UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

PETITIONERS'/PLAINTIFFS' REPLY BRIEF ON JURISDICTION

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**pro hac vice* application pending or forthcoming

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

STATUTES

As set forth in Plaintiffs'/Petitioners' ("Petitioners") opening brief on jurisdiction (ECF No. 10) (the "Opening Brief" or "Pet. Br."), this Court has jurisdiction here. As discussed below, Respondents/Defendants (the "Government") offer no basis for holding otherwise in their response brief (ECF No. 15) (the "Government Brief" or "Gov't Br.").

ARGUMENT

As Petitioners argued in their Opening Brief, the Court has jurisdiction to hear Petitioners' claims as a legal matter for two reasons. *First*, as three district courts have held, 8 U.S.C. § 1252 does not remove district court jurisdiction to hear the claims at issue here because Petitioners do not seek substantive review of their final removal orders. Instead, they seek only the opportunity to fully access the motion to reopen process. *See Sied v. Nielsen*, No. 17 Civ. 6785, 2018 WL 1142202 (N.D. Cal. Mar. 2, 2018); *Chhoeun v. Marin*, No. 17 Civ. 1898, 2018 WL 566821 (S.D. Cal. Jan. 25, 2018); *Gbotoe v. Jennings*, No. 17 Civ. 6819, 2017 WL 6039713 (N.D. Cal. Dec. 6, 2017). *Second*, assuming arguendo that this Court concludes that Section 1252 precludes jurisdiction, Petitioners' summary removal would violate the Suspension Clause—as three other district courts have held. *Ibrahim v. Acosta*, No. 17 Civ. 24574, 2018 WL 582520 (S.D. Fla. Jan. 26, 2018); *Devitri v. Cronen*, No. 17 Civ. 11842, 2017 WL 5707528 (D. Mass. Nov. 27, 2017) ("*Devitri I*")[1]; *Hamama v. Adducci*, 258 F. Supp. 3d 828 (E.D. Mich.).

I. Section 1252 Does Not Bar Review.

The Government argues that 8 U.S.C. §§ 1252(b)(9) and (g) preclude jurisdiction. For the reasons set forth below, the Government is wrong.

First, Petitioners do not ask this Court to review the validity of their old final removal orders; thus Section 1252(b)(9) does not apply. This conclusion follows the Third Circuit's

[1] The subsequent decision granting a preliminary injunction is referred to herein as "*Devitri II*." *Devitri v. Cronen*, No. 17 Civ. 11842, 2018 WL 661518 (D. Mass. Feb. 1, 2018). Unless otherwise indicated, all other abbreviations are as indicated in the Opening Brief.

decision in *Chehazeh v. Attorney General*, 666 F.3d 118 (3d Cir. 2012). There, the petitioner had been previously found to be removable, but granted asylum. Years later, the Board of Immigration Appeals ("BIA") reopened his case to terminate that asylum grant, citing government allegations of security risk. The Third Circuit found that the BIA's decision to reopen—an action that post-dated the final order of removal—was reviewable in district court. "[W]hen a person is not seeking review of 'an order of removal under subsection (a)(1),' the limitations of § 1252(b)(9) do not apply." *Chehazeh*, 666 F.3d at 132; *accord Singh v. Gonzales,* 499 F.3d 969, 978 (9th Cir. 2007) ("By virtue of [its] explicit language . . . 1252(b)(9) appl[ies] only to those claims seeking judicial review of orders of removal.").

Second, Petitioners do not challenge prosecutorial discretion to execute their removal orders; thus Section 1252(g) does not apply. Instead, as explained in the Opening Brief, and unrebutted by the Government, petitioners assert *mandatory* prohibitions on removal. Section 1252(g) was "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Chehazeh*, 666 F.3d at 135 (quoting *Reno v. AADC*, 525 U.S. 471, 485 n.9 (1999)). Because Petitioners' claim a non-discretionary right to pursue a motion to reopen before they are removed, they do not attack the discretion of the government to remove them.

The cases cited by the Government are inapposite. Those cases, unlike here, each involved challenges to the underlying orders of removal or the process that led to those orders. In *Gallego-Gomez v. Clancy*—an unpublished decision—the Third Circuit affirmed the dismissal of a habeas petition requesting a finding that "the final order of removal. . . is without legal force or effect because it was issued without notice." 458 F. App'x 91, 92 (3d Cir. 2012). Section 1252 dictated that result because the old removal order was directly challenged. In contrast, Petitioners do not ask for review of the merits of their old orders or to vacate those orders.

The Government also erroneously relies on *Barrios v. Attorney General*, 452 F. App'x 196 (3d Cir. 2011), which involved a procedural posture and claims wholly unlike those at issue here. In *Barrios*, the petitioner filed a motion to reopen before the BIA and sought a stay of removal pending a decision. The BIA denied the stay before reaching the merits of the motion to reopen. Petitioner then filed a petition for review challenging the stay denial *before* there was a final order to appeal to the circuit. *Id.* at 197. The Third Circuit held there was no jurisdiction over the petition for review.[2] *Id.* at 198. This decision, however, has no bearing on Petitioners' habeas action here. Unlike in *Barrios*, Petitioners do not challenge the failure to grant a stay, but rather challenge their inability to meaningfully access the motion to reopen process.[3]

Finally, the Government cites a handful of unpublished district court cases to argue that district courts cannot stay removals. However, none are analogous to the instant case—where denying a stay would foreclose Petitioners' opportunity to fully pursue motions to reopen based on changes in country conditions. *See K.A. v. Green*, No. 17 Civ. 3542, 2017 WL 5513685, at *3 (D.N.J. Nov. 16, 2017) (Linares, C.J.) (no jurisdiction to grant stay pending BIA adjudication of motion to reopen, after Third Circuit denied stay requests where petitioner was "not likely to succeed on merits of motion to reopen); *Conceicao v. Holder*, No. 11 Civ. 4119, 2012 WL 253151, at *4 (D.N.J. Jan. 26, 2012) (denying stay of removal where challenge to removal was recently denied by immigration court, BIA, and Court of Appeals); *Calderon v. Holder*, No. 10

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[2] The Government also cites *Barrios* for the proposition that 8 U.S.C. § 1252(g) precludes the federal courts from issuing stays of removal. But this cannot be correct: courts regularly grant such stays. *See generally Nken v. Holder*, 556 U.S. 418 (2009).

[3] The Government suggests that Petitioners can seek a stay from the Third Circuit even before a motion to reopen is denied—citing *Khan v. Attorney General*, 691 F.3d 488 (3d Cir. 2012). But, the Government has not offered a viable theory by which Petitioners can seek a stay directly from the court of appeals at this time. The reliance on *Khan* is misplaced. *Khan* does not hold that the Circuit Court can issue a stay of removal before a petitioner is able to file a motion to reopen—which is the issue here. It also does not hold that the Circuit Court can issue a stay of removal before the BIA issues a final denial of a motion to reopen.

Civ. 3398, 2010 WL 3522092, at *2 (D.N.J. Aug. 31, 2010) (no jurisdiction to grant stay where petitioner challenged removal order on the merits and sought stay to challenge underlying criminal convictions); *Gil v. Mukasey*, No. 08 Civ. 4064, 2008 WL 4416458, at *4 (D.N.J. Sept. 24, 2008) (no jurisdiction to review challenge to an order of removal based on argument that petitioner could not be removed while a conviction forming the basis for removal was not final).[4]

In sum, under this Circuit's precedent, Section 1252 does not preclude habeas review under the particular circumstances presented here. Indeed, three courts recently arrived at exactly that conclusion in analogous cases. *See Sied*, 2018 WL 1142202 at *21; *Chhoeun*, 2018 WL 566821 at *7–9; *Gbotoe*, 2017 WL 6039713 at *2–4.

II. Section 1252 Violates the Suspension Clause If It Bars Jurisdiction.

The Government accepts that Petitioners have Suspension Clause rights, but argues that its reading of Section 1252 would not violate the Suspension Clause as applied for three reasons: because Petitioners had an opportunity for judicial review of their old final removal orders; because the relief they seek is not release from detention; and because Congress provided an adequate substitute to habeas relief. The government is wrong as to each argument.

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[4] The Government cites one case where a petitioner sought a stay to pursue a motion to reopen based on changed country circumstances. *Estrada-Zapata v. U.S. Immigration & Customs Enforcement*, No. 07 Civ. 2034, 2007 WL 3334996 (M.D. Pa. Nov. 8, 2007). That one-page, unpublished opinion does not support the Government's position. The case is not binding on this Court and addressed the issue in summary fashion without the benefit of any briefing. The decision construed the claim presented as "assailing the validity of the underlying removal order." *Id.* at *1. But the court here is not being asked to decide the validity of the underlying orders. Instead, as in *Sied*, Petitioners "seek[] only a 'day in court' on [their] motion[s] to reopen" and "do[] not ask this court to review [their] removal order[s] or address whether [the] country conditions have in fact changed, or whether [they] should in fact be afforded asylum or withholding of removal." 2018 WL 1142202 at *13. The decision in *Estrada-Zapata* thus does nothing to undermine the six recent decisions on point that, after thorough briefing and analysis, have exercised jurisdiction without exception.

A. Petitioners have not had an opportunity for judicial review of their claim that removal based on current conditions in Indonesia, which post-date their final removal orders, would be unlawful.

Petitioners have not had an opportunity for judicial review of their claim that removal to Indonesia would violate the Convention Against Torture ("CAT") and withholding statutes, given the changed country conditions that post-date their removal orders. The Government relies on *Qureshi v. Administrative Appeals Office of U.S. Citizenship & Immigration Services*, 408 F. App'x 611 (3d Cir. 2010), to argue that non-citizens are not entitled to judicial review of *discretionary* relief that post-dates the final order. But Petitioners do not seek review of discretionary relief: withholding of removal pursuant to Immigration and Nationality Act and CAT relief are *mandatory* forms of relief. "[T]here is a statutory right to move to reopen and an entitlement to not be deported to a country where persecution would occur." *Devitri II* at *5.

The Government further raise two factual issues that they wrongly suggest defeat jurisdiction here. In fact, neither issue distinguishes this case from the six other recent cases that have stayed summary removals so that particular groups could file motions to reopen—most notably in *Devitri*, where the facts are identical in all material respects. The Court should reject the Government's invitation to be the first court to chart a different path.

First, the Government argues that Petitioners "have had years to raise claims of persecution" and now "cannot rely on the Suspension Clause" because they did not file motions to reopen when they learned of these conditions. (Govt. Br. at 1, 17.) This argument misconstrues the persecution claim. The question is whether the current conditions are different than those that existed previously at the time Petitioners' orders of removal were finalized. They are, as set forth in the Affidavit of Jeffrey Winters, which addresses events that occurred *since 2012*. (*See* Winters Aff. at 30–50.) For example, the Winters Affidavit describes a May 2017 watershed event where a Christian political leader was sentenced to two years in prison for

"blasphemy" simply for saying that, according to the Quran, Muslims are not forbidden from voting for non-Muslims candidates. (*Id.* at 47.) Petitioners' own fears of persecution were heightened as a result of this recent event. (Pangemanan Decl. ¶ 7)[5]

The Government fails to explain why this *identical* testimony was sufficient in *Devitri*, but is not here. *See Devitri II* at *2, 4, 6, 7 (stating that "[a]ccording to Dr. Winters, since 2012 . . . Christian Indonesians face an 'extremely high probability of persecution'" and that "Petitioners have presented unrebutted evidence to show that, if they were deported to Indonesia, they would face the threat of persecution or torture," and concluding motions to reopen would thus be "non-frivolous"); *Devitri I* at *4 (noting "Congress explicitly 'set no time limit on the filing of a motion to reopen" if "changed country conditions… evidence is material and … would not have been discovered or presented at the previous preceding").

Second, the Government argues that Petitioners knew they were going to be removed and should have filed motions to reopen earlier because ICE informed Petitioners' representatives that their status—*i.e.,* living under successively renewed Orders of Supervision ("OSUPs")—was only "for a temporary period" (Govt. Br. at 3), and "repeated that advisal [sic.] over the next several years." (*id.* at 21). The Government's argument is belied by the record, including its own chronology of events. In reality, those Petitioners who were part of the 2009 New Jersey Indonesian Orders of Supervision Agreement lived under OSUPs for nearly a decade.

The bottom line is that ICE officials at the highest levels decided to maintain the Agreement. While Director Tsoukaris warned that he would only allow "a final six-month stay" of removal and that ICE "made clear that no further extensions would be granted, unless there was substantial evidence of possible relief in individual cases" (Gov't Br. at 4), those statements

[5] Citations to "Pangemanan Decl." are to the Sworn Declaration of Harry Pangemanan dated March 12, 2018.

were made in 2011. Yet Petitioners were permitted to live under OSUPs for *nearly seven more years*. Indeed, after certain enforcement actions were taken against Indonesian Christians in 2011 and 2012,[6] Reverend Seth Kaper-Dale met with then Director of Enforcement and Removal Operations Gary Mead in Washington, D.C. on February 13, 2013 to advocate that the Agreement continue. (Kaper-Dale Decl. ¶ 14). The next day, Kaper-Dale learned Petitioners would receive renewed OSUPs, and two days later he received emails from ICE to implement Mead's decision. (*Id.* Ex. 2.) Thereafter, Petitioners lived under OSUPs without incident: no enforcement action was taken against any Petitioner *for more than four years*, and ICE offered no empty caveat about the "temporary" nature of Petitioners' status. (Pangemanan Decl. ¶ 4)

The Government's recitation of the facts omits any reference to the period between 2013 and the first two thirds of 2017—during which there was no indication whatsoever that Petitioners' status would abruptly change. For example, the Government provides copious background about Harry Pangemanan, yet refers to no events during the nearly five-year period between February 19, 2013 "when ICE placed him on other OSUP" and January 25, 2018 when "ICE attempted to arrest" him.[7] (Govt. Br. at 7). The same nearly five-year gap appears in the descriptions of each named Petitioner. (Govt. Br. at 8–11.)

Notably, the Government's argument that similarly situated groups were on notice that they would be removed has failed in other cases. The court in *Devitri* dismissed the contention that the New Hampshire Indonesian Christians forfeited their due process right to file motions to

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[6] Similarly, in *Devitri*, the court noted that ICE took some enforcement actions against "a group of program participants" in 2011, but the OSUP program nonetheless continued until June 2017. *Devitri I* at *2.

[7] ICE had typically ordered Pangemanan to report for a check-in on a six month schedule. Yet, in January 2017, he was told that he did not have to report back for another year. If anything, Pangemanan had even more security in his OSUP status than in prior years. (Pangemanan Decl ¶ 5.)

reopen because they knew OSUPs could be discontinued, yet sat on their rights. The *Devitri* court concluded that although "[t]he Government never made any promises or agreements that the program participants could stay in the country indefinitely . . . nothing in the record suggests that Petitioners were notified that they would forfeit the right to assert changed country conditions if they did not file motions to reopen while they participated in Operation Indonesian Surrender." *Devitri II* at *2. The same facts are present here: Petitioners lived collectively under OSUPs for many years while their removal orders lay dormant—including during a more than four year period when the Government concedes there was no indication that their status would abruptly change. As such, Petitioners—like the *Devitri* petitioners, "reasonably relied on their OSUPs in not filing motions to reopen earlier" because they "had no reason to suspect that the Government would abruptly change its mind about the humanitarian program." *Id.*

As a practical matter, the Government's efforts to distinguish *Devitri* are particularly ironic given that the New Hampshire program was designed based on the New Jersey Agreement, and in consultation with Reverend Kaper-Dale. (Kaper-Dale Decl. ¶ 11.) In fact, the *Devitri* facts actually presented a *harder* notice question, since ICE explicitly "advised pastoral leaders in June 2017 that it would be terminating" the New Hampshire OSUP program. *Devitri I* at *2. By contrast, ICE provided no notice to Petitioners or their representatives that their status would abruptly change. (Kaper-Dale Decl. ¶ 22; Pangemanan Decl. ¶¶ 5–6)

Finally, Petitioners' are also similarly situated to those in *Chhoeun.* There, the court concluded that: "[t]he removal orders Petitioners seek to reopen have lain dormant, in many cases for over a decade. Circumstances have changed in the interim that may allow Petitioners to raise serious questions" as to their right to immigration relief. "Denying Petitioners the right to do so amounts to a denial of due process." 2018 WL 566821 at *2. In so holding, the *Chhoen*

court rejected "[t]he Government's assert[ion] that Petitioners' liberty interest is weak, because Petitioners knew they were subject to removal orders and should have expected to be deported at any instant," cautioning that it was "disingenuous for the Government to claim that throughout the many years that Petitioners were permitted to live and work on supervised release, they should not have built up any expectation that they would be permitted to remain in the country." *Id.* at *9. To the contrary, petitioners "had no compelling or urgent reasons, prior to their re-detention, to incur the significant time and expense of retaining counsel to file a motion to reopen." *Id.* at *10; *accord Hamama v. Adducci*, 261 F. Supp. 3d 820, 833 (E.D. Mich. 2017) (finding "it was reasonable not to incur the prohibitive cost of filing a motion to reopen" where petitioners were "living peaceably under removal orders for over a decade").

B. The habeas claims are within the protections of the Suspension Clause.

The Government also suggests that Petitioners are not protected by the Suspension Clause because they do not seek release from detention. But, it is well settled that habeas review covers removal, not just release from detention. Petitioners have already addressed the Government's arguments as to the scope of habeas relief. (Pet. Br. at 11–12.) It is well settled that habeas review covers removal, *see INS v. St. Cyr*, 533 U.S. 289, 300 (2001), as the act of removal itself inherently involves confinement and restraint of the person's physical liberty. *See, e.g.*, *Chin Yow v. United States*, 208 U.S. 8, 12 (1908) ("It would be difficult to say that [an alien] was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China.").

C. The motion to reopen process is an inadequate substitute for habeas.

Finally, the motion to reopen process, followed by a petition for review, is not an adequate habeas substitute in this case. Each court to hear an analogous case has held that the

motion to reopen process is not adequate if Petitioners may be removed to danger before the motion is fully adjudicated. (*See* Pet. Br. at 12–17.)

The Government cites *Kolkevich v. Attorney General*, 501 F.3d 323 (3d Cir. 2007), for the proposition that the motion to reopen process does not violate the Suspension Clause. But that case held only that the motion to reopen process is not *facially* unconstitutional. Petitioners do not claim the reopening process is facially invalid, but rather that it is unconstitutional as applied to their case because it exposes them to the risk that they will be removed before they can fully adjudicate a motion to reopen— a "Kafkaesque procedure [under which] they will be removed back to the very country where they fear persecution and torture while awaiting a decision on whether they should be subject to removal because of their fears of persecution and torture." *Devitri II* at *4. (*See also* Kanstroom Decl.)

CONCLUSION

For the reasons described herein and in Petitioners' Opening Brief, Petitioners respectfully request that the Court issue an order taking jurisdiction over this case.

Dated: March 13, 2018

Respectfully Submitted,

PETITIONERS/PLAINTIFFS

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CERTIFICATE OF SERVICE

I, Emily B. Goldberg, certify that the foregoing Petitioners'/Plaintiffs' Reply Brief on Jurisdiction was served electronically on all counsel by CM/ECF on March 13, 2018.

/s/ Emily B. Goldberg
Emily B. Goldberg

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HARRY PANGEMANAN, et al.,

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JOHN TSOUKARIS, et al.,

Respondents/Defendants.

Civil Action No.
2:18-cv-01510-ES

SWORN DECLARATION OF HARRY PANGEMANAN

I, Harry Pangemanan, under oath, depose and say as follows:

1. I am an Indonesian Christian man of Chinese descent who has lived in the United States since July 1993.

2. I followed closely Reverend Seth Kaper-Dale's efforts to reach an agreement with ICE in 2009. Through that agreement, myself, my wife, Mariyana Sunarto, and many members of the Indonesian community in New Jersey were given stays of deportation and employment authorization in exchange for our agreement to identify ourselves and to be monitored by ICE.

3. During the first few years after the agreement was reached with Reverend Kaper-Dale, there were some periods when I thought I would be sent back to Indonesia. On February 19, 2013, ICE placed me on another Order of Supervision. From February 2013 until January 2018, the government told me nothing to suggest that my situation had changed— and my family and I lived in New Jersey without incident.

4. During that nearly five-year period, my wife and I went to our check-ins together. Starting in 2013, we had check-ins every six months or so, and they were usually quick and uneventful.

5. The last check-in I attended with ICE was in January 2017. I remember that the ICE officers were very kind. Even though our check-in date was usually set for every six months, they told us we did not need to return for a whole year, giving us a check-in date of January 30, 2018.

6. On January 25, 2018, five days before my scheduled check-in, ICE attempted to arrest me at my home, as I was about to leave to drive my daughter to school. I had no notice that this would happen.

7. I am a devout Christian and am of Chinese ethnicity. My case is already well-known to the Indonesian government, and I am terrified of being returned to Indonesia and persecuted because of my religion, ethnicity, or actual or perceived political opinions. I follow events in my home country closely, and the situation has gotten worse and worse. For example, in May 2017, the Christian Governor of Jakarta was arrested for saying that a certain verse in the Quran does not prevent Muslims from voting for a Christian, and that those who said otherwise were being misleading. He was accused of insulting the Quran and sentenced to two years in prison under the Indonesian law against blasphemy.

In accordance with 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: March 1[illegible], 2018

Harry Pangemanan