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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANTONIO DE JESUS MARTINEZ et al., *Petitioners*, v. KIRSTJEN NIELSEN *et al.*, *Respondents.*	HON. MADELINE COX ARLEO *Civil Action No.* 2:18 -cv- 10963 (MCA) **RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR A STAY OF REMOVAL AND CROSS-MOTION TO DISMISS FOR LACK OF JURISDICTION**

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PRELIMINARY STATEMENT

Petitioner is subject to a final order of removal and this Court is without jurisdiction to stay the execution of that final order. The Immigration and Nationality Act, as amended by the REAL ID Act, channels review of removal orders to the Appellate Courts and specifically precludes District Courts from exercising jurisdiction, to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to execute removal orders against any alien. Petitioner's interest in filing requests for Provisional Unlawful Presence Waivers of Inadmissibility does not change this outcome. The regulations themselves specifically provide that the discretionary waiver process does not protect an alien from being removed from the United States in accordance with DHS's exercise of prosecutorial discretion. Petitioner's motion for a stay of the execution of his removal order must therefore be denied and this action should be dismissed.

BACKGROUND

Petitioner is a native and citizen of El Salvador. *See* Ex. 1 – Record of Inadmissible Alien at 1. He entered the United States without inspection on April 18, 2003. *Id.* at 2. Petitioner was apprehended by the Border Patrol on April 23, 2003. *Id.* He was placed into removal proceedings through the issuance of a Notice to Appear on that date, and charged as removable under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without having been admitted or paroled. *See* Ex. 2 – Notice to Appear. After he failed to appear for his removal hearing, he

was ordered removed *in absentia* on May 23, 2003. *See* Ex. 3 – IJ Decision. On May 10, 2018, nearly fifteen years later, Petitioner filed a motion to reopen his removal proceedings. *See* Ex. 4 – IJ Decision 6/4/2018. The Immigration Judge denied Petitioner's motion to reopen finding that it was untimely, did not establish exceptional circumstances as contemplated under the INA, and failed to establish changed country conditions sufficient to warrant reopening for asylum or related relief. *Id.* at 1-3. The Immigration Judge also rejected as untimely Petitioner's request to reopen based upon his intent to apply for an Unlawful Presence Waiver and found no basis to reopen *sua sponte*. *Id.* at 3. As of the filing of this brief it does not appear that Petitioner has appealed this decision to the Board of Immigration Appeals.

On April 27, 2018, Petitioner was arrested by Immigration and Customs Enforcement ("ICE"). Ex. 5 – Record of Deportable Alien at 3-4. Petitioner was noted to have an approved I-130 application and no other pending applications or appeals. *Id.* at 4. He was detained for execution of his outstanding removal order. *Id.* On June 22, 2018, seeking to prevent the execution of his final removal order, Petitioner filed the pending emergent habeas petition and motion for stay of removal with this Court. *See* Dkt. No. 1. The United States now files its response in opposition.

ARGUMENT

I. This Court Lacks Jurisdiction to Stay the Removal of Petitioner.

Petitioner argues this Court has jurisdiction in this matter under 8 U.S.C §

2241 (habeas), 28 USC § 1331 (federal question), 28 U.S.C. § 1651 (all writs act), 20 U.S.C. § 2201 (Declaratory Judgment Act); and under the Suspension Clause of the Constitution. Pet. Me. At 16-17. None of the statutory bases for jurisdiction apply because 8 U.S.C. §1252 specifically strips federal district courts of subject-matter jurisdiction over claims attacking the federal government's decision to enforce a final removal order. In accordance with section 1252(g), except as otherwise provided in section 1252, "*no court* shall have jurisdiction to hear *any* cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to . . . execute removal orders against any alien." 8 U.S.C. § 1252(g) (emphases added).[1] Instead, judicial review is provided through the familiar petition-for-review process and the immigration courts, the BIA, and courts of appeals have ample authority to halt the execution of a removal order. *See id.* §§ 1252(a)(1), (b)(3)(B); *see also* 8 C.F.R. §§ 1003.2(f), 1003.6(b), and 1003.23(b)(1)(v). Section 1252(g)'s jurisdictional bar applies "notwithstanding any other provision of law (statutory or nonstatutory)"—"[e]xcept as" otherwise "provided in" section 1252. *Id.* This unequivocal language protects the government's authority to make "discretionary determinations" over whether and when to execute a removal order, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999), and reaches constitutional claims. *Elgharib v. Napolitano*, 600 F.3d 597, 606 (6th Cir.

[1] The Attorney General once exercised this authority, but that authority has been transferred to the Secretary of Homeland Security. *See Clark v. Martinez*, 543 U.S. 371, 375 n.1 (2005). Many of the INA's references to the Attorney General are now understood to mean the Secretary. *See id.*

2010) ("[T]he Constitution qualifies as 'any other provision of law (statutory or nonstatutory)' under all subsections of § 1252."). Section 1252 also provides that claims arising from the removal process must first be exhausted administratively and then ultimately channeled to the federal courts of appeals through petitions for review. 8 U.S.C. § 1252(d)(1). That section specifies that a petition for review is the "*sole and exclusive* means for judicial review of an order of removal," *id.* § 1252(a)(5) (emphasis added), and that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9).

The provisions of 8 U.S.C. § 1252 thus grant exclusive jurisdiction to review removal orders and related matters to the Courts of Appeal and deprive District Courts, like this one, of any such review power. *See* 8 U.S.C. § 1252(a)(5), (b)(9), (g); *see also Vasquez v. Aviles*, 639 Fed.Appx. 898, 900–01 (3d Cir. 2016); *Gonzalez–Lora v. Warden Fort Dix FCI*, 629 Fed.Appx. 400, 401 (3d Cir. 2015); *Torres-Jurado v. Saudino*, No. CV 18-2115 (KM), 2018 WL 2254565, at *2 (D.N.J. May 17, 2018); *accord Jennings v. Rodriguez*, No. 15- 1204, 2018 WL 1054878, at *8 (U.S. Feb. 27, 2018) (suggesting that when an alien "challeng[es] the decision . . . to seek removal," Section 1252(b)(9) presents a jurisdictional bar); *AADC*, 525 U.S. at 483 (labeling Section 1252(b)(9) an "unmistakable zipper clause," and defining a zipper clause as "[a] clause that says 'no judicial review in deportation cases unless this section

provides judicial review'"); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("Taken together, "§ 1252(a)(5) and § 1252(b)(9) mean that any issue – whether legal or factual – arising from any removal-related activity can be reviewed only through the PFR process."").

Indeed, as this Court has noted, "the REAL ID's modifications to former law 'effectively limit all aliens to one bite of the apple with regard to challenging an order of removal, in an effort to streamline what the Congress saw as uncertain and piecemeal review of orders of removal, divided between the district courts (habeas corpus) and the courts of appeals (petitions for review).'" *Lopez v. Green*, No. CV 17-2304 (KM), 2017 WL 2483702, at *1–2 (D.N.J. June 8, 2017) *citing Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005). Thus, aliens can obtain review of, reopening of, or stays of removal orders—but *only* through the established administrative-review process, with judicial review available in the federal courts of appeals. The immigration courts and the BIA have authority to adjudicate motions to reopen removal proceedings, 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3), and to grant stays of the execution of removal, *id.* §§ 1003.2(f), 1003.23(b)(1)(iv).

Petitioner thus must seek relief before the BIA, where he can secure review of the Immigration Judge's denial of his motion to reopen and also seek a stay of his removal pending such review. *See* 8 C.F.R. § 1003.23. To the extent that he ultimately seeks judicial review regarding his "order of removal," he must file a petition for review with the federal court of appeals. 8 U.S.C. § 1252(a)(5), (d)(1); *see also id.* § 1252(a)(4) (same for CAT claims); *id.* § 1252(b)(9) (emphasizing the

breadth of this rule). Even in exigent circumstances the forum for federal court review is through this process, not a separate habeas case. *See*, *e.g.*, *Khan v. Attorney Gen.*, 691 F.3d 488, 491 (3d Cir. 2012) ("grant[ing] the petitioners a temporary stay of removal" where petitioners alleged that the BIA had not yet "adjudicated their motion" that was filed "within hours of [the alien's] scheduled removal"); *see also, Telecomms. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 75 (D.C. Cir. 1984) (holding that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals"); *Garcia v. Holder*, 788 F. Supp. 2d 326, 331-32 (S.D.N.Y. 2011) (explaining that an appeals court can stay a removal order to guard against the possibility of wrongful removal, even if the administrative courts have not yet adjudicated the alien's motion to reopen).

Given the above, and as this Court has found, "[w]hen an alien files a mixed petition for habeas relief, in which the challenge to his detention is grounded in the removal order rather than based on some inherent problem with the detention itself, the petition is subject to the REAL ID Act and may not be heard by the District Court." *Vasquez v. Aviles*, Civ No. 15-2341 (CCC), 2015 WL 1914728, at *2 (D.N.J. Apr. 24, 2015), aff'd, 639 F. App'x 898 (3d Cir. 2016)(internal quotes and citations omitted). Judges in districts across the country, including this one, have found that this jurisdictional bar applies to applications to stay removal. *See Fermin v. United States*, No. 17–cv–1862, 2018 WL 623645 (D.N.J. Jan. 29, 2018) (finding

that "any challenge to the validity of that removal order or a request for a stay of that Order could be entertained only by the Court of Appeals"); *see also Torres-Jurado v. Saudino*, No. CV 18-2115 (KM), 2018 WL 2254565, at *2 (D.N.J. May 17, 2018)(collecting cases).

In an attempt to avoid the above jurisdictional bars, Petitioner argues that this Court retains jurisdiction over claims seeking to enjoin removal in order to effectuate statutory, regulatory and Due Process rights. *See* Pet. Mem. at 17. Such an argument clearly swallows the rule that *any* removal-related claims, including questions of law and fact, must be raised in immigration proceedings and in the courts of appeal, and would render 8 U.S.C. § 1252 meaningless. The cases Petitioner relies upon in support of this argument are outlier District Court decisions and are unpersuasive under the facts of this matter. As explained more fully below, Petitioner in this case seeks to preclude his removal while he pursues a provisional discretionary waiver of inadmissibility which, even if granted, would not result in relief from removal. The statutes and regulations providing for this discretionary waiver specifically state that pending and even approved applications do not provide Petitioner with any immigration status or any right to a stay of the execution of his removal order. Moreover, Petitioner has not identified any impediment to his procedural due process rights with respect to filing an appeal of the IJ's denial of his motion to reopen with the "appropriate" venue, the BIA. His choice to file a stay request with this Court rather than to pursue relief before the BIA is not permitted under the statutory review scheme, and indicative of his intent

to simply delay and frustrate his removal.

II. Congress' Limitations on Review of Removal Orders Does Not Implicate the Suspension Clause In This Case.

Petitioner vaguely argues that this Court may exercise jurisdiction over his stay of removal request because he cannot raise his challenges in a petition for review. Pet. Mem. at 18. Petitioner, however, failed entirely to note that he had already filed a motion to reopen with the Immigration Court or to explain why he has not appealed that court's decision to the Board of Immigration Appeals. The cases relied upon by Petitioner do not stand for the application of the Suspension Clause under such circumstances. The Suspension Clause does not create jurisdiction where there is an adequate substitute to habeas relief, and the substitute that Congress designed—review by the immigration courts, the BIA, and federal appellate courts—is entirely adequate in this case. Applying section 1252 here is thus appropriate and constitutional.

A. The claims and relief that Petitioner seeks are not a core application of the writ of habeas corpus, so the claims do not trigger the Suspension Clause at all.

As a threshold matter, the Suspension Clause is not even triggered here because petitioner fails to seek relief that is properly cognizable in habeas. The Suspension Clause protects core applications of the writ of habeas corpus. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (explaining that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789'" and then analyzing the protections of the writ "[a]t its historical core"). "Habeas is at its core a remedy for unlawful executive detention," and "[t]he typical remedy for such detention is, of

course, release." *Munaf v. Geren*, 553 U.S. 674, 693 (2008); *see, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (similar); *St. Cyr*, 533 U.S. at 301 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.").

Here, Petitioner is not merely challenging his detention. Rather, he asks this Court to issue "a temporary restraining order halting the government's imminent removal" of him, and to stay his removal while he continues to pursue a discretionary provisional waiver of inadmissibility. Pet. Mem. at 5.; *cf. Munaf*, 553 U.S. at 692, 693–94, 697 (habeas not available to prisoners who did not object to being held in U.S. custody, but rather only to being released into Iraq). Here, Petitioner does not seek a traditional exercise of habeas jurisdiction that is protected by the Suspension Clause and it thus does not even come into play in this case.

Moreover, Petitioner has not exhausted available remedies, but seeks habeas in advance and in lieu of exhausting such remedies. It is fundamental that prior to seeking relief under the habeas writ, administrative remedies must be exhausted. *See Boumediene v. Bush*, 553 U.S. 723, 793 (2008) ("in other contexts and for prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief"); *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) ("federal courts normally will not entertain habeas petitions . . . unless all available . . . remedies have been exhausted"). And an exhaustion

requirement "is in no sense a suspension of the writ of habeas corpus" *Gusik v. Schilder*, 340 U.S. 128, 132 (1950). Petitioner here has done the opposite by seeking relief in the District Court rather than using the process available in the BIA, and federal appellate courts.

Additionally, Petitioner's claims are based on his alleged rights to apply for discretionary provisional waivers of inadmissibility prior to any execution of his removal order, *see* Pet. Memo. at 15-16. Even if he had no alternate means of review of this claim, which he does and which he's only partially exercised, the Suspension Clause is not implicated in this case. As explained more fully below, Petitioner has no regulatory or statutory right to stay the execution of his removal order while he pursues discretionary waivers, much less one of Constitutional significance.

Finally, traditional habeas does not preclude Congress's channeling mechanism. Petitioner is subject to a valid removal order. Congress has leeway in establishing procedures to collaterally attack final orders, and traditional habeas does not preclude limitations or channeling of that kind of collateral review. *Cf. Felker v. Turpin*, 518 U.S. 651, 664 (1996) (a modified res judicata rule falls well within the evolving principles involved in "abuse of the writ" doctrine and does not violate the Suspension Cause).[2] Nor may an alien assert a right in habeas to "seek

[2] Regardless, it is well-settled that the writ is not suspended merely because Congress has elected "'to alter the standards on which writs issue.'" *Crater v. Galaza*, 491 F.3d 1119, 1125 (9th Cir. 2007) (*quoting Lindh v. Murphy*, 96 F.3d 856, 867 (7th Cir. 1996) (*en banc*), *rev'd on other grounds*, 521 U.S. 320 (1997)). Indeed, "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman,* 8 U.S. (4 Cranch) 75 and 94, 2 L.Ed. 554 (1807), and "judgments about the proper scope of the writ are normally for Congress

to alter their status in the United States in the hope of avoiding release to their homelands." *Castro v. DHS*, 835 F.3d at 450 (3d Cir. 2016) (Hardiman, J., concurring). And that is especially so where Petitioner could, and indeed has, sought review in Congress's alternative mechanism before execution of the removal order, through his immigration proceedings, and ultimately, if he so chose, in the Third Circuit.

B. Even if the Suspension Clause were implicated, it would be satisfied because the administrative motion-to-reopen process provides a fully adequate alternative to habeas.

Even if Petitioner was seeking relief that could trigger the Suspension Clause, that Clause's requirements would be satisfied. Congress can, consistent with the Suspension Clause, foreclose a habeas remedy if it provides an adequate substitute. *See Muka v. Baker,* 559 F.3d 480, 483 (6th Cir. 2009) (Suspension Clause not violated where "there is the substitution of a new collateral remedy which is both adequate and effective") (internal citation omitted). Here, that substitute—the procedure of pursuing relief in the immigration courts and then review in the federal courts of appeals—has been widely held to be adequate and constitutional.

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to make." *Felker*, 518 U.S. at 664. "[O]nly a limited class of cases was cognizable on collateral review in 1789," and while "[t]he Constitution permitted Congress to grant additional habeas jurisdiction, [] such grants were discretionary and could be repealed." *Crater*, 491 F.3d at 1125. "[T]o alter the standards on which writs issue is not to 'suspend' the privilege of the writ ... Regulating relief is a far cry from limiting the interpretive power of the courts, however, and Congress has ample power to adjust the circumstances under which the remedy of the writ of habeas corpus is deployed." *Lindh*, 96 F.3d at 867. In other words, "[a]ny suggestion that the Suspension Clause forbids every contraction of the powers bestowed [subsequent to 1789] ... is untenable. The Suspension Clause is not a ratchet." *Id.*

See Muka, 559 F.3d at 485 ("[b]ecause a petition for review provides an alien with the availability of the same scope of review as a writ of habeas corpus, . . . facially, the limitation on habeas corpus relief in the REAL ID Act does not violate the Suspension Clause."); *Iasu v. Smith*, 511 F.3d 881, 893 (9th Cir. 2007) ("[A] potential motion to reopen at the administrative level and the possibility of judicial review thereafter provides the necessary process to alleviate Suspension Clause concerns."); *Alexandre v. U.S. Att'y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006) (motion-to-reopen procedure with judicial review in courts of appeals "offers the same review as that formerly afforded in habeas corpus" and therefore "is adequate and effective") (internal citations omitted); *Luna v. Holder*, 637 F.3d 85, 97 (2d Cir. 2011) (motion-to-reopen process "provides Petitioners with an adequate and effective substitute for habeas"); *Kolkevich v. Att'y Gen. of U.S.*, 501 F.3d 323, 332 (3d Cir. 2007) ("[T]he current regime, in which aliens may petition for review in a court of appeals but may not file habeas, is constitutional."). This procedure allows petitioners to move to reopen their removal proceedings. The Immigration Courts, BIA and Federal Courts of Appeals are able to grant stays of removal in exigent circumstances, and are experts in addressing those circumstances. Directing petitioners' claims to those forums is adequate, effective, and fully consistent with the Suspension Clause.

III. Even Assuming Jurisdiction Petitioner Has Failed to Establish that a Stay of Removal is Warranted

Assuming arguendo that the Court has jurisdiction to consider Petitioner's stay of removal request, Petitioner has failed to establish that a stay is warranted.

Circuit Court's review requests for stays of removal under the standard for granting a preliminary injunction. *See Nken v. Holder*, 556 U.S. 418 (2009); *see also Douglas v. Ashcroft*, 374 F.3d 230, 234 (3d Cir. 2004). Applying that standard here, the Court should deny Petitioner's stay motion because, as required under *Nken*, he has not made a strong showing that he is likely to succeed on the merits of his claim. In *Nken*, the Supreme Court held that requests for stays of removal in immigration proceedings are governed by the four factor test traditionally applied to preliminary injunctions: (1) whether the applicant for the stay "has made a strong showing that he is likely to succeed on the merits"; (2) whether the applicant will be "irreparably injured absent a stay"; (3) "whether issuance of the stay will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Nken,* 556 U.S. at 426; *see Douglas*, 374 F.3d at 233-34.

In deciding whether to grant a stay, the first two factors are "the most critical." *Nken*, 556 U.S. at 433. For an applicant to demonstrate "a strong showing" of a likelihood of success on the merits, "[i]t is not enough that the chance of success . . . be better than negligible" or that the petitioner has a "mere possibility" of obtaining the relief sought. *Id.* The Court must weigh the factors in each case and cannot "simply assume that ordinarily, the balance of hardships will weigh heavily in the applicant's favor." *Id.* at 436 (internal quotation omitted). In sum, this is a demanding standard and "courts should not grant stays of removal on a routine basis." *Id.* at 438.

Petitioner argues that he is entitled to a stay of removal throughout the filing

and the adjudication of his various provisional waiver applications. Pet. Memo at 15-16. This argument is wholly without merit. Contrary to Petitioner's claims, the availability of these discretionary waivers confers no rights upon petitioner to avoid detention or to stay removal. To start, Petitioner claims that the USCIS field manual precludes his arrest when he appears for an interview. Pet. Mem. at 15. However, Petitioner neglects to note the exception to this general rule which provides that an alien, like Petitioner, appearing for an interview "who is the subject of a previously-issued warrant of deportation or warrant of removal" may be referred to ICE for potential arrest. *See* USCIS Adjudicator's Field Manual 15.1(c)(2).[3] Moreover, USCIS's Field Manual provides internal agency guidance and does not provide Petitioner with substantive rights or constrain ICE's lawful execution of a removal order. *See Villa-Anguiano v. Holder*, 727 F.3d 873, 886 (9th Cir. 2013)("[i]t is well settled that internal policy manuals of federal agencies do not generally create due process rights in others."); *Ibarra v. Swacina*, No. 09-22354-CIV, 2009 WL 4506544, at *7 (S.D. Fla. Dec. 3, 2009), aff'd, 628 F.3d 1269 (11th Cir. 2010)(internal guidelines do not confer substantive rights independent of statutes or regulations).

[3] This exception contains an exception for aliens seeking benefits under a provision of law (e.g. NACARA or HRIFA) which specifically allows an alien under an order of removal to seek such benefits. This exception to the exception does not apply to Petitioner as he is not seeking similar "benefits" which allow aliens to remain lawfully in the United States.

Next, Petitioner argues that by detaining and removing him the government has failed to follow its own regulations and thus violated his due process rights. Pet. Mem. at 15-16. However, nothing in the regulations or statutes provides that Petitioner has a right to remain free from detention or to a stay of removal while he pursues a discretionary provisional waiver of inadmissibility. Rather, the Federal Register implementing the waiver regulations specifically states:

> DHS reminds the public that the filing or approval of a provisional unlawful presence waiver application will *not*: Confer any legal status, protect against the accrual of additional periods of unlawful presence, authorize an alien to enter the United States without securing a visa or other appropriate entry document, **convey any interim benefits** (e.g., employment authorization, parole, or advance parole), **or protect an alien from being** placed in removal proceedings or **removed from the United States in accordance with current DHS policies governing initiation of removal proceedings and the use of prosecutorial discretion.**

See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 FR 536-01 (bold emphasis added). Similarly, the regulation itself explains that:

> (i) . . . A pending or approved provisional unlawful presence waiver does not constitute a grant of a lawful immigration status or a period of stay authorized by the Secretary.
>
> (ii) A pending or an approved provisional unlawful presence waiver does not support the filing of any application for interim immigration benefits . . .

See 8 C.F.R. §§ 212.7(e)(2)(i) & (ii). Petitioner's claims of a deprivation of due

process of Constitutional dimension are thus wholly unfounded as he lacks even a regulatory basis for a stay of removal pending his request for discretionary provisional waivers. As the Ninth Circuit has explained:

> While aliens are entitled to a procedurally fair hearing, "aliens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection" because such relief is "a privilege created by Congress." *Tovar–Landin v. Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004). Denial of such discretionary relief "cannot violate a substantive interest protected by the Due Process clause." *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003).

Mendez-Garcia v. Lynch, 840 F.3d 655, 665 (9th Cir. 2016); *see also Achbani v. Homan*, No. 3:17-CV-1512 (JBA), 2017 WL 4227649, at *4 (D. Conn. Sept. 22, 2017)(Rejecting the very same claim that a plaintiff was entitled to apply from the United States for an unlawful presence waiver, and has a due process right not to be removed, or detained in order to effectuate removal, during the pendency of his application, and denying a stay for lack of jurisdiction); *see also See Singh v. Att'y Gen.*, 399 F. App'x 769, 773 (3d Cir. 2010)(Finding an alien lacks a due process right to halt one's removal pending adjudication of an application for adjustment of status where there are no immediately available visas for Petitioners' priority dates); *Luevano v. Holder*, 660 F.3d 1207, 1215 (10th Cir. 2011); *Chacku v. U.S. Att'y Gen.*, 555 F.3d 1281, 1286 (11th Cir. 2008).

Moreover, it does not appear that Petitioner has, as of the filing of this brief,

even filed a Form I-212, Permission to Reapply for Admission with U.S. Citizenship and Immigration Services ("CIS"), or that he is even eligible to return to the United States utilizing provisional waivers of inadmissibility. Because Petitioner is subject to an *in absentia* removal order he is subject to a five year bar to returning after departure pursuant to 8 U.S.C. § 1182(a)(6)(b). The provisional waiver regulations do not provide a waiver for this bar and none is available otherwise. Thus, while Petitioner claims that his inability to complete the provisional waiver application process prior to removal would cause him harm in the form of a delayed return to the United States, it appears his return is likely barred for five years in any event. *See* Ex. 6 – AAO decision (noting no waiver available) at 3; *see also* Ex. 4 – IJ Decision at 1-2 (declining to reopen Petitioner in absentia order); *see also* 9 FAM 302.9-3(B)(2) (Foreign Affairs Manual providing guidance on Department of State determinations concerning applicability of the 5 year bar and explaining that the reasonable cause exception does not include changes in venue or the alien moving to a new residence).

Finally, as "[t]here is always a public interest in prompt execution of removal orders," granting a stay of removal in the present case would impede the government's interest in expeditiously enforcing removal orders and controlling immigration into the United States. *Nken*, 556 U.S. at 436. This is of particular significance where Petitioner is currently in ICE custody, and has been subject to removal for an extended period of time.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

DATED: July 3, 2018

Respectfully submitted,

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