UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

DEFENDANT'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS
(Leave to File Granted August 11, 2022)

Defendant has moved under FRCP 12(b)(1) and 12(b)(6) to dismiss Plaintiff's Complaint, docket #1, in its entirety.[1] Plaintiff seeks to hold Defendant liable under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) & 2671 *et seq*., for harm he allegedly suffered while in a Salvadoran jail. But the United States has not waived its sovereign immunity for this type of claim and the Immigration and Naturalization Act, 8 U.S.C. §§ 1104-1401 ("INA") bars district court jurisdiction on cases arising from the execution of a removal order, which is what occurred here.[2]

[1] Defendant has referenced documents attached to Plaintiff's Complaint in the Statement of Undisputed Facts. This need not cause the Court to treat the Motion to Dismiss as a Motion for Summary Judgment. *See, e.g., Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993). Should the Court disagree, Defendant requests that its motion be evaluated pursuant to FRCP 56.

[2] There is no dispute that Defendant, despite the extensive efforts set out in the Statement of Undisputed Facts, ultimately failed to comply with the First Circuit's stay order. This was plainly a mistake, inadvertently done and without malice or intent as regards Plaintiff. The First Circuit demanded an explanation, as it was entitled to do, and was apparently satisfied with

I. FACTUAL BACKGROUND

A. Overview of Plaintiff's Claims

U.S. Immigration and Customs Enforcement ("ICE") effectuated Plaintiff's final order of removal to his native country, El Salvador, in violation of a stay of removal issued by the First Circuit. Such removal occurred notwithstanding extensive efforts by the Department of Justice and ICE to communicate the stay and prevent premature removal. Plaintiff claims that he was subject to unfavorable conditions while detained in El Salvador (on serious criminal charges that were eventually dismissed) and tortured. He blames the United States for the harm inflicted by Salvadoran government officials.

Plaintiff's Complaint contains three counts:

1. Count I, FTCA Negligence: Plaintiff claims that ICE owed him an extensive list of duties, including to not unlawfully deport him, and that it breached these duties. Plaintiff claims that the breach was the proximate cause of his injuries. (Complaint, ¶ 95). He also claims that his torture in a Salvadoran jail by Salvadoran authorities was foreseeable "in light of the Salvadoran Government's false claims that Plaintiff was a member of MS-13" (¶ 96);

2. Count II, FTCA Negligent Infliction of Emotional Distress: this claim is founded upon the same facts and reasoning as Count I**;** and

3. Count III, FTCA Wrongful Deportation: this count asserts that there is a tort of "wrongful deportation" and claims that the facts stated in the Complaint support it was committed by Defendant.

Defendant's response. The Circuit Court's order to show cause why Defendant should not be held in contempt was discharged upon joint motion of the parties. *See* 19-1736, June 13, 2022 order.

B. Plaintiff's Immigration History

Plaintiff's immigration history, including the stays of removal issued by the First Circuit, are set out in Defendant's Statement of Undisputed Facts, filed herewith. The essential facts are that Plaintiff, a 25-year-old citizen of El Salvador, had a valid removal order that had been stayed by the First Circuit pending his appeal. Despite numerous attempts by Defendant to make sure he was *not* removed while the stay was in place, he was removed.

II. APPLICABLE LAW

A. Motions to Dismiss

The standard for reviewing motions to dismiss under FRCP 12(b)(1) and 12(b)(6) is familiar to the Court and will not be addressed in detail. Federal Rule of Civil Procedure 12(b)(1) requires dismissal of claims where the Court "lack[s] jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). The party seeking to invoke the jurisdiction of a federal court bears the burden of establishing the court's subject matter jurisdiction. *See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996); *U.S. Ecology, Inc. v. Dep't of the Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). Courts may consider documents attached to a complaint in evaluating motions to dismiss. *Newman v. Lehman Bros. Holdings Inc.*, 901 F.3d 19, 25 (1st Cir. 2018);*Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002) ("The attachment of exhibits to a Rule 12(b)(1) motion does not convert it to a Rule 56 motion. While the court generally may not consider materials outside the pleadings on a Rule 12(b)(6) motion, it may consider such materials on a Rule 12(b)(1) motion").

Rule 12(b)(6) requires the Court to take all well-pled allegations, but not conclusory statements of law or fact, as true and determine if the complaint states a claim upon which relief may be granted. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965,

167 L. Ed. 2d 929 (2007)("on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

B. The FTCA Generally

Absent a waiver of sovereign immunity, a district court lacks subject matter jurisdiction over claims against the United States and its agencies. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also United States v. Mitchell,* 463 U.S. 206, 212 (1983); *Muirhead v. Mecham*, 427 F.3d 14, 17 (1st Cir. 2005) ("[i]t is beyond cavil that, as the sovereign, the United States is immune from suit without its consent"). The plaintiff bears the burden of establishing that a waiver of sovereign immunity encompasses their claims. *See Lundeen v. Mineta*, 291 F.3d 300, 304 (5th Cir. 2002). Waivers of sovereign immunity "must be unequivocally expressed in statutory text ... and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Muirhead*, 427 F.3d at 17. Accordingly, a waiver of the United States' sovereign immunity will be strictly construed in favor of the sovereign. *Lane*, 518 U.S. at 192.

The FTCA provides a carefully limited waiver of the United States' sovereign immunity for certain torts. *Mahon v. United States*, 742 F.3d 11, 12 (1st Cir. 2014); *Carroll v. United States*, 661 F.3d 87, 93-94 (1st Cir. 2011) ((FTCA must be "construed strictly in favor of the federal government, and must not be enlarged beyond such boundaries as its language plainly requires," *quoting Bolduc*, 402 F.3d at 56 (additional citations omitted)); *see also* 28 U.S.C. §§ 1346(b), 2671-80. Specifically, the FTCA:

> [A]llows civil actions against the government for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred…

Id.

Importantly, the United States has only waived its sovereign immunity for acts of its employees if a private person would be liable under state law. 28 U.S.C. § 1346(b)(1). The application of any limitations or conditions of the Government's waiver of sovereign immunity is a threshold issue which precedes any negligence analysis. *Johnson v. U.S. Dept. of Interior,* 949 F.2d 332, 335-36 (10th Cir. 1991); *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981).

Federal district courts have original jurisdiction over what have come to be known as federal question cases, that is, civil actions arising under the Constitution, laws, or treaties of the United States. *Viqueira v. First Bank*, 140 F.3d 12, 17 (1st Cir. 1998) (quoting 28 U.S.C. § 1331). However, jurisdiction conferred under this statute "can be precluded by another, more specific statute." *Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co*., 215 F.3d 195, 200 n.3 (1st Cir. 2000); *Viana v. President of United States*, No. 18-CV-222-LM, 2018 WL 1587474, at *2 (D.N.H. Apr. 2, 2018).[3]

III. ARGUMENT

A. 8 U.S.C. § 1252(g) Strips This Court of Jurisdiction

1. 8 U.S.C. § 1252(g) generally:

8 U.S.C. § 1252(g) strips courts of jurisdiction to review cases "arising from" all decisions to commence, adjudicate or execute removal orders against noncitizens:

[3] By enacting the Immigration and Nationality Act (INA), as amended by the REAL ID Act of 2005, Congress unambiguously abrogated the authority of federal district courts on "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States." *Gicharu v. Carr*, 983 F.3d 13, 16 (1st Cir. 2020) (*citing* 8 U.S.C. § 1252(b)(9)); *Compere v. Riordan*, 368 F.Supp.3d 164, 170-171 (D. Mass. 2019); *Ishak v. Gonzales*, 422 F.3d 22, 27–28 (1st Cir. 2005). *See also Vega-Del Roquel v. Barr*, 568 F. Supp. 3d 73, 75–76 (D. Mass. 2021) (*citing* 8 U.S.C. §§ 1252(b)(9) as well as § 1252(g)).

> [N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g). This provision applies "notwithstanding any other provision of law" (statutory or nonstatutory), and "deprives the district court of jurisdiction in removal cases." *Ishak v. Gonzales*, 422 F.3d 22, 27-28 (1st Cir. 2005); *Lopez Lopez v. Charles,* 2020 WL 419598, at *3 (D. Mass. Jan. 26, 2020) (Casper, J.) (Section 1252(g) applies to any cause or claim arising from the execution of a removal order, including constitutional claims).

There are several issues typically addressed by courts in determining the scope and effect of this statute. First, what sorts of actions does the statute encompass, and, in particular, does the statute bar review of both discretionary and nondiscretionary actions (it does). Second, what does it mean to "arise from" one of the actions set out in the provision. There is no First Circuit precedent directly on point, but all but one of the five Circuits to address these issues have held that section 1252(g) strips district courts of jurisdiction to resolve claims stemming from the specified actions whether those actions are deemed discretionary or not.

2. § 1252(g) applies to nondiscretionary acts as well as discretionary:

Plaintiffs seeking to hold the United States, or its employees, liable in either the FTCA or a *Bivens* action relating to immigration typically argue that section 1252(g) applies only to discretionary actions and decisions by the government, citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 472–73, 119 S. Ct. 936, 938, 142 L. Ed. 2d 940 (1999) (hereinafter referenced as "AAAC"). In that case, noncitizens sued the government for allegedly targeting them for deportation because of their affiliation with a politically unpopular (and arguably terrorist) group. While their suit was pending, Congress passed the Illegal Immigration

Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, which contained what was codified as 8 U.S.C. § 1252(g).

Because the AAAC opinion referred to "three discrete actions" that the [Secretary] may take in the removal context (i.e., the decision or action to commence removal proceedings, adjudicate removal cases, or to execute removal orders), and, in a footnote, referred to these actions as discretionary, plaintiffs in FTCA and *Bivens* actions challenging improper removals have argued that section 1252(g) does not apply to strip a court's jurisdiction over claims related to nondiscretionary decisions or actions. *See, e.g., Arce v. United States*, 899 F.3d 796 (9th Cir. 2018). Only the Ninth Circuit Court of Appeals has endorsed this view, while at least four, and likely five, circuits have rejected it.[4]

The vast majority of district courts to address this issue have also rejected the argument that section 1252(g) only applies to nondiscretionary actions.[5]

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[4] *Arce*, 899 F.3d 796 (9th Cir. 2018) (finding a difference between discretionary and non-discretionary for purposes of section 1252(g). The Ninth Circuit noted that it was "bound by our own precedent that limits § 1252(g)'s scope to discretionary decisions that the Attorney General actually has the power to make, as compared to the violation of his mandatory duties." *Id.*, at 801. There is no comparable First Circuit precedent. Other circuits that have looked at the issue have rejected the limit of § 1252(g) to discretionary decisions. *See Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001); *Lopez Silva v. United States*, 866 F.3d 938 (8th Cir. 2017); *Tsering v. U.S. Immigration & Customs Enf.*, 403 Fed.Appx. 339, 342 (10th Cir. 2010); and *Merritt v. United States Immigration & Customs Enf.*, 737 Fed.Appx. 66 (3rd Cir. 2018) (*citing Lopez Silva* with approval). *See also Hamama v. Adducci*, 258 F.Supp.3d 828, 836-37 (E.D. Mich. 2017) (concluding that Sixth Circuit does not support the distinction).

[5] *See Michel v. Mayorkas*, 2021 WL 797810, at *3 (D. Mass. Mar. 2, 2021), appeal dismissed, No. 21-1356, 2021 WL 5349306 (1st Cir. Oct. 21, 2021); *Kareva v. United States*, 9 F.Supp.3d 838, 844–45 (S.D. Ohio 2014) (finding that § 1252(g) barred jurisdiction for a FTCA claim alleging false arrest which arose from the Government's action to execute a removal order); *Guardado*, 744 F.Supp.2d at 493 (dismissing alien's assault, battery, and false imprisonment claims under the FTCA due to lack of jurisdiction under § 1252(g), based on the facts that ICE agents handcuffed the plaintiff and placed him on an airplane during removal); *Magallanes v. United States*, 184 F. Supp. 3d 1372, 1375–76 (N.D. Ga. 2015); *Viana v. President of United States*, 2018 WL 1587474, at *3 (D.N.H. Apr. 2, 2018); *Reeves v. United States*, 2020 WL

This Court should also determine that section 1252(g) is not limited to nondiscretionary actions as these courts have concluded for multiple reasons. First, the plane language of the statute itself does not cabin the statute to certain types of action. Notably, the statute itself says nothing about discretionary versus nondiscretionary actions. Nor does the statute say "arising from a *proper* decision to commence or execute a removal order…" Thus, the fact that the removal order in this case was stayed is irrelevant for purposes of the section 1252(g) bar. *See, e.g., Magallanes v. United States*, 184 F. Supp. 3d 1372, 1375–76 (N.D. Ga. 2015).

In addition, as the Eighth Circuit has summarized:

> The statute… makes no distinction between discretionary and nondiscretionary decisions. So long as the claim arises from a decision to execute a removal order, there is no jurisdiction.
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> * * *
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> [The Supreme Court's] reference to discretionary decisions [in *AAAC*] did not say that § 1252(g) applies only to discretionary decisions, notwithstanding plain language that includes no such limitation.

Lopez Silva v. United States, 866 F.3d 938, 940-41 (8th Cir. 2017) (*quoting in part Gonzales v. Oregon*, 546 U.S. 243 (2006)); *see also Foster*, 243 F.3d at 213; *Jimenez v. Nielsen*, 334 F. Supp. 3d 370, 384 (D. Mass. 2018); *Gupta*, 709 F.3d at 1065 (holding that Section 1252(g) precluded jurisdiction over an alien's *Bivens* claims alleging that ICE agents "illegally procured an arrest warrant, that the agents illegally arrested him, and that the agents illegally detained him"); *Sissoko*

6431628, at *5 (S.D.N.Y. Nov. 2, 2020), aff'd in part, vacated in part, remanded, 2022 WL 2812881 (2d Cir. July 19, 2022); *Rico-Pineda v. Lucero*, 2015 WL 13805331 (W.D. Tx.); *Johnson v. Gonzalez*, 2007 WL 9719055 (E.D.N.Y.) ("Supreme Court has stressed time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"); *Hamama*, 258 F.Supp.3d at 836-37; *Cagnant v. United States*, 2019 WL 10910808 (S.D. Fla.) ("plain language of the statute… does not impose such a limitation," rejecting limit of § 1252(g) to discretionary acts); *Mohamed v. Napolitano*, 2012 WL 1229929 (D. Colo. Apr. 12, 2012) (decision to remove plaintiff notwithstanding a stay of removal was not actionable because of § 1252(g)).

v. Rocha, 509 F.3d 947, 949 (9th Cir. 2007) (holding that Section 1252(g) barred Fourth Amendment claim for false arrest against the immigration officer who ordered the alien's detention).

The Supreme Court in *AAAC* itself said that § 1252(g) [should] be applied "without limitation" to "claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." 525 U.S. at 487.[6] Moreover, in light of the Supreme Court's interpretation of 8 USC § 1252(e) as precluding an alien from challenging a discretionary judgment by the Attorney General or a decision that the Attorney General has made regarding his detention or release, *see Demore v. Kim*, 538 U.S. 510, 516 (2003), there would be no need for section 1252(g) if it solely applied to discretionary judgments. *See also Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018). It is a familiar canon of construction that, whenever possible, every word and phrase in a statute should be given effect. *See, e.g.*, *Jennings*; *United States v. Ven–Fuel, Inc.*, 758 F.2d 741, 751–52 (1st Cir.1985); *Aguilar v. U.S. Immigr. & Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 10 (1st Cir. 2007).

Another session of this Court stated plainly:

> This court finds that § 1252(g) is not ambiguous. Unlike other provisions in § 1252, it does not limit itself to "discretionary" decisions, *see* 8 U.S.C. § 1252(a)(2)(B)(ii), or preserve jurisdiction over "constitutional claims or questions of law," *see id*. § 1252 (a) (2) (D).

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[6] *AAAC* also does not say 1252(g) should be interpreted narrowly, despite what some courts have said. What it said was that the statute is *narrower* than respondent argued. This was the starting point for the "applies only to three discrete actions" quote widely cited. *See AAAC* at 482, 485. These three actions are "three discrete events" and not three *discretionary* events. *Id. AAAC* does say "Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." But that is *dicta*; most courts have held that the Supreme Court in *AAAC* did not hold that § 1252(g) *only* applies to discretionary actions. *See* notes 6 & 7, *supra; see also Demore v. Kim*, 538 U.S. 510, 537, 123 S. Ct. 1708, 1725, 155 L. Ed. 2d 724 (2003) (O'Connor, J., concurring); *I.N.S. v. St. Cyr*, 533 U.S. 289, 311 n. 34, 121 S. Ct. 2271, 2285, 150 L. Ed. 2d 347 (2001).

Jimenez v. Nielsen, 334 F. Supp. 3d 370, 383 (D. Mass. 2018). *See also Viana v. President of United States*, 2018 WL 1587474, at *3 (D.N.H. Apr. 2, 2018) (§ 1252(g) covers "any cause or claim" within its ambit, which includes constitutional claims).

Congress knows how to make a statute apply to only discretionary decisions when it wants to do so. For example, 8 U.S.C. § 1252(a)(2)(B)(ii) strips courts of jurisdiction over any "decision or action ... the authority for which is specified under this subchapter to be ***in the discretion*** of the Attorney General or the Secretary of Homeland Security, other than the granting of" asylum," (emphasis supplied). *See, e.g., Kucana v. Holder*, 558 U.S. 233, 236, 251, 130 S.Ct. 827, 175 L.Ed.2d 694 (2010); *Candra v. Cronen*, 361 F. Supp. 3d 148, 155–56 (D. Mass. 2019). The standards of statutory construction require that the Court take Congress at its word(s): section 1252(g) makes no reference to discretionary acts while other sections of the INA, such as 1252(a)(2)(B)(ii), do.[7] *See, e.g., Vega-Del Roquel v. Barr*, 568 F.Supp.3d 73, 76 (D. Mass. 2021) (noting that Court must enforce the law as written notwithstanding the sympathy evoked by plaintiffs' situation).

The Fifth Circuit made clear in *Foster v. Townsley*, 243 F.3d 210, 211-14 (5th Cir. 2001), that § 1252(g) precludes jurisdiction over causes and claims arising from an action or decision in the three areas specified, and that whether the decision was discretionary or nondiscretionary is not controlling. Numerous district courts have cited *Foster* to reject the notion that § 1252(g)

[7] The Court in *Candra* held that a decision not to grant a stay of removal is in effect a decision to execute a removal order, and vice versa. Either would be within the category of decisions that § 1252(g) bars courts from second-guessing. Once the false discretionary-nondiscretionary dichotomy is eliminated, a decision, even inadvertent, to not honor a stay order is also within § 1252(g)'s bar. 361 F. Supp. 3d at 156.

applies only to discretionary actions and this Court should also reject the premise that section 1252(g) would not apply in the instant matter.[8]

3. Plaintiff's removal is a claim "arising from" Defendant's execution of the removal order: Section 1252(g) of the INA strips courts of jurisdiction to review cases "arising from," *inter alia*, the decision to "execute removal orders against" noncitizens. 8 U.S.C. § 1252(g). Plaintiffs in improper removal FTCA cases have argued that their claims do not arise from a decision to commence or execute a removal order where there was a stay; *see, e.g., Mohamed v. Napolitano*, 2012 WL 1229929 (D. Colo. April 12, 2012) (acknowledging, but rejecting, this argument); *see also* Complaint, dkt. #1 at ¶¶ 95, 96, 105-107. The argument is often combined with the argument that section 1252(g) applies only to discretionary decisions, therefore (the argument goes) the decision to remove a person notwithstanding that a stay of removal is in place cannot be discretionary (because the United States has no discretion to ignore court orders) and the harm stems not from the execution of a removal order (because it has been stayed) but from the violation of the stay. *See, e.g. Mohamed*.

The argument has superficial appeal, but it is ultimately incorrect. Section 1252(g)'s use of the phrase "arising from" connotes a prohibition not just on judicial review of a decision to execute a removal order, but on all claims that derive from such a decision or action. The courts have interpreted this practically: if the ultimate harm of which a plaintiff complains would not

[8] *See, e.g., Villafuerte v. United States*, 2017 WL 8793751, at *8 n. 5 (S.D. Tex. Oct. 11, 2017); *Cagnant v. United States*, 2019 WL 10910808, at *4 (S.D. Fla. Jan. 16, 2019) ("Plaintiff asserts that 8 U.S.C. § 1252(g) precludes only discretionary decisions or actions. The plain language of the statute, however, does not impose such a limitation. While [*AAAC*] concludes that discretionary decisions and actions are precluded, it does not hold that 8 U.S.C. § 1252(g)'s jurisdictional stripping provision applies only to discretionary decisions and actions"); *Alvarez v. Skinner*, 2014 WL 12675058, at *5 (S.D. Fla. May 19, 2014). *See also* note 7, *supra.*

have resulted but for the executive's action in one of the three areas set out in the statute and highlighted in *AAAC*, then the claims necessarily "arise from" that action and section 1252(g) applies. *See, e.g., Foster*, 243 F.3d at 214; *see generally Aguilar v. U.S. Immigr. & Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 11 (1st Cir. 2007)("[w]e thus read the words "arising from" in section 1252(b)(9) to exclude claims that are independent of, or wholly collateral to, the removal process"). 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. The harm therefore arose in connection with the removal, and section 1252(g) therefore strips this court of jurisdiction to consider the Plaintiff's FTCA claim that arises from such removal.

Similarly, in *Lopez Silva v. United States*, 866 F.3d 938 (8th Cir. 2017), the Eighth Circuit dismissed an FTCA action brought by a noncitizen who was removed in violation of a stay of removal. Plaintiff in *Lopez Silva* argued the tort claims did not arise from the removal but rather the violation of the stay order and argued, in the alternative, that 1252(g) only insulates discretionary decisions from review and that the obligation to comply with the stay order was not discretionary. *Id.* at 940. The Eighth Circuit rejected both arguments. "Although the execution of this removal order happened to be in violation of a stay, the alien's claims are directly connected to the execution of the removal order," *citing Foster*.[9]

[9] *See also*, *Kong v. United States*, 2021 WL 1109910 (D. Mass. March 23, 2021) *appeal docketed*, No. 21-1319 (1st Cir. filed Apr. 30, 2021) (FTCA action challenging arrest, detention, and removal of noncitizen to Cambodia dismissed for lack of jurisdiction); *Tsering*, 403 Fed. Appx. at 343 (concluding that alleged falsification of Nepali passport for Tibetan arose from actions precluded from review by § 1252(g); *Viana v. President of United States*, 2018 WL 1587474, at *2 (D.N.H. Apr. 2, 2018) (rejecting a challenge to the manner in which immigration authorities executed removal order on the ground that the claims were dependent on and grounded in the removal decision); *Ma v. Holder*, 860 F. Supp. 2d 1048, 1059 (N.D. Cal. 2012) (interpreting "arising from" in § 1252(g) to include claims that are "connected directly and immediately to a

In *Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001), a noncitizen filed a civil rights action against several immigration officers and officials for wrongful deportation that occurred in violation of an automatic stay provision applicable to his case. The Fifth Circuit concluded that 8 U.S.C. § 1252(g)'s plain language precluded review of plaintiff's claims of excessive force, denial of due process, denial of equal protection, and retaliation in connection with the actions taken to execute the removal order, finding that the claims arose under a decision or action by the Attorney General taken to execute a removal order. *Id.* at 214–15. *Accord Hook v. Holder*, 2014 WL 6775594, at *2 (W.D. La. Dec. 1, 2014).

In contrast, the Ninth Circuit in *Arce v. United States*, 899 F.3d 796 (9th Cir. 2018), found that the tort claims "cannot be fairly characterized as 'arising from' the government's decision or action to execute a removal order…because there was no removal order for the Government to execute." *Id.* at 801 (citations omitted). In *Arce*, the Plaintiff was removed to Mexico in violation of a temporary stay of removal associated with his emergency petition for review filed before the Ninth Circuit. The *Arce* court characterized the claim as "not attacking the removal itself, . . . [but rather] that the Attorney General lacked the authority to execute the removal order because of the stay of removal. Thus, his claims arise not from the execution of the removal order, but from the violation of [the] court's order." *Id.* at 800.

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decision or action ... to execute a removal order"); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1068 (N.D. Ill. 2007) ("Since I find that Plaintiff's Fourth Amendment claim (the arrest/detention portion) "arises from" the decision to commence removal proceedings, I find that § 1252(g) divests this Court of subject-matter jurisdiction to hear it."); *Gupta*, 709 F.3d 1062 at 1065-66 (11th Cir. 2013) (Bivens); *Sissoko v. Rocha*, 509 F.3d 947, 950 (9th Cir. 2007) (Bivens); *Magallanes v. United States*, 184 F. Supp. 3d 1372, 1375-76 (N.D. Ga. 2015) (FTCA); *Cagnant v. United States*, 2019 WL 10910808, at *3 (S.D. Fla. Jan. 16, 2019); *Candra v. Cronen*, 361 F. Supp. 3d 148, 156 (D. Mass. 2019) (§ 1252(g) applies to constitutional as well as statutory claims); *Guardado v. United States*, 744 F.Supp. 2d 482 (E.D. Va. 2010); *Alcaraz v. United States*, 2013 WL 4647560 (N.D. Cal. Aug. 29, 2013).

The Ninth Circuit's reasoning in *Arce* has been rejected by most other courts examining the "arising from" language of section 1252(g). It makes sense to question *Arce* for several reasons. First, the language of the provision, "all claims… arising from…" is broad and is not restricted to discretionary decisions as argued earlier. Second, the effect of section 1252(g) could, in almost any case, be circumvented by simply characterizing the essential act as one down the chain of events from the three actions cited by *AAAC*. Thus, a plaintiff could always make the claim that it was not the decision to execute a removal order, but the manner in which it was executed, that caused his harm. The better analysis looks to whether the commencement of a removal action or execution of a removal order is a *but for* cause of the harm. Such is the case here: but for the decision and actions taken to execute the removal order (the transfer from Boston to Louisiana to stage for removal, the manifesting of Plaintiff on a removal charter to El Salvador, the transfer of Plaintiff off the removal charter to Salvadoran authorities once arrived in El Salvador), Plaintiff would not have been removed to El Salvador and not subjected to whatever transpired in the Salvadoran prison. In this sense, it is clear that the alleged harms "arose from" the execution of the removal order.

Section 1252(g) does not turn on whether the sovereign's decision to take action was correct or not, or even whether the removal order was valid or stayed. Instead, by its plain language, the statute proscribes jurisdiction over claims arising from the commencement or execution of removal orders.[10] As such, this Court is without jurisdiction over Plaintiff's claims and his Complaint must be dismissed.

[10] Moreover, the Ninth Circuit was wrong when it said in *Arce* that there was no removal order to execute when the order had been stayed, not vacated. A stay of removal does not invalidate the removal order, it merely suspends its operation. *See, e.g., Lopez Silva*, 866 F.3d at 940.

B. The Foreign Country Exception to the FTCA Also Bars These Claims

Under the FTCA, the United States has consented to be sued for the negligence of its employees acting within the scope of their employment in circumstances where, if the United States were a private person, it would be liable to the claimant under the laws of the place where the negligence occurred. 28 U.S.C. § 1346(b)(1); *e.g., Richards v. United States*, 369 U.S. 1, 6, 82 S.Ct. 585 (1962). However, that waiver is subject to certain exceptions. *See generally* 28 U.S.C. § 2680. One such exception is the FTCA's foreign country exception, found at 28 U.S.C. § 2680(k). That provision states "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to— Any claim arising in a foreign country." *Id.* As the Supreme Court stated:

> By the exclusion of 'claims arising in a foreign country,' the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States.
>
> * * *
>
> In brief, though Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power. The legislative will must be respected.

United States v. Spelar, 338 U.S. 217, 220-21, 70 S. Ct. 10, 12, 94 L. Ed. 3 (1949). *Accord Gerritson v. Vance*, 488 F. Supp. 267, 268 (D. Mass. 1980).

The purpose of the foreign country exception is to ensure that the United States is not exposed to liability under the laws of a foreign country over which it has no control. Because Plaintiff was allegedly tortured and mistreated in El Salvador, by Salvadoran authorities, the foreign country exception applies and the United States may not be held liable under the FTCA. Nor does the fact that ICE inadvertently removed Plaintiff notwithstanding the First Circuit's stay order change the analysis. Again, the Supreme Court has definitively addressed this issue as it

rejected claims that decisions made in the United States opened the door to liability for action that occurred in a foreign country:

> [In] what has come to be known as the "headquarters doctrine[,]" [s]ome Courts of Appeals, reasoning that the entire scheme of the FTCA focuses on the place where the negligent or wrongful act or omission of the government employee occurred, have concluded that the foreign country exception does not exempt the United States from suit for acts or omissions occurring here which have their operative effect in another country. Headquarters claims typically involve allegations of negligent guidance in an office within the United States of employees who cause damage while in a foreign country, or of activities which take place within a foreign country.
>
> * * *
>
> Not only does domestic proximate causation under the headquarters doctrine fail to eliminate application of the foreign country exception, but there is good reason to think that Congress understood a claim "arising in" a foreign country in such a way as to bar application of the headquarters doctrine. There is good reason, that is, to conclude that Congress understood a claim "arising in a foreign country" to be a claim for injury or harm occurring in a foreign country.
>
> * * *
>
> We therefore hold that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.

Sosa v. Alvarez-Machain, 542 U.S. 692, 701, 704, 712 (2004) (citations omitted). In *Sosa*, the Supreme Court held that the foreign country exception applied to bar plaintiff's FTCA claims stemming from a DEA-directed abduction that occurred in Mexico. The Supreme Court rejected the argument that a decision made by a federal agency in the United States, i.e., the headquarters analysis, could defeat the foreign country exception.

Following *Sousa's* overturning of the "headquarters doctrine," the Fifth Circuit dismissed a tort claim raised by a Mexican child who was shot across the U.S.-Mexico border by a U.S.

Customs and Border Protection agent based on the foreign country exception. *Hernandez* v. *United States*, 757 F.3d 249 (5th Cir. 2014). In *Hernandez*, the panel found "at all relevant times, Hernandez was standing in Mexico. Any claim will therefore necessarily be based on an injury in a foreign country. Accordingly, these tort claims are barred by the foreign country exception…" *Id.* at 258.[11] Therefore, 28 U.S.C. § 2680(k) bars all claims against the federal government based on any injury suffered in a foreign country, regardless of where the decision to act occurred. *Sosa*, at 700-06.[12] This Court should also find in the context of this case that the foreign country exception bars Plaintiff's claims for what he alleges occurred to him in El Salvador as it is of no moment that decisions that led to Plaintiff's removal occurred in the United States. It is true that in the specific context of the improper removal of a noncitizen in violation of a court order, the Ninth Circuit rejected the argument that the FTCA's foreign country exception bars claims related to removal in violation of a stay order because the plaintiff's "injury clearly occurred in the United States when the government removed him." *Arce,* 899 F.3d at 801 n.5. In summarily dismissing the government's foreign country exception argument in a footnote, the court found that "[a] claim arises where "the last act necessary to establish liability occurred,"

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[11] The outcome in *Hernandez* is unlikely to satisfy many, but it is consistent with the Supreme Court's interpretation of the foreign country rule.

[12] *See also Doe v. Meron*, 929 F.3d 153, 167 (4th Cir. 2019) (conduct occurring on an American military base in a foreign country falls within the foreign country exception to the FTCA); *S.H. by Holt v. United States*, 853 F.3d 1056, 1062 (9th Cir. 2017) (holding that § 2680(k) barred claims by parents who became pregnant and received advice regarding medical care while in the United States but had premature child who was diagnosed with cerebral palsy in Spain); *Gross v. United States*, 771 F.3d 10 (D.C. Cir. 2014) (exception applied to bar tort claims of United States contractor imprisoned in Cuba whose claims arose in Cuba because that is where wrongful arrest and continued detention occurred); *Gil-Perenguez v. U.S. ex rel. U.S. Atty. Gen*., 449 F. App'x 781 (11th Cir. 2011) (indictment by federal grand jury based on mistaken identification as member of drug conspiracy that led to his arrest and detention in Colombia was barred by foreign country exception for claims based on any injury suffered in foreign country).

and "[a]n injury 'occurs' where it is first suffered, even if a negligent act results in further or more serious harm." *Id. citing S.H. by Holt v. United States*, 853 F.3d 1056, 1061-62 (9th Cir. 2017). Accordingly, the *Arce* panel found that the petitioner's "injury occurred in the United States when the government removed him from Adelanto and deported him to Mexico." *Arce*, 899 F.3d at 801.[13] There is no logical way to reconcile *Arce* with the Supreme Court's holding in *Sosa*, so this Court should not consider it persuasive – especially as this finding was not central to the outcome in *Arce* and the court provided no analysis to support its conclusion. The central issue in *Arce* was whether a decision to violate a court order staying removal deprived the district court of jurisdiction pursuant to 8 U.S.C. § 1252(g) (which the Ninth Circuit arguably also got wrong).

Here, to the extent that circumstances surrounding the Plaintiff's removal may be considered negligent, because his removal was executed in contravention of the stay order issued by the First Circuit, the Government's liability to Plaintiff for actions that took place in El Salvador are "most naturally understood as the kernel of the claim arising in a foreign country." *Sosa*, 542 U.S. at 701. Put another way, the violation of the stay in and of itself did not cause the alleged mistreatment in El Salvador. Therefore, the FTCA's foreign country exception bars all claims in this Court based on any injury suffered in El Salvador at the hands of Salvadoran

[13] In an unpublished decision, a United States District Court, following *Arce*, found that the foreign country exception does not apply where the negligent acts of the Government officials that led to Plaintiff's removal were alleged to have occurred in the United States, and Plaintiff suffered the injury of removal while he was still in the United States. *Roe v. United States*, 2019 WL 1227940, at *5 (S.D.N.Y. Mar. 15, 2019); *see also Avalos-Palma v. United States*, 2014 WL 3524758, at *8 (D.N.J. July 16, 2014) (basing the decision on the incorrect assumption that 8 USC § 1252(g) only applies to discretionary acts).

authorities.[14]

C. No Proximate Causation

In his Complaint at ¶ 3, Plaintiff says as a result of the wrongful deportation, he was incarcerated in a Salvadoran prison where he was tortured and experienced physical and emotional trauma. He says the deportation proximately caused his "extensive torture and his detention under inhumane conditions." Complaint, ¶ 5.

Under Massachusetts law, "[i]n addition to being the cause in fact of the injury [the 'but for' cause], the plaintiff must show that the negligent conduct was a proximate or legal cause of the injury as well." *Kent v. Commonwealth*, 437 Mass. 312, 320, 771 N.E.2d 770 (2002). To establish proximate cause, a plaintiff must show that his or her injuries were within the reasonably foreseeable risks of harm created by the defendant's negligent conduct. *Staelens v. Dobert*, 318 F.3d 77, 79 (1st Cir. 2003).

"Proximate cause is causation substantial enough and close enough to the harm to be recognized by law, but a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa,* 542 U.S. at 704. It is not the removal itself which caused Plaintiff's harm, however. It was the Salvadoran government. The removal was a necessary link in the series of events that led to the alleged harm, but it was not a proximate cause any more than driving a car without a license is the proximate cause if a passenger gets assaulted after exiting the car at a destination. *See, e.g., CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) ("The term

[14] If all damages resulting from actions by the government El Salvador are barred, the U.S. Government could, at most, be liable for the act of removal and any harm stemming from the removal and not from events in El Salvador. Such harm is likely barred by the "government function" doctrine discussed in section D *infra*. *See generally Lyttle v. United States*, 867 F. Supp. 2d 1256, 1301 (M.D. Ga. 2012) (court reserved for trial the issue of whether plaintiff's damages for continuing harm that originated in the United Stated are recoverable).

"proximate cause" is shorthand for a concept: injuries have countless causes, and not all should give rise to legal liability") (*citing* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 42, p. 273 (5th ed.1984)). Thus, even if the foreign country exception is set aside, under fundamental tort analysis, the inadvertent failure to abide by the stay order was not the proximate cause of Plaintiff's harm.

Nor does Plaintiff's argument that the harm was foreseeable determine that the removal was a proximate cause.[15] *See, e.g.,* Complaint ¶ 4. Foreseeability is but one element of proximate cause analysis. *CSX Transp., Inc.*, at 692. An event may be foreseeable but that does not make an actor liable in and of itself. If our hypothetical driver knows that Chicago has a high rate of gun crime, that does not mean that his dropping a passenger off in that city is the proximate cause of the passenger's harm if she is subsequently shot, much less that the driver is legally responsible. Because Defendant's violation of the stay of removal was not the proximate cause of Plaintiff's harm, the Complaint should also be dismissed under Rule 12(b)(6) for failure to state a claim.

D. <u>No private analogue</u>

The FTCA does not apply "where the claimed negligence arises out of the failure of the United States to carry out a [federal] statutory duty in the conduct of its own affairs." *Sea Air*

[15] It is unclear whether the alleged harm would have occurred in any event, because the First Circuit's stay of removal was temporary. It is certainly a likely possibility that absent the premature removal, Plaintiff would have been removed and returned to El Salvadoran government custody eventually given that Plaintiff had been ordered removed by an immigration judge and such removal order affirmed by the Board of Immigration Appeals and he faced outstanding serious criminal charges in El Salvador. At least according to Plaintiff, he would have then suffered the same consequences regardless of when he was removed. This is a necessary implication of his argument that the mistreatment by the Salvadoran personnel was entirely foreseeable. Complaint, ¶ 4. While Defendant disputes the foreseeability, Plaintiff cannot claim that the harm was both foreseeable and unlikely to occur if he was later removed absent an allegation of changed circumstances.

Shuttle Corp. v. United States, 112 F.3d 532, 536 (1st Cir. 1997) (citations omitted). Under Section 2674, the United States is liable in tort "in the same manner and to the *same extent as a private individual* under like circumstances." 28 U.S.C. § 2674 (emphasis added). This language is repeated in section 1346(b)(1) which reinforces that district court jurisdiction under the FTCA is limited to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The FTCA does not permit claims that are "governed exclusively by federal law." *Feres v. United States*, 340 U.S. 135, 146 (1950). Nor does the FTCA permit claims challenging conduct "of a governmental nature or function." *Dalehite v. United States*, 346 U.S. 15, 28 (1953).

Because the FTCA limits federal liability to those circumstances in which a private person would be liable under the law of the place where the injury occurred, there is no liability in this case because a private person cannot remove an individual from the country as part of an immigration process.[16]

The private analogue has also been interpreted to exclude claims premised on laws which would only lead to state or municipal liability. In *United States v. Olson*, 546 U.S. 43 (2005),

[16] Where the conduct involves a "peculiarly governmental function," as to which there is no analogous circumstance in which state law would impose a duty of care on a private person, there is no jurisdiction under the FTCA. *See, e.g., Butt v. United States*, 714 F.Supp.2d 217 (D.Mass. 2010) (claim that government failed to timely process his visa extension had no state analogue so no FTCA liability); *Akutowicz v. United States*, 859 F.2d 1122, 1125–26 (2d Cir. 1988) (FTCA does not extend to conduct governed exclusively by federal law, or to conduct of a governmental nature or function, that has "no analogous liability" in the law of torts *citing Dalehite v. United States*, 346 U.S. 15, 28 (1953)); *LaBarge v. Mariposa County*, 798 F.2d 364 (9th Cir. 1986) (United States not liable where similarly situated private company would not be liable); *Bhuiyan v. United States*, 2017 WL 2837023 (D.N.Mar. Is. June 30, 2017) (no local law equivalent for immigration processing).

the Supreme Court reiterated that the FTCA "requires a court to look to the state-law liability of private entities, not to that of public entities, when assessing the Government's liability under the FTCA "in the performance of activities which private persons do not perform." *Id.* at 46. But the Court also advised that the phrase "under like circumstances" does not mean "same circumstances" and permitted claims that sufficiently analogize private claims with the Government's actions at issue. *Id.* at 47. *Compare Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (finding a private analogue in the U.S. Coast Guard's operation of lighthouse because once the decision was made to operate a lighthouse, the agency was obligated to use due care to repair the broken light).

In *Sea Air*, the First Circuit dismissed an FTCA action brought against the Department of Transportation and Federal Aviation Administration challenging the agencies failure to administer the use of certain seaplane ramps, after finding the *Sea Air* plaintiffs challenged "a type of conduct that private persons could not engage in, [a private person] hence could not be liable for under local law." *Sea Air*, 112 F.3d 532, 537 (internal quotations omitted). "[E]ven where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the [FTCA] if state law recognizes no comparable private liability." *Id.* (citations omitted).

While these cases stand for the proposition that the Government may be liable for governmental actions that are similar to causes of actions brought against private individuals, the Government cannot be liable in situations where a private person or entity would never encounter such circumstances. *See Dugard v. United States*, 835 F.3d 915 (9thCir. 2016) (dismissing FTCA action against parole officers for failure to properly supervise parolee who kidnapped 11-year-old girl and held her hostage for 18 years).

The nature of executing a final order of removal is a uniquely federal government action; there is no private or state actor comparison. *See Akutowicz v. United States*, 859 F.2d 1122 (2d. Cir. 1988) (no private analogue in the Department of State decision to withdraw citizenship); *Bhuiyan*, 2017 WL 2837023. This forecloses any FTCA action arising from "wrongful removal" and any injuries arising from transferring custody of the Plaintiff to a foreign government. In this regard, the Complaint also fails to state a claim and must be dismissed pursuant to FRCP 12(b)(6).

E. <u>There Is No Tort of "Wrongful Deportation"</u>

As stated, the FTCA limits federal immunity to claims in which a private person would be liable under the law where the allegedly wrongful act occurred. Plaintiff has alleged that the wrongful act was his deportation in violation of the First Circuit stay and claims that, because he was subject to local ICE control, that act occurred in Massachusetts. As argued above, there is no basis on which to find that a private person (or even the Commonwealth of Massachusetts) could remove a person from the United States so there can be no liability under the FTCA. But, more broadly, there simply is no recognized tort of "wrongful deportation," and therefore this is another ground upon which the Third Count must be dismissed pursuant to FRCP 12(b)(6). *Guardado*, 744 F.Supp. 2d at 492 (no tort of "false removal").

It does not aid Plaintiff's cause that he claims he was arrested on false charges (Complaint, ¶ 20), because there is no factual support for the allegation that the charges were false and no suggestion that, if they were, ICE knew of the falsity. Plaintiff cites to the dismissal of the charges lodged against him in El Salvador, but as this Court is well aware, dismissal of charges does not mean they were false.

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint must be dismissed in its entirety.

Respectfully submitted,

RACHAEL S. ROLLINS
United States Attorney

Dated: August 10, 2022

By: */s/ Thomas E. Kanwit*
Thomas E. Kanwit
Mark Sauter
Assistant United States Attorneys
United States Attorney's Office
1 Courthouse Way, Suite 9200
Boston, MA 02210
Tel.: 617-748-3100
Email: thomas.kanwit@usdoj.gov

CERTIFICATE OF SERVICE

I, Thomas E. Kanwit, Assistant United States Attorney, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

Dated: August 10, 2022

By: */s/ Thomas E. Kanwit*
Thomas E. Kanwit
Assistant United States Attorney