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 RESPONSE TO RESPONDENT'S SEPTEMBER 26, 2019 SUBMISSION AND BRIEF ON THE ISSUE OF CONTEMPT

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

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CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case. With respect to counsel American Civil Liberties Union ("ACLU") of New Hampshire, the ACLU of New Hampshire does not have a parent corporation. No publicly held corporation owns 10% or more of any stake or stock in the ACLU of New Hampshire.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over questions of law and constitutional issues. *See* 8 U.S.C. § 1252(a)(2)(D). This Court has the authority to enforce its orders through contempt. *Ex parte Robinson*, 86 U.S. 505, 510 (1874). Further, in its September 19, 2019 order, this Court invited Petitioner to respond to the government's September 26, 2019 submission.

STATEMENT OF THE ISSUE

Should this Court hold the government in civil contempt and impose a $1,000 daily fine (i) where the government violated this Court's August 30, 2019 and September 11, 2019 orders staying Petitioner's removal from the United States by deporting Petitioner to El Salvador on September 13, 2019, (ii) where the government has not returned Petitioner to the United States to cure this violation, and (iii) where this improper removal has effectively eliminated Petitioner's ability to seek meaningful relief from this Court by causing the very harm that Petitioner sought to avoid in this appeal—namely, deportation to a country where he would be jailed and tortured?

STATEMENT OF THE CASE

A. Petition for Review Before the First Circuit.

On July 23, 2019, Petitioner Jose Daniel Guerra-Castaneda (hereinafter "Mr. Guerra-Castaneda" or "Petitioner") timely filed this petition for review after the Board of Immigration Appeals ("BIA") affirmed the Immigration Judge's decision to deny relief from removal, including the relief of asylum, withholding of removal, and deferral of removal under the Convention Against Torture. *See* Petition for Review, No. 19-1736 (1st Cir. July 23, 2019).

One of Petitioner's claims is that he would be detained in El Salvador in the Salvadoran government's custody under severe conditions—including not being provided medical care—that would amount to torture. Administrative Record ("AR") at 23-27. The U.S. government has been aware that the Salvadoran government was going to detain him upon his removal from the United States to El Salvador, at a minimum, since December 2, 2018. AR at 143. Now, because of the government's unlawful deportation in contravention of this Court's August 30, 2019 and September 11, 2019 orders, he is in the Salvadoran government's custody from which he sought protection from this Court. It is not clear whether Mr. Guerra-Castaneda will be returned to the United States even if he is successful in his appeal.

B. Court's Stay Orders and Communication Between Agencies.

On August 19, 2019, the Office of Immigration Litigation ("OIL") filed its

notice of intent to remove Petitioner to El Salvador. *See* Notice of Intent to Remove, No. 19-1736 (1st Cir. Aug. 19, 2019). On August 28, 2019, a deportation officer at Immigration and Customs Enforcement – Enforcement and Removal Operations Boston Field Office (hereinafter "ICE Boston") notified the Office of Immigration Litigation (hereinafter "OIL") via email that Mr. Guerra-Castaneda "was scheduled for removal to El Salvador on September 6, 2019 and that he would be transferred to Oakdale, Louisiana on September 3, 2019 in order to stage him for removal." *See* Declaration of Assistant Field Office Director Immaculata Guarna-Armstrong, No. 19-1736 (1st Cir. Sept. 16, 2019) at ¶ 13 (hereinafter "Guarna-Armstrong Decl.").

On August 29, 2019, Mr. Guerra-Castaneda filed his emergency motion to stay removal proceedings with this Court. *See* Petitioner's Stay Motion, No. 19-1736 (1st Cir. Aug. 29, 2019). On August 30, 2019, this Court granted a temporary stay of removal until September 13, 2019 to give the Court an opportunity to more fully review Petitioner's emergency motion. *See* Temporary Stay Order, No. 19-1736 (1st Cir. Aug. 30, 2019).

Four days later, on September 3, 2019, at approximately 11:35 AM, ICE Boston "received an email from OIL notifying that the First Circuit had issued a temporary stay of removal until September 13, 2019." *See* Guarna-Armstrong Decl. at ¶ 14. On the same date, ICE Boston "entered a comment into the [Enforce Alien Removal Module ("EARM")] system" (i) noting that a temporary stay order was in

effect until September 13, 2019 and (ii) noting not to remove Petitioner "until and unless OIL notified [ICE] that the First Circuit had lifted the stay of removal." *See* Guarna-Armstrong Decl. at ¶ 15.

C. Petitioner's Transfer to Louisiana Despite the August 30, 2019 Temporary Stay Order.

On the morning of the same date, September 3, ICE Boston transferred Mr. Guerra-Castaneda to Oakdale, Louisiana from the Strafford County Department of Corrections in Dover, New Hampshire. *See* Guarna-Armstrong Decl. at ¶ 16; *see also* Exhibit 1 (I-213 – ICE Air Ops Sept. 3, 2019). In Louisiana, Petitioner was housed at "Natchitoches Parish Jail, staging for his removal flight that was scheduled for Friday, September 6, 2019." *See* First Declaration of Supervisory Detention and Deportation Officer Robert G. Hagan, No. 19-1736 (1st Cir. Sept. 16, 2019) at ¶ 4 (hereinafter "First Hagan Decl."); *see also* Declaration of Deportation Officer Glen W. Noblitt, No. 19-1736 (1st Cir. Sept. 26, 2019) at ¶ 3 (hereinafter "Noblitt Decl.").

D. The Agency's Internal Communication Concerning the August 30, 2019 Temporary Stay Order.

On September 3, 2019, ICE Boston notified the officers at the Boston ICE Air Operations unit "advising that a temporary stay of removal had been granted and that the Petitioner should not be removed from the United States." *See* Guarna-Armstrong Decl. at ¶ 17. ICE Louisiana also received an email from the ICE Boston that "Guerra-Castaneda be removed from the manifest of the flight that was to occur on Friday, September 6, 2019." *See* First Hagan Decl. at ¶ 5.

On September 4, 2019, ICE Boston contacted multiple officers in ICE Louisiana about this temporary stay of removal and asked that Mr. Guerra-Castaneda "be taken off the manifest for his scheduled September 6, 2019 removal flight and that he be returned to a detention facility within [the ICE Boston's] jurisdiction the following week." *See* Guarna-Armstrong Decl. at ¶ 18. On the same date, Supervisory Detention and Deportation Officer Robert Hagan from the Alexandria Staging Facility ("ASF") of ICE Louisiana sent an email to eleven deportation officers, including Officer Glen W. Noblitt, requesting that Mr. Guerra-Castaneda be pulled from any removal flight and returned to Boston. *See* Guarna-Armstrong Decl. at ¶ 19; First Hagan Decl. at ¶ 5; Noblitt Decl. at ¶ 4. However, Officer Hagan apparently did not enter this information in EARM.

Subsequently, ICE Louisiana pulled Mr. Guerra-Castaneda off the September 6 deportation flight. *See* Noblitt Decl. at ¶ 5. On the afternoon of September 6, Officer Noblitt "saw that an ICE Form I-203, Order to Detain or Release, and an ICE Form I-216, Record of Person and Property Transfer, bearing Guerra-Castaneda's name and Alien Registration Number had been left in the mailbox for outgoing removal flights to El Salvador." *See id*. at ¶ 6. Officer Noblitt checked "Guerra-Castaneda's Alien number listed on the forms and determined that he was a detainee at the [Natchitoches Parish Detention Center (NPDC)]." *See id*. at ¶ 6.

However, Officer Noblitt—despite the email he personally received two days

earlier on September 4 indicating that Petitioner was not to be removed but instead returned to Boston—did not recognize that Mr. Guerra-Castaneda was supposed to be taken off of any removal flight "[d]ue to the high number of detainees who transit in and out of the ASF on a daily basis." *See* Noblitt Decl. at ¶ 7. According to Officer Noblitt, the field indicating a stay of removal in EARM "had not been activated." *See id* at ¶ 7. Further, "[w]hile there was information regarding a potential stay in the Comments section of EARM, [Officer Noblitt] did not click that tab to read the comments and erroneously assumed that [he] had missed placing Guerra-Castaneda on the next available flight to El Salvador that was departing on September 13, 2019." *See id*. at ¶ 7.

While none of the submitted affidavits indicate whether it is customary for each ICE office to enter text in the field indicating a stay of removal in the EARM system or just enter such information into the Comment section, it appears that at least ICE Boston enters the stay information in the Comment section. *See* Guarna-Armstrong Decl. at ¶¶ 15, 22.

E. Unlawful Deportation of Petitioner on September 13, 2019.

Under the mistaken belief that "Guerra-Castaneda had no stay or other impediment to removal, [Officer Noblitt] requested that [the ICE Air Operations in Arizona] add Guerra-Castaneda to the next flight to El Salvador." *See* Noblitt Decl. at ¶ 8. However, Officer Noblitt's affidavit does not indicate when and how he

submitted his request to the ICE Air Operations (though it appears to have occurred on September 6, 2019). Moreover, the ICE Air Operations apparently accepted this request despite ICE Boston's notification of a temporary stay of removal to the ICE Air Operations on September 3, 2019. *See* Guarna-Armstrong Decl. at ¶ 17. Notwithstanding Mr. Guerra-Castaneda's previous physical location in Louisiana, ICE Boston had "administrative control over" his case and is "responsible for having [him] manifested for a chartered removal flight through ICE Air Operations (IAO)." *See* Second Declaration of Supervisory Detention and Deportation Officer Robert G. Hagan, No. 19-1736 (1st Cir. Sept. 26, 2019) at ¶ 4 (hereinafter "Second Hagan Decl."). "The detainee is usually at ASF for approximately a week, if all flights go on schedule. ASF does not have control of each case in order to check each detainee to ensure that the removal can proceed because control remains with the [ICE Boston in this case]. It is dependent on [ICE Boston] retaining control of the case to review each case to confirm that there is no impediment to removal and notify ASF if there is an impediment to removal." *See* Second Hagan Decl. at ¶ 4.

On September 11, 2019, at 4:10 PM, the Court ordered Mr. Guerra-Castaneda's stay of removal during the pendency of his petition for review. *See* Stay Order, No. 19-1736 (1st Cir. Sept. 11, 2019). On September 12, 2019, at 4:54 PM—over 24 hours after this Court's stay of removal order—OIL sent an email to BOS-STAYS about the stay of removal order. *See* Guarna-Armstrong Decl. at ¶ 20. ICE

Boston received this email at 4:57 PM that day. *See id*. at ¶ 20. The government has provided no explanation for OIL's 24-hour delay in sending this email. *Moreover, aside from this email sent one full day later, the government's affidavits say little concerning ICE's efforts to actually comply with this Court's September 11, 2019 order before Petitioner's ultimate deportation*.

Also on September 12, 2019—the night before he was removed—Mr. Guerra-Castaneda called his counsel (Attorney Nina Froes) and said that "guards had informed him that he was scheduled to return to El Salvador in the morning. He was extremely concerned for his safety." *See* Exhibit 2 (Affidavit of Nina J. Froes) at ¶ 9. However, Attorney Froes assured Mr. Guerra-Castaneda that he could not be deported to El Salvador because of the stay order. *See id*. at ¶ 10.

However, on September 13, 2019, at approximately 8:00 AM, the government deported Mr. Guerra-Castaneda from the ASF on a charter removal flight to El Salvador. *See* Guarna-Armstrong Decl. at ¶ 21. On the same date at 9:53 AM—approximately 1 hour 53 minutes after his deportation—ICE Boston entered a comment into EARM about this Court's September 11, 2019 stay order. *See id*. at ¶ 22.

On the same date, at 8:15 AM, Attorney Froes called ICE Boston and spoke with the deportation officer assigned to Mr. Guerra-Castaneda's case. *See* Exhibit 2 at ¶ 11. The officer "emphatically stated that Mr. Guerra-Castaneda was not being

sent to El Salvador, rather he was on a flight destined for Boston." *See id*. On the same date, at or about 2:15 PM, Attorney Froes learned that Petitioner was deported to El Salvador because she received a phone call from Mr. Guerra-Castaneda's friend. *See id*. at ¶ 13. Attorney Froes then spoke with Mr. Guerra-Castaneda at 3:40 PM for about four minutes while he was in El Salvador, and he "told [her] that he told the official [in Louisiana] that his lawyer had confirmed that there was a stay but the official said that he didn't have that information and that he had emailed somebody and that if he didn't get an email back before a certain time that Mr. Guerra-Castaneda was going on the flight." *See id*. at ¶ 15.

F. The Court's September 14, 2019 Order to Show Cause.

On September 14, 2019, after learning of this unlawful deportation in contravention of this Court's stay orders, this Court issued an order to show cause requiring the government to explain how and why Mr. Guerra-Castaneda was removed and why Respondent should not be held in contempt. *See* First Order, No. 19-1736 (1st Cir. Sep. 14, 2019). The government filed its response on September 16, 2019. *See* Respondent's Response to the Court's September 14, 2019 Order, No. 19-1736 (1st Cir. Sept. 16, 2019) (hereinafter "First Response"). Mr. Guerra-Castaneda filed his reply to the government's response on September 17, 2019. *See* Petitioner's Reply to Respondent's Response, No. 19-1736 (1st Cir. Sept. 17, 2019). On September 18, 2019, the government filed a second notice to the Court,

explaining the current location of Mr. Guerra-Castaneda and its efforts to return Mr. Guerra-Castaneda to the United States. *See* Respondent's Second Notice, No. 19-1736 (1st Cir. Sept. 18, 2019).

G. The Court's September 19, 2019 Order.

This Court issued a new order on September 19, 2019, requiring the government to respond to the Court's inquiry on Mr. Guerra-Castaneda's current condition and its "efforts being made to ascertain information about petitioner's current condition and the means and resources at its disposal to do so." *See* Second Order, No. 19-1736 (1st Cir. Sept. 19, 2019). The Court further ordered that the Government do the following:

- "provide information regarding [P]etitioner's current condition" and "describe in detail the efforts being made to ascertain information about [P]etitioner's current condition and the means and resources at its disposal to do so";

- "provide a detailed explanation of its efforts to locate [P]etitioner and to secure his prompt return to the United States, as well as the means and resources at [R]espondent's disposal to do so";

- "provide affidavits from the transferring and manifesting officers" and "to provide more detail on the transfer and manifest processes"; and

- provide "the steps it will take to ensure that such removals do not happen in the future in contravention of this court's stay-of-removal orders."

H. The Government's September 26, 2019 Response and Apparent Inability to Cure its Violation.

On September 26, 2019, the government filed its response to the Court's September 19 order. *See* Respondent's Response to the Court's September 19, 2019 order, No. 19-1736 (1st Cir. Sept. 26, 2019) (hereinafter "Second Response"). In its response, the government fails to provide any concrete plan to return Petitioner to the United States and cure its violation of this Court's stay orders. This is concerning.

The Government has also not represented that it can transport Petitioner back to the United States if his appeal is successful—a reality that effectively renders meaningless this Court's ability to provide Petitioner the relief he seeks in this case. Indeed, the government has troublingly suggested that ICE, "while exhausting efforts to secure his prompt return to the United States, may lack the means and resources" to facilitate Mr. Guerra-Castaneda's return to the United States because "Guerra-Castaneda is in custody in El Salvador pending charges for Homicide." *See id*. at 6; *see also* Declaration of Deputy Assistant Director International Operations Division Jeffrey D. Lynch, No. 19-1736 (1st Cir. Sept. 26, 2019) at ¶ 12 (hereinafter "Lynch Decl.").

I. Petitioner's Current Status and Incarceration Conditions.

The current conditions of Mr. Guerra-Castaneda's incarceration in El

Salvador are not clear but appear to be very challenging. The only person who can have access to the facility where Mr. Guerra-Castaneda is detained is his criminal defense lawyer, Jackson A. Guzman Melendez. *See* Exhibit 2 at ¶ 18. Attorney Froes has spoken with Attorney Guzman Melendez three times. *See id*. At this Salvadoran facility, family visitation is not allowed, nor does the facility provide any food. *See id*. As a consequence, Mr. Guerra-Castaneda's mother "brings two meals a day to the jail [without seeing her son], but states that she cannot afford to do so and her family members are having to skip meals to provide for Mr. Guerra-Castaneda." *See id*. at ¶ 19. Her mother also "has been asked to bring items to the jail, such as t-shirts, for [Mr. Guerra-Castaneda] to give to other prisoners as a way to keep himself on good terms with his cellmates." *See id*. at ¶ 20. According to Attorney Guzman Meledez, "the conditions in detention are very difficult and very restricted." *See id*. at ¶ 23. There are currently "twelve other men detained in the same cell with Mr. Guerra-Castaneda." *See id*. Mr. Guerra-Castaneda has a hearing in San Salvador on October 8, 2019 and another hearing in Cojutepeque on October 16, 2019. *See id*. at ¶ 24. He contests the charge.

SUMMARY OF THE ARGUMENT

The contempt issue in this case is serious and concerns the very ability of this Court to grant relief. On September 13, 2019, ICE deported Petitioner to El Salvador—the very country to which he claims in this appeal he should not be sent because he will be jailed and tortured. In so doing, the government violated this Court's August 30, 2019 and September 11, 2019 orders staying Petitioner's removal from the United States.

The government's violation is especially problematic because this violation apparently cannot be cured. The government has failed to show any concrete plan to return Petitioner to the United States. To the contrary, the government concedes that ICE "may lack the means and resources" to facilitate Petitioner's return to the United States. Moreover, with the government's violation, the government has undermined this Court's ability to grant relief to Petitioner. The government has provided no assurance that, if Petitioner is successful in his appeal, he will be returned to the United States. This Court's August 30, 2019 and September 11, 2019 orders staying deportation were not merely procedural; rather, they were issued to ensure that this Court could exercise jurisdiction over Petitioner's claim and provide relief if appropriate. With the government's violation, the government has irreparably damaged this Court's authority in this case. The prejudice caused by the government's unlawful deportation is real. The government's unlawful deportation

has placed Petitioner in the very circumstance from which he sought protection from this Court.

This brief asks this Court to find Respondent in civil contempt, reprimand Respondent, and impose a $1,000 daily coercive fine on the government and/or its responsible agents until the government returns Petitioner to the United States. Because of the government's apparent inability to cure its violation and given how this violation has effectively prevented Petitioner from obtaining relief from this Court, a finding of contempt and the imposition of a fine are justified even if the government's actions were negligent and not in bad faith. The orders of this Court must mean something, especially when those orders exist to preserve a party's ability to seek and obtain relief from an Article III court. Without a finding of contempt, every detained noncitizen who has a pending petition for review could be physically removed by the government, without penalty, despite an order staying deportation.

Moreover, the government's proposed action to ensure that wrongful deportations will not occur again in the future is insufficient. As the accompanying declarations and exhibits show, ICE has been so aggressive in facilitating the deportation of noncitizens that it has previously violated court orders staying deportation. Petitioner has documented in this brief and accompanying exhibits three other examples of wrongful deportations, as well as additional examples of deportations that were halted at the last minute only because the immigrants were

fortunate enough to be represented by counsel who became aware of the improper deportation plan. Nothing in the government's affidavits has changed these aggressive policies that, in their hasty implementation, will likely lead to others being improperly deported in the future.

THE ARGUMENT

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

A. The Government Still Has Not Provided Any Concrete Plan to Return Petitioner to the United States.

The government's response states that it is diligently trying to explore possible options to return Mr. Guerra-Castaneda to the United States. Yet, it still has failed to explain how and when the government could return Petitioner to the United States. More critically, the government suggests that it "may lack the means and resources" to facilitate Mr. Guerra-Castaneda's return to the United States because "Guerra-Castaneda is in custody in El Salvador pending charges for Homicide." *See* Lynch Decl. at ¶ 12. This is unacceptable. The government has been aware that the Salvadoran government was going to detain Petitioner upon his removal, at a minimum, since December 2, 2018. AR at 143. If Mr. Guerra-Castaneda's prompt return is impossible, then this Court should find Respondent and/or its individual officers in civil contempt and impose sanctions. *See infra* II-III.

B. The Government's Explanation of How This Unlawful Removal Occurred is Still Ambiguous.

Based on the additional declarations the government provided on September 26, 2019, it appears that the officer who is directly responsible for the government's violation of this Court's stay order is Officer Noblitt at ASF. Officer Noblitt failed to review the EARM's Comment section on September 6, 2019 indicating the

August 30, 2019 stay order as to Petitioner. This failure occurred after Officer Noblitt received a direct email on September 4, 2019 indicating that Petitioner should not be deported, but rather should be returned to Boston. *See* Noblitt Decl. at ¶¶ 4, 6-7.

According to Officer Noblitt, the field indicating a stay of removal in EARM "had not been activated." *See* Noblitt Decl. at ¶ 7. There is no explanation as to why this field had not been activated—an omission that requires further explanation. Further, "[w]hile there was information regarding a potential stay in the Comments section of EARM, [Officer Noblitt] did not click that tab to read the comments and erroneously assumed that [he] had missed placing Guerra-Castaneda on the next available flight to El Salvador that was departing on September 13, 2019." *See* Noblitt Decl. at ¶ 7. However, none of the submitted affidavits indicate whether it is customary for each ICE office to enter the field indicating a stay of removal in EARM or just enter such information in the Comment section. It appears that ICE Boston just enters the stay information into the Comment section. *See* Guarna-Armstrong Decl. at ¶¶ 15, 22. Whether such practice is customary would be germane to the inquiry of how and why this unlawful deportation occurred. If reliance on the Comments section is customary, then Officer Noblitt's failure to check the Comment section could have been severely negligent. However, if reliance on the "stay of removal" field in EARM is customary, then Petitioner's deportation could be the

result of a systemic failure at the Boston ICE office, which failed to trigger this field.

Moreover, the government's affidavits say little concerning ICE's efforts to actually comply with this Court's stay of removal order issued at 4:10 PM on September 11, 2019. The only facts presented by the government concerning compliance with this specific order are: (i) an email issued on September 12, 2019, at 4:54 PM—*over 24 hours after this Court's order*—by OIL to BOS-STAYS about the stay of removal order, *see* Guarna-Armstrong Decl. at ¶ 20; and (ii) the entry by ICE Boston into EARM of this stay order on September 13, 2019 at 9:53 AM, approximately 1 hour 53 minutes *after* Petitioner's deportation. *See id.* at ¶ 22. *Thus, it appears that a whole 24 hours elapsed before ICE did anything to ensure compliance with this order*. The government has provided no explanation for this delay. Put another way, there is no evidence that ICE acted with any sense of urgency when this Court issued its September 11, 2019 order.

Furthermore—despite Officer Noblitt's mistaken belief and despite the email he received on September 4, 2019 concerning Petitioner—the ICE Air Operations was on notice of Mr. Guerra-Castaneda's temporary stay of removal, which this Court issued on August 30, 2019 and was in place until September 13, 2019. The ICE Air Operations in Mesa, Arizona "is the primary logistical location for I[CE] Air Operations." *See* Noblitt Decl. at ¶ 5. On September 3, 2019, ICE Boston

notified the officers at the Boston ICE Air Operations unit[1] "that a temporary stay of removal had been granted and that the Petitioner should not be removed from the United States." *See* Guarna-Armstrong Decl. at ¶ 17. The ICE office that controls who gets deported or not is the one that has administrative control over the noncitizen's case. *See* Second Hagan Decl. at ¶ 4. Here, it was ICE Boston, which was "responsible for having [him] manifested for a chartered removal flight through ICE Air Operations (IAO)." *See id*. Thus, it is still not clear why ICE Air Operations accepted ICE Louisiana's request for deportation of Mr. Guerra-Castaneda despite ICE Boston's previous notice of stay order to the ICE Air Operations. *Compare* Noblitt Decl. at ¶ 8, *with* Guarna-Armstrong Decl. at ¶ 17.

Lastly, the government has submitted no information shedding light on the last minute communication between Mr. Guerra-Castaneda and the unknown ICE officer at ASF, which occurred on approximately September 12, 2019. Attorney Froes spoke with Mr. Guerra-Castaneda for about four minutes after he was deported to El Salvador on September 13, 2019, and he "told [her] that he told the official [in Louisiana] that his lawyer had confirmed that there was a stay but the official said that he didn't have that information and that he had emailed somebody and that if he didn't get an email back before a certain time that Mr. Guerra-Castaneda was going

[1] It is not clear whether the ICE Air Operations unit at the ICE Boston office is the same as the ICE Air Operations based in Arizona.

on the flight." *See id*. at ¶ 11. Subsequently, the government deported him.

Thus, Petitioner respectfully asks this Court to require the government to provide further information as to the government's specific efforts to comply with the September 11, 2019 order. Further, Petitioner requests that this Court require the government to provide affidavits of Deportation Officers in the ICE Air Operations—including but not limited to the ICE Air Operations unit at the ICE Boston and the ICE Air Operations in Arizona, which were part of Petitioner's transfer or removal between September 3 and 13—and explain why and how Mr. Guerra-Castaneda was deported notwithstanding this Court's August 30, 2019 order. The government should also be required to explain its customary practice of how stay of deportation orders are entered and reviewed in the EARM system. This information will further clarify why Officer Noblitt did not click the Comments section of EARM. Lastly, the government must shed light on the last minute communication between Mr. Guerra-Castaneda and the unnamed ICE officer.

Should this Court find that further factual development through a hearing is necessary for the resolution of the issue of contempt, it could designate a special master to hold hearings and to recommend factual findings. *See* Fed. R. App. P. 48 (appointment of a special master).

C. The Government's Proposed Plan to Ensure that Wrongful and Illegal Deportations Do Not Occur is Insufficient.

To ensure that unlawful deportations will not occur again, the government submitted a proposal of action items in its September 26, 2019 Response. Despite these proposed actions, there is still a strong chance that unlawful deportations will occur in the future. This is for three reasons. *First*, the government's proposal does little more than remind government officers of information that they already should know. *Second*, this case embodies a complete lack of communication between various agencies within ICE that the proposal does little to address. In this case, everyone was already on notice of this Court's August 30, 2019 temporary stay of removal order through extensive communications between OIL, the ICE Boston and Louisiana offices, and the ICE Air Operations. Nonetheless, Petitioner was still deported. Also, nothing in the government's proposal addresses ICE Air Operations, which has not submitted an affidavit and was informed of the August 30, 2019 temporary stay of removal order but continued the deportation of Petitioner on September 13, 2019. Given this lack of communication, there is little confidence that updating and monitoring EARM will eliminate improper deportations in the future. *Third*, this proposal is unlikely to eliminate improper deportations because these deportations are likely more of a function of the federal government's hyper-aggressive deportation efforts. These efforts, given their scale and haste, will inevitably lead to human error. The government confirmed this scale, noting that

"[h]undreds of detainees are removed daily through the ASF. On average, approximately 600 detainees move in an out of ASF per day." *See* Second Hagan Decl. at ¶ 2. Officer Noblitt further explained that his error was "[d]ue to the high number of detainees who transit in and out of the ASF on a daily basis . . . ." *See* Noblitt Decl. at ¶ 7.

1. ICE Has Been Extremely Aggressive In Deporting Individuals In Contravention of Administrative or Court-Ordered Stays of Removal.

Officials acting under color of immigration authority all too often wrongfully deport individuals, including U.S. citizens, individuals whose deportations have been stayed by operation of law, and individuals granted an administrative or court-ordered stay of removal (as is the case here). *See, e.g., Guzman v. Chertoff et al.*, No. 08-cv-01327 GHK (C.D. Cal. Feb. 27, 2008) (U.S. citizen with mental disability who was detained and removed; ultimately settled); *Lyttle v. United States*, 867 F. Supp. 2d 1256 (M.D. Ga. 2012) (same); *Turnbull v. United States et al.*, No. 1:06-cv-858 SL, 2007 U.S. Dist. LEXIS 53054, *6-8 (N.D. Ohio, July 23, 2007) (lawful permanent resident wrongfully deported in violation of magistrate judge's stay order and forced to remain outside the country for thirty two days, after district court issued order directing his return; ultimately settled); *Rodriguez-Franco v. Reno et al.*, No. 3:00-cv-03546 MEJ (N.D. Cal. Sept. 26, 2000) (lawful permanent resident wrongfully deported to Mexico for three days in violation of Ninth Circuit stay

order; ultimately settled); *Araujo v. United States*, 301 F. Supp. 2d 1095 (N.D. Cal. 2004) (unlawful arrest and removal; ultimately settled); *Avalos-Palma v. United States*, No. 13-5481 (FLW), 2014 U.S. Dist. LEXIS 96499 (D.N.J. July 16, 2014) (noncitizen wrongfully deported to Guatemala for forty-two months in violation of regulation automatically staying deportation upon filing of a motion to reopen based on lack of notice; ultimately settled).

Similarly, with increasing frequency, Courts of Appeals have acted to redress the wrongful deportations of immigration petitioners seeking judicial review. *See, e.g., Ramirez-Chavez v. Holder*, No. 11-72297 (9th Cir. Order of April 10, 2012), ECF Dkt. No. 18 at pg. 2 ("Despite respondent's clear and unequivocal knowledge, no later than October 5, 2011, that a stay of removal was in effect in this docket, petitioner was removed on October 19, 2011" and directing the government to locate and return petitioner "using every contact and address at their disposal") (attached for the Court's convenience as Exhibit 3); *Rodriguez Sutuc v. Attorney General*, No. 15-2425 (3d Cir. Order of June 19, 2015) (after the government represented to the court that immigration officials had no plans to remove a noncitizen mother and twelve-year old daughter, the government subsequently deported them to Guatemala; the court issued an order stating, in part, that "[t]he Court would have granted Petitioners a stay of removal, but was informed that Petitioners were removed earlier today. The government is hereby ordered to use its best efforts to

intercept Petitioners when they land tonight in Guatemala City and to return Petitioners to the United States immediately.") (attached as Exhibit 4); *Gurbinder Singh v. U.S. Attorney General*, No. 15-10136 (11th Cir. Order of July 2, 2015) (after the government represented to the court that immigration officials had no travel plans for *pro se* petitioner's removal, the government nonetheless deported him subsequently to India; the Eleventh Circuit issued an order, *inter alia*, appointing counsel, ordering petitioner's immediate return, and directing the government to show cause why it should be issue sanctions"; ultimately the Eleventh Circuit granted the government's opposed motion to remand after the petitioner returned to the United States) (attached as Exhibit 5). This Court has also adopted Local Rule 18, which (i) requires the government to file a notice to the Court of the scheduled removal date and (ii) provides an automatic administrative stay order for ten business days upon a first motion for stay of removal. *See* Local Rule 18.

Despite numerous wrongful deportations and the Courts of Appeals' efforts to prevent such unlawful removal, improper deportations by ICE have still occurred. This brief and its accompanying exhibits document three other examples of wrongful deportations from various parts of the United States.[2]

Further, there are additional examples in this brief's exhibits of deportations

[2] Petitioner is submitting three affidavits as examples of recent wrongful deportation under Local Rule 11(c)(2).

that were halted at the last minute only because the immigrants were fortunate enough to be represented by counsel who became aware of the improper deportation plan. *See* Exhibit 6 (Affidavit of Attorneys). In October 2018, ICE Boston attempted to deport a Cape Verdean citizen whose motion to reopen was granted by the BIA. *See id*. at 2-4 ¶ 6. On October 5, 2018, ICE transferred the Cape Verdean person to Louisiana from Boston to deport him. *Id*. at ¶ 6-a. However, the BIA had previously granted his motion to reopen on October 3, 2018. *Id*. at ¶ 6-b. Counsel for the immigrant attempted to contact ICE Louisiana but failed to get any response. *Id*. Counsel also contacted ICE Boston about this unlawful deportation plan but failed to get any response. *Id*. at ¶ 6-c. Counsel finally contacted Senator Edward Markey's office and the Cape Verde embassy for their intervention. *Id*. at ¶ 6-c, d. Ultimately, on October 12, 2018, counsel received a message from ICE that their client would be transferred back to Boston on October 16, 2018. *Id*.

Early this year, ICE Boston also attempted to deport a Trinidadian citizen without informing the First Circuit under Local Rule 18 when this person's petition for review was pending before this Court. *See* Exhibit 6 at 4-5 ¶ 7. On February 20, 2019, counsel for this person were notified by their client's family member that ICE intended to remove him at 5:00 AM the next morning. *See id*. at ¶ 7-c. The government in that case did not file a notice of intent to remove him as required by Local Rule 18. *See id*. To stop this unlawful deportation attempt, counsel had to

file an emergency habeas corpus petition with the District Court for the District of Massachusetts. *See id*. Further, the person became very ill because of the stress caused by possible deportation and was transported to a local hospital. *See id*. ¶ 7-d. After discussing this issue with the government attorneys assigned to the habeas case and petition for review, the person was released from custody on February 22, 2019. *See id*. ¶¶ 7-e, f.

2. The Government Has Also Been Aggressive in Deporting Noncitizens from New Hampshire by Transferring Them to Louisiana.

The Strafford County Department of Corrections in Dover, New Hampshire is the only detention facility in Northern New England that houses immigration detainees on a long term basis. Notably, because of the availability of the Portsmouth International Airport at Pease in Newington, New Hampshire—which is located 14 miles from the detention facility—it "serves as a staging site for individuals who have been ordered removed from the United States." *See* ECF 7-1, Govt's Memorandum in Support for its Motion to Dismiss, *Hussein v. Strafford Cty. Dep't of Corr*. at 5 n.1 (D.N.H. Apr. 11, 2018). As a result, "[t]he United States District Court for the District of New Hampshire has seen an increase in the number of complaints filed by individuals seeking to forestall their removal because they are housed at the Strafford County Department of Corrections prior to their removal, thereby resulting in the filing of complaints in the United States District Court where

the petitioner is located prior to his/her removal." *Id*. The ACLU of New Hampshire has brought many of these cases.

Like Mr. Guerra-Castaneda's case, the government routinely transfers individuals subject to final orders of removal from New Hampshire to Louisiana for removal. *See, e.g., Hussein v. Strafford Cty. Dep't of Corr.*, No. 18-cv-273-JL, 2018 U.S. Dist. LEXIS 103901 (D.N.H. June 21, 2018) (a case challenging the removal and transfer to Louisiana); *Compere v. Nielsen*, 358 F. Supp. 3d 170, 176 (D.N.H. 2019) (same); *Veth v. Whitaker*, No. 18-cv-1139-SM, 2018 U.S. Dist. LEXIS 210846, at *3 (D.N.H. Dec. 14, 2018) (same); *Beaubrun v. US Attorney General et al*, ECF 4 (Order), No. 1:19-cv-835-JL (D.N.H. Aug. 12, 2019) (same) (attached as Exhibit 7).

While the government may have authority to transfer immigration detainees to Louisiana to facilitate their removal from the United States, there is a significant concern that human errors at ICE Louisiana's office will cause individuals to be unlawfully deported who have stay of removal motions or habeas corpus petitions pending, and that these errors will only be made more frequent by the government's zeal.[3] For example, in the case of Mr. Hussein, the government had to pull him off

[3] This case is not the first time that the government failed to comply with court orders. *E.g., Rocha v. Barr*, No. 19-cv-410-JL, 2019 U.S. Dist. LEXIS 101496, at *5 (D.N.H. June 18, 2019) (despite the 48 hour advance notice requirement for any transfer or removal, ICE improperly transferred Rocha from New Hampshire, "but

the deportation airplane in Louisiana at the last minute.[4] However, unlike Mr. Hussein, Mr. Guerra-Castaneda was unlawfully deported from Louisiana despite an Article III court's stay order. Given these concerns with the Louisiana ICE office—and since Mr. Hussein's case—counsel for Petitioner have asked the District Court for the New Hampshire in habeas cases to stop the transfer of immigrant detainees to Louisiana during the pendency of the habeas action, notably when they would face persecution or torture upon removal. *See, e.g.*, *Compere*, 358 F. Supp. 3d at 176; *Beaubrun*, No. 1:19-cv-835-JL (Exhibit 7).

Petitioner's counsel believe that there is no reason to transfer noncitizens to Louisiana when their stay motions or habeas petitions are pending before or granted by an IJ, the BIA, and any Article III court. The government may well argue that such transfer to Louisiana is unlawful and necessary to timely facilitate deportation upon the denial of such stay motions. However, it appears that Petitioner's transfer to Louisiana involving various ICE components has led to a diffusion of responsibility that ultimately led to his mistaken removal. As Petitioner was transferred to Louisiana with multiple ICE offices involved in various ways,

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returned him to New Hampshire the same day"); *Hernandez-Lara v. ICE*, ECF 20, No. 1:19-cv-394-LM (D.N.H. July 19, 2019) (ICE did not transport the petitioner to July 23, 2019 hearing, despite the order from the District Court).

[4] *See* Randy Billings, *Deferment of deportation order makes Portland man 'feel like a dead person who came back to life,'* Press Herald (Sept. 5, 2019), *available at* https://www.pressherald.com/2019/09/05/headline-2/.

responsibility for his improper removal appears to have disappeared into the ether. As ICE transfers more and more people to Louisiana as part of the executive branch's aggressive deportation efforts, this will only become more common. But preventing the unlawful deportation of noncitizens should outweigh the government's plans, especially where erroneous deportations have occurred from Louisiana and where such noncitizens would face persecution or torture upon removal. Here, despite this Court's temporary stay order on August 30, 2019, the government transferred Mr. Guerra-Castaneda to Louisiana on September 3, 2019, and never returned him to the Boston area despite an email directing ICE Louisiana officials to do so. *See* Guarna-Armstrong Decl. at ¶¶ 14. This transfer to Louisiana only facilitated ICE's subsequent improper deportation on September 13, 2019.

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 finding of contempt is both necessary and appropriate. At the outset, the government does not dispute that this Court has contempt power. This Court has the "inherent authority to initiate contempt proceedings for disobedience to [its] orders." *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 793 (1987). "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of judgments, orders, and writs of the courts, and consequently to the administration of

justice." *Ex parte Robinson*, 86 U.S. 505, 510 (1874); *see also International Union v. Bagwell*, 512 U.S. 821, 831 (1994) (contempt authority is "a power necessary to the exercise of all others") (quotations omitted). This contempt authority is necessary and essential to judicial power, since otherwise this Court's rulings would be merely advisory. *See Gompers v. Buck's Stove & Range Co*., 221 U.S. 418, 450 (1911) ("For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law.").

Rather than contesting this Court's contempt power, the government relies on the Second Circuit's decision *In re Att'y Gen. of U.S.*, 596 F.2d 58 (2nd Cir. 1979), for the proposition that a contempt finding is unwarranted in this case. *See* First Response at 12. It is true that this Court "must not lightly invoke its contempt power." *In re Att'y Gen.*, 596 F.2d at 65. However, this case presents a unique and troubling violation that is easily distinguishable from *In re Att'y Gen. of U.S* given the consequences that flow from the government's failure in this case. *In re Att'y Gen. of U.S.* involved a discovery request of an internal government report—not deportation to a place where torture or persecution can occur and where such deportation is both incurable and effectively prevents meaningful appellate relief. Here, because of the government's wrongful deportation, Mr. Guerra-Castaneda is currently detained in a Salvadoran prison prior to having an opportunity to challenge

the agency's removal determination before this Court. By violating this Court's stay orders and deporting him to the country from which he seeks protection, he has effectively lost his opportunity to present his claims before this Court. *See Choeum v. I.N.S.*, 129 F.3d 29, 38 (1st Cir. 1997) ("a meaningful opportunity to be heard" is "[a]t the core of these due process rights").

As to the appropriate sanction, this Court should hold Respondent in civil contempt and impose a civil contempt fine of $1,000 per day against the government until it returns Mr. Guerra-Castaneda to the United States. *E.g.*, *see Henderson v. Orr*, No. C-3-81-554, 1987 U.S. Dist. LEXIS 14507, at *4 (S.D. Ohio May 5, 1987) (citing the Secretary of the Air Force in contempt of court and ordering the Secretary to pay a fine of $500 a day from the date of the court's order until delivery of the agreed-upon checks); *Hinton v. Sullivan*, 737 F. Supp. 232, 241 (S.D.N.Y. 1990) (imposing a compensatory contempt fine of $1,000 on the Department of Health and Human Services to make up for consequential harm arising from the agency's failure to pay court-ordered benefits); *Cabrera v. Municipality of Bayamon*, 622 F.2d 4, 7 (1st Cir. 1980) (affirming $1,000 per day against mayor). This sanction is warranted for the same reasons why a contempt finding is necessary: because (i) the government is apparently unable to cure its violation, and (ii) this violation has undermined this Court's ability to provide relief.

Historically, the government has objected to such contempt fines by claiming

sovereign immunity. However, any claim of sovereign immunity fails for the two independent reasons explained below. *First*, through 5 U.S.C. § 702, the government has waived sovereign immunity. *Second*, even if sovereign immunity has not been waived, federal courts are constitutionally empowered with inherent authority to issue monetary contempt fines against federal government agencies.

A. The Government Has Waived Its Sovereign Immunity as to Coercive Contempt Fines.

Congress has expressly waived sovereign immunity for injunctive and all "relief other than money damages" imposed against the government by persons suffering wrongs because of agency action. This waiver is contained in Section 702 of the Administrative Procedures Act ("APA"). 5 U.S.C. § 702. This waiver applies to contempt fines like those sought here that are designed to coerce a government agency to comply with a court order, as these fines are not "monetary damages."

This waiver of sovereign immunity in Section 702 is phrased in sweeping terms: immunity is waived for all actions seeking "relief" against government agencies, with the single exclusion of claims seeking "money damages." "Mandatory and injunctive decrees" are expressly authorized by Section 702, with no limitation whatever. Accordingly, this waiver in Section 702 should be construed liberally in accordance with its broad language. *E.g.*, *FDIC v. Meyer*, 510 U.S. 471, 480 (1994) (a "simple and broad" statutory clause authorizing agency to "sue and be sued" should be 'liberally construed' . . . notwithstanding the general rule that

waivers of sovereign immunity are to be read narrowly in favor of the sovereign"); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) ("sweeping" statutory waiver warrants narrow construction of exceptions).

In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Supreme Court recognized that Section 702 does not forbid all claims against government agencies for monetary relief. As the Court explained, such suits are permitted, and sovereign immunity is waived, for claims seeking as "specific relief" the payment of funds that the government is required to pay the claimant under a regulatory scheme. The Court contrasted this "specific relief" to "money damages," which are defined as "a sum of money used as compensatory relief … given to the plaintiff to substitute for a suffered loss." *Bowen*, 487 U.S. at 893; *see also Lane v. Pena*, 518 U.S. 187, 196 (1996). The Court further noted: "The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen*, 487 U.S. at 893. *Bowen*'s definition of "money damages" as compensatory and substitutionary confirms that coercive civil contempt fines like those sought here do not constitute "money damages," as such fines are not measured by the wronged party's loss and normally do not go into that party's pocket. Here, the fines sought would go to the judiciary, not Petitioner or his counsel.

This Court has yet to address Section 702 in the context of civil contempt

fines. In *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994), this Court did conclude that sovereign immunity barred a district court from invoking its supervisory power (and not its contempt power) to impose an award of attorneys' fees on the government in a criminal case for prosecutorial misconduct. However, this Court had no occasion to address the Section 702 waiver argument, as Section 702 applies only to non-damages civil suits against the government, not to criminal prosecutions like those in *Horn*.

1. Coercive Contempt "Fines" Are Not "Money Damages"

The federal courts are empowered by statute to "punish by fine or imprisonment" disobedience or resistance to their lawful orders. *See* 18 U.S.C. § 401. Such punishment can occur for the government's "[d]isobedience . . . [of a court's] lawful writ, process, order, rule, decree, or command." *Id*. § 401(3). A "fine" entered pursuant to this contempt statute as "punishment" for "disobedience" is not "money damages" under Section 702. This is for at least five reasons.

First, the two forms of remedy ("fine" and "money damages") arise in different ways and apply to different to classes of persons:

- A contempt "fine" (i) arises from disobedience of the court's prospective injunction, and (ii) applies only to litigants previously before the court (or their agents).

- In contrast, "money damages" arise under (i) an independent cause of action, (ii) involving any person subject to suit, and (iii) are usually retrospective in seeking compensation for past injury.

Accordingly, the Supreme Court has noted in the civil contempt context that the "court's authority is inherently limited" to those "particular persons whose legal obligations result from their earlier participation in proceedings before the court." *Young*, 481 U.S. at 800 n.10. Another court similarly observed that "there is no such thing as an independent cause of action for civil contempt." *Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988).

Second, "money damages" are purely compensatory and are never characterized as punishment. *Bowen*, 487 U.S. at 895 ("The term 'money damages' . . . normally refers to a sum of money used as compensatory relief"). On the other hand, "coercive" civil contempt fines are not measured by a plaintiff's loss and generally do not go into its belongings. The Supreme Court explained this principle in *Gompers v. Buck's Stove & Range Co.*, when it ruled that all motions for contempt must contain "an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and *punished* therefor." 221 U.S. at 441 (emphasis added). The Supreme Court also explained coercive civil contempt in *Penfield Co. of Cal. v. Securities and Exchange Commission*, where the Court noted that contempt fines are employed "as coercive sanctions to compel the contemnor to do what the law made it his duty to do." 330 U.S. 585, 590 (1947); *see also Young*, 481 U.S. at 798 (the "underlying concern that gave rise to the contempt power" was "disobedience to the orders of the Judiciary"); *Armstrong v. Exec. Office of*

President, 821 F. Supp. 761, 773 (D.D.C. 1993) ("when a court, as in the instant case, imposes coercive fines upon a government agency in a contempt proceeding, these fines are deposited into the court registry and thus, do not allow a party to recover any damages and thereby circumvent Congress' express waivers of sovereign immunity") (internal quotations omitted), *rev'd on other grounds*, 1 F.3d 1274 (D.C. Cir. 1993).

Third, contempt proceedings were historically "sui generis – neither civil actions nor prosecutions for offense, within the ordinary meaning of those terms – and exertions of the power inherent in all courts to enforce obedience." *Myers v. United States*, 264 U.S. 95, 103 (1924); *see also Gompers*, 221 U.S. at 441 ("Contempts are neither wholly civil nor altogether criminal"); *Walascheck & Associates, Inc. v. Crow*, 733 F.2d 51, 53 (7th Cir. 1984) ("Contempt proceedings . . . are sui generis, neither civil actions nor prosecutions"). In contrast, "money damages" signify claims made for money in civil proceedings. This is apparent from Congress' reference in the legislative history of Section 702 to claims for "money damages contained in the Federal Tort Claims Act, the Tucker Act, or similar statutes," which are civil in nature. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 9, 11 (Oct. 1, 1976), *reprinted in* 1976 U.S.C.C.A.N. 6124, 6131. "Money damages" and contempt "fines" therefore had a different character historically.

Fourth, civil contempt sanctions are subject to a different standard of proof

than "money damage" claims generally. "A party moving for civil contempt must establish by clear and convincing evidence that the defendant violated a court order." *National Organization of Women v. Operation Rescue*, 37 F.3d 646, 662 (D.C. Cir. 1994) (emphasis added); *see also Armstrong*, 1 F.3d at 1289; 11A Wright, Miller & Kane § 2960 (in civil contempt motion, "a bare preponderance of the evidence will not suffice"). In contrast, "money damage" claims raising substantive claims are normally subject to the lesser "preponderance of the evidence" standard.

Fifth, unlike claims for monetary damages, the right to a jury trial does not apply to civil contempt fines, which ensures that contempt fines are levied only by judges nominated by the President and confirmed by the Senate. The Supreme Court ruled in *Bagwell* that "civil contempt sanctions . . . designed to compel future compliance with a court order" are not subject to "a jury trial." 512 U.S. at 827; *see also* 11A Wright, Miller & Kane § 2960 ("There is no right to a trial by jury for the violation of an order of court when the proceeding is for civil contempt unless a statute so provides."). In contrast, an action for "money damages" under Section 702 has been described as "an action at law for damages," *Bowen*, 487 U.S. at 893, which generally would be subject to the Seventh Amendment right to a jury trial.

Taken together, these distinctions between "money damages" and contempt "fines" demonstrate their different origins, elements, purposes, procedural features, and associated means of fact-finding. The two cannot be equated. Thus, a coercive

contempt fine is relief "other than money damages" and falls within Section 702's waiver of sovereign immunity. This conclusion is made even more compelling because, as described next, a contempt fine is a part and extension of injunctive "relief" and "decrees" authorized by the APA.

2. Contempt Fines Are Part of Injunctive Relief

Section 702 authorizes "decrees" against the government, with no limitation as to the form of such decrees. This authorization, of necessity, contemplates that contempt fines may be imposed because such fines are themselves a part of "decree" within the meaning and purpose of Section 702.

The legislative history of Section 702 explains that the statute's purpose was to ensure government compliance with judicial orders: "Only if citizens are provided with access to judicial remedies against Government officials and agencies will we realize a government truly under law." H.R. Rep. No. 94-1656 at 10; 1976 U.S.C.C.A.N. at 6130. The legislative history went on to state that the government would be subject to injunctive and "mandatory relief" under the statute. H. Rep. No. 94-1656 at 11; 1976 U.S.C.C.A.N. at 6131 (sovereign immunity is "abolished" for "injunction, declaratory judgment, mandatory relief, etc.").

In *Bowen*, the Supreme Court construed Section 702 as waiving sovereign immunity for actions seeking "[1] the recovery of specific property or monies, . . . [2] or injunction." 487 U.S. at 893 (emphasis added). The Supreme Court addressed

the scope of the waiver for the first category, but not the second relating to injunctions.

Civil contempt fines themselves are equitable remedies that are an integral element of injunctive decrees. A civil contempt fine imposed for violation of an injunction in equity "is a part of the main in equity." *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932). In *In re Matter of Grand Jury Proceedings Empanelled May 1988*, the Seventh Circuit noted that the remedy of civil contempt "originated, like so many other devices operating on the person directly rather than on his assets, in equity, as a device for enforcing compliance with equitable decrees," and "[i]t is still an equitable procedure." 894 F.2d 881, 884 (7th Cir. 1989) (Posner, J.). Another decision recognized that a compensatory contempt fine is essentially "an equitable supplement" of the court's injunctive order. *Wisconsin Hospital Association v. Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987).

Contempt orders historically developed to enforce orders made by courts in equity. 1 D. Dobbs, Law of Remedies § 1.4 (1993) ("The old separate equity court often enforced its decree by using contempt powers, fining or imprisoning the defendant until he complied with the [decree]"). Accordingly, contempt orders are considered to be "equitable decrees" made pursuant to injunctive relief. 1 D. Dobbs, Law of Remedies § 2.8 (1993); *see also generally Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 571 (1990) ("a monetary award

'incidental to or intertwined with injunctive relief" may be equitable").

Most fundamentally, contempt sanctions are inherent in injunctive "decrees" because such decrees are meaningless without them. As one scholar observed over fifty years ago: "The value of a right, to a litigant, is no greater than the available remedy, and the remedy in equity is the injunction. This insight, however, should be worked to capacity, and we have not done so until we realize that the remedy, the injunction, is worth no more than its sanction, contempt." Joseph Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Colum. L. Rev. 780 (1943). Contempt "fines" are necessary to give "teeth" to equity's traditional sanctions for contempt. *See U.S. Department of Energy v. Ohio*, 503 U.S. 607, 623 (1992); *see also Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (noting in dicta that "the grant of injunctive relief [against HHS] makes the Secretary's duty to comply enforceable by contempt order").

For these reasons, a coercive contempt fine is, in essence, part of an injunctive decree. When Congress allowed claims for injunctive relief against the government, it surely contemplated that the government could not flout that relief with impunity. *See Armstrong*, 821 F. Supp. at 773 ("such coercive sanctions are necessary to ensure that the executive branch of government [does not] treat with impunity the valid orders of the judicial branch") (internal quotations omitted), *rev'd on other grounds*, 1 F.3d 1274 (D.C. Cir. 1993); *Am. Rivers v. United States Army Corps of Eng'rs*,

274 F. Supp. 2d 62, 70 (D.D.C. 2003) (same). To rule otherwise would frustrate Congress' intent in Section 702 to ensure greater fairness and accountability of the government to complainants by authorizing the federal courts to grant injunctive relief. That accountability would be eviscerated if the government, even after being enjoined, could injure the interests of persons like Mr. Guerra-Castaneda and remain immune from responsibility.

B. The Courts Are Empowered By the Constitution With Inherent Authority to Issue Monetary Contempt Fines Against the Government for Its Breach of Court Orders.

If this Court finds that the government has not waived sovereign immunity in Section 702, then the Court must decide whether, under the doctrine of sovereign immunity, the government can violate a federal court order free of any ability by the court to impose a contempt sanction requiring the payment of money.

The separation of powers doctrine requires that the federal courts be empowered to enforce their orders through remedial contempt fines against the government. Otherwise, executive branch officials could effectively arrogate unto themselves the power to decide which court orders should be obeyed. This is prohibited by "the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). As set forth below, this important separation of powers principle should take precedence over the doctrine of sovereign immunity

because (i) separation of powers interests are more fundamental and undergird the entire system of constitutional government, and (ii) the policies given for the sovereign immunity doctrine will not substantially be impaired by allowing such contempt fines.

1. The Court's Ability to Levy Coercive Fines Is Essential to the Contempt Power.

As set forth above, this Court may exercise its inherent contempt power against the government; otherwise this Court could not exercise its "judicial power" as contemplated by Article III of the Constitution. This proposition applies with special force in cases, such as this, where a federal court lawfully enters a stay order against the government to "ba[r] Executive Branch officials from removing [a noncitizen] from the country." *Nken v. Holder*, 556 U.S. 418, 429 (2009) (internal citation omitted). If this Court cannot impose a "coercive" civil contempt sanction when that stay order is violated as a means of inducing compliance, then the courts are left with no enforcement mechanism.

An alternative, non-monetary contempt sanction may vindicate the authority of the Court. However, such a contempt sanction fails to protect the interests of the Petitioner and those similarly situated who are in removal proceedings and therefore does nothing to protect "the power of the court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Muskrat v. United States*, 219 U.S. 346, 356 (1911); *see also Plaut*, 514

U.S. at 218 (the constitutional "charter of the judicial department . . . gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them") (emphasis added).

For these reasons, the power to issue a coercive contempt fine is an essential power of the federal courts in those cases involving injunctions to prevent deportation injury to individuals.

2. Sovereign Immunity Principles Must Be Subordinate to the Contempt Power in a Civil Suit.

There is scarce authority to support the position that the sovereign immunity doctrine precludes the entry of a coercive contempt fine against the government in a civil lawsuit. Only a few courts have questioned the power of federal courts to impose contempt fines on the government, and several of those courts have done so only in *dictum*, or in criminal cases, or with respect to compensatory fines—scenarios which are different from this case. *Compare United States v. Horn*, 29 F.3d 754 (1st Cir. 1994) (sovereign immunity precluded award of attorney's fees and costs against the government following prosecutorial misconduct in a *criminal* case, because, *inter alia*, the Court had other means of controlling recalcitrant prosecutors; not addressing Section 702 as it was inapplicable); *United States v. Droganes*, 728 F.3d 580, 584-85, 588-90 (6th Cir. 2013) (in a *criminal* case where the government seized the defendant's property and violated a court order by failing to return it, holding that compensatory civil contempt fines were barred by sovereign

immunity; not addressing Section 702 as it was inapplicable); *Baolong Biochemical Products Co. v. United States*, 406 F.3d 1377, 1379-80 (Fed. Cir. 2005) (finding of sovereign immunity as to request for contempt damages, but discussion of immunity and waiver was confined to the specific statutes and rules governing the Court of International Trade; the opinion did not address Section 702 or separation of powers); *Coleman v. Espy*, 986 F.2d 1184 (8th Cir. 1993), *cert. denied*, 510 U.S. 913 (1993) (*compensatory* civil contempt fines barred by doctrine of sovereign immunity); *Barry v. Bowen*, 884 F.2d 442, 444 (9th Cir. 1989) (*dictum* that sovereign immunity precluded sanctions for late payment of attorney's fees under Equal Access to Justice Act); *with Chilcutt v. United States*, 4 F.3d 131 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 460 (1994) (fine against the government attorney permitted); *McBride v. Coleman*, 955 F.2d 571, 577 (8th Cir. 1992) (the court "need not decide the question" of the district court's contempt power to levy fines on the United States; the dissent, however, argues that compensatory contempt fine is permitted); *Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991) (government does not have sovereign immunity from Rule 11 money sanctions); *United States v. Gavilan Joint Community College Dist.*, 849 F.2d 1246 (9th Cir. 1988) ("we have previously ordered the government to pay costs and attorney's fees under Rule 37(b) and 60, and no independent justification exists for barring Rule 11 sanctions under sovereign immunity"); *Armstrong*, 821 F. Supp. at 773 (doctrine of sovereign immunity does

not prevent imposition of coercive fines against federal agency for contempt after violation of an injunction), *rev'd on other grounds*, 1 F.3d 1274 (D.C. Cir. 1993); *Nelson v. Steiner*, 279 F.2d 944, 948 (7th Cir. 1960) (government officials fined for contempt of court injunction); *Am. Rivers*, 274 F. Supp. 2d at 69 ("While it is true that courts have ruled that the government has not waived its sovereign immunity with regard to compensatory fines for contempt, *Plaintiffs in this case are seeking coercive, rather than compensatory, fines*.") (internal citation omitted) (emphasis added).

This collision of constitutional doctrines should not be resolved by arbitrarily declaring one principle absolute, and the other subordinate. Indeed, this Court's approach taken in *Horn* reasoned that "sovereign immunity ordinarily will trump supervisory power in a head-to-head confrontation" because the former is "mandatory and absolute." 29 F.3d at 764. Yet, the sovereign immunity doctrine must bow here for several reasons.

First, the principle of separation of powers is structural in that it establishes the foundation of our constitutional system of government that is based on the rule of law. *E.g., United States v. Nixon*, 418 U.S. 683, 704 (1974) ("the 'judicial Power of the United States' vested in the federal courts" cannot be "shared" with the Executive Branch, as that "would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite

government").

In contrast, the doctrine of sovereign immunity doctrine holds a lesser role. Its historical and contemporary rationale is confused. The sovereign immunity doctrine "has its origin in the ancient myth that the '[K]ing can do no wrong.' [Citation omitted.] Whatever might be said of this polite falsehood in English law, the doctrine is an anomalous import within our own." *United States v. Dalm*, 494 U.S. 596, 622 (199) (Stevens, J., dissenting). The doctrine has nonetheless been construed to stand "as an obstacle to virtually all direct assaults against the public fisc." *Horn*, 29 F.3d at 761. If this is the rationale, the doctrine serves a budgetary interest, which should be subordinate to basic structural principles like the separation of powers doctrine when the two collide.

Second, a contempt fine does not present a "direct assault" on the public fisc. Such fines are not the "direct" goal of litigants seeking injunctive relief, who seek first and foremost the government's compliance with injunctive orders. Rather, contempt fines are effectively self-inflicted by the government, as they spring from the government's own actions in breaching court orders.

Third, one apparent purpose of the sovereign immunity doctrine is to "protect the operations of government" by guarding "against judicial interference in executive functions." *Horn*, 29 F.3d at 764 (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949)). If this is so, then it should be manifest

that judicial interference with "executive functions" is minimized by the imposition of contempt fines rather than other forms of civil contempt sanctions such as confinement of executive officials. Thus, in Eleventh Amendment cases, the Supreme Court has found that the imposition of a contempt fine is a lesser sanction than confinement of government officials. *Hutto v. Finney*, 437 U.S. 678, 691 (1978) ("The principles of federalism that inform the Eleventh Amendment surely do not require federal courts to enforce their decrees only by sending high state officials to jail"); *cf., Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) (court's power to assess attorney's fees is a "less severe sanction" than dismissal of a claim). The same principle applies here. If the sovereign immunity doctrine seeks to minimize judicial intrusions, it should therefore be subordinate to the courts' power to impose remedial contempt fines in lieu of more drastic remedies.

Fourth, the Supreme Court has on several occasions subordinated constitutional prerogatives of the Executive Branch to other constitutional principles undergirding the judicial power. Perhaps the best example is *United States v. Nixon*, 418 U.S. 683 (1974), where the President's executive privilege for confidential communications was subordinated to the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 707. Sovereign immunity principles are also subordinate to the constitutional prohibition on Takings without just compensation. *United States v. Jacobs*, 290 U.S. 13 (1933).

Finally, this Court noted that, "if Congress has not waived the sovereign's immunity in a given context, the courts are obliged to honor that immunity." *Horn*, 29 F.3d at 764. Congress has never intended that the government would be immune to its violation of this Court's inherent stay of removal order. *See Nken*, 556 U.S. at 426-427 (explaining the courts of appeals' inherent authority of stay of removal pending judicial review, and stay is different from an injunction); *see id*. at 433 (the Supreme Court is "loath to conclude that Congress would, 'without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review'"; rejecting argument that Subsection (f)(2) covers the stay authority).

Taken together, there is ample precedent and cause to subordinate the budgetary and other interests associated with the sovereign immunity doctrine to the fundamental, structural interests associated with constitutional separation of powers. Moreover, in *Horn*, this Court suggested that separation of powers concerns would not be undermined by depriving a litigant of a punitive contempt fine against the government in a criminal case because "courts have many other weapons in their armamentarium." 29 F.3d at 766. But, in this case where the government has not cured the violation, it is not clear whether any other remedy other than coercive civil fine would be feasible in this case to compel compliance with this Court's stay of removal orders.

III. ALTERNATIVELY, THIS COURT CAN FINE THE ICE OFFICIALS WHO ARE INDIVIDUALLY RESPONSIBLE FOR THE VIOLATION.

Alternatively, if this Court wishes to avoid the issue of sovereign immunity altogether, this Court can issue a coercive fine against the individual officers who violated this Court's August 30, 2019 and September 11, 2019 stay of removal orders. As the District Court for the District of Columbia held in *Cobell v. Babbitt* in finding two cabinet secretaries and an assistant secretary in civil contempt: "[C]ourts have a duty to hold government officials responsible for their conduct when they infringe on the legitimate rights of others …. The court must hold such government officials accountable; otherwise, our citizens—as litigants—are reduced to mere supplicants of the government, taking whatever is dished out to them. That is not our system of government, as established by the Constitution." 37 F. Supp. 2d 6, 14 (D.D.C. 1999). This Court also previously noted that, "an officer, responsible for the corporation's affairs and for its disobedience, may be held liable for contempt." *NLRB v. Me. Caterers, Inc*¸ 732 F.2d 689, 691 (1st Cir. 1984); *see also Horn*, 29 F.3d at 766 n.14 ("[t]here would seem to be no sovereign immunity bar to imposing a monetary penalty as a sanction against a rogue attorney merely because she happens to represent the federal government").

In this case, the circumstances set forth above—including Officer Noblitt's receipt of a September 4, 2019 email indicating that Petitioner should not be removed and his failure to check the Comment section of EARM—make clear that,

at the very least, Officer Noblitt was responsible for Mr. Guerra-Castaneda's wrongful deportation. That Officer Noblitt and other ICE officials are not parties to this action does not insulate them from being held in contempt and fined, so long as they had notice of the orders at issue. *See Stotler & Co. v. Able*, 870 F.2d 1158, 1164 (7th Cir. 1989) ("[O]rdinarily a court may find a nonparty in contempt if that person has 'actual knowledge' of the court order and either abets the [party named in the court order] or is legally identified with him.") (internal quotation marks omitted). Moreover, an official's notice of an order "can be proven by circumstantial evidence." *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F. Supp. 2d 70, 82 (D.D.C. 2003).

Here, everyone was on notice of this Court's stay order via emails and EARM. Four days after this Court's issuance of temporary stay order, on September 3, 2019, at approximately 11:35 AM, ICE Boston "received an email from OIL notifying that the First Circuit had issued a temporary stay of removal until September 13, 2019." *See* Guarna-Armstrong Decl. at ¶ 14. On the same date, ICE Boston "entered a comment into the [Enforce Alien Removal Module ("EARM")] system" about the temporary stay order that was in effect until September 13, 2019 and not to remove Petitioner "until and unless OIL notified [ICE] that the First Circuit had lifted the stay of removal." *Id.* at ¶ 15. On the same date, ICE Boston notified the officers at the Boston ICE Air Operations unit "advising that a temporary stay of removal had

been granted and that the Petitioner should not be removed from the United States." *Id.* at ¶ 17. ICE Louisiana also received an email from ICE Boston that "Guerra-Castaneda be removed from the manifest of the flight that was to occur on Friday, September 6, 2019." *See* First Hagan Decl. at ¶ 5; *see also* Noblitt Decl. at ¶ 4. On September 4, 2019, the ICE Boston contacted multiple officers in the ICE Louisiana about this temporary stay of removal and asked that Mr. Guerra-Castaneda "be taken off the manifest for his scheduled September 6, 2019 removal flight and that he be returned to a detention facility within [the ICE Boston's] jurisdiction the following week." *See* Guarna-Armstrong Decl. at ¶ 18. On the same date, Supervisory Detention and Deportation *Officer Hagan sent an email to eleven deportation officers, including Officer Noblitt, requesting that Mr. Guerra-Castaneda be pulled from any removal flight and returned to Boston*. *See* Guarna-Armstrong Decl. at ¶ 19; First Hagan Decl. at ¶ 5; Noblitt Decl. at ¶ 4. Taken all together, Officer Noblitt and others who deported Mr. Guerra-Castaneda knew about this Court's stay order and failed to comply.

This Court need not be concerned that the imposition of fines against ICE officers in their individual capacity will lead to direct personal financial liability. This is because the government will indemnify these officers, as their actions were taken within the course and scope of their employment. The Department of Justice's Office of Legal Counsel has stated that agencies can indemnify their employees for

personal liability arising in the scope of their employment, with the funds coming from the agency's appropriation for its employees' salaries and/or the activity in which the liable employee was engaged (not the Judgment Fund).[5] *See* Indemnification of Treasury Department Officers & Employees, 15 Op. O.L.C. 57, 60 (1991). The Government Accountability Office has also adopted this approach and applied it to contempt fines incurred by agency employees. *See* Walter B. Toner, B-205438, 1981 WL 23117 (Comp. Gen. Nov. 12, 1981).

IV. THIS COURT SHOULD AWARD PETITIONER ATTORNEYS' FEES IN ADDRESSING THIS CONTEMPT ISSUE.

Finally, this Court should order Respondent to pay all reasonable attorneys' fees and costs associated with Petitioner's efforts to brief the issue of contempt and unlawful removal in contravention of this Court's stay order, including all efforts to locate Mr. Guerra-Castaneda and inquire as to his status/condition in El Salvador. *See Cobell v. Babbitt*, 188 F.R.D. 122, 123 (D.D.C. 1999) (awarding fees incurred by plaintiffs due to agency's noncompliance).

To be clear, however, an award of attorneys' fees must be accompanied by a finding of contempt. Here, the government's violation is serious, as the government's actions are apparently incurable and have irreparably damaged this Court's ability to provide relief on the merits. A finding of civil contempt is

[5] The Judgment Fund is a permanent indefinite appropriation for judgments and settlements against federal agencies enacted by Congress. *See* 31 U.S.C. § 1304.

necessary so that this Court may officially acknowledge and express disapproval of the government's conduct in violating a judicial decree that compromised this Court's jurisdiction. Such a judicial statement is an essential element of the remedy that Petitioner requests. A civil contempt finding, on its own, is vital as a means of officially acknowledging the violation of a court order.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court:

(1) Order Respondent in civil contempt, reprimand Respondent, and impose a $1,000 daily coercive fine on the government and/or its responsible agents until the government returns Petitioner to the United States;

(2) order Respondent to pay all reasonable attorneys' fees and costs associated with Petitioner's efforts to brief the issue of contempt and unlawful removal in contravention of this Court's stay order, including all efforts to locate Mr. Guerra-Castaneda and inquire as to his status/condition in El Salvador;

(3) require the government to explain all its efforts to comply with this Court's September 11, 2019 stay of removal order (as opposed to this Court's August 30, 2019 temporary stay of removal order);

(4) require the government to provide declarations of officers in the ICE Air Operations—including but not limited to the ICE Air Operations unit at ICE Boston and the ICE Air Operations in Arizona, which were part of Petitioner's transfer or removal between September 3 and 13—explaining why and how Mr. Guerra-Castaneda was deported;

(5) require the government to explain its customary practice of how stay of deportation orders are entered and reviewed in the EARM system;

(6) require the government to detail the last minute communication on approximately September 12, 2019 between Mr. Guerra-Castaneda and

the unknown ICE officer at ASF; and

(7) if warranted, designate a special master for further factual findings under Fed. R. App. P. 48.

Dated: October 2, 2019

Respectfully submitted,

JOSE DANIEL GUERRA-CASTANEDA

By and through Counsel,

/s/ Gilles R. Bissonnette
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Nina J. Froes #1163821
[redacted]

Harvey Kaplan #18126
[redacted]

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Response complies with the type-volume limit of Fed. R. App. P. 32(A)(7)(B)(i) [no more than 13,000 words] and the typeface requirement of Fed. R. App. P. 32(a)(5)(A) [proportionally spaced face 14-point or larger]. The Response contain 13,000 words and was prepared in proportionally spaced Times New Roman 14-point type.

/s/ Gilles Bissonnette
Gilles Bissonnette

Dated: October 2, 2019

CERTIFICATE OF SERVICE

I certify that this brief and addendum is served to all counsel of record registered in ECF on October 2, 2019 including the opposing counsel, Trial Attorney **Giovanni B. Di Maggio** at the Office of Immigration Litigation, Civil Division, United States Department of Justice, P.O. Box 878, Ben Franklin Station, Washington, DC 20042.

/s/ Gilles Bissonnette
Gilles Bissonnette

Dated: October 2, 2019

Exhibit 1

ICE AIR OPS 03 SEPTEMBER 2019

Form I-216
U.S. DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION & CUSTOMS ENFORCEMENT

(12)

Sheet No. 1 of 3

Transfer Date: 09/03/19

RECORD OF PERSONS AND PROPERTY TRANSFERRED

FROM: BOSTON
Origin FO:

VIA (1)
VIA (2)

TO: OAKDALE, LA
Dest. FO:

MODE: AIR OPS
Other:

File No.	Name of Person LAST	Name of Person FIRST	DOB	C.O.C.	Status (1)	Sex	CLASS LEVEL	G-589#	Money $ Amt.	Baggage I-77 No.	Description	Comments
ECUADOR												
A [redacted]												
A [redacted]												
A [redacted]												
A [redacted]												
A [redacted]												
A [redacted]												
EL SALVADOR												
A 208 273 627	GUERRA-CASTANEDA	JOSE	[redacted]	ELSAL	8H	M	HI	XXXX	XXXX	4836701	ASSIGNED TAG	~~ELSAL #1~~
cut A [redacted]												NO TD
A [redacted]												
A [redacted]												
EL SALVADOR NO TD												
A [redacted]												
A [redacted]												

NOTE: Please sign and leave with Property Officer.

(1) - Show whether transfer or removal. For transfers show whether NTA or Final Order

Use a separate line for each person transferred.
This form is to be executed in sufficient number of copies to allow receiving officer to retain one copy of his personal expense voucher and two additional copies for station of final delivery.

Received the above listed property, and baggage checks

Signature: _____

Title: _____

Place and Date: _____

Exhibit 2

Affidavit of Nina J. Froes

I, Nina J. Froes, hereby state:

1. My true and complete name is Nina Jane Froes. My business address is [redacted]. I am an attorney licensed to practice law in Massachusetts. My Massachusetts bar license number is 672728

2. I represent the Petitioner, Jose Daniel Guerra-Castaneda, in case No. 19-1736, Guerra-Castaneda v. Barr, currently pending in the United States Court of Appeals for the First Circuit. Prior to the Circuit Court appeal, I also represented Mr. Guerra-Castaneda before the Immigration Court and the Board of Immigration Appeals in the proceedings below.

3. The purpose of this affidavit is to provide information regarding what I know about the background of this case, how my client came to be removed and the current location and condition of my client subsequent to his removal from Immigration and Customs Enforcement Custody in the United States to El Salvador.

4. [redacted]

5. Mr. Guerra-Castaneda asked me if it was possible to introduce new evidence for the appeal and I explained that we could not. Regardless, he had his mother request a copy of his criminal history form the Ministry of Justice and Public Safety in El Salvador, which she mailed to me via Express Mail from EMS EL Salvador on 08/21/2019. I have attached a copy of that document, and the mailing label from the envelope it arrived in, to this affidavit.

6. The criminal history document was received directly by me at my office address, in hand from a U.S. postal worker who delivered it as an express mail package separately from my regular mail delivery.

7. In the two weeks prior to Mr. Guerra's removal to El Salvador, I had been in frequent telephone communication with him to provide updates on his litigation. He called me each time he was told he would be transferred and then he would check back in with me once he arrived at the new detention facility so I could always maintain communication with him.

8. When he was initially moved from New Hampshire to Louisiana, I called counsel for OIL and the removal officer in change of my client's case and I was told that he was sent there in preparation for removal in the event that a stay was not granted. I believe he was held in two locations in Louisiana.

9. I spoke to him the night before he was removed and he told me that guards had informed him that he was scheduled to return to El Salvador in the morning. He was extremely concerned for his safety.

10. Having previously been assured by ICE and opposing counsel that my client would not be removed, I told my client not to worry, that a stay was in place and that he couldn't be sent to El Salvador. I told him that I was sure he was going to come back to Boston.

11. At 8:15 a.m. the next morning, I called the ICE office in Burlington, MA and first spoke to a duty officer who then transferred the call to the officer assigned to his case. When I voiced my concerns that Mr. Guerra-Castaneda was scheduled for a flight to El Salvador that day, the officer emphatically stated that Mr. Guerra-Castaneda was not being sent to El Salvador, rather he was on a flight destined for Boston. I waited all day to for a call from my client telling me his new location.

12. I know the dates, times and durations of all phone calls mentioned herein because I use a cell phone for all business calls, and all of the information is saved on my phone. I also have all of the call logs for contact with my client, his mother and his lawyer in El Salvador because most of these calls are through the WhatsApp phone application on my cell phone that allows for free international calling and that information is also stored on my phone.

13. At about 2:15 on September 13, 2019, I received a phone call from a friend of my client's in the United States stating that Mr. Guerra-Castaneda was in San Salvador. This friend stated that she had received a phone call from Mr. Guerra-Castaneda's mother stating that he had already arrived in El Salvador. Apparently his mother had been notified that he returned and went to meet him at the local police station.

14. At approximately 3:40 p.m. that same day I received a phone call from a number from El Salvador through the WhatsApp application on my cell phone. It was Mr. Guerra-Castaneda who called. He said something to the effect of " I don't have long to talk, they are taking me to the bartolinas and I am going to court tomorrow My mother will be in touch with you from this number." I only spoke to him for about four minutes.

15. In those four minutes, my client told me that he was calling from his mother's phone, that he was in El Salvador, that had been taken into police custody and was going to brought to the local court for a hearing the next day which I assumed to be akin to an arraignment. I asked him if he had told the officials in Louisiana to check to verify that a stay was in place. Mr. Guerra-Castaneda told me that he told the official that his lawyer had confirmed that there was a stay but the official said that he didn't have that information and that he had emailed somebody and that if he didn't get an email back before a certain time that Mr. Guerra-Castaneda was going on the flight.

16. I have not spoken to my client since September 13, 2019.

17. I have spoken to my client's mother and his criminal defense lawyer, Jackson A. Guzman Melendez, about three times each.

18. According to Mr. Guerra-Castaneda's lawyer, no family visitation is allowed at the jail, he cannot make or receive phone calls, and only attorneys have access to pretrial detainees. His mother stated that the facility where he is being held does not provide food to the detainees. Family members have to bring detainees their food, water, tooth paste, medicine, etc.

19. His mother brings two meals a day to the jail, but states that she cannot afford to do so and her family members are having to skip meals to provide for Mr. Guerra-Castaneda.

20. Mr. Guerra-Castaneda's mother also stated that she has been asked to bring items to the jail, such as t-shirts, for her son to give to other prisoners as a way to keep himself on good terms with his cellmates.

21. His mother states that Mr. Guerra-Castaneda had already acquired a fungal infection in his skin and she had to buy him topical antifungal medicine. She informed me yesterday that a prescription medication that he had from his last detention facility had run out and the guards had told her to get it re-filled. She sent me a photo of the prescription, which was for Prazocin. I was not aware that my client had been taking medication while in detention in the United States.

22. I spoke to Mr. Guerra-Castaneda's attorney in El Salvador, Mr. Guzman Melendez, today. Mr. Guzan Melendez states that he has seen Mr. Guerra-Castaneda several times since he has been in the bartolina. He states that there are five cells at the facility and Mr. Guerra-Castaneda is in cell 2.

23. The attorney states that the conditions in detention are very difficult and very restricted. The lawyer states that there are currently about twelve other men detained in the same cell with Mr. Guerra-Castaneda. My understanding is that the cells are very small and overcrowded.

24. The attorney states that Mr. Guerra-Castaneda has a hearing in San Salvador on October 8, 2019 and another in Cojutepeque on October 16, 2019 and the attorney believes that both cases will be resolved on those dates.

25. This is the only information I have been able to gather about my client's current status. I expect to receive a further update from the attorney in El Salvador after the hearing on October 8, 2019.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 10/2/2019. Signature: _____

Nina J. Froes

MINISTRY OF JUSTICE AND PUBLIC SAFETY [SEAL]
GOVERNMENT
OF EL SALVADOR
COST: $3.00
(Three dollars)

Receipt No. 0565585

The undersigned Employee of the Dept. of Registry and Corrections Control of the General Director of Prisons Certifies:

That [gender options] Mr. **JOSE DANIEL GUERRA CASTAÑEDA**, son of [redacted] and of [redacted].

Who is requesting certification of Criminal Record for procedures: **JUDICIAL.** According to the Records of this Office he **DOES NOT HAVE** any criminal record associated with a final sentence for any criminal offense.

And, at the request of [redacted]
Identified with Official ID number [redacted] resident of, [redacted], [redacted], who is acting as **AUTHORIZED PERSON** I am issuing this certification in San Salvador on the twenty ninth day of August of the year two thousand nineteen.

[SEAL]
MINISTRY OF JUSTICE
AND PUBLIC SAFETY
EL SALVADOR

[SIGNATURE]
MARIA FERNANDA SANTOS MANCIA
ADMINISTRATIVE EMPLOYEE DEPT. OF REGISTRY
AND CORRECTIONS CONTROL

FB/Doc/DGCP
This certificate consists of 01 page

ANY ERASURE RENDERS THIS DOCUMENT NULL AND VOID
VALID FOR NINETY DAYS FROM DATE OF ISSUE
WITH REQUIRED SEALS AND SIGNATURE

No. 337327

YO cambio._
COMPENSO, TRABAJO Y AYUDO A CONSTRUIR UNA SOCIEDAD MEJOR
DIRECCIÓN GENERAL DE CENTROS PENALES

MINISTERIO DE JUSTICIA Y SEGURIDAD PÚBLICA.
DIRECCIÓN GENERAL DE CENTROS PENALES.

MINISTERIO DE JUSTICIA Y SEGURIDAD PÚBLICA
GOBIERNO DE EL SALVADOR

Valor: $ 3.00
(Tres dólares)

Recibo N°. 0565585

La Infrascrita Colaboradora Depto. Registro y Control Penitenciario de la Dirección General de Centros Penales Certifica:

Que el (la), señor (a) (Srita) **JOSE DANIEL GUERRA CASTAÑEDA,** Hijo (a) de [redacted] y de [redacted]

Quien solicita certificación de Antecedentes Penales para trámites: **JUDICILES.**
Según el Registro que esta Dirección lleva **NO TIENE** Antecedentes Penales por Sentencia Condenatoria Ejecutoriada en su contra, por imputársele un delito.

Y, a solicitud de, [redacted]
Portador de su Documento Único de Identidad número [redacted] del domicilio de, [redacted] quien actúa en calidad de: **AUTORIZADA** se extiende la presente en San Salvador a los veinte días del mes de agosto del año dos mil diecinueve.

MINISTERIO DE JUSTICIA Y SEGURIDAD PUBLICA
DIRECCIÓN GENERAL DE CENTROS PENALES
UNIDAD DE REGISTRO Y CONTROL PENITENCIARIO
EL SALVADOR, C.A.

MARIA FERNANDA SANTOS MANCIA
COLABORADORA ADMINISTRATIVA DEPTO. REGISTRO Y CONTROL PENITENCIARIO

FB//Doc//DGCP

La presente certificación consta de 01 folio

CUALQUIER ALTERACION ANULA EL PRESENTE DOCUMENTO
VALIDO DURANTE UN PERIODO DE NOVENTA DIAS A PARTIR DE SU EMISIÓN
CON SUS RESPECTIVOS SELLOS Y FIRMA

No. 337327

CERTIFICATE OF TRANSLATION

I, Thomas Chace Kehler, am competent to translate from Spanish into English, and certify that the translation of Certification of Criminal Record is true and accurate to the best of my abilities.

(signature of translator)

[redacted]
typed/printed name of translator

[redacted]

Exhibit 3

FILED

APR 10 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALONSO RAMIREZ-CHAVEZ, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 11-72297 PRO BONO Agency No. A039-812-513 ORDER

Before: CANBY and FISHER, Circuit Judges.

This petition for review was filed August 9, 2011, along with a motion for stay of removal, which resulted in a temporary stay of removal as of that date. *See* Ninth Circuit General Orders 6.4(c). Petitioner had filed a previous petition for review in docket no. 11-71741, which petitioner voluntarily dismissed on September 2, 2011. Respondent was aware of the fact that two petitions for review had been filed because it filed a motion on October 3, 2011 to file the administrative record from the 11-71741 petition in this petition for review. Respondent was further aware that there was a temporary stay of removal in this docket no later than October 5, 2011, when this court granted the October 3, 2011 motion and directed respondent to file a response to the pending motion for stay of

removal in this docket. This court granted the opposed motion for stay of removal on January 11, 2012.

Despite respondent's clear and unequivocal knowledge, no later than October 5, 2011, that a stay of removal was in effect in this docket, petitioner was removed on October 19, 2011. Respondent states in its notice of such removal to this court, filed on January 24, 2012, that the Department of Homeland Security (DHS) was "understandably unaware" of this petition for review and the stay that was in effect at the time of petitioner's removal. We disagree that DHS' violation of the stay of removal was understandable in light of respondent's actual knowledge of the pendency of this petition and the stay in place at the time of petitioner's removal.

Respondent is hereby directed to make substantial further attempts to locate petitioner and to return him to this country. Within 28 days from the date of this order respondent shall file a status report that describes in detail all efforts made by respondent to locate and return petitioner, using every contact and address at their disposal.

Petitioner's counsel's motion to withdraw as pro bono counsel and all other proceedings in this petition for review are held in abeyance pending further order of this court.

Exhibit 4

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 19, 2015
ECO-031-E

No. 15-2425

Rodriguez Sutuc v. Attorney General
(A206-448-275)

Present: MCKEE, Chief Judge

1) Motion by Petitioners to Stay Removal

2) Response by Respondent in Opposition to Motion to Stay Removal

---

The Court would have granted Petitioners a stay of removal, but was informed that Petitioners were removed earlier today. The government is hereby ordered to use its best efforts to intercept Petitioners when they land tonight in Guatemala City and to return Petitioners to the United States immediately. If the government is unable to intercept Petitioners at the airport, they must locate Petitioners in Guatemala and return them to the United States as quickly as possible. Upon their return, Petitioners are granted a stay of removal pending disposition of their petition for review. If, upon contact, Petitioners inform the government that they do not want to return to the United States, the government shall secure a written memorialization to that effect - even if that writing is in Spanish.

By the Court,

s/ Theodore A. McKee
Chief Judge

Dated: June 19, 2015
JK/cc: Bridget Cambria, Esq.
Bernard A. Joseph, Esq.

A True Copy:

Marcia M. Waldron

Marcia M. Waldron, Clerk

Exhibit

5

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Douglas J. Mincher
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 02, 2015

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-10136-FF
Case Style: Gurbinder Singh v. U.S. Attorney General
Agency Docket Number: A206-235-829

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED. See attached order for specific directions on additional filings to the Court.

Sincerely,

DOUGLAS J. MINCHER, Clerk of Court

Reply to: Janet K. Mohler, FF/bmc
Phone #: (404) 335-6178

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-10136-FF

GURBINDER SINGH,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petitions for Review of a Decision of the
Board of Immigration Appeals

Before: MARTIN, ROSENBAUM, and JILL PRYOR, Circuit Judges.

BY THE COURT:

On January 12, 2015, Gurbinder Singh filed a petition for review in this Court of the Board of Immigration Appeals' dismissal of his appeal of a final order of removal. In conjunction with his petition, Mr. Singh filed motions to proceed *in forma pauperis* ("IFP") and for a stay of removal. Three days later, a representative of the Office of Immigration Litigation ("OIL") notified the Court that Mr. Singh was in the custody of the U.S. Immigration and Customs Enforcement agency ("ICE") and represented that there were "no travel plans" for Mr. Singh.

This Court granted Mr. Singh's motion for leave to proceed IFP on April 9, 2015. On June 10, 2015, this Court granted Mr. Singh's motion for a stay of removal pending the outcome

of his petition for review. The Court issued a briefing schedule making Mr. Singh's initial brief due on June 23, 2015.

The following day, counsel for respondent U.S. Attorney General ("the government") telephoned to inform the Court that, when she contacted ICE to notify the agency of the stay of removal, she learned that ICE had removed Mr. Singh to India on April 15, 2015, without notifying the government, OIL, or this Court. The government subsequently filed an official Notice of Removal with the Court in which counsel stated that the agency was "taking steps to investigate this matter further with ICE and to ascertain what steps ICE may take to facilitate Petitioner's return to the United States." Included with the Notice of Removal was a declaration of ICE officer Orestes Cruz, who confirmed that, although ICE's Chief Counsel's office had asked that the Office of Enforcement and Removal Operations (also under ICE's agency umbrella) contact OIL with any changes in Mr. Singh's removal status, ICE's records did not reflect that the Chief Counsel's office had been so advised before Mr. Singh was removed.

On June 16, 2015, the government filed a Supplemental Notice of Removal in which counsel stated that ICE had begun the process of attempting to locate Mr. Singh to return him to the United States and represented that counsel would update the Court when she received additional information. As of the date of this order, the Court has received no update from the government, ICE, OIL, or Mr. Singh. Indeed, the Court is doubtful that Mr. Singh is aware his motion for stay of removal was granted and that he accordingly has a right to remain in the United States pending the outcome of his petition for review. Moreover, Mr. Singh's premature removal likely also prevented him from receiving notice of his briefing schedule in this case.

Recognizing that Mr. Singh was improperly removed more than two months ago and presumably is unaware of both his rights and obligations in this case, we deem it prudent to

appoint counsel to protect his interests, facilitate his return, and assist the Court in navigating his case. The Court hereby appoints Jay Bogan with the law firm of Kilpatrick Townsend & Stockton LLP to represent Mr. Singh throughout his proceedings before this Court.

Additionally, the government is hereby ordered to use its best efforts to locate Mr. Singh in India as quickly as possible and to make contact with him. Upon initiating contact, the government is hereby ORDERED to advise Mr. Singh of the following:

1. Mr. Singh has a right pursuant to this Court's stay of removal to be returned to the United States.

The government must advise Mr. Singh of his right to be returned to the United States pending the outcome of his petition for review and of this Court's appointment of counsel in his case. If, upon contact, Mr. Singh informs the government that he does not wish to return to the United States, the government shall secure a written memorialization to that effect, even if that writing is in Mr. Singh's native language. If Mr. Singh chooses to remain in India, his decision has no bearing on the pendency of his case or his entitlement to counsel, and the government must advise Mr. Singh accordingly.

2. The Court has appointed counsel for Mr. Singh at no cost

The government must advise Mr. Singh that, regardless of whether he wishes to be returned to the United States, his case remains under the Court's consideration. The government must inform Mr. Singh that the court has appointed him counsel at no cost to him. The government is ordered to facilitate Mr. Singh's contact with his appointed counsel, including by permitting Mr. Singh to telephone counsel at the government's expense and by providing translation services if necessary. If Mr. Singh informs the government that he does not wish to

be represented by counsel, the government shall secure a written memorialization to that effect as well.

Every fifteen days, the government shall notify this Court of the status of its efforts to locate Mr. Singh until he is contacted. The government shall also inform the Court promptly once Mr. Singh has been contacted and promptly upon his decisions regarding whether he will return to the United States and/or accept the appointment of counsel. At that time, the government shall file with the Court any written memorialization of his decisions as described above. If Mr. Singh wishes to be returned to the United States, the government is ORDERED to return him as soon as possible. All merits briefing in this case is hereby STAYED pending a determination by Mr. Singh within seven days of his being located by the United States government, of whether he wishes to proceed with his case, and, if he chooses to proceed and to return to the United States, until his return to the United States.

Finally, the government is DIRECTED to show cause within fifteen days why this Court should not impose sanctions upon the agencies and officers involved in Mr. Singh's improper removal.

IT IS SO ORDERED.

Exhibit 6

JOINT AFFIDAVIT OF ATTORNEYS JEFFREY B. RUBIN, TODD C. POMERLEAU, AND KIMBERLY A. WILLIAMS

State of Massachusetts)
)
Suffolk County) ss.
)

We, Jeffrey B. Rubin, Todd C. Pomerleau, and Kimberly A. Williams, Esq. after being duly sworn upon this oath, under penalty of perjury, hereby declare and state as true, accurate, and complete, the following specific facts and information:

1. I, Jeffrey B. Rubin, Esq., am a Managing Partner with Rubin Pomerleau, P.C. I am licensed in the State of Massachusetts (BBO #640964) and am admitted to practice in the Commonwealth of Massachusetts, the United States District Court, District of Massachusetts, the U.S. Court of Appeals for the First, Third, Fifth, Eighth, and Eleventh Circuits, and the Supreme Court of the United States.
2. I, Todd C. Pomerleau, Esq., am a Managing Partner with Rubin Pomerleau, P.C. I am licensed in the State of Massachusetts (BBO #664974) and am admitted to practice in the Commonwealth of Massachusetts, the State of Maine, the United States District Court, District of Massachusetts, the U.S. Court of Appeals for the First and Fourth Circuits, and the Supreme Court of the United States.
3. I, Kimberly A. Williams, Esq., am a Senior Associate Attorney with Rubin Pomerleau, P.C. I am licensed in New York State with the First Judicial Department of the Appellate Division (License # 540174) and am also admitted to practice in the U.S. Court of Appeals for the Third Circuit.
4. We jointly submit this affidavit to attest to our office's recent experiences with Immigration and Customs Enforcement's ("ICE") repeated practice of unlawfully deporting and/or attempting to deport noncitizens in violation of federal District Court judicial orders

preventing their removal from the jurisdiction of Massachusetts, in violation of the U.S. Court of Appeals for the First Circuit ("First Circuit") Local Rule 18.0, and granted stays of removal. Further, ICE has on more than one occasion failed to confirm whether a noncitizen had their proceedings reopened and were thus no longer subject to a final removal order before making efforts to remove them from the U.S.

5. The following are five examples of ICE's malfeasance with respect to our clients within the last year.

6. **Client # 1 (Cape Verdean citizen and lawful permanent resident):**

    a. On October 5, 2018, our office received a call from one of our clients notifying us that he was being transferred to the Jena detention facility in Lasalle, LA and was being staged for deportation. At that time, he had a motion to reopen his immigration proceedings pending with the Board of Immigration Appeals ("the Board") which was based on the vacatur of a criminal conviction on constitutional grounds. Once notified, our office contacted the Board's Emergency Stay Line and asked them to rule on our stay motion given the circumstances.

    b. On October 9, 2018, the Board's Emergency Stay Line notified us that they could not issue a stay on the case because a decision had already been issued on October 3, 2018. We contacted the Clerk's Office which informed us that the motion to reopen had been granted and the proceedings were being remanded back to the Immigration Court. The Clerk's Office faxed a copy of the decision to us as we had not yet received the written decision. Our office attempted to reach the Etowah ICE Field Office, which has jurisdiction over the Jena facility, via phone but got the run

around for a period of time until a fax number could be obtained. We faxed over the decision and asked for a return call but did not receive one.

c. On October 11, 2018, our client called to notify us that he was contacted by the Cabo Verde Embassy alerting him that plane tickets had been purchased for him to be removed from the U.S. We got the contact information of the embassy official and emailed him a copy of the Board's decision. Several attempts were made to contact the Etowah ICE Field Office to confirm that they had received the Board's decision. We also contacted the Boston ICE Field Office out of an abundance of caution via phone and email. No one answered the phone despite multiple attempts. Our office was forced to contact Senator Edward Markey's office to see if they could intervene since ICE was misrepresenting the situation to the Cabo Verde Embassy and no one from ICE was responding to numerous outreach attempts.

d. On October 12, 2018, nine (9) days after the Board issued its decision granting reopening in our client's case, the Cabo Verde Embassy sent an email informing us that it had contacted ICE to remove the client from the list for deportation based on our email to them. Our office also received an email from Senator Markey's office informing us that they have been in touch with the Boston Field Office Field Office Director who was "looking into the matter." Our office made multiple attempts to contact the Boston Field Office via phone and email requesting that their office confirm receipt of our communications and the Board's decision. At the very end of the day, our office was notified that our communications had finally been received and our client would be transferred back to the Boston area on or about October 16, 2018.

e. At the time of this incident with ICE our client had been in the United States for nearly forty (40) years and was a lawful permanent resident that entire time. He also had three U.S. citizen children, a U.S. citizen grandchild, U.S. citizen parents, and an extended family of U.S. citizens and lawful permanent residents.

f. Our client has since had his immigration proceedings terminated for no longer being removable as charged, has been released from detention, and maintains his lawful permanent resident status.

7. **Client # 2 (Trinidadian citizen and lawful permanent resident):**

a. On January 28, 2019, our office contacted the ICE Boston Field Office to speak with our client's deportation officer to see if ICE would consider releasing him given that our client was 65 years old, had not had any criminal issues in a while, was no longer removable as charged, had a motion to reopen pending at the Board, and had a pending Petition for Review with the U.S. Court of Appeals for the First Circuit. We were informed that ICE was still working with the Trinidad Consulate to obtain travel documents for him and while they would consider these factors, it was highly unlikely he would be released.

b. On January 30, 2019, our office received a call from the client's family wherein they informed us that the client was told by someone at his detention facility that he would be released by the end of February 2019.

c. On February 20, 2019, our office was notified very late in the day that ICE intended to remove our client at 5am the next morning by a family member. We filed an emergency habeas petition with the U.S. District Court for the District of Massachusetts around 9:30pm. Our office then contacted ICE at the Suffolk

County House of Correction in Boston, MA as a courtesy to let them know that we had filed the habeas and that they would be in violation of First Circuit Local Rule 18.0 if they removed our client without first notifying that Court. The officers would not acknowledge us as his counsel or confirm that he was being removed the next day.

d. On February 21, 2019, because of the stress of being taken to the airport and told he was being deported, our client became extremely ill and thought he was having a heart attack. He had to be transported to a local hospital thereby stopping his early morning, clandestine, and unlawful removal attempt.

e. Over the next couple of days, several discussions occurred between the attorneys assigned to the habeas petition before the District Court, the Office of Immigration Litigation ("OIL") attorneys assigned to the Petition for Review before the First Circuit, and our office regarding this matter and the violation of our client's rights, not to mention the First Circuit Local Rule 18.0 violation.

f. Thankfully, on February 22, 2019, our client was released from immigration custody. His motion to reopen and terminate his proceedings was granted, and he continues to maintain his lawful permanent residence.

8. **Client # 3 (Guatemalan citizen and prior DACA recipient):**

a. Our client, who was represented by predecessor counsel before the Boston Immigration Court, accepted and received voluntary departure. He also had a pending motion for new trial relating to a conviction that had rendered him ineligible for DACA at the time.

b. We were subsequently hired in the middle of March 2019. Our office pushed to get him a hearing on the motion for new trial, which he later won on constitutional grounds and thus became eligible to reapply for DACA as a result.

c. We also filed a motion to reopen his case and a motion to stay his removal with the Immigration Court on March 18, 2019. The motion to reopen he filed was one he was entitled to by statute given the change in his circumstances. Despite informing ICE of this pending motion, the agency decided to remove him from the U.S. anyway even though it violated his due process rights.

d. The next day, on March 19, 2019, our office filed a habeas petition with the U.S. District Court for the District of Massachusetts. That same day, the Court issued an order telling ICE not to remove him from the jurisdiction of Massachusetts without first providing the Court notice. Although we had become aware that our client had been transferred to New Hampshire, we argued that the decision to transfer our client out of Massachusetts rested with the Boston ICE Field Office located in Burlington, MA. Because our client was already in New Hampshire, ICE decided to ignore the District Court order and deported him to Guatemala the following day.

e. While his motion to reopen was pending with the Immigration Court, our office tried negotiating with the AUSA assigned to the habeas case to see if the Government would parole our client back in. Unfortunately, the Government would not agree to do so, and our client remains outside the U.S. as of this submission. Our client is not able to renew his DACA status outside the U.S.

9. **Client # 4 (Brazilian citizen):**

   a. On February 11, 2019, our office filed a habeas petition with the U.S. District Court for the District of Massachusetts on February 11, 2019. On that day, the District Court issued an order preventing our client's removal from outside the jurisdiction of Massachusetts without prior notice and consent of the Court.

   b. On May 22, 2019, the Government filed a motion to reconsider the February 11, 2019 order with the District Court. The Court ordered briefing on the issue, but as of the date of this submission has not issued a decision with respect to the motion.

   c. However, since that Court issued an order preventing our client's transfer out of the jurisdiction on February 11, 2019, our client has been told more than once that he is on a list to be deported immediately and/or instructed to pack his things. Once, on July 18, 2019, despite this Court's order, his phone account was shut off because he was going to be transferred for removal, and he had to call us through another client's account to tell us what was happening.

   d. Because of these aggressive actions by ICE to try to remove our client, even in violation of a court order, we have had to contact the U.S. Attorney's Office twice – on July 3, 2019 and July 18, 2019 – to make sure that he is not removed and to ensure that ICE complied with the order issued from the District Court. These incidents have caused unnecessary stress on him, his U.S. citizen wife, their six U.S. citizen children, and our office.

10. **Client #5 (Brazilian citizen):**

   a. This client presently has a pending habeas before the U.S. District Court for the District of Massachusetts. On July 26, 2019, the District Court issued an order

preventing our client's removal from outside the jurisdiction of Massachusetts without prior notice and consent of the Court.

b. Additionally, this client has a pending Petition for Review with the First Circuit regarding an issue of first impression before that Court pertaining to his eligibility for cancellation of removal.

c. Despite the fact that the District Court's order is still in place, OIL filed a Notice of Intent to Remove our client pursuant to First Circuit Local Rule 18.0 notifying the First Circuit of the Government's intent to remove him around the middle of October 2019. They did so within less than one hour after receiving our client's passport as part of the terms of the agreement made with the District Court Judge.

d. Even though this client has a current order from the District Court preventing his removal, our office had to draft an emergency stay motion within two days after receiving the Notice of Intent in order to comply with the First Circuit Local Rule 18.0. A decision on that motion is still pending. However, deporting our client while his Petition for Review is pending with the First Circuit will detrimentally affect his eligibility for the relief that he seeks. Despite knowing this, ICE is adamant that they want to remove our client as soon as they are able to.

11. In addition to the specific incidents involving these five clients, our office has witnessed the extremely aggressive removal tactics of ICE with respect to clients who are still within their 30-day window to file their Petitions for Review with a local Circuit Court of Appeals, particularly with our detained clients. In nearly all of those cases, ICE began to initiate the process to execute the removal order almost immediately after the denial from the Board has been issued. This has resulted in clients being transferred to detention facilities in the

southern U.S. and near deportation while our office was weighing the option of filing an appeal within the statutory thirty (30) day window. It has also resulted in several requests for emergency stays and unnecessary stress on our clients and their families.

12. Moreover, our office has several clients who have successfully fought to have their cases reopened while outside the U.S., particularly where they had a conviction vacated on constitutional grounds and are no longer removable as charged in their Immigration Court proceedings. However, despite these successes, our office has been unable to convince the Department of Homeland Security to allow our clients back into the U.S. to be able to attend their reopened Immigration Court proceedings. In fact, we have two clients who have master calendar hearings in March and April of 2020 who still remain in their home countries. We also have another client who got his proceedings reopened and terminated and was thus placed back into lawful permanent resident status. He still had his unexpired resident card and proof of the Immigration Court's decision, but he was pulled off of the airplane as he tried to reenter the U.S. Efforts to get Customs and Border Patrol to allow him entry into the U.S. have also failed, and at this time, we are considering federal litigation to force the Government to allow him back into the U.S.

Dated: September 27, 2019

/s/ *Jeffrey B. Rubin*
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/s/ *Kimberly A. Williams*
Kimberly A. Williams, Esq.
kw@rubinpom.com
NY License # 5401724

Exhibit 7

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Jeff Benson Beaubrun

v. Civil No. 19-cv-835-JL

US Attorney General, et al.

ORDER

Having considered Petitioner's Emergency Motion to Stay Petitioner's Transfer to Louisiana and Removal[1] and it appearing that this is a proper case for its issuance to maintain the status quo pending resolution of the petition for a Writ of Habeas Corpus,[2] this Court GRANTS the Emergency Motion and ORDERS as follows:

1. Respondents are hereby enjoined and prohibited from removing or causing the removal of the Petitioner from the United States. The Petitioner's removal is hereby stayed and shall not proceed.

2. Respondents are hereby enjoined and prohibited from transferring or causing the transfer of the Petitioner outside the jurisdiction of this court.

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[1] Document no. 2. The court held a telephone chambers conference with counsel and was informed that the Immigration Judge denied the petitioner's Motion to Reopen and Motion for Stay, both of which were appealed to the BIA, which intends to decide the motions "two days before" the petitioner's chartered removal flight on August 20, 2019.

[2] See Hussein v. Strafford County Department of Corrections, et al., Civil Case No. 18-cv-273-JL, Document no. 3; Compere v. Nielsen, 358 F.Supp. 3d 170 (2019).

This Order granting the emergency motion shall remain in full force and effect pending further procedural or substantive proceedings of the court.

SO ORDERED.

Joseph N. Laplante
United States District Judge

Dated: August 12, 2019

cc: Gilles R. Bissonnette, Esq.
SangYeob Kim, Esq.
T. David Plourde, AUSA