obtained, CAT relief would have been terminable if the government demonstrated that conditions had changed again. In contrast to other motions to reopen, there is no deadline for filing motions to reopen based on changed country conditions as what matters is country conditions at the time a petitioner actually faces removal. 8 U.S.C. §1229a(c)(7)(C)(ii); 8 C.F.R. §1003.23(b)(4)(i). This also avoids wasteful adjudication in the immigration courts. Analogously, some courts of appeals have developed procedures to avoid adjudicating petitions for review where removal is unlikely. *See, e.g.*, *In re Immigration Petitions*, 702 F.3d 160 (2d Cir. 2012) (adjudication where removal unlikely would waste judicial resources).

ICE executing removal orders before stay decisions is "widespread." Realmuto Decl., ¶¶21-22, R.77-26, Pg.ID#1890-91 (describing removal before the BIA considered—and granted—a stay). *See also Madrigal v. Holder*, 572 F.3d 239, 241-42 (6th Cir. 2009); *Coyt v. Holder*, 593 F.3d 902, 904 (9th Cir. 2010); Former Federal Immigration and DOJ Officials' Brf., No. 17-2171 Doc.43, Pg.14-19.

2. Courts of appeals were likewise unavailable to Petitioners as a forum in which to obtain a stay. If Petitioners could not even get into immigration court or the BIA, of course they could not appeal the denial (or failure to grant) a stay. And even if they *could* assemble the voluminous necessary record, the courts of appeals have uniformly held[3] (and the government has itself repeatedly argued[4])

[3] *See Shaboyan v. Holder*, 652 F.3d 988, 989-990 (9th Cir. 2011); *Barrios v. Attorney Gen. of U.S.*, 452 F. App'x 196, 198 (3d Cir. 2011); *Villalobos v. Holder*, 417 F. App'x 610 (8th Cir. 2011); *Shirkhani v. I.N.S.*, 956 F.2d 278 (10th Cir. 1992); *Gando-Coello v. I.N.S.*, 857 F.2d 25, 26 (1st Cir. 1988); *Reid v. I.N.S.*, 766 F.2d 113, 116 (3d Cir. 1985); *Bothyo v. I.N.S.*, 783 F.2d 74, 75 (7th Cir. 1986); *Diaz-Salazar v. I.N.S.*, 700 F.2d 1156, 1159 (7th Cir. 1983); *Del Cid v. I.N.S.*, 829 F.2d 1119 (4th Cir. 1987); *Yuet Fung Ho v. I.N.S.*, 780 F.2d 1024 (6th Cir. 1985); *Bonilla v. I.N.S.*, 711 F.2d 43, 44 (5th Cir. 1983). *Cf. Casillas v. Holder*, 656 F.3d 273, 275 (6th Cir. 2011) (no circuit court jurisdiction to review ICE denials of petitions to stay removal because the "act of *enforcing*" an old order of removal did not amount to a new final order of removal) (original emphasis). Counsel has been unable to locate a single circuit court case finding jurisdiction to stay removal during pendency of a motion to reopen. The government mistakenly relies on *Khan v. Att'y Gen'l*, 691 F.3d 488 (3d Cir. 2012), where, before the BIA had decided the motion to reopen, a noncitizen prematurely sought appellate review and a stay. The Court granted a temporary stay pending review, and ultimately found jurisdiction because in the meantime, the premature petition ripened when the BIA denied the motion to reopen. *Id.* at 491-94. Notably, the government argued that the circuit lacked jurisdiction until the BIA decided the merits of the reopening motion. *Id.* at 492. *Accord Jimenez-Morales v. U.S. Att'y Gen*., 821 F.3d 1367 (11th Cir. 2016).

[4] *See, e.g.*, Motion to Dismiss, *Filippi v. Sessions*, No. 17-2083 (1st Cir. Nov. 1, 2017) (seeking dismissal of stay request pending BIA's adjudication of a motion to reopen because INA "limits the Court's jurisdiction to review final orders of removal") (Exh. A); *Sihotang v. Sessions*, No. 17-2044 (1st Cir. Oct. 24, 2017) (describing it as "well settled" the BIA stay denial "is not a reviewable final order of removal" while a motion to reopen is pending) (Exh. B). In the past few days, the government has reversed its position, arguing in at least one district court that the courts of appeals are the proper forum in which to seek a stay of removal. *See, e.g.*, Reply Brf., *Alam v. Nielsen*, No. 18-cv-00680 (S.D. Tex. May 2, 2018) ("If

that protective stays are unavailable: courts of appeals may grant stays only after a motion to reopen (not merely a stay motion) has been finally denied, on the merits, by the BIA. The primary ground on which the circuit courts have denied interlocutory jurisdiction is that the INA limits petition-for-review jurisdiction to "final orders of removal." 8 U.S.C. §§1252(a)(1), (a)(5), (b)(1).

Prior to 2005, a few circuits had held that the All Writs Act, 8 U.S.C. §1651, provided stopgap jurisdiction in "extraordinary cases" to stay removal pending issuance of a final removal order. *See Michael v. I.N.S.*, 48 F.3d 657, 663-64 (2d Cir. 1995); *see also Reid v. INS*, 766 F.2d 113, 116 n. 9 (3d Cir. 1985). However, the government has argued, and courts have agreed, that the REAL ID Act of 2005 amended 8 U.S.C. §1252(g) to remove All Writs Act jurisdiction to grant stays of removal absent BIA motion-to-reopen decisions.[5] (Moreover, as a practical matter, even if the courts of appeals *could* issue interlocutory stays while motions to reopen remain administratively pending, in this case, this Court alone would have had to adjudicate over a hundred stay requests, quite possibly in a matter of hours.)

The government has not seriously suggested that, absent a stay, Petitioners could have obtained a ruling on the merits of their reopening motions in time to seek circuit court stays.[6] Indeed, 70% of the motions to reopen pending in the BIA were filed over 6 months ago. Schlanger Decl., ¶22, No.18-1233 Doc.59, Pg.13. *See also* Schlanger Decl., ¶¶25-26, R.138-2, Pg.ID#3407-08. Absent the habeas avenue, Petitioners would have been removed long before the court of appeals had jurisdiction over any administrative stay denial.

3. In contrast, relief *was* available in district court, given Petitioners' strong merits showing. Under basic habeas and preliminary-injunction proce-

Plaintiff wishes to guard against the possibility of wrongful removal, his sole federal-court remedy is to move for stays of removal in the courts of appeals, citing those courts' authority under the All Writs Act to preserve his [sic] power to grant effective relief if an administrative decision on a motion to reopen is eventually presented to them for review.") (citing *Garcia v. Holder*, 788 F. Supp. 2d 326, 332 (S.D.N.Y. 2011)) (Exh. C). However, the government has previously argued that the Real ID Act eliminated this type of All Writs Act jurisdiction. *See infra* note 5.

[5] *See Barrios*, 452 F. App'x at 198 (rejecting All Writs Act jurisdiction), 198 n.6 (distinguishing *Reid*'s discussion of All Writs Act as superseded by statute); Resp. Brf., *Barrios*, 2011 WL 9373001 at *25 (3d Cir. July 11, 2011) (no circuit jurisdiction because §1252(g) exempts removal orders from All Writs Act).

[6] Those required to file motions to reopen before an immigration judge would have had to obtain merits adjudication from *both* the immigration judge and BIA before seeking a stay from the courts of appeals.

dures, the district court properly granted Petitioners emergency relief based on a likelihood of success on their claim that they should have an opportunity to be heard, without predicating such emergency relief on the filing of full-blown, complex petitions for the underlying immigration relief. To be sure, even in the district court, Petitioners—both named Petitioners and the class of those similarly situated—had to prove that they deserved a stay: that country conditions have changed, that they face severe danger if removed, and that they have a strong claim that CAT bars their removal. The difference lies in their ability to get temporary emergency relief on the basis of a preliminary showing—without completing the arduous application for underlying relief which can take months to prepare, without needing to provide original signatures,[7] and with great dispatch. (Petitioners filed on June 15, 2017, and the court held a hearing and entered a temporary stay by June 22, 2017. *See* Temp. Stay Order, R.32, Pg.ID#497-502.) The availability of class adjudication was also helpful—allowing one set of lawyers and one set of experts to make the requisite showing for all the similarly situated Petitioners, many of whom had no access to counsel. *See* Juris. Op., R.64, Pg.ID#1232. But as just demonstrated, the class action device is far from the only reason that the district court was an available forum, in contrast to the unavailable options now touted by the government. *See Sied v. Nielsen*, 2018 WL 1142202 at *2 (N.D. Cal. Mar. 2, 2018) (jurisdiction over individual habeas petition given "Kafkaesque prospect" of deportation to torture before motion could be heard).

Ordinarily the orderly filing of reopening and stay motions is possible, but in rare instances a district court forum is needed.[8] Here it was: the government intended to conduct mass deportations, without notice, of longtime residents ordered removed years ago, to a very dangerous country that long refused repatriation.

4. The REAL ID Act did not eliminate habeas jurisdiction where, as here, the courts of appeals could not act; if it did, it would violate the Suspension Clause. Appellees' Brf., No. 17-2171 Doc.32, Pg.44-50; *see also* Habeas Scholars' Brf., No. 17-2171 Doc.47. The REAL ID Act was a specific response to the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), which made clear

[7] *See Brenner v. Coyle*, No. 99-3570, 1999 WL 33453848, at *1 (6th Cir. Nov. 1, 1999) (attorney signature "creates presumption of authorization" to act on behalf of habeas petitioner) (citing *Lucky v. Calderon*, 86 F.3d 923 (9th Cir. 1996)).

[8] This issue arises only in the motion-to-reopen context because in regular removal proceedings the government may not remove someone until after the BIA rules. 8 C.F.R. §1241.1. Thus stay requests to the courts of appeals normally arise after the noncitizen receives a BIA decision and immediately files a petition for review with a stay request, allowing sufficient time for court of appeals review.

that the INA could abrogate habeas corpus only where the courts of appeals retained jurisdiction to adjudicate the claim—*i.e.*, where there was another forum.[9] Here that other Article III forum was not available, and so 8 U.S.C. §1252(g) does not repeal district court review of Petitioners' non-discretionary claims. That was precisely the holding of *AADC*, 525 U.S. 471 (1999). Petitioners' constitutional claim in *AADC* was that proceedings should never have been commenced against them because selective enforcement violated the First Amendment. The claim fell squarely within the terms of §1252(g), but the Court nonetheless reviewed it—because it would have been moot by the time it reached a court of appeals through a petition for review. Significantly, the Court explained that resolving the First Amendment claim on the merits in an action that originated in a district court was far preferable to deciding the more far-reaching question of whether Congress could leave *no* forum for review.[10] *See id.* at 945 n. 10.

5. Finally, and critically, if this Court were to conclude that the district court lacked jurisdiction to stay removal, but that courts of appeals may issue protective stays, it should transfer Petitioners' first motion for preliminary injunction, R.77, Pg.ID#1703-47, to itself under 28 U.S.C. §1631. Doing so is

[9] Any contention that CAT claims are not covered by *St. Cyr*'s Suspension Clause analysis is flat wrong. *See Jama v. INS*, 329 F.3d 630, 632 (8th Cir. 2003), aff'd, 543 U.S. 335 (2005). Habeas courts routinely exercised habeas jurisdiction over challenges analogous to CAT claims where the petitioners asserted that they would be harmed if removed. For example, in the pre-INA period, immigration statutes specified the destinations to which deportable aliens could be removed. The Supreme Court and the lower courts used habeas corpus to inquire into the lawfulness of a chosen destination, sometimes requiring the substitution of a lawful destination, and sometimes ordering release. *See, e.g.*, *Wenglinsky v. Zurbrick*, 282 U.S. 798 (1930); *United States ex rel. Mensevich v. Tod*, 264 U.S. 134 (1924); *United States v. Ruiz*, 203 F. 441 (5th Cir. 1913); *Yee Suey v. Berkshire*, 232 F. 143 (5th Cir. 1916), cert. denied, 242 U.S. 639 (1916); *Gorcevich v. Zurbrick*, 48 F.2d 1054, 1055 (6th Cir. 1931); *see also Bellaskus v. Crossman*, 335 U.S. 840 (1948).

[10] The government notes that in *Elgharib v. Napolitano*, 600 F.3d 597 (6th Cir. 2010), this Court denied district court review over a constitutional claim under section §1252(g) because it involved the execution of a removal order. But this Court expressly explained that Ms. Elgharib could have filed a petition for review. *Id.* at 600 n.2. *Elgharib* is entirely consistent with Petitioners' reading of *AADC*: that district court review remains available where a non-discretionary claim cannot be reviewed through a petition for review. Indeed, to read *Elgharib* any other way suggests that this Court simply ignored *AADC*'s footnote 10 and the fact the *AADC* Court did review the constitutional claim in that district-court-initiated litigation.

permissible where the petitioner timely filed in the wrong court, another court would properly have jurisdiction, and transfer is in the interests of justice. *See, e.g. Salazar-Regino v. Gonzales*, 415 F.3d 436, 444-46 (5th Cir. 2005), *vacated on other grounds*, 127 S.Ct. 827 (2006) (transferring habeas case where circuit court was correct forum but there was confusion over jurisdictional issues); *Berrum-Garcia*, 390 F.3d 1158, 1161-63 (10th Cir. 2004) (same). Failure to consider whether transfer is in the interests of justice is an abuse of discretion. *Commodities Export Company v. U.S. Customs Serv.*, 888 F.2d 431, 439 (6th Cir. 1989). Here Petitioners should not be penalized for failing to seek protective court-of-appeals stays in the face of uniform law barring such stays. *See Thiam v. Holder*, 677 F.3d 299, 303 (6th Cir. 2012) (finding immigrant's mistaken belief about proper forum "entirely understandable" given the "confusing flurry" of events at outset of case).

III. THE IMPACT, IF ANY, OF 8 U.S.C. §1252(f)(1)

8 U.S.C. §1252(f)(1) provides: "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter … other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." Dictum in *AADC*, 525 U.S. at 481, suggested this provision might act as an immigration class action bar. That is not the case, for several independently sufficient reasons.

1. The plain text of the statute simply does not bar class actions. Rather, §1252(f)'s language bars injunctions that purport to protect persons not yet in immigration proceedings. Every person protected by the district court's preliminary injunctions is an "individual alien against whom proceedings ... have been initiated." The statute says nothing at all about the power of a district court to consolidate their claims through Rule 23. Moreover, "[t]he Court in *AADC* did not consider, and had no reason to consider, the application of §1252(f)(1) to such a class." *Jennings*, 138 S.Ct. at 875 (Breyer, J., dissenting).

Had Congress intended to prohibit class actions in §1252(f)(1), it would have said so, as it did—at the very same time, *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546—in the immediately preceding statutory subsection, which provides (with respect to challenges to expedited removal) that no court may "certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection." 8 U.S.C. §1252(e)(1)(B). By contrast, the provision at issue does not even mention class actions, much less prohibit them.[11] The use of the term "individual alien" does not

[11] *See* Jill E. Family, *Another Limit on Federal Court Jurisdiction? Immigrant*

withdraw a court's power to grant class relief. *See Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) ("The fact that the statute speaks in terms of an action brought by 'any individual' or that it contemplates case-by-case adjudication does not indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action otherwise is permissible. Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them.").[12]

2. §1252(f)(1) does not apply to habeas. Although 8 U.S.C. §1252(f)(1) applies "[r]egardless of the nature of the action or claim," Congress made no specific reference to habeas corpus, which therefore remains intact. "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *St. Cyr*, 533 U.S. at 299. The failure even to mention habeas corpus in §1252(f)(1) stands out particularly strongly in light of Congress's express reference to habeas in other subsections of §1252, which specifically use the phrase "[n]otwithstanding any other provision of law (statutory or non-statutory), *including section 2241 of Title 28, or any other habeas corpus provision*" to describe their scope. 8 U.S.C. §§1252(a)(2)(A), (B), (C), 1252(a)(4), (5), 1252(g) (emphasis added).[13] By failing to mention habeas corpus in §1252(f)(1), while expressly and repeatedly addressing habeas in neighboring subsections, Congress made clear its intention *not* to apply §1252(f)(1)'s limitations to habeas actions. *See Nken v. Holder*, 556 U.S. 418, 430-431 (2009).

3. As to their statutory claims, Petitioners do not seek "to enjoin or restrain the operation of the [referenced] provisions" of the INA. 8 U.S.C. §1252(f)(1). The district court properly read §1226(c) as inapplicable here[14], and

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Access to Class-Wide Injunctive Relief, 53 Clev. St. L. Rev. 11, 37-48 (2005).

[12] Similarly, the Prison Litigation Reform Act, 18 U.S.C. §3626(a)(1)(A), states: "Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs," but the Supreme Court has affirmed class action relief covered by that statute. *Brown v. Plata*, 563 U.S. 493, 531 (2011); *see also Shook v. El Paso Cty.*, 386 F.3d 963, 970 (10th Cir. 2004) ("The text of the PLRA says nothing about the certification of class actions.").

[13] Section 1252(a)(5) provides that, throughout the statute, "the terms 'judicial review' and 'jurisdiction to review' include habeas corpus." But §1252(f)(1) does not use the terms "judicial review" or "jurisdiction to review."

[14] The government's reply brief offered a brand-new strained reading of §1226(c); that "when ... released" means "not until released." But that would render the language surplusage. *See* 8 U.S.C. §1231(a)(4)(A) ("the Attorney

properly read §1231 to disallow prolonged detention without bond hearings or other individualized justification; the district court was not enjoining or restraining these statutes, but rather interpreting them to ensure they are correctly enforced. As the legislative history makes clear, such statutory claims are outside the reach of §1252(f) because they do not seek "to enjoin procedures *established by Congress* to reform the process of removing illegal aliens from the U.S." *H.R. Rep. No.* 104-469, Pt. 1, at 161 (1996) (emphasis added)[15]. *See also Rodriguez*, 591 F.3d at 1120-21; *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) ("Section 1252(f)(1) prohibits only injunction of 'the operation of' the detention statutes, not injunction of a violation of the statutes.").[16]

4. Finally, §1252(f)(1) does not apply to Petitioners' request for classwide declaratory relief, which is not before this Court, as the district court has not yet ruled on Petitioners' request for such relief. *See Alli v. Decker*, 650 F.3d 1007, 1012-13 (3d Cir. 2011); *Rodriguez*, 591 F.3d at 1119-20.[17]

General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment").

[15] The report referred to §306 of the proposed Immigration in the National Interest Act (proposed new subsection (g) to 8 U.S.C. §1252). In 1996, IIRIRA enacted this same provision as §1252(f)(1). Pub. L. No. 104-208, 110 Stat. 3009-546.

[16] Unlike statutory provisions that generally constrain court authority over agency action, §1252(f)(1) limits only court power to enjoin statutory "provisions." *Cf., e.g.*, 28 U.S.C. §1342 ("[D]istrict courts shall not enjoin, suspend or restrain the operation of, or compliance with, *any order* affecting [public utility] rates [in certain circumstances]." (Emphasis added)).

[17] Section 1252(f)(1)'s reference to actions to "*enjoin* or *restrain*" immigration enforcement also does not encompass a request for a stay of removal. *Nken* considered the immediately adjacent statutory subsection, §1252(f)(2), which restricts the ability of courts to "*enjoin* the removal of any alien." (Emphasis added). The Court expressly rejected the government's argument that "a stay is simply a type of injunction covered by the term 'enjoin.'" 556 U.S. at 428. "[W]hen Congress wanted to refer to a stay" in 8 U.S.C. §1252, "it used the word 'stay.'" *Id.* at 430 (referring to §1252(b)(3)(B)). To be sure, the subsection at issue here limits the court's power to "enjoin or restrain," while the subsection considered in *Nken* spoke only of limiting the power to "enjoin." But the word "restrain" in this context "is best read to refer to temporary *injunctive* relief" rather than to stays of removal. *Rodriguez*, 591 F.3d at 1119 (emphasis added); *see also Alli*, 650 F.3d at 1013 ("'[R]estrain' refers to one or more forms of temporary injunctive relief, such as a temporary restraining order or preliminary injunction.").

EXHIBIT A

No. 17-2083

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RENATO FILIPPI,
A 079 129 100,

Petitioner,

v.

JEFFERSON B. SESSIONS III,
Attorney General,

Respondent.

RESPONDENT'S MOTION TO DISMISS THE PETITION FOR REVIEW, AND OPPOSITION TO PETITIONER'S REQUEST FOR STAY OF REMOVAL

Respondent moves the Court to dismiss the petition for review for lack of jurisdiction for two reasons. First, the only agency decisions in this case are several years old, and Mr. Filippi did not file a petition for review of these decisions within thirty days—a mandatory, jurisdictional requirement. *See* 8 U.S.C. § 1252(b)(1). Second, Mr. Filippi also has a motion to reopen pending at the Board of Immigration Appeals (which would be his second motion to reopen). But because there is no order on this motion, the Court has no jurisdiction to issue a decision. Because the Court lacks jurisdiction over any claims raised in this petition, Respondent also moves the Court to dismiss Petitioner's request for a stay of removal as moot.

BACKGROUND[1]

Mr. Filippi, a citizen of Brazil, has made several illegal entries into the United States over the past two decades. Ultimately, the Department of Homeland Security entered an expedited order of removal at the John F. Kennedy International Airport because Mr. Filippi previously overstayed a visa, and that order was later reinstated. Because Mr. Filippi expressed a fear of returning to Brazil, and because an asylum officer found a reasonable possibility of future harm, Mr. Filippi was referred to an Immigration Judge.

After hearing Mr. Filippi's testimony about his fear of returning to Brazil, the Immigration Judge denied his applications for withholding of removal under 8 U.S.C. § 1231(b)(3) and the United Nations Convention

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[1] Because the Certified Administrative Record has not been prepared, undersigned counsel relies on the findings of fact in the Immigration Judge's April 5, 2013 decision, which is attached to this motion.

Against Torture. The Immigration Judge found that Mr. Filippi had clearly never been persecuted in the past as there were no allegations of past harm. The Judge then found, citing this Court's decision in *Scatambuli v. Holder*, 558 F.3d 53 (1st Cir. 2009), that Mr. Filippi's proposed social group of informants who testify against criminal smugglers is not cognizable under the law. Because withholding of removal under § 1231(b)(3) requires a nexus between the feared harm and a statutorily protected ground—here membership in a particular social group—and because Mr. Filippi failed to establish that he belonged to a protected class, the Judge denied the application.

The Judge further denied Mr. Filippi's application for protection under the Convention Against Torture. He found that Mr. Filippi failed to establish it more likely than not that a government or public official acting in official capacity would acquiesce to the harm he fears from criminal smugglers. The Judge noted Mr. Filippi's argument that certain promises were made to allow him to remain in the country, but the Judge did not know the nature of those promises.

On July 25, 2014, the Board dismissed an appeal of this decision. It agreed with the Immigration Judge that Mr. Filippi failed to demonstrate membership in a particular social group, and further agreed that Mr. Filippi failed to establish the required government involvement for protection under the Convention Against Torture. Mr. Filippi did not file a petition for review of this decision in this Court.

On January 26, 2015, the Board denied Mr. Filippi's motion to reopen his removal proceeding. It first noted that Mr. Filippi failed to attach an application for relief with his motion to reopen as required by the regulations governing such motions. And it further held that the evidence he submitted did not establish prima facie eligibility for relief, and thus was unlikely to change the result of the previous decision rendered in the removal proceeding. Mr. Filippi did not file a petition for review of this decision, either.[2]

ARGUMENT

This Court's jurisdiction is governed by 8 U.S.C. § 1252. The statute limits the Court's jurisdiction to review final orders of removal. 8 U.S.C.

[2] Roughly two weeks ago, the United States District Court for the District of New Hampshire dismissed a habeas petition and complaint for declaratory and injunctive relief based upon the same claims he now makes in this petition for review. Case No. 17-CV-459. There has been no appeal filed from this decision.

§ 1252(a)(1). It further places a requirement that a petition for review of a final order of removal be filed within thirty days of that order. *See* 8 U.S.C. § 1252(b)(1). This time limit is a "mandatory and jurisdictional" rule that "must be construed with strict fidelity" to its terms, and is "not subject to equitable tolling." *Stone v. INS*, 514 U.S. 386, 405 (1995); *see also Pimental-Romero v. INS*, 952 F.2d 564 (1st Cir. 1991) (holding that the Court lacks jurisdiction over an untimely petition for review).

This petition for review is clearly outside the thirty days allowed by statute in relation to the two orders described above. Mr. Filippi has had two opportunities to bring his claims to this Court. He could have challenged the Board's July 25, 2014 order which brought his applications for protection from removal to a close. And he could have challenged the Board's January 26, 2015 decision denying his motion to reopen. It is he who has deprived himself the opportunity to seek relief in this Court because he failed to do so in the time allotted by statute.[3]

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[3] Mr. Filippi was represented by counsel before the Immigration Judge and the Board.

Because the Court lacks jurisdiction over this untimely petition for review, the petition must be dismissed.[4]

Given that jurisdiction is lacking over the petition, the Court should dismiss Mr. Filippi's motion for stay of removal as moot. Indeed, a request for a stay should be denied as moot where a court lacks jurisdiction because the court has no power over the matter. This is because "without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is [the] power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506 (1869)).

Moreover, Mr. Filippi has not demonstrated that he merits a stay of removal. The Court may stay an alien's removal pending review of a final order of removal. 8 U.S.C. § 1252(b)(3)(B) (2012). But a stay of removal is an "intrusion into the ordinary processes of administration

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[4] If Mr. Filippi is seeking review of a pending motion to reopen with the Board, and he is seeking to challenge this yet to be issued decision, the Court was also clearly lack jurisdiction to review the non-existent order because the Court's jurisdiction is limited to final orders of removal. 8 U.S.C. § 1252(a)(1).

and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (citation omitted). A stay "is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as a matter of right." *Id.* at 437 (citations omitted) (Kennedy, J., concurring). Whether to grant a stay pending review is "an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Id.* at 433 (internal quotations omitted). The alien "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34.

In adjudicating a motion to stay an alien's removal, this Court must make an "individualized judgment" regarding: (1) whether the applicant "has made a strong showing that he is likely to succeed on the merits"; (2) whether the applicant will be "irreparably injured absent a stay"; and (3) whether issuance of a stay will be contrary to the public interest. *Id.* at 426 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987)). This test does not involve balancing interdependent factors against one another. *Id.* at 435. Instead, these factors are independent elements, each of which the alien must satisfy to meet his burden of proof in establishing that a stay of removal is warranted. *Id.*

With regard to the first factor, the *Nken* Court declared that "[i]t is not enough that the chance of success . . . be better than negligible" or that the alien have a "mere possibility" of obtaining the relief sought. *Id.* at 434. Instead, Mr. Filippi must make a strong showing of a likelihood of success on the merits. He has not met this standard.

In his motion, he perfunctorily states that he has a right to file a motion to reopen. While this much is true, nothing has prevented him from filing a motion to reopen. He has done it twice, and is now awaiting a decision on his second motion to reopen which he filed less than two weeks ago. Nothing is preventing him from filing a motion to reopen, and thus there is no likelihood he will succeed in a claim arguing that he is prevented from doing so.

He also perfunctorily states that he seeks enforcement of an agreement between him and the government, but he has provided no argument as to how he will succeed in this claim (nor has he produced any such agreement).[5] Finally, he claims a due process violation in the

[5] It appears from his submission to the Board (and attached to his petition for review) that he has provided valuable assistance. Pet. for Rev. at 182.

time he has been given to leave the country, but again provides no legal support or argument as how he will succeed in this claim. And all this on top of the obvious jurisdictional problems with this petition.

If this petition is trying to garner a stay to await a decision on a motion to reopen that Mr. Filippi filed with the Board,[6] this amounts to nothing more than an attempt to prevent DHS from executing the removal order, a matter over which the Court lacks jurisdiction. *See Foroglou v. Reno*, 241 F.3d 111, 115 (1st Cir. 2001) (recognizing that while district court may preserve its jurisdiction over an alien's habeas petition by granting a stay of deportation pending its decision, a habeas petition that raises unpreserved or meritless arguments is nothing more "than an attempt, contrary to section 242(g), to prevent the Attorney General from 'execut[ing][a] removal order[ ].'"). Thus, the Court should dismiss this case and deny the motion for stay of removal.

But there is no evidence the agents made an agreement to provide him with legal status.

[6] The Board may very well grant him a stay of removal (as might the Department of Homeland Security), and may even grant his motion to reopen. But at this point, there is no jurisdictional ground for this Court to intervene.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition and deny the motion for stay of removal.

Respectfully submitted,

Chad A. Readler
Acting Assistant Attorney General
Civil Division

Nancy Friedman
Senior Litigation Counsel
Office of Immigration Litigation

/s/ *Gregory A. Pennington, Jr.*
Gregory A. Pennington, Jr.
Trial Attorney
Office of Immigration Litigation
Civil Division, U.S. Dep't of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 598-2293
First Cir. Bar #: 1172032

Dated: November 1, 2017

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, I certify that this motion was prepared using 14-point Century type, is proportionally spaced, and contains 1,831 words.

/s/ *Gregory A. Pennington, Jr.*
Gregory A. Pennington, Jr.
Trial Attorney
Office of Immigration Litigation
Civil Division, U.S. Dep't of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 598-2293
First Cir. Bar #: 1172032

CERTIFICATE OF SERVICE

I hereby certify that on, November 1, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. Petitioner's counsel is a registered CM/ECF user and will be served through the CM/ECF system.

/s/ *Gregory A. Pennington, Jr.*
Gregory A. Pennington, Jr.
Trial Attorney
Office of Immigration Litigation
Civil Division, U.S. Dep't of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 598-2293
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U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

ENRIQUE F. MESA JR., ESQ.
LAWSERVE
15 STARK STREET
MANCHESTER, NH 03101

DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114

Name: FILIPPI, RENATO

A 079-129-100

Date of this notice: 7/25/2014

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Userteam: Docket

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

FILIPPI, RENATO
1 TSIENNETO ROAD, UNIT 10
DERRY, NH 03038

DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114

Name: FILIPPI, RENATO

A 079-129-100

Date of this notice: 7/25/2014

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Userteam:

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: A079 129 100 - Boston, MA Date: JUL 25 2014

In re: RENATO FILIPPI a.k.a. Renato Felippe

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Enrique F. Mesa, Jr., Esquire

APPLICATION: Withholding of removal; Convention Against Torture

The applicant appeals the Immigration Judge's April 5, 2013, decision denying his applications for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and under the Convention Against Torture, 8 C.F.R. §§ 1208.16-.18 (2014). The appeal will be dismissed.

In his decision, the Immigration Judge determined that the applicant did not meet his burden in establishing his membership in a particular social group for purposes of qualifying for withholding of removal under the Act (I.J. at 6-7). In particular, the applicant's claim is based on his fear of retribution from members of various criminal organizations in, *inter alia*, Brazil against whom he worked as an informant and testified against as a witness from 2002 through 2009 for immigration authorities in the United States (I.J. at 2-3). In his decision, the Immigration Judge relied on the Board's decision in *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), and the First Circuit's decision in *Scatambuli v. Holder*, 558 F.3d 53 (1st Cir. 2009), in concluding that the applicant did not meet the requirements of "social visibility" and an "immutable characteristic" in defining his particular social group (I.J. at 4-6). The Immigration Judge also denied the applicant's application for withholding of removal under the Convention Against Torture concluding he did not establish that the Brazilian authorities would acquiesce in treatment against him rising to the level of torture, as required (I.J. at 7).

On appeal, the applicant contends that he met the "social visibility" requirement for a particular social group because, unlike the aliens in *Matter of C-A-*, *supra*, and *Scatambuli v. Holder*, *supra*, which he claims only "passed on information," he actually testified in open court in front of the criminals against whom he acted as an informant. *See* Applicant's Brief at 2-5. In this way, the applicant attempts to distinguish his situation from those considered in *Matter of C-A-* and *Scatambuli* by virtue of the high visibility inherent in the situation of testifying in court. *See id.* In addition, the applicant disputes the Immigration Judge's decision denying his application under the Convention Against Torture contending that the Immigration Judge erred in denying the application using the same bases as his denial of his application under the Act. *See* Applicant's Brief at 5-6.

Initially, we note that, subsequent to the Immigration Judge's decision in this case, the Board decided *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), clarifying the requirement of "social visibility" as set forth in, *inter alia, Matter of C-A-, supra*. *See also Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014). Indeed, the Board renamed the element of "social visibility" and it is now termed as "social distinction." *See Matter of W-G-R-, supra*. The element of "social distinction" requires an applicant for withholding of removal seeking relief based on "membership in a particular social group" to establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *See id.* at 215-18. In making our decision, the Board was responding to various circuit court decisions asking for such clarification. *See id.* However, the Board did not otherwise overrule our decision in *Matter of C-A-, supra*. *See Matter of W-G-R-, supra*. In making our decision in this case, we have considered our recent precedent decisions regarding the clarification of the "social distinction" element.

Notwithstanding the applicant's contentions on appeal, we find no reason to disturb the Immigration Judge's decision finding he did not meet his burden in establishing a particular social group for purposes of qualifying for relief under the Act based on his fear of retribution from criminal organizations based on his former work as a non-criminal informant (I.J. at 4-7). *See* 8 C.F.R. § 1003.1(d)(3)(ii) (2014) (*de novo* review). In particular, we agree the applicant has not shown that the particular group he proposes shares a "common immutable characteristic" based on a shared past experience, e.g., acting as an informant, sufficient to establish a particular social group affording him refugee status (I.J. at 6). Specifically, while past shared experiences can constitute a sufficient "immutable characteristic," the Board has found that the shared experience of non-criminal informants, such as the applicant in this case, does not afford the protection of membership in a particular social group. *See Matter of C-A-, supra* at 958 (similar to those persons who are exposed to risks normally associated with employment in occupations such as the police or the military, a person who agrees to work as a government informant in return for compensation, or out of civic duty, takes a calculated risk and is not in a position to claim refugee status should such risks materialize); *see also Scatambuli v. Holder, supra*. Thus, the applicant has not met the first requirement necessary in establishing a particular social group for purposes of qualifying for withholding of removal under the Act (I.J. at 6).[1]

Finally, we find no reason to disturb the Immigration Judge's denial of the applicant's application for protection under the Convention Against Torture based on the reasons stated in his decision (I.J. at 7). The applicant has not presented evidence that the Brazilian government would acquiesce in treatment rising to the level of torture against him by members of criminal

[1] Because the applicant has otherwise failed to meet his burden in establishing a viable particular social group, we need not address the several arguments he makes regarding the "social visibility," now "social distinction," of former ICE informants. The Immigration Judge's decision rested on at least two independent rationales: that the proposed group lacked "social visibility," and the applicant did not show a shared immutable characteristic (I.J. at 4-7). Having affirmed the second rationale, we do not reach the first (I.J. at 4-7). *See Costa v. Holder*, 733 F.3d 13 (1st Cir. 2013) (declining to address Immigration Judge's and Board's findings as to "social visibility" and relying on alternative rationale).

organizations in Brazil for purposes of qualifying for protection under the Convention Against Torture (I.J. at 7). None of the arguments raised by the applicant on appeal would cause us to otherwise disturb the Immigration Judge's decision in this regard. *See* Applicant's Brief at 5-6.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

File: A079-129-100 April 5, 2013

In the Matter of

	)
RENATO FILIPPI	)IN WITHHOLDING ONLY PROCEEDINGS
	)
APPLICANT	)

CHARGES:

APPLICATIONS: Withholding of removal.
Withholding of removal under the Convention Against Torture.

ON BEHALF OF APPLICANT: ENRIQUE MESA, JR.

ON BEHALF OF DHS: REBEKAH G. GRAFTON

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is a 53-year-old, married native and citizen of Brazil. Withholding only proceedings were initiated against him initially on January 21, 2003 and then again on November 15, 2010 by way of notices of referral to the Immigration Judge, which were ultimately filed in the Immigration Court on or about January 28, 2011. (See Exhibits 1 and 1A).

The background of this case, based upon my factual determination, predicated upon the respondent's credible testimony and the documentary evidence of record, including his declaration, are as follows:

The respondent initially entered the United States at some point in time during the year 1999. He came to this country in order to provide his family with a better life. After about six months in the United States, the respondent returned to Brazil to visit his family. After spending some time with his family, the respondent attempted to return to the United States and was apprehended, interviewed, and deported.

Thereafter, on or about April 9, 2002, the respondent once again entered the United States near Hidalgo, Texas without inspection. He was apprehended shortly after entry and detained at Port Isabel Service's Processing Center in Los Fresnos, Texas for several months. The respondent was subject to a reinstatement order based on an expedited removal order dated March 12, 2012, when the respondent's visitors visa was cancelled at the JFK airport in New York for having previously overstayed.

On January 21, 2003, the Houston Asylum Office found that the respondent had a reasonable fear of persecution if he returned to Brazil. For reasons unknown, the notice of referral was never properly filed in Immigration Court. Due to the passage of time, the respondent was given the opportunity to present additional evidence and testimony regarding his ongoing fear.

While the respondent was detained by the Immigration Service, he was approached and asked if he was willing to provide testimony and information that he had about the criminal organization that was behind the Mexican coyote Ricardo, who had helped the respondent to come to the United States.

The respondent gave information to Immigration officials with respect to various mafia branches in Mexico, Brazil, and the United States. He testified against Ricardo in court. The respondent was approached when back in detention by an Officer

Andrew who told him that he would help the respondent if he continued to give information and become a witness. The respondent agreed to become an informant. He says that Andrew offered to help him stay in the country legally if he were to do so.

The respondent then entered into conversations with other inmates and subsequently upon release from detention, engaged other Brazilians on the street and asked them for information they might have on how to help someone come to the United States illegally.

The respondent worked as an informant between the years 2002 and 2009. He was given employment authorization and ultimately has ended up in Immigration Court for a hearing on his withholding of removal application. I will also consider the respondent's testimony and application in the context of the Convention Against Torture.

The respondent says that since ~~his~~ having become an informant, his house in Pedras Grandes, Brazil was closed ever since 2002 when Brazilian mafia people came to the house and threatened his wife and daughter. Ultimately, the respondent's wife and daughter moved to Florianópolis, the capital of Santa Catalina which is about 160 kilometers away from Pedras Grandes. The respondent's wife continued to receive threats on her cellphone and ultimately had to change cellphones. Since the respondent's wife and daughter moved, the respondent learned from neighbors that strange cars pass by his former house at night and park in the front lawn for hours making calls. The neighbors also have told the respondent that people come by their houses asking for him by name and when he is coming back.

Recently, the respondent received a letter from his sister-in-law in Brazil warning him not to return. She told him that a friend of his, Renaldo Joaquin, who was detained with him in 2002 and 2003 and who was also a witness against the Brazilian mafia had been stabbed with a knife. Renaldo Joaquin had been deported back to Brazil sometime in the year 2006, according to the respondent.

When the respondent moved to New Hampshire in 2003, he wanted to get a work authorization. He called the ICE officers in Texas~~,~~ with whom he had been working as an informant. He presented all of his paperwork from Texas to the officers in New Hampshire. He was, in fact, granted employment authorization.

The respondent fears that if he returns to Brazil he believes that the mafia is connected to Eduardo Locke, who was one of those against whom the respondent testified as being a drug and human trafficker in Brazil.

The issue then is whether or not the respondent, who fears retribution from those that he testified against and exposed to the Immigration Service, may upon his return to Brazil be more likely than not to be persecuted based upon a statutorily protected ground. This case is governed by the provisions of the REAL ID Act. That being the case, the burden of proof is on the respondent to demonstrate that either race, religion, nationality, membership in a particular social group, or political opinion is at least one central reason for the persecution. The respondent must prove that such ground will be a cause of the persecutor's acts.

Clearly, the respondent has not been a victim of past persecution. While his family has received threats in the past having to do with his whereabouts, they have not been harmed; neither was the respondent harmed when he was in Brazil. The Board of Immigration Appeals has held~~,~~ with respect to former non-criminal drug informants working against the Cali drug cartel in Colombia~~,~~ that they did not have the requisite social visibility to constitute a particular social group. See In re: C-A-, 23 I&N Dec. 951 (BIA 2006).

In February of 2009, the First Circuit Court of Appeals weighed in on that issue in the case of Scatambuli v. Holder, 558 F.3d 53 (First Circuit Court of Appeals, 2/25/09).

In that case, the First Circuit Court of Appeals reviewed the factual circumstances having to do with Geliane Scatambuli, which are quite similar to the respondent's circumstances in this case. Scatambuli had been referred to ~~these~~ disreputable people who were able to provide fraudulent tourist visas, plane tickets from Brazil to Mexico City, and then travel arrangements to the United States. The smugglers took Scatambuli from Mexico City in a rental van to the border town of Juárez, Mexico. When he was attempting to cross the border, Scatambuli was detained because an officer told him that he believed the visas were fraudulent. Scatambuli was told that if he were to tell the truth, the United States Government would protect him. Therefore, he agreed to cooperate with the Immigration Service and to provide information about the smugglers and forgers. In return for his cooperation, Scatambuli received work permits.

Mr. and Ms. Scatambuli's applications for asylum were denied by the Immigration Judge who found, relying on the Board of Immigration Appeals decision In re: C-A-, that the Scatambuli's reported particular social group lacked the visibility to be considered a social group for asylum purposes. The judge held that the only people who knew of their decision to provide information to the Department of Homeland Security were their family members and possibly the forgers and smugglers.

The same, of course, holds true in this case. Certainly, Mr. Filippi's family knows that he was an informant and, potentially, the smugglers and its mafia members know about this.

In any event, the Board of Immigration Appeals held that the Immigration Judge properly applied the social visibility factor in determining that informants against a

Brazilian smuggling ring are not a particular social group. Persons who act as informants for the United States Government have not been shown to be part of a socially visible group within Brazilian society. As in this case, the respondents did not allege or have any outward characteristics that would cause others in Brazilian society to recognize them as one who acted as an informant with government authority.

Witnesses in criminal cases or other investigations do not share a characteristic which identifies them to others. The Board went on to hold that individuals who inform on others in criminal or other investigative matters may face risk from the individuals who have been informed upon. However, the risk would arise from an individual's reaction of the person informed upon to the specific behavior of the informant. The Board of Immigration Appeals also held the Immigration Judge's determination that the Scatambulis had ~~ve~~ failed to establish that upon return to Brazil, the smugglers would be able to bribe Brazilian police, who would then subject him to punishment reaching the level of torture.

The First Circuit Court of Appeals, citing In re: C-A-, stated that persecution on account of membership in a particular social group refers to persecution that is directed towards an individual who is a member of a group of persons all of whom share a common immutable characteristic. Then non-criminal informants who had passed on information concerning a drug cartel to the Colombian government did not have the kind of shared past experience to qualify for asylum on the basis of membership in a particular social group.

The First Circuit Court of Appeal has affirmed the decision of the Board of Immigration Appeals and adopted the findings of the Board of Immigration Appeals.

Here, as in the other cases cited, the respondent, albeit having perhaps provided a valuable service to the Department of Homeland Security, has not established that he is a member of a particular social group based upon the analysis which I have engaged in above. While he may have a subjective fear of harm from those upon whom he informed, his fear is not reasonably objective on account of a statutorily protected ground. Rather, it seems that anyone who might be seeking to harm the respondent to the extent that they are aware that he informed on him would be seeking revenge by way of a personal vendetta.

Therefore, I do not find it to be more likely than not that the respondent will be persecuted upon his return to Brazil on account of a statutorily protected ground.

Moreover, the respondent has failed to establish it to be more likely than not that he would be tortured if he returns to Brazil and that the torture would be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The respondent, although he alleges that the police are in cahoots with the mafia, has not defined any governmental official or agency who would be seeking to torture him. The First Circuit Court of Appeals has not endorsed the willful acquiescence doctrine.

I would note, prior to closing, that if indeed the Department of Homeland Security, an agency of the United States Government, made certain representations or promises to the respondent, then it would seem only fair that they keep their word. However, I do not know what, if any, promises were made to the respondent. Perhaps, he was promised that he would be allowed to stay in the United States forever. Or perhaps, as reflected in the credible fear packet, he was promised that he would be able to work legally.

That being the case, and for the reasons set forth above, the following orders will be entered:

ORDERS

IT IS HEREBY ORDERED that the respondent's application for withholding of removal be denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under the Convention Against Torture be denied.

Please see the next page for electronic signature

LEONARD I. SHAPIRO
Immigration Judge

//s//

Immigration Judge LEONARD I. SHAPIRO

shapirol on July 11, 2013 at 11:37 AM GMT

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Mesa Jr., Enrique F., Esq.
LawServe
15 Stark St
Manchester, NH 03101

DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114

Name: FILIPPI, RENATO

A 079-129-100

Date of this notice: 1/26/2015

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Miller, Neil P.

Userteam: Docket

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

FILIPPI, RENATO
8 WILLOW ST
SALEM, NH 02079

DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114

Name: FILIPPI, RENATO

A 079-129-100

Date of this notice: 1/26/2015

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Miller, Neil P.

Userteam:

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: A079 129 100 – Boston, Massachusetts

Date: JAN 26 2015

In re: RENATO FILIPPI a.k.a. Renato Felippe

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

MOTION

ON BEHALF OF APPLICANT: Enrique F. Mesa, Jr., Esquire

ON BEHALF OF DHS: Jennifer Mulcahy
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before the Board on July 25, 2014, at which time the decision of the Immigration Judge of April 5, 2013, denying the respondent's applications for the relief of withholding of removal and relief pursuant to the Convention Against Torture, pursuant to section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1231 and 8 C.F.R. §§ 1208.16-18, was affirmed and the appeal dismissed. A timely motion to reopen was filed by the respondent on October 27, 2014. The motion will be denied.

The respondent has failed to submit an application for relief along with his motion to reopen as required by 8 C.F.R. § 1003.2(c)(1). Further, the documentary evidence that he has submitted in support of the motion, newspaper articles and a report issued by a non-governmental organization, is not sufficient to make a prima facie showing that the respondent would more likely than not be subject to torture by or with the acquiescence of a government official upon his return to Brazil.

Absent new, previously unavailable material evidence that makes such a prima facie showing, we will not reopen. The respondent has not established that if proceedings before the Immigration Judge were reopened, the new evidence would likely change the result of the case. *Matter of Coelho,* 20 I&N Dec. 464 (BIA 1992); 8 C.F.R. § 1003.2(c)(1). Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied.

FOR THE BOARD

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Renato Filippi

v. Case No. 17-cv-459-PB
Opinion No. 2017 DNH 221

President of the United States Of America, et al.

MEMORANDUM AND ORDER

Renato Filippi is a Brazilian national facing an order of removal. He has challenged that order in a Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief. For the reasons that follow, I determine that I do not have subject matter jurisdiction to grant Filippi the relief he seeks.

I. BACKGROUND

Filippi traveled to the United States in 2002. With the help of a "coyote" (a criminal smuggler), he crossed the Rio Grande River from Mexico into the United States, but he was soon taken into custody by United States immigration agents.

Filippi's case proceeded through administrative proceedings in the immigration court and the court ultimately issued a final order of removal. While the case was proceeding in the immigration court, Filippi agreed to help the government by "supplying information concerning the operation of the smuggling organization which had brought him to the United States" and "testi[fying] against its members. . . ." Doc. 1 at 4. According to Filippi, government agents told him that, in exchange for his cooperation, he "would be permitted to remain 'forever' in the United States." Doc. 1 at 4.

Filippi initially remained in immigration detention, subject to a final order of removal. After eleven months of detention, however, he was released on an "Order of Supervision." Pursuant to the Order of Supervision, Filippi had to check in with immigration authorities periodically. He continued to work with government officials to aid in the capture of individuals who smuggled people across the border from 2003 until 2009.

Filippi also obtained employment at a self-storage facility in 2003. He bought a house, where he lives with his wife, a lawful permanent resident, and his daughter, who is a citizen. He has no criminal history in the United States.

On January 25, 2017, Executive Order 13768 went into effect. Proclamation No. 13768, 82 Fed. Reg. 8799 (January 25, 2017). The Executive Order states that the department of "Homeland Security shall prioritize for removal" those individuals who "are subject to an order of removal, but who have not yet complied with their legal obligation to depart the United States." Id. at 8800.

On September 3, 2017, Filippi went to United States Immigration and Customs Enforcement (ICE) to check in pursuant to his Order of Supervision. He was told that he must report back to ICE on October 6, 2017 with plane tickets and an itinerary detailing his departure from the United States, and that he must depart by November 6, 2017. Doc. 1 at 9.

Filippi filed his Petition and Complaint in this court on October 2, 2017. He alleges that the removal order cannot be enforced because it is stale, he has not been given an adequate opportunity to challenge the order, he will face persecution and/or torture if the order is enforced, and any attempt to enforce the order will breach the government's promise to allow him to remain in the United States permanently. He asserts a claim based on the Immigration and Nationality Act ("INA") (Count One), a procedural due process claim (Count Two), a habeas corpus claim (Count Three), a claim for injunctive relief (Count Four), a claim for declaratory judgment (Count Five), and a claim for costs and fees (Count Six).

II. **ARGUMENT**

A federal district court may not consider a claim for relief unless Congress has given the court jurisdiction to act. Finley v. United States, 490 U.S. 545, 547-548 (1989). Filippi argues that the court has both federal question jurisdiction and habeas corpus jurisdiction, but his argument fails to properly account for 8 U.S.C. § 1252, which gives the courts of appeals exclusive jurisdiction over claims that arise from a removal order.

8 U.S.C. § 1252(b)(9) provides in pertinent part that "[e]xcept as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 . . . or by any other provision of law (statutory or nonstatutory), to review [a removal] order . . . ." 8 U.S.C. § 1252(a)(5), further specifies 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 an order of removal . . . ." Read together, these provisions leave no doubt that this court lacks jurisdiction to consider claims that arise from a removal order.

Filippi nevertheless argues that § 1252 does not limit this court's power to consider his claims because he is not attempting to directly challenge the removal order itself. This argument is foreclosed by the First Circuit's decision in Aguilar v. United States Immigration & Customs Enforcement Div., 510 F.3d 1, 9 (1st Cir. 2007). In Aguilar, the court stated that § 1252(b)(9) "aims to consolidate 'all questions of law and fact' that 'arise from' either an 'action' or a 'proceeding' brought in connection with the removal of an alien." Id. at 9. The court also explained that "[t]he petitioners cannot skirt the statutory channel markers by lumping together a mélange of claims associated with removal, each of which would be jurisdictionally barred if brought alone, and eschewing a direct challenge to any particular removal proceeding." Id. at 9-10.

What Filippi is attempting to do here is precisely what Aguilar prohibits. Filippi argues in Count One that the removal order cannot be enforced without violating the INA because the order is stale and new evidence will demonstrate that he faces persecution and/or torture if he is returned to Brazil. He invokes the due process clause in Count Two in arguing that using the removal order to force him to leave the United States without an opportunity to present new evidence is unconstitutional. He seeks a declaration in Count Five that any attempt to remove him based on the removal order violates the government's enforceable promise to allow him to remain here permanently. All of the remaining counts seek relief based on similar grounds. In short, Filippi cannot avoid § 1252 because all of his claims arise from the removal order.[1]

Filippi also makes a half-hearted effort to convince me that § 1252 is inapplicable because it only applies to discretionary decisions and his claims are based on breaches of mandatory legal duties that arise from the INA, the due process clause, and contract law. This argument falls well wide of the mark because it completely fails to engage with the plain language of § 1252, which bars challenges to removal orders without regard to whether the duty breached is mandatory or discretionary.

In a final attempt to support his claim, Filippi argues that I have the emergency power to grant his request for

[1] To the extent that Filippi argues that § 1252 does not apply to his habeas corpus claim because that claim challenges the Order of Supervision rather than the removal order, his argument also fails. As Filippi's petition makes clear, his only argument that the supervision order is unlawful is that the order cannot stand because it is based on the allegedly stale removal order. Aguilar does not permit a petitioner to circumvent § 1252 with such arguments.

injunctive relief even if I lack subject matter jurisdiction over his claims. This argument cannot be squared with either the applicable law or the facts of Filippi's case. First, it is simply untrue that a federal court can grant injunctive relief to preserve the status quo even though it lacks subject matter jurisdiction. See Laker Airways Ltd. V. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984). ("If there is no justification for the court's exercise of jurisdiction, the injunctive relief should necessarily fail.") In any event, Filippi has an available forum for his claims in the court of appeals, which belies his own contention that an emergency situation exists that permits this court to act on his claims.[2] Accordingly, I cannot grant Filippi relief based on a claim that no other forum exists to consider his challenge to the removal order.

III. CONCLUSION

Congress has given the courts of appeals exclusive

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[2] Filippi invokes Hamama v. Adducci, 2017 WL 3124331 (E.D. MI 2017) to support his claim. Hamama appears to be based on the premise the plaintiffs in that case did not have a right to seek relief in the court of appeals. Filippi nowhere claims, however, that he cannot present his claims to the court of appeals. Thus, Hamama does not support his argument.

jurisdiction to consider the types of claims that Filippi is seeking to raise in this case. Because this court lacks subject matter jurisdiction, I dismiss Filippi's petition (Doc. No. 1) without prejudice to his right to refile his claims in the Court of Appeals for the First Circuit. The clerk is directed to enter judgment accordingly.

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

October 16, 2017

cc: Robert E McDaniel, Esq.
George Bruno, Esq.
John J. Farley, Esq.

EXHIBIT B

No. 17-2055

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

INDRA HASUDUNGAN SIHOTANG
A098 228 560,

Petitioner,

v.

JEFFERSON B. SESSIONS III,
United States Attorney General,

Respondent.

RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION, OPPOSITION TO PETITIONER'S MOTION TO STAY REMOVAL, MOTION TO STAY PRODUCTION OF THE ADMINISTRATIVE RECORD, AND REQUEST TO LIFT THE TEMPORARY STAY ON AN EXPEDITED BASIS

Respondent requests that the Court dismiss the petition for review under 8 U.S.C. § 1252(a)(1), because Petitioner Indra Hasudungan Sihotang ("Petitioner") is seeking review of a decision by the Board of Immigration Appeals ("Board") that is not a final order of removal. Because this Court lacks jurisdiction over the petition for review, Respondent respectfully opposes Petitioner's motion for a stay of removal and requests the Court stay the deadline for the production of the administrative record pending resolution of this motion. Finally, Respondent respectfully requests that the Court consider the motion on an expedited basis because Petitioner is detained and his removal is scheduled for the morning of October 25, 2017.

ARGUMENT

I. The Court Should Dismiss the Petition for Review for Lack of Jurisdiction Because Petitioner Is Not Seeking Review of a Final Order of Removal

The statute governing petitions for review of Board decisions strictly limits this Court's jurisdiction to "final orders of removal." 8 U.S.C. § 1252(a)(1). An order of removal is final when the Board affirms an immigration judge's finding of removability or when the time has expired for appealing an immigration judge's decision. 8 U.S.C. § 1101(a)(47)(B); *Hakim v. Holder*, 611 F.3d 73, 76-77 (1st Cir. 2010). It is well settled in the Courts of Appeals that the Board's denial of a motion for a stay of deportation or removal is not a reviewable final order of removal. *See Gando-Coello v. INS*, 857 F.2d 25, 26 (1st Cir. 1988) (denial of stay of deportation pending disposition of a motion to reopen was not a final order sufficient to provide jurisdiction); *see, e.g.*, *Vlassis v. INS*, 963 F.2d 547, 549 (2nd Cir. 1992) ("We have spoken out on a number of occasions against meritless dilatory tactics of aliens or their counsel designed to delay departure from the United States. Treating the [Board's] order as a denial of Vlassis' petition to reopen, rather than merely the denial of a stay, would only encourage the tactics we have condemned. We refuse to do so."). Here, the Board's decision denying Petitioner's request for a stay of removal pending adjudication of Petitioner's motion to reopen is not a final order of removal, and as such, the Court lacks jurisdiction over the petition for review. *Gando-Coello*, 857 F.2d at 26; *see Hakim*, 611 F.3d at 76-77. Accordingly, the Court should dismiss the petition for review for lack of jurisdiction. 8 U.S.C. § 1252(a)(1).

II. The Court Should Deny Petitioner's Emergency Stay Motion Because Petitioner Has Not Satisfied the Necessary Prerequisites for a Stay

Where the Court lacks jurisdiction over Petitioner's petition for review, it *a fortiori* lacks jurisdiction to grant Petitioner's motion for a stay of removal, and the Court should therefore deny the motion as moot upon dismissing the petition. 8 U.S.C. § 1252(a)(1). In the alternative, the Court should deny the motion where Petitioner has not met his burden to justify a stay. The Court may stay an alien's removal pending review of a final order of removal. INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B). However, a stay of removal is an "intrusion into the ordinary processes of administration and judicial review." *Nken*, 556 U.S. at 427. A stay of removal "is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as a matter of right." *Id.* at 437 (Kennedy, J., concurring). Whether to grant a stay pending review is "an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Id.* at 433. The alien "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34.

In adjudicating a motion to stay an alien's removal, this Court must make an "individualized judgment" regarding: (1) whether the applicant "has made a strong showing that he is likely to succeed on the merits"; (2) whether the applicant will be "irreparably injured absent a stay"; and (3) whether issuance of a stay will be contrary to the public interest. *Id.* at 426 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987)). This test does not involve balancing interdependent factors against one another. *Id.* at 435. Instead, these factors are independent elements, each of which the alien must satisfy to meet his burden of proof in establishing that a stay of removal is warranted. *Nken*, 556 U.S. 435.

With regard to the first factor, the *Nken* Court declared that "[i]t is not enough that the chance of success . . . be better than negligible" or that the alien have a "mere possibility" of obtaining the relief sought. *Id.* at 434. Instead, an applicant must make a strong showing of a likelihood of success on the merits. *Id.* Here, Petitioner has failed to satisfy even the first factor for a stay of removal where he fails to address, let alone establish, the Court's jurisdiction to consider his petition for review and therefore fails to make the requisite strong showing that he is likely to succeed on the merits. Indeed, his arguments in favor of the first *Nken* factor asserts only that he is likely to prevail on his pending motion to reopen before the Board, which is irrelevant to his likelihood of success on his petition for this Court's review of the Board's decision declining to grant an administrative stay of removal. Accordingly, Petitioner has failed to make the strong showing of success on the merits needed for a stay, and his request should be denied.

III. The Court Should Stay the Deadline for Production of the Administrative Record Pending a Decision on the Instant Motion to Dismiss

Because Respondent's motion to dismiss is dispositive of all the issues in this case, Respondent requests that the Court stay the deadline for production of the certified administrative record pending a decision on the motion. The certified administrative record is currently due by December 4, 2017. *See* Court's Order of October 23, 2017. Should the Court deny the instant motion, Respondent respectfully requests an additional sixty days from the date of the denial of the motion in which to file the certified administrative record.

IV. The Court Should Consider Petitioner's Motion and Respondent's Pleading On an Expedited Basis

Respondent requests that the Court consider Respondent's motion on an expedited basis and lift the temporary stay of removal today, October 24, 2017. The Department of Homeland Security ("DHS") has arranged for Petitioner to be removed tomorrow, October 25, 2017. A last-minute stay of Petitioner's removal would be at additional cost to the government without good reason, as this Court lacks jurisdiction over the petition for review and will inevitably dismiss the petition and deny Petitioner's motion for a stay of removal.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review for lack of jurisdiction, deny Petitioner's motion for a stay of removal, stay the deadline for production of the administrative record, and lift the temporary stay of removal today, October 24, 2017.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

ANTHONY C. PAYNE
Assistant Director

ALEXANDER J. LUTZ
Trial Attorney

s/ Jessica D. Strokus
JESSICA D. STROKUS
Trial Attorney
Office of Immigration Litigation
Civil Division, U.S. Dep't of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-8779

Dated: October 24, 2017

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that all participants who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days to the following non-CM/ECF participant:

Jesse Hyatt Thompson
Catholic Charities Community Services
13th Fl
80 Maiden Ln
New York, NY 10038

s/ Jessica D. Strokus
JESSICA D. STROKUS
Trial Attorney
Office of Immigration Litigation
Civil Division, U.S. Dep't of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-8779

Dated: October 24, 2017

EXHIBIT C

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

SYED MUEED ALAM,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action H-18-00680
	§	
JEFF SESSIONS, United States Attorney General, et al.	§	
	§	
	§	
	§	
Defendants.	§	
	§	

DEFENDANTS' BRIEF IN RESPONSE TO AMICUS BRIEF AND REPLY IN SUPPORT OF THE MOTION TO DISMISS

Respectfully submitted,

ABE MARTINEZ
Acting United States Attorney

By: /s/ Eleanor Robinson Gaither
Eleanor Robinson Gaither
Assistant United States Attorney
Fed ID No. 2972
1000 Louisiana Ave. Suite 2300
Houston, Texas 77002
Tel: (713) 567-9533
Eleanor.robinson-gaither@usdoj.gov
Attorney-in-Charge for the Defendants

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SYED MUEED ALAM,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action H-18-00680
	§	
JEFF SESSIONS, United States Attorney General, et al.	§	
	§	
	§	
	§	
Defendants.	§	
	§	

DEFENDANTS' BRIEF IN RESPONSE TO AMICUS BRIEF
AND REPLY IN SUPPORT OF THE MOTION TO DISMISS

Defendants hereby file this Brief in response to *amici curiae* the American Civil Liberties Union Foundation, ACLU Foundation of Texas, and the American Immigration Council (collectively, "ACLU") amicus brief. (ECF No. 20). Also, the Defendants file this reply in support of their Motion to Dismiss. (ECF No. 10).

I. INTRODUCTION

In the ACLU's amicus brief, the Court is asked to circumvent Congress's immigration framework by staying Plaintiff's removal. The Court should deny that request. The availability of judicial review of orders of removal is governed by 8 U.S.C. § 1252. Nothing permits the Court to enjoin the execution of Plaintiff's lawfully entered final removal orders. Congress has unambiguously stripped this Court of jurisdiction to even consider a stay of removal. By enacting 8 U.S.C. § 1252(g), Congress precluded district courts from hearing any claim that "aris[es] from the decision or action by the [Secretary] to . . . execute removal orders against any alien." Here, Section 1252 precludes this Court from doing so. Plaintiff asks this Court to enjoin the Government from executing Plaintiff's removal order. Plaintiff's removal will not offend the Suspension Clause, and the Court should reject Plaintiff's arguments to the contrary.

That result fully harmonizes with the Constitution. Removal does not offend the Constitution's Suspension Clause such that the Court could act to grant Plaintiff relief from removal. The Suspension Clause does not apply in this case when Plaintiff has had the chance to seek review of his removal order, which was denied. Nor does the Suspension Clause apply to the contested claims here, which seek injunctive relief (a stay of removal), rather than habeas relief. And finally, even if emergency relief is required to forestall Plaintiff's removal, federal courts of appeals are the sole courts that can grant such relief under the All Writs Act and consistent with the immigration scheme that Congress designed. The Court should vacate the order staying the removal and dismiss with prejudice Plaintiff's demands to enjoin his removal.

II. BACKGROUND AND FACTS1

As set forth in Defendants' dismissal motion, BIA dismissed the Plaintiff's appeal on March 23, 2005. The Fifth Circuit dismissed Plaintiff's petition for review ("PFR") of that BIA decision on March 10, 2006. (ECF No. 10). From December 28, 2006 through December 6, 2017, USCIS granted Plaintiff's stay of removal based on prosecutorial discretion because of his four-year-old daughter,2 Zia Rehman's, medical condition. (ECF No. 1, exhibits E, F & G). Each notice, informed Plaintiff that he had to resubmit updated medical documentation of the daughter. *Id.* Per Exhibit G, Plaintiff was informed that he had to submit information regarding his residency application to Canada. *Id.* On January 29, 2018, Plaintiff's 2018 application for stay of removal was denied. (ECF No. 1, exhibit O). In the denial decision, Plaintiff was reminded that his past stay-of-removal applications (since 2006) were primarily based on his then-minor-daughter's

1 / The Defendants fully adopt and incorporate by reference all of the facts and arguments in the dismissal motion.
2 / Because Plaintiff's daughter was born on December 28, 1996, she became 21 years old in December 2017.

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medical condition and residency in Canada. *Id.*

On March 7, 2018, Plaintiff was issued a Notice of Revocation of Release. According to the Notice of Revocation of Release, the removal was based on the immigration judge's May 16, 2004 decision. Further, Plaintiff would be afforded an interview at which [he would] be given the opportunity respond to the reasons for the revocation. (Gov't Exhibit No. 2).

On March 9, 2018, the Court entered a temporary restraining order enjoining the removal of Plaintiff. (ECF No. 9).

On March 16, 2018, BIA denied Plaintiff motion to stay removal pending a decision on his amended motion to reopen. BIA noted that the stay of removal was denied because there was little likelihood that Plaintiff's motion to reopen would be granted. (Gov't Exhibit No. 4).

On March 18, 2018, ACLU filed their jurisdictional brief. Their brief argues that that the Government's attempts to detain and remove Plaintiff with a final removal order violates his due process rights and the Suspension Clause of the United States Constitution. (ECF No. 20).

III. ARGUMENT

The Court lacks jurisdiction to stay Plaintiff's removal order. The INA unambiguously deprives the Court of jurisdiction to enter a stay, and nothing, including the Suspension Clause of the Constitution, overrides that jurisdictional bar. If the BIA denies a stay motion without adjudicating the motion to reopen, the Plaintiff may file a motion to reconsider the stay denial with the immigration courts, the BIA, and the Fifth Circuit – not this Court.

A. Section 1252 Strips the Court of Jurisdiction to Stay Plaintiff's Removal.

Federal statutes deprive the Court of jurisdiction to stay the execution of Plaintiff's removal order. The INA provides that "[e]xcept as 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

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action by the [Secretary of Homeland Security3] to . . . execute removal orders against any alien." 8 U.S.C. § 1252(g). In prior Fifth Circuit cases, this Court applied Section 1252 to hold that it "lack[ed] jurisdiction over Plaintiff's claim for a stay of removal." *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999); *Alvidres-Reyes v. Reno,* 180 F.3d 199 (5th Cir. 1999); *Earle v. Copes*, No. 2:05-CV-1614, 2005 WL 2999149, at *1 (W.D. La. Nov. 8, 2005). Plaintiff's request for a stay is directed at the Attorney General's decision to execute his removal order. *Idokogi v. Ashcroft*, 66 F. App'x 526 (5th Cir. 2003). The Court should do the same here.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute[.]..." *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994) (citations omitted). The burden of establishing a federal court's jurisdiction rests upon the party that invokes jurisdiction. *Hartford Ins. Group v. Lou–Con Inc*., 293 F.3d 908, 910 (5th Cir. 2002) (per curiam). Accordingly, Plaintiff must prove that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp*., 613 F.2d 507, 511 (5th Cir. 1980). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Krim v. pcOrder.com, Inc.*, 402 F.3d 489 (5th Cir. 2005) (citations omitted).

Here, the primary issue is whether the Court has jurisdiction to hear this case. "[T]he passage of the REAL ID Act divested district courts of jurisdiction over removal orders and designated the courts of appeals as the sole forums for such challenges via petitions for review." *Mohumud v. Joyce*, No. 18–CV–00102, 2018 WL 1547848 (W.D. Tex. March 29, 2018) (quoting *Moreira v. Mukasey*, 509 F.3d 709, 712 (5th Cir. 2007)). Therefore, "*no court shall have*

3 / Section 1252(g) references the Attorney General, not the Secretary of Homeland Security. But Congress has transferred responsibility for immigration enforcement functions from the Attorney General to the Secretary. 6 U.S.C. § 251; see *Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005). "Under 6 U.S.C. § 557, references in federal law to any agency or officer whose functions have been transferred to DHS shall be deemed to refer to the Secretary of DHS or other official or component to which the functions were transferred." *Durable Mfg. Co. v. U.S. Dep't of Labor*, 578 F.3d 497, 499 n.1 (7th Cir. 2009).

jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under . . . [8 U.S.C. § 1252(g)] (emphasis added). This prohibition extends to habeas petitions under 28 U.S.C. § 2241. 8 U.S.C. § 1252(a)(5); 8 U.S.C. § 1252(b)(9)." *Id.* The Fifth Circuit has held that the prohibition strips district courts of the jurisdiction to consider requests for a stay of removal proceedings. *Idokogi v. Ashcroft*, 66 F. App'x 526 (5th Cir. 2003) (per curiam) ("The district court therefore correctly determined that it lacked jurisdiction to stay the order of removal."); *Fabuluje v. Immigration & Naturalization Agency*, 244 F.3d 133 (5th Cir. 2000) (per curiam) ("[T]he district court correctly determined that it was without jurisdiction to consider *Fabuluje's* request for a stay of the removal proceedings.").

As noted above, the REAL ID Act stripped this Court of jurisdiction to decide Plaintiff's request for a stay of removal. The Court cannot "hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." *Id. See* 8 U.S.C. § 1252(g).

Nevertheless, the Court should see a distinguishing factor in this case—an immigration judge considered Plaintiff's Motion to Reopen and denied it; Plaintiff next filed an appeal and a Motion for a Stay of Removal before the BIA); and finally, the BIA denied his Motion for a Stay of Removal. (Government Exhibit No. 4). The Supreme Court has held that Congress stripping federal courts of habeas jurisdiction does not violate the Suspension Clause when it provides litigants with an adequate and effective substitutionary remedy. *Swain v. Pressley*, 430 U.S. 372, 381–82 (1977). In the instant case, Plaintiff had an adequate and effective substitutionary remedy. An immigration judge heard and ruled on his Motion to Reopen, and the BIA heard and denied his Motion for a Stay of Removal. Plaintiff now, in essence, asks the Court to overturn the Attorney

General's determination. Congress has explicitly stripped the Court of jurisdiction to do that. Therefore, 8 U.S.C. § 1252(g) bars the Court from hearing this case.

Section 1252(g) applies squarely to Plaintiff's request for a stay of removal. Plaintiff premise his request on a claim that if USCIS executed his removal orders, USCIS would violate the INA and the Due Process Clause. (ECF No. 1). Because Plaintiff's stay request stems from a claim that the execution of his removal orders would be unlawful, it clearly "aris[es] from the decision or action by the [Secretary] to . . . execute removal orders against any alien." 8 U.S.C. § 1252(g). Section 1252(g) thus deprives this Court of jurisdiction to stay Plaintiff's removal orders.

Section 1252(b)(9) also deprives the Court of jurisdiction. That provision provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9).

Section 1252(a)(5) adds that "a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal." Taken together, "§ 1252(a)(5) and § 1252(b)(9) mean that *any* issue – whether legal or factual – arising from *any* removal-related activity can be reviewed *only* through the PFR process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016); *see AADC*, 525 U.S. at 483 (labeling Section 1252(b)(9) an "unmistakable zipper clause," and defining a zipper clause as "[a] clause that says 'no judicial review in deportation cases unless this section provides judicial review' "); *see also Jennings v. Rodriguez*, 138 S.Ct. 830 (2018) (suggesting that when an alien "challeng[es] the decision . . . to seek removal," Section 1252(b)(9) presents a jurisdictional bar).4

Section 1252(a)(5) and Section 1252(b)(9) apply to Plaintiff's request for a stay of removal. The question of whether an alien's removal violates the INA or the Due Process Clause is a "question of law and fact" that arises from an "action taken . . . to remove an alien from the United States" (*i.e.*, the act of executing the alien's removal order). 8 U.S.C. § 1252(b)(9). Thus, Section 1252(g) and Section 1252(b)(9) deprive the Court of jurisdiction to stay Plaintiff' removal orders.

As previously mentioned, Courts in this District have recognized that Section 1252 deprives a district court of jurisdiction to stay a removal order. The Court should hold that Plaintiff's request for a stay of removal must be filed with the Fifth Circuit Court of Appeals, the BIA, or an immigration court, but not in this Court. *Mohumud v. Joyce*, No. 18–CV–00102, 2018 WL 1547848 (W.D. Tex. March 29, 2018).

B. Section 1252 Does Not Violate the Suspension Clause as Applied.

Applying Section 1252 to Plaintiff is consistent with the Suspension Clause. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

1. Plaintiff's Claims Do Not Implicate the Suspension Clause.

The Suspension Clause is not implicated where, as here, an alien "has already had an opportunity to obtain judicial review of his final order of removal. Here, an immigration judge considered Plaintiff's Motion to Reopen and denied it; Plaintiff next filed an appeal and a Motion for a Stay of Removal before the Board of Immigration Appeals (the "BIA"); and finally, the BIA

4 / The Supreme Court has explained that Section 1252(g) encompasses only a subset of the claims that fall within Section 1252(b)(9)'s jurisdictional bar. *AADC*, 525 U.S. at 483. Indeed, Congress enacted Section 1252(g) largely to clarify that Section 1252(b)(9) sweeps broadly. *Id.* (Section 1252(g) "mak[es] it clear" that claims arising from the Secretary's decision to execute a removal order "are covered by the 'zipper' clause of § 1252(b)(9).").

denied his Motion for a Stay of Removal. (Gov't Exhibit No. 4).

In *Mohumud*, the Fifth Circuit affirmed the dismissal of a habeas petition and explained that because the Plaintiff has already received an opportunity to obtain judicial review of his final order of removal and, furthermore, had years to file motions to reopen; he could not rely on the Suspension Clause to defeat Section 1252's jurisdiction-limiting provisions. *Mohumud v. Joyce*, No. 18–CV–00102, 2018 WL 1547848 (W.D. Tex. March 29, 2018); *Qureshi v. Admin. Appeals Office of U.S. Citizenship & Immigr. Servs.*, 408 F. App'x 611, 615 (3d Cir. 2010).

Just as the Plaintiff in *Mohumud* had already received an opportunity to obtain judicial review of his final removal order, Plaintiff has received opportunities to petition a court of appeals to review his final removal orders. And just as the Plaintiff in *Mohumud* invoked habeas jurisdiction in an effort to obtain discretionary relief, Plaintiff seeks discretionary relief (*i.e.*, the reopening of his removal proceedings). *I.N.S. v. Doherty*, 502 U.S. 314 (1992) ("The granting of a motion to reopen is thus discretionary . . ."). Since Plaintiff has received an opportunity to obtain judicial review of his final removal orders and now invoke habeas in an effort to obtain discretionary relief, his claims do not implicate the Suspension Clause.

Due process jurisprudence supports the conclusion that the Suspension Clause does not apply in the motion-to-reopen context. Indeed, several courts of appeals have held that an alien "has no due process right in seeking a discretionary grant of a motion to reopen." *Jian Xing Huang v. Holder*, 342 F. App'x 718, 719 (2d Cir. 2009); *see Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002) ("[T]he discretionary right to suspension of deportation does not give rise to a liberty or property interest protected by the Due Process Clause."); *Oguejiofor v. Att'y Gen.*, 277 F.3d 1305, 1309 (11th Cir. 2002) ("[A]n alien has no constitutionally-protected right to discretionary relief or to be eligible for discretionary relief.").

Again, Plaintiff contends that his prior opportunities to obtain judicial review are insufficient. But "[t]he Constitution does not guarantee litigants the most effective means of judicial review for every type of claim they want to raise." *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018). Rather, in the present context, the Suspension Clause guarantees only that an alien receive one opportunity to obtain judicial review of his final removal order. Plaintiff has received that opportunity. And to the extent that Plaintiff's request for a stay of removal implicates the Due Process Clause, Plaintiff has not stated a valid claim because the BIA has not "unreasonably delayed in ruling on a motion to reopen." *Ramos-Chamana De Zevallos*, 2004 WL 2944057, at *3.

Plaintiff argues that he is not requesting a removal review. Instead, he claims that he is requesting that the court review the constitutional issue of whether the Defendants violated his due process rights in his removal procedures. Even though Plaintiff alleges a violation of his right to due process, Plaintiff's constitutional claim is merely an attempt to circumvent the jurisdiction bar of § 1252(g). *See Lopez Gonon v. Holder*, 341 F. App'x 88, 92 (6th Cir. 2009). Plaintiff does not allege any infirmity in the proceedings rising to the level of a constitutional deprivation of due process. Rather, he alleges denial of removal. As a result, the Court lacks jurisdiction to stay the removal. *Komi Adade v. Eric Holder, Jr.*, No. 09-3670 (6th Cir. 2010).

In *Alshareqi v. Mukasey*, 295 F. App'x 2, 6 (6th Cir. 2008), the IJ concluded that the petitioner failed to demonstrate the factors necessary for cancellation of removal. The petitioner argued on appeal that the IJ denied his due process rights by failing to "demonstrate that it properly weighed all of the relevant factors used in assessing hardship." *Id.* at 5. The court rejected this argument, finding that "[the petitioner's] due process claim is little more than an attempt to have us review the unreviewable discretionary determination of ... undue hardship." *Id.* at 6. The court concluded it did not have jurisdiction to review the issue. *Id.* In the instant case, Plaintiff asserts before this Court a similar due process claim. In accordance with *Alshareqi*, this court lacks jurisdiction to review the IJ's decision in this regard. Other circuits have made similar distinctions. The Seventh Circuit has explained:

> We have interpreted the phrase "questions of law" [in 8 U.S.C. § 1252(a)(2)(D)] to permit judicial review of only "pure" questions of law. A "pure" question of law arises in situations in which a case comes out one way if the Constitution or statute means one thing, and the other way if it means something different. Therefore, factual or discretionary determinations do not constitute reviewable questions of law under § 1252(a)(2)(D).

Castro v. Holder, 727 F.3d 125 (1st Cir. 2013) (quoting *Stepanovic v. Filip*, 554 F.3d 673, 678 (7th Cir. 2009) (internal citations omitted)).

Herein, Plaintiff also wrongly asserts that he reasonably relied upon a status quo that afforded him years of protection against deportation. (ECF No. 1). In *Devitri v. Cronen*, No. 17-CV-11842, 2018 WL 661518 (D. Mass. Feb. 1, 2018), the court found that the Plaintiff had "reasonably relied on his OSUPs in not filing motions to reopen earlier and had no reason to suspect that the Government would abruptly change its mind." *Id.* at *2. While the Government disputes that characterization in *Devitri*, it is certainly not true here. As early as 2006, USCIS officials advised Plaintiff that he had to resubmit updated medical documentation of his 4-year-old daughter, along with information regarding his residency application to Canada. (ECF No. 1, exhibit G). USCIS repeated that advice over the next several years. And Plaintiff's OSUPs ordered Plaintiff to assist with pursuing a travel voucher, appear in person . . . upon each and every request of [USCIS] for identification and for deportation or removal. (ECF No. 1, exhibit O). In light of those advisories, Plaintiff did not reasonably rely "upon a status quo" in failing to file prior motions to reopen.

C. The Suspension Clause is Not Implicated When an Alien Does Not Seek Habeas Relief.

The Suspension Clause does not provide an exception to Section 1252 for an independent, alternative reason: Plaintiff's request for a stay of removal is not a habeas corpus claim. A habeas claim seeks "the discharge from custody of the person in whose behalf the writ was sued out." *United States v. Jung Ah Lung*, 124 U.S. 621, 622 (1888). Plaintiff does not seek "discharge from custody." *Id.* Instead, he seeks injunctive relief in the form of a stay of removal. Because the Suspension Clause protects the Privilege of the Writ of Habeas Corpus, not requests for injunctive relief, Plaintiff's request for stays of his removals does not implicate the Suspension Clause.

Plaintiff's request is not a habeas claim. The request arises from allegations of changed factual circumstances. (ECF No. 1). Plaintiff claims that unless the Court halts his removal, he will be unable to resolve his motion to reopen. *Id.* But the writ of habeas of habeas corpus "serve[s] as a means of reviewing the legality of Executive detention," *INS v. St. Cyr*, 533 U.S. 289, 301 (2001), not the factual justification for removal. *Id.* at 305-06. *A fortiori*, habeas is not a mechanism by which an alien can obtain additional time to assert factual claims in another forum. *See id.* (at ratification, habeas "encompassed detentions based on errors of law"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("the final determination of those facts may be in trusted by congress to executive offices," and "no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted"). In *Heikkila*, the Supreme Court distinguished habeas relief from "injunctions, declaratory judgments and other types of relief" that "courts ha[d] consistently rejected" in immigration cases. *Heikkila v. Barber*, 345 U.S. 229, 230 (1953). The Court rejected the alien's request for "injunctive and declaratory relief" because Congress had authorized courts to grant relief only in habeas proceedings. *Id.* at 230, 237. The Court reaffirmed that distinction in *St. Cyr*, noting that the 1961 Immigration and Nationality Act withdrew the district courts' "authority to grant declaratory and injunctive relief," but not habeas relief. 533 U.S. at 309-10. And Congress has confirmed that

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distinction by allowing one form of relief, but not the other, in particular circumstances. *Compare*, *e.g.*, 8 U.S.C. § 1252(e)(1) (prohibiting courts from granting "declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1)") *with* 8 U.S.C. § 1252(e)(2) (allowing "judicial review . . . in habeas corpus proceedings" of particular "determination[s] made under section 1225(b)(1)").

Therefore, Plaintiff does not seek habeas relief, but rather an injunction in the form of a stay of removal. Because the Suspension Clause does not apply to requests for injunctive relief, Plaintiff's request for a stay of removal does not implicate the Suspension Clause.

D. Congress Has Provided an Adequate Habeas Substitute.

Aside from addressing the clarity with which congressional intent needs to be expressed, the Court in *St. Cyr* also asserted that if the jurisdictional provisions of the INA did in fact preclude all judicial review in certain circumstances, as they now do as a result of the REAL ID Act, then Suspension Clause concerns would be implicated with regard to "pure questions of law." *St. Cyr*, 533 U.S. at 300, 121 S.Ct. 2271. "The REAL ID Act addresses this consideration in § 1252(a)(2)(D), which provides that: '[n]othing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.' " *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 512 (5th Cir. 2006).

Even if the Suspension Clause were triggered here, its demands would be satisfied, and thus the Court could not rely on the Clause to hear Plaintiff's claims. The Suspension Clause permits Congress to eliminate district court habeas jurisdiction if it provides "adequate substitute procedures." *Boumediene v. Bush*, 553 U.S. 723, 771 (2008). In the removal context, Congress has

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provided an adequate habeas substitute: aliens may petition for review of removal orders and motions to reopen in the courts of appeals. *Kolkevich v. Att'y Gen.*, 501 F.3d 323, 332-33 (3d Cir. 2007). *Kolkevich*, 501 F.3d at 332 ("[T]here is no question that the current regime, in which aliens may petition for review [of his removal orders and motions to reopen] in a court of appeals but may not file habeas, is constitutional [under the Suspension Clause].").

Despite the various circuits' unequivocal holdings, Plaintiff argues that the motion-to-reopen procedure is inadequate in his case because, in the absence of a district-court stay of removal, the Government may remove him while his motion-to-reopen is pending.

The Court should reject that argument for three independent reasons. First, under the Suspension Clause, the adequacy of a substitute habeas procedure does not depend on an individual Plaintiff's ability to access it. Indeed, "[i]t is the inefficacy of the remedy, not the personal inability to use it, that is determinative." *Cradle v. U.S. ex rel. Miner*, 290 F.3d 536, 538 (3d Cir. 2002).5 Stated differently, "[t]he fact that [a Plaintiff] must satisfy certain gatekeeping requirements . . . does not amount to a suspension of the writ." *McAdory v. Warden Lewisburg USP*, 545 F. App'x 88, 91 n.1 (3d Cir. 2013) ("[8 U.S.C.] § 2255 is not inadequate or ineffective merely because of a Plaintiff's 'personal inability' to surmount § 2255 procedural requirements" (quoting *Cradle*, 290 F.3d at 538)). Accordingly, Plaintiff's allegations regarding the procedural difficulties of filing a motion to reopen and concomitant administrative motion for stay of removal are not relevant to the Suspension Clause question. Rather, the Suspension Clause is satisfied so long as Congress

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5 / Although the *Cradle* court analyzed the phrase "inadequate or ineffective" in the context of 28 U.S.C. § 2255, the court's reasoning applies equally in the Suspension Clause context. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977) (implicitly equating Section 2255's "inadequate or ineffective" test to the test for a Suspension Clause violation and finding that D.C. superior court judges who lack life tenure are "presume[d] . . . neither ineffective nor inadequate" to address claims in substitute habeas remedy).

has provided an adequate habeas substitute. *Boumediene*, 553 U.S. at 779. "[T]here is no question" that Congress has done so. *Kolkevich*, 501 F.3d at 332. Second, the motion-to-reopen procedure is an adequate habeas substitute. The BIA and immigration courts hold jurisdiction to grant a stay of removal when an alien moves for one in conjunction with a motion to reopen. 8 U.S.C. § 1103; 8 C.F.R. §§ 1003.2(f), 1003.6(b), 1003.23(b)(1)(v). The administrative courts assign emergency stay requests the "utmost priority." Although emergency stays are available only to aliens whom USCIS has detained, a non-detained alien does not face imminent removal and thus can obtain effective relief through the non-emergency administrative stay procedure. Third, even if the administrative courts did not provide an adequate habeas substitute, the courts of appeals' authority to stay the execution of Plaintiff's removals would still satisfy the Suspension Clause. *Telecomms. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984) (holding that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals"); *Garcia v. Holder*, 788 F. Supp. 2d 326 (S.D.N.Y. 2011) (an appeals court can stay a removal order to guard against the possibility of wrongful removal, even if the administrative courts have not yet adjudicated the alien's motion to reopen).

In *Khan*, the Third Circuit granted an emergency motion to stay removal even though the Plaintiff filed the motion *before* the BIA ruled on his administrative motions to reopen and stay. *Khan v. Att'y Gen.*, 691 F.3d 488, 498 (3d Cir. 2012). As the Third Circuit's order demonstrates, and as at least one federal court has explained, an appeals court can stay a removal order to guard against the possibility of wrongful removal:

> It therefore is possible that Plaintiff would be unable to pursue his [motion to reopen] if he were removed before it is resolved. But that possibility does not empower this Court to grant Plaintiff the relief that he seeks. As stated above, this Court is without "jurisdiction to hear any . . . claim . . . by . . . an alien arising from the decision or action by the Attorney

> General to . . . execute removal orders against any alien." This does not mean, however, that Plaintiff has no means of protecting his ability to pursue his [motion to reopen].
>
> The Second Circuit would have the authority to review a denial by the BIA of Plaintiff's [motion to reopen], provided that a proper petition for review were filed before that court within 30 days after the ruling. Plaintiff therefore is at liberty to move in that court under the All Writs Act for a stay of removal and to argue that a stay is necessary to protect the Court of Appeals's ability ultimately to determine whether any denial of the [motion to reopen] were proper.

Garcia, 788 F. Supp. 2d at 331-32 (footnotes omitted).

As the *Garcia* court recognized, the possibility that Plaintiff will be removed before the administrative courts resolve his motions to reopen does not empower this Court to stay his removal orders. *Id.* at 331. If Plaintiff wishes to guard against the possibility of wrongful removal, his sole federal-court remedy is to move for stays of removal in the courts of appeals, citing those courts' authority under the All Writs Act to preserve his power to grant effective relief if an administrative decision on a motion to reopen is eventually presented to them for review. *Id.* at 332; *see Khan*, 691 F.3d at 492; *Telecomms. Research & Action Ctr.*, 750 F.2d at 75.

Unlike the district-court-stay remedy that Plaintiff proposes, an appeals-court-stay remedy is consistent with federal law, which explicitly channels all challenges to removal orders to the courts of appeals. *See* 8 U.S.C. § 1252(b)(9). And the availability of that remedy unquestionably satisfies the Suspension Clause because it affords Plaintiff a pre-removal opportunity to present his substantive removal defenses. For the foregoing reasons, the Court should reject Plaintiff's Suspension Clause claim.

E. Unlawful Detention

Plaintiff's claims are without merit and should be rejected. The arguments in support of dismissing Plaintiff's petition are already laid out in the Government's pending Motion to Dismiss (ECF No. 10). Defendants incorporate by reference the facts, arguments and exhibits offered in connection with their dismissal motion.

As discussed in the Government's dismissal motion, Plaintiff received notice that he was found deportable as charged and ordered removable. Detention is lawful under 8 U.S.C. § 1231(a) because removal is reasonably foreseeable. *Zadvydas v. Davis*, 533 U.S. 678 (2001). On March 7, 2018, Plaintiff was issued a Notice of Revocation of Release. Pursuant to 8 C.F.R. § 241.13, USCIS revoked Plaintiff's release on the basis of changed circumstances (it had obtained, or was about to obtain, travel documents). (ECF No. 11). USCIS has obtained travel documents and Plaintiff is subject to removal. (*Id.* at Government Exhibit 1). Again, any violation of notice and interview regulations does not provide a basis to stay removal or order release.

IV. CONCLUSION

For these reasons, and as discussed in greater detail above, the Court should reject Plaintiff's demand to enjoin his removals for lack of subject matter jurisdiction. Plaintiff's petition should be dismissed due to the lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Respectfully submitted,

RYAN K. PATRICK
United States Attorney

By: /s/ *Eleanor Robinson Gaither*
Eleanor Robinson Gaither
Assistant United States Attorney
Federal ID No. 2972
1000 Louisiana, Suite 2300
Houston, Texas 77208
Tel: (713) 567-9000
E-mail: eleanor.robinson-gaither@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

This will certify that the foregoing instrument was filed electronically and served on May 2, 2018, by the Court's electronic ECF system upon All Counsel of Record.

/s/ Eleanor Robinson Gaither
Eleanor Robinson Gaither
Assistant United States Attorney

Office of Detention and Removal Operations
Houston Field Office

U.S. Department of Homeland Security
5520 Greens Road
Houston, Texas 77032

U.S. Immigration and Customs Enforcement

ALAM, Syed Mueed
C/O CCA
15850 Export Plaza Rd
Houston, TX 77032

A079 005 389

Notice of Revocation of Release

This letter is to inform you that your case has been reviewed and it has been determined that you will be kept in the custody of U.S. Immigration and Customs Enforcement (ICE) at this time. This decision has been made based on ICE receiving authorization to effect your removal from the United States as ordered by an Immigration Judge on May 16, 2004.

Based on the above, and pursuant to 8 CFR 241.4, you are to remain in ICE custody at this time. You will promptly be afforded an informal interview at which you will be given an opportunity to respond to the reasons for the revocation. If you are not released after the informal interview, you will receive notification of a new review, which will occur within approximately three months of the date of this notice.

You are advised that you must demonstrate that you are making reasonable efforts to comply with the order of removal, and that you are cooperating with ICE's efforts to remove you by taking whatever actions ICE requests to effect your removal. You are also advised that any willful failure or refusal on your part to make timely application in good faith for travel or other documents necessary for your departure, or any conspiracy or actions to prevent your removal or obstruct the issuance of a travel document, may subject you to criminal prosecution under 8 USC Section 1253(a).

(A)SDDO
Signature and Title of Deciding Official

3-7-18
Date

Gov't Ex No. 2

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PROOF OF SERVICE

(1) Personal Service

(a) I MBJ Marco A. Barcena Jr., (A)Supervisory Detention and Deportation Officer,
Name of ICE Officer Title
certify that I served Syed Mueed Alam, A079 005 389 with a copy of
Name of detainee
this document at CCA facility on March 7, 2018, at 1:25pm.
Institution Date Time

OR

(2) Service by certified mail, return receipt. (Attach copy of receipt)

I ______________________, ______________________, certify
Name of ICE Officer Title
that I served ______________________ and the custodian ______________________,
Name of detainee Name of Official
with a copy of this document by certified mail at ______________________ on ________.
Institution Date

(X) cc: Attorney of Record or Designated Representative
(X) cc: A-File

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Gracia, Amber Constance
Quan Law Group PLLC
5444 Westheimer Suite 1750
Houston, TX 77056

DHS/ICE Office of Chief Counsel - HOU
126 Northpoint Drive, Suite 2020
Houston, TX 77060

Name: ALAM, SYED MUEED **A 079-005-389**

Date of this notice: 3/19/2018

Enclosed is a copy of the Board's interim decision in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Liebowitz, Ellen C

Userteam:

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A079 005 389 – Houston, TX

Date: MAR 16 2018

In re: Syed Mueed ALAM

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Amber C. Gracia, Esquire

APPLICATION: Stay of Removal

Counsel for the respondent has applied for a stay of removal pending consideration by the Board of a motion to reopen. After consideration of all information, the Board has concluded that there is little likelihood that the motion will be granted. Accordingly, the request for a stay of removal is denied.

ORDER: The request for stay of removal is denied.

Ellen Liebowitz
FOR THE BOARD

Government's Exhibit No. 4