No. 17-1916

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CARLTON BAPTISTE,
A030-338-600,

Petitioner,

v.

JEFFERSON B. SESSIONS III,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

PETITIONER'S RESPONSE TO MOTION TO DISMISS AND/OR MOTION TO STAY THE THIRD CIRCUIT PROCEEDINGS

I. INTRODUCTION

A. STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Carlton Baptiste, a 78-year-old great-grandfather in declining health, has resided in the United States since 1965 and has been a lawful resident since 1972. Mr. Baptiste is a native of Trinidad and Tobago; however, after residing in the United States for over fifty years, he has no ties to his former country. On June 7, 2013, Mr. Baptiste was detained by Immigration and Customs Enforcement (ICE) after completing his criminal sentence resulting from a guilty plea to N.J. Stat. Ann.

[1] Since the administrative record has not yet been filed with the Court, the facts and procedural history are largely taken from the Third Circuit's decision in *Baptiste v. Att'y Gen. of the United States*, 841 F.3d 601 (3d Cir. 2016), *petition for cert. filed*, (U.S. Feb. 7, 2017) (16-978).

§ 2C:12-1. Since the completion of his criminal sentence, Mr. Baptiste as of April 30, 2017, has been incarcerated an additional four years in civil detention.

In June 2013, the Department of Homeland Security (DHS) began removal proceedings against Mr. Baptiste. DHS alleged Mr. Baptiste was removable in accordance with 8 U.S.C. § 1227(a)(2)(A)(iii) because of his 2009 guilty plea under N.J. Stat. Ann. § 2C:12-1(b)(1). DHS further asserted Mr. Baptiste was an alien convicted of an aggravated felony, as per the definition in 8 U.S.C. § 1101(a)(43)(F) of a "crime of violence," defined in 18 U.S.C. § 16(b). DHS also contended that Mr. Baptiste's conviction for assault and battery in December 1978 under former N.J. Stat. Ann. § 2A:90-1 constituted a crime of violence under 18 U.S.C. § 16(b). In addition, DHS claimed Mr. Baptiste was removable under 8 U.S.C. § 1227(a)(2)(ii) for two convictions, in December 1978 and April 2009, of crimes involving moral turpitude (CIMT) "not arising out of a single scheme of misconduct." Because of these charges by DHS, Mr. Baptiste was detained under 8 U.S.C. § 1226(c).

On May 20, 2014, the Immigration Judge (IJ) ruled that the 1978 conviction did not constitute a crime of violence under 18 U.S.C. § 16(b). However, under 8 U.S.C. § 1227(a)(2)(ii), the IJ found that the 1978 conviction qualified as a CIMT. Furthermore, the IJ found the underlying crime resulting in Mr. Baptiste's April 2009 guilty plea constituted both a crime of violence and a CIMT.

The IJ also found that Mr. Baptiste was "personally a sympathetic person." Oral Decision of IJ, *In Matter of Carlton Baptiste*, A 030 338 600 (May 20, 2014). This observation about Mr. Baptiste was consistent with that of the sentencing judge for Mr. Baptiste's 2009 guilty plea, who noted that (1) Mr. Baptiste had been law abiding "for a substantial period of time," (2) his criminal conduct resulted from circumstances that are unlikely to be repeated, and (3) imprisonment would cause an excessive hardship on Mr. Baptiste and his family. Vol. 2, Joint App. 0025-26, *Baptiste v. AG United States*, No. 14-4476 (3d Cir. Nov. 30, 2015).

Mr. Baptiste appealed to the Board of Immigration Appeals (BIA). The BIA upheld the IJ's decision, finding Mr. Baptiste's plea to a violation of N.J. Stat. Ann. § 2C:12-1(b)(1) was a crime of violence and a CIMT.

Mr. Baptiste, acting *pro se*, appealed to the Third Circuit. The Third Circuit then appointed the Penn State Law Civil Rights Appellate Clinic as counsel for Mr. Baptiste for the appellate proceedings. Mr. Baptiste's appeal challenged the classification of the underlying crime in his 2009 guilty plea as a crime of violence and CIMT, along with the constitutionality of the crime of violence statute under the Due Process Clause. The Third Circuit found that, although Mr. Baptiste was convicted of a crime of violence under 18 U.S.C. § 16(b), the statute was void for vagueness and, therefore, unconstitutional. *Baptiste*, 841 F.3d at 621. The Third Circuit also concluded that, because of Mr. Baptiste's 1978 and 2009 convictions,

he was potentially removable as an alien convicted of two CIMTs pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii). *Id.* at 623. The case was remanded to the BIA for further proceedings. *Id.*

The Attorney General then filed a petition for writ of certiorari with the Supreme Court of the United States on the void for vagueness issue which is now pending before the Court at Supreme Court Docket 16-978. The constitutional issue decided by the Third Circuit in *Baptiste* is currently before the Supreme Court in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 2016 WL 323911 (U.S. Sept. 29, 2016) (No. 1598).

Because of his prolonged detention, on September 22, 2016, Mr. Baptiste filed a motion with the Immigration Court in Elizabeth, New Jersey, requesting a custody determination and bond hearing pursuant to the Third Circuit's decision in *Diop v. ICE/Homeland Security*, 656 F. 3d 221 (3d Cir. 2011). On October 24, 2016, Immigration Judge Geisse denied Mr. Baptiste's request for a bond hearing stating only, "No jurisdiction. Need habeas." After filing a notice of appeal, counsel for Mr. Baptiste received a bond order dated November 30, 2016, which provided Judge Geisse's analysis supporting the conclusion that an IJ lacks jurisdiction to grant a bond hearing, absent a habeas petition. On March 23, 2017, the BIA issued an order dismissing Mr. Baptiste's appeal, citing the IJ order of no jurisdiction. That determination is the subject of this petition for review.

II. ARGUMENT

B. THE PETITION FOR REVIEW RAISES CONSTITUTIONAL ISSUES AND AN ERROR OF LAW THAT DIRECTLY CONFLICTS WITH THIRD CIRCUIT GUIDANCE, GIVING THIS COURT JURISDICTION.

The Government in its Motion to Dismiss and to Toll the Time Filing of the Administrative Record asks this Court to "dismiss the petition for review as Baptiste does not seek review of a final order of removal under 8 U.S.C. § 1252(a)." Petitioner agrees this is a correct statement of the general rule, but the Government's interpretation ignores the law's explicit exceptions. Further, if the Court determines that Mr. Baptiste does not seek review of a final order of removal, there are other bases for the Court to exercise jurisdiction over the constitutional claims and questions of law raised by Mr. Baptiste's Petition for Review.

The general requirement that a removal order be "final" before it may be judicially reviewed is set forth in the Immigration and Nationality Act (INA), 8 U.S.C. §1252(a)(1) as amended by the REAL ID Act of 2005 ("REAL ID Act"). This "finality" requirement is expressly referenced throughout 8 U.S.C § 1252. *See, e.g.*, 8 U.S.C § 1252(a)(2)(C) (barring review of "any final order of removal" against criminal aliens); 8 U.S.C § 1252(b)(1) (providing that a petition for review must be filed within 30 days "after the date of the final order of removal"); 8 U.S.C § 1252(b)(3)(A) (requiring service of the petition for review on the Service officer "in charge of the Service district in which the final order of removal . . . was entered"); 8 U.S.C § 1252(b)(9) (mandating consolidation of all questions of law

and fact "in judicial review of a final order under this section"); 8 U.S.C §1252(d) (court may review a final order of removal only if person has exhausted all administrative remedies); 8 U.S.C § 1252(f)(2) (limiting court's ability to "enjoin the removal of any alien pursuant to a final order") (emphasis added to all quotations).

These provisions would appear to support the Government's argument; however, as the Government has pointed out in briefing to this Court, simply looking at 8 U.S.C. § 1252(a)(1) does not answer the jurisdictional issue. The impact of 8 U.S.C § 1252(a)(2)(D), which was added as part of the REAL ID Act, must be considered. The Government explained this contention succinctly in its briefing in *Perez-Alevante v. Gonzales*, Third Circuit Docket 05-4230, Brief for the Respondent at 15.

> This, however, does not end the Court's jurisdictional analysis. A recent amendment to § 1252 provides that '[n]othing in [§ 1252(a)(2)(C)] . . . which limits or eliminates judicial review, shall be constructed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.' Accordingly, if Perez-Alevante raises a legitimate constitutional claim or question of law, the Court will have jurisdiction to review such a claim, notwithstanding the jurisdictional bar of § 1252(a)(2)(C).

Mr. Baptiste raises constitutional claims and legal questions of law regarding the BIA's position that it lacks jurisdiction to hold a bond hearing in the absence of a habeas petition in federal district court.[2] The Government, of course, will argue that these constitutional and legal claims can only be raised in a petition for review involving a "final" order of removal. However, the plain language of the statute does not support the Government's position. Section 1252(a)(2)(D) provides:

> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

This is particularly true when 8 U.S.C § 1252(a)(2)(D) is read in connection with 8 U.S.C § 1252(a)(5), which funnels all claims regarding an "order of removal" into a petition for review in the court of appeals as the "sole and exclusive means for judicial review." One interpretation of these provisions, which comes from the literal language of the statute, is that courts of appeals have jurisdiction through a petition for review when the petitioner has raised questions of law and/or constitutional claims. Conspicuously absent from Section 1252(a)(2)(D) is any mention of a "final" order of removal. As discussed above, Congress was meticulous in its use of the term "final" order of removal throughout § 1252, but

[2] As discussed in Section III of this Response at pages 16–18, this issue is also currently before the Supreme Court in *Jennings v. Rodriguez*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (June 20, 2016) (No. 15-1204).

chose not to include any language regarding a "final" order of removal in the provision preserving the court of appeals jurisdiction over questions of law and constitutional claims. If Congress intended that the only time constitutional claims and questions of law could be reviewed was after a final order of removal, then Congress knew how to make this condition plain and, in fact, did so in numerous parts of § 1252. Congress chose not to use this language in the jurisdictional carve-out provision of § 1252(a)(2)(D). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Kucana v Holder*, 558 U.S. 233, 247–50 (2010) (quoting *Nken v. Holder*, 556 U.S. 418 (2009)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Congress could have included the six words "of a final order of removal" in the next-to-last line of § 1252(a)(2)(D), making its intent clear. Congress did not include this language.

The Government will no doubt argue the parenthetical "(other than this section)" contained in 18 U.S.C. § 1252(a)(2)(D) defeats this analysis. While the statute is not a model of clarity, a plain reading of this language appears to be simply reinforcing that there is no bar to bringing these claims in the courts of appeals "other than the [requirements of filing a petition for review in the method and using the processes]" of § 1252. A plain reading of this section leads to the

conclusion that, if a petitioner raises constitutional claims or questions of law, then there is no bar to court of appeals review, provided these issues are raised in a timely-filed petition for review pursuant to § 1252(a)(5). Mr. Baptiste has timely filed a petition for review raising questions of law and constitutional claims and has exhausted all of his administrative remedies.

Admittedly, Petitioner has found no case adopting this plain reading of the statute, but this literal reading of the statute is consistent with what appears to be the intent of the jurisdictional bar when read in connection with the carve-out for constitutional and legal claims. As discussed below, Mr. Baptiste is attempting to "thread the needle" regarding how to have the particular issue presented here reviewed—whether the BIA's decision that it lacks jurisdiction to hold a bond hearing in the absence of a habeas petition is an error of law and violates his constitutional rights.[3]

The Government's reactionary response may be to state "file a habeas petition",[4] but that solution, as discussed below, insulates the BIA jurisdictional

[3] On the issue presented here, the answer to why there are no cases addressing this point may be that IJs have held these hearings in the past without requiring habeas petitions. *See, e.g., Maxwell v. Att'y Gen. of the United States*, 505 Fed. Appx. 132, n.1 (3d Cir. 2012), where the IJ held a bond hearing even though Mr. Maxwell was being held, as is Mr. Baptiste, in custody pursuant to 8 U.S.C. § 1226(c)(1).

[4] The Penn State Law Civil Rights Appellate Clinic was appointed by the Third Circuit to handle the appellate briefing regarding Mr. Baptiste's original Petition for Review. The Clinic has continued to attempt to represent Mr. Baptiste's interests following the Third Circuit's decision in his case. The Clinic is not, however, equipped to do the type of trial work that may be required of a habeas proceeding,

determination from any judicial review. The Government's citation to *Jah v. Att'y Gen. of the United States*, 258 Fed. Appx. 394, 395 (3d Cir. 2007) (unpublished), stating "[f]ederal district courts retain habeas jurisdiction to examine the statutory and constitutional basis for a detention unrelated to a final order of removal," captures the Government's position and illustrates the Hobson's choice petitioners like Mr. Baptiste must make. Under the Government's view, all petitioners must pursue a habeas proceeding in district court to have their statutory and constitutional claims reviewed. But here, Mr. Baptiste's claim is that IJs have the jurisdiction and the constitutional obligation to hold these hearings in the absence of a habeas proceeding when the length of detention becomes unreasonable. Indeed, the Third Circuit in *Diop v. ICE/Homeland Security*, as further explained in *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469 (3d Cir. 2015), has already given the IJs guidance on how to determine when to grant these bond hearings. Once a habeas petition is filed, the legal issue at the heart of this matter disappears. The district court has no reason to provide an advisory opinion on whether the IJs should have held these hearings without first requiring a habeas petition.

A literal reading of §1252(a)(2)(D) gives this Court jurisdiction. The Third Circuit has also appeared to entertain "'constitutional claims or questions of law'

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which would be litigated in a federal district court in another state four hours away. While the Clinic has searched diligently for trial counsel willing to take on the habeas proceeding, as of this date we have been unsuccessful in having a habeas petition filed on Mr. Baptiste's behalf. This is the plight of most detainees, as the discussion at pages 14–16 of this Response explains.

raised in a petition of review," which were not attacking final orders of removal, but rather the BIA's refusal to grant reconsideration of prior orders of removal and denying claims for relief. *Maxwell*, 505 Fed. Appx. at 133. Petitioner requests that the Court, likewise, exercise its jurisdiction in this matter.

C. THE PETITION FOR REVIEW CHALLENGES THE BIA ORDER THAT IT LACKS JURISDICTION IN THE ABSENCE OF A HABEAS PETITION, NOT A DISCRETIONARY DETERMINATION REGARDING BOND, AND THUS CHALLENGES A FINAL ORDER SUBJECT TO REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The Government argues that the Court "lacks jurisdiction to consider Baptiste's latest petition for review because the BIA's March 23, 2017 order relates solely to Baptiste's bond and custody, which is 'separate and apart from . . . any deportation or removal hearing or proceeding." Accepting the Government's position *arguendo*, the March 23, 2017 order of the BIA stating that IJs have no jurisdiction in the absence of a habeas petition is a final agency order. Accordingly, it is reviewable under the Administrative Procedure Act (APA). The APA provides in relevant part that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA continues that judicial review is provided for a "final agency action for which there is no other adequate remedy in the court." 5 U.S.C. § 704. In order for a court to have jurisdiction, "the agency action must be final, it must adversely affect the party seeking review, and it must be non-discretionary." *Pinho v. Gonzales*, 432 F.3d

193, 200 (3d Cir. 2005). The agency decision is final if it is "one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Engineers v. Hawkes Co*., 136 S. Ct. 1807, 1813 (2016).

There is no doubt the March 23, 2017 order is a final agency action. The denial of a right to a bond hearing adversely affects Mr. Baptiste as he remains incarcerated, and other legal consequences flow from this denial. Further, if the Government is correct that this Court does not have jurisdiction because the BIA's action is not a "final order of removal," then Mr. Baptiste has no other remedy at law, let alone an adequate one. The Government again will point to a habeas proceeding, but as discussed, this avoids the issue here—whether IJs have jurisdiction to hold bond hearings without a habeas petition.

The more difficult issue is which court has jurisdiction to hear these claims– federal district courts or this Court. Again, Petitioner believes jurisdiction properly lies with this Court. The APA provides in 5 U.S.C. § 703:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action . . . in a court of competent jurisdiction.

While the Government may contest this interpretation, when read in context, § 1252 is a claim-channeling, not a claim-barring, provision.[5] 8 U.S.C § 1252(a)(5) funnels

[5] As a claims-channeling statute, § 1252(a)(5) cannot be read to be the "practical equivalent of a total denial of judicial review of generic constitutional and statutory

all claims regarding an "order of removal" into a petition for review in an appropriate court of appeals. A subsequent provision then limits the ability to raise claims in another forum by consolidating all claims in the petition for review. 8 U.S.C. §1252(b)(9) provides that "*[w]ith respect to review of an order of removal . . .* [j]udicial review of all questions of law and fact . . . *arising from any action taken or proceeding brought to remove an alien* from the United States" must be sought via petition for review of a final removal order. 8 U.S.C. §1252(b)(9) (emphasis added). As with § 1252(a)(2)(D), this text is far from plain, "and courts have debated [its] meaning." *Aguilar v. U.S. ICE*, 510 F.3d 1, 10 (1st Cir. 2007). But the legislative intent behind these provisions is clear: it was to consolidate judicial review of immigration proceedings into one action in courts of appeals. *INS v. St. Cyr*, 533 U.S. 289, 313 and n.37 (2001). Subsequent amendments to the INA confirmed "that only courts of appeals—and not district courts—could review a final order of removal." H.R. Rep. No. 109-72 at 173. Again, we recognize that the Government's position here is that there is no final order of removal, but this does not undermine this clear legislative expression that the courts of appeals are a proper forum for resolving immigration issues related to removal. In short, but for the

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claims" because Congress intends to preserve an effective avenue for judicial review when it enacts claims-channeling provisions. *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496–97 (1991). The Government's position would effectively preclude judicial review of the type of claims Mr. Baptiste has raised. *See* discussion *infra* at 16–18.

removal order, Mr. Baptiste would not be asking for a bond hearing before an IJ because of his prolonged detention.

These provisions read together in a manner consistent with legislative intent confirm that a petition for review filed in the courts of appeals "is the special statutory review proceeding relevant to the subject matter." 5 U.S.C. § 703. Even if the detainee is raising constitutional claims or questions of law, should the Court determine that the BIA's decision is not subject to its jurisdiction because §1252 requires a "final order of removal," then the Court should exercise jurisdiction under the APA.

D. THE BIA SHOULD NOT BE PERMITTED TO DEFINE ITS JURISDICTION IN A MANNER THAT CONFLICTS WITH THIRD CIRCUIT GUIDANCE AND DEPRIVES A PERSON OF THEIR CONSTITUTIONAL RIGHTS, BUT WHICH THEN CANNOT BE REVIEWED BY THE COURTS.

The Government's argument sets up a system where the BIA can determine its own jurisdiction—even if it infringes on constitutional rights, and as here, ignores guidance given by the Third Circuit. But the Government's position has a more insidious impact. As a practical matter, it insulates the BIA's self-defining jurisdiction determinations from judicial review. It will force thousands of detainees to attempt to secure legal counsel and navigate the habeas process, which itself is a difficult legal maze even for experienced lawyers. Requiring the filing of a habeas petition sets a virtually insurmountable burden for most immigrants. The habeas process is such a procedural morass that *pro se* petitioners cannot be

expected to navigate it on their own—even attorneys often misunderstand the law. Jonathan Atkins, Danielle B. Rosenthal, Joshua D. Weiss, *The Inequities of AEDPA Equitable Tolling: A Misapplication of Agency Law*, 68 Stan. L. Rev. 427 (2016).

To be effective, experienced counsel is required, but this population has virtually no access to any legal representation. Between 2007 and 2012, only a little over 10% of detainees were represented by counsel in immigration court. *Jennings v. Rodriguez*, Brief for the American Bar Association as Amicus Curiae at 27 (citing Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 (2015)). As a result, most immigrants file a petition *pro se*, if at all, to begin the arduous process of securing their constitutional rights. *Rodriguez v. Robbins*, 804 F.3d 1060, 1085 (9th Cir. 2015). Requiring a detainee to use a remedy which realistically is unavailable cannot be what Congress intended and is not what the Constitution requires.

Under the process the Government wishes the Court to adopt, the BIA's determination that it lacks jurisdiction is impervious to review. Once there is a final order of removal, the question of whether there is jurisdiction for the BIA to hold a bond hearing absent a habeas petition is a moot point. If, on the other hand, a petitioner files a habeas proceeding, then there is no reason for the district court to address whether the BIA has jurisdiction to hold a hearing without a habeas petition, since a habeas petition has been filed.

If individuals seeking bond hearings when their incarceration has passed all constitutional bounds are forced to file habeas petitions, then the Government has perfected the ideal catch-22. This insulates the BIA from ever having its error of requiring a habeas petition reviewed by a court. Adding significantly to the harm inflicted by this process, the individual who has already experienced prolonged and possibly unconstitutional deprivations of liberty continues to suffer this harm with no way of correcting the BIA's legal error of holding it lacks jurisdiction. This is not a result intended by the INA or the Constitution.

III. IN THE ALTERNATIVE, THE COURT SHOULD STAY THIS MATTER PENDING THE SUPREME COURT'S DECISION IN *JENNINGS V. RODRIGUEZ*

Federal Rule of Appellate Procedure 27(a)(3)(B) provides that "[a] response may include a motion for affirmative relief." As an alternative to deciding the jurisdictional issue at this stage of the litigation, Mr. Baptiste requests that the Court stay this matter until the Supreme Court addresses the issue underlying Mr. Baptiste's Petition for Review. As discussed in footnote 2 of this Response, this issue is squarely before the Supreme Court in *Jennings v. Rodriguez*. One of the issues before the Court in *Jennings* is "whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months." Brief for the Petitioners at I, *Jennings v. Rodriguez*, No. 15-1204 (filed Aug. 26, 2016).

Whether an IJ has the jurisdiction to hold a bond hearing without a habeas petition is central to the resolution of this question. The Government argues that IJs do not have the authority to release criminal aliens on bond, *Jennings v. Rodriguez*, U.S. Government Merits Brief at 30–46, and that "[a]ny relief from detention must be sought in an individual habeas proceeding raising an applied constitutional challenge." *Id*. at 46. In *Jennings*, the respondent argues that IJs have both the right, and the constitutional obligation, to grant bond hearings. *Jennings v. Rodriguez*, Respondent Brief at 17–27 and 54–58. The respondent further explains "the theoretical possibility of habeas corpus relief in cases of unreasonable government delay does not satisfy due process," *Id* at 23, and that "immigration judges must consider length of detention at prolonged detention custody hearing, and must conduct them periodically." *Id* at 54.

If the Supreme Court accepts the Government's argument that the IJs have no authority to grant bond hearings in cases like Mr. Baptiste's and that the remedy is through individual habeas proceedings, then this would answer the issue presented by Mr. Baptiste and the case will be withdrawn or dismissed. If, on the other hand, the Supreme Court rules that IJs are required to provide bond hearings when detention becomes unreasonable, then we trust the Government would subsequently provide those hearings and the underlying issue is again moot. *Jennings v. Rodriguez* has been fully briefed and was argued on November 30, 2016. A

decision should be forthcoming. If, for whatever reason, the Supreme Court does not reach the issue underlying Mr. Baptiste's Petition for Review, then the Court can move forward and decide the thorny issue of the Court's jurisdiction in this case.

IV. CONCLUSION

"With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" *Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting Elizabeth Hull, Without Justice for All: The Constitutional Rights of Aliens 107 (1985)). The REAL ID Act's attempt to restrict judicial review in immigration cases and funnel the immigration issues into the federal courts of appeals has only further complicated this byzantine process. As demonstrated above, the Court, under either the INA or the APA, has the jurisdiction to review the BIA's decision that IJs lack the jurisdiction to hold bond hearings without a habeas petition. The Court should not permit the BIA to ignore the guidance given by the Third Circuit in *Diop* and *Chavez-Alvarez* in an attempt to insulate the BIA's decision from judicial review. These actions continually minimize the rights of those detained.

Accordingly, Mr. Baptiste respectfully requests:

1. The Court exercise jurisdiction and deny the Government's Motion to Dismiss,
2. Or in the alternative, stay this matter including a stay on the time for filing the administrative record until the Supreme Court issues its decision in *Jennings v. Rodriguez* and order the parties to submit their positions on the Court's decision within 14 days of it.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that Petitioner's Response to Motion to Dismiss:

(1) was prepared using 14-point Times New Roman font;

(2) is proportionally spaced; and

(3) contains 4,710 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On May 4, 2017, I electronically filed the foregoing Petitioner's Response to Motion to Dismiss with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. This service constitutes sufficient service upon Respondent because Respondent's counsel is a registered user of the appellate CM/ECF system.

Respectfully submitted,

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