IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WANRONG LIN, et al.,	)	
Plaintiffs-Petitioners,	)	
v.	)	Civil No. _____
KIRSTJEN NIELSEN, et al.,	)	
Defendants-Respondents.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND STAY OF REMOVAL

The Plaintiffs respectfully move this court for a temporary restraining order halting the government's imminent removal from the United States of Wanrong Lin — a longtime Maryland resident who is married to an American-citizen wife and who is the father of three American-citizen children —and ordering the government to release him from custody. Relying on federal regulations that remain fully in effect, he and his wife, Hui Fang Dong, have begun the process of applying for a special waiver that permits noncitizens to remain in the United States while seeking legal status arising through their valid marriages to American citizens. Without notice and in direct contradiction to those regulations, immigration officials have recently detained and deported noncitizens who appear at interviews pursuant to this waiver process. Courts in Boston and New Jersey that have considered habeas petitions and motions for stay of removal under these circumstances, have halted the removal and released the petitioner from custody.

On August 29, 2018, the Mr. Lin and Ms. Dong appeared at a federal immigration office in Baltimore, Maryland for what they understood to be a routine interview to confirm the bona fides of their marriage, bringing along their three children, Ms. Dong's parents, a friend of Mrs. Dong's to serve as a translator and other evidence of their family life. At the end of the joint interview, the interviewer told Ms. Dong the government had other questions for Mr. Lin and asked her to go in the waiting area, where her children and parents were, while he escorted Mr.

Lin into a separate room. Ms. Dong did as requested without concern, thinking the officer was telling her the truth about wanting to further question her husband. Instead, Mr. Lin's lawyer later came out of the room to which Mr. Lin had been escorted and informed her that agents had seized her husband. Mr. Lin is now being held at the Ordnance Road Correctional Center, one of the Anne Arundel County Detention Facilities, in Glen Burnie, Maryland, and faces imminent deportation to The People's Republic of China. Mr. Lin received a Notice of Imminent Removal from ICE, telling him that ICE is in possession of a travel document to effect his removal and that he will be removed from the U.S. sometime before the end of this month (November, 2018), meaning he may be deported imminently unless his removal is stayed.

In light of this dire situation, the plaintiffs-petitioners seek a temporary restraining order. The threat of Mr. Lin's immediate deportation plainly poses a risk of irreparable harm, and the plaintiffs-petitioners can demonstrate a sufficient likelihood of succeeding on their claims that deporting Mr. Lin would violate the regulations that expressly authorize the waiver process he undertook, would violate related federal statutes, and would violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Finally, considerations of public interest and a balancing of the equities favor the plaintiffs-petitioners. For all these reasons, they respectfully urge the Court to grant their motion for a temporary restraining order until this Court can fully address the merits of this case.

LEGAL BACKGROUND

The spouses of U.S. citizens are eligible to apply for lawful status that will permit them to reside permanently in the United States. But non-U.S. citizens who entered the United States without inspection or who have been ordered removed from the United States—whatever their manner of entry—are ineligible to adjust their status and become Lawful Permanent Residents while in the U.S. Instead, they need to leave the U.S. in order to apply for an immigrant visa at a U.S. consulate abroad—a procedure known as consular processing.

Departure from the United States can trigger several grounds of inadmissibility, however. 8 U.S.C. 1182(a). Two of the most common apply to anyone who has left the U.S. after spending over a year here without authorization, 8 U.S.C. § 1182(a)(9)(B)(i)(10), and anyone who has been ordered removed. 8 U.S.C. § 1182(a)(9)(A). Both of these grounds of inadmissibility require that a person who has left the United States remain abroad for ten years prior to returning—unless the ground of inadmissibility is waived. *See* 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of inadmissibility for unlawful presence if separation from U.S.-citizen or LPR spouse or parent will cause that person extreme hardship); 8 U.S.C. § 1182(a)(9)(A)(iii) (waiver of inadmissibility for prior removal order if applicant obtains consent to reapply for admission[1]). But the process of applying for a waiver of inadmissibility can itself take over a year, during which time a non-U.S. citizen spouse who has left the country must remain abroad. In most cases, this means a prolonged family separation.

Prior to 2013, the unpredictability of this process and long wait time outside the country deterred many noncitizen spouses from leaving the U.S. to consular process. *See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Proposed Rule* ("2013 Proposed Rule"), 77 Fed. Reg. 19902, 19906 (Apr. 2, 2012) ("many immediate relatives who may qualify for an immigrant visa are reluctant to proceed abroad to seek an immigrant visa"). For those who did depart, the long wait times abroad often caused their U.S.-citizen family members precisely the type of hardship that the waivers were intended to avoid. *Id.*

In 2013, USCIS addressed this problem by promulgating regulations that made it possible for the spouses of U.S. citizens who have been present in the U.S. without authorization to apply for a waiver of inadmissibility for unlawful presence *prior* to leaving the U.S. to consular process. *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives: Final Rule* ("2013 Final Rule"), 78 Fed. Reg. 536-01 (Jan. 3, 2013). This application is known as a stateside waiver. In 2016, the agency expanded the stateside waiver process to make it available to noncitizens with final orders of removal—like Mr. Lin. *See Expansion of Provisional Unlawful*

[1] The standard for an I-212 waiver is broader and includes hardship to family, the applicant's moral character, and length of residence in the U.S. *See Matter of Lee,* 17 I. & N. Dec. 275 (BIA 1978); *Matter of Tin,* 14 I. & N. Dec. 371, 373 (BIA 1973).

Presence Waivers of Inadmissibility; Final Rule ("2016 Final Rule"), 81 Fed. Reg. 50244, 50245 (July 29, 2016). Both regulations were promulgated through notice and comment.

The purpose of these amendments to federal regulations was to encourage people who would otherwise be reluctant to pursue lawful status — because it would require them to remain outside the United States for indefinite and potentially prolonged periods of time — to do so and to promote family unity during the process. 2013 Final rule, 78 Fed. Reg. 535, 536; 2016 Final Rule, 81 Fed. Reg. at 5024-01 (expansion of waiver program will "reduce[] separation time among family members" and bring about "humanitarian and emotional benefits derived from reduced separation of families"). By permitting noncitizens to obtain waivers in the U.S. prior to departing, the regulations reduce the time that noncitizen spouses must spend outside the U.S., separated from their families, and reduce "the financial and emotional impact on the U.S. citizen and his or her family due to the [noncitizen] immediate relative's absence from the United States." 2013 Proposed Rule, 77 Fed. Reg. at 19907; *see also 2016* Final Rule, 81 Fed. Reg. at 50245-46. This "encourage[s] individuals to take affirmative steps" to obtain lawful status that they might not otherwise take, 2013 Proposed Rule, 77 Fed. Reg. at 19902-01, including an estimated 100,000 people who like Mr. Lin became eligible for the provisional waiver process when it was expanded in 2016. 2016 Final Rule, 81 Fed. Reg. at 50244.

It is important to also identify the humanitarian and emotional benefits that these regulations have particularly on immigrant communities that have systemically been disenfranchised. Poor immigrant communities, especially poor immigrant communities of color, must overcome inherent barriers in this process, such as a level of financial stability (the hiring of a lawyer to navigate the complicated legal process, the thousands of dollars in filing fees, the costs of travel to consular process) that many immigrants who are undocumented, or have final orders of removal, struggle to maintain. The regulations recognize that struggle, and the necessity of continuous income, avoiding the lasting trauma of family separation, and maintaining a family structure that would allow immigrant families to thrive as members of

American society. In order to realize the humanitarian and emotional benefits that the regulations are meant to provide, ICE and other federal agencies must give meaning to those humanitarian and emotional promises and allow families to remain together while they navigate this process without detaining and deporting family members who are trying to succeed in American life.

STATESIDE WAIVER PROCESS

For noncitizen spouses with an outstanding order of removal, the process to obtain a stateside waiver now has five parts.

First, the U.S. citizen or Lawful Permanent Resident spouse files a Form 1-130, Petition for Alien Relative, which requires establishing that the petitioner and beneficiary have a bona fide relationship. USCIS may require an appearance at an interview to determine this. USCIS's Field Manual states, "As a general rule, any alien who appears for an interview before a USCIS officer in connection with an application or petition seeking benefits under the Act shall *not* be arrested during the course of the interview, even though the alien may be in the United States illegally." USCIS Field Manual § 15.1(c)(2) (emphasis added).

Second, once the 1-130 is approved, the noncitizen spouse files a Form 1-212, Permission to Reapply for Admission into the United States After Deportation or Removal. As amended in 2016, the regulations governing this waiver state that it can be conditionally approved prior to a person's departure from the U.S. 8 C.F.R. § 212.2(j); 2016 Final Rule, 81 Fed. Reg. at 50262. An I-212 application filed as part of the stateside waiver process is adjudicated by the local USCIS field office.

Third, once a Form 1-212 is conditionally approved, the noncitizen applies for a provisional unlawful presence waiver using Form 1-601A, Application for Provisional Unlawful Presence Waiver. 8 C.F.R. § 212.7(e)(4)(iv) (establishing eligibility of a person with a removal order who "has already filed and USCIS has already granted... an application for consent to reapply for admission").

Fourth, once the noncitizen obtains a provisional unlawful presence waiver, he or she must go abroad to appear for an immigrant visa interview at a U.S. consulate. 8 C.F.R. §

212.7(e)(3)(v). The departure from the U.S. executes the prior removal order. 8 U.S.C. § 1101(g); 8 C.F.R. § 1241.7. After the interview, if the Department of State determines no other ground of inadmissibility applies, it may issue an immigrant visa.

Fifth, the noncitizen may travel to the United States with his or her immigrant visa. Upon admission to the United States, the noncitizen becomes a lawful permanent resident.

FACTS ABOUT PLAINTIFFS

The petitioners-plaintiffs, Wanrong Lin and Hui Fang Dong, are a married couple who have known each other since they were children in The People's Republic of China, but began dating in 2002 when they both lived in New York. They have been married since May, 2004. Declaration of Hui Fang Dong at ¶ 2. They have three children together. Their first daughter, Sophia Lin, was born in July, 2004; their second daughter, Nancy Lin, was born on March 11, 2007 and their son, Matthew Lin, was born on June 4, 2009. *Id.* The family resides in California, Maryland. *Id.*

Ms. Dong became a naturalized U.S. citizen on February 24, 2004. Mr. Lin is a citizen of China who has had a removal order from the U.S. after his request for asylum or other relief was denied on March 10, 2008, and his appeal of that request denied on November 20, 2009. Mr. Lin subsequently attempted to have his case reopened and to obtain lawful residency in the United States, efforts which culminated with the Plaintiff-Petitioners' pursuit of the provisional waiver process in 2016. Since 2006, Mrs. Dong has owned and Mr. Lin has been the head cook at their family owned and operated restaurant, Hong Kong III, located in California, Maryland. *Id.* Mr. Lin has no criminal history and has consistently worked and paid taxes in the United States. *Id.* at ¶ 3.

Mr. Lin and Ms. Dong began the provisional waiver process in 2016 based on the understanding and belief that it would allow Mr. Lin to waive his unlawful presence in the U.S. and ultimately depart the country for only a few weeks before returning with his residency. *Id.* at ¶ 6. The couple did not want Mr. Lin to spend a long period separated from his family. *Id.* But after learning of the waiver process, Mr. Lin and Ms. Dong were assured by their then-attorney that the waiver process would enable Mr. Lin to consular process after only brief a departure from the U.S. *Id.* And indeed, as explained *supra,* that was indeed precisely the

purpose of the provisional waiver process and its extension in 2016 to individuals like Mr. Lin with final orders of removal.

The couple was scheduled for an interview on their 1-130 application and appeared at the USCIS field office in Baltimore, Maryland on August 29, 2018. *Id.* at ¶ 7. "The interview notice and USCIS's own guidance and procedures indicated that the interview was solely to confirm the bona fides of the couple's marriage."[2] After the interview ended, the interviewer, Officer Comes, approved their I-130 petition and gave them a hand written approval of the I-130 petition, telling them that a more formal approval would be sent in the mail. Id. at ¶ 8. Ms. Dong felt relieved, and lucky that they would finally be able to keep moving forward and finish the process that would allow Mr. Lin to become a permanent resident. When it was time to leave, Officer Comes asked Ms. Dong to go to the waiting area while her husband was taken to another room for further questioning —which she understood to be part of verifying the legitimacy of their marriage. A few minutes later, Ms. Dong and Mr. Lin's lawyer entered the waiting area to say that Mr. Lin had been put in handcuffs and was being taken into detention. Neither Ms. Dong nor the children had an opportunity to say goodbye to Mr. Lin that day. *Id.* at ¶ 9. Since that day, they have spoken to him only through a glass window at the Anne Arundel County Detention Center in Glen Burnie Maryland where Mr. Lin has been detained since August 29, 2018. *Id.* at ¶ 15.

Mr. Lin's detention and possible deportation have caused his wife and children significant and ongoing harm. Ms. Dong tries to visit Mr. Lin on Saturdays with the children but the drive is almost two hours one way. *Id.* Because the detention center is so far away, she and her husband have to speak over the phone at night after the restaurant closes. Usually the children are asleep and do not have a chance to speak with him. *Id.*

Ms. Dong is sad, anxious and unable to sleep. *Id.* at ¶ 12. Since Mr. Lin's detention, she was diagnosed with a depressive disorder, has had suicidal thoughts and depends on sleeping pills in

[2] The interview notice actually tells applicants how to go about retaining counsel, thus encouraging them to expend resources on what the subsequent detention renders a sham process.

order to sleep. *Id.* Before Mr. Lin was arrested, the two worked at the family-owned restaurant that she and Mr. Lin operated together. Although the restaurant was open seven days a week, Mr. Lin's presence made it possible for Ms. Dong to be home when the children returned from school and to be with them in the evenings. *Id.* at ¶ 10. Since his arrest, she has to operate the restaurant on her own, is unable to spend much time with her children and is considering selling the restaurant. *Id.*

The couple's eldest daughter, 14 year old Sophia Lin, has become more and more withdrawn. *Id.* at ¶ 7. Because only one parent is now available, she has had to forego after-school activities and is often called upon to care for her younger siblings. *Id.* at ¶ 10 *Id.* . Sophia has not been eating lately, and told her mother that she "wants to die." *Id.* She has also said she does not want to go to school because she is afraid that her mother will be taken away while she is in school. *Id.* Formerly reserved and quiet, she now sometimes screams at her sister and brother. *Id.* at ¶ 11. Sophia has been diagnosed with an Adjustment Disorder with depressed mood. *Id.* Ms. Dong is worried that Sophia, who entered high school in September of this year, will make poor life choices. *Id.*

The middle child, 12-year-old Nancy Lin, has also undergone a significant change in behavior since Mr. Lin was detained. *Id.* at ¶ 10. Normally a happy child, she has become increasingly withdrawn and non-talkative. *Id.* She is confused about where her father is and does not understand what has happened to her family. *Id.*

The youngest child, nine-year-old Matthew, has been acting out with anger and having academic problems. *Id.* He is hard to control without his father in the home. *Id.* He also will not sleep on his own and is sleeping in bed with Ms. Dong. *Id.* All of the children were very close to their father and spent a great deal of time playing with him, making his absence a profound loss for the Lin family. *Id.*

The trauma and hardship resulting from Mr. Lin's detention were heightened by the extremely sudden and unexpected nature of his detention. The couple had no opportunity to plan for childcare or financial support, nor to prepare their children for a prolonged separation or say goodbye.

Several other I-130 applicants with outstanding removal orders have been detained at I-130 interviews at USCIS Field Offices around the country since April 2018. *See, e.g., Calderon v. Nielsen*,

18-10225-MLW (D. Mass. September 21, 2018) (referring to April 13, 2018 order prohibiting ICE from removing any of the named petitioners from Massachusetts while the case was pending and denying respondents' motion to dismiss); *Martinez v. Nielsen*, 18-10963 (D. of New Jersey, September 14, 2018) (granting TRO and ordering defendants to release petitioner-plaintiff and stay his removal until "he completes the process of obtaining a unlawful presence waiver"); *You v. Nielsen,*18-cv-5392 (S.D.N.Y. June 20, 2018) (enjoining removal and ordering release of petitioner detained at his 1-130 interview).

Mr. Lin is facing imminent removal. ICE has sent him a Notice of Imminent Removal, announcing that ICE is in possession of a travel document to effect his removal to the People's Republic of China and that he will be removed from the U.S. sometime in November, 2018, meaning that he may be deported at any moment unless his removal is stayed.

ARGUMENT

I. THE COURT SHOULD GRANT A TEMPORARY RESTRAINING ORDER.

The Court should grant a temporary restraining order enjoining ICE from removing Mr. Lin from the Maryland area and ordering his release from custody during the pendency of the provisional waiver process.

In order to grant this motion, the Court need not reach a final determination on any of the Petitioner-Plaintiff's claims, but simply must determine whether they have pled their claims sufficiently to warrant a stay to allow the Court time to fully adjudicate the pending claims. The Fourth Circuit considers four factors in determining whether to grant a temporary restraining order: whether plaintiffs have shown: (1) a likelihood of success on the merits, (2) that they are likely to suffer irreparable harm in the absence of such relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008); *see also Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188-89 (4th Cir. 2013) (*en banc*) (outlining *Winter* standard). To show a likelihood of success on the merits, plaintiffs "need not show a certainty of success." *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIMS.

A. Plaintiff-Petitioners Are Likely to Succeed on the Merits of their Claims because Statutes, Regulations, and the Constitution Bar Mr. Lin's Immediate Removal to China.

First, Mr. Lin and Ms. Dong are likely to succeed on the merits of their claims that deportation without an opportunity to pursue a provisional waiver through the process set forth by regulation would violate the Immigration and Nationality Act and applicable regulations; the Administrative Procedure Act; and the Due Process Clause of the Fourteenth Amendment.

The regulations promulgated by DHS in 2013 and 2016 permit Mr. Lin and Ms. Dong to do exactly what they set out to do here: seek a waiver of Mr. Lin's unlawful presence and prior order of removal while he remained at home with his family, such that he could leave the U.S. and consular process with only a few weeks' separation from them. 8 C.F.R. § 212.7(e)(4)(iv) (a person with a removal order is eligible for a stateside waiver if he or she "has already filed and USCIS has already granted... an [I-212] application for consent to reapply for admission"); 8 C.F.R. § 212.2(j) (providing for conditional approval of an [I-212] while a person is in the U.S.), The regulations were promulgated in order to encourage families to come forward and take these affirmative steps, with the assurance that doing so would "reduce[] separation time among family members" and bring about "humanitarian and emotional benefits derived from reduced separation of families." 2016 Final Regulation, 81 Fed. Reg. at 5024-01. And indeed, USCIS's field manual confirms that non-U.S. citizens appearing for interviews "in connection with an application or petition... shall not be arrested during the course of the interview" even if in the U.S. unlawfully. USCIS Field Manual § 15.1(c)(2).

By detaining and removing people who undertake this process, like Mr. Lin, the government has rendered these regulations at best a nullity and at worst an intentional trap. That is unlawful. Under what is known as the "*Accardi* doctrine" and the Due Process Clause, agencies

are required to follow their own rules or procedures when those rules or procedures affect people's fundamental rights. *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954); *United States v. Heffner,* 420 F.2d 809, 811 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down."); *Yanez-Marquez v. Lynch,* 789 F.3d 434, 474 (4th Cir. 2015) ("We have recognized that "an agency's failure to afford an individual procedural safeguards required under its own regulations may result in the invalidation of the ultimate administrative determination."); *United States v. Morgan,* 193 F.3d 252, 266 (4th Cir.1999) ("We have recognized that an agency's failure to afford an individual procedural safeguards required under its own regulations may result in the invalidation of the ultimate administrative determination") The provisional waiver regulations were intended to safeguard family unity, *see* 2016 Final Regulation, 81 Fed. Reg. at 5024-01, which is just such a fundamental right. *Moore v. City of E. Cleveland, Ohio,* 431 U.S. 494, 50406 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"). The agency is not free to disregard them.

Finally, the plaintiffs are likely to prevail in their claim that the defendants' actions and policy violate the Administrative Procedure Act (APA). The APA requires that agency action not be arbitrary and capricious, and that agencies not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." FCC *v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009). Nor does the APA permit regulations promulgated by notice and comment to be ignored, altered or repealed without a further notice and comment procedure. *Clean Air Council v. Pruitt,* 862 F.3d 1, 9 (D.C. Cir. 2017). The defendants detention of Mr. Lin at his interview, and apparent institution of a policy that anyone attending an interview who has a prior order of removal is not safe from detention and removal, have effectively abrogated the provisional waiver regulations and

have done so *sub silentio* and without notice and comment. That is quintessentially arbitrary and capricious agency action.

B. The Court Has Jurisdiction to Temporarily Stay Mr. Lin's Removal.

The court has jurisdiction over the Petitioners' claims, and this motion for a Temporary Restraining Order enjoining Mr. Lin's removal under Art. I, § 9, cl. 2 of the United States Constitution (Suspension Clause); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § (All Writs Act); 28 U.S.C. § 2201 (Declaratory Judgment Act); and 28 U.S.C. § 2241 (habeas corpus). Although the Government may argue that the INA's jurisdiction-stripping provisions bar review, these provisions do not bar review for the reasons below. More importantly, as the preliminary matter, there can be no question that the Court has jurisdiction to determine its own jurisdiction. *United States v. United Mine Workers of America,* 330 U.S. 258 (1947). In light of the imminent nature of Mr. Lin's removal, the Court should accept jurisdiction to determine its own jurisdiction, and to allow time for a more thorough analysis of these issues.

In numerous recent analogous cases, district courts have determined that they have statutory jurisdiction over claims seeking to enjoin removal in order to effectuate statutory, regulatory, and Due Process rights. *See Pangemanan v. Tsoukaris,* 18-cv-1510 (D.N.J. Feb. 2, 2018) (ECF no. 2) (enjoining the removal of a group of Indonesian nationals with final orders of removal while their case was adjudicated); *Calderon v. Nielsen*, 18-10225-MLW (D. Mass. September 21, 2018) (ECF No. 159) (finding that the court had jurisdiction to hear case challenging DHS' attempts to remove petitioners from the US in violation of regulations allowing them to apply for provisional waivers of their inadmissibility); *Martinez v. Nielsen*, 18-10963 (D. of New Jersey, September 14, 2018) (ECF No. 25) (staying removal and ordering immediate release of petitioner with an outstanding removal order who was recently detained at his adjustment of status interview); *You v. Nielsen,* 18-cv-5392 (S.D.N.Y. June 20, 2018) (ECF no. 17) (same); *Villavicencio Calderon v. Sessions,* 18-cv-5222 (S.D.N.Y. June 9, 2018) (ECF no. 9) (enjoining the removal of the petitioner from the New York City area who was detained on an outstanding order of removal despite having commenced the

provisional waiver process); *Ramsundar v. Sessions,* 18-cv-6430 (W.D.N.Y. June 20, 2018) (ECF no. 8) (enjoining removal of petitioner for two months while her motion to reopen her asylum case is pending at the Board of Immigration Appeals); *see also Ragbir v. United States,* No. 2:17-CV-1256-KM, 2018 WL 1446407, at *11 (D.N.J. Mar. 23, 2018) (granting preliminary injunction enjoining removal for pendency of petitioner's coram nobis case). As these decisions recognize, the Real ID Act cannot be read so broadly as to foreclose all district court review of non-discretionary legal claims.

Numerous courts have also determined that a finding that the court does not have habeas jurisdiction would violate the Suspension Clause. *See, e.g., Bowrin v. U.S. I.N.S.,* 194 F.3d 483 (4th Cir. 1999); *Osorio-Martinez v. Attorney Gen. United States of Am.,* No. 17-2159, 2018 WL 3015041, at *17 (3d Cir. June 18, 2018) (holding that 8 U.S.C. § 1252(e) "violates the Suspension Clause as applied to Petitioners" because "the INA does not provide 'adequate substitute procedures"); *Devitri v. Cronen,* 290 F. Supp. 3d 86 (D. Mass. 2017) ("If the jurisdictional bar in 8 U.S.C. § 1252(g) prevented the Court from giving Petitioners an opportunity to raise their claims through fair and effective administrative procedures, the statute would violate the Suspension Clause as applied."); *Hamama v. Adducci,* 258 F. Supp. 3d 828, 842 (E.D. Mich. 2017) ("To enforce § 1252(g) in these circumstances would amount to a suspension of the right to habeas corpus. The Constitution prohibits that outcome."), *appeal docketed,* 17-2171 (6th Cir. Sep. 21, 2017); *Ibrahim v. Acosta,* No. 17-cv-24574, 2018 WL 582520 , at *6 (S.D. Fla. Jan. 26, 2018) ("[Section 1252(g)] violates the Suspension Clause as applied if it deprives Petitioners of a meaningful opportunity to exercise their statutory right ...."); *see also Chhoeun v. Marin,* -- F. Supp. 3d. --, 17-cv-01898, 2018 WL 566821, at *9 (C.D. Cal. Jan. 25, 2018) (finding jurisdiction to stay removal of Cambodian citizens with outstanding orders of removal while they filed motions to reopen because they did not seek review of removal orders or "any substantive benefits" but rather adequate due process in their underlying proceeding), *appeal docketed,* 18-55389 (9th Cir. March 26, 2018).

Mr. Lin's inability to access the petition for review process—because he does not challenge a final order of removal, *see Robledo v. Chertoff,* 658 F. Supp. 2d 688, 694 (D. Md. 2009) (section 1252(b)(9) does not preclude district court's review of USCIS' denial of I-130 petition), necessarily vests jurisdiction over his claims with the district court. *See also Welch v. Reno*, No. CIV. CCB-99-2801, 2000 WL 1481426, at *2 (D. Md. Sept. 20, 2000), *aff'd sub nom. Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002); *Woo v. Reno*, No. CIV.CCB-00-2630, 2000 WL 1481302, at *10 (D. Md. Sept. 20, 2000) (granting a petition for habeas corpus and staying removal until discretionary relief can be decided) Where a petitioner like Mr. Lin cannot raise legal challenges in a petition for review, the jurisdiction-channeling provisions of the Real ID Act do not eliminate all court jurisdiction. *Jennings v. Rodriguez,* 138 S. Ct. 830, 840 (2018) (rejecting an interpretation of 1252(b)(9) so broad that it would render plaintiffs' detention claims "effectively unreviewable" and risk "depriving that detainee of any meaningful chance for judicial review"); *Singh v. Gonzales,* 499 F.3d 969, 979 (9th Cir. 2007) (where ineffective assistance claim arose after a removal order, neither (a)(5) nor (b)(9) barred review because "a successful habeas petition in this case will lead to nothing more than 'a day in court' for Singh, which is consistent with Congressional intent underlying the REAL ID Act"). *See also Mynor Abdiel TUN-COS v. Perrotte,* No. 117CV943AJTTCB, 2018 WL 3616863, at *4 (E.D. Va. Apr. 5, 2018) (recognizing that section 1252(b)(9) is a "judicial channeling provision, not a claim - barring one."*)(quoting Aguilar v. ICE ,* 510 F.3d 1, 9-12 (1st Cir. 2007)).

Moreover, Mr. Lin's claim is also not barred by 1252(g), which the Third Circuit has held that the statute should be read "narrowly and precisely to prevent review only of the three narrow discretionary decisions or actions referred to in the statute." *Garcia v. Attorney Gen. of U.S., 553* F.3d 724, 729 (3d Cir. 2009) (emphasis added). *See also Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999) (recognizing that 1252(g) is narrow and only applies to the three discretionary decisions or actions referred to in the statute). Because that provision is concerned with discretionary decisions, it does not bar a challenge to "the government's very authority to

commence those proceedings," *id.,* nor to the legal and constitutional questions raised here. *See United States v. Hovsepian,* 359 F.3d 1144, 1155 (9th Cir. 2004) *(en bane)* ("The district court may consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority.").

Because the INA does not bar review of Mr. Lin and Ms. Dong's claims, or in the alternative because if they do those provisions violate the Suspension Clause as applied, this court has jurisdiction over their case.

C. Mr. Lin Is Likely to Prevail in His Claim that His Detention Violates Applicable Regulations and the Due Process Clause.

Mr. Lin is likely to prevail in his claim that his detention violates regulations and due process in that he presents neither of the two permissible justifications for immigration detention: risk of flight or danger to the community. Moreover, DHS has failed to follow regulations that are designed to protect against unconstitutional deprivations of liberty. Instead of making the individualized assessment of whether to impose detention that due process and those regulations require, DHS has deployed a new tactic of detaining aliens who arrive for an interview to pursue the provisional waiver process.

1. Because Mr. Lin Presents Neither a Risk of Flight Nor a Danger to the Community, His Detention Violates Due Process.

Due process permits civil detention "in certain special and narrow nonpunitivecircumstances . . . where a special justification … outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas v. Davis,* 533 U.S. 678, 690 (2001) (quotations omitted). Such special justification exists only where a restraint on liberty bears a "reasonable relation" to permissible purposes. *Jackson v. Indiana,* 406 U.S. 715, 738 (1972); *see also Foucha v. Louisiana,* 504 U.S. 71, 79 (1992); *Zadvydas,* 533 U.S. at 690. In the immigration context, those purposes are "ensuring the appearance of aliens at future immigration proceedings and preventing danger to the community." *Zadvydas,* 533 U.S. at 690 (quotations omitted).

Mr. Lin plainly presents neither a risk of flight nor a danger to the community. He has willingly provided DHS with his address, work history, and the intimate details of his life as part of a process to obtain lawful status that necessarily involves leaving the country at its conclusion. He has every incentive to follow that process. Moreover, DHS has not suggested, nor would it have any basis to suggest, that he poses a danger to the community.

2. Due Process Requires DHS to Adhere to Its Custody Regulations.

As noted *supra,* it is well-settled that "rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency." *Leslie v. Attorney Gen. of U.S.,* 611 F.3d 171, 175 (3d Cir. 2010) (citing *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 266-67 (1954)). The custody regulations governing detention of individuals with final orders of removal, like Mr. Lin, are exactly such rules. *See* Detention of Aliens Ordered Removed, 65 F.R. 80281-01, at 80283 (2000) (explaining that § 241.4 "has the procedural mechanisms that . . . courts have sustained against due process challenges"). The agency has stated that the regulations "contemplate[d] individualized determinations where each case must be reviewed on its particular facts and circumstances," *id.* at 80284, and acknowledged a Third Circuit decision holding that due process "requires an opportunity for an evaluation of the individual's current threat to the community and his risk of flight." *Id.* (citing *Chi Thon Ngo v. LIV.S.,* 192 F.3d 390, 398 (3d Cir. 1999), which held that INS directors' reliance on widely applicable characteristics to deny release was "not satisfactory and d[id] not afford due process," *id.* at 399). Thus the custody regulations are not mere "housekeeping" procedures but rather binding requirements that "protect the fundamental Fifth Amendment right to notice and an opportunity to be heard." *Jimenez v. Cronen,* No. 18-cv-10225 (MLW), 2018 WL 2899733, at *9 (D. Mass. June 11, 2018) (finding that where DHS fails to follow the regulations, "the court may order ICE to conduct a custody review, or conduct the review itself and, if warranted, order the alien released").

Yet DHS has failed to follow those regulations here. When a person's release under 8 U.S.C. § 1182(d)(5)(a) is revoked, the relevant custody regulation directs that "the alien will be

notified of the reasons for the revocation of his or her release …[and] will be afforded an initial informal interview promptly after his or her return to [DHS] custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification." 8 C.F.R. §241.4(1)(1). Mr. Lin never received a notification stating DHS's reasons for suddenly detaining him, nor has he had an interview or other opportunity to respond to them or explain why his detention is unnecessary. Declaration of Hui Fang Dong at ¶ 17.

Moreover, the government has no apparent justification for detaining Mr. Lin. The custody regulations provide a list of potential considerations to inform the discretionary decision to imprison a previously released individual. *See* 8 C.F.R. § 241.4(1)(3). Imminent removal is not a sufficient reason to re-detain a person. *See* 8 C.F.R. § 241.4(l)(2) (listing bases for revocation of release); *see also Alexander v. Attorney Gen, U.S.,* 495 F. App'x 274, 277 (3d Cir. 2012) (holding that even where removal is imminent, detainee may be able "to prevail on an alternative ground predicated on regulatory noncompliance"). Indeed, the regulations explicitly provide for release under an order of supervision if DHS determines "that the alien would not pose a danger to the public or a risk of flight, without regard to the likelihood of the alien's removal in the reasonably foreseeable future," 8 C.F.R. § 241.13(b)(1) (emphasis added).

Permitting revocation and re-detention on the sole basis of foreseeable removal, without an individualized finding that an individual now poses a flight risk or danger, moreover, would violate due process. *See Zadvydas,* 533 U.S. at 690 (holding permissible regulatory goals of immigration detention are "ensuring the appearance of aliens at future immigration proceedings" and "preventing danger to the community"); *Diop v. ICE/Homeland Sec.,* 656 F.3d 221, 232 (3d Cir, 2011) (explaining that Congress may "pass a law authorizing an alien's initial detention" but only "so long as those implementing the statute provide individualized procedures through which an alien might contest the basis of his detention."); *Chi Thon Ngo v. INS.,* 192 F.3d 390, 399 (3d. Cir. 1999) (holding that to comport with due process, custody review must entail "individualized analysis of the alien's . . present danger to society and willingness to comply with the removal

order").[3] Accordingly, Mr. Lin is likely to prevail on his claims challenging his ongoing detention.

II. PLAINTIFFS HAVE STANDING AND WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

"To establish standing under Article III of the Constitution, a plaintiff must 'allege (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief.'" Bostic v. Schaefer, 760 F.3d 352, 370 (4th Cir. 2014) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 590 (1992)). While standing is necessary, "the Supreme Court has made it clear that the presence of one party with standing is sufficient to satisfy Article Ill's case-or-controversy requirement." *Id.* (internal quotation marks omitted).

Mr. Lin and Ms. Dong will be irreparably harmed by the denial of an injunction barring Mr. Lin's immediate, forced removal from the U.S. and ordering his release during the pendency of the provisional waiver process. Removal "visits a great hardship on the individual and deprives him of the right to stay and live and work in the land of freedom. That deportation is a penalty- at times a most serious one- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Rose v. Woolwine*, 344 F.2d 993, 995 (4th Cir. 1965) (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)). *See also Padilla v. Kentucky,* 559 U.S. 356 (2010) ("[w]e have long recognized that deportation is a particularly severe 'penalty.") As another District Court recently observed, failure to enjoin the removal of a longtime U.S. resident with a final order of removal during the pendency of his case would "separate[] [him] from his wife, daughter, family, and

[3] The INA imposes 90 days of mandatory detention once an order of removal becomes final, *see* 8 U.S.C. § 1231(a)(1), but past that period detention is discretionary. *See* 8 U.S.C. § 1231(a)(6) (providing that individuals "may be detained beyond the removal period" if "determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal"); *see also, e.g., Guerra v. Shanahan,* 831 F.3d 59, 62 (2d Cir. 2016) (explaining that "[a]fter the removal period has expired, detention is discretionary"). Mr. Lin was detained many years after the removal period expired, and thus his detention is discretionary.

community." *Ragbir v. United States,* No. 2:17-CV-1256-KM, 2018 WL 1446407, at *18 (D.N.J. Mar. 23, 2018).

In this case, removal will also separate Mr. Lin from his family for years—precisely the hardship that DHS documented and addressed in the regulations creating the provisional waiver process. 2016 Final Rule, 81 FR 50244-01 (noting that consular processing, absent a stateside waiver, can cause "lengthy separations of immigrant visa applicants from their U.S. citizen or LPR spouses, parents, and children, causing financial and emotional harm"); 2013 Proposed Rule, 78 FR 536-01 ("DHS anticipates that the changes made in this final rule will result in a reduction in the time that U.S. citizens are separated from their alien immediate relatives, thus reducing the financial and emotional hardship for these families").

The irreparable hardship that precipitated the regulations and that Mr. Lin's removal will cause his family is sadly evidenced by the harm already caused since he was detained. Ms. Dong and their three children are devastated. Declaration of Hui Fang Dong at ¶ 17. The family is not able to relocate to China with Mr. Lin because they have no family in China, the children have never known life outside the U.S. and the psychological treatment that Ms. Dong and Sophia will need going forward to overcome the trauma they have suffered through this process is almost certainly not available in China. *Id.*

III. THE BALANCE OF HARMS AND PUBLIC INTEREST MILITATE HEAVILY IN FAVOR OF A TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION.

The balance of harms and public interest weigh strongly in favor of granting a temporary restraining order and preliminary injunction. *See Winter*, 555 U.S. at 24. The government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins,* 715 F.3d 1127, 1145 (9th Cir. 2013).

A. The Balance of Harm Weighs in Plaintiffs' Favor.

Far from facing harm, the government has an interest in keeping Mr. Lin in the U.S. with his family and promoting the fair and orderly operation of the 2013 and 2016 DHS regulations it devised and implemented. Family unity is the central public policy undergirding our immigration laws, and

indeed was the purpose of the provisional waiver process. *See, e.g., Solis-Espinoza v. Gonzales,* 401 F.3d 1090, 1094 (9th Cir. 2005) ("Public policy supports recognition and maintenance of a family unit. The [INA] was intended to keep families together. It should be construed in favor of family units . . ."); *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final* Rule, 78 Fed. Reg. 535, 536 (Jan. 3, 2013); 81 Fed. Reg. at 5024-01 (expansion of waiver program will "reduce[] separation time among family members" and bring about "humanitarian and emotional benefits derived from reduced separation of families").

The likelihood that Mr. Lin, a hardworking, law-abiding spouse and father, will ultimately prevail in his attempts to obtain lawful status also militate in favor of his release and continued presence with his family. (The fact that Mr. Lin has no criminal record and a long history of peaceful residence in the U.S. and that his family is already suffering significant hardship due to Mr. Lin's detention make him a strong candidate for the necessary waivers).

B. Granting a Temporary Restraining Order is in the Public Interest.

A temporary restraining order is in the public interest. The government put in place the provisional waiver process precisely because it recognized the substantial public interest the process would serve, by diminishing "the financial and emotional impact on the U.S. citizen and his or her family due to the [noncitizen] immediate relative's absence from the United States." *Proposed Rule,* 77 Fed. Reg. 19902, 19907 (Apr. 2, 2012).

Granting a temporary restraining order will serve another vital public interest central to the purpose of the provisional waiver process: promoting public trust and the integrity of the provisional waiver process. The regulation is intended to encourage those in positions similar to Mr. Lin's to "take affirmative steps" to secure lawful status, *id.* at 19902-01, a purpose that is ill-served by the detention and removal of provisional waiver applicants. In fact, the respondents' acts are perverse and highly reprehensible. They have taken the waiver provisions made available to I-130 applicants and not only rendered them a nullity, they have actually used

the waiver provisions to lure citizens like Ms. Dong and her children, as well as non-citizens like Mr. Lin, to lure and entrap individuals seeking to legalize their immigrant status.

CONCLUSION

For the foregoing reasons, the motion for a temporary restraining order should be granted.

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Respectfully Submitted,

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