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November 4, 2025

BY ECF
The Honorable Evelyn Padin, U.S.D.J.
U.S. District Court for the District of New Jersey
50 Walnut Street
Newark, New Jersey 07102

Re: *Jorge Barrios v. Pam Bondi, et al.,* No. 25-15122
Letter Sur-Reply to Petitioner's Writ of Habeas Corpus

Dear Judge Padin:

This Office represents Respondents in this habeas matter filed by Petitioner Jorge Barrios, a noncitizen previously in the custody of U.S. Immigration and Customs Enforcement ("ICE"). At the Court's direction, ECF No. 12, Respondents respectfully submit this sur-reply to respond to Petitioner's argument that the matter is not moot despite his removal from the country two months ago, ECF No. 10.

Certain key points are not in dispute. When ICE removed Petitioner, he was subject to a final order of removal. The immigration court ordered him removed because he was deportable, he defied an order to voluntarily depart issued in 1998, and that order turned into a final order of removal. Petitioner and ICE executed a joint motion to reopen his removal proceedings at some point in the past, but Petitioner did not file the motion until 2025, and he has not explained the reason for the delay. Filing a motion to reopen does not prohibit ICE from removing Petitioner. *See* Ans. Ex. 1 ("Filing a motion with the Board DOES NOT automatically stop the Department of Homeland Security from executing an order of removal or deportation." (original emphasis)). Although Petitioner, who is represented by counsel, was advised to seek a stay of removal from the BIA, he did not do so. *See id.* ("If you are in DHS detention and are about to be deported, you may request the Board to stay your deportation on an emergency basis.").

Despite his removal, Petitioner nonetheless claims that his habeas challenge is still ripe because the joint motion to reopen his removal proceedings was pending when ICE removed him to Guatemala on September 1. He acknowledges that "a stay [of] removal was technically not pending" when ICE removed him. *Id.* at 2. But he

argues that ICE had to treat him as if a stay existed (in his words, he had the "functional equivalent" of a stay) because the joint motion was pending. *Id.* at 3-4. He asks the Court to order ICE to return him to the United States and release him. *Id.* at 1.

Petitioner's arguments—both the mootness argument and relief sought—have no basis in the law. As a threshold matter, courts lack habeas jurisdiction over challenges to the lawfulness of detention or removal after the alien is removed. *Vasquez v. Aviles*, 639 F. App'x 898, 902 (3d Cir. 2016) (holding district court "correctly held that [the] petition was moot insofar as it challenged the legality and length of his detention, for upon his removal his petition no longer presented a justiciable case or controversy"); *Naqib v. Ashcroft*, No. 05-7010, 2006 WL 3469636, at *2 (N.D. Ohio Nov. 29, 2006) ("Naqib's removal has definitively mooted Naqib's claims for release from pre-removal detention, for injunctive relief from such detention, and for a stay of removal. There plainly is no longer any basis for ordering that Naqib be released from pre-removal detention when he is not so detained.").

More importantly, even if he could challenge his removal, his claim that ICE could not remove him while his motion was pending is unfounded. Courts routinely permit removal while a noncitizen's motion to reopen is pending. *See, e.g., M'Bagoyi v. Barr*, 423 F. Supp. 3d 99, 106 (M.D. Pa. 2019). The fact that the motion was "joint," or even that it was likely to be granted under the regulations, does not change the result. When courts recognize that ICE may remove someone who has a pending motion to reopen, those courts do not ask if the motion is joint, stipulated, meritorious, or any other way to describe a motion's chance of success. They simply recognize that the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(g), strips federal courts of jurisdiction over attempts to stay removal itself (as distinct, say, from attempts to challenge detention prior to removal). *See M'Bagoyi*, 423 F. Supp. 3d at 106 ("[T]o the extent that the petitioner seeks a stay of his removal until he exhausts his remedies with respect to his motion to reopen his immigration proceedings, that would be a direct challenge to his removal order and the court does not have jurisdiction over that aspect of the petitioner's filing under § 1252."). Thus, when no stay of removal exists, ICE may remove the person.

To that end, although Petitioner acknowledges that no stay existed, he claims an implied or "functional" stay of removal was in place because the BIA was all but certain to grant the motion to reopen. He cites to no case supporting that novel proposition. And it finds no support in the INA or the regulations. Rather, BIA regulations expressly say that it is not possible. The BIA regulations governing motions to reopen say ICE "shall proceed" with removal "unless a stay of execution is specifically granted by the Board[.]" 8 C.F.R. § 1003.2(f). The regulation contains no exception for what Petitioner argues is a "functional" or implied stay when a joint motion is pending.[1] Nor does a pending joint motion fall under the narrow times when

[1] 8 C.F.R. § 1003.2 reads as follows:

an automatic stay of removal occurs. *See* Executive Office for Immigration Review, *BIA Practice Manual, Ch. 6 – Stays and Expedited Requests*.[2]

This Court, when it denied Petitioner's order to show cause, recognized in effect that there was no pending stay. Petitioner asked this Court to enjoin his removal because of the pending joint motion. ECF No. 3. The Court's September 5 Memorandum Order denied the request, stating:

> Petitioner filed a motion to reopen to adjust status in 2018, and although it was a joint motion "signed by Respondent's BIA counsel and DHS Attorney," it was never acted upon. *Id.* ¶ 14, and Petition, Ex. A. Petitioner has a motion to reopen removal proceedings pending with the BIA since July 30, 2025. *Id.* ¶ 1. Nonetheless, Petitioner has not alleged the motion has been granted, and failure to voluntarily depart within time renders a person subject to detention and removal.

ECF No. 4 at 2 n.3 (internal citations omitted). The Court ordered Respondents to answer the Petition within twenty days and entered no restraints on removal. ECF No. 4 at 3.

Petitioner, however, argues that "exceptional circumstances" exist to avoid mootness because he believes ICE took contradictory positions in his removal proceedings. Reply at 3-4. The "exceptional circumstances" doctrine is a rarely applied mootness exception that requires egregious facts, as exemplified by the two out-of-circuit cases cited by Petitioner, *Rivera v. Ashcroft*, 387 F.3d 835 (9th Cir. 2004) and *Singh v. Waters*, 87 F.3d 346 (9th Cir. 1996), neither of which is instructive here. In *Rivera*, the INS deported a U.S. Citizen, effectively rendering him stateless, even though the citizen was not represented by counsel and the immigration court egregiously mishandled the deportation proceedings. 387 F.3d at 845-48. In *Singh*, immigration officials deported the petitioners despite "the immigration judge grant[ing] a stay of deportation" and immigration officials failing to disclose the immigration file to petitioner's attorney. 87 F.3d at 347-49.

> **(f) Stay of deportation.** Except where a motion is filed pursuant to the provisions of § 1003.23(b)(4)(ii) and (b)(4)(iii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the immigration judge, or an authorized DHS officer.

Petitioner would rewrite this section to say that pending joint motions to the BIA count as "a stay of execution."

[2] https://www.justice.gov/eoir/reference-materials/bia/chapter-6/2 (last visited Nov. 4, 2025).

No similar facts exist here. The ICE attorney in Petitioner's immigration proceedings signed the joint motion sometime in the past. *See* Pet. ¶¶ 14-17.[3] For reasons that Petitioner does not explain, his counsel did not file the motion until July 2025. *Id.* And during the intervening time, Petitioner did not seek a stay of removal. Meanwhile, ICE took steps to execute the final order of removal that had been pending since 1998. The Court denied Petitioner's TRO motion to enjoin his removal. ECF No. 4. And Petitioner did not seek a stay of removal from the BIA. Further, when ICE removed petitioner, it complied with BIA regulations which require ICE to execute an order of removal unless the BIA "specifically grant[s]" a stay, which did not occur here. 8 C.F.R. § 1003.2(f) ("Execution of such [final order of removal] shall proceed unless a stay of execution is specifically granted by the Board, the immigration judge, or an authorized DHS officer.").

Further, Petitioner can still pursue his green card from his native country through consular processing. *See Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010) ("the physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen."); *Beltran Prado v. Nielsen*, 379 F. Supp. 3d 1161, 1169-70 (W.D. Wash. 2019) ("If he is removed to Mexico while his motion to reopen is pending, he may continue to litigate his case from abroad . . . Allowing petitioner to remain in the United States while his motion to reopen is pending is unlikely to provide additional value, in terms of due process protections, and it likely would provide at least some administrative burdens on ICE").[4] Accordingly, Petitioner's facts fall well short of the "exceptional circumstances" that existed in *Rivera* and *Singh*.

Lastly, Petitioner's claimed relief—return to the United States without detention—fails because courts lack the power to order it. Doing so would invalidate a final order of removal. *See Yearwood v. Barr*, 391 F. Supp. 3d 255, 263 (S.D.N.Y. 2019) ("The ultimate relief that the petitioner seeks—an order returning him to the United States and preventing the respondents from detaining him or removing him during the pendency of any appeals—is a direct challenge to the order of removal, regardless of the fact that the petitioner frames his claim as a challenge to the process through which he was removed . . . And by its plain terms, 8 U.S.C. § 1252(g) strips district courts of jurisdiction over claims attacking the Government's decisions or actions to execute removal orders.") (citing *Vasquez v. Aviles*, No. 15-2341, 2015 WL

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[3] Petitioner asserts that the ICE attorney signed the joint motion in 2018, Pet. ¶ 14, but the document contains no date or other way to verify the timeframe.

[4] U.S. Citizenship and Immigration Services, *Consular Processing*, https://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing ("If you are outside of the United States, you may apply at a U.S. Department of State consulate abroad for an immigrant visa in order to come to the United States and be admitted as a permanent resident. This pathway is referred to as consular processing.") (last visited Nov. 4, 2025).

1914728, at *2 (D.N.J. Apr. 24, 2015), *aff'd*, 639 F. App'x 898 (3d Cir. 2016)); *Nabeel v. Prendes*, No. 12-666, 2012 WL 3731231, at *3 (N.D. Tex. Mar. 19, 2012) ("[P]etitioner is . . . seeking relief from the deportation order so that he may return to the United States. A federal district court does not have the jurisdiction to grant petitioner the relief that he seeks").

Accordingly, Respondents respectfully request that the Court dismiss the Petition for lack of subject matter jurisdiction. We thank the Court for its continued attention to this matter.

Respectfully submitted,

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