IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WANRONG LIN, et al., Plaintiffs-Petitioners, v. KIRSTJEN NIELSEN, et al., Defendants-Respondents.	)	Civil No. 8:18-cv-03548-GJH

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND STAY OF REMOVAL

The Government urges this Court to find that it has unreviewable authority to disregard its own regulations, the APA, and the U.S. Constitution by luring families to come forward with the promise of a provisional waiver that will minimize their separation and then using that promise as a trap to tear those families apart.[1] The Government has no such authority and this Court has jurisdiction to hear Mr. Lin and Ms. Dong's claims and grant them injunctive relief.

The Government primarily contends that the REAL ID Act divests this Court of subject matter jurisdiction to stay an alien's removal and that its lack of jurisdiction—which would leave Mr. Lin and Ms. Dong with no forum for their claims—presents no Suspension Clause issue. The Government is wrong on both counts. As courts have repeatedly recognized in cases presenting nearly identical claims, the REAL ID Act does not strip this Court of jurisdiction because Mr. Lin's and Ms. Dong's claims do not challenge Mr. Lin's final order of removal or any discretionary determination by the Government to remove him. Second, if the REAL ID Act were construed to

[1] Capitalized terms not defined herein shall have the same meaning ascribed to them in Plaintiffs' opening brief ("Opening Brief").

bar Mr. Lin's and Ms. Dong's claims, this would violate the Suspension Clause because no adequate and effective alternative forum exists in which they can obtain review of their claims.

The Government also contends that Mr. Lin and Ms. Dong are unlikely to succeed on their APA and Due Process claims because the regulations purportedly do not provide protection from removal and there is no Due Process interest in the grant of discretionary waivers. The Government, again, misses the mark on both counts. As this Court noted in its November 2018 Order granting a temporary restraining order, detaining and deporting individuals who are seeking to adjust their immigration status through a U.S. citizen spouse is arbitrary and capricious given the text of the regulations and their purpose drawn from supporting documents like the USCIS Adjudicator's Field Manual. Order at 3.

Finally, the Government makes the specious argument that Mr. Lin's and Ms. Dong's purported "lack of diligence" in filing their I-130 petition and Forms I-212 and I-601A is relevant to the Court's balance of harms inquiry, citing to a case invoking the laches doctrine. There has been no lack of diligence on Mr. Lin's and Ms. Dong's part. This argument by the Government seeks to penalize Mr. Lin and Ms. Dong for delays for which the Government itself is responsible. Regardless, this Kafkaesque argument by the Government can be disregarded because it is blackletter law that the laches doctrine cannot be invoked unless the defendant has been prejudiced by the plaintiff's delay. The Government does not assert any prejudice caused by any delay nor any harm caused by the issuance of a preliminary injunction. The balance of harms tips decidedly in Mr. Lin's and Ms. Dong's favor.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO GRANT A PRELIMINARY INJUNCTION AND STAY MR. LIN'S REMOVAL

This Court has jurisdiction over Mr. Lin's and Ms. Dong's claims. The Government relies on inapposite authority to argue that §§ 1252(a)(5), (b)(9), and (g) of the REAL ID Act bar this Court's review. *See* Government's Opposition ("Opposition") 6–9. As discussed, *infra*, these same arguments have been repeatedly rejected by the courts, which have consistently held that district courts have jurisdiction over nearly identical claims. *See De Jesus Martinez v. Nielsen*, 341 F. Supp. 3d 400 (D.N.J. 2018) ("*Martinez*"); *Calderon v. Sessions*, 330 F. Supp. 3d 944 (S.D.N.Y. 2018) ("*Calderon*"); *You, Xiu Qing v. Nielsen*, 321 F. Supp. 3d 451 (S.D.N.Y. 2018) ("*You*"); *Jimenez v. Nielsen*, 334 F. Supp. 3d 370 (D. Mass. 2018) ("*Jimenez*").[2] The REAL ID Act has no application to this lawsuit.

A. Sections 1252(a)(5) and (b)(9) Do Not Bar the Plaintiffs' Claims

Sections 1252(a)(5) and (b)(9) do not bar Mr. Lin's and Ms. Dong's claims because their claims do not directly or indirectly challenge the validity of Mr. Lin's order of removal. Rather, Mr. Lin and Ms. Dong contend that that they have a statutory and constitutional right to engage in the provisional waiver process ***before*** Mr. Lin's removal. They further contend that the Government disregarded its regulations (and the Constitution) by detaining Mr. Lin and attempting to remove him during his I-130 interview. The Government is conflating the challenge brought here—a legal challenge based on the provisional waiver regulations—with a challenge to the immigration court's removal order. As the court in *Martinez* recognized:

[2] *Accord S.N.C. v. Sessions*, 2018 WL 6175902, at **3–5 (S.D.N.Y. Nov. 26, 2018) (holding district court had habeas jurisdiction for alien's claim seeking to stay removal before her T-Visa and Violence Against Women Act applications were adjudicated).

> Here, Mr. Martinez does not challenge the validity of the order of removal against him…. Nor is the Court overturning Mr. Martinez's order of removal by granting him relief. In fact, whether or not Mr. Martinez obtains a provisional waiver, he will need to leave the United States at the end of the process, thereby effectuating his order of removal. The issue is not if, but when. As Mr. Martinez does not bring a challenge to his order of removal but rather claims that he has the right to engage in the provisional waiver process ***before*** removal, §§ 1252(a)(5) and (b)(9) are inapplicable and do not strip the Court of jurisdiction.

Martinez, 341 F. Supp. 3d at 408 (emphasis in original); *accord Calderon*, 330 F. Supp. 3d at 955 (§§ 1252(a)(5) and (b)(9) do not bar substantially identical provisional waiver-related claims because they are "neither direct nor indirect challenges to his order of removal"); *Robledo v. Chertoff,* 658 F. Supp. 2d 688, 694 (D. Md. 2009) (§ 1252(b)(9) does not preclude district court's review of USCIS' denial of I-130 petition); *Chehazeh v. Attorney General*, 666 F.3d 118 (3d Cir. 2012) ("[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."). Simply because the provisional waiver regulations "may have consequences within the removal proceedings does not equate their claims with those that 'arise from' an action or proceeding to remove an alien." *Mynor Abdiel TUN-COS v. Perrotte*, 2018 WL 3616863, at *6 (E.D. Va. Apr. 5, 2018).

Additionally, §§ 1252(a)(5) and (b)(9) do not apply because the claims raised in this action are not claims that could be raised in immigration court or the Board of Immigration Appeals ("BIA"). As the Supreme Court cautioned in *Jennings v. Rodriguez,* 138 S. Ct. 830, 840 (2018), §§ 1252(a)(5) and (b)(9) should not be read in a way that would render an alien detainee's claims "effectively unreviewable" and risk "depriving that detainee of any meaningful chance for judicial review." The "arising from" language of § 1252(b)(9) emphasized by the Government (see Opp. 6–7) has a "narrow meaning and [does] not apply to judicial review of matters 'independent of, or wholly collateral to, the removal process,' or 'that cannot effectively be

handled through the available administrative process.'" *Robledo*, 658 F. Supp. 2d at 693–94 (quoting *Aguilar v. I.C.E.*, 510 F.3d 1, 11 (1st Cir. 2007)).[3]

Mr. Lin and Ms. Dong could not challenge the Government's use of the provisional waiver regulations as a bait-and-switch tactic in immigration court because the immigration court does not have jurisdiction to consider these claims or provide any of the relief sought in this action. *See Jimenez*, 334 F. Supp. 3d at 381; *You*, 321 F. Supp. 3d at 459; discussion *infra* Part I.C.1. Indeed, the provisional waiver process was specifically designed to assist aliens who have already gone through the administrative process in immigration court and are subject to orders of removal.

The Government cites *Achbani v. Homan*, 2017 WL 4227649, at *4 (D. Conn. Sept. 22, 2017), in which the court held that § 1252(a)(5) divested the court from hearing a challenge to the Government's removal of an alien while he completed the provisional waiver process. *Achbani* was wrongly decided and is contrary to the numerous decisions that have reached the opposite conclusion, including *Martinez*, *Calderon*, *You,* and *Jimenez*, discussed *supra*. In *Achbani*, the court incorrectly relied on the decision in *Delgado v. Quarantillo*, 643 F.3d 52 (2d Cir. 2011), which is inapposite. Delgado filed an I-212 from the U.S. in 2006, ***prior*** to the 2013 regulations that allowed for a stateside filing of the I-212 form. The court therefore construed her mandamus action seeking to force USCIS consideration of her I-212 application as an indirect challenge to her removal. The court in *Achbani* wrongly viewed *Delgado* as controlling, despite the fact that the new 2016 regulations gave petitioners like Achbani a legal avenue to pursue the I-212 waiver while in the United States. S*ee Calderon*, 330 F. Supp. 3d at 956 (disagreeing with *Achbani* and recognizing that "Petitioner seeks consideration of his legitimate and authorized pursuit of an existing process ***before*** the Government exercises its right to remove. That is not a

[3] *See also Mynor*, 2018 WL 3616863, at *4 (agreeing that "§ 1252(b)(9) as a 'judicial channeling provision, not a claim-barring one.'"); *Jimenez*, 334 F. Supp. 3d at 381 (same).

claim of a right to remain in the United States.") (emphasis in original). Moreover, *Achbani* is materially different from this case because the Government had not used the plaintiff's I-130 interview to lure him to be detained. Mr. Lin is not asserting a right to remain in the United States and in fact acknowledges that he will be required to leave the United States and will be subject to the prior order of removal. The remaining authority relied on by the Government is also unavailing.[4] Sections 1252(a)(5) and (b)(9) do not strip this Court of jurisdiction.

B. Section 1252(g) Does Not Bar the Plaintiffs' Claims

Section 1252(g) of the REAL ID Act also does not bar Mr. Lin's and Ms. Dong's claims. Section 1252(g) limits only "judicial review of ICE's ***prosecutorial discretion*** to engage in three discrete types of actions: to commence proceedings, to adjudicate cases, or to execute removal orders." *Martinez*, 341 F. Supp. 3d at 406 (citing *AADC*, 525 U.S. at 482–83) (emphasis added). As the Fourth Circuit has recognized, § 1252(g) strips district courts of jurisdiction to review the Government's exercise of its ***prosecutorial discretion only***. *See Bowrin v. U.S. I.N.S.*, 194 F.3d 483, 488 (4th Cir. 1999) ("§ 1252(g) stripped the federal courts

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[4] In *Hamama v. Adducci*, 912 F.3d 869, 872–73 (6th Cir. 2018) and *Mapoy v. Carroll*, 185 F.3d 224, 227 (4th Cir. 1999) the petitioners were challenging the Government's discretionary decisions to 1) deny their requests to reopen their cases because of purported changed conditions in their home countries. Whether the Government's had legal authority to remove them or had disregarded its own regulations was not at issue in either case. *Solis on Behalf of JGGS v. Whitaker*, 2018 WL 6348386, at *2 (D.S.C. Dec. 5, 2018) was interpreting § 1252(a)(5), ***not*** § 1252(g), and simply found that § 1252(a)(5) divested the court of jurisdiction of a lawsuit that was challenging the validity of her order of removal. The other authority relied on by the Government reinforces that § 1252 does not strip this Court of jurisdiction. In *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (hereafter "*AADC*"), the Supreme Court was interpreting the scope of §1252(g), ***not*** §§ 1252(a)(5) or (b)(9) (and the Court rejected the broad interpretation of § 1252(g) that the Government proffers here. The Court's passing reference to 1252(b)(9) as an "unmistakable zipper clause" was not an opinion as to what constitutes a direct or indirect challenge to an order of removal. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031–32 (9th Cir. 2016) was addressing a direct challenge to an order of removal, and the court recognized that §§ 1252(a)(5) and 1252(b)(9) do not apply to "claims that are independent of or collateral to the removal process." *Id.* at 1032.

of jurisdiction ***only to review challenges to the Attorney General's decision to exercise her discretion to initiate or prosecute these specific stages in the deportation process***.") (emphasis added) (citing *AADC*); *Selgeka v. Carroll*, 184 F.3d 337, 341 (4th Cir. 1999) (recognizing that the Supreme Court has narrowly construed § 1252(g) and that it is only "intended to protect discretionary decisions of the Executive from judicial review.").[5]

The Government contends that this action concerns its efforts to enforce a removal order. However, Mr. Lin and Ms. Dong are not challenging the Government's ***prosecutorial discretion*** to remove him; rather, they are asserting that the Government ***<u>exceeded its legal authority</u>*** by disregarding its own regulations. As the court stated in *Martinez*:

> Respondent-Defendants contend that ICE engaged in the third of these types of actions [i.e., that ICE was merely executing a removal order] when it detained and attempted to deport Mr. Martinez. But that is not what happened. ICE agents did not track down Mr. Martinez because of his final order of removal. Instead they waited until he appeared for an interview pursuant to DHS regulations that permit aliens ***in exactly Mr. Martinez's position*** to gain legal status, and attempted to frustrate those regulations by detaining Mr. Martinez without warning or explanation. ICE arrested Mr. Martinez because he presented himself for an I-130 interview and, as such, exceeded its legal authority when it chose to arrest him after he had begun a lawful process but before it was completed.

Martinez, 341 F. Supp. 3d at 406 (emphasis in original); *see also Calderon*, 330 F. Supp. 3d at 954 ("Petitioner here does not challenge ICE's prosecutorial discretion. Rather, Petitioner challenges ICE's ***legal authority*** to exercise such discretion when the subject of the removal order also has a right to seek relief made available by the DHS."). "Whether [the

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[5] *See also Medina v. United States*, 92 F. Supp. 2d 545, 553 (E.D. Va. 2000) (§ 1252(g) is "directed against a particular evil: attempts to impose judicial constraint upon prosecutorial discretion."); *Alvarez v. U.S. Immigration & Customs Enf't.*, 818 F.3d 1194, 1205 (11th Cir. 2016) (§ 1252(g) applies only to "discretionary determinations"); *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (§1252(g) does not bar "consideration of a purely legal question, which does not challenge the Attorney General's discretionary authority"); *Jama v. INS*, 329 F.3d 630, 632 (8th Cir. 2003), *aff'd sub nom Jama v. ICE,* 543 U.S. 335 (2005) (§1252(g) does not bar review of the Attorney General's non-discretionary "legal conclusions").

Government's] actions were legal is not a question of discretion, and, therefore, falls outside the ambit of § 1252(g)." *You*, 321 F. Supp. 3d at 457. Government officials "do not possess discretion to violate constitutional rights or federal statutes." *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (citation omitted).[6] Binding Fourth Circuit precedent, discussed *supra*, which establishes that the scope of § 1252(g) is narrow and divests the district courts of jurisdiction only to hear challenges to the Government's exercise of its prosecutorial discretion, further supports the reasoning found in the two nearly identical cases *Martinez* and *Calderon*, and support a finding that § 1252(g) does not strip this court of jurisdiction.[7]

C. Regardless, Section 1252 Cannot Strip this Court of Jurisdiction to Hear this Habeas Action

Even assuming *arguendo* that the REAL ID Act precludes judicial review of Mr. Lin's and Ms. Dong's claims, the statute as construed by the Government would violate the Suspension Clause (U.S. Const. art. I, § 9, cl. 2) and therefore is unenforceable with respect to habeas claims.

The Government asserts that § 1252 of the REAL ID Act would not violate the Suspension Clause because (1) Congress has provided an adequate habeas substitute vis-à-vis the immigration courts, and (2) the writ of habeas corpus only serves as a means for challenging one's detention and not to enjoin or stay one's removal. The Government is wrong on both counts.

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[6] *Accord Newbrough v. Piedmont Reg'l Jail Auth.*, 2012 WL 169988, at *5 (E.D. Va. Jan. 19, 2012) (immunity provided to government officials for exercising discretion did not shield ICE agents accused of violating plaintiff's constitutional rights because federal officials do not have discretion to violate constitutional rights); *McGee v. Cole*, 115 F. Supp. 3d 765, 778 (S.D.W. Va. 2015) (recognizing that the government has no discretion to disregard the laws regulating it).

[7] The Government cites *Jimenez*, in which the court found that § 1252(g) applied to the petitioner's provisional waiver process-related claims because the court disagreed with other courts' conclusions that § 1252(g) "applies ***only*** to discretionary decisions." 334 F. Supp. 3d at 385 (emphasis in original). That reasoning is irrelevant here, because, as discussed *supra*, the Fourth Circuit has held that § 1252(g) applies only to the Government's exercise of its prosecutorial discretion. Regardless, the court in *Jimenez* ***nevertheless held that it had jurisdiction*** because the court found that § 1252(g) cannot override the Supremacy Clause, which gave it jurisdiction over habeas claims.

1. Plaintiffs Do Not Have an Adequate Habeas Substitute

The Government concedes that, pursuant to the Suspension Clause, district courts cannot be stripped of habeas jurisdiction unless Congress has provided an adequate habeas substitute. *See* Opp. 11-12. For a substitute procedure to be adequate, the adjudicative body "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Boumediene v. Bush*, 553 U.S. 723, 783 (2008). At a minimum, the person being detained (or facing removal) must have "meaningful opportunity" to demonstrate that he is being held or removed pursuant to "the erroneous application or interpretation" of relevant law, and "the habeas court must have the power to order the conditional release [or relief from removal] of an individual unlawfully detained." *See id.* at 729 (quoting *INS v. St. Cyr,* 533 U.S. 289, 302 (2001)).

Though § 1252 channels certain types of actions to the administrative removal process in immigration court, those procedures provide no opportunity for Mr. Lin or Ms. Dong to pursue their claims seeking to temporarily stay Mr. Lin's removal. The immigration courts and BIA do not have the jurisdiction or authority to grant them the relief they seek. Mr. Lin seeks a stay of removal because his removal prevents him from pursuing a provisional waiver, in violation of the provisional waiver regulations and his right to due process. Neither the immigration courts nor BIA have jurisdiction or authority to adjudicate constitutional claims. *See Jarpa v. Mumford*, 211 F. Supp. 3d 706, 711 (D. Md. 2016) (and authority cited therein) (recognizing that the immigration courts and BIA are courts of limited jurisdiction that cannot consider constitutional claims). Those administrative bodies also do not have authority to grant Mr. Lin relief accorded through the provisional waiver process and subsequent consular processing. *See* 8 U.S.C. § 1255(a) (immigration judges do not have authority to grant an application for Lawful Permanent Residency if the applicant entered the U.S. without inspection); 8 C.F.R. § 1003.1(b) (limiting jurisdiction of

the BIA to appeals from decisions of immigration judges and limited other petitions or applications); *see also* 8 C.F.R. § 1240.1(a)(1)(ii) (immigration judges do not have authority to grant an I-212 waiver of inadmissibility under 8 U.S.C. § 1182(a)(9)(A)).[8]

The Government points to no administrative or other mechanism by which Mr. Lin and Ms. Dong can get judicial review over their challenge to the Government's failure to follow the provisional waiver regulation, because there is none.[9] Instead, the Government sets up a straw-man argument that Mr. Lin has already had a meaningful opportunity to challenge the validity of his removal order and may not "take advantage of a favorable law" to further challenge its validity. *See* Opp. 11–12. As discussed *supra*, Mr. Lin is not challenging the validity of his removal order. Even if Mr. Lin obtains a provisional waiver, it will not invalidate the removal order. Mr. Lin has never been afforded any opportunity for any court to consider his provisional waiver-related claims. *See Jimenez*, 334 F. Supp. 3d at 381 (pursuant to Suspension Clause, district court had habeas jurisdiction to hear claims substantially similar to those in this case).[10]

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[8] In addition to the jurisdictional deficiencies, immigration courts cannot reopen a case so that an alien may pursue a provisional waiver through the normal process via USCIS. Reopening Mr. Lin's case would make him ineligible for a provisional waiver. *See Jimenez*, 334 F. Supp. 3d at 382 (citing 8 C.F.R. § 212.7(e)(4)(iii)). Also, the Attorney General has prohibited immigration courts from administratively closing or staying a case so that the alien becomes eligible to pursue a provisional waiver. *See id.* (citing *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 288 (BIA 2018)).

[9] The authority cited by the Government recognizes that Congress has provided a forum for aliens to seek review of an immigration court's removal order, or reopen their immigration cases, neither of which Mr. Lin is seeking to do. *See Kolkevich v. Attorney Gen. of U.S.*, 501 F.3d 323, 332 (3d Cir. 2007); *Hamama v. Adducci*, 912 F.3d 869, 876 (6th Cir. 2018); *Mejia v. Sessions*, 866 F.3d 573, 590 (4th Cir. 2017). In *Majano Garcia v. Martin*, 2018 WL 6003535, at *1 (S.D. Fla. Nov. 14, 2018) the plaintiff was challenging the validity of an *in absentia* order of removal based on his assertion that he had not been served a notice of hearing by the immigration court. The petitioner's wife filed an I-130 petition only ***after*** he had been detained and thus there was no allegation that the Government had used the I-130 interview as a bait-and-switch. *Id.* at 2. The court recognized that its holding was contrary to both *Calderon* and *Martinez*. *See id.* at 5.

[10] Other courts that have considered similar provisional waiver claims did not have to consider the Suspension Clause issue because they held that § 1252 did not divest the district court of jurisdiction to hear those claims. *See* discussions of *Martinez*, *Calderon*, and *You*, *supra*. Courts have similarly concluded that district courts retain habeas jurisdiction over claims seeking to

2. The Suspension Clause Indisputably Applies to Removal-Related Claims

The Government also argues that the Suspension Clause applies only to detention and not removal-related claims. Opp. 9–10. This argument was squarely rejected by the Supreme Court in *St. Cyr*, which recognized that the Suspension Clause also protects habeas claims challenging an alien's removal. *See* 533 U.S. at 300 ("some judicial intervention in deportation cases is unquestionably required by the Constitution"); *see also id.* at 305 ("[T]o conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law."); *Heikkila v. Barber*, 345 U.S. 229, 230 (1953) (recognizing that historically, "habeas corpus was the only remedy by which deportation orders could be challenged in the courts").[11] In *St. Cyr*, the petitioners did not seek release from detention but, rather, were challenging their removal. The Court construed the INA to find habeas jurisdiction, emphasizing that the INA would have raised "serious" Suspension Clause problems had it eliminated habeas review over petitioners' removal orders. *Id.* As the Fourth Circuit has recognized:

> In *St. Cyr,* the Supreme Court rejected the INS' contention that the 1996 amendments to the INA, 8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C), and 1252(b)(9), "stripped the courts of [habeas] jurisdiction" to consider a discrete question of law relating to a petitioner's removal. As the Supreme Court observed, before the 1996 amendments, district courts had authority to decide such a habeas petition, and any construction of the statutes to withdraw that authority would raise "a serious Suspension Clause issue."

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enjoin or stay orders of removal so that an alien may pursue statutory, regulatory, or due process rights, because the administrative process in immigration court does not provide an adequate and effective remedy. *See, e.g.*, *Ibrahim v. Acosta*, 2018 WL 582520, at *5–6 (S.D. Fla. Jan. 26, 2018); *Devitri v. Cronen*, 290 F. Supp. 3d 86, 93 (D. Mass. 2017).

[11] The Government mischaracterizes *Heikkila's* distinction of habeas corpus from "injunctions, declaratory judgments, and other forms of relief." *See* Opp. 10. The Supreme Court noted that, historically, habeas corpus was the only form of relief available for an alien challenging his or her removal and other forms of relief were not available. The Court was very clearly recognizing that habeas corpus is (and historically has been) a mechanism to enjoin or stay removal.

Dragenice v. Ridge, 389 F.3d 92, 99 (4th Cir. 2004); *see also Malm v. Ashcroft*, 2004 WL 964278, at *4 (D. Md. May 4, 2004) ("Holdings subsequent to *St. Cyr* generally have reaffirmed federal court… habeas jurisdiction over final removal orders brought by aliens facing removal…").[12]

None of the authority relied on by the Government even remotely supports its argument that habeas jurisdiction does not apply to Mr. Lin's and Ms. Dong's removal-related claims. *Munaf v. Geren*, 553 U.S. 674 (2008) did not involve an alien bringing removal-related claims. Rather, the court was addressing whether U.S. citizens who traveled voluntarily to Iraq and were detained there by the U.S. military could challenge being transferred to Iraqi authorities for crimes they allegedly committed. The Court unanimously found habeas jurisdiction. *Id.* at 685–88.[13] *Hamama v. Adducci*, 912 F.3d 869, 876 (6th Cir. 2018) also supports that this Court has jurisdiction. The court recognized that under *St. Cyr*, habeas jurisdiction would clearly extend to an alien's claim seeking to be "released into and remain in the United States" as opposed to the petitioners in that case who were seeking withholding of removal, which would only prevent them from being removed to one particular country and gave them no right to remain in the United

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[12] *Accord Sandoval v. Reno*, 166 F.3d 225, 233 (3d Cir. 1999) (canvassing the long "availability of habeas to challenge immigration decisions" where petitioner sought to challenge removal); *Devitri,* 2017 WL 5707528 at *2 ("Custody is not limited to physical detention. Final orders of removal have been held to satisfy the custody requirement."). Numerous courts have similarly recognized that the "in custody" requirement under the federal habeas statute, 28 U.S.C. § 2241(c), is satisfied where aliens are subject to a final order of removal, even if they are not physically detained. *See, e.g.*, *Futeryan-Cohen v. I.N.S.*, 140 F. Supp. 2d 646, 652 (E.D. Va. 2001), *vacated* on other grounds 34 F. App'x 143 (4th Cir. 2002); *Rosales v. Bureau of Immigration & Customs Enf't*, 426 F.3d 733, 735 (5th Cir. 2005); *Simmonds v. I.N.S.*, 326 F.3d 351, 355 (2d Cir. 2003); *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1291 (10th Cir. 2001); *Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017, 1021 n. 4 (6th Cir. 1999); *Nakaranurack v. U.S.*, 68 F.3d 290, 293 (9th Cir. 1995).

[13] The Court rejected the habeas claim on its merits, holding that under sovereignty principles, a US court cannot prevent persons in Iraq from being transferred to Iraqi authorities. *Id.* at 697–98. The Court further recognized that if the petitioners were released by the U.S. military, they would be arrested by Iraqi authorities, precisely what they were seeking to avoid. *Id.*

States. *Id.* (citations omitted, emphasis in original).[14] The other authority cited by the Government is also unavailing.[15]

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. APA Claims

As this Court has already recognized, Mr. Lin and Ms. Dong are likely to succeed in their claim that the Government's disregard of the provisional waiver process it created violates the APA because it is an arbitrary and capricious disregard of its own rules and regulations. Order 3–4 *see also Calderon*, 330 F. Supp. 3d at 958 (granting alien's habeas petition, and finding Government's attempted removal of alien while he was applying for provisional waiver was a violation of the APA); *Martinez*, 341 F. Supp. 3d at 410 (D.N.J. 2018) (granting preliminary injunction enjoining removal of alien, after finding alien was likely to succeed on merits of nearly identical APA claim).

As described in Plaintiff's Opening Memorandum, obtaining the necessary provisional waivers is a three-step process: First, an undocumented non-U.S. citizen spouse must obtain an approved I-130 petition, which requires that the noncitizen and his or her spouse attend an interview to confirm they are in a bona fide relationship. Second, once the I-130 is approved, the noncitizen spouse files a Form I-212. Third, once a Form I-212 is conditionally approved, the noncitizen applies for a provisional unlawful presence waiver using Form I-601A. *See* Op. Mem. 6.

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[14] The dissent in *Hamama* argued that the majority's interpretation of *St. Cyr* was too narrow and was contrary to *Munaf,* where the Supreme Court found habeas jurisdiction. *See id.* at 882–83.

[15] In *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) the Court endorsed an expansive interpretation of the habeas statute ("recent cases have established that habeas corpus relief is not limited to immediate release from illegal custody…"). In *Hatami v. Ridge*, 270 F. Supp. 2d 763, 768 (E.D. Va. 2003), the court simply rejected the plaintiff's arguments regarding habeas corpus because the plaintiff had not asserted habeas claims in his complaint.

The Government argues that it has not disregarded its regulations because Mr. Lin is not yet "eligible" for a waiver, since he has not yet completed steps two and three of the provisional waiver process. The Government ignores that the Government detained and attempted to remove Mr. Lin ***during the first step of that process***, at his I-130 interview. Mr. Lin is "is not asserting a right to a provisional waiver; he is merely claiming a right to try," *Calderon*, 330 F. Supp. 3d at 958. As the Court has already recognized, to allow the Government to use the first step of the provisional waiver process as a honeypot to lure, arrest and deport those who seek to stay in the United States legally with their families "would be to allow DHS to nullify its own rule without explanation." Order 4; *see also Martinez*, 341 F. Supp. 3d at 410 (allowing Government to use the I-130 interview to prevent aliens from completing the waiver process "would render the provisional waiver a nullity"). Moreover, the USCIS Adjudicator's Field Manual (the "Field Manual") prohibits ICE from arresting aliens during an I-130 interview, and "is further evidence of what is apparent on the face of the provisional waiver program: the very existence of the program is nullified if ICE agents can use the application process as a honeypot to trap undocumented immigrants who seek to take advantage of its protections." Order 3–4.[16]

The Government laughably argues that it did not technically violate the rules delineated in the Field Manual because it detained Mr. Lin "immediately following" rather than "during the course of" his I-130 interview. Opp. 14 –15. In fact, ***during*** the I-130 interview, Government agents told Mr. Lin and Ms. Dong that they had further questions for Mr. Lin and then took him to another room down the hallway and arrested him. The Government does not dispute these facts and its disingenuous argument is emblematic of the lack of legal merit to any of its contentions.

[16] Courts frequently rely on the Field Manual as an aid for construing immigration-related laws and regulations, and determining whether the Government is in compliance with those laws and regulations. *See, e.g.*, *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 90 (2014); *Musunuru v. Lynch*, 831 F.3d 880, 890 (7th Cir. 2016); *Tadevosyan v. Holder*, 743 F.3d 1250, 1256–57 (9th Cir. 2014).

The Government also maintains that the protections offered by the Field Manual do not apply to "[a]n alien who is the subject of a previously-issued warrant of deportation or warrant of removal UNLESS the alien is seeking benefits under a provision of law (e.g. NACARA or HRIFA) which specifically allows an alien under an order of deportation or removal to seek such benefits." Opp. 15. The Government's asserted distinctions between the provisional waiver program and NACARA or HRIFA are meaningless. Provisional waivers are clearly specifically designed to benefit individuals with final orders of removal.

Finally, the Government mischaracterizes § 15.1(c)(2) of the Field Manual as a "catchall provision," that the Government wrongly implies provides USCIS unfettered authority to disregard its own rule for any reason at all. In fact, that section merely states that an "alien's actions or situation ***may be so egregious*** as to justify making an exception to the general rule," and provides as examples aliens who (i) are subject to an outstanding arrest warrant for criminal violations, (ii) assault someone during the interview; (iii) willfully destroy government property during the interview; (iv) are a threat to the safety of another person, or (v) "any other ***similar*** action or situation." (emphasis added). The Government does not and cannot contend that Mr. Lin committed any sort of similar egregious action that falls under these exceptions. Regardless, arresting Mr. Lin during or moments after his interview is unlawful because it renders the provisional waiver regulations (which ***do*** have the force of law) meaningless. Mr. Lin and Ms. Dong are likely to succeed on the merits of their APA claim.

B. Due Process Claims

Mr. Lin and Ms. Dong are also likely to succeed on the merits of their claims that removal of Mr. Lin while he is continuing to avail himself of the provisional waiver process would be an

unconstitutional deprivation of Due Process.[17] *See Calderon*, 330 F. Supp. 3d at 958–59 (granting alien's habeas petition, and finding Government's attempted removal of alien while he was applying for provisional waiver was a Due Process violation).

The Government's argument that these regulations create no Due Process interest because the ultimate grant of the waivers is discretionary, (see Opp. 16–17) misses the point. Mr. Lin and Ms. Dong do not seek an order from the Court ***granting*** Mr. Lin a discretionary benefit or even adjudicating his eligibility. Gov. at 16-17. Rather, they are simply seeking the access to the process and adjudication to which the regulations entitle them. Under these controlling regulations, provisional waivers are available to individuals in the United States who, like Mr. Lin, have final orders of removal. The Government is not free to ignore its own regulations and surreptitiously adopt a policy or practice of denying Mr. Lin and other beneficiaries like him any individualized decision, while using the provisional waiver program as a lure to detain and deport aliens who are seeking the legal benefits of the program. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *United States v. Morgan*, 193 F.3d 252, 267 (4th Cir. 1999) (recognizing that under *Accardi* doctrine, it is prejudicial for agencies to disregard a procedural framework meant to protect a fair process); *Abdulai v. Ashcroft*, 239 F.3d 542, 550 (3d Cir. 2001) (non-U.S. citizens seeking adjudication of a discretionary immigration benefit are entitled to "an individualized determination").

The Government relies on *Maldonado-Guzman v. Sessions*, a case involving the denial of a stay of deportation for someone who was seeking a U visa, which is a discretionary visa. 715 F. App'x 277, 284 (4th Cir. 2017). The court held that there was no Due Process violation because a denial of a stay of removal "[did] not affect Maldonado-Guzman's interest in filing or pursuing a

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[17] The references in the Complaint to the Due Process Clause of the Fourteenth Amendment is a typographical error, and will be corrected in an amended complaint to the Fifth Amendment.

U visa application" and the "mere expectation of a statutory benefit is not enough." *Id.* at 284. Here, although Mr. Lin is seeking a discretionary benefit, removal of course would "affect [his] interest in filing or pursuing" the provisional waiver process. The whole point of the provisional waiver process is to keep individuals like Mr. Lin together with their families while they pursue an adjustment of status. By removing Mr. Lin from the U.S. before he has an opportunity to access the protections of the provisional waiver process, after having lured him to an ICE office with the promise of an adjustment of status, the Government nullifies the provisional waiver process and violates Mr. Lin's (and Ms. Dong's) Due Process rights.

Unlike the petitioner in *Maldonado-Guzman*, Mr. Lin is similarly situated to the petitioner in *Accardi*, whose application for a discretionary immigration benefit was denied solely because his name appeared on a government list of "unsavory characters." *Accardi*, 347 U.S. at 268 Here, Mr. Lin was detained due to a policy of foreclosing a legitimate process to obtain legal status despite the existence of rules and regulations affording him a right to that process. Compl. ¶ 15–20, 32–34. Because of immigration authorities' "failure to exercise [their] own discretion, contrary to existing valid regulations," the *Accardi* Court reversed and held that the regulations entitled the appellant to consideration of his application on the merits. *Accardi*, 347 U.S. at 268; *see also United States v. Heffner*, 420 F.2d 809, 812 (4th Cir. 1969) (IRS agents failing to follow agency procedure violated the broad sweep of the *Accardi* doctrine, which was meant to prevent "the arbitrariness which is inherently characteristic of an agency's violation of its own procedures"); *Leslie v. Attorney Gen. of U.S.*, 611 F.3d 171, 180 (3d Cir. 2010) (relying on the *Accardi* doctrine to hold that when an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation"). Mr. Lin is entitled to no less.

The Government argues that the USCIS Field Manual creates no substantive rights (see Opp. 14–15), but it ignores the due process requirement that agencies follow their own procedures "[w]here the rights of individuals are affected." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("[I]t is incumbent upon agencies to follow their own procedures. . . even where [they] are possibly more rigorous than otherwise would be required"); *accord Heffner*, 420 F.2d at 812. That requirement applies even to directives and policies like the USCIS manual, which, while less formal than regulations, still give rise to expectations as to how the agency will address individual cases. *See Abdi v. Duke*, 280 F. Supp. 3d 373, 389 (W.D.N.Y. 2017) (holding that ICE's policy memo governing parole determinations is binding on the agency); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 336 (D.D.C. 2018) (same); *Pasquini v. Morris*, 700 F.2d 658, 663 n.1 (11th Cir. 1983) ("Although the [INS] internal operating instruction confers no substantive rights on the alien-applicant, it does confer the procedural right to be considered for such status upon application.").

The Government may not altogether abrogate the provisional waiver process through a blanket policy of de facto denial by arresting individuals at, or immediately after, their marriage interview through a bait-and-switch practice and policy. Mr. Lin is not seeking to require that the Government provide him a provisional waiver, but instead wants to be allowed to avail himself of the provisional waiver process—which is precisely what the regulations intend.

III. ANY ASSERTION THAT PLAINTIFFS HAVE NOT BEEN "DILIGENT" IS WRONG AND THAT ISSUE IS IRRELEVANT TO THEIR REQUEST FOR A PRELIMINARY INJUNCTION

The Government's throwaway argument that the Plaintiffs' request for a preliminary injunction should be denied because of some purported "lack of diligence" on their part is wholly without merit, factually or legally. Mr. Lin and Ms. Dong filed the I-130 petition on December 21, 2016, within four months of the adoption of the rule expanding the provisional waiver to

individuals with final orders of removal on August 29, 2016. 81 Fed. Reg. 50244, 50245 (July 29, 2016, adopted August 29, 2016); 8 C.F.R. § 212.2(j). Prior to the adoption of this regulation, Mr. Lin was not eligible to participate in the provisional waiver process. The claimed "delay" in filing the I-212 is a result of the Government's continued attempt to obstruct Mr. Lin's ability to avail himself of the waiver process. Mr. Lin was detained immediately after the I-130 petition was approved, and later deported, making the preparation of the I-212 application virtually impossible. Minikon Supplemental Decl. ¶ 3–11. Mr. Lin's immigration lawyer, Patricia Minikon, sensibly and ethically does not begin the costly process of preparing the 100+ page packet that accompanies the filing of the I-212 until after a grant of the I-130 application, which occurred the day that Mr. Lin was detained. *Id.* ¶ 3–4. The preparation of the entire I-212 submission generally takes three months, given no delays caused by factors beyond Ms. Minikon and her clients' control. *Id.* ¶ 3. While Mr. Lin was detained, Ms. Minikon could not meet privately with Mr. Lin to draft the requisite affidavit from him. She was unable to work on this portion of the I-212 petition until the day he returned from China on December 14, 2018. *Id.* ¶ 7.

USCIS requires applicants to show that they have no outstanding criminal issues. In order to obtain records to show Mr. Lin has no criminal record in China, Ms. Minikon needs Mr. Lin's passport, which was confiscated upon his return to the United States. *Id.* Despite Ms. Minikon's efforts to obtain his passport, ICE has not returned it. *Id.* ¶ 10. The government shutdown exacerbated the delay. *Id.* ¶ 9. As of this date, ICE and USCIS still have not provided Ms. Minikon with Mr. Lin's passport. *Id.* ¶ 10. The "lack of diligence" and "procrastination" for which the Government blames Mr. Lin are part and parcel of the Government's continued refusal to allow Mr. Lin access to the provisional waiver process.

Regardless, the issue of Mr. Lin and Ms. Dong's diligence has no bearing on their request for a preliminary injunction. In *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 79 (4th Cir. 1989), relied on by the defendants, the court was applying the laches doctrine, and affirmed the denial of a preliminary injunction to halt construction of a road because an injunction ***would have caused significant harm to the defendants***, who had already spent millions of dollars building the road. It is well-established that the defense of laches is available only where the plaintiff's delay has prejudiced the defendant. *See Safeway, Inc. v. Sugarloaf P'ship, LLC.*, 423 F. Supp. 2d 531, 537 (D. Md. 2006) ("Laches… will only apply when delay in bringing a claim is both inexcusable and prejudicial to the opposing party.") (citation omitted). In this case, the Government does not assert that harm has resulted from any delay, or would result from issuance of a preliminary injunction. In short, the balance of harms weighs decidedly in favor of the Plaintiffs. *See Gilliam v. Foster*, 63 F.3d 287, 292 (4th Cir. 1995) (holding that "balance of the hardships tips decidedly in favor" of habeas petitioners seeking to stay pending trial, finding that the Government's assertion of delay in completing the trial was not irreparable harm and the petitioners would "likely suffer an irreparable loss of their constitutional rights" if their trial was not stayed); *Byrd v. Moore*, 252 F. Supp. 2d 293, 298 (W.D.N.C. 2003) (balance of harms tipped decidedly in favor of habeas petitioners where they alleged violations of their rights under the APA and U.S. Constitution and Government failed to present evidence of any harm).

CONCLUSION

For the reasons set forth in Plaintiffs' initial papers and in this Reply, the motion for a preliminary injunction should be granted.

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Baltimore, MD

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of February, 2019, a copy of Plaintiffs' "Reply in Support of Motion for Preliminary Injunction and Stay of Removal" was served by the court's electronic filing system upon:

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