UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HARRY PANGEMANAN, MARIYANA SUNARTO, ROBY SANGER, GUNAWAN ONGKOWIJOYO LIEM, individually and on behalf of all others similarly situated,

Petitioners/Plaintiffs,

v.

JOHN TSOUKARIS
Newark Field Office Director for Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement

MATTHEW ALBENCE
Executive Associate Director for Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement

THOMAS D. HOMAN
Acting Director of U.S. Immigration and Customs Enforcement

KIRSTJEN M. NIELSEN
Secretary of the U.S. Department of Homeland Security

JEFFERSON B. SESSIONS
Attorney General of the United States

CHARLES L. GREEN
Warden, Essex County Correctional Facility

and

ORLANDO RODRIGUEZ
Warden, Elizabeth Detention Center

Respondents/Defendants.

Civil Action No. _____

MEMORANDUM OF LAW IN SUPPORT OF
MOTIONS FOR TEMPORARY RESTRAINING ORDER AND STAY OF REMOVAL

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I. INTRODUCTION

Petitioners/Plaintiffs, and the putative class they represent, are Christian Indonesian nationals who have resided in the United States for many years. They have committed no crime. They are devout, committed members and leaders of their churches. They volunteer in their communities. They are hard workers. Many are part of close-nit families with U.S. citizen children. Some of their children are "dreamers" who are part of the DACA program. While Petitioners ultimately became subject to final orders of removal, ICE nevertheless permitted them to live and work here under Orders of Supervision for years, pursuant to an agreement reached with the ICE Newark Field Office in 2009.

Petitioners now face imminent removal to Indonesia, a country in which they are likely to face persecution on account of their Christian faith. They seek a stay of removal to be afforded a reasonable period of time to gather and present evidence and 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—country conditions that postdate their final orders of removal. Just yesterday, the United States District Court for the District of Massachusetts granted a preliminary injunction and stayed the removal of a group of Indonesian Christian residents from New Hampshire on very similar facts in order to allow those petitioners to file motions to reopen based on the same changed country conditions. *Devitri v. Cronen*, No. 17 Civ. 11842, slip op., ECF No. 90 (D. Mass. Feb. 1, 2018) ("*Devitri* Prelim. Inj. Dec."). In doing so, that court framed its decision as "doing no more than allowing [the New Hampshire Indonesian Christians] to use the administrative and judicial procedures that Congress designed and the Constitution requires." *Id.* at 21.

Like the Indonesian Christians residing in New Hampshire, Petitioners here seek a stay of removal so that they may have a reasonable period of time to compile and present evidence—in the form of motions to reopen their immigration cases—to demonstrate that they are legally entitled to remain in the United States. Such motions would rest principally on the fact that if they are forcibly removed to Indonesia, they will face a grave risk of persecution, torture and possibly death due to the current dangerous conditions in Indonesia. That is so because—as set forth in detail in the Affidavit of Jeffrey A. Winters, Ph.D. ("Winters Aff."), there has since 2012 been a dramatic increase in violence and intolerance directed at religious minorities in Indonesia, especially Christians. Indeed, yesterday's *Devitri* opinion credited this same expert testimony, concluding that the New Hampshire Indonesian Christians had "presented unrebutted evidence to show that, if they were deported to Indonesia, they would face threat of persecution or torture." *Devitri* Prelim. Inj. Dec. at 18. The court further recognized record evidence in that case showing that "law enforcement in Indonesia is unlikely to provide meaningful protection to religious minorities—and [Christians], like Petitioners, in particular—in the face of violence and intolerance" and that "'the Indonesian government actively supports Islamic extremists who are anti-Christian and 'will punish those who are 'vocal' and 'assertive' Christians, such as Plaintiffs.'" *Devitri* Prelim. Inj. Dec. at 5 (citing Winters affidavit). The *Devitri* court also noted that the Government's own 2013 report concludes that the Indonesian government "'did not enforce laws that would protect vulnerable groups and religions' and 'collaborated with hardline groups against members of sects they deemed to be 'deviant.'" *Id.* (citing Winters affidavit). As is true for the petitioners in *Devitri*, the Petitioners here could not have presented such evidence in their original proceedings because these conditions arose after the adjudication of their immigration cases.

Under federal law, ICE may not remove an alien to a country if the government decides that "the alien's life or freedom would be threatened in that country because of the alien's . . . religion." 8 U.S.C. § 1231(b)(3)(A). Removal becomes unlawful where the alien demonstrates an entitlement to asylum, *i.e.,* that it "is more likely than not that he or she would be persecuted on account of . . . religion' if removed." 8 C.F.R. § 208.16(b)(2). Even where someone has a final order of removal, and even where the time to file a motion to reopen has run, mandatory relief from deportation can still be found through a motion to reopen the immigration case based on "changed country conditions." 8 U.S.C. § 1229a(c)(7)(c)(ii). Related relief is available in the form of withholding of removal under the United Nations Convention Against Torture (CAT), 8 C.F.R. § 208.16(c)(4). The law sets "no time limit on the filing of a motion to reopen . . . based on changed country conditions . . . if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. § 1229a(c)(7)(C)(ii).

Several courts adjudicating analogous recent cases have recognized that filing a motion to reopen is not an easy process, particularly for people with limited access to competent counsel and limited means. For example, the court in *Chhoeun v. Marin*, No. 17 Civ. 1898, 2018 WL 566821, at *6 (C.D. Cal. Jan. 25, 2018) explicitly acknowledged the "complex process of filing such a motion." 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." The complexity of the motion to reopen process is complicated by the fact that the groups affected are often the least able to afford it. Yet, the importance of this due process right is paramount: "[t]he Supreme Court has recognized that the motion to reopen process is critical, a statutorily-based procedural safeguard." *Ibrahim v. Acosta*, No. 17 Civ. 24574, 2018 WL 582520, at *3 (S.D. Fla. Jan. 26, 2018).

Yesterday's decision in the *Devitri* case rejected the Government's contention that existing procedures—which operate without a stay of removal—would be sufficient due process to protect their rights to the relevant immigration relief such as asylum or CAT. *Devitri* Prelim. Inj. Dec. at 6–9, 11–12 (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 while their motions were pending—leaving them exposed to the very risk of persecution that their motions would be intended to prevent. *Id.* at 12 (calling this procedure "Kafkaeseque").

Because the Due Process Clause of the United States Constitution requires noncitizens be given a reasonable period of time to move to reopen their cases based on changed country conditions, four federal courts have recently stayed removals of groups of similarly situated noncitizens to ensure that such process is afforded. *Devitri* Prelim. Inj.; *Ibrahim* (S.D. Fla. Jan. 26, 2018); *Chhoeun* (C.D. Cal. Jan. 25, 2018); *Hamama* (E.D. Mich. 2017). Like

members of the putative class in this case, the groups in the other cases had each been allowed to stay in the United States for many years under Orders of Supervision, relied upon that status quo, and then were subject to imminent group-based ICE enforcement action with little or no notice. In each of those cases, only a court's intervention stopped the group's summary removal without due process.

Petitioners, Indonesian Christians living in New Jersey, now seek the same relief so that they may have the opportunity to exercise their due process rights. To that end, Petitioners request that the Court grant a temporary restraining order enjoining detainment and deportation activity for a reasonable period of time to allow Petitioners to file motions to reopen and have those motions adjudicated. In the alternative, Petitioners request that the Court grant a temporary restraining order to maintain the status quo and avoid the irreparable harm that would result in the event that any Petitioners are deported while the Court is adjudicating the issues. To the extent Respondents may dispute that this Court has jurisdiction to hear this case, Petitioners respectfully request that the Court impose a temporary restraining order and bifurcate the proceedings such that issues of jurisdiction are determined first before proceeding to the merits—as has been done in three of the other analogous cases. *Ibrahim* (S.D. Fla. Jan. 26, 2018); *Devitri*, 2017 WL 5707528 (D. Mass. Nov. 27, 2017); *Hamama* (E.D. Mich. 2017).

II. BACKGROUND

In 2009, Reverend Seth Kaper-Dale, the Senior Co-Pastor at the Reformed Church of Highland Park, a church that ministers to the Indonesian Christian community, became deeply concerned about the limbo in which members of this community were forced to live. (Kaper-Dale Decl. ¶ 4.)[1] As their spiritual leader, he uniquely understood the fear that the community experienced at the prospect of being forced to return to Indonesia to face the rising

[1] Citations to "Kaper-Dale Decl." are to the Declaration of Reverend Seth Kaper-Dale dated February 2, 2018.

tide of persecution of Christians in Indonesia. (*Id.* ¶¶ 3–4.) As a result, Reverend Kaper-Dale began to work with ICE to explore options to help Indonesian Christians with final orders of removal and no criminal records—and he was told that ICE wanted to help this group. As discussions evolved, an agreement between then-Newark ICE Supervisor Scott Weber emerged: Reverend Kaper-Dale would encourage this group to "come out of the shadows" by disclosing their identity to ICE and submitting to Orders of Supervision and associated monitoring conditions, in exchange for the group's ability to obtain a stay of deportation and employment authorization (the "New Jersey Indonesian Orders of Supervision Agreement" or the "Agreement"). (*Id.* ¶ 5.) In effect memorializing the Agreement, Supervisor Weber sent Kaper-Dale an e-mail dated December 14, 2009, saying that the agreement would "serve to build a little more trust in the community so that other groups in a similar situation as yours will come forward to meet with ICE as you did." (*Id.*) As a show of further good faith, ICE released nine Indonesian Christian residents of New Jersey from detention. (*Id.* ¶ 6.) Ultimately, based on the representations underlying the Agreement, at least 78 individuals came forward in order to live their lives under Orders of Supervision. (*Id.*)

Petitioners could have remained "under the radar," but they relied upon the Agreement. For nearly a decade, they reported to ICE officials at the intervals directed, and abided by the Agreement largely without incident. (*Id.* ¶ 9.) As described above and in the Petition and Class Complaint filed herewith ("Complaint" or "Compl."), this group has lived their lives since the Agreement as peaceable, family and service-oriented, exemplary members of their community. To be sure, there were some individual instances in which Indonesian Christians were the subject of ICE enforcement action in the years after the Agreement was reached. But, this affected only a handful of individuals; none had U.S. citizen children to

support a strong showing of family ties, and—most importantly—there was not group-action to indicate that ICE had abandoned the Agreement. To the contrary, the vast majority of the group continued to report for check-ins as directed, and continued to live relatively normal lives.

In March 2017, ICE ordered a few members of the group to report again in May. (*Id.* ¶ 10.) When they did so, they were detained and, within a month, deported. (*Id.*) Though this caused concern in the community, other members of the group continued to appear for check-ins and were told to simply report again at a later date. (*Id.* ¶11.) Reverend Kaper-Dale attempted to dialogue with ICE officials to determine if the Agreement as to this group had been abandoned or would soon be. (*Id.* ¶12.) He realized that most of the members of the group had limited financial means and could not easily find or afford to hire a lawyer to pursue the complicated motions to reopen. (*Id*.) In an attempt to bring his congregants clarity, Reverend Kaper-Dale repeatedly contacted Newark ICE Supervisor John Tsoukaris to schedule a meeting to discuss the status of the Agreement. (*Id*.) He attempted contact for several weeks in April 2017, with no response. (*Id*.) When members of Tsoukaris's staff finally met with Reverend Kaper-Dale on May 10, 2017 (Tsoukaris did not), they offered no clarity as to the status of the Agreement. But, neither did they tell Reverend Kaper-Dale that the Agreement had been abandoned. (*Id*.) By contrast, in New Hampshire, ICE explicitly "advised pastoral leaders in June 2017 that it would be terminating" a program that was functionally equivalent to the Agreement. *Devitri*, 2017 WL 5707528 at *2. To the contrary, no member of the New Jersey group was detained or deported during the spring or summer of 2017. The common feeling was that while there might have been individual enforcement actions as there had been a few years before, the group was still subject to the Agreement and that it was still largely being honored by ICE.

Petitioners/Plaintiffs long-held belief that they could, as a group, reasonably rely on the Agreement began crumble in late 2017 and early 2018. (Kaper-Dale Decl. ¶¶ 13–14.) Their fear crystallized into panic when ICE attempted to detain three prominent members of the Indonesian Christian community in New Jersey on a single day: January 25, 2018. (*Id.* ¶ 14.) One member of the group was apprehended immediately after he dropped his children off at school, while another was apprehended immediately after he dropped his child off at the school bus stop. The attempted detention of Petitioner Harry Pangemanan was particularly shocking, as Mr. Pangemanan has been a model member of his community—he led disaster relief efforts in New Jersey and Texas, and was honored with the Dr. Martin Luther King Jr. Humanitarian Award by the Highland Park Human Relations Commission on January 15, 2018, just ten days before ICE attempted to detain him. This dramatic ICE action sent an unequivocal message to all putative class members that the Agreement would not be honored. Members of the putative class are now terrified of being forcibly returned to Indonesia, where they will likely face persecution based on their religion, and they are desperate to be afforded the time necessary to identify and hire competent counsel who will file motions to reopen their cases based on changed country conditions that arose after their final order of removal were entered. In short, they are desperate to be afforded the very right that Due Process requires.

The putative class is not the first that ICE has attempted to recently and summarily remove under analogous circumstances. In *Hamama*, the United States District Court for the Eastern District Court of Michigan heard a challenge to the deportation of a group of Iraqis who similarly lived for years under Orders of Supervision. On June 22, 2017 the court stayed their removal pending a determination of the court's jurisdiction. *Hamama v. Adducci*, No. 17 Civ. 11910, 2017 WL 2684477, at *3 (E.D. Mich. June 22, 2017). Then, on July 11,

2017, the court recognized the Due Process and Suspension Clause rights at issue here, and granted an injunction against enforcement of the group members' orders of removal so that their rights could be "meaningfully asserted and addressed before other courts." *Hamama v. Adducci*, 258 F. Supp. 3d 828, 842 (E.D. Mich. 2017). Next, on November 27, the United States District Court for the District of Massachusetts confronted a challenge to the removal of a group of Indonesian Christians who resided in New Hampshire under functionally identical terms as the putative class members here. *Devitri* , 2017 WL 5707528 at *8. The *Devitri* court held that it had jurisdiction over the dispute and temporarily enjoined ICE from removing the New Hampshire group pending a ruling on the motion for preliminary injunction. *Id.* In that decision, the court concluded that the procedural safeguards would be adequate "as long as they receive from this Court a reasonable time period for filing the motions to reopen to which they are entitled." *Id.* at *7.

Just last week, two federal courts reached the same conclusions. The Central District of California issued a preliminary injunction to stop the deportation of a group of Cambodians—without any showing of changed country conditions—based on the finding that their due process right to file motions to reopen were implicated by the fact that they "had been living undisturbed under supervised release for decades, and reasonably concluded that removal, particularly imminent removal, was unlikely." *Chhoeun* v. *Marin*, No. 17 Civ. 01898, 2018 WL 566821 (S.D. Cal. Jan. 25, 2018). In so doing, the *Chhoeun* Court cautioned that

> It is 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 expectations that they would be permitted to remain in the country. Petitioners should instead be commended for investing in and becoming productive members of our communities notwithstanding their removal orders.

Id. at *9. The very next day, the District Court for the Southern District of Florida similarly halted the deportation of a group of Somali nationals who alleged a due process right to reasonable time in which to file motions to reopen based on changed circumstances: the escalation of violence in Somalia caused by Muslim extremists—conditions that postdated their final orders of removal. *Ibrahim v. Acosta*, No. 17 Civ. 24574, slip op. at 1, 6, ECF No. 14 (S.D. Fla. Dec. 19, 2017). Finally, just yesterday, the *Devitri* court issued its second decision, granting a preliminary injunction and staying the removal of Indonesian Christians in New Hampshire. *Devitri* Prelim. Inj. Dec. Moreover, yesterday's *Devitri* decision noted that the court previously ordered the Government to produce each individual's A-file; *Devitri* Prelim. Inj. Dec. at 23 n.13 (citing Docket No. 58); *accord* Order, *Ibrahim v. Acosta*, No. 17 Civ. 24574, ECF No. 70 (S.D. Fla. Feb. 1, 2018) (also requiring the production of A-files). Finally, the court set a specific timeline under which motions to reopen must be filed. *Devitri* Prelim. Inj. Dec. at 23.

III. THE COURT HAS SUBJECT MATTER JURISDICTION

The Court has subject matter jurisdiction over this dispute. As the preliminary matter, there can be no question that the Court has jurisdiction to consider its own jurisdiction. *Dupont v. United States*) (citing *White-Squire v. U.S. Postal Serv.*, 592 F.3d 453, 456 (3d Cir. 2010). All four recent cases confronting the summary removal of a group that has long lived under Orders of Supervision hold that jurisdiction is appropriate in this context to protect against removal while the court considers any threshold questions as to jurisdiction over the merits of the claim.

The Court has jurisdiction over the substance of Petitioners' claims. In each of the four analogous cases, the Government argued that the courts lacked subject matter jurisdiction because Congress eliminated habeas jurisdiction in the Immigration and Nationality Act, as amended in 2005 by the REAL ID Act. And the government has further argued that

Congress may constitutionally eliminate habeas corpus jurisdiction under circumstances like those presented here. In each of these four actions, the courts rejected that argument and held that they had subject matter jurisdiction. In three of those cases, the courts found that if the Immigration Act's jurisdictional provisions were read to deprive it of habeas jurisdiction, the statute would violate the Suspension Clause as applied because "there would be no meaningful opportunity to be heard." *Devitri*, 2017 WL 5707528 at *5 (finding jurisdiction over claims brought by Indonesian Christians in New Hampshire after ICE began detaining and deporting individuals with final orders of removal who had been living for years under Orders of Supervision pursuant to an agreement with ICE, without providing opportunity to move to reopen); *see also Hamama v. Adducci*, No. 17 Civ. 11910, 258 F. Supp. 3d 828, 834 (E.D. Mich. 2017) (same, in case challenging removal of Iraqis; holding that claims are excluded under terms of the REAL ID Act, but that the REAL ID Act is unconstitutional as applied); *Ibrahim v. Acosta*, No. 17 Civ. 24574, 2018 WL 582520, at *6 (S.D. Fla. Jan. 26, 2018) (same, enjoining removal of Somalis without due process right to move to reopen). In the fourth case, the court took a different route to the same result, pointing to Ninth Circuit case law holding that "district courts have jurisdiction when, as in this case, petitioners do not directly challenge their orders of removal, but rather assert a due process right to challenge the orders in the appropriate court." *Chhoeun v. Marin*, No. 17 Civ. 1898, 2018 WL 566821, at *8 (C.D. Cal. Jan. 25, 2018) (same, in challenge brought by Cambodians).

This Court should likewise find jurisdiction or, at a minimum, order further briefing to resolve that threshold issue in advance of additional briefing on the merits. The REAL ID Act Amendments did not eliminate jurisdiction over non-discretionary legal claims where, as here, those claims could not be brought in the courts of appeals by petition for review.

Moreover, the Suspension Clause requires habeas jurisdiction where a legal claim cannot be brought in another forum.

The approach taken by the other four courts to hear recent analogous cases should be followed here. First, as the court recognized in *Chhoeun*, the immediate dispute concerns Petitioners' due process rights, not the validity of their final orders of removal. The Supreme Court has interpreted the REAL ID Act's jurisdictional bar to apply only to three enumerated categories of ICE's discretionary decisions, including the decision "to execute removal orders." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999). Petitioners' claims here do not challenge ICE's execution of removal orders. Instead, Petitioners assert the due process right to seek a stay so that they can exercise their statutory right to move to reopen those proceedings in the appropriate venue.

Even if the Court were to find that the terms of the jurisdictional bar apply on their face, the Court should hold that the bar unconstitutional as applied, just as the three other courts held in *Devitri*, *Hamama*, and *Ibrahim*. 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. The Supreme Court has held that the Suspension Clause may apply to cases involving deportation. *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001). The Supreme Court has also made clear that Congress may eliminate habeas jurisdiction only if it provides an adequate and effective substitute for habeas. *Id.* at 314 n.38. Absent a stay by this Court, Petitioners would lack a meaningful opportunity to assemble and file motions to reopen, and would thus be deprived of an adequate forum for enforcing their statutory and due process rights. Accordingly, as the courts in Boston, Detroit, Miami and Los Angeles have all recently held, the motion to reopen process

is not an adequate substitute for habeas where under the unusual circumstances where ICE seeks to abruptly remove long term residents.[2]

In short, the Immigration Act, as amended by the REAL ID Act, does not apply to bar jurisdiction here, and even if it does, it is unconstitutional under the Suspension Clause as applied to the putative class. Either way, the Court should exercise jurisdiction over this dispute, just as every other District Court to hear the same issue has done in analogous circumstances.

IV. THE COURT SHOULD GRANT A TEMPORARY RESTRAINING ORDER

After determining that it has jurisdiction, the Court should proceed to grant a temporary restraining order enjoining ICE from deporting Indonesian nationals in New Jersey with final orders of removal, who have for years lived under their Orders of Supervision pursuant to the Agreement reached with ICE on in 2009.

The Third Circuit considers four factors in determining whether to grant a temporary restraining order: "(1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest." *Highmark, Inc.* v. *UPMC Health Plan, Inc.*, 276 F.3d 160, 170–71 (3d Cir. 2001) (upholding grant of preliminary injunction).[3] These factors weigh decidedly in favor of a temporary restraining order in this case. Petitioners face tremendous risk of physical harm, yet the government would experience no material burden

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[2] Yesterday's decision in *Devitri* also rejected the Government's contention that jurisdiction would properly lie in the federal court of appeals, finding that such courts have jurisdiction only over a denial of a motion to reopen." *Devitri* Preliminary Injunction Decision at 13.

[3] Courts in the Third Circuit apply the same standard for considering grants of temporary restraining orders and preliminary injunctions. *See, e.g. Int'l Foodsource, LLC* v. *Grower Direct Nut Co. Inc.*, No. 16 Civ. 3140, 2016 WL 4150748, at *6 (D.N.J. Aug. 3, 2016).

if required to provide this group with the basic due process right to have the courts fully adjudicate their claims.

A. Petitioners are Likely to Succeed on the Merits of Their Claims that Their Removal Is Unlawful and Violates Due Process.

First, Petitioners are likely to succeed on the merits of their claims that deportation without an opportunity to move to reopen would violate Petitioners' procedural due process rights and subject them to a high risk of persecution, torture, or death because of their Christian faith, in violation of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.,* and the United States' treaty obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988). Yesterday's decision in *Devitri* unequivocally recognized the New Hampshire Indonesian group's "statutory right to move to reopen and an entitlement to not be deported to a country where persecution would occur." *Devitri* Prelim. Inj. Dec. at 14 (quoting 8 U.S.C. § 1231(b)(3)(A)).

The Fifth Amendment Due Process Clause guarantees fair procedures prior to any deprivation of life, liberty, or property, including removal from the United States. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v.* Eldridge, 424 U.S. 319, 333 (1976) (internal quotation and citation omitted). By seeking to remove Petitioners before they have a meaningful opportunity to make a case for why they are entitled to remain in the country as a result of changed country conditions in Indonesia, among other reasons, Respondents would deprive Petitioners of an opportunity to be heard on matters that directly threaten their life and liberty—a plain violation of the Due Process Clause.

As discussed, every court to hear the issue has concluded that changed country conditions, which postdate a final order of removal, is a statutorily recognized basis for permitting motions to reopen at any point in time. *Devitri* Prelim. Inj. Dec.; *Hamama v. Adducci*, 261 F.Supp.3d 820 (2017); *Ibrahim v. Acosta*, No. 17 Civ. 24574, 2018 WL 582520 (S.D. Fla. Jan. 26, 2018) ; *see also* 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(3)(ii) (accepting motions to reopen if filed to "reapply for asylum or withholding of removal based on changed conditions . . . if such evidence is material and was not available and could not have been discovered or presented at the previous hearing."). As set forth in detail in the Affidavit of Jeffrey A. Winters, Ph.D., there has since 2012 been a dramatic increase in violence and intolerance directed at religious minorities in Indonesia, especially Christians.

Notably, the most recent *Devitri* opinion rejected the notion that the New Hampshire Indonesian Christians could be afforded adequate due process through a post-removal consideration of their motions to reopen "because of the significance of the liberty interests at stake." *Devitri* Prelim. Inj. Dec. at 15 (citing *Hamama,* 261 F.Supp.3d at 837–38).

Were Petitioners to be deported now, without an opportunity to file motions to reopen and have those motions adjudicated— as is their constitutional right—their deportations would violate the prohibitions under the INA and CAT against removing individuals to countries where they are more likely than not to face persecution or torture. Petitioners must be afforded their due process rights to make such a showing in a motion to reopen. Therefore, Petitioners are likely to prevail on the merits of their due process claim.

B. Petitioners Will Suffer Irreparable Harm Absent a Temporary Restraining Order.

Second, Petitioners face the imminent prospect of severe and irreparable injury in the absence of a temporary restraining order. To establish irreparable harm, a movant must

demonstrate that the potential harm cannot be redressed by a legal or equitable remedy alone. *Campbell Soup Co.* v. *ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992). Each of the recent analogous cases to consider the issue has held that possible persecution constitutes irreparable harm sufficient to justify injunctive relief against summary removal without the opportunity to move to reopen. *Devitri* Prelim. Inj. Dec. at 15; *Hamama,* 261 F.Supp.3d at 837–38; *see also Ibrahim,* 2018 WL 582520 (the summary removal of a group that had long relied upon Orders of Supervision was itself harm sufficient to support the kind of injunctive relief sought here).

The affidavit of Dr. Jeffrey A. Winters, attached hereto, describes in the detail the recognized dangers posed to Christians in Indonesia—country conditions that have precipitously declined since 2012:

> Indonesian Christians [are] a despised religious minority facing increasing persecution due to a rising tide of extremist Islam across Indonesian society. Country conditions for religious minorities have deteriorated at an alarming pace in Indonesia since 2008, but especially since 2012. The 2011 State Department Human Rights Report on Indonesia (released on May 24, 2012) highlighted this "deterioration in the protection of the right to religious freedom" as religious intolerance and violent extremism grew unchecked by the Indonesian government. In April of 2012, Indonesian Christians . . . were attacked by a mob during a church service. A month later, around 1,000 Public Order Agency officers, residents, and hardline Islamic groups once again attacked and blocked congregants from the same church from being able to attend Sunday services. Government officials provided no protection. In the summer of 2012, Indonesian media ran numerous front-page stories tracking the uptick in intolerance and religious persecution across the country, and Jakarta-based think tank, the Centre for Strategic and International Studies, "affirmed the widely held assumption that religious tolerance was on the rise." The following year, in 2013, Human Rights Watch issued a report condemning the Indonesian government for its "complicit" approach to religious conflict, and noted that the violence continued to escalate. It implicated the government leadership and law enforcement in fueling the surge of religious violence that have rendered religious minorities vulnerable to attack. As a result of this dramatic change in the Indonesian religious and political climate, all non-Muslims are under threat in Indonesia as intolerance grows and violence against religious minorities becomes more widespread.

(Winters Aff. at 3–4.)

The case that is functionally identical to the instant suit is, of course, *Devitri,* which also confronted the claim that a group of Indonesian Christians would be persecuted if forcibly removed. In considering the possibility of irreparable harm, the first *Devitri* decision noted that "[a]t least two circuits, including the First Circuit, have recently found that conditions for Christians in Indonesia may warrant relief from removal." *Devitri,* 2017 WL 5707528 at *5. In yesterday's *Devitri* opinion, that court credited the testimony of Dr. Winter, the same expert who has offered an affidavit in this case, concluding that the New Hampshire Indonesian Christians had "presented unrebutted evidence to show that, if they were deported to Indonesia, they would face threat of persecution or torture." *Devitri* Prelim. Inj. Dec. at 18. The court quoted Dr. Winter's warning:

> While I am not able to speak to legal consequences, I wish to express in the strongest terms that if these Plaintiffs, whose stories are now well-known in Indonesia, are returned, they are highly likely to face retribution by the Indonesian authorities for having "spoken out as Christians," and will certainly never be permitted to leave Indonesia for the U.S. again. The 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. at 19 (citing Winters Supp. Aff. (Docket No. 88-1) ¶ 5). In light of the record evidence, the Court concluded that the New Hampshire Indonesian Christians "presented a sufficient basis for fearing persecution to demonstrate a motion to reopen is non-frivolous."

Here, as in the *Devitri* case, the risk of irreparable harm is plain: if Petitioners—a group of Indonesian Christians—are deported, they face the risk of persecution, torture, or even death in an Indonesian landscape that is increasingly hostile toward Christians.

C. Respondents Would Not Suffer Greater Harm From a Temporary Restraining Order.

The third factor is "whether there will be greater harm to the nonmoving party if the injunction is granted" *Highmark, Inc.*, 276 F.3d at 170–71. This factor plainly weighs in

favor of granting an injunction. Whatever minor inconvenience the government might suffer as a result of a delaying deportations of members of the putative class, that inconvenience pales in comparison to the threat to Petitioners' lives should they be removed to Indonesia.

As discussed here and in the Complaint sets forth in greater detail, Petitioners are exemplary members of their communities and pose no threat whatsoever. To the contrary, they have been living in the United States for years, many for two decades or longer. Indeed, the public outcry in response to the recent ICE enforcement actions against this group is itself a testament to the esteem in which they are held. *See e.g.* Chris Fuchs, *Fearing deportation, Indonesian men seek sanctuary in a church,* NBC NEWS (Jan 29, 2018, 10:04am), https://www.nbcnews.com/news/asian-america/fearing-deportation-indonesian-men-seek-sanctuary-church-n841921. By contrast, injunctive relief would "not materially impinge on the Government's interest," particularly given "the significant passage of time and the abrupt manner" of the ICE enforcement action. *See, e.g., Chhoen* v. *Marin,* No. 17 Civ. 1898, 2018 WL 566821 at *11 (C.D. Cal. Jan. 25, 2018). In the instant case, the government can hardly claim that it all of a sudden has an urgent need to remove these peaceful, law-abiding residents from the country when the group was allowed to live under Orders of Supervision for many years. As the *Devitri* court held yesterday: "A brief delay in unlawful deportation of residents who have lived here with Government permission for over a decade outweighs the public interest in prompt execution of removal orders, where Petitioners have been law-abiding and pose no threat to public safety." *Devitri* Prelim. Inj. Dec. at 21.

D. Granting a Temporary Restraining Order Is in the Public Interest.

Finally, the last factor, "whether granting the injunction is in the public interest," also weighs in favor of a temporary restraining order. *Id.* For the same reason it is difficult to articulate a serious harm to the government caused by staying deportations for a reasonable

period of time, it is hard to see why a stay would be against public interest. First, as discussed, Petitioners are law abiding members of their communities and had consistently complied with ICE's directions pursuant to their Orders of Supervision. They pose no risk to their communities.

As set forth in the Complaint—and by way of example —named Petitioner Harry Pangemanan has lived in the United States since 1993 and has two U.S. citizen minor children. He is an active member of his church, where he serves as Minister of Facilities and Disaster Relief. After Superstorm Sandy in 2012, he led a team of volunteers in repairing over 200 homes. After Hurricane Harvey, he coordinated and drove a volunteer crew to the Houston area to assist with relief efforts. For his extraordinary efforts, he received the Dr. Martin Luther King Jr. Humanitarian Award on January 15, 2018 from the Highland Park Human Relations Commission—just ten days before ICE attempted to detain him. (Compl. ¶ 30.)[4] Named Petitioner Roby Sanger also has two minor U.S. citizen children and has lived in the United States since 1995. He is an active member of his church and regularly volunteers there. (Compl. ¶ 32.) Named Petitioner Gunawan Ongkowijoyo Liem has lived in the United States since approximately 1999. Both of his two minor U.S. citizen children have medical issues, as does his wife, whom he met in church. Mr. Liem is a church deacon. In this role, he distributes bread and wine during the services, collects parishioners' donations, and visits ill parishioners. He, like other members of the putative class, volunteered for Superstorm Sandy relief efforts. (Compl. ¶ 33.)

As an independent matter, and as held in the most recent *Devitri* decision, there is a strong public interest in ensuring that the due process rights of immigrants are actually afforded:

[4] *See also* "Immigrant who volunteered to rebuild N.J. homes after Superstorm Sandy seeks sanctuary from deportation" U.S.A. Today (Jan. 25, 2018), *available at* https://www.usatoday.com/story/news/nation-now/2018/01/25/n-j-gov-backs-immigrant-targeted-deporation/1068063001/.

> It is indisputably in the public interest to "prevent[ ] aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." (quoting *Nken*, 556 U.S. at 436). The public's interest in providing due process for non-citizens to ensure that they are not removed to a country where they will be persecuted is an extremely weighty one. *Cf. 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*, 554 U.S. at 18 (2008))).

Id. at 20.

Finally, the *Chhoen* Court recognized yet another basis for concluding that the summary removal of a similarly exemplary group, with strong family ties, was itself contrary to the public interest. In particular, the court noted that "[t]he record contains substantial evidence indicating that removal of Petitioners would result in significant emotional, psychological, and physical strain on their families and children, and that churches and workplaces would be deprived on Petitioners' support and active engagement." *Chhoen,* 2018 WL 566821 at *11.

For each of these reasons, independently and cumulatively, there is a strong public interest in granting a stay of removal so that Petitioners can be afforded their due process rights.

* * *

Because all four factors under the Third Circuit's framework weigh in favor of Petitioners, the Court should grant Petitioners' motion for a temporary restraining order to allow Petitioners a reasonable period to seek reopening of their cases based on changed country conditions that postdate their final orders of removal.

V. CONCLUSION

For the reasons set forth above and in Petitioners' Class Petition for Writ of Habeas Corpus and Mandamus Class Complaint for Declaratory and Injunctive Relief, along with the supporting papers thereto, Petitioners respectfully request that the Court (1) exercise

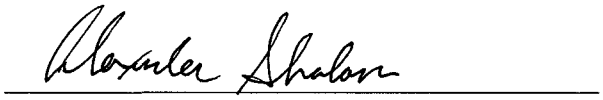
jurisdiction over this dispute, (2) grant an immediate temporary restraining order staying removal of members of the putative class pending resolution of the claims.

Dated: February 2, 2018

Respectfully Submitted,

PETITIONERS/PLAINTIFFS

By Their Attorneys,



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