IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOSE DANIEL GUERRA-CASTAÑEDA, *Plaintiff*, v. UNITED STATES OF AMERICA, *Defendant*.	Civil No. 1:22-CV-10711-NMG

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Defendant concedes that it "failed to comply with the First Circuit's stay order" when it deported Plaintiff from the United States to El Salvador. *See* Def.'s Br. at 1 n.2. However, Defendant claims that it "was plainly a mistake, inadvertently done and without malice or intent." *Id.* Defendant makes this half-hearted concession despite the fact that, through the collective knowledge and actions of its agents, Defendant *did* know about the First Circuit's stay orders and nonetheless *did* intend for Plaintiff to be deported. While on notice of the First Circuit's stay orders, Defendant's agents shackled Plaintiff, forced him to board a plane against his will, and sent him from Louisiana to El Salvador. *See* Compl. ¶64. Petitioner was not accidentally on that plane.[1] And when Attorney Nina Froes informed one of Defendant's agents on the morning of September 13, 2019 of her concerns that Plaintiff may be deported (which apparently had not yet been completed), that agent dismissed such concerns. On September 12, 2019, Plaintiff even told ICE guards about the stay orders when the guards said that he was scheduled to be deported the next morning. *See* Compl. ¶¶41-42. Yet nothing was done to stop the deportation. *See* Compl. *Ex. 14*, Froes Aff. ¶ 11. This deportation occurred in the face of Plaintiff's repeated statements in the removal proceeding that, if he was deported, he would be tortured. *See* Compl. ¶25. Plaintiff's prediction came true. *See* Compl. ¶¶74-84. During his ten months in a Salvadoran jail, Plaintiff was subjected to horrifying conditions and was tortured and beaten, resulting in physical,

[1] For an act to be intentional, there need not be an intent to violate the law—in this case, an intent to violate the First Circuit's stay of removal orders. Here, even if this Court believes that there was no intent to violate the First Circuit's stay orders (despite the fact that Defendant had notice of these orders), Defendant intended to deport Plaintiff and intended him to be removed to El Salvador. Massachusetts law recognizes this "intentional theory" with respect to other claims. For example, when establishing that a defendant committed assault and battery, a prosecutor must prove "that the defendant intended to commit an assault by means of a dangerous weapon, and having intended to commit the assault did touch the victim with the dangerous weapon." *See Commonwealth v. Ford*, 424 Mass. 709, 711 (1997). Here, there can be no reasonable dispute that Defendant engaged in an intentional act in sending Plaintiff on a plane from Louisiana to El Salvador and, thus, intended to deport Plaintiff.

emotional, psychological, and economic harm that continues to this day. *See id*. But for Defendant's unlawful deportation, Plaintiff would not have been in El Salvador and he would not have been tortured.

Any suggestion that the First Circuit was "apparently satisfied with Defendant's response," *see* Def.'s Br. at 1 n.2, is belied by the First Circuit's own statements at the July 27, 2020 oral argument. There, the panelists had unusually harsh words for Defendant, including strongly suggesting that Defendant had not taken its contempt seriously or taken meaningful steps to help Plaintiff up until that point. At oral argument—a transcript of which is attached at *Exhibit A* (July 27, 2020 Transcript)[2]—Judge O. Rogeriee Thompson noted that "[i]ts very odd that knowing that today was oral argument you would not have reached out so that you could have some answers for us [concerning Mr. Guerra-Castañeda's mistreatment in Salvadoran jail]." *Id*. at 31:13-15. Judge David J. Barron added the following after Defendant acknowledged that it had not responded to Plaintiff's request for security protection: "I don't understand the position the Government's saying. We've been represented that he was released. He was concerned for his security and you were reached out to. Is it the Government's response that that's not the type of thing you have to respond to?" *Id.* at 32:7-12. Judge William J. Kayatta further noted: "So to be clear, you get a letter saying this guy's outside of prison now. He's at risk of being killed, he alleges. *He's only there because in violation of our order, your client sent him there*. And yet apparently that hadn't yet prompted you to pick up the phone and say, tell me what we can do to get him protection? Am I correct?" *Id.* at 35:14-19 (emphasis added). Judge Thompson added: "[W]ho's taking this

[2] This Court can take judicial notice of this transcript at the motion to dismiss stage, as it is a public record. *See Hardiman v. United States*, 945 F. Supp. 2d 246, 251 (D. Mass. 2013) ("When considering a motion to dismiss, a court may augment these facts and inferences with data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice.") (internal quotations omitted).

seriously? I mean, there's a pending motion to adjudge the Government in contempt and it sounds like[] you're being more contemptuous …. You know, we scheduled the merits hearing as well as the hearing on the contempt motion for today. It's just shockingly unreasonable for you not to be prepared to address [how to protect Plaintiff]." *Id.* at 36:5-8, 38:18-21.[3]

In the face of all this—and even with Defendant's concession that it made a "mistake" in deporting Plaintiff in violation of the First Circuit's stay orders—Defendant continues to evade responsibility by seeking to deprive Plaintiff of a remedy under the Federal Tort Claims Act ("FTCA"). But Defendant cannot escape responsibility just because it is the government. That is precisely why the FTCA exists. This Court should reject Defendant's failure, through a diffusion of responsibility, to take ownership of its actions and the harm that Defendant caused. Plaintiff is entitled to a remedy for this violation. This case should proceed.

STANDARD FOR MOTION TO DISMISS

In evaluating Defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), "the facts adumbrated in the plaintiff's complaint [must be] taken at face value." *Gordo-González v. United States*, 878 F.3d 32, 35 (1st Cir. 2017). "When considering a motion to dismiss, a court 'may augment these facts and inferences with data points gleaned from documents incorporated by reference into the complaint matters of public record, and facts susceptible to judicial notice.'"

[3] After the July 27, 2020 oral argument, the issue of civil contempt was resolved by the parties through the First Circuit's mediation program (Civil Appeals Management Plan (CAMP)) on June 13, 2022. *See* Order, *Guerra-Castañeda v. Garland*, No. 19-1736 (1st Cir., June 13, 2022). In resolution of this civil contempt issue, Defendant agreed to (i) the payment of an amount to Plaintiff's attorneys reflecting reasonable attorneys' fees in enforcing the First Circuit's stay of removal orders and (ii) join Plaintiff's immigration motion to reopen and terminate his removal proceedings to allow him to pursue his adjustment of status based on the Special Immigrant Juvenile Status. *See Exhibit B*. Plaintiff could not seek compensatory damages as part of this civil contempt process because of Defendant's claim of sovereign immunity as to any compensatory money damages claim. *See* 5 U.S.C. § 702 (waiving sovereign immunity for injunctive and all "relief *other than money damages*" imposed against the government by persons suffering wrongs because of agency action) (emphasis added). Because Plaintiff could not be made whole during the civil contempt proceeding, this FTCA lawsuit became necessary.

Hardiman v. United States, 945 F. Supp. 246, 251 (D. Mass. 2013) (quoting *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011)).

ARGUMENT

Defendant advances five arguments in support of its theory that the United States government cannot be held accountable for its actions. None provide a basis to dismiss this lawsuit at the pleadings stage.

I. 8 U.S.C. § 1252(G) DOES NOT DEPRIVE THIS COURT OF JURISDICTION OVER PLAINTIFF'S CLAIMS

Congress' jurisdictional stripping provision—8 U.S.C. § 1252(g)—only applies to "any cause or claim . . . *arising from* the decision or action by the Attorney General to . . . *execute removal orders*." 8 U.S.C. § 1252(g) (emphasis added). As explained below, because Defendant's unlawful deportation was not done to "execute" a "removal order," § 1252(g) does not apply

A. Overview of 8 U.S.C. § 1252(g)

In *Reno v. AADC*, the Supreme Court held that courts must give § 1252(g) a "narrow reading" and limit its applicability to discretionary decisions. 525 U.S. 471, 487 (1999). The Supreme Court stated that § 1252(g) is not a "'zipper' clause" that "covers the universe of deportation claims," and instead "is much narrower"; it "applies only to [the] three discrete actions" delineated in the statute: "'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* at 482 (emphasis added). The Court found "good reason for Congress to focus special attention" on these three discrete actions because "[a]t each stage the Executive has discretion to abandon the endeavor ...." *Id.* at 483. Calling § 1252(g) a "discretion-protecting provision," the Court stated that it was "clearly designed to give some measure of protection to 'no deferred action' decisions *and similar discretionary determinations*." *Id.* at 487,

485 (emphasis added). The Court further explained:

> There are of course many other decisions or actions that may be a part of the deportation process-such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order.

Id. at 482. But, significantly, the Supreme Court added that "[i]t is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *Id.* (emphasis added). Thus, the Supreme Court found that § 1252(g) is not the "general jurisdiction limitation" that the district court erroneously found it to be here, but rather it is limited to bar review of challenges to discretionary determinations. *Id.* at 482-83.

Defendant suggests that *AADC* "does not say 1252(g) should be interpreted narrowly." Def.'s Br. at 9 n.6. However, since *AADC*, the Supreme Court has reiterated its position that § 1252(g) does not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General," but rather "just those three specific actions themselves." *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality) (characterizing the interpretation of § 1252(g) in *AADC*). At issue in *Jennings* was the legality of immigration detention, including the meaning of the term "arising from" as used in 8 U.S.C. § 1252(b)(9), a neighboring jurisdictional provision. The Court admonished against broadly interpreting that term in an "extreme way." *See id.* at 840. Such a construction would, the Court stated, erroneously render many claims "effectively unreviewable." *Id.*; *see also Anderson v. Moniz*, Civil Action No. 21-11584-FDS, 2022 U.S. Dist. LEXIS 22104, at *10 (D. Mass Feb. 7, 2022) ("[t]he Supreme Court has interpreted that provision somewhat narrowly"); *Hernandez v. Reno*, 63 F. Supp. 2d 99, 101 (D. Mass. 1999) ("By holding that § 1252(g) does not apply to the 'universe of deportation claims,' . . . [*AADC*]

considerably narrowed the sweep of § 1252(g)'s seemingly broad brush.").[4]

B. Plaintiff's FTCA Claims Do Not Arise From Defendant's Execution of His Removal Order

For several reasons, Plaintiff's FTCA claims do not arise from Defendant's execution of his removal order, which had been stayed. Instead, Plaintiff's claims arise from Defendant's unlawful deportation of Plaintiff in violation of the First Circuit's judicial stay of removal orders.

First, Defendant's argument that Plaintiff's FTCA claims arise from the execution of a removal order appears to be predicated on the theory that Defendant had an executable removal order. *See* Def.'s Br. at 12 ("Here, despite the fact there was a court-ordered stay, the underlying removal order had not been vacated at the time of removal and Defendant's actions were taken to execute that order."). Defendant further suggests that "[a] stay of removal does not invalidate the removal order, it merely suspends its operation." Def.'s Br. at 14 n.10. This position is wrong. Defendant did not have an executable removal order.

The First Circuit's judicial stay orders issued on August 30, 2019 and September 11, 2019 suspended any removal order and returned Plaintiff to the "status quo" before the existence of any removal order. As the Supreme Court has explained, a judicial stay order issued by a court of appeals "temporarily suspend[s] the source of authority to act—the order or judgment in question . . . [and thereby] returning to the status quo—the state of affairs before the removal order was entered." *Nken v. Holder*, 556 U.S. 418, 429 (2009); *id*. 428 (defining "stay" as "a suspension of the case" and "temporarily divesting an order of enforceability"). In other words, Defendant

[4] Importantly, the *Jennings* Court referenced a *Bivens* claim "based on allegedly inhumane conditions of confinement" and a "state-law [tort] claim for assault against a guard or fellow detainee" as examples of claims that would be improperly barred were courts to adopt an overly broad reading of the term. *Jennings*, 138 S. Ct. at 840. "[C]ramming judicial review of those questions into the review of final removal orders [under § 1252] would be absurd," the Court held. *Id.*

never executed Plaintiff's removal order. Instead, Defendant physically deported Plaintiff despite having no executable removal order in place. The Ninth Circuit reached this same conclusion in the context of the government's violation of a judicial stay of removal order, finding that "[a] decision or action to violate a court order staying removal . . . falls outside of [§ 1252(g)]'s jurisdiction-stripping reach," and did not deprive the district court of jurisdiction. *See Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018) ("Thus, his claims arise not from the execution of the removal order, but from the violation of our court's order …. Put differently, but for the violation of the stay of removal, [the plaintiff] would not have an FTCA claim at all."). Other courts have reached the same conclusion.[5]

Congress could have written the statute as any action arising from the decision or action by the Attorney General to *remove any alien*. *Cf.* 8 U.S.C. § 1252(g). Or Congress could have "used the term 'related to' instead of 'arising from'" to expand the statute's scope. *Aguilar v. United States Imm. & Customs Enforcement Div. of the Dep't of Homeland Sec.*, 510 F.3d 1, 10 (1st Cir. 2007). However, Congress expressly limited the scope to any actions or decision "*arising from* the decision or action by the Attorney General to *. . . execute removal orders against any alien*." 8 U.S.C. § 1252(g) (emphasis added). Indeed, Congress was well aware of the effect of stay of removal orders issued by the courts of appeals. For instance, in the context of the pre-or-post removal order detention authorities, Congress intended that the removal period does not begin at

[5] *See Turnbull v. United States*, No. 1:06cv858, 2007 U.S. Dist. LEXIS 53054, at *12, 15 (N.D. Ohio July 23, 2007) ("[T]he focus of the present lawsuit is the damages that flowed from defendants' refusal to abide by the stay order issued in the habeas proceeding and the forced deportation that followed. Because plaintiff's action does not arise from defendants' original decision to execute a removal order, § 1252(g) does not rob this Court of subject matter jurisdiction."); *Roe v. United States*, No. 18-CV-2644 (VSB), 2019 U.S. Dist. LEXIS 43124, at *11 (S.D.N.Y. Mar. 8, 2019) (same for the mandatory administrative stay); *Avalos-Palma v. United States*, Civil Action No. 13-5481(FLW), 2014 U.S. Dist. LEXIS 96499, at *24-5 (D.N.J. July 16, 2014) ("[T]he Court disagrees with the Government's assertion that Plaintiff's claims arise from ICE's decision to 'execute' his removal order. Rather, Plaintiff's FTCA claims stem from ICE's failure to obey the statutorily imposed mandatory [administrative] stay provision under [the statute].").

the issuance of a final administrative removal order if a court of appeals stays the removal.[6] Thus, Defendant's suggestion that Congress intended the government's unlawful deportations to constitute the "execut[ion] [of] removal orders" under 8 U.S.C. § 1252(g)'s jurisdiction-stripping provision not only is textually wrong, but also is unsupported by the overall structure of Congress' immigration enforcement regime. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) (Courts "normally assume that Congress is 'aware of relevant judicial precedent' when it enacts a new statute.") (quoting *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010)); *Nken*, 556 U.S. at 429 (quoting and citing *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

Second, even assuming that Defendant's improper removal of Plaintiff could technically relate to the administrative agency's prior removal order, the analysis does not end there. Rather, courts must apply the limiting principle adopted in *AADC*: that § 1252(g) strips jurisdiction over *only discretionary decisions* related to the commencement of proceedings, adjudication of cases, and execution of removal orders. *AADC*, 525 U.S. at 482. Here, Plaintiff's claims do not challenge the exercise of discretion; rather, he contends that Defendant's officers violated First Circuit orders designed to protect Plaintiff from deportation and torture. *See Nken*, 556 U.S. at 421 (noting that a stay order is important because, "if a court takes the time it needs, [absent a stay order] the court's decision may in some cases come too late for the party seeking review"). And following the issuance of the First Circuit's stay of removal orders, Defendant had *no* discretion to deport him.

[6] *See* 8 U.S.C. § 1231(a)(1)(B)(ii) (the removal period does not begin until a federal court's final decision if "the removal order is judicially reviewed and if a court orders a stay of the removal of the alien"); *Hechavarria v. Sessions*, 891 F.3d 49, 57 (2d Cir. 2018) ("We observe that all other circuits to have considered this issue [of whether the pre-removal order detention authority governs once a court of appeals issues a judicial stay order in the pending petition for review] have arrived at the same conclusion [that the pre-removal order detention governs]."); *see also* 8 U.S.C. § 1252(b)(3)(B) ("Stay of order"; "Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.").

In other words, Plaintiff's claims are predicated on unlawful—not discretionary—conduct. *See AADC*, 525 U.S. at 485 ("[§ 1252(g)] seems clearly designed to give some measure of protection to ... discretionary determinations.") (emphasis added); *see also Arce*, 899 F.3d at 801 ("Where the Attorney General totally lacks the discretion to effectuate a removal order, § 1252(g) is simply not implicated.")

Third, Defendant has cited no case holding that a violation of a judicial stay of removal order is covered under § 1252(g). The cases relied upon by Defendant—in particular, *Silva v. United States*, 866 F.3d 938 (8th Cir. 2017) and *Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001)—are distinguishable because they, unlike *Arce*, dealt with administrative stays of removal, not the government's violation of *judicial stay orders*. *See Silva*, 866 F.3d at 940 (administrative stay of removal); *Foster*, 243 F.3d at 213 (same); *cf. Arce*, 899 F.3d at 800 (judicial stay order); *Turnbull*, 2007 U.S. Dist. LEXIS 53054, at *14-15 (same). In fact, none of the district court cases Defendant cites involved a violation of judicial stay orders.[7] Under *Nken*, a judicial stay order temporarily suspends the underlying removal orders—an action different from an agency merely blocking the execution of the existing removal order. *Cf. Silva*, 866 F.3d at 940 ("But the removal order here still existed after the administrative appeal was filed, and the authorities mistakenly executed the order."); *see, e.g., Ramirez v. United States*, No. CV 17-2757 PSG (ASx), 2018 U.S. Dist. LEXIS

[7] *See* Def.'s Br. at 12 n.9; *Kong v. United States*, No. 20-10119-MPK1, 2021 U.S. Dist. LEXIS 55976, at *9 (D. Mass. Mar. 23, 2021) (Kelley, M.J.) (immigration administrative detention), *appeal pending*, No. 21-1319 (case argued on Jan. 6, 2022); *Tsering v. United States Imm' & Customs Enforcement*, 403 F. App'x 339 (10th Cir. 2010) (directly seeking a judicial stay of deportation); *Viana v. President of the United States*, 2018 DNH 073, 2018 U.S. Dist. LEXIS 55626 (D.N.H. Apr. 2, 2018) (same); *Xiaoyuan Ma v. Holder*, 860 F. Supp. 2d 1048, 1050-51 (N.D. Cal. 2012) (same); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1067-70 (N.D. Ill. 2007) (Fourth Amendment claim); *Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013) (same); *Sissoko v. Rocha*, 509 F.3d 947, 948 (9th Cir. 2007) (same); *Magallanes v. United States*, 184 F. Supp. 3d 1372, 1373-74 (N.D. Ga. 2015) (lawfulness of administrative deportation); *Cagnant v. United States*, No. 18-22267-CIV-MORE, 2019 U.S. Dist. LEXIS 234210 (S.D. Fla. Jan. 10, 2019) (same); *Candra v. Cronen*, 361 F. Supp. 3d 148, 152 (D. Mass. 2019) (directly seeking a judicial stay of deportation); *Guardado v. United States*, 744 F. Supp. 2d 482, 485 (E.D. Va. 2010) (lawfulness of administrative deportation); *Alcaraz v. United States*, No. C-13-511 MMC, 2013 U.S. Dist. LEXIS 124051 (N.D. Cal. Aug. 29, 2013) (same).

223797, at *9-10 (C.D. Cal. Nov. 1, 2018) (distinguishing the case from *Arce* because the court interpreted *Arce* as "limited to cases where the Government's authority to execute a removal order *is deprived by a court order*") (emphasis added).[8]

Even if this Court were to conclude that *Silva* and *Foster* are on point, those non-binding cases were wrongly decided because they are based on a mistaken reading of *AADC*. Based on *Silva* and *Foster*, Defendant suggests that § 1252(g) applies to not only discretionary actions, but also mandatorily prohibitive actions. *See* Def.'s Br. at 6-11. However, the Supreme Court explicitly held that § 1252(g) is a "narrow" provision "directed against a particular evil: attempts to impose judicial constraints upon *prosecutorial discretion*." *AADC*, 525 U.S. at 485 n.9 (emphasis added); *see also INS v. St. Cyr*, 533 U.S. 289, 311 n.34 (2001) (noting that § 1252(g) applies only "to three types of *discretionary* decisions by the Attorney General") (emphasis added); *Lopez-Reyes v. Gonzales*, 496 F.3d 20, 22 (1st Cir. 2007) (explaining that "at the time § 1252(g) was enacted, the [DHS] had been engaging in a practice known as 'deferred action' through which the service could 'decline to . . . execute a final order of deportation'") (quoting *AADC*, 525 U.S. at 484); *but see Jimenez v. Nielsen*, 334 F. Supp. 3d 370, 383 (D. Mass 2018) (§ 1252(g) "does not limit itself to 'discretionary' decisions") (Wolf, J.)[9]; *Kong*, 2021 U.S. Dist. LEXIS 55976, at *9

[8] In contrast, the regulation governing administrative stays of removal does not appear to have the same effect of temporarily returning the proceedings back to the moment before the removal order was entered. *See* 8 C.F.R. § 1003.6(a) ("the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed"). Unlike an administrative stay of removal, a judicial stay of removal order does not only suspend the Board of Immigration Appeals' removal order, but also the underlying Immigration Judge's order. *See Molina-Diaz v. Wilkinson*, 989 F.3d 60, 63 (1st Cir. 2021) ("Because the BIA adopted and discussed the IJ's findings and conclusion, we examine both decisions."); Compl. *Ex. 13* (directing the parties to focus on both the Immigration Judge and the Board of Immigration Appeals' decisions on the protection under the Convention Against Torture).

[9] *Jimenez* is distinguishable because it directly challenges the government's removal of noncitizens through the habeas corpus process. *Jimenez*, 334 F. Supp. 3d at 382. As suggested by the district court, the decision of whether to administratively stay a deportation was discretionary and "directly part of a decision to execute a removal." *Id*. at 383 (quoting *Moussa v. Jenifer*, 389 F.3d 550, 554 (6th Cir. 2004). However, in *Jimenez*, there was no judicial stay of removal order that would have cabined the discretion of ICE to execute removal.

(same) (Kelley, M.J.), *appeal pending*, No. 21-1319 (case argued on Jan. 6, 2022).[10] *Foster* not only conflicts with *AADC*'s limiting principle but was also decided without the benefit of the *Jennings* Court's position that applying § 1252(g) to bar damages claims would be "absurd." *Jennings*, 138 S. Ct. at 840.[11]

Finally, should this Court have any doubt about the ambiguity of the statutory text, it should apply the presumption of reviewability doctrine. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). Without this Court's judicial review, there are no other alternatives for a judicial review of Plaintiff's suffering stemming from Defendant's unlawful deportation in violation of the First Circuit's judicial stay of removal orders. *See Arce*, 899 F.3d at 801 (applying the strong presumption of a judicial review doctrine).

For all of these reasons, this Court should reject Defendant's § 1252(g) argument and allow Plaintiff's claims to proceed.

II. THE FOREIGN COUNTRY EXCEPTION TO FTCA DOES NOT BAR PLAINTIFF'S FTCA CLAIMS

The foreign country exception to the FTCA does not bar Plaintiff's FTCA claims at the pleading stage because "the last act necessary to establish liability occurred" in the United States. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 705 (2004).

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[10] *Kong* is distinguishable because it does not involve a mandatory prohibition on the government, but rather discretionary detention. Defendant also cites *Michel v. Mayorkas*, No. 4:20-cv-10885-IT, 2021 U.S. Dist. LEXIS 38556, at *10 (D. Mass. Mar. 2, 2021) (Talwani, J.). This case is off point because the issue in question—namely, whether "USCIS erred in closing [the plaintiff's] adjustment application for lack of jurisdiction"—had nothing to do with the removal order or the commencement of removal proceedings. *Id*. at *9-10. In any event, the district court denied the government's Section 1252(g) argument.

[11] The better-reasoned dissenting opinion in *Silva* supports Plaintiff's position. There, Judge Kelly opined that § 1252(g) did not apply to the plaintiff's claim because the government's obligation to adhere to the automatic stay regulation is mandatory, not discretionary. *Silva*, 866 F.3d at 942-43 (Kelly, J. dissenting) ("Silva's claims arise out of the government's violation of a mandatory automatic stay of the removal order."); *see also Arce*, 899 F.3d at 801 (citing *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1117 (9th Cir. 2001)); *Avalos-Palma*, 2014 U.S. Dist. LEXIS 96499, at *24-25 (removal in violation of mandatory administrative stay did not arise from execution of removal order); *Garcia v. AG of the United States*, 553 F.3d 724, 729 (3d Cir. 2009) (§ 1252(g) did not foreclose the plaintiff's claim because it was "not challenging the discretionary *decision* to commence proceedings") (emphasis in original).

Congress created several exceptions to FTCA claims, including the foreign country exception. 28 U.S.C. § 2680(k) (stating that the FTCA "shall not apply to" … "[a]ny claim arising in a foreign country."). In interpreting this exception, the Supreme Court in *Sosa* rejected the Ninth Circuit's so-called headquarter doctrine, which relied on the location of the decisions made in the United States when the acts occurred in a foreign country. 542 U.S. at 707. Since *Sosa*, several courts have focused the foreign country exception inquiry on the location where "the last act necessary to establish liability occurred." *See Sosa*, 542 U.S. at 705. As Defendant's cited authorities show, the foreign country exception forecloses any derivative injuries stemming from the main injury if *this injury occurred in a foreign country*. Def.'s Br. at 17 n.12.[12]

However, in this case, the location of "the last act necessary to establish liability occurred" was in the United States—namely, Defendant's physical deportation of Plaintiff by boarding him on a plane in Louisiana. The suffering Plaintiff has endured since the deportation stems from this deportation in the United States. As Judge William J. Kayatta noted at oral argument in the First Circuit contempt proceeding, Plaintiff was "only there because in violation of our order, your client [the government] sent him there." *See* *Exhibit A* at 35:14-19. Defendants' affidavits in the undelrying contempt proceeding further confirm that the deportation—including the acts leading to Defendant's contempt—occurred in the United States. Indeed, there appear to have been few, if any, steps taken by Defendant to actually comply with the First Circuit's September 11, 2019

[12] *See Doe v. Meron*, 929 F.3d 153, 167 (4th Cir. 2019) (all injuries occurred "on an American military base in a foreign country"); *S.H. by Holt v. United States*, 853 F.3d 1056, 1061-62 (9th Cir. 2017) (the main injury—premature birth—occurred in Spain); *Gross v. United States*, 771 F.3d 10, 12-13 (D.C. Cir. 2014) (the main injury occurred in Cuba); *Gil-Perenguez v. United States*, 449 F. App'x 781 (11th Cir. 2011) (unpublished) (the last act necessary to establish liability occurred in Colombia); *Hernandez v. United States*, 757 F.3d 249, 258 (5th Cir. 2014) (finding that the injury occurred in Mexico because "Hernandez was standing in Mexico"), *vacated and reinstated on en banc*, 785 F.3d 117 (5th Cir. 2015)*, but was vacated by the Supreme Court in Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam)

stay of removal order before the unlawful deportation commenced.[13]

Many courts have applied the same inquiry and focused on whether the ***main*** injury occurred in the United States or a foreign country. *See, e.g., Arce*, 899 F.3d at 801 n.5 (finding that the plaintiff's "injury clearly occurred in the United States when [Defendant] removed him from Adelanto and deported him to Mexico"); *Roe v. United States*, No. 18-CV-2644 (VSB), 2019 U.S. Dist. LEXIS 43124, at *14 (S.D.N.Y. Mar. 8, 2019) ("because the tortious conduct underlying each of Plaintiff's claims against the United States and at least some of his injuries resulting from that conduct occurred in the United States, the foreign-country exception does not apply"); *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1301 n.18 (M.D. Ga. 2012) (noting that the injury "originated in the United States"); *S.H. by Holt*, 853 F.3d at 1061 (for the purpose of the foreign country exception, "we ask only where 'the last act necessary to establish liability occurred'") (quoting *Sosa*, 542 U.S. at 705).[14]

Defendant claims that the Ninth Circuit's decision in *Arce*—which rejected the government's foreign country exception argument in an FTCA case where there was unlawful deportation in violation of the Ninth Circuit's judicial stay order—cannot be reconciled with *Sosa*.

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[13] *See* Compl. *Ex. 15*, ¶¶6-7 (Supervisory Detention and Deportation Officer Robert G. Hagan based in Louisiana Field Office testifying that Plaintiff "was misakenly not returned to ERO [Enforcement and Removal Operations] Boston Field Office as he should have been due to the fact that that ERO had moved him to one of the New Orleans outlying facilities and the transferring officers mistakenly forgot to have him returned …. [Plaintiff] was [then] erroneously re-manifested by officers at [the Alexandria Staging Facility in Louisiana] who were under the mistaken belief that the stay of removal had been cleared and the subject could be removed"); *Ex. 17*, ¶¶ 7-8 (Deportation Officer Glen W. Noblitt in Louisiana Field Office testifying that, "[a]s a result of my erroneous belief that [Plaintiff] had no stay or other impediment to removal, I requested that [ICE Air Operations] Mesa, Arizona add [Plaintiff] to the next flight to El Salvador.").

[14] *See also Doe v. Meron*, Civil Action No. PX-17-812, 2018 U.S. Dist. LEXIS 127474, at *27 (D. Md. July 30, 2018) (for the purpose of the foreign country exception, "[a] cause of action 'arises' where 'the last act necessary to establish liability occurred . . . i.e., the jurisdiction in which injury was received'") (quoting *Sosa*, 542 U.S. at 705), *affirmed by Doe v. Meron*, 929 F.3d 153 (4th Cir. 2019); *Torres-Colón v. United States*, No. 15-3037 (JAG), 2017 U.S. Dist. LEXIS 21185, at *6 (D.P.R. Feb. 13, 2017) (finding that "the last act necessary to establish liability occurred" in Afghanistan) (quoting *Sosa*, 542 U.S. at 705); *Gil-Perenguez*, 449 F. App'x at 783 (focusing on the location of "the last act necessary to establish liability occurred") (quoting *Sosa*, 542 U.S. at 705).

Def.'s Br. at 18. In support of this position, Defendant cites the Ninth Circuit's decision in *S.H. by Holt*. Def.'s Br. at 17 n.12 (citing *S.H. by Holt*, 853 F.3d at 1061-62). But this case does not help Defendant. *S.H. by Holt*'s central holding is that the dispositive inquiry for the purposes of the foreign country exception is "where 'the last act necessary to establish liability occurred,' . . . without taking into account what the plaintiff knew or did not know." *S.H. by Holt*, 853 F.3d at 1061 (quoting *Sosa*, 542 U.S. at 705)). In *Arce*, the Ninth Circuit applied this holding of *S.H. by Holt* in assessing where the main injury occurred, concluding that the foreign country exception did not apply because the deportation occurred in the United States. *Arce*, 899 F.3d at 801 n.5. This Court should make the same determination here.

Defendant similarly fails to acknowledge the continuing harm (e.g., emotional distress) Plaintiff endured *after* Plaintiff's return to the United States—harm which stems from Plaintiff's deportation itself and would not be covered by the foreign country exception. Even if Plaintiff's emotional suffering in El Salvador should be excluded from the covered FTCA claims (and it should not), then Defendant must nonetheless agree that the continuing emotional harm suffered by Plaintiff *after* his arrival in the United States is not excluded under the foreign country exception because *some parts* of this emotional distress emanating from the deportation have occurred in the United States. Thus, this Court should reject Defendant's foreign country exception claim at this stage. *See Roe*, 2019 U.S. Dist. LEXIS 43124, at *14 ("Whether the foreign-country exception may prevent Plaintiff from recovering for certain of his injuries is a question to be determined at trial."); *Lyttle*, 867 F. Supp. 2d at 1301 n.18 (same).

Finally, Defendant disputes that there was nexus between its unlawful deportation in the United States and the harm Plaintiff endured in El Salvador. Def.'s Br. at 18 ("the violation of the stay in and of itself did not cause the alleged mistreatment in El Salvador"), 19 n.14; *compare*

Def.'s Stat. of Undisputed Facts (DN 17) at 6 ¶15, 20 ¶15 (disputing the foreseeability) *with* Compl. ¶¶33-34, 40, 94-96, 102. But this factual dispute concerning the nexus between the main injury (deportation) and the location of the subsequent harms stemming from this injury are questions to be answered at trial. *Roe*, 2019 U.S. Dist. LEXIS 43124, at *13 ("Whether the foreign-country exception may prevent Plaintiff from recovering for certain of his injuries is a question to be determined at trial."); *Lyttle*, 867 F. Supp. 2d at 1301 n.18 ("The Court reserves for trial the issue of whether Lyttle's damages for continuing harm that originated in the United States are recoverable.").

III. PROXIMATE CAUSATION CANNOT BE RESOLVED AT THE PLEADING STAGE BECAUSE THE COMPLAINT ADEQUATELY PLEADS THIS ELEMENT

Similar to Defendant's foreign country exception claim, Defendant suggests that this Court can adjudicate the proximate causation question at the pleading stage. Defendant is wrong. "The sole inquiry under Rule 12(b)(6) is whether, construing the well-pleaded facts of the complaint in the light most favorable to the plaintiffs, the complaint states a claim for which relief can be granted." *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 7 (1st Cir. 2011). Here, Plaintiff's complaint alleges a "plausible entitlement to relief" for his claims. *Rodriguez-Ortiz v. Margo Caribe, Inc.*, 490 F.3d 92, 95 (1st Cir. 2007).

Defendant also requests that, in the alternative, "its motion be evaluated pursuant to FRCP 56" if this Court believes that Defendant's "Statement of Undisputed Facts" requires conversion of Defendant's motion into one for summary judgment. Def.'s Br. at 1 n.1. But this Court cannot, at the pleadings stage, adjudicate this case through a motion for summary judgment where Defendant "disputes the foreseeability" of Plaintiff's physical, emotional, and psychological suffering stemming from the unlawful deportation. Def.'s Br. at 20 n.15; Fed. R. Civ. P. 56(c).

The accompanying declaration of Attorney SangYeob Kim explains the necessity of discovery in this case. *See* Exhibit C; Fed. R. Civ. P. 56(d)(1) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may … defer considering the motion or deny it."). Indeed, courts have routinely rejected motions for summary judgment filed at the pleadings stage, especially where the plaintiff has not had the opportunity to test the defendant's defenses in discovery.[15]

"Under Massachusetts law, proximate cause requires a showing by the plaintiff, first, that the loss was a foreseeable consequence of the defendant's negligence, second, that the defendant's negligence was a but-for cause of the loss, and third, that the defendant's negligence was a substantial factor in bringing about the loss." *Jorgensen v. Massachusetts Port Auth.*, 905 F.2d 515, 522-23 (1st Cir. 1990). In its motion, Defendant appears to challenge the first two prongs of this proximate cause analysis. First, Defendant contends that Plaintiff's emotional, psychological, and physical suffering was not a foreseeable consequence of Defendant's unlawful deportation. Def.'s Br. at 19 (arguing that his injuries were not "within the reasonably foreseeable risks of harm created by the defendant's negligent conduct"). Second, Defendant contends that Defendant's unlawful deportation was not a but-for cause of this harm. *Id.* (arguing that "[i]t is not the removal itself which caused Plaintiff's harm … [i]t was the Salvadoran government," and the "removal was a necessary link in the series of events that led to the alleged harm"). Both arguments are unavailing.

[15] *See Winfield v. Lawrence Gen. Hosp.*, Civil Action No. 1:16-cv-11482-IT, 2017 U.S. Dist. LEXIS 44435, at *7 (D. Mass. Mar. 27, 2017) ("The court therefore does not consider the statements in the reports as true at the motion-to-dismiss stage, without prejudice to the officers submitting the reports as exhibits to affidavits in support of an early motion for summary judgment. If such a motion is filed before discovery commences, Plaintiff may respond by affidavit stating what discovery, if any, she seeks in order to present facts essential to justify any opposition."); *Moore v. Brouillette, Civil Action No. 20-1060 (CKK)*, 2020 U.S. Dist. LEXIS 232971, at *13 (D.D.C. Dec. 11, 2020) (denying motion for summary judgment at pleadings stage where "Plaintiff's declaration adequately sets forth the specific facts he intends to discover and indicates how those facts are necessary to this litigation").

A. Plaintiff Has Adequately Alleged Foreseeability of Harm

Plaintiff has adequately pled that his emotional, psychological, and physical suffering in El Salvador—and its continuing harm in the United States—were foreseeable. The foreseeability test assesses "[n]ot what actually happened, but what the reasonably prudent person *would then have foreseen as likely to happen*." *Swift v. United States*, 866 F.2d 507, 510 (1st Cir. 1989) (emphasis in original) (applying Massachusetts law) (quoting 3 F. Harper, F. James, Jr. & O. Gray, *Law of Torts* § 16.9 at 468-69 (2d ed. 1986)); *Jupin v. Kask*, 447 Mass. 141, 148 (2006) ("[a]n act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm" and "a third party's criminal conduct is not unforeseeable if 'the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a . . . crime.'") (quoting Restatement (Second) of Torts, §§ 302B, 448).

Here, Defendant had ample objective bases to foresee that Plaintiff's detention and torture were highly likely to occur if he was deported. *See Malave-Felix v. Volvo Car Corp.*, 946 F.2d 967, 971 (1st Cir. 1991). At the outset, Plaintiff made repeated statements in the immigration proceeding that, if he was deported, he would be tortured. *See* Compl. ¶¶25, 32-34. This was the very reason he was seeking immigration relief in the first place. For example, in his August 29, 2019 Motion for Emergency Stay of Removal that the First Circuit granted, Plaintiff, through counsel, said that "he would suffer irreparable injury if he is forced to return to El Salvador because it is evident from the record that he will be detained while his legal proceedings wind through the Salvadoran courts." *See* Compl. ¶¶32-34; *id.*, *Ex. 10* at 13-14. And, in granting this August 29, 2019 motion and agreeing to stay removal, the First Circuit suggested that Plaintiff had a strong

likelihood of success on the merits of his Convention Against Torture claim. Under *Nken*, a strong likelihood of success on the merits is one of "the most critical" factors in granting a stay of removal. *Nken*, 556 U.S. at 434. Indeed, the First Circuit appears to have been receptive to Plaintiff's torture claim. The First Circuit's second judicial stay order, issued on September 11, 2019, explicitly instructed the parties to focus on "the [imprisonment-based] CAT claim." Compl. *Ex. 13*.

The First Circuit's concern was not unreasonable based on the administrative record. In his immigration case, there was a Red Notice from the INTERPOL suggesting (falsely) that Plaintiff "has been identified by others in El Salvador as a member of the MS-13 gang"—a fact that would lead him to be detained in an "extraordinary measures" prison for gang members. Compl. *Ex. 3* at 7. According to the administrative record, the total prison population in El Salvador was about 38,000. *See Exhibit D* (country conditions excepts from the certified administrative record) at 5. Among them, 17,614 inmates (46 percent) were either current or former gang members. *Id.* at 6. Only gang members were detained in the prisons governed under "extraordinary measures." *Id.* at 36. These "extraordinarily measured" prisons had 14,213 inmates. *Id.* at 6. Thus, solely based on the numbers provided by the administrative record, the probability that Plaintiff would be detained in one of these prisons—and tortured as a result—was 80% (14,213/17,614 x 100). Moreover, Defendant "knew that in these prisons human rights violations routinely occurred, and prisoners died while in detention—including by homicide." Compl. ¶34. Thus, the likelihood of detention and torture was beyond the preponderance of evidence when this case was in the First Circuit. *See Diaz Ortiz v. Garland*, 23 F.4th 1, 29 (1st Cir. 2022) (en banc).

In challenging foreseeability, Defendant also notes that "[i]t is unclear whether the alleged harm would have occurred in any event, because the First Circuit's stay of removal was temporary." Def.'s Br. at 20 n.15. Defendant adds that "[i]t is certainly a likely possibility that absent premature

removal, Plaintiff would have been removed and returned to El Salvadoran custody given that Plaintiff had been ordered removed by an immigration judge and such removal order affirmed by the [BIA] and he faced outstanding serious criminal charges in El Salvador." *Id.*[16] But Defendant's speculation as to whether Plaintiff would have been deported anyway is beside the point. The First Circuit stayed the deportation orders in this case. Setting aside the fact that the First Circuit did *not* deny Plaintiff immigration relief in this case, the only pertinent inquiry is whether a reasonably prudent person would then have foreseen this suffering as likely to happen if Plaintiff was deported in violation of the First Circuit's judicial stay orders. Plaintiff's allegations meet this standard. As alleged, Defendant owed Plaintiff a duty of care to not deport him in violation of the First Circuit's judicial commands. *See* Compl. ¶¶90-91, 100. Defendant breached this duty, and Plaintiff suffered significant harm as a result. *See* Compl. ¶¶92, 101.

B. Plaintiff Has Adequately Pled But-For Causation

Plaintiff has adequately pled that Defendant's unlawful deportation was a but-for cause of and a substantial factor in bringing the harms Plaintiff has suffered in El Salvador and the United States. Defendant appears to argue that the Salvadoran government's detention and torture of Plaintiff was an intervening event cutting off Defendant's liability. However, the "intervening negligent conduct of a third person will not relieve the original tortfeasor from liability where such conduct was reasonably foreseeable." *Staelens v. Dobert*, 318 F.3d 77, 79 (1st Cir. 2003); *Genereux v. Am. Bryllia Corp.*, 577 F.3d 350, 375 (1st Cir. 2009) ("Under Massachusetts law, a

[16] The outstanding criminal charges in El Salvador did not affect any of Plaintiff's eligibility for the relief he sought, including under the Convention Against Torture. Every noncitizen, even with serious criminal convictions can apply for protection under the Convention Against Torture. *See, e.g., Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682 n.1 (2013) ("[a] conviction of an aggravated felony has no effect on CAT eligibility"); *Neguise v. Holder*, 555 U.S. 511, 514 (2009) ("[t]h[e] so-called 'persecutor bar' . . . does not disqualify an alien from receiving a temporary deferral of removal under the Convention"). Further, while there is a serious nonpolitical crime bar for asylum and withholding of removal, neither the immigration judge nor the BIA invoked this ground in this case. *Compare Cantarero v. Holder*, 734 F.3d 82, 87 (1st Cir. 2013) *with* Compl. *Exs. 3, 5*.

'defendant is liable for the foreseeable intervening conduct of a third party whether that conduct is negligent or not.'"). Because, as addressed above, any reasonably prudent person would anticipate the detention and torture upon the unlawful deportation, Defendant's motion to dismiss should be rejected. Without the unlawful deportation, none of this suffering would have occurred.

Lastly, for the same reasons, Defendant's summary judgment argument must be rejected. Proximate causation [including intervening causation] is normally a [fact-finder] question." *Genereux*, 577 F.3d at 375 (citing *Solimene v. B. Grauel & Co.*, 399 Mass. 790, 507 N.E.2d 662, 666 (Mass. 1987)).

IV. THE EXCLUSIVELY-GOVERNMENTAL-CONDUCT DOCTRINE DOES NOT APPLY

Defendant's argument that it cannot be liable because there is no private analogue for Plaintiff's claims under Massachusetts law is without merit.

For Defendant to be liable under the FTCA, there must be "comparable private liability" under the governing state law. *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 536-37 (1st Cir. 1997) ("violation of a federal statute by governmental actors does not create liability unless state law would impose liability on a 'private individual under like circumstances'") (quoting 28 U.S.C. § 2674). As Defendant acknowledges, the phrase "under like circumstances" under 28 U.S.C. § 2674 does not mean "same circumstances." Def.'s Br. at 22; *Indian Towing Co. v. United States*, 350 U.S. 61, 67 (1955) (rejecting argument that Defendant cannot be negligent under FTCA for performing "uniquely governmental" actions because "all Government activity is inescapably uniquely governmental"). Notwithstanding this acknowledgment, Defendant argues that a private person or entity "would never encounter" the circumstance Plaintiff faced. Def.'s Br. at 22. Although Massachusetts law does not explicitly impose a duty on a private actor to refrain from

deporting another person, the Supreme Court emphasized that this Court must "look further afield" for the private analogue analysis. *United States v. Olson*, 546 U.S. 43, 46 (2005). Based on this instruction, courts have rejected Defendant's argument in other unlawful deportation cases. *See Roe*, 2019 U.S. Dist. LEXIS 43124, at *14-17 (rejecting Defendant's uniquely governmental action argument because New York law allowed "tort claims against private citizens who disregarded or violated a statutory duty"); *Avalos-Palma v. United States*, Civil Action No. 13-5481(FLW), 2014 U.S. Dist. LEXIS 96499, at *36-37 (D.N.J. July 16, 2014) (same under New Jersey law); *Lyttle*, 867 F. Supp. 2d at 1301 (same under Georgia law).

Both negligence and negligent infliction of emotional distress claims have a private analogue in Massachusetts. And a wrongful deportation claim is analogous to a private person being liable for failing to prevent harm on another private person inflicted by third parties. Under Massachusetts law, "liability may arise solely from the violation of an affirmative duty to act with reasonable care to prevent harm to another caused by a third person." *Irwin v. Ware*, 392 Mass. 745, 760 (1984) (collecting cases). Under this theory of liability, "a special relationship" exists "between the person posing the risk and the one who can prevent the harm." *Lev. v. Beverly Enters-Massachusetts*, 457 Mass. 234, 243 (2010). One category of this special relationship is "one having custody over another." *Id.*; *Williams v. Steward Health Care System, LLC*, 480 Mass. 286, 296-97, 103 N.E.3d 1192 (2018) ("[a] special relationship arises out of the level of control exercised by the custodian"). Under this special relationship, Massachusetts courts have permitted negligence and negligent infliction of emotional distress claims. *See, e.g., Mullins v. Pine Manor College*, 355 Mass. 450, 452 (1969) (duty of a college for the protection of resident students).[17]

[17] *See also Carey v. New Yorker of Worcester, Inc.*, 355 Mass. 450, 452 (1969) (duty of a restaurateur for the protection of patrons); *Jupin v. Kask*, 447 Mass. 141, 152 (2006) (duty of property owner to secure gun from a person known to

This liability is further proven with the evidence that the private person, "while in a supervisory capacity over another person, violates a [legally] imposed duty." *Avalos-Palma*, 2014 U.S. Dist. LEXIS 96499, at *36; *see, e.g., Swift v. United States*, 866 F.2d 507, 508 (1st Cir. 1989) (in Massachusetts, "proof that a statute has been violated constitutes some evidence of negligence 'as to all consequences that statute was intended to prevent'") (quoting *Adamian v. Three Sons, Inc.*, 353 Mass. 498 (1968)).[18]

Defendant, as the legal custodian of Plaintiff, owed him a duty to protect him from deportation in light of the First Circuit's judicial stay of removal orders. *See Sallaj v. United States Immigration & Customs Enf't*, No. 20-167-JJM-LDA, 2022 U.S. Dist. LEXIS 72857, at *7 (D.R.I. Apr. 24, 2020) ("The Constitution imposes upon the Government a duty to assume responsibility for a detainee's safety and general well-being while in custody"); 8 U.S.C. § 1252(b)(3)(B) ("Stay of Order") ("Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, *unless the court orders otherwise*") (emphasis added); *Wireless Specialty Apparatus Co. v. Priess*, 246 Mass. 274, 277, 140 N.E. 793 (1923) ("So long as the restraining order remained in force the defendant was bound to respect and obey it."); *Irving & Casson-A. H. Davenport Co. v. Howlett*, 229 Mass. 560, 563, 118 N.E. 901 (1918) (The order's "purpose was to hold matters in statu[s] quo pending the litigation between the parties to the suit. It was the plain duty of the defendants while the order was in force to obey it."). Moreover,

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have a history of violence and mental instability); *Pratt v. Martineau*, 69 Mass. App. Ct. 670, 679-80 (2007) (a mother's negligent infliction of emotional distress claim against the licensed gun owner who was liable for failing to prevent a third person from recklessly using the gun at the owner's home and killing the mother's son).

[18] *See also Vasquez v. Potter & Co.*, 2007 Mass. App. Div. 26, 28 (violation of a statute "may be considered as to whether summary judgment on the plaintiff's count for negligent infliction of emotional distress was appropriate" in a damage claim by a former employee against the former employer); *Lindsey v. Massios*, 372 Mass. 79, 360 N.E.2d 631 (1977) (an injured visitor to a building may have a negligence claim against a landlord where "violation of a safety statute constitutes evidence of negligence in any action by a person whose only relationship to the premises where the injury occurred is that of a lawful visitor"); *Bencosme v. Kokoras*, 400 Mass. 40, 41, 507 N.E.2d 748 (1987) (holding that a residential property owner is liable for "injuries sustained by a child under six years of age who ingested lead-based paint or other material which the owner failed to remove from those premises as requires by [the statute]").

because of the First Circuit's particular concern and interest over Plaintiff's imprisonment-based CAT claim in its September 11, 2019 stay of removal order, Defendant had a special duty of care. *See* Compl. Ex. 13; *INS v. Cardoz-Fonseca*, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."); *Nken*, 556 U.S. at 421 (noting that a stay order is important because, "if a court takes the time it needs, [absent a stay order] the court's decision may in some cases come too late for the party seeking review"). Despite the duty to protect Plaintiff from deportation under this special relationship, Defendant removed him from the United States to El Salvador where he was detained and tortured by the Salvadoran government. This violation of the First Circuit's judicial stay of removal orders is evidence of negligence. Thus, these private analogues are the proper bases for Plaintiff's FTCA claims.

In support of its position, Defendant does not cite any cases arising in the context of an unlawful deportation in violation of a federal court's judicial stay of removal order. Def.'s Br. at 20-22. And the cases Defendant does cite do not undermine Plaintiff's argument. For example, Defendant cites the First Circuit's *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532 (1st Cir. 1997), for its position that Defendant cannot be liable to Plaintiff. Def.'s Br. at 22. However, *Sea Air Shuttle Corp.* "wholly concern[ed] the FAA's alleged failure to perform its regulatory functions vis a vis an entity that is out-of-compliance with federal laws and rules." *Sea Air Shuttle Corp.*, 112 F.3d at 537. Hence, the challenged action is "a type of conduct that private persons could not engage in, and hence could not be liable for under local law." *Id*. (internal quotations omitted).

Similarly, the Ninth Circuit in *Dugard v. United States*, 835 F.3d 915 (9th Cir. 2016),

explained that the federal government did not "owe a duty of care to the public at large for the conduct of inmates or parolees under their supervision" under the state law. *Id*. at 919. Because the plaintiff "submit[ed] no facts to suggest, that she was a specifically identifiable victim, she would not have a viable claim [as a member of the public at large] against an analogous private person under California law." *Id*. Here, in contrast, Plaintiff has alleged such facts. Moreover, Defendant's reliance on *Akutowicz v. United States*, 859 F.2d 1122 (2d Cir. 1988), does not help its position. Def.'s Br. at 23. There, the Second Circuit explained that "no private citizen is empowered to certify the loss of American nationality." *Liranzo v. United States*, 690 F.3d 78, 96 (2d Cir. 2012) (quoting *Akutowicz*, 859 F.2d at 1125-26).

In contrast to Defendant's authorities, there was, as explained above, "some relationship between [Defendant] and the plaintiff to which state law would attach a duty of care in purely private circumstances." *See Sea Air Shuttle Corp.*, at 537 (quoting *Myers v. United States*, 17 F.3d 890, 899 (6th Cir. 1994). Defendant can be liable for a failure to prevent the foreseeable detention and torture of Plaintiff inflicted by the Salvadoran government when Defendant had Plaintiff in custody and an obligation to obey the First Circuit's judicial commands. Thus, the Court should allow this case to proceed. *See Roe*, 2019 U.S. Dist. LEXIS 43124, at *16 (rejecting Defendant's uniquely governmental action argument because "under New York Law, a similar duty exist[ed] where private citizens would be liable under the claims described above for disregarding a statutory requirement"); *Avalos-Palma*, 2014 U.S. Dist. LEXIS 96499, at *26-30 (same); *Lyttle*, 867 F. Supp. 2d at 1301 (same).

V. WRONGFUL DEPORTATION CAUSE OF ACTION SHOULD NOT BE DISMISSED

Finally, Defendant asserts that "there is simply no recognized tort of 'wrongful

deportation,'" citing to *Guardado v. United States*, 744 F. Supp. 2d 482, 493 (E.D. Va. 2010) ("the act of removal, by itself, cannot give rise to a cognizable tort in the state of Virginia"). That may be true under Virginia law, upon which *Guardado* was decided. However, that need not be the case in Massachusetts where courts have repeatedly demonstrated their willingness to advance their understanding of the law as society evolves.

An argument "that there is no authority under existing Massachusetts law" for a particular claim

> is true only because the precise question has never been presented to [the] court for decision. That argument is therefore no more valid than would be an argument by plaintiff that there is no record of any Massachusetts law denying recovery on such facts. No litigant is automatically denied relief solely because he presents a question on which there is no Massachusetts judicial precedent. It would indeed be unfortunate, and perhaps disastrous, if [courts] were required to conclude that at some unknown point in the dim and distant past the law solidified in a manner and to an extent which makes it impossible now to answer a question which had not arisen and been answered prior to that point. The courts must, and do, have the continuing power and competence to answer novel questions of law arising under ever changing conditions of the society which the law is intended to serve.
> . . . .
>
> The right to recover for [] items of damages should not be denied just because they do not fit in any of the existing niches in the ancient walls surrounding the law of torts. If the current needs of society require and justify so doing, the walls may be extended and additional niches built to accomplish justice.

George v. Jordan Marsh Co., 268 N.E.2d 915, 918 (Mass. 1971) (internal quotations omitted). Applying these principles, Massachusetts courts are willing to recognize new tort claims.[19]

The primary purpose of the FTCA is to "waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental

[19] *See*, *e.g.*, *id.* at 921 (recognizing cause of action for intentional infliction of emotional distress); *Shafir v. Steele*, 727 N.E.2d 1140, 1143-44 (Mass. 2000) (recognizing tort claim for intentional interference with contractual relations); *Alberts v. Devine*, 479 N.E.2d 113, 120 (Mass. 1985) (recognizing cause of action against physician for wrongful disclosure of confidential communications and noting "that for so palpable a wrong, the law provides a remedy.").

liability." *Rayonier Inc. v. U.S.*, 352 U.S. 315, 377 (1957) (noting that "[i]t may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its fire-fighters" and rejecting argument that holding the government responsible for the negligence of Forest Service firemen would impose a heavy burden on the public treasury). The *Rayonier* Court found that Congress believed charging such negligence against the public was in the best interest of the nation because "*when the entire burden falls on the injured party it may leave him destitute or grievously harmed*." *Id.* (emphasis added). Put another way, "[t]he broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws." *Indian Towing Co. v. U.S.*, 350 U.S. 61, 68-69 (1955).

Defendant's insinuation that the Salvadoran charges against Plaintiff might not have been false (even though he was not convicted) cannot detract from the undisputed fact that Defendant deported Plaintiff in contravention of two First Circuit orders staying his removal. There is no question that Plaintiff's deportation was wrongful. Instead, the question is whether the United States should be liable to Defendant in tort for that wrongful deportation. Officials acting under color of immigration authority have all too often wrongfully deported 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).[20] Similarly, with

[20] *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.*

increasing frequency, Courts of Appeals have acted to redress the wrongful deportations of immigration petitioners seeking judicial review.[21] The First Circuit 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 of removal order for ten business days upon a first motion for stay of removal. *See* Local Rule 18 (1st Cir. May 7, 2018).[22]

With increasing numbers of immigration authorities unlawfully deporting asylum seekers in violation of their own operation of law and administrative stay and judicial stay of removal orders, Defendant cannot be permitted to avoid liability for violating court orders staying Plaintiff's deportation merely because no Massachusetts court has previously recognized a tort of wrongful deportation. Society is changing and so, too, must the court's understanding of Massachusetts law. *George*, 268 N.E.2d at 918.

Defendant's motion to dismiss with respect to Plaintiff's claim of wrongful deportation should be denied.

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).

[21] *See, e.g., Ramirez-Chavez v. Holder*, No. 11-72297 (9th Cir. Order of April 10, 2012), ECF Dkt. No. 18 at 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 E at 1-2); *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 E at 3); *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 E at 4-8).

[22] *Available at* https://www.ca1.uscourts.gov/sites/ca1/files/Press%20Release%20LR%2018.0.pdf.

Dated: October 3, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified in the Notice of Electronic Filing (NEF) on October 3, 2022.

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