No. 19-1736

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOSE DANIEL GUERRA-CASTANEDA
A FILE NO. 208 273 627
Petitioner,

v.

WILLIAM BARR
Attorney General of the United States,
Respondent

PETITIONER'S SUPPLEMENTAL REPLY BRIEF ON THE ISSUE OF CONTEMPT AND UNLAWFUL REMOVAL FROM THE UNITED STATES

ON PETITION FOR REVIEW OF A DECISION OF THE BOARD OF IMMIGRATION APPEALS

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INTRODUCTION

Respondent Attorney General William Barr, the Department of Homeland Security,[1] and its officers (collectively "the government") do not dispute that they violated this Court's stay orders during the pendency of judicial review on Jose Daniel Guerra-Castaneda's ("Mr. Guerra-Castaneda" or "Petitioner") petition. Because of this serious violation and the government's inability to cure, Petitioner has lost any meaningful opportunity to challenge the government's plan to remove him to El Salvador – the very country to which he claims in this petition he should *not be* deported because he will be jailed, persecuted, and tortured.

Mr. Guerra-Castaneda has been jailed in the Salvadoran government's custody since September 13, 2019, but the government has failed to provide sufficient updates on his imprisonment condition or any steps the government is taking to secure his prompt return to the United States. Moreover, the government's responses continue to say little about what the government did to ensure compliance with this Court's stay orders from September 5, 2019 to September 13, 2019. *See* Resp't's Supp. Brief Regarding Issues Related To Pet's Improper Removal From The United States, No. 19-1736 (1st Cir. Nov. 1, 2019) (hereinafter "Govt's Brief")

[1] Congress has transferred the enforcement of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, to the Secretary of Homeland Security. *See* 6 U.S.C. §§ 202(3), 251, 271(b), 542 notes, 557; 8 U.S.C. §§ 1103(a)(1) & (g).

at 7-8. Based on the record thus far, the government seems to have done nothing during this time frame. Moreover, most of Petitioner's criminal charges have been resolved in El Salvador, though he is still being jailed while the Salvadorian prosecution appealed the dismissal of the homicide charge which was dismissed for lack of probable cause. Notwithstanding the importance of this development, the government has not independently provided this information to this Court. The government's excuse for this lack of effort is that any communication with the Salvadoran government is sensitive. It is unclear how the government simply calling or visiting a Salvadorian court or prosecutor to get information on a criminal case would somehow be "sensitive." In any event, the government suggests that Petitioner should report these developments to the Court – not the government. But it is the government that has violated this Court's orders and undermined the authority of this Court, and which has been ordered to provide this Court with status updates every ten days. Thus, a contempt finding is warranted in this case.

SUMMARY OF THE ARGUMENT

The government's position on contempt is remarkable and only underscores the appropriateness of a contempt finding in this case. The government argues that this Court should discharge the order to show cause, should not impose daily fines, and should not grant attorneys' fees simply because—though the government violated two orders of this Court, is unable to cure this violation, and this violation has undermined this Court's authority—it acknowledges its mistake. *See* Govt's Brief at 10-11. The government avers that this unlawful removal in violation of this Court's orders was inadvertent and it has taken specific proactive steps designed to prevent its recurrence. *Id*. at 10. The government also argues that a contempt finding is unwarranted because (i) there is no order from this Court directing the government to return Mr. Guerra-Castaneda to the United States, (ii) returning him to the United States is impossible, and (iii) sovereign immunity bars holding the government accountable for its violation. *Id*. at 11.

First, this Court should not discharge the order to show cause. Whether inadvertent or not, this violation is severe in that it is apparently incurable and has deprived this Court of its ability to issue meaningful relief to Petitioner. Moreover, this unlawful removal is not a one-time isolated event. As Petitioner argued in his brief, the government has a history of unlawfully removing noncitizens from the United States. The unlawful removal in the present case is, in all likelihood, a

consequence of the government's hyper-aggressive deportation efforts. The government's response further supports that no agency is meaningfully taking ownership of being in charge of preventing the deportation of noncitizens pursuant to judicial stay orders. Notably, in light of the government's new declaration with respect to the roles of Alexandria Staging Facility (ASF) in manifesting removal from Louisiana (which contradicts the earlier declaration submitted on September 27, 2019), the government's proposed solution does little more than remind government officers of information that they already should know. Lastly, notwithstanding significant developments in Petitioner's criminal proceedings in El Salvador, the government has failed to independently provide *any* update to this Court on these developments. *See* Govt. Status Report, No. 19-1736 (1st Cir. Oct. 28, 2019) ("no other updates for the Court at this time"); Govt. Status Report, No. 19-1736 (1st Cir. Oct. 17, 2019) (same); Govt. Status Report, No. 19-1736 (1st Cir. Nov. 18, 2019) (same). The only information the government provided to the Court was based on its communication with Attorney Nina Froes. This is unacceptable. The government, like any other litigant, is not entitled to deference when the nature of the violation is this severe and has damaged this Court's ability to grant meaningful immigration relief.

Second, this Court must hold the government in contempt and impose against the government a daily $1,000 coercive fine starting from the date when it violated

this Court's stay orders until Petitioner is brought back to the United States. The government's response only confirms the need for this type of coercive relief. This Court's stay orders were clear and unequivocal. This Court subsequently ordered the government to "provide a detailed explanation of its efforts to locate petitioner and to secure his prompt return to the United States, as well as the means and resources at respondent's disposal to do so." *See* Order, No. 19-1736 (1st Cir. Sept. 19, 2019) ("9/19 Order"). Yet the government attempts to avoid its obvious obligation to cure the violation by boldly arguing that the Court's September 11, 2019 stay order did not include an affirmative duty to return Petitioner in case the government violated the Court's order. The government's argument is stunning, and its audacity should not be lost on this Court. Once the government violated that order, it has a duty—like all litigants—to cure that violation, especially when the violation carries the potential to deprive this Court of its ability to provide substantive relief.

Further, the government avers that the impossibility of returning Petitioner to the United States renders contempt unwarranted. Govt. Brief at 25-26. But the dispositive question of any impossibility defense is whether it was impossible to comply with the Court's stay orders – not whether it would be impossible to cure any violation of these stay orders. Here, the Court's orders were equivocal, and the government was on notice of the existence of the orders. Compliance was possible,

which is undisputed. Nonetheless, the government violated these orders. Thus, contempt is an appropriate sanction here, especially given the prejudice to Petitioner.

Lastly, to avoid the waiver of sovereign immunity, the government relies on this Court's holding in *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994). However, *Horn* is inapposite because it is a criminal case that does not implicate the waiver of sovereign immunity in 5 U.S.C. § 702 for claims "seeking relief other than money damages." Conversely, a removal proceeding like this one seeking relief from deportation is civil in nature, *see Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893), and thus implicates "relief other than money damages" for Section 702 purposes.

ARGUMENT

I. THIS COURT SHOULD NOT DISCHARGE ITS ORDER TO SHOW CAUSE.

A. The Government Still Has Not Provided Sufficient Updates on Petitioner's Detention Condition, His Criminal Case, or Any Concrete Plan to Return Petitioner to the United States.

"The consequences that attend the violation of a court order are potentially dire." *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 17 (1st Cir. 1991). The government's brief along with status updates underscore the appropriateness of a contempt finding in this case. The government argues that this Court should discharge the order to show cause because the unlawful removal in violation of this Court's stay order was inadvertent, and it has acknowledged the violation and is

committed to remedial actions (but not the only remedial action which would provide solace to Petitioner—namely, his immediate return to the United States). But inadvertence does not absolve this Court from the necessity of a contempt finding, especially given the severe consequences of the violation. Here, given the government's apparent inability to cure, the government's violation has perhaps fatally undermined this Court's ability to grant relief to Petitioner. To be found in civil contempt, the violation need not be willful, deliberate, or intentional. As the Supreme Court just reiterated, the "absence of willfulness does not relieve" a party "from civil contempt"; instead, a party's good faith efforts to comply are only relevant insofar as they "may help to determine an appropriate sanction" flowing from the contempt. *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019); *see also McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) ("it matters not with what intent the [contemnor] did the prohibited act"); *NLRB v. Local 254, Bldg. SEIU*, 376 F.2d 131, 134 n.2 (1st Cir. 1967) ("This being a civil contempt, actual intent is immaterial."); *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987) ("The 'exceptional circumstances' offered by the appellants are irrelevant. If a person disobeys a specific and definite court order, he may properly be adjudged in contempt."); *Go-Video v. Motion Picture Ass'n of Am. (In re Dual-Deck Video Cassette Recorder Antitrust Litig.)*, 10 F.3d 693, 695 (9th Cir. 1993) ("there is no good faith exception to the requirement of obedience to a court order");

Manriquez v. Devos, No. 17-cv-07210-SK, ___ F. Supp. 3d ___, 2019 U.S. Dist. LEXIS 186957, at *9, 11 (N.D. Cal. Oct. 24, 2019) (same).

Moreover, the government owes a duty to report on Petitioner's "current condition and . . . describe in detail the efforts being made to ascertain information about petitioner's current condition and the means and resources at its disposal to do so." *See* 9/19 Order. The government is also obliged to "provide a detailed explanation of its efforts to locate petitioner and to secure his prompt return to the United States, as well as the means and resources at [the government's] disposal to do so." *Id*. Critically, the Court directed that "[s]tatus reports shall be filed whenever the events warrant an update, but [the government] must file a status report at least every ten (10) days . . . ." *Id*.

After the issuance of 9/19 Order, the government explained to this Court that the government confirmed Mr. Guerra-Castaneda's custody location in the City of Cojutepeque in the Department of Cuscatlan in El Salvador and his homicide case was pending before the Second Instruction Court of Conjutepeque. *See* Declaration of Deputy Assistant Director International Operations Division Jeffrey D. Lynch, No. 19-1736 (1st Cir. Sept. 27 2019) (hereinafter "Lynch Decl.") at 4 ¶10. On September 20, the government reached out to the Salvadoran Attorney General's Office to find out more information about Petitioner's detention conditions and return to the United States. *Id*. at 5 ¶11. On October 7, 2019, the government

submitted a required status report providing *the same information*. *See* 10/7 Status Report. However, the government has never provided any information about his imprisonment condition. Subsequently, the government submitted two more status reports, on October 17 and 28, indicating that it had "no other updates for the Court at this time." *See* 10/17 and 10/28 Status Reports. On November 7, 2019, as part of its 10-day required status report, the government reported to the Court that "certain criminal matters pending against Petitioner had been resolved" based on the counsel for the government's conversation with Attorney Froes. *See* 11/7 Status Report. Yet this information is not directly from the government or the Salvadoran government, even though the government apparently reached out to the Salvadoran Attorney General's Office earlier. The government instead states that, despite its resources and diplomatic connections, it is not in the best position to provide "updates regarding Petitioner's pending criminal matters, including his location and current condition" because of "foreign policy sensitivities and sovereign criminal justice interests." *See id*. The government submitted another required status report on November 18, 2019, but without any update. *See* 11/18 Status Report.

The government's willingness to impose the burden on the jailed Petitioner to provide status reports on his criminal proceedings and imprisonment condition is troubling. Petitioner's argument in the instant appeal, *inter alia*, is that the agency erred in determining that Mr. Guerra-Castaneda did not submit *any* evidence that he

would "be detained in a prison governed by 'extraordinary measures,' which alleged led to violations of inmates' human rights. AR[2] 5, 76. When this Court issued a stay order during the pendency of judicial review, it also invited the parties to focus on this argument. *See* Stay Order, No. 19-1736 (1st Cir. Sept. 11, 2019). Now, because of the government's unlawful deportation, Petitioner is in the very imprisonment conditions he feared and has lost a meaningful opportunity to present his CAT claim. Against this backdrop, the government owes a duty to provide thorough reports to this Court about his detention condition. However, the government has never fulfilled its obligation. The government has not filed a single report providing the current condition of Petitioner's imprisonment.

In addition, this Court ordered the government to provide reports "whenever the events warrant an update . . . ." *See* 9/19 Order. Rather than following the order to secure information on Petitioner's criminal proceedings and imprisonment conditions along with a detailed plan to potentially secure his return to the United States immediately upon resolution of his criminal cases, the government has imposed its duty on Petitioner. *See* 11/7 Status Report. To be clear, pursuant to the Court's invitation, Petitioner has offered additional relevant information to the Court. *See* Petitioner's Response to Respondent's September 26, 2019 Submission and Brief on the Issue of Contempt ("Pet's Brief"); Pet's 11/19 Status Report.

[2] Administrative Record.

However, this Court's order is directed to the government to report "whenever the events warrant an update." *See* 9/19 Order. Despite this order, the government wishes to be excused from reporting imprisonment conditions of Mr. Guerra-Castaneda and his criminal proceedings. The government's position is unacceptable. The government violated this Court's orders. It is the government that has the corresponding obligation to provide meaningful and thorough updates to this Court. This lack of thoroughness and seriousness to cure its violation of this Court's order further supports the appropriateness of a contempt finding.

B. More Information Is Required To Determine The Degree of The Government's Negligence.

The government avers that a contempt finding is unwarranted because the unlawful deportation of Petitioner was "the inadvertent result of the combination of several oversights or errors; that it occurred despite substantial efforts taken by [the government's] attorneys and ICE personnel to ensure compliance with the stay order, and that [its] attorneys and ICE personnel have committed to substantial remedial steps to address the deficiencies that led to the violation in this case." Govt's Brief at 13. At the outset, whether the government's violation was willful or intentional is irrelevant to the finding of contempt. *See NLRB*, 376 F.2d at 134 n.2 ("This being a civil contempt, actual intent is immaterial."). Moreover, the degree of the government's negligence—specifically whether it was gross negligence or merely inadvertent—is still not clear from the government's brief, mainly because

the government failed to provide further information Petitioner demanded in his brief on the issue of contempt.

The government questions the credibility of Petitioner's conversation between him and an ICE officer because "that information is too vague to shed significant additional light on how and why Petitioner was removed." Govt's Brief at 21. In an effort to avoid contempt, the government further suggests the possibility of mischaracterization of the event, and argues that this conversation is hearsay. Govt's Brief at 21-22. The government has provided no evidence contradicting his conversation, and has apparently made no effort to do so. Presumably, it would not be difficult for the government to ascertain which ICE agents had access to Petitioner prior to his deportation. The fact that Petitioner would engage an ICE officer upon learning of his deportation in violation of a court order should also not be surprising.

It is not Petitioner's burden to show why contempt would be impermissible or to collect additional evidence confirming this conversation which is sworn under oath by Petitioner's counsel, especially given the difficulty in doing so in light of Petitioner's imprisonment in El Salvador that is the result of the government's violation. Here, the Court issued an order to show cause why Respondent should not be held in contempt *sua sponte*. Order to Show Cause, No. 19-1736 (1st Cir. Sep. 14, 2019). It is the government's burden to argue that contempt should not be found.

In addition, with respect to the government's proposed plan to prevent future unlawful removals in violation of this Court's stay orders, the government still has not submitted an affidavit from the Boston ICE Office on the question of who has control over removal of noncitizens. Instead, counsel for the government states on behalf of that office that "it will remind all officers of the importance of timely updating EARM . . . ." *See* Government's Response to the Court's Order, No. 19-1736 (1st Cir. Sept. 26, 2019) at 8. However, the new declaration from Supervisory Detention and Deportation Officer Robert G. Hagan submitted to the Court as part of the government's brief is contradictory to the previously submitted declaration on the question of who has control over removal of noncitizens. *See* Declaration of Supervisory Detention and Deportation Officer Robert G. Hagan, No. 19-1736 (1st Cir. Nov. 1, 2019) ("11/1 Hagan Decl."). According to Officer Hagan's Declaration submitted to the Court on September 26, 2019, the Boston Field Office was in charge of "having a detained alien manifested for a chartered removal flight through ICE Air Operations (IAO)." *See* Declaration of Supervisory Detention and Deportation Officer Robert G. Hagan, No. 19-1736 (1st Cir. Sept. 26, 2019) ("9/26 Hagan Decl.") at ¶4-5. Therefore, it was the ICE Boston Office's responsibility to manifest removal of Mr. Guerra-Castaneda from the United States pursuant to 9/26 Hagan Declaration. The ICE Boston Office, on September 3, 2019, notified the officers at the Boston ICE Air Operations unit that "a temporary stay of removal had been granted and that

the Petitioner should not be removed from the United States." *See* Declaration of Assistant Field Office Director Immaculata Guarna-Armstrong, No. 19-1736 (1st Cir. Sept. 16, 2019) at ¶17. Despite this notification and the ICE Boston Office's apparent control over Petitioner, IAO accepted ASF's request for Petitioner's deportation. *See* Declaration of Officer Glen W. Noblitt, No. 19-1736 (1st Cir. Sept. 26, 2019) at ¶8. Therefore, given that the ICE Boston Office was apparently in control of this process according to Officer Hagan, Petitioner in his brief on contempt questioned why ASF was involved in manifesting his removal. Pet's Brief at 20.

Contrary to Officer Hagan's statement that the ICE Boston Office bears the control of manifesting removal on September 26, Officer Hagan now states in a new declaration that:

> . . . the fact that the request to IAO to have this alien added to a removal flight manifest was made by ASF rather than the field office did not make his case unusual: such requests may be made, and routinely are made, by personnel at staging facilities such as ASF.

See 11/1 Hagan Decl. at ¶4-b. In other words, ASF—not the ICE Boston Office—effectively had control over Petitioner's removal, as it was ASF that facilitated and dictated his removal. This contradiction only highlights the need for a finding of contempt here—namely, to ensure that the government takes actual responsibility for its actions, rather than using its bureaucracy as a defense to serious mistakes that

endanger the rights of immigrants and may deprive the federal courts of jurisdiction. These contradictory statements also underscore the importance of not transferring noncitizens to Louisiana when their stay motions are pending before this Court. Officer Hagan's two contradictory declarations suggest the possible confusion of who bears responsibility in manifesting removal of noncitizens at ASF, notably given that the IAO does not check EARM about the stay of removal information. In light of this new information, it seems clear that "Petitioner's transfer to Louisiana involving various ICE components has led to a diffusion of responsibility that ultimately led to his mistaken removal." Pet's Brief at 29. The government's position that transferring noncitizens to Louisiana, despite the existence of temporary stay order, is not problematic demonstrates that what the government proposes to prevent any future unlawful removals does little more than remind government officers of information that they already should know.

II. THIS COURT MUST HOLD THE GOVERNMENT IN CONTEMPT AND IMPOSE AGAINST THE GOVERNMENT A $1,000 PER DAY COERCIVE FINE UNTIL PETITIONER IS BROUGHT BACK TO THE UNITED STATES.

A. This Court's Stay Order Was Clear And Unequivocal – Do Not Deport.

The government audaciously suggests that it cannot be held in contempt even if it does not return Petitioner to the United States because there is no specific order from this Court directing the government to return him. According to the

government, the only relevant order is the stay order issued by this Court on September 11 and that order "does not carry with it, however, an order that [the government] must return an improperly-removed alien to the United States if the alien is removed in violation of the stay." Govt's Brief at 25. Further, the government notes that this Court's subsequent orders following its stay order did not require it to return Mr. Guerra-Castaneda to the United States. To support its argument, the government relies on *Project B.A.S.I.C.*, 947 F.2d at 16 to suggest that this Court's 9/11 stay order did not provide "fair notice that [the government] was compelled, on penalty of contempt, to follow a particular course of conduct." Govt's Brief at 24-5.

The government's position is bold and incorrect. Indeed, "[d]ue process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." *Cooke v. United States*, 267 U.S. 517, 537 (1925). "[I]n cases of misbehavior of which [the Court] can[]not have such personal knowledge, and is informed thereof only by confession of the party . . . the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished." *Id*. at 535. Further, "[c]ivil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous." *Project B.A.S.I.C.*, 947 F.2d at 16 (collecting

cases). This Court "can only compel action from those who have adequate notice that they are within the order's ambit." *Id*. at 17.

Here, this Court issued two stay orders, and their directions were clear and unambiguous – do not deport. *See* 9/11 Stay Order and 8/30 Temporary Stay Order. Nonetheless, the government deported Mr. Guerra-Castaneda. The government acknowledges its violation and has had multiple opportunities to explain the nature of the violation, thereby making contempt appropriate. For example, on September 16, 2019, the government submitted its response to the Court's September 14 "show cause" order. Having reviewed the response, the Court held that "[t]he court's show-cause order is continued." *See* 9/19 Order. Despite acknowledging these fair notices, the government stunningly avers that no particular language of returning Petitioner was included in the Court's stay order and, thus, it has not received fair notice with respect to its obligation to return him to the United States.

The obvious flaw in the government's argument is its underlying assumption that—unless this Court presciently anticipates a violation of an order by the government and clearly spells out in advance the consequences that may occur in the event of violation—the government simply has no obligation to cure any violation. Such a theory, if adopted, would have especially dangerous ramifications in the context of removal proceedings when the government deports a noncitizen in violation of a court order. Under this theory, the government apparently can deport

any noncitizen in violation of an Article III court's stay of removal order without any obligation to cure unless the order contains specific language specifying what the government would be required to do upon its violation of the order.

The Supreme Court in *Nken v. Holder* noted that "if a court takes the time it needs [to decide a case on appeal], the court's decision may in some cases come too late for the party seeking review [because 'no court can make time stand still']." 556 U.S. 418, 421 (2009). "A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it." *Id*. For a proper review of Petitioner's claims, this Court stayed his removal proceedings "by returning to the status quo – the state of affairs before the removal order was entered." *Id*. at 429. However, because of the government's violation of this Court's stay order, the Court's reviewable authority has been severely (and perhaps fatally) undermined. If this Court were to accept the government's position, no Article III courts would have authority to hold the government in contempt even if it violates stay orders or any orders because the nature of such orders is merely temporarily suspending the source of authority to act—here, deportation.

In addition, even if the Court's stay orders did not include specific language requiring the government to return Petitioner to the United States upon unlawful deportation in violation of this Court's order, this Court subsequently ordered the government to "provide a detailed explanation of its efforts to locate petitioner and

to secure his prompt return to the United States, as well as the means and resources at respondent's disposal to do so." *See* 9/19 Order. Critically, the Court has continued the show-cause order. *Id*. Thus, the government's argument that it does not have obligation to cure its violation meritless.

B. The Government's Impossibility Defense Fails Because It Was Not Impossible to Comply With the Court's Stay Orders.

The government's impossibility defense is without merit. The government argues that it cannot be held in contempt because it is impossible to return Mr. Guerra-Castaneda to the United States. Govt's Brief at 25-26. Indeed, noncompliance may not support contempt findings insofar as compliance is objectively impossible. *See Star Fin. Servs. v. Aastar Mortg. Corp.*, 89 F.3d 5, 13 (1st Cir. 1996). Yet the government's impossibility doctrine does not apply here for two reasons.

First, there is no dispute that it *was* possible for the government to comply with the August 30/September 11 stay orders by not deporting Petitioner. The impossibility defense can only be successful if the government did make *all reasonable efforts* to comply with the order. *Eck v. Dodge Chem. Co. (In re Power Recovery Sys.)*, 950 F.2d 798, 803 (1st Cir. 1991) (following *United States v. Hayes*, 722 F.2d 723, 725 (11th Cir. 1984)). This burden is beyond 'substantial,' 'diligent,' or in 'good faith.' *See id*. The government is "required to exhaust 'all reasonable efforts.'" *Id*. Here, there is no question that the government could have complied

with the stay orders with all reasonable efforts. Nonetheless, the government deported Petitioner anyway. Petitioner is not seeking an independent contempt finding for the government's failure to cure its original violation. Rather, the contempt finding is predicated on the government's violation occurring on September 13, 2019 and its prejudicial effect on Petitioner's rights.

Second, and more generally, the impossibility of any ability to cure a violation of a court order does not constitute a defense to the underlying violation. The case cited by the government does not stand for the proposition that the impossibility of curing a violation mitigates the finding of contempt. *See Star Fin. Servs.*, 89 F.3d at 13. Indeed, contempt can be issued even if the violation was inadvertent and even if the violation cannot be cured. In fact, contempt may be more appropriate here where the violation cannot be cured, as this renders the violation even more consequential.

Furthermore, the government's deficient efforts in taking appropriate actions within its power to cure of its violations underscore the appropriateness of contempt finding. Perhaps the strongest example is the government's current position that it does not believe that it has a legal obligation to return Petitioner notwithstanding this Court's August 30 and September 11, 2019 orders staying deportation. According to the Court, the government is required to "provide a detailed explanation of its efforts to locate petitioner and to secure his prompt return to the United States, as

well as the means and resources at [the government's] disposal to do so." 9/19 Order. Moreover, the Court directed that "[s]tatus reports shall be filed whenever the events warrant an update, but [the government] must file a status report at least every ten (10) days . . . ." *Id*. Despite these specific requirements, the government has failed to provide any information about Petitioner's imprisonment condition or any proposed plan to promptly return Petitioner to the United States upon his release from criminal custody. Critically, the government has abandoned its plan to obtain information about his criminal proceedings due to sensitivity. *See* 11/7 Status Report.

The government argues that obtaining information on Petitioner's criminal proceedings and current imprisonment condition is not in the best interest of the United States "due in part to foreign policy sensitivities and sovereign criminal justice interests . . . ." *Id.* at 2. This is a conscious choice on the part of the government that flouts this Court's orders. As mentioned above, the government already reached out to the Salvadoran government on or before September 20. *See* Lynch Decl. On October 7, the government submitted a status report, containing information related to Petitioner's custody situation because of the homicide charge. *See* 10/7 Status Report. However, after this 10/7 status report, the government stopped further reporting any development in his criminal proceedings to the Court, nor has the government ever provided any information about his imprisonment

condition. It is counter-intuitive that the government cannot take such minimal efforts, particularly when it has negotiated with foreign governments to deport noncitizens based on diplomatic assurances that they would not be tortured. *See, e.g., Khouzam v. AG of the United States*, 549 F.3d 235 (3d Cir. 2008). Thus, a contempt finding is further warranted.

C. The Government Has Waived Its Sovereign Immunity As To Coercive Contempt Fines Because Section 702 Applies Even If The Civil Suit Was Not Filed under the APA.

The government's argument that sovereign immunity is not waived under the Immigration and Nationality Act, particularly under 8 U.S.C. § 1252, is unavailing. The government argues that no language in Section 1252 waives its "sovereign immunity to an imposition of a fine under the circumstances here." Govt's Brief at 26. For this position, the government cites this Court's holding in *United States v. Horn*, 29 F.3d 754, 762 (1st Cir. 1994). The government's argument fails because *Horn* is a *criminal* case. In *Horn*, this Court had no occasion to address 5 U.S.C. § 702 waiver argument, as this provision applies only to non-damage *civil* suits against the government, not to criminal prosecutions like *Horn*. A removal proceeding like this case, however, is civil in nature. *Fong Yue Ting*, 149 U.S. at 730; *see also Arizona v. United States*, 567 U.S. 387, 396 (2012) ("Removal is a civil, not criminal, matter."); *Emile v. INS*, 244 F.3d 183, 189 (1st Cir. 2001) ("Since deportation is civil, the Confrontation Clause does not apply."). Because the request for relief in

this case — namely, prevention of removal — is civil in nature, his claim falls squarely under Section 702's waiver of immunity.

Indeed, a waiver of sovereign immunity "must be 'unequivocally expressed' [to be effective]." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). However, the waiver of sovereign immunity found in the Administrative Procedure Act (APA), 5 U.S.C. § 702, applies to any civil suits that seek relief other than money damages. Several courts have held that this waiver applies in suits against unlawful agency action even if the suit is not brought under the APA. *See, e.g.*, *Michigan v. U.S. Army Corps of Engineers*¸ 667 F.3d 765, 774-75 (7th Cir. 2011) ("The waiver applies when any federal statute authorizes review of agency action, as well as in cases involving constitutional challenges and other claims arising under federal law."); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not."); *Muniz-Muniz v. United States Border Patrol*, 741 F.3d 668, 672 (6th Cir. 2013) ("§ 702's waiver of sovereign immunity extends to all non-monetary claims against federal agencies and their officers sued in their official capacity . . . ."); *see also Presbyterian Church v. U.S.*, 870 F.2d 518, 524-25 (9th Cir. 1989) (waiver found in a challenge to INS investigation brought directly under the Constitution).

Here, because 8 U.S.C. § 1252 provides this Court with statutory jurisdiction over judicial review of the agency's denial of Petitioner's immigration relief

claims—which is civil—this Court has jurisdiction over the issue of contempt for the purposes of 5 U.S.C. § 702. No new process is required to subject the party to contempt charges. *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 454 (1932) (holding that when contempt proceedings are applicable to the party already subject to "the jurisdiction of the court for the purposes of all proceedings"). Coercive contempt fines are not money damages. Pet's Brief at 35-38. Thus, the government's argument that the statutes do not contain any language that definitely waives sovereign immunity fails.

To avoid the waiver of sovereign immunity argument, the government subsequently relies on the distinction between "stay order" and "injunctive relief" provided by the *Nken* Court to argue that a violation of this Court's stay order is not covered by the waiver of sovereign immunity under Section 702. *See* Govt's Brief at 28-29. This counter-argument is unavailing. The government's argument focuses on the nature of the stay order rather than judicial review under Section 1252. But it cannot be disputed that judicial review of immigration petitions provided by Congress through Section 1252 is statutorily available. *See* 8 U.S.C. § 1252; *Ardestani v. INS*, 502 U.S. 129, 133-134 (1991). The government unequivocally waived its sovereign immunity act to be sued for the purpose of judicial review of the agency's judgment through Section 1252. Thus, the fact that a stay is different from an injunction does not change the applicability of a waiver of sovereign

immunity provided by Section 702 to the extent that this Court can impose coercive fines on Respondent as part of civil contempt. *See Michigan*, 667 F.3d at 774-75.

With respect to this Court's authority to find individual officers in contempt, the Court has the power to punish contemptuous acts committed beyond the Court's territorial jurisdiction or charge a person who was not a party to the original action. *See, e.g., Binkley v. United States*, 282 F. 244 (C.C.A. 8th Cir. 1922) (found beyond territorial jurisdiction to entertain contempt claims); *Tilghman v. Tilghman*, 57 F. Supp. 417, 418 (D.D.C. 1944); *Chicago Truck Drivers v. Bhd. Labor Leasing*, 207 F.3d 500, 507 (8th Cir. 2000) ("It is well-settled that a court's contempt power extends to non-parties who have notice of the court's order and the responsibility to comply with it."); *ClearOne Communs., Inc. v. Bowers*, 651 F.3d 1200, 1215-16 (10th Cir. 2011). Thus, under Section 702's waiver of sovereign immunity is applicable to other officers involved in Petitioner's unlawful deportation.

III. THE AWARD OF ATTORNEYS' FEES IS AN APPROPRIATE REMEDY FOR CONTEMPT IN THIS CASE.

The award of attorneys' fees is a perfectly appropriate remedy for contempt in this case. The government argues that an award of attorneys' fees is governed by EAJA, 28 U.S.C. § 2412 and Petitioner is not a prevailing party. But EAJA is not the only authority that exists to grant an award of attorney's fees. It cannot be reasonably disputed that courts have broad equitable authority to grant an array of sanctions necessary to effectuate and ensure compliance with its orders, including

the imposition of attorney's fees. As the Supreme Court has explained:

> Courts traditionally have broad authority through means other than contempt – such as . . . *assessing costs* . . . – to penalize a party's failure to comply with the rules of conduct governing the litigation process. *See, e. g.*, Fed. Rules Civ. Proc. 11, 37. Such judicial sanctions never have been considered criminal, and the imposition of civil, coercive fines to police the litigation process appears consistent with this authority.

Int'l Union v. Bagwell, 512 U.S. 821, 833 (1994) (emphasis added). Consistent with this broad authority, courts around the country have not hesitated to impose an award of attorneys' fees in the event of a violation of a court rule or order where a party prevails in enforcing the violation, even where the violation was not willful. *See, e.g.*, *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 958 (9th Cir. 2014) (holding that "the Plaintiffs are entitled to recover attorney's fees and costs incurred in bringing and prosecuting these contempt proceedings"); *Perry v. O'Donnell*, 759 F.2d 702, 705 (9th Cir. 1985) ("An inflexible rule requiring the denial of [attorneys'] fees when civil contempt is not 'willful' would prevent the party proving the contempt from being fully compensated in many cases."); *Webb v. Ada Cty.*, 285 F.3d 829, 834-35 (9th Cir. 2002) (affirming award of attorneys' fees as a remedy for contempt in jail conditions case); *see also Fish v. Kobach*, 294 F. Supp. 3d 1154, 1169 (D. Kan. 2018) (holding that actual losses sustained included reasonable attorneys' fees in contempt); *Dystar Corp.*, No. 96-11720-PBS, 1997 U.S. Dist. LEXIS 22330, at *27-29 (D. Mass. June 23, 1997) ("The issue of whether

the contemnor's conduct must have been willful in order for the complainant to recover attorney's fees is one of first impression in the First Circuit. With the exception of the Second Circuit, the majority of circuits reaching this issue do not require a finding of willfulness.").

CONCLUSION

For the foregoing reasons, this Court should hold Respondent and his officers to be held in contempt.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Supplemental Reply Brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(ii) [no more than 6,500 words] and the typeface requirement of Fed. R. App. P. 32(a)(5)(A) [proportionally spaced face 14-point or larger]. The Brief, containing 6,500 words, exclusive of those items that, under Fed. R. App. P. 32(f) and Local Rule 34.0, are excluded from the word count, was prepared in proportionally spaced Times New Roman 14-point type.

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CERTIFICATE OF SERVICE

I certify that this brief and addendum is served to all counsel of record registered in ECF on November 19, 2019 including the opposing counsel, Trial Attorney **Giovanni B. Di Maggio** and **Bryan S. Beier** at the Office of Immigration Litigation, Civil Division, United States Department of Justice, P.O. Box 878, Ben Franklin Station, Washington, DC 20044.

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