UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HARRY PANGEMANAN et al., Petitioners/Plaintiffs, v. JOHN TSOUKARIS et al. Respondents/Defendants.	Civil Action No. 18-1510 (ES)

PETITIONERS'/PLAINTIFFS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

Petitioners/Plaintiffs, and the putative class they represent ("Petitioners"), are approximately 50 Christian Indonesian nationals who have resided in the United States for many years. They now face imminent removal to Indonesia, a country in which they are likely to face persecution on account of their religion. They seek a stay of removal and a reasonable period of time to file motions to reopen their immigration cases to demonstrate that they are entitled to remain in the United States due to recent changes in country conditions that make Indonesia increasingly dangerous for Christians—circumstances that postdate their final orders of removal.

The law forbids the removal of individuals to countries where they would face a likelihood of persecution or torture. *See* 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. §§ 1208.13, 1208.16. As such, Petitioners can each apply, or re-apply, for asylum, withholding of removal, or relief under the Convention Against Torture based on the danger they *now* face. Specifically, Petitioners are entitled to file motions to reopen their removal proceedings, and receive a decision on such a motion, because they seek "[t]o apply or reapply for asylum or withholding of deportation based on *changed circumstances* arising in the country of nationality or in the country to which deportation has been ordered." 8 CFR § 1003.2(c)(3)(ii) (emphasis added).

The issue now presented is solely whether the Court has jurisdiction over Petitioners' claim that they are entitled to a stay to file motions to reopen, and not how long a stay Petitioners may be entitled to, or the precise nature and scope of the stay. That was the same jurisdictional issue presented in each of the four other recent cases seeking similar stays of removal. In each case, the court found habeas jurisdiction was proper—including in one case that presented the identical question as applied to a class of similarly situated Indonesian Christians residing in New Hampshire. *Devitri v. Cronen*, No. 17 Civ. 11842, 2017 WL 5707528 (D. Mass. Nov. 27, 2017). The other three cases considered the same question in light

of putative classes of Iraqi nationals, *Hamama v. Adducci*, 258 F. Supp. 3d 828 (E.D. Mich. 2017), Somali nationals, *Ibrahim v. Acosta*, No. 17 Civ. 24574, 2018 WL 582520 (S.D. Fla. Jan. 26, 2018), and Cambodian nationals, *Chhoeun v. Marin*, No. 17 Civ. 1898, 2018 WL 566821 (C.D. Cal. Jan. 25, 2018)—all of whom, like the putative class here, the government sought to summarily remove without affording opportunity to file motions to reopen (collectively, the "four recent stay cases" or "the four cases").

In each of the four cases, as here, the noncitizens had final orders of removal but argued that they were entitled to a meaningful opportunity to file motions to reopen based on factors that arose well *after* their original proceedings concluded. In *Devitri*, *Hamama,* and *Ibrahim*, just as in the instant case, petitioners argued that they would be persecuted due to country conditions that had changed since their original orders of removal. Each court found it had habeas jurisdiction to order such a stay and, in three of the cases, held that the absence of habeas jurisdiction in that context would constitute an unconstitutional violation of the Suspension Clause guarantee of the writ of habeas corpus. This Court should likewise find habeas jurisdiction exists here and, accordingly, set a briefing schedule on the merits of a preliminary injunction to determine the precise nature of a stay to prevent Petitioners' summary removal pending adjudication of their motions to stay.

STATEMENT OF FACTS

Petitioners incorporate the facts set forth in their Petition for Writs of Habeas Corpus and Mandamus and Class Complaint for Declaratory and Injunctive Relief, filed with the Court on February 2, 2018 (ECF No. 1) (the "Complaint"), as well as the discussion of those facts in their accompanying Memorandum of Law in Support of Motions for Temporary Restraining Order and Stay of Removal (ECF No. 1-2).

ARGUMENT

A motion to reopen is statutorily guaranteed (8 U.S.C. § 1229a(c)(7)) and is a critical part of the administrative process. *Kucana v. Holder*, 558 U.S. 233, 242 (2010) ("The motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings.") (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)). Under the unique circumstances here, a motion to reopen can only be meaningful as a matter of law—under principles of due process, the Immigration and Nationality Act, the Convention Against Torture, and the Suspension Clause—if pursued from the United States. Otherwise, if returned to Indonesia with pending motions, Petitioners could suffer the very fate— namely persecution or torture—their motions would seek to avoid.

Generally, a challenge to removal must be raised in the court of appeals by petition for review from a decision of the Board of Immigration Appeals ("BIA"). But Congress did not repeal habeas jurisdiction where, as here, the petition-for-review process would be unavailable or inadequate. Nor could Congress have constitutionally repealed habeas jurisdiction in such situations given the Suspension Clause, which requires habeas jurisdiction where an adequate alternative is unavailable. *See Ibrahim*, 2018 WL 582520 at *5–6; *Devitri*, 2017 WL 5707528 at *5; *Hamama*, 258 F. Supp. 3d at 838–42.

The government will likely rely on the REAL ID Act to argue that Congress generally intended that removal be challenged by petition for review in the circuit courts. But Petitioners do not contest that general rule, and argue only that habeas review remains available for situations—as in the instant case—where habeas review is the only realistic adequate alternative. As the facts in this case demonstrate, a motion to reopen is not an adequate alternative for individuals who had no meaningful notice that they would be removed to a country where they risk potential persecution and torture, without a stay of removal to ensure the

opportunity to have their claims heard in the immigration system followed by review in the circuit by petition for review. *See Ibrahim*, 2018 WL 582520 at *6 (finding that the motion to reopen process was not an adequate remedy when the petitioners' reopen claims "arose very recently" and the government sought to remove the petitioners immediately); *Devitri,* 2017 WL 5707528 at *5 (finding that the motion to reopen procedure is not an effective remedy when petitioners had no notice that their removal was imminent); 258 F. Supp. 3d at 842 (motion to reopen process not an adequate remedy where removal would "critically compromise their ability to file and prosecute motions to reopen"). To avoid this unlawful outcome, Petitioners request only a brief stay to seek review of their substantive claims in the immigration courts. This Court has jurisdiction to adjudicate those claims and order this very limited equitable relief.

Specifically, and as explained in detail below, this Court can find jurisdiction in one of two ways. First, it can construe the Immigration and Nationality Act ("INA"), as amended in 2005 by the REAL ID Act, to avoid Suspension Clause problems by finding that Congress did not eliminate habeas jurisdiction in circumstances like those presented here. This is the conclusion reached by the court in *Chhoeun*, the recent Cambodian stay case. *See* Section A, *infra*. Alternatively, if the Court concludes that the INA has divested it of habeas jurisdiction, it can nonetheless adopt the approach of the Boston, Detroit, and Miami courts and hold that habeas jurisdiction is constitutionally required under the Suspension Clause. *See* Section B, *infra*.

A. Congress Did Not Eliminate Statutory Habeas Jurisdiction Where The Petition-For-Review Process Is Unavailable or Inadequate.

As it has in the four recent stay cases, the government will almost certainly rely principally on the 2005 REAL ID Act to argue that Congress has repealed habeas jurisdiction over removals. But the REAL ID Act simply makes clear that, as a *general* rule, removals must

be challenged in the courts of appeals by petition for review, rather than by habeas. Neither 8 U.S.C. §§ 1252(a)(5) or 1252(b)(9), nor the REAL ID Act generally, demonstrates Congressional intent to repeal habeas where, as here, review in the court of appeals would be unavailable or inadequate.

The general rule is based on two well-settled principles. First, the legality of a removal must be reviewable in some court to avoid a Suspension Clause violation. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) ("Because of [the Suspension] Clause, some judicial intervention in deportation cases is unquestionably required by the Constitution.") (citation and internal quotation marks omitted). Second, review in the court of appeals by petition for review must generally be feasible, thereby providing a judicial forum and avoiding the Suspension Clause problem that would otherwise exist if no judicial forum were available.

Recognizing these twin principles, courts have not hesitated to find that habeas jurisdiction remains available where a removal could not adequately be challenged by petition for review. Courts have found that habeas remains available where, for example, the petitioner's challenge is based on events that post-dated review of the initial removal challenge, such as where there have been changed circumstances or post-order ineffective assistance of counsel. *See, e.g.*, *Chehazeh v. Att'y Gen.*, 666 F.3d 118, 130–133 (3d Cir. 2012) (finding district court jurisdiction to review BIA decision to reopen case to terminate asylum because petitioner did not challenge the original order but rather decisions that post-dated its entry); *Jama v. INS*, 329 F.3d 630, 632–33 (8th Cir. 2003), *aff'd sub nom Jama v. ICE*, 543 U.S. 335 (2005) (claims based on events that occurred after removal order; finding habeas jurisdiction to review challenge to agency's failure to adhere to mandatory post-order statutory requirements); *Singh v. Gonzales*, 499 F.3d 969, 979 (9th Cir. 2007) (finding jurisdiction over claim based on ineffective assistance

of counsel that arose after removal order, explaining that "a successful habeas petition in this case will lead to nothing more than 'a day in court' . . . , which is consistent with Congressional intent underlying the REAL ID Act"); *Kellici v. Gonzalez*, 472 F.3d 416, 419–20 (6th Cir. 2006) (holding that habeas available to challenge the government's failure to provide notice of a petitioner's arrest after a removal order became final, and stating that habeas is available where the court does not need to directly address "the final order").[1]

Courts have also found jurisdiction exists where there is too little time to seek review by motion to reopen, especially where individuals fear persecution or torture once removed. *See Ibrahim*, 2018 WL 582520 at *6 (petitioners would not have enough time to adequately file a motion to reopen before removal and "cannot effectively pursue motions to reopen from Somalia where they would likely be forced underground to avoid persecution immediately upon arrival"); *Devitri*, 2017 WL 5707528 at *7 (finding the procedures in the Immigration Court will be adequate "so long as they receive from this Court a reasonable time period for filing the motions to reopen to which they are entitled"); *Hamama*, 261 F. Supp. 3d 820, 832 (E.D. Mich. July 24, 2017) (finding that if petitioners were removed to Iraq, where they would likely face persecution and torture, "prior to their filing and adjudication of motions to reopen, their ability to seek judicial review in the courts of appeals [would] be effectively foreclosed"). *See also Chhoeun*, 2018 WL 566821 at *9 (finding jurisdiction because petitioners "merely request that their deportations be delayed until they can file motions to reopen and until they can avail themselves of the administrative system that exists to litigate meritorious motions to reopen").

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[1] *See also Ilyabaev v. Kane*, 847 F. Supp. 2d 1168, 1174 (D. Ariz. 2012) (finding habeas jurisdiction over claim that "could not have been raised in their removal proceedings").

Finally, courts have permitted habeas review of challenges to detention during the administrative immigration process for the same conceptual reason: review in the courts of appeals after the immigration process concluded would come too late to remedy unlawful detention during the immigration process. *See Hernandez v. Gonzales*, 424 F.3d 42, 42–43 (1st Cir. 2005); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075–76 (9th Cir. 2006); *Kellici*, 472 F.3d at 419–20.

In short, the circumstances in which the courts have found habeas review in the courts of appeals will vary—but the common denominator is that review in the courts of appeals would be unavailable or inadequate based on the particular facts of the case.

As explained below, Petitioners assert claims that could not have been raised in the courts of appeals by petition for review when they received their initial removal orders. That is necessarily so because Petitioners contend that the government seeks to remove them without any opportunity to show that they would be persecuted or tortured if removed given *recent* events and the *current* situation in Indonesia—circumstances that postdate their removal orders. As discussed below, the claims thus must be reviewable in this Court to avoid the Suspension Clause violation triggered by the absence of any forum in which Petitioners can assert their claims.

The government will rely on 8 U.S.C. § 1252(g), which generally eliminates habeas jurisdiction over challenges to the "execution" of removal orders. But Section 1252(g) has no bearing on this case because that provision applies only to challenges to *discretionary* claims. As the Third Circuit has explained, Section 1252(g) was "'directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion.'" *Chehazeh v. Attorney Gen. of U.S.*, 666 F.3d 118, 135 (3d Cir. 2012) (quoting *Reno v. AADC*, 525 U.S. 471,

485 n. 9 (1999)). *See also AADC*, 525 U.S. at 485 ("Section 1252(g) seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations"). As such, the Third Circuit has stated that the provision is to be read "narrowly and precisely to prevent review only of the three narrow discretionary decisions or actions referred to in the statute." *Garcia v. Att'y Gen.*, 553 F.3d 724, 729 (3d Cir. 2009); *see also Orozco-Velasquez v. Att'y Gen.*, 817 F.3d 78, 81 (3d Cir. 2016) (holding that § 1252(g) does not bar jurisdiction where petitioner did not challenge the commencement of his removal order but rather challenged the absence of proper notice to appear); *Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001) (holding that Section 1252(g) "limits the power of federal courts to review the discretionary decisions of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders");.[2]

Here, Petitioners are not raising discretionary claims. They do not categorically challenge the government's prosecutorial discretion to remove them. Rather, they claim that before they can be removed they must have the opportunity to seek meaningful review based on changed circumstances. In particular, they raise a due process claim and a CAT claim (and a related withholding of removal claim), and they rely on the Suspension Clause. Constitutional

[2] Other Circuit Courts of Appeals have likewise read Section 1252(g) narrowly. *See, e.g. Madu v. Attorney General*, 470 F.3d 1362, 1368 (11th Cir. 2006) (stating that the provision is to be "interpreted narrowly" and does "not proscribe substantive review of the underlying legal bases for . . . discretionary decisions and actions"); *Alvarez v. U.S. Immigration & Customs Enf't.*, 818 F.3d 1194, 1205 (11th Cir. 2016), *cert. denied sub nom. Alvarez v. Skinner*, 137 S. Ct. 2321 (2017) (stating that Section 1252(g) applies only to "discretionary determinations"); *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) (Section 1252(g) does not bar "consideration of a purely legal question, which does not challenge the Attorney General's discretionary authority"); *Jama*, 329 F.3d at 632 (Section 1252(g) does not bar review of the Attorney General's non-discretionary "legal conclusions"); *Flores-Ledezma v. Gonzales*, 415 F.3d 375, 380 (5th Cir. 2005) (finding no Section 1252(g) bar where petitioner "challenges the constitutionality of the statutory scheme allowing for such discretion").

claims are, of course, non-discretionary. And both CAT and withholding are *mandatory* forms of relief that cannot be denied in the exercise of discretion where the applicant meets the statutory standard. 8 U.S.C. § 1231(b)(3) ("the Attorney General may not remove" a noncitizen who meets the standard for withholding, unless narrow criminal exceptions are present); 8 C.F.R. § 1208.17(a) (noncitizen who satisfies the CAT standard "shall be granted deferral of removal"). *See Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d. Cir. 2003) (stating that "withholding removal under the Convention is mandatory just as it is for withholding of deportation").

Thus, Petitioners claims do not fall within the narrow scope of Section 1252(g) because they do not challenge the government's discretion to remove them. Instead, they claim they have a non-discretionary *legal right* to pursue a motion to reopen before the government removes them, and to raise mandatory forms of relief under CAT and withholding of removal.

In short, because Congress has not eliminated habeas jurisdiction in cases where a petition for review is not feasible, this Court need not reach the Suspension Clause issues. *See Chhoeun*, 2018 WL 566821 at *9 (finding INA did not bar habeas jurisdiction because "Petitioners do not directly challenge the bases for their orders of removal [but] seek an opportunity to challenge the removal orders."). If, however, the Court concludes that Congress has repealed habeas jurisdiction over petitioners' claims, then it must invalidate the statute as applied here, as the Detroit, Boston and Miami courts have done—as explained in detail below.

B. Even If Congress Repealed Statutory Habeas Jurisdiction, The Suspension Clause Nonetheless Guarantees Habeas Review Over Removals Where No Other Adequate and Effective Alternative Exists.

The Suspension Clause states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. If the REAL ID Act precludes judicial review of

Petitioners' claims, it would violate the Suspension Clause because the Suspension requires that some adequate forum be available, and here habeas jurisdiction is the only forum available.

As the Supreme Court explained, the Suspension Clause "unquestionably requires some jurisdiction in deportation cases." *INS v. St. Cyr*, 533 U.S. 289, 300-01 (2001) (*quoting Heikkila v. Barber*, 345 U.S. 229, 235 (1953)); *see also id.* at 305 ("[T]o conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law."); *Hamama*, 261 F. Supp. 3d at 831 (finding Suspension Clause applies to removal of Iraqis); *Devitri*, 2017 WL 5707528 at *5 (same as to Indonesians); *Ibrahim*, 2018 WL 582520 at *6 (same as to Somalis). See also *Sandoval v. Reno*, 166 F.3d 225, 237–38 (3rd Cir. 1999) (emphasizing that the lack of review over removals would raise serious constitutional problems under the Suspension Clause).

In the recent stay cases, the government has unsuccessfully offered two types of Suspension Clause arguments. The first is that the Suspension Clause does not apply to challenges to removal, but only to a claim for release from detention. The second is that even if the Suspension Clause does apply to removals, the Suspension Clause permits the repeal of habeas if there is an adequate alternative; according to the government, a motion to reopen from *outside* the country is an adequate alternative. Both arguments are unavailing and were properly rejected by the courts to consider the recent stay cases. *See Ibrahim*, 2018 WL 582520 at *6 ("[t]he Court is unpersuaded by the government's position that Petitioners can meaningfully pursue a motion to reopen from Somalia"); *Devitri,* 2017 WL 5707528 at *2 ("[c]ustody is not limited to physical detention . . . [f]inal orders of removal have been held to satisfy the custody requirement); *Hamama,* 261 F. Supp. 3d at 831–32 ("The Government's argument that habeas is

not appropriate—on the theory that Petitioners are not challenging the fact of their detention—thus has no support… .”).

1. The Suspension Clause Applies to Individuals Facing Removal.

The government will likely argue that the Suspension Clause applies only where one seeks release from detention. Yet, such an argument cannot be squared with the Supreme Court's decision in *St. Cyr*, 533 U.S. at 300–08, or the voluminous historical precedent on which *St. Cyr* relied. In *St. Cyr*, the petitioners did not seek release from detention, but rather, sought to challenge their removal. The Court construed the INA to find habeas jurisdiction, emphasizing that the INA would have raised "serious" Suspension Clause problems had it eliminated habeas review over petitioners' removal orders. The Court's Suspension Clause concerns would have made little sense if, as the government contends, the Suspension Clause applies only where noncitizens seek release from detention, and not where they challenge their removal. Nor would the Court's lengthy discussion of the long history of habeas review over removals make any sense if the government were correct. *See accord. Sandoval v. Reno*, 166 F.3d 225, 233 (3d Cir. 1999) (canvassing the long "availability of habeas to challenge immigration decisions" where petitioner sought to challenge removal, and was not seeking release from detention).

In the recent stay cases, the government has also relied on decisions addressing overseas matters to suggest that habeas review is limited to situations where one seeks release from detention. For instance, the government has cited *Munaf v. Geren*, 553 U.S. 674 (2008), and *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009). Neither remotely precludes habeas jurisdiction here. Indeed, both cases could not be more different than the instant case. As an initial matter, the Court in *Munaf* unanimously found habeas jurisdiction. Moreover, in rejecting the merits claim, the Court stressed the unique overseas military context, involving two individuals arrested and detained in Iraq who sought to block the U.S. military's wartime transfer

of them to the Iraqi government for criminal prosecution. *See* 553 U.S. at 680 (holding "the habeas statute extends to American citizens held overseas by American forces" but denying relief "[u]nder circumstances presented [in the instant case]"); *Hamama*, 261 F. Supp. 3d at 829–30 (finding jurisdiction and distinguishing *Munaf* because "[u]nlike the petitioners in *Munaf*, Petitioners here are not the subject of extradition requests by a foreign power, so there is no issue of interference with comity in regards to foreign nations, the expressed concern of the Supreme Court."). And unlike the *Munaf* petitioners, Petitioners here have not made a speculative claim that they may be mistreated; they have produced substantial evidence that such mistreatment is highly probable and have specifically invoked the CAT.

Kiyemba is likewise far afield. That case involved enemy combatants held at Guantanamo Bay. The D.C. Circuit held only that CAT claims could not be raised by enemy combatants overseas, wholly outside the immigration system. *Kimbeya,* 561 F.3d at 514. The court did not remotely hold that habeas review does not encompass claims raised by individuals, like Petitioners, who are in the United States and who seek to access the immigration process to raise CAT claims challenging their removal. *Hamama*, 261 F. Supp. 3d at 830 (distinguishing *Kiyemba* because "unlike the petitioners there, who were enemy combatants, Petitioners here are participants in the immigration process, who wish to raise CAT[] arguments to challenge the present enforcement of their removal orders.").

2. The Motion to Reopen Process Would Not Provide an Adequate and Effective Alternative to Habeas for Petitioners in the Absence of a Stay.

The government's next argument will likely be that Petitioners have an adequate alternative to habeas such that the Suspension Clause is satisfied. Specifically, in the other recent stay cases, the government argued that the writ of habeas corpus is not suspended if Congress has provided an "adequate and effective" collateral remedy to challenge the alleged

illegality in federal courts. *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *Boumediene v. Bush*, 553 U.S. 723, 780 (2008). Petitioners do not of course dispute that general proposition. Rather, the question presented here, as in the other four recent stay cases, is whether the alternative—a motion to reopen from overseas for individuals facing persecution and torture—is an adequate and effective alternative. It is not, for virtually the identical reasons found by the other four courts.

"The administrative process to file motions to reopen and stay can only be adequate and effective if individuals are given a fair chance to access the process." *Hamama*, 261 F. Supp. 3d at 830. Given the risk of imminent deportation that Petitioners face, "the confluence of events in this case . . . would effectively foreclose [the opportunity to file a motion to reopen] for many Petitioners without intervention by the Court." *Id.* *See also Ibrahim*, 2018 WL 582520 at *6 (holding that petitioners cannot effectively pursue motions to reopen from Somalia because "[i]t is unclear how Petitioners could access their immigration files or witnesses in the United States . . . all while attempting to avoid persecution in Somalia" upon arrival); *Devitri*, 2017 WL 5707528 at *7 ("Exercising jurisdiction to grant Petitioners time to effectively use the required administrative process is consistent with Congressional intent.").

The most recent decision in *Devitri* involving Indonesian Christians in New England unequivocally rejected the government's contention that existing procedures would be sufficient due process to protect their rights to the relevant immigration relief such as asylum or CAT. *Devitri v. Cronen*, No. 17 Civ. 11842, 2018 WL 661518, at *4–5 (D. Mass. Feb. 1, 2018) (finding that the process for adjudication motions to reopen and motions to stay "are not adequate administrative alternatives to habeas for these Petitioners."). This holding was based on concern about the likelihood that petitioners in that case would be returned to Indonesia before

their motions to reopen could be filed or while their motions were pending—leaving them exposed to the very risk of persecution that their motions would be intended to prevent. *Id.* at *4 (calling this administrative procedure "Kafkaeseque"). (*See also* Kanstroom Decl. ¶ 6.)[3]

The *Hamama* court similarly concluded on behalf of a group of Iraqis that forcing individuals to litigate relief from torture and persecution after they have been deported to the *very* country where they will face torture and persecution would leave due process a hollow promise. "Petitioners who face this severe mistreatment will obviously be unable to vindicate their habeas rights" as they will face potentially insurmountable obstacles to pursue their legal claims. *Hamama*, 261 F. Supp. 3d at 833 (noting, among other things, that "[m]aintenance of legal paperwork and communication with lawyers and potential witnesses would likely become extraordinarily problematic, if not impossible" when attempting to escape persecution and torture after removal). In order to ensure that the process is adequate—given the risk of torture and persecution in Indonesia—Petitioners' motions to reopen must be filed and decided before they are removed.

The government will likely argue, however, that Petitioners can seek administrative stays from the immigration courts or the Board of Immigration Appeals. However, in order to seek a stay, Petitioners must *first* prepare and file a motion to reopen proceedings. (*See* Kurzban Decl. ¶ 16; Realmuto Aff. ¶ 14; Anker Decl. ¶ 14.)[4] The regulations

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[3] Citations to Citations to "Kanstroom Aff. __" are to the Affidavit of Professor Daniel Kanstroom, dated February 16, 2018, attached as Exhibit B to the Declaration of Alexander Shalom.

[4] Citations to "Kurzban Decl. __" are to the Sworn Declaration of Ira J. Kurzban, dated February 15, 2018, attached as Exhibit F to the Declaration of Alexander Shalom. Citations to "Realmuto Aff. __" are to the Affidavit of Trina A. Realmuto, dated February 1, 2018, previously filed in this action as ECF No. 1-6, and attached as Exhibit C to the Declaration of Alexander Shalom. Citations to "Anker Decl. __" are to the Declaration of Deborah Anker,

require that a motion to reopen include "the appropriate application for relief and all supporting documentation." 8 C.F.R. § 1003.2(c)(1). Petitioners must therefore prepare and file an application for asylum, withholding, or relief under the CAT, and all evidence showing that circumstances have changed since their last immigration hearing. It is not enough to assert changed circumstances, the circumstances must be established through evidence, which takes time to gather and assemble. *See generally* 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R. § 1003.2(c)(1). And the burden is upon the applicant to show not merely changed circumstances, but significant changed circumstances in the country of persecution that would affect the applicant's case in a way that is different than his previous application. (*See* Realmuto Aff. ¶ 9; Kurzban Decl. ¶ 12; Anker Decl. ¶ 4.)

Moreover, as the court recognized in *Hamama*, "preparing a motion to reopen proceedings before the immigration courts is a difficult task." 261 F. Supp. 3d at 826–27. A lawyer must obtain the underlying A-File, the file documenting the noncitizens' immigration history, and the Record of Proceedings, a court file that contains a history of the past administrative proceedings. (*See* Realmuto Aff. ¶¶ 10–11; Kurzban Decl. ¶ 14.) USCIS has a backlog of over 35,000 FOIA requests, and generally takes several months to produce an A-file. (Kurzban Decl. ¶ 14.) EOIR requests can take several weeks to months. (*Id.*) Requests for older records can take even longer than requests for newer ones. (*Id.*) In addition to reviewing the file once obtained, counsel must assemble evidence necessary to support the motion to reopen. *See* 8 U.S.C. § 1229a(c)(7)(B) (requiring that motions to reopen "be supported by affidavits or other evidentiary material").

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dated January 31, 2018, previously filed in this action as ECF No. 1-7, and attached as Exhibit D to the Declaration of Alexander Shalom.

Absent this arduous preparation, a stay request will not be granted. Yet, under the government approach, Petitioners will not be protected from removal to Indonesia during this period of preparation, and filing a motion to reopen from abroad presents often insurmountable practical impediments, especially when the individual seeking to filing the motion is also attempting to evade persecution or torture. (*See* Kanstroom Decl. ¶ 6). Moreover, the filing of an emergency stay motion does not require ICE to halt a deportation. Instead, either an Immigration Judge ("IJ") or the Board of Immigration Appeals ("BIA") must actually grant the stay motion before ICE has a legal obligation to halt a deportation. No legal standard requires that the IJ or the BIA rule on a stay before a person is deported. (Kurzban Decl. ¶ 17.) In light of this, *Devitri* firmly rejected the contention that existing procedures—which provide no concurrent stay of removal—would be sufficient to protect the plaintiffs' right to the substantive immigration relief they sought (*e.g.*, asylum or CAT). *Devitri*, 2018 WL 661518 at *4–5 (finding that the "processes for adjudicating motions to reopen and motions to stay are not adequate administrative alternatives to habeas for these Petitioners."). This holding was based on concern about the likelihood that petitioners in that case would be returned to Indonesia while their motions were pending—leaving them exposed to the very risk of persecution that their motions would be intended to prevent. *Id.*

Finally, even if they were able to litigate their motions to reopen from Indonesia, there will be further, practical impediments to return. As the Boston court found in the context of Indonesian Christians, "even if the BIA granted Petitioners' motions to reopen after their removal, they may not be able to return to the United States" as a result of circumstances they may face in Indonesia and governmental barriers. *Devitri*, 2018 WL 661518 at *7. As Professor Daniel Kanstroom explains in his attached declaration, the U.S. government's "Return Policy"

for people who have had motions to reopen granted is "unevenly applied" and often discretionary. (Kanstroom Decl. ¶ 11). People whose motions to reopen have been granted following removal too often are unable to return to the United States due to factors such as "refusal of agencies to issue travel documents; noncitizens receiving conflicting information about return from the Department of State and the Department of Homeland Security; agency staff imposing limitations on the types of cases eligible for return"; and by U.S. officials' "bald refusal to effect return." (*Id.* ¶ 11.).

3. <u>Petitioners Did Not Unreasonably Delay Pursuing Their Rights</u>.

The government may argue that Petitioners are at fault for not having previously prepared and filed motions to reopen. Such an argument lacks merit for several independent reasons.

First, Petitioners intend to raise claims in their motions to reopen that necessarily could not have been raised in their original immigration cases. Each Petitioner's order of removal became final before 2009—in some cases years before that date. Yet, the motions to reopen they now seek to file would be based on events that occurred *after* their removal orders became final. Petitioners' argument is supported by the Affidavit of Jeffrey A. Winters, Ph.D. ("Winters Aff."), which contains the same evidence of changed country conditions in Indonesia that the Boston court credited in *Devitri*. Dr. Winters recognizes that "[t]here has been a marked increase in violent extremism against Indonesian Christians over the last few years . . . [, which] has *grown at a particularly alarming pace since 2012*." (Winters Aff. at 1) (emphasis added). *See also Devitri*, 2018 WL 661518 at *6–7 (concluding that the New Hampshire Indonesian Christians had "presented unrebutted evidence to show that, if they were deported to Indonesia, they would face the threat of persecution or torture"). The *Hamama* court applied common sense analysis, recognizing that a group of Iraqis could not have filed motions to reopen before the

changed country conditions on which the motions would be based had even occurred. 261 F. Supp. 3d at 832. The *Devitri* court reached the same conclusion as to Indonesian Christians, finding that there is "no time limit" on filing a motion to reopen if the changed country conditions "would not have been discovered or presented at the previous proceeding" –and even cautioned that "a longer time period may be appropriate when there is proof of changed country circumstances." *Devitri*, 2017 WL 5707528 at *4, 7 (citing 8 U.S.C. § 1229a(c)(7)(C)(ii)).

Second, any claim that Petitioners should have previously pressed their rights must fail because they face a separate and newly heightened risk of persecution based on recent public attention to the U.S. government's plan to summarily deport Indonesian Christian asylum seekers. In *Devitri*, the court acknowledged evidence that the New Hampshire group now faces this new, heightened risk if they are deported—noting Dr. Winter's affidavit as "evidence that this case has been covered by the Indonesian press, which has expressly stated the names of some of the Petitioners." 2018 WL 661518 at *7. The court further noted evidence that the New Hampshire petitioners "are highly likely to face retribution by the Indonesian authorities for having 'spoken out as Christians'" because "[t]he Indonesian government is extremely sensitive about negative portrayals of the country abroad, and officials take an especially negative view of Indonesians who are the source of the criticism." *Id.*; *see also Ibrahim*, 2018 WL 582520 at *6 (recognizing the heightened danger that the Somali petitioners face based on public attention related to the recent events underlying the attempted deportation of that group). Here, the New Jersey Indonesians fear they will face the same heightened risk of persecution as their New Hampshire counterparts, either because the publicized conduct of the New Hampshire group will be imputed to them, or because the growing press coverage of their own situation will increase

the risk directly. (Kaper-Dale Decl. ¶ 24.)[5][6] Since this new risk could not have been raised in immigration cases that were final before 2009, any claim that changed circumstances are not implicated here would lack merit.

Third, Petitioners reasonably relied upon a status quo that afforded the group years of protection against deportation. From 2009 on, Petitioners were living in the United States pursuant to an agreement negotiated with the government that allowed them to live, work, and build families without imminent risk of removal. In 2009, Reverend Kaper-Dale, the pastor of a church that ministers to Indonesian Christians in New Jersey, worked with ICE to explore options to protect Indonesian Christians in New Jersey with final orders of removal and no criminal history. (Kaper-Dale Decl. ¶¶ 6–7.) These discussions led to a mutually beneficial agreement: members of the group would disclose their identity and residences to ICE, in exchange for Orders of Supervision ("OSUPs") and employment authorization (the "New Jersey Indonesian Orders of Supervision Agreement" or the "Agreement").[7] (*Id.*) The group before this Court could have remained "under the radar," but they relied upon the Agreement, and approximately 78 individuals came forward to live under OSUPs, and others joined the group thereafter. (*Id.* ¶ 9.)

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5 Citations to "Kaper-Dale Decl. __" are to the Supplemental and Amended Declaration of Reverend Seth Kaper-Dale, dated February 16, 2018, attached as Exhibit A to the Declaration of Alexander Shalom.

6 The government's treatment of the putative class has received significant coverage in the press. *See, e.g.*, "Christian Indonesians in New Jersey fear deportation to hostile homeland, seek sanctuary at church" ABC News (Feb. 9, 2018), *available at* http://abcnews.go.com/US/christian-indonesians-jersey-fear-deportation-hostile-homeland-seek/story?id=52916931; "New Jersey's Indonesian Christians Avoid Deportation–For Now," WNYC News (Feb. 6, 2018), *available at* https://www.wnyc.org/story/new-jerseys-indonesian-christians-avoid-deportation-for-now/.

7 The Complaint filed on February 2, 2018 incorrectly identifies named Petitioner Harry Pangemanan as having an Order of Supervision from 2013. In fact, his OSUP was dated 2009 and was issued after the Agreement was reached.

Petitioners lived under the Agreement for years and were led to believe it provided a form of protection. Even when the Agreement seemed to falter, during a one year period in 2012 to 2013, Reverend Kaper-Dale's advocacy ultimately shored up the protections afforded the group. (*Id.* ¶¶ 13–14.) Indeed, four years passed uneventfully, during which not a single member of the group is believed to have been deported. (*Id.* ¶ 15.) In short, the Agreement afforded special protections to this group of Indonesian Christians.

In 2017, new ICE enforcement activity created confusion: a small number of the group was detained, but others appeared for check-ins and were told to simply report again at a later date. (*Id.* ¶ 16.) Despite Reverend Kaper-Dale's numerous communications with ICE officials seeking clarity regarding the group's status, no ICE official ever stated that the Agreement had been abandoned. (*Id.* ¶¶ 17–19.). By contrast, a similarly situated group of Indonesian Christians in New Hampshire were explicitly notified in June 2017 that protections afforded under an analogous program were terminated. *Devitri*, 2017 WL 5707528 at *2. On January 25, 2018, individual anxieties crystallized into a group-panic when ICE detained two members of the community, and attempted to detain a third, in a coordinated enforcement action. (*Id. ¶* 22.) The individual targets of the January 25th action had no notice of the change in their status; indeed, their check-in dates were days, weeks, or months away,[8] and they were not told that they would be detained.

Like the New Hampshire group, Petitioners "reasonably relied on their OSUPs in not filing motions to reopen earlier and had no reason to suspect that the Government would abruptly change its mind about the humanitarian program." *Devitri*, 2018 WL 661518 at *2.

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[8] Harry Pangemanan was scheduled to check in with ICE five days after his attempted arrest, while Roby Sanger was scheduled to report in February 2018 and Gunawan Ongkowijoyo Liem in March 2018.

And, as was true for the group of Cambodians whose summary removal was halted just last month, here it would be "disingenuous for the Government to claim that throughout the many years that Petitioners were permitted to live and work on supervised release, they should not have built up any expectations that they would be permitted to remain in the country." *Chhoeun*, 2018 WL 566821 at *9.

Finally, the argument that Petitioners should have acted earlier ignores the significant barriers to filing a motion to reopen. The courts that have adjudicated analogous recent cases recognized that filing a motion to reopen is not an easy process, particularly for people with limited access to competent counsel and with limited means. For example, the court in *Chhoeun* explicitly acknowledged the "complex process of filing such a motion." 2018 WL 566821 at *6. The court further recognized:

> Filing motions to reopen therefore requires substantial time, resources and expertise. Attorneys working to file these motions must have access to their clients and to various documents. These documents include, at a minimum, the A-File, a comprehensive immigration file maintained by the Department of Homeland Security, and the Record of Proceedings, the immigration court file maintained by the Executive Office for Immigration Review. In some cases, attorneys can only obtain these necessary files through Freedom of Information Act requests, which may not produce results for months.

Id. (omitting references to the case record). For those in detention, the court further acknowledged, filing a motion to reopen can be "prohibitively difficult." *Id.* Likewise, the court in *Hamama* v. *Adducci*, 258 F. Supp. 3d 828, 833 (E.D. Mich. 2017), called the motion to reopen process "no easy task," one that "requires 'a high level of immigration law knowledge and experience,' and one that can cost "up to $80,000."

Courts have thus recognized that the complexity of the motion to reopen process is exacerbated by the fact that the groups affected are often the least able to afford it. In the instant case, Petitioners are certainly no exception to that rule: the majority of the group is unrepresented

for the purpose of filing motions to reopen. (Kaper-Dale Decl. ¶ 25.) Reverend Kaper-Dale's church has stretched financially to assist a few people hire lawyers, but can do no more. (*Id.* ¶ 26.) Kaper-Dale has himself worked tirelessly to find lawyers for his community, but it has proven very difficult. (*Id.*) Pro bono counsel has only just begun the difficult process of identifying pro bono attorneys for such a large group—and will require sufficient time to accomplish the difficult task. Once a sufficient number of lawyers are recruited, those lawyers must then endeavor to obtain the necessary evidenced and prepare complex motions to reopen.

It is "confluence of grave, real-world circumstances" that makes the motion to reopen process inadequate. *Hamama*, 258 F. Supp. 3d at 840. Petitioners face torture and persecution if returned to Indonesia; they cannot complete the typical motion to reopen process before their removal to torture or persecution; and Petitioners could not have reasonably been expected to file their motions to reopen earlier. To the contrary, Petitioners rights can only be protected—and their physically safety ensured as required by law— if they are afforded time in which to file and await the outcome of motions to reopen their immigration cases.

CONCLUSION

For all the reasons described above, Petitioners respectfully request that the Court find jurisdiction is proper and set a briefing schedule on the merits of the preliminary injunction to determine how much time to afford Petitioners to pursue their motions to reopen.

Dated: February 16, 2018

Respectfully Submitted,

PETITIONERS/PLAINTIFFS

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/s/ Alexander Shalom

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CERTIFICATE OF SERVICE

I, Alexander Shalom, certify that the foregoing Petitioners'/Plaintiffs' Brief on Jurisdiction was served electronically on all counsel by CM/ECF on February 16, 2018.

/s/ Alexander Shalom
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