Farrin R. Anello
Liza Weisberg
Alexander Shalom
Jeanne LoCicero
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
89 Market Street, 7th Floor
P.O. Box 32159
Newark, New Jersey 07102
(973) 642-2084

Paige Austin
Jordan Wells
Christopher Dunn
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Antonio de Jesus MARTINEZ and Vivian MARTINEZ,

Plaintiffs-Petitioners,

v.

KIRSTJEN NIELSEN, Secretary, Department of Homeland Security; THOMAS HOMAN, Acting Director, Immigration and Customs Enforcement; THOMAS DECKER, Director, New York Field Office of ICE Enforcement and Removal Operations; RONALD EDWARDS, Director, Hudson County Correctional Facility,

Defendants-Respondents.

HON. MADELINE COX ARLEO

Civil Action No.: 2:18-cv-10963 (MCA)

PLAINTIFFS-PETITIONERS' BRIEF IN REPLY TO DEFENDANTS-RESPONDENTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND STAY OF REMOVAL AND IN OPPOSITION TO PARTIAL CROSS-MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTRODUCTION

The respondent-defendants urge the Court to find that the government has unreviewable authority to lure couples and families to come forward with the promise of waivers that will minimize their separation and then use that promise as a trap to tear those families apart. The government has no such authority, and this Court has jurisdiction to grant temporary injunctive relief to a mother and father whose lives have been shattered by the government's ploy.

The government primarily contends that this Court lacks subject matter jurisdiction to stay a non-U.S. citizen's removal and that its lack of jurisdiction—which would leave the plaintiffs with no forum for their claims—presents no Suspension Clause issue. The government is wrong on both counts. First, because the plaintiffs do not challenge a discretionary determination by the government and do not challenge Antonio Martinez's final order of removal, no federal statute strips the Court of jurisdiction over the plaintiffs' claims nor channels them to the Court of Appeals. Indeed, as the government concedes, the relief they seek in this petition and complaint will leave that order undisturbed. Second, if the Immigration and Nationality Act were construed to bar their claims, this would violate the Suspension

Clause because no adequate and effective alternative forum exists in which they can obtain review of these claims.

The Martinez family, including the couple's two-year old daughter and infant son, is already enduring deep and irreparable harm due to Mr. Martinez's detention, and this harm would become even more severe if he were removed. They have a reasonable probability of success on their claims that Mr. Martinez's removal would violate the provisional waiver regulations and thereby due process and the APA, and—as the government does not appear to dispute in its motion to dismiss or opposition to the temporary restraining order—that Mr. Martinez's sudden and ongoing detention, in the absence of any evidence of flight risk or danger, violates statutory law, DHS regulations, and due process. Finally, any public interest the government may have in detaining and deporting spouses and parents of U.S. citizens is strongly outweighed by the countervailing public interests of keeping families together, providing lawful immigration status to those who are eligible, and protecting U.S. citizen infants and children – all interests that the Department of Homeland Security identified when it promulgated the regulations pursuant to which Mr. and Mrs. Martinez came forward to seek a waiver.

Accordingly, the Court should grant Mr. and Mrs. Martinez's motion for a temporary restraining order extending the stay of his removal and

seeking an immediate release from custody, or in the alternative a bond hearing, while the family completes the provisional waiver process they began pursuant to those regulations. The Court should also deny the government' partial motion to dismiss.[1]

BACKGROUND

This case arises from the respondent-defendants' unlawful arrest and ongoing detention of longtime New York resident Antonio De Jesus Martinez and their attempt to remove him from the United States before he can complete a process, created by federal regulation, through which he was on course to become a lawful permanent resident. The Martinezes' opening papers describe the abrupt arrest of Mr. Martinez at an I-130 interview he attended with his U.S.-citizen wife, Vivian Martinez, to confirm the bona fides of their marriage as part of that process, as well as the devastating effect his ongoing detention has had on their young family. *See* Mem. Supp. TRO at 9-12. The government does not contest these facts.

Six days after Mr. Martinez was detained at the I-130 interview, Mrs. Martinez received notice that the I-130 relative petition was approved, bringing the couple one step closer to completing the process of obtaining a

[1] As discussed above, this motion is styled as a "motion to dismiss" but only argues for dismissal of the claims for a stay of removal, not any claims challenging Mr. Martinez's detention.

provisional waiver and green card. Vivian Martinez Decl. ¶ 16. On June 15, 2018, the Martinezes retained a new attorney, Bryan Pu-Folkes, who began assisting them with the second step in the provisional waiver process: an I-212 application to waive inadmissibility arising from a prior order of removal. Pu-Folkes Supp. Decl. ¶ 2. This submission was roughly 528 pages and took Mr. Pu-Folkes several weeks to prepare. *Id*. He filed the application on July 12, 2018. *Id*. Mr. Martinez intends to apply for a second waiver once the I-212 application is conditionally approved, and ultimately to leave the United States for only a few weeks to appear for an interview at a U.S. consulate in El Salvador.[2] If the respondent-defendants remove Mr. Martinez before he obtains the provisional waivers, he will instead be separated from his family for a minimum of around two years before being able to return, and will risk a much longer separation. *Id.* ¶ 3.

[2] On April 27, 2018, while represented by prior immigration counsel, Mr. Martinez challenged his removal order through a motion to reopen explaining his fear of returning to live in to El Salvador. This motion to reopen was denied on June 4, 2018. Mr. Martinez, via current immigration counsel, plans to file another motion to reopen based upon the ineffective assistance of his prior counsel and the fact that (as his current counsel discovered) he qualifies for suspension of removal under the Nicaraguan Adjustment and Central American Relief Act (NACARA) because he was included as a derivative on his mother's NACARA application. Pu-Folkes Supp. Decl. ¶ 8.

ARGUMENT

The Court should continue and expand the present TRO and deny the partial Motion to Dismiss. Mr. and Mrs. Martinez and their two young children have demonstrated that they will suffer irreparable harm if their family separation is allowed to continue, whether through ongoing detention or the long-term harm of deportation. The Martinezes have demonstrated a probability of success on the merits of their claims for a stay of removal because DHS violated its own regulations, due process, and the APA by attempting to deport Mr. Martinez and others who came forward in reliance on the provisional waiver process; and on their challenges to detention, which, again, the government does not appear to seek to dismiss, because ICE did not follow its own regulations and Mr. Martinez's abrupt and unexpected detention violated his due process rights. Likewise, the respondent-defendants' argument that the Court lacks jurisdiction to temporarily stay removal in this case must fail because the Martinezes are not challenging an order of removal or any other decision subject to the INA's jurisdictional bars, and because denying review would violate the Suspension Clause.

I. This Court Should Continue and Expand the Temporary Restraining Order.

The Court should continue to enjoin Mr. Martinez's removal pending completion of the provisional waiver process and order his immediate

release from custody. Four factors govern a district court's decision to issue a TRO: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting a TRO will result in greater harm to the nonmoving party; and (4) whether granting the TRO will be in the public interest. *See Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999); *see also, e.g.*, *Int'l Foodsource, LLC v. Grower Direct Nut Co. Inc.*, No. 16-cv-3140, 2016 WL 4150748, at *6 (D.N.J. Aug. 3, 2016) (applying preliminary injunction standard to consideration of TRO). The plaintiffs meet each of these requirements.

A. Mr. Martinez and his Family Will Suffer the Irreparable Harm of Prolonged Family Separation if the TRO Enjoining his Removal is Lifted and if He is Not Released from Detention

The respondent-defendants do not and cannot contest that Mr. Martinez and his family are suffering irreparable harm as a result of his detention and will suffer even greater harm if he is removed prior to adjudication of his provisional waivers. Prior to his detention, Mr. Martinez was the sole breadwinner for his wife, 2-year-old daughter, and 4-month-old son, all of whom are U.S. citizens. *See* Vivian Martinez Decl. ¶ 7. He was also a loving and dedicated caretaker of his children and a critical source of emotional support to his wife, whom he began dating fourteen years ago. *Id.* ¶¶ 3, 5, 6.

Since his detention, his wife has been suffering from anxiety and depression. She has been forced to start taking psychiatric medication, and as a result, has lost the ability to breastfeed their infant son. *Id.* ¶ 6. His two-year-old daughter is suffering night terrors due to her father's absence, and his mother and siblings have been left without his crucial financial, emotional and caretaking contributions. *See* Mem. Supp. TRO at 13-14. These are precisely the types of harm that the provisional waiver process sought to avoid. *See* 2016 Final Rule, 81 FR 50244-01; Pu-Folkes Supp Decl. ¶ 3; Ex. A to Pu-Folkes Supp. Decl.

The government suggests, however, that no irreparable harm exists because, it speculates, Mr. Martinez will be barred from the U.S. for five years even if he obtains the provisional waiver on a separate ground of inadmissibility arising from his *in-absentia* removal order. Gov. at 17 (citing 8 U.S.C. § 1182(a)(6)(B)). Setting aside that this ground of inadmissibility is inapplicable to those who, like Mr. Martinez, had "reasonable cause" for missing their removal hearing, 8 U.S.C. § 1182(a)(6)(B),[3] in deciding the present motion the Court should not credit the government's *post hoc*

[3] On the date of his court hearing in 2003, Mr. Martinez went to the immigration court in Manhattan to seek the transfer of his case. Antonio Martinez Decl. ¶ 9; Pu-Folkes Supp. Decl. ¶ 4. He has also complied with the requirements for an ineffective assistance of counsel claim against the law firm that advised doing so. Pu-Folkes Supp. Decl. ¶ 5; *see.* Gov. at 17 (citing 9 FAM 302.9-3(B)(2)).

speculation that some other ground of inadmissibility might render less harmful the respondent-defendants' gross disregard for Mr. Martinez' rights that gave rise to this case. Absent a TRO allowing him to continue pursuing the provisional waiver's central promise—that he may remain with his family during the pendency of his waiver applications and then proceed abroad with a reasonable expectation of returning within a few weeks—he and his family will suffer the gratuitous and irreparable harms of prolonged separation.

B. Mr. Martinez Has a Reasonable Probability of Prevailing on His Claims for a Stay of Removal Pending the Provisional Waiver Process.

Mr. Martinez has demonstrated a reasonable probability of prevailing on his claims that his abrupt removal prior to the adjudication of his provisional waiver would be unlawful and unconstitutional. Courts apply a "sliding scale" approach in assessing this factor, where the "probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury" that would obtain absent interim relief. *In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015) (*quoting Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002)). Here, because of the grievous harm that Mr. and Mrs. Martinez, their children, and Mr. Martinez's mother and siblings are already suffering as a result of his detention, and which would worsen dramatically

were he to be deported, they need only show "serious questions going to the merits." *Id.* They have made such a showing.

i. Mr. Martinez's Removal Would Violate Controlling Regulations and Due Process.

The Martinezes have contended—and the government's filing does not dispute—that Mr. Martinez was detained on April 27, 2018 pursuant to an unannounced new policy according to which U.S. Immigration and Customs Enforcement (ICE) will detain and deport anyone with a final order of removal who attends an immigration interview, even if he or she is eligible for a provisional waiver. Compl. ¶¶ 31, 37. In response to the plaintiffs' claim that this policy violates federal regulations and guidance, the government contends that its own regulations and manuals create no due process interests and are unenforceable. Gov. at 14-16. This position is foreclosed, however, by controlling Supreme Court and Third Circuit law.

The government's argument that these regulations create no due process interest because the ultimate grant of the waivers is discretionary, Gov. at 16, misses the point. Mr. Martinez does not seek an order from the Court granting him a discretionary benefit or even adjudicating his eligibility. Gov. at 16. He simply seeks access to the process and adjudication to which the regulations entitle him. Under these controlling regulations, provisional waivers are available to individuals *in the United States* who, like Mr.

Martinez, have final orders of removal. *See* 8 C.F.R. § 212.2(j) (permitting individuals with outstanding removal orders to waive inadmissibility while in the U.S.); *id.* at § 212.7(e)(4)(iv) (permitting individuals with a final order of removal to apply for a provisional waiver of unlawful presence while in the U.S. after an I-212 is granted).

The government is not free to ignore its own regulations and surreptitiously adopt a policy or practice of denying Mr. Martinez and other beneficiaries like him any individualized decision, while using the lure of a green card to detain and deport people who are eligible for this waiver. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Abdulai v. Ashcroft*, 239 F.3d 542, 550 (3d Cir. 2001) (non-U.S. citizens seeking adjudication of a discretionary immigration benefit are entitled to "an individualized determination").

The Supreme Court confronted a similar situation in *Accardi*, when the appellant's application for a discretionary immigration benefit was denied solely because his name appeared on a government list of "unsavory characters," *Accardi*, 347 U.S. at 268—just as here Mr. Martinez was detained due to a new and secret policy. Compl. ¶ 31. Because of immigration authorities' "failure to exercise [their] own discretion, contrary to existing valid regulations," the Court reversed and held that the regulations entitled the

appellant to consideration of his application on the merits. *Accardi*, 347 U.S. at 268; *see also Leslie v. Attorney Gen. of U.S.*, 611 F.3d 171, 180 (3d Cir. 2010) (relying on the *Accardi* doctrine to hold that "when an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation"). Mr. Martinez is entitled to no less.

The *Accardi* doctrine also binds the government to its assurance in the USCIS Field Manual that "as a general rule" individuals attending interviews "shall *not* be arrested." Compl. ¶ 18 (citing USCIS Field Manual). Because provisional waivers are a benefit that individuals with final orders of removal are "specifically allow[ed]… to seek," *see* 2016 Final Rule, 81 FR 50244-01 (making waiver available to individuals with final orders of removal), the exception to the general rule set forth in the USCIS manual that applicants will not be detained at their interviews is inapplicable. *See.* Gov. at 14 (citing USCIS Adjudicator's Field Manual 15.1(c)(2)). The government argues that the USCIS Field Manual creates no substantive rights, Gov. at 14, but it ignores the due process requirement that agencies follow their own procedures "[w]here the rights of individuals are affected." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("[I]t is incumbent upon agencies to follow their own procedures . . . even where [they] are possibly more rigorous than otherwise would be

required"); *accord Leslie*, 611 F.3d at 179. That requirement applies even to directives and policies like the USCIS manual, which, while less formal than regulations, still give rise to people's expectations as to how the agency will address their cases. *See Abdi v. Duke*, 280 F. Supp. 3d 373, 389 (W.D.N.Y. 2017) (holding that ICE's policy memo governing parole determinations is binding on the agency), *order clarified sub nom. Abdi v. Nielsen*, 287 F. Supp. 3d 327 (W.D.N.Y. 2018), *appeal docketed* 18-94 (2d Cir. Jan. 12, 2018); *Damus v. Nielsen*, 18-cv-578, 2018 WL 3232515, at *14 (D.D.C. July 2, 2018) (same); *Pasquini v. Morris*, 700 F.2d 658, 663 n.1 (11th Cir. 1983) ("Although the [INS] internal operating instruction confers no substantive rights on the alien-applicant, it does confer the procedural right to be considered for such status upon application.").

Applicants' due process interest in that individualized decision-making is not extinguished by the lack of interim benefits or immigration status accorded during the pendency of the provisional waiver process. *See* Gov. at 15; *see, e.g., Medina v. U.S. Dep't of Homeland Sec.*, No. C17-0218RSM, 2017 WL 5176720, at *9 (W.D. Wash. Nov. 8, 2017) ("While the Court recognizes and acknowledges that DACA does not confer lawful status upon an individual, the Court also finds that the representations made to applicants for DACA cannot and do not suggest that no process is due to them.").

The government quotes from language accompanying the 2013 provisional waiver regulations to suggest that applicants can be "removed from the United States in accordance with current DHS policies governing initiation of removal proceedings and the use of prosecutorial discretion." Gov. at 15. But that language cannot extinguish the interests created by the process, *see Damus v. Nielsen*, No. 18-cv-578, 2018 WL 3232515, at *14 (D.D.C. July 2, 2018) (finding that "the disclaimer language contained within the Directive does not bar the application of the *Accardi* doctrine"), and in any event refers to DHS's undisputed authority to exercise individualized discretion to deny individual applications—not to abrogate the process altogether through a blanket policy of *de facto* denial. *E.g.* Compl. ¶ 31.

ii. The Government's Policy of Detaining and Removing Waiver Applicants Such as Mr. Martinez is Arbitrary and Capricious.

Mr. Martinez is also likely to succeed in his claim that the government's unannounced rescission of the provisional waiver process violates the Administrative Procedure Act (APA) because it is an arbitrary and capricious change in policy. Mem. Supp. TRO at 16. As with DACA, revocation of an existing program implicates the APA and requires, at a minimum, a reasoned analysis, taking into account beneficiaries' significant reliance interests. *See*

Regents of Univ. of California v. United States Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1045 (N.D. Cal. 2018) (enjoining rescission of DACA as arbitrary and capricious and noting that hundreds of thousands of young people "submitted substantial personal identifying information to the government, paid hefty fees, and planned their lives according to the dictates of DACA"); *see also Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 431 (E.D.N.Y. 2018).

Moreover, the requirement that the government comply with the APA is even more stringent here because, unlike DACA, the provisional waiver program was created through notice and comment, *see* 2016 Final Rule, 81 FR 50244-01, and thus cannot be rescinded without notice and comment. *See* Mem. Supp. TRO at 16; *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017).

C. Mr. Martinez Has A Reasonably Probability of Prevailing on His Detention Claims.

The respondent-defendants do not dispute that Mr. Martinez is likely to prevail on the merits of his claim to release from detention, or in the alternative and at minimum, to a bond hearing. *See* Mem. Supp. TRO at 20-23 (arguing that Mr. Martinez's detention violates due process and DHS regulations). At least two district courts have confronted similar challenges brought by petitioners detained at I-130 interviews and have ordered release

from detention, in addition to enjoining removal. *See Jimenez v. Cronen*, No. 18-cv-10225, 2018 WL 2899733, at *23 (D. Mass. June 11, 2018); *You v. Nielsen*, No. 18-cv-5392 (S.D.N.Y. June 20, 2018).

As argued more fully in the opening brief, Mr. Martinez's imprisonment violates due process because it has not been justified by any individualized process finding risk of flight or danger to the community. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Chin Thon Ngo v. I.N.S.*, 192 F.3d 390, 398 (3d Cir. 1999) ("The process due even to excludable aliens requires an opportunity for an evaluation of the individual's current threat to the community and his risk of flight."). The government's abrupt detention of Mr. Martinez likewise violates binding regulations "that regulate the rights and interests" of people like Mr. Martinez, *Leslie*, 611 F.3d at 175 (citing *Accardi*, 347 U.S. at 266-67), and that require notice and an opportunity to be heard on whether detention is warranted. Mem. Supp. TRO at 21-23; *see also* 8 C.F.R. § 241.13(b)(1) (authorizing release if noncitizen "would not pose a danger to the public or risk of flight, without regard to the likelihood of the alien's removal in the reasonable foreseeable future").

Mr. Martinez poses no danger and no flight risk: he has no criminal history and exceptionally strong family ties in the United States. Indeed, his future life with his family depends on completing a government process that

will return him from El Salvador to the United States as a lawful permanent resident, so he has every incentive to cooperate with the government and no incentive to flee. In light of these factors, the Court should not accept the respondent-defendants' unjustified detention of Mr. Martinez and its casual disregard of controlling regulations.

Finally, the sudden and unexpected nature of his arrest and imprisonment—without any opportunity to prepare for departure, put his affairs in order, or say goodbye to his family—violates fundamental notions of due process. *Ragbir v. Sessions*, No. 18-cv-236, 2018 WL 623557, at *3 (S.D.N.Y. Jan. 29, 2018) (petitioner entitled to release so he could prepare for "an orderly departure" and exercise "the freedom to say goodbye").

Because Mr. Martinez has demonstrated a reasonable probability of prevailing on his claim that this detention is unlawful, and because the government does not contest this point, this Court should order his release.[4]

D. This Court Has Jurisdiction to Grant a Temporary Restraining Order.

As a preliminary matter, the government does not dispute that the Court has jurisdiction over Mr. Martinez's detention claims.[5] However, the

[4] In the alternative, as set forth in the Petition-Complaint, this Court should order an immediate bond hearing before an immigration judge or hold a habeas corpus hearing to determine whether Mr. Martinez's detention is justified by danger or flight risk.

[5] This Court has jurisdiction to review challenges to immigration detention pursuant to 8 U.S.C. § 2241. *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 226 (3d Cir. 2011). Review of

government does dispute that this Court has jurisdiction over his provisional-waiver claims, citing the jurisdiction-channeling and jurisdiction-stripping provisions of the REAL ID Act. Gov. at 4-7. The government is wrong. At bottom, the government conflates the challenge brought here—a legal challenge based on the provisional-waiver regulation—with a challenge to a removal order itself. District court jurisdiction over the latter may be barred in some instances by the REAL ID Act. However, district court jurisdiction over the former is not. Indeed, the government points to no administrative or other mechanism by which petitioner can get judicial review over his challenge to government's failure to follow the provision waiver regulation, because there is none. The challenge cannot be brought before an immigration judge or the board of immigration appeals, and therefore, cannot be raised in a petition for review in the circuit court of appeals. In short, because petitioner does not challenge the validity of his order of removal, and because there is no other avenue for judicial review of his claim except in district court, the REAL ID Act has no application here.

---

such detention is not precluded by statute, *e.g.*, *Jennings v. Rodriguez,* 138 S.Ct. 830, 839-41 & n. 2, and is required by the Suspension Clause, *see Boumediene v. Bush*, 476 F. 3d 981 (2008).

i. The REAL ID Act Does Not Channel Review of the Plaintiffs' Claims to the Court of Appeals, Because They Do Not Seek Review of a Removal Order.

The government argues at length that under the jurisdiction-channeling provisions of the REAL ID Act, the plaintiffs' claims can only be heard by the Court of Appeals. Gov. at 4-7 (arguing 1252(a)(5) and (b)(9) "grant exclusive jurisdiction to review removal orders and related matters to the Court of Appeal"), but the Third Circuit has rejected the government's broad interpretation of these provisions. *See Nnadika v. Attorney Gen. of U.S.*, 484 F.3d 626, 632 (3d Cir. 2007) (holding that "only challenges that directly implicate the order of removal" are reserved to the circuit courts); *see also Verde-Rodriguez v. Attorney Gen. U.S.*, 734 F.3d 198, 207 (3d Cir. 2013) (under the REAL ID Act, jurisdiction lies with the Court of Appeals for claims that "directly challenge the lawfulness of the removal order and are intertwined with the IJ's decision"). Moreover, the internal contradiction in the government's own argument reveals its weakness: the government argues that to challenge his removal order, Mr. Martinez must seek review in the Court of Appeals, Gov. at 5, but it concedes that the relief Mr. Martinez seeks—an injunction permitting him to pursue the provisional waiver process—"would not result in relief from removal," Gov. at 7. Because Mr.

Martinez' provisional-waiver claims do not involve review of his removal order, jurisdiction lies in this Court. [6]

Initial jurisdiction over claims that "point to no legal error in the final order of removal" does not lie with the Court of Appeals. *Nnadika*, 484 F.3d at 633 (dismissing petition for review for failure to allege legal error in the removal order). Just as in *Nnadika*, Mr. Martinez makes no claims of error in his 2003 order of removal. Compl. at 10-11. His claims therefore cannot be raised in a petition for review. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (rejecting an interpretation of 1252(b)(9) so broad that it would render plaintiffs' detention claims "effectively unreviewable" and risk "depriving that detainee of any meaningful chance for judicial review"); Mem. Supp. TRO at 19 (collecting cases). Only this Court has jurisdiction to hear his claims.

Many of the cases the government cites in support of its jurisdiction-channeling argument are inapposite, as the petitioners in those cases challenged their underlying removal orders as invalid. *Gonzalez Lora v.*

[6] By contrast, Mr. Martinez's motions to reopen—which raise distinct claims, Pu-Folkes Supp. Decl. ¶¶ 7-8—do challenge his removal order and are reviewable in the Court of Appeals. Because the provisional waiver claims cannot be brought administratively, there is also no administrative exhaustion requirement. *See* Gov. at 4 (arguing Mr. Martinez must exhaust his administrative remedies); *Bonhometre v. Gonzales*, 414 F.3d 442, 447-48 (3d Cir.2005) (exhaustion is required under 1252(d)(1) only if a claim is "within the jurisdiction of the BIA to consider," which constitutional claims are not, and if "the agency was capable of granting the remedy sought by the alien").

Warden, 629 Fed. Appx. 400, 401 (3d Cir. 2015) (upholding dismissal of a habeas petition where the petitioner challenged his removal order as " void" because it was based on a conviction that was not final); *Lopez v. Green*, No. No. 17-cv-2304 2017 WL 2483702 at *1 (D.N.J. 2017) (holding that the petitioner's claim that "his controlled substance conviction does not make him removable" cannot be brought in district court); *see also Khan v. Attorney General*, 691 F.3d 488, 491 (3d Cir. 2012) (noting Court of Appeals granted an initial stay after the petitioners filed a premature petition for review). In *Vasquez v. Aviles*, the district court found it lacked jurisdiction to consider whether the government was required to release the petitioner and adjudicate his DACA application—which he sought to file for the first time after he was detained—before removing him because that challenge was "grounded in [his] removal order." No. 15-cv-2341, 2015 WL 1914728, at *2 (D.N.J. Apr. 24, 2015). But that holding is counter to the rule set forth in *Nnadika* and, recognizing this, the Third Circuit did not reach the issue and instead ruled on other grounds. *Vasquez v. Aviles*, 639 F. App'x 898, 901 (3d Cir. 2016).[7] In

[7] Similarly, in *Fermin*, a district court denied a motion for a stay of removal filed as part of a *coram nobis*. *Fermin v. US*, No. 17-cv-1862, 2018 WL 623645 (D.N.J. Jan. 29, 2018). After first denying the *coram nobis* on the merits, the court then denied the stay motion for lack of probable success and noted as an alternative holding that it lacked jurisdiction to stay the petitioner's removal because "any challenge to the validity of that removal order or request for a stay of that Order could be entertained only by the Court of Appeals, not this Court." *Id.* (internal quotations omitted). But of course, a motion for a stay pending resolution of a *coram nobis* is not an attack on the validity of an underlying removal order,

other unpublished cases, courts assumed jurisdiction to issue a stay lies solely with the Court of Appeals without closely scrutinizing the relevant jurisdictional provisions, and where petitioners failed to establish specific questions falling outside the statutory bars. *See, e.g.*, *Torres-Jurado v. Saudino*, No. 18-cv-2115, 2018 WL 2254565 (D.N.J. 2018) (denying stay where petitioner failed to file any memorandum of law and was found to be challenging the discretionary decision to execute a removal order).

ii. Section 1252(g) Does Not Bar Review.

8 U.S.C. section 1252(g) does not eliminate jurisdiction over Mr. Martinez's claim. That statute eliminates habeas jurisdiction over "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." *See* Gov. at 3.[8] The Third Circuit and the Supreme Court have cautioned that this provision should be narrowly construed. *Reno v. Am.-*

---

and another district court in this circuit recently took the opposite view and granted a stay during the pendency of a *coram nobis*. *Ragbir v. United States*, No. 2:17-CV-1256-KM, 2018 WL 1446407, at *18 (D.N.J. Mar. 23, 2018).

[8] To the extent that challenges to these discretionary determinations are cognizable in a PFR, the provision channels them to the Court of Appeals. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (§ 1252(g) clarifies that "those specified decisions and actions" referenced in the statute "*are* covered by the 'zipper' clause of § 1252(b)(9)") (emphasis in original). To the extent that—like here—no jurisdiction is available in the Court of Appeals, section 1252(g) would bar review if applicable. *AADC*, 525 U.S. at 487 (finding § 1252(g) barred review of selective enforcement claim and "nothing elsewhere in 1252 provides for jurisdiction").

Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999); *Garcia v. Attorney Gen. of U.S.*, 553 F.3d 724, 729 (3d Cir. 2009). The government appears to argue that section 1252(g) channels review to the Court of Appeals, Gov. at 4 (arguing jurisdiction lies with the Court of Appeals in light of 1252(a)(5), (b)(9) and (g)), but here, where the claims cannot be raised through a petition for review, that would preclude review all together.

That result is inconsistent with Third Circuit precedent holding that "Section 1252(g) is not a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review,' as it is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *Chehazeh v. Attorney Gen. of U.S.*, 666 F.3d 118, 134 (3d Cir. 2012). Instead, the provision is "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Id.* (*quoting Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999)); *see also DeSousa v. Reno*, 190 F.3d 175, 182 (3d Cir. 1999) (section 1252(g) bars review only of claims "challenging the government's selective enforcement of the immigration laws").

Mr. Martinez does not challenge a discretionary decision to deny his waiver. He challenges the government's violation of its non-discretionary

duty to consider provisional waiver applicants' claims on the merits. In light of that, section 1252(g) does not bar review. Mem. Supp. TRO at 12-13 (collecting cases); *see also Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005) ("Determination of *eligibility* for adjustment of status—unlike the *granting* of adjustment itself—is a purely legal question and does not implicate agency discretion") (emphasis in original).

The primary case the government cites to suggest that section 1252(g) prevents review, Gov. at 3 (claiming section 1252(g) "protects the government's authority to make 'discretionary determinations'… and reaches constitutional claims"), involved a Sixth Circuit appeal from a claim that the plaintiff's removal order "was granted without notice or an opportunity to be heard in violation of the Due Process Clause." *Elgharib v. Napolitano*, 600 F.3d 597, 599 (6th Cir. 2010). The Sixth Circuit found that section 1252(a)(5) and (g) barred district court review, but noted that if the "petition raised a challenge that did not require the district court to address the merits of her order of removal," the outcome would have been different. *Id.* at 605; *see also* n. 6 (characterizing the challenge as "in effect, a challenge to the ultimate Order of Removal"). The Martinezes' claims do not raise the jurisdictional concerns at issue in Elgharib. In *Elgharib*, the petitioner had filed a motion to reopen challenging the validity of an order of removal itself. Judicial review

for such claim *was* available through the petition-for-review process, but had not been pursued. As explained above, the only avenue for judicial review of the Martinezes' claims for a stay of removal pending the provisional waiver process lies in the district courts. Most importantly, the interpretation of 1252(g) adopted in *Elgharib* is inconsistent with that adopted by the Third Circuit in *Chehazah*, discussed above.[9]

Nor does the legal question of Mr. Martinez's right to pursue a benefit created by regulation "arise from" a discretionary decision to execute his removal order. *See Ragbir*, 2018 WL 1446407, at *8 (the "arising" language in section 1252(g) "refers to the law that creates the cause of action in suit" and not all claims that would have been unnecessary "but for" the execution of a removal order) (*quoting Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018));[10] *cf. Osorio-Martinez v. Attorney Gen. United States of Am.*, No. 17-cv-2159, 2018 WL 3015041, at *7 (3d Cir. June 18, 2018) (construing a separate jurisdiction-stripping provision of the INA, 8 U.S.C. § 1252(a)(2)(A)(i), more broadly because it bars review of "any other cause or

[9] And indeed, in a separate case, the Sixth Circuit held that jurisdiction over a *habeas* petition raising constitutional challenges to the arrest and detention of a petitioner with a final order of removal lay with the district court, because while the habeas "possibly implicated the underlying order" the constitutional claim raised "does not address the final order, [and so] is not covered by the plain language of the Act." *Kellici v. Gonzales*, 472 F.3d 416, 419 (6th Cir. 2006).

[10] *Jennings* construed the phrase "arising from" as it is used in 1252(b)(9).

claim arising from or relating to the implementation or operation" of an expedited order of removal). Mr. Martinez's removal claims arise from his initiation of the provisional waiver process, not from a discretionary decision of the government thereafter. Mem. Supp. TRO at 14-16; *see also* Exs. A-B to Vivian Martinez Decl. (I-130 receipt and approval notices showing commencement of waiver process over a year prior to his detention).

Finally, because it bars review only of claims arising from discretionary decisions to execute a removal order, section 1252(g) also does not bar "'general collateral challenges to unconstitutional practices and policies used by the agency'" that may accompany the commencement of proceedings or execution of removal orders but "do not directly challenge the bases for their orders of removal." *Chhoeun v. Marin*, 306 F. Supp. 3d 1147 (C.D. Cal. 2018) (quoting *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998)); *see also Medina v. U.S. Dep't of Homeland Sec.*, No. 17-cv-0218, 2017 WL 5176720, at *6 (W.D. Wash. Nov. 8, 2017) (1252(g) does not bar review of "whether Defendants complied with their own non-discretionary procedures when taking Plaintiff into custody and questioning him," though that ultimately led to the commencement of proceedings against him). As in *Chhoeun*, the relief that Mr. Martinez seeks from this Court is not the grant of a substantive benefit—such as rescission of his removal order, a provisional waiver or

permanent status—but rather his "day in court" in the form of an individualized adjudication of a benefit to which lawfully promulgated regulations have entitled him. *Id.*

For these reasons, the language of section 1252(g) does not reach the removal claims raised by Mr. Martinez.

E. If the INA Were Interpreted to Strip This Court of Jurisdiction, It Would Violate the Suspension Clause, Because No Adequate and Effective Alternative Forum For Review Exists.

If the government is correct that any or all of these provisions of the INA deprive this Court of jurisdiction, then the application of those statutes to this case would violate the Suspension Clause, which provides 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. To find that this Court does not have habeas jurisdiction would be to deny petitioners access to the only forum adequate to review their claims. The government puts forward two arguments against the application of the Suspension Clause in this case. Neither is supported. Against the great weight of relevant precedent, the government first asserts that the Suspension Clause does not apply to challenges to removal, but only to claims for release from detention. The government then suggests that, even if the Suspension Clause does apply to removal, the motion-to-reopen process provides an

adequate and effective substitute for the writ of habeas corpus, but that process does not protect Mr. Martinez's constitutional and statutory rights to pursue a provisional waiver, nor his claim to be free of unlawful and unconstitutional detention during this time. Review before this Court is his only avenue for enforcing these rights.

i. The Suspension Clause Requires Access to Courts to Raise Legal and Constitutional Claims Against Removal.

The government's position that the petitioner's claims are not "cognizable in habeas," Gov. at 10, is glaringly inconsistent with the Supreme Court's decision in *I.N.S. v. St. Cyr* and the robust historical precedent on which that decision rested. 533 U.S. 289, 300-08 (2001). As an initial matter, it is undisputed that habeas provides a mechanism for challenging unlawful detention. *Id.* at 301. While the government makes a blanket assertion that "[t]he claims and relief that Petitioner seeks are not a core application of the writ of habeas corpus," the government does not appear to contest that the petitioners' detention claims and request for release implicate habeas. The government does, however, suggest that claims and relief related to removal falls outside the scope of habeas jurisdiction. This view is simply incorrect: "The Constitution's Suspension Clause, which protects the privilege of the habeas corpus writ, unquestionably requires some judicial intervention in

deportation cases." *Id.* at 300-01 (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953).

In *St. Cyr*, the Supreme Court found that the district court retained habeas jurisdiction to hear the petitioner's challenge to his removal. *Id.* at 308. The Court emphasized that "a serious Suspension Clause issue would be presented" if the INA eliminated habeas review over his removal order. *Id.* at 305;*see also Sandoval v. Reno* 166 F.3d 225, 233 (3d Cir. 1999) (cataloguing the longstanding "availability of habeas to challenge immigration decisions").

Lower courts have repeatedly reinforced the availability of habeas jurisdiction to contest or stay removal. In *Osorio-Martinez*, for example, the Third Circuit concluded that the jurisdiction-stripping provision of the INA operated as an unconstitutional suspension of the writ of habeas corpus as applied to children with Special Immigrant Juvenile (SIJ) status seeking judicial review of orders of expedited removal. No. 17-2159, 2018 WL 3015041, at *8. Likewise, the Court in *Devitri v. Cronen* exercised habeas jurisdiction to stay the deportation of members of a putative class of Indonesian nationals, many of whom were not detained, noting that final orders of removal constitute a form of custody and concluding that "[i]f the jurisdictional bar in 8 U.S.C. § 1252(g) prevented the Court from giving Petitioners an opportunity to raise their claims through fair and effective

administrative procedures, the statute would violate the Suspension Clause as applied." 290 F. Supp. 3d 86, 93 (D. Mass. 2017); *accord Pangemanan v. Tsoukaris*, No. 18-cv-1510 (D.N.J. 2018) (summary order granting emergency stay of removal); *see also Hamama v. Adducci*, 258 F. Supp. 3d 828, 842 (E.D. Mich. 2017) (reaching the same conclusion as to the removal of Iraqis), *appeal docketed*, No. 17-cv-2171 (6th Cir. Sep. 21, 2017); *Ibrahim v. Acosta*, No. 17-cv-24574, 2018 WL 582520 , at *6 (S.D. Fla. Jan. 26, 2018) (reaching the same conclusion as to the removal of Somalis).

The government does not cite a single case in which a court has refused to exercise jurisdiction on the grounds that removal is not a liberty interest sufficient to implicate habeas relief. The theory finds no support in *Munaf v. Geren*, 553 U.S. 674 (2008), Gov. at 9, in which the court unanimously found that it *had* habeas jurisdiction. The government also references *Preiser v. Rodriguez* in apparent support for its view of the narrow reach and function of the writ*;* in fact, the case stands for the opposite proposition and, in any event, predates *St. Cyr*. It concerned state prisoners who were deprived of good-conduct-time credits as a result of disciplinary proceedings. They sought injunctive relief to restore the credits, which would hasten their release. The Court determined that the federal habeas corpus statute provided the appropriate and exclusive remedy, noting the evolution and expansion of the

writ and explaining that "recent cases have established that habeas corpus relief is not limited to immediate release from illegal custody." *Id.* at 487; *see also id.* at n. 16 (citing Supreme Court decisions that "have established habeas corpus as an available and appropriate remedy in situations where the petitioner's challenge is not merely to the fact of his confinement")(Brennan, J., dissenting). Forty-five years ago, it was clear that habeas vindicates liberty interests outside the slender silo of physical imprisonment, and it is yet clearer today.

ii. The Motion to Reopen Process Does Not Provide Mr. Martinez with an Adequate and Effective Alternative to Habeas.

In opposing the Motion for a Temporary Restraining Order and moving to dismiss the present action, the respondent-defendants argue that the administrative motion-to-reopen process satisfies the Suspension Clause by providing an adequate and effective substitute for habeas corpus proceedings. The constitutional and legal claims Mr. Martinez has raised before this Court cannot be resolved in a motion to reopen or petition for review of such a motion.

Assuming *arguendo* that the motion to reopen process could provide an adequate and effective substitute for habeas review with respect to claims that can be raised and decided via that process, Mr. Martinez's claims in the

present action do not fall in this category because they cannot be presented in a motion to reopen. For a substitute procedure to be adequate, the decision-maker "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Boumediene v. Bush*, 553 U.S. 723, 783 (2008). At a minimum, the person being detained (or facing removal) must have "a meaningful opportunity to demonstrate that he is being held (or removed) pursuant to 'the erroneous application or interpretation' of relevant law." *Id.* at 779 (quoting *St. Cyr*, 533 U.S. at 301). The Third Circuit considers the following questions in determining whether the statutory motion-to-reopen process provides an adequate and effective alternative: (1) "whether 'the purpose and effect of the [substitute] was to expedite consideration of the [detainee's] claims, not to delay or frustrate it'"; (2) "whether 'the scope of the substitute procedure . . . [is] 'subject to manipulation' by the Government'"; (3) "whether the 'mechanism for review . . . 'is wholly a discretionary one,'"; and (4) "whether 'the entity substituting for a habeas court ... '[has] adequate authority ... to formulate and issue appropriate orders for relief.'" *Osorio-Martinez*, No. 17-cv-2159, 2018 WL 3015041, at n. 22 (3d Cir. June 18, 2018) (citing *Luna v. Holder*, 637 F.3d 85, at 97 (2d Cir. 2011) (citing *Boumediene*, 553 U.S. at 775-91)).

As described *supra*, Section D, the immigration court, Board of Immigration Appeals, and Court of Appeals have no jurisdiction to review the provisional-waiver or detention claims that Mr. Martinez presents here. Mr. Martinez seeks a stay of removal because his surprise detention and imminent removal prevent him from pursuing the provisional waiver process, which violates the regulations and his right to due process. Neither immigration courts nor the BIA "have jurisdiction to adjudicate constitutional issues." *Bonhometre,* 414 at 447 n. 7 (3d Cir.2005) (quotations omitted). An immigration judge also has no authority to grant the relief accorded through the provisional waiver process and subsequent consular processing. *See* 8 U.S.C. § 1255(a) (immigration judges do not have authority to grant an application for Lawful Permanent Residency if the applicant entered the U.S. without inspection); 8 C.F.R. § 1003.1(b) (limiting jurisdiction of the Board of Immigration Appeals to appeals from decisions of immigration judges and limited other petitions or applications); *see also* 8 C.F.R. § 1240.1(a)(1)(ii) (immigration judges do not have authority to grant an I-212 waiver of inadmissibility under 8 U.S.C. § 1182(a)(9)(A)).[11]

[11] None of the cases cited by the respondent-defendants addressed the type of claims Mr. Martinez raises here. The Third Circuit's decision in *Kolkevich v. Att'y Gen. of U.S.*, 501 F.3d 323 (3d Cir. 2007) and the Sixth Circuit's decision in *Muka v. Baker*, 559 F.3d 480, 485 (6th Cir. 2009) both found that *direct* circuit court review of removal orders was a substitute for habeas corpus review. The cited cases that did discuss motions to reopen all involved claims that could be raised and adjudicated in petitions for review of motions to

Next, the motion to reopen process plainly does not provide an adequate and effective alternative forum to adjudicate statutory and constitutional challenges to detention. In granting a motion to reopen, the agency would rule only on the question of whether removal proceedings should be reopened, not on the legality or constitutionality of detention. By contrast, the jurisdiction of habeas courts to review the legality and constitutionality of executive detention is extremely well established, since it is central to the historic purpose of the writ. *Boumediene*, 553 U.S. at 786.

If Mr. Martinez were forced to rely solely on the motion to reopen process, ICE would be permitted to frustrate the goals of the provisional waiver regulation by deporting him and separating him from his wife, newborn son, and young daughter for a period of years, even though he came forward in reliance on DHS's offer of the provisional waiver to keep his family together while applying to become a lawful permanent resident. *See* 2016 Final Rule, 81 FR 50244-01. Moreover, if forced to depart without first obtaining a provisional waiver, he could face barriers to return that would lead

---

reopen, in sharp contrast to Mr. Martinez's claims. *See Iasu v. Smith*, 511 F.3d 881, 893 (9th Cir. 2007) (discussing non-discretionary claim to U.S. citizenship, and holding that the Court of Appeals could consider this claim on a petition for review of a removal order); *Alexandre v. U.S. Att'y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006) (non-discretionary *eligibility* for section 212(c) relief); *Luna v. Holder*, 637 F.3d 85, 97-99 (2d Cir. 2011) (equitable tolling of motion to reopen "when ineffective assistance of counsel or governmental interference prevent [petitioners] from timely filing a petition for review").

to a more permanent family separation. *See* Pu-Folkes Supp. Decl. ¶ 3. For all of these reasons, the motion to reopen process, including circuit court review, does not provide an adequate and effective substitute for habeas in this case.

F. A Temporary Restraining Order Serves the Significant Public Interests Underlying Creation of the Provisional Waiver Process and Does Not Harm the Government.

The government asserts that the public interest lies in the "prompt execution of removal orders," particularly when a person is detained. Gov. at 17 (*quoting Nken v. Holder*, 556 U.S. 418, 436 (2009)). But "the country also has a strong interest in not destroying families by deporting the wives, husbands, mothers, and fathers of United States citizens." *Jimenez v. Cronen*, No. 18-cv-10225, 2018 WL 2899733 at *1. Mr. Martinez's long residency here has not revealed him to pose any danger or detriment to our country, *see Nken*, 556 U.S. at 436, but rather to be a hard-working and devoted husband, father, son, and brother who is supporting his extended family. Mr. Martinez's removal or continued detention would undermine the interests documented by the Department of Homeland Security in promulgating the provisional waiver process in the first place, including keeping families together; encouraging individuals married to U.S. citizens to come forward and obtain lawful status; and allowing the federal government "increased efficiencies" by "streamlining immigrant visa processing." 2016 Final Rule, 81 FR 50244-01.

To the extent that the government's interest in removal is heightened by the cost of detaining Mr. Martinez, Gov. at 17, this issue is easily addressed by releasing him from custody pending adjudication of his provisional waiver applications. Indeed, the government has not contested the claim for release in the motion for a TRO.

II. The Government's Motion to Dismiss Should Be Denied.

The government's cross-motion to dismiss should also be denied. The government relies on the same arguments addressed *supra* to move for dismissal of the Martinezes' provisional-waiver claims under Rule 12(b)(1) for lack of subject matter jurisdiction. As noted, the Government fails altogether to address the separately cognizable detention claims in this case.

"A district court can grant a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction based on the legal insufficiency of a claim. But dismissal is proper only when the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.'" *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408–09 (3d Cir. 1991) (*quoting Bell v. Hood*, 327 U.S. 678, 682 (1946)).[12] As detailed in the foregoing section, the Court has jurisdiction over

[12] Because the government mounts a facial rather than a factual challenge to subject matter jurisdiction, the court accepts the plaintiffs' allegations as true. *Gould Elecs. Inc. v. United*

the Martinezes' removal claims because the Immigration and Nationality Act neither channels nor strips challenges like those presented herein, which are not cognizable before the immigration court or the Court of Appeals and do not challenge a discretionary determination by the government. *Supra* at I. D. In the alternative, if the Court finds that those claims are barred by the INA, that presents a violation of the Suspension Clause because no alternative forum is available for the Martinezes to obtain meaningful review. *Supra* at I. E.

CONCLUSION

For the foregoing reasons, the motion for a temporary restraining order should be granted; the stay of removal should be continued; and Mr. Martinez should be immediately released from detention, or in the alternative granted an immediate, constitutionally-adequate bond hearing before a neutral adjudicator. The government's partial cross-motion to dismiss should be denied.

States, 220 F.3d 169, 176 (3d Cir. 2000), *holding modified by Simon v. United States*, 341 F.3d 193 (3d Cir. 2003) ("In reviewing a facial attack [to subject matter jurisdiction], the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff"). Although the government's submission included exhibits, none of those exhibits appear to contradict the plaintiff's factual assertions nor do they go to the government's jurisdictional arguments. *Cf. Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016) ("because it submitted a signed declaration disputing Davis's factual allegations, Assurant has mounted a factual challenge to subject matter jurisdiction").

Dated: July 13, 2018
Newark, NJ

Respectfully Submitted,

/s/ Liza Weisberg

Farrin R. Anello
Liza Weisberg
Alexander Shalom
Jeanne LoCicero
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
89 Market Street, 7th Floor
P.O. Box 32159
Newark, NJ 07102
Tel: (973) 642-2084

Paige Austin
Jordan Wells
Christopher Dunn
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor,
New York, NY 10004
Tel: (212) 607-3300

CERTIFICATION OF SERVICE

I hereby certify that I caused a copy of the foregoing Brief In Reply To Defendants-Respondents' Opposition To Motion For Temporary Restraining Order And Stay Of Removal And In Opposition To Partial Cross-Motion To Dismiss and all attachments thereto to be served July 13, 2018 by ECF on all parties.

I further certify that on this date I caused to be delivered by first-class mail a courtesy copy of the forgoing documents to the chambers of the Honorable Madeline Cox Arleo.

Dated: July 13, 2018

/s Liza Weisberg
Liza Weisberg