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

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND STAY OF REMOVAL

The Plaintiffs respectfully move this court to preliminarily enjoin the government from removing Wanrong Lin — a longtime Maryland resident who is married to an American-citizen wife and who is the father of three American-citizen children — from the United States during the pendency of this litigation. 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 subject to deportation 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 required as part of this waiver process, including Mr. Lin. 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. *Calderon v. Nielsen*, 18-10225-MLW (D. Mass. September 21, 2018), attached hereto as Exhibit A; *Martinez v. Nielsen*, 18-10963 (D. of New Jersey, September 14, 2018) attached hereto as Exhibit B.

On August 29, 2018, 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, a prerequisite to the form of relief they are seeking. They brought 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 their petition that USCIS recognize that their marriage was bona fide had been approved, but said that 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 arrested and detained her husband. Mr. Lin was held at the Ordnance Road Correctional Center, one of the Anne Arundel County Detention Facilities, in Glen Burnie, Maryland. 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 would be removed from the U.S. sometime before the end of November, 2018. On November 19, 2018, at approximately 1:00AM, ICE moved Mr. Lin to New Jersey, and placed him on a commercial flight to Shanghai, China that departed at 9:54AM. Plaintiffs filed this action at 9:35AM that same day seeking, *inter alia*, a TRO to block Mr. Lin's deportation. The Court heard oral argument on the motion at 3:00PM, and subsequently (while the plane was still en route) issued a Temporary Restraining Order directing ICE to immediately return Mr. Lin to Maryland, and temporarily enjoined any subsequent removal of Mr. Lin. On December 3, 2018, the temporary restraining order was extended, and on December 14, 2018, the Court entered an Order, based on the agreement of the parties, extending the TRO enjoining Mr. Lin's removal pending the Court's decision on this Motion, and noting Defendants' agreement to release Mr. Lin from detention subject to an order of supervision during the pendency of this Motion. Lin Declaration, Exh. 1. Mr. Lin was returned to Maryland on December 14, 2018, and released that afternoon.

The plaintiffs-petitioners seek a preliminary injunction to address the substantial threat of irreparable harm caused by Mr. Lin's removal, as is evident from the actual harm that was caused

by his most recent detention and removal to China. The threat of future 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 again 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 preliminary injunction 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

[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).

the country must remain abroad. Minikon Declaration ¶ 2. 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 utilize the 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 begin the 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); 8 C.F.R. § 212.7(e)(4)(iv). This application is known as a stateside waiver, and requires filing Form I-601A. In 2016, the agency expanded the stateside waiver process to make it available to noncitizens with final orders of removal — like Mr. Lin, who had previously been barred from utilizing that process. *See Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule* ("2016 Final Rule"), 81 Fed. Reg. 50244, 50245 (July 29, 2016); 8 C.F.R. § 212.2(j). 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 dramatically reduce the time that noncitizen spouses must spend outside the U.S. (the process is reduced from a matter of years, to a matter of weeks apart from the individual's family. Minikon Declaration ¶ 2), 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 back to country of origin to complete the 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. Our laws, and due process, require no less.

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 I-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 I-130 is approved, the noncitizen spouse files a Form I-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 I-212 is conditionally approved, the noncitizen applies for a provisional unlawful presence waiver using Form I-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 in their country of origin. 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. They grew up in Menbian Village in Fujian Province. Mr. Lin's schooling in China ended when he was 11 years old, because his family could no longer afford the cost of school and came to the United States by himself when he was 14 years old. Lin Declaration ¶ 2. He found it difficult to adjust to American life, but was able to support himself through different jobs in Chinese restaurants, learning the skills he would need to eventually open his own restaurant. *Id.* He learned how to cook and clean, and worked very long hours to continue living in the US. *Id.* In 2002, his uncle arranged for him to meet Hui Fang Dong, because he knew both Mr. Lin and Ms. Dong had grown up in the same village in China, and were both living in the United States. He also knew that because both of them were working twelve hour days, seven days per week, at restaurant jobs, they had little to no opportunity to meet other people. *Id* at ¶ 3. At that time, Mr. Lin was living in Leonardstown, MD, and Ms. Dong was living in Roxboro, NC helping run her family's restaurant there. *Id*. Although Mr. Lin had not seen Ms. Dong in many years, he immediately recognized her because he walked by her house every day in China as a child. *Id.* They began a long distance phone relationship while Ms. Dong worked at her family's restaurant and Mr. Lin worked in Leonardtown. *Id.* Over the next two years, their relationship developed, and Ms. Dong's family accepted Mr. Lin as a good match for their daughter. *Id.* They fell in love, married, and have grown their family to have three children, and want to support and give their children opportunities that they did not have to finish their education and go to college. *Id.* They have three children together. Dong Declaration at ¶ 2. 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. *Id.* at ¶ 1. 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.* at ¶ 2. 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 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 I-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 and Mr. Lin 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. Mr. Lin was brought to another room where he was asked questions about his wife and children by two ICE officers, and was placed in handcuffs. Lin Declaration ¶ 4. Neither Ms. Dong nor the children had an opportunity to say goodbye to Mr. Lin that day. Dong Declaration at ¶ 9.

[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.

For the next 82 days, between August 29, 2018 and November 19, 2018, Mr. Lin was held at the Anne Arundel County Detention Center in Glen Burnie Maryland, where Mr. Lin felt effectively alone, as he knew almost no English and could call his wife and children only occasionally and not speak to the for long periods of time. Lin Declaration at ¶ 5; Dong Declaration at¶ 15. On the two occasions where Ms. Dong and the children were able to visit the detention center, they could only speak to each other through a glass window. Dong Declaration at ¶ 15. Mr. Lin met at least one other person in detention in Anne Arundel County Detention Center who was arrested after his and his wife's I-130 marriage interview. Lin Declaration at ¶ 6. Meeting him made Mr. Lin feel as though he were not completely alone, but not being able to see or speak with my family was extremely difficult. *Id.* While Mr. Lin was detained, it was difficult for his lawyer, Ms. Patricia Minikon, to represent him. *Id.* at ¶ 7. It cost more money for her to visit the jail in person in order prepare documents, which otherwise could have been done over the phone with Ms. Dong there to translate. *Id.* at ¶ 7. There is also a stigma associated with being in jail. Some friends and family members thought that Mr. Lin did something wrong to merit being in jail, and made Ms. Dong feel as though there was something wrong with the family, making detention significantly more difficult emotionally. *Id.* at ¶ 8.

Mr. Lin's detention and deportation have also caused issues in determining which process the immigration lawyer must take in order to complete the waiver process. Minikon Declaration ¶ 4. If Mr. Lin were removed, there is no mechanism to allow for provisional waivers, so the first step would be to appear for an immigrant visa interview at a U.S. consulate and have his visa application denied based on his prior removal and accrual of over a year of unlawful presence (the two grounds of inadmissibility that the I-212 and I-601A forms would address). *Id.* at ¶ 4. After being denied a visa, he may then file an I-212 and a regular I-601 (non-provisional), which he must wait to get approved while he is abroad. *Id.* This process normally takes years. *Id.* The forms are filed in different places depending on whether Mr. Lin is in the United States or if he is in China. In order to successfully complete Mr. Lin's application, the immigration lawyer needed to know whether ICE would allow Mr. Lin to stay in the United States to pursue the provisional waiver process, or if ICE would deport him, requiring him to pursue the second, more time consuming, waiver process abroad.

On November 18, 2018, a paralegal from the American Civil Liberties Union of Maryland came to the detention center and to speak with Mr. Lin, and that night, on November 19, 2018, Mr. Lin was told to sign a document he did not understand, which he refused to sign. *Id.* at ¶ 9–10. At approximately 1:00AM that night, Mr. Lin was taken to Newark, New Jersey, to be put on a plane and removed to China. *Id.* at ¶ 10. He was distressed at the thought of being deported, because he would be sent thousands of miles away and would not be able to see his family for a long time, since they did not have enough money for the family to travel to China and either visit or uproot their lives to be together. *Id.* at ¶ 10. While Mr. Lin was *en route* to China, Ms. Dong arranged for someone to help him upon arrival in China, and was able to get in touch with family living in Fuzhou. *Id.* at ¶ 11. Mr. Lin had $100 US in his possession, from the jail account where Ms. Dong deposited money, but the money was useless in China because without a National ID card, he could not exchange the money for food, lodging, or transportation. *Id.* National ID cards are only issued to people who have been in China for a month, and must wait another 15 to 20 days afterward to receive the card. *Id.* Without Ms. Dong arranging transportation, Mr. Lin would have been rendered homeless in Shanghai. *Id.* Mr. Lin's family traveled 500 miles from Fuzhou and back, to pick up Mr. Lin. *Id.* Because Mr. Lin did not have a National ID card, his family spent a significant amount of money on him, for food, plane tickets to go to and from Shanghai, and on basic necessities needed to live. *Id.* at ¶ 12. There was also a stigma in the small town that Ms. Dong and Mr. Lin grew up in, about Mr. Lin being deported from the United States, that caused a lot of people in the neighborhood to disassociate themselves from him and his family. *Id*. After returning to the United States on December 14, 2018, he was brought into ICE custody in Baltimore, and held for five or six hours in a freezing cold room. *Id.* at ¶ 13. He was released that afternoon, on an order of supervision. *Id*. Mr. Lin is thankful to be back home with his family, but his children are still nervous and he can see the lasting impact of having been arrested and taken away from them for three and a half months, and they worry that he will be taken away from them again. *Id.* at ¶ 14.

Mr. Lin's detention and deportation caused him, his wife, and children significant and ongoing harm, and is evidence of the irreparable harm that would once again occur if Mr. Lin is

placed in detention or removed. While Mr. Lin was detained, Ms. Dong traveled two hours each way to visit Mr. Lin. *Id.* Because the detention center is so far away, she and her husband had to speak over the phone at night after the restaurant closed. Usually the children were asleep and did not have a chance to speak with him. *Id.*

While Mr. Lin was in detention and in China, Ms. Dong was 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 depended on sleeping pills in order to sleep. *Id.* Before Mr. Lin was arrested, the two worked at the family-owned restaurant that she and Mr. Lin operate 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. While he was in detention, she had to operate the restaurant on her own, was unable to spend much time with her children and was 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 was available, she had to forego after-school activities and was often called upon to care for her younger siblings. *Id.* at ¶ 10. Sophia had not been eating lately, and told her mother that she does not want to be alive. *Id.* She 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.* 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 while Mr. Lin was in detention and deported. *Id.* at ¶ 11. 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 and deportation 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), attached as Exh. A; *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), attached hereto as Exhibit C.

Mr. Lin is finally able to begin repairing the damage caused by his detention and deportation. He is now at home with his family, although lasting damage can be seen from the ordeal his family has been through. He is currently on an order of supervision with ICE, but if he is removed pending the adjudication of this case, the separation from his family will again cause irreparable harm unless his removal is stayed.

ARGUMENT

I. THE COURT SHOULD GRANT A PRELIMINARY INJUNCTION.

The Court should grant a preliminary injunction enjoining ICE from removing Mr. Lin from the Maryland area 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 preliminary injunction: 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 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. *See* Raley v. Ohio, 360 U.S. 423, 426, 438-439 (1959) ("convicting a citizen for exercising a privilege which the State clearly had told him was available to him" was the "most indefensible sort of entrapment by the State" and violated Due Process Clause). 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. As this Court has already recognized, the waiver process rules were written "for the express purpose of encouraging otherwise 'reluctant' undocumented spouses of U.S. citizens to seek immigrant visas." Lin v. Nielsen, No. 8:18-cv-03548-GJH, Order Granting TRO, Nov. 19, 2018, 3. If the whole purpose of the provisional waivers is to keep families together, "to allow ICE—a federal agency under the jurisdiction of DHS—to arrest and deport those who seek this legal protection would be to allow DHS to nullify its own rule without explanation." *Id*. That is quintessentially arbitrary and capricious agency action.

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

The court has jurisdiction over the Petitioners' claims, and this motion for a preliminary injunction 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 a 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 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), attached hereto as Exh. F; *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), attached hereto as Exh. A; *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), attached hereto as Exh. C; *id.* Aug. 2, 2018 (Opinion, ECF 40), attached hereto as Exh. D; *Villavicencio Calderon v. Sessions,* 18-cv-5222 (S.D.N.Y. Aug. 1, 2018) (ECF no. 31) (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), attached hereto as Exhibit E; *Ramsundar v. Sessions,* 18-cv-6430 (W.D.N.Y. Sept. 11, 2018) (ECF no. 11) (enjoining removal of petitioner until Board of Immigration Appeals decides motion to reopen her asylum case), attached hereto as Exhibit G; *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). Further, although Mr. Lin was released from detention, he is still subject to an order of supervision, which some courts have found is unlawful in this context. See *You v. Nielsen,*18-cv-5392 (S.D.N.Y. June 20, 2018); *Villavicencio Calderon v. Sessions,* 18-cv-5222 (S.D.N.Y. June 9, 2018) (ECF no. 9).

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.

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 forced removal from the U.S. 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."). In fact, the time that Mr. Lin spent in China as a result of ICE's removal of him is evidence of the great hardship that removal causes. 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 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. *See Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 320 (4th Cir.), *vacated on other grounds,* 138 S. Ct. 2710 (2018) ("the prolonged, if not indefinite, separation of the plaintiffs and their family members" are "quintessential examples of irreparable harms"); *Leiva-Perez v. Holder*, 640 F.3d 962, 969–70 (9th Cir. 2011) ("separation from family members, medical needs, and potential economic hardship" are important factors when considering irreparable harm). This is 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 during the pendency of the stateside waiver process will cause his family is sadly evidenced by the harm already caused since he was detained and deported. Ms. Dong and their three children were devastated and the lasting effects, especially on their children are still felt. Dong Declaration at ¶ 17; Lin Declaration ¶ 14. When he was deported to China, he was left to fend for himself, and could not do anything on his own without the significant help from his family. Without having a national ID card, if removed again, he would have to fend for himself again for a significant period of time, and Ms. Dong and their children would suffer in the interim. The family is not able to relocate to China with Mr. Lin because 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 PRELIMINARY INJUNCTION.

The balance of harms and public interest weigh strongly in favor of granting a 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 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 has already suffered significant hardship due to Mr. Lin's detention and deportation make him a strong candidate for the necessary waivers.

B. Granting a Preliminary Injunction is in the Public Interest.

A preliminary injunction 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). As this Court ruled in granting a temporary restraining order, the "order is in the public interest, as it requires DHS to comport with its own rules and regulations, and bars arbitrary and capricious agency action towards vulnerable undocumented immigrants."

Granting a preliminary injunction 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 preliminary injunction should be granted.

Dated: December 19, 2018
Baltimore, MD

Respectfully Submitted,

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Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LILIAN PAHOLA CALDERON JIMENEZ, Petitioner,	)	
v.	)	C.A. No. 18-10225-MLW
KIRSTJEN M. NIELSEN, ET AL., Respondents.	)	

ORDER

WOLF, D.J. February 6, 2018

Lilian Pahola Calderon Jimenez's Petition for Writ of Habeas Corpus under 28 U.S.C. §2241 was filed on February 5, 2018. As the United States is evidently the real adverse party and the cases involve the same or similar claims, it appears that this case was properly designated by petitioner as related to Arriaga-Gil v. Tompkins, C.A. No. 17-10743-MLW and De Oliveira v. Moniz, et al., C.A. No. 18-10150-MLW. See L. R. 40.1(G)(1). Therefore, it was assigned to this court.

Calderon Jimenez alleges that she is being unlawfully detained without due process by United States Immigration and Customs Enforcement ("ICE"). She represents that she was taken into ICE custody on January 17, 2018, when she appeared at an office of United States Citizenship and Immigration Services for an interview as part of her efforts to correct deficiencies in her immigration status and become a lawful permanent resident.

Calderon Jimenez seeks immediate release from custody and a stay of her removal until the issues concerning whether she should be allowed to remain in the United States permanently are finally determined.

In view of the foregoing, it is hereby ORDERED that:

1. The Clerk of this Court shall serve forthwith a copy of the petition (Docket No. 1) upon respondents and the United States Attorney for the District of Massachusetts.

2. The parties, including the United States, shall confer and, by February 12, 2018, report, jointly if possible, but separately if necessary: (a) whether they have reached an agreement to resolve this case; and, if not, (b) whether they request more time to continue their discussions and/or for briefing than provided in paragraph 3 of this Order.

3. Unless otherwise ordered, the petitioner shall, by February 14, 2018, file a memorandum and affidavit(s) in support of the petition. Respondents shall, by February 16, 2018, file a memorandum and affidavit(s) in opposition to the petition.

4. Unless otherwise ordered, a hearing on the petition shall be held on February 21, 2018, at 10:00 a.m.

5. In order to preserve the court's jurisdiction, to provide the parties an opportunity to attempt to resolve this case

and, if necessary, to brief the issues properly, petitioner shall not be moved outside the District of Massachusetts, temporarily or permanently, during the pendency of this case. See 28 U.S.C. §1651(a)("[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). This requirement may be reconsidered by the court sua sponte or upon motion by either party.

UNITED STATES DISTRICT JUDGE

Exhibit B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANTONIO DE JESUS MARTINEZ, et al., ***Petitioner-Plaintiffs,*** **v.** **KRISTJEN NIELSEN, et al.,** ***Respondent-Defendants.***	**Civil Action No. 18-10963** **OPINION AND ORDER**

ARLEO, United States District Judge

THIS MATTER arises from the detention of Antonio de Jesus Martinez, a law-abiding undocumented immigrant and married father of two, who was told by an agency of the United States Government that he could apply for a waiver to legalize his immigration status but was abruptly arrested by the same agency when he tried to do so.

I. Background

Petitioner-Plaintiff, Antonio de Jesus Martinez, is a citizen of El Salvador who has lived in the United States without authorization for approximately the past 15 years. Compl. ¶¶ 1, 26-27. Mr. Martinez is married to a United States citizen and with his wife, Plaintiff Vivian Martinez, is the father of two young children. Id. ¶¶ 8, 26. Mr. Martinez is a Heating Ventilation and Air Conditioning (HVAC) technician and pays his taxes. Id. ¶ 28; Antonio Martinez Aff. ¶ 7, ECF No. 1-1. He has no criminal history and has never been arrested. Compl. ¶ 28. He taught himself English. A. Martinez Aff. ¶ 7. He supports his immediate family, and provides for his mother and siblings. Id. ¶¶ 5, 7.

Mr. Martinez entered the United States at age 19 in 2003 and was apprehended by border patrol. Id. ¶ 9. He was given notice to appear in court in Texas. Id. He hired a lawyer and moved

to New York to live with his family. Id. He attempted to transfer his case to New York, including by appearing in immigration court in Manhattan on his appointed court date. Id. He was unsuccessful in transferring his case and an immigration judge in Texas ordered him removed in absentia. Id.; Compl. ¶27. Mr. Martinez has continued to live in the United States and does not dispute the validity of this removal order in this action.[1]

Mr. Martinez seeks to legalize his immigration status through a process promulgated by the Department of Homeland Security ("DHS"). Generally, spouses of U.S. citizens are eligible to apply to become lawful permanent residents of the United States. See 8 U.S.C. § 1255. But a non-citizen spouse like Mr. Martinez, who has been ordered removed, may not apply domestically; rather, he must leave the United States to apply for an immigrant visa at a U.S. consulate abroad. Further, his prior order of removal triggers various provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., that bar him from reentering the U.S. for up to 10 years even with a visa. See 8 U.S.C. §§ 1182(a)(9)(A); (a)(9)(B).

In 2013, the Department of Homeland Security promulgated regulations that allow non-citizen spouses of U.S. citizens with no criminal history who have been present in the U.S. without authorization to apply for a waiver of inadmissibility for unlawful presence (a "provisional waiver"). The provisional waiver allows them to adjust their respective immigration status and obtain immigrant visas without a prolonged period of separation from their families—that is, a waiver of the multiple-year bar. See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule 78 Fed. Reg. 535, 536 (Jan 3, 2013). In 2016, DHS expanded the program to make it available to non-citizens like Mr. Martinez who have final orders

[1] Mr. Martinez's immigration attorney, Bryan Pu-Folkes, is in the process of challenging the merits of that order on the grounds of, inter alia, ineffective assistance of counsel. Pu-Folkes Aff. ¶ 12, ECF No. 1-3.

of removal. See Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule, 81 Fed. Reg. 50244, 50245 (July 29, 2016); id. at 50271 (stating that the provisional waiver program will "reduce[] separation time among family members during the immigrant visa process" and referencing the "humanitarian and emotional benefits derived from reduced separation of families[.]").

Under the provisional waiver program, a waiver applicant must file a Petition for Alien Relative ("Form I-130") with U.S. Citizenship and Immigration Services ("USCIS"), a division within DHS, to establish that the applicant and beneficiary have a bona fide relationship. The applicant and beneficiary are then scheduled for an interview with USCIS to determine the validity of that relationship. Once the Form I-130 is approved, the applicant files a Permission to Reapply for Admission to the United States form ("Form I-212") and then for a provisional unlawful presence waiver ("Form I-601A").

Based upon these regulations, Mr. and Ms. Martinez began the process of applying for a provisional waiver in 2016. Compl. ¶ 29. As part of this process, Mr. and Ms. Martinez, together with their attorney, appeared for an interview with U.S. Citizenship and Immigration Services ("USCIS") on their I-130 application on April 27, 2018 to confirm the bona fides of their marriage. Id. ¶ 31. At the conclusion of the interview, and despite DHS's regulations concerning the provisional waiver process, two Immigration and Customs Enforcement ("ICE") agents entered the interview room and abruptly arrested Mr. Martinez, purportedly based on a "new policy" of detaining any individual with an outstanding order of removal at an interview.[2] Id. ¶ 31. ICE agents transported Mr. Martinez to Hudson County Correctional Facility in New Jersey where he

[2] An ICE agent told Ms. Martinez that this "new policy" was announced through an internal memo and that, had the couple been scheduled for an interview a few weeks earlier, Mr. Martinez would not have been detained. Compl. ¶ 31. ICE is a division within DHS.

has been detained since April 27, 2018. Id. ¶ 32. Less than one week later, USCIS approved the Martinezes' I-130 application. Id. ¶ 33. Nevertheless, ICE did not release Mr. Martinez. Id.

On June 22, 2018, Mr. Martinez filed this petition for a writ of habeas corpus and an emergency motion for a temporary restraining order seeking, inter alia, his release from custody and to enjoin Respondent-Defendants from removing him from the United States while he is pursuing the provisional waiver process. ECF Nos. 1, 2. That same day, the Court stayed Mr. Martinez's removal pending further order of the Court. ECF No. 6. On August 3, 3018, the Court entered an Order finding that the government's actions violated the Administrative Procedure Act ("APA") and Mr. Martinez's due process rights, and ordered him released so that he could complete the waiver process. ECF No. 25. This Opinion and Order supplements and amends the Court's August 3, 2018 Order.

II. Discussion

Mr. Martinez sought an order releasing him from custody and enjoining Respondent-Defendants Kristjen Nielsen, Thomas Homan, Thomas Decker, and Ronald Edwards[3] from removing him until he exhausts his right to complete the process of obtaining a provisional unlawful presence waiver. He argues that the government's attempt to detain and deport him as he engaged in a step of the provisional waiver process violated his rights under the Fifth Amendment and the APA.

[3] Kristjen Nielsen is named in her official capacity as Secretary of DHS. Thomas Homan is named in his official capacity as Acting Director of ICE, within DHS. Thomas Decker is named in his official capacity as Director of the New York Field Office for ICE. Ronald Edwards is named in his official capacity as Director of the Hudson County Correctional Facility.

Respondent-Defendants contend that the Court lacks jurisdiction to review Mr. Martinez's claims and that, even if it did, the Court cannot grant Mr. Martinez relief because he has no right to engage in the provisional waiver process. The Court rejects these arguments.

A. Jurisdiction

As a threshold matter, the Court has jurisdiction over this matter, and that jurisdiction is not vitiated by 8 U.S.C. § 1252. Section 1252(g) strips federal court jurisdiction over "any cause or claim by or on behalf of an alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." Id. That is, the statute precludes 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. Reno v. Am. Arab Anti-Discrimination Comm., 525 U.S. 471, 482-83 (1999).

Respondent-Defendants contend that ICE engaged in the third of these types of actions 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. The Honorable Paul Crotty in the Southern District of New York recently considered similar claims brought by a petitioner seeking to complete the provisional waiver process prior to his removal and found that Petitioner's claims were not barred by § 1252(g):

> 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. The Court's review of ICE's legal authority is not foreclosed by 8 U.S.C. § 1252(g). See e.g., Zadvydas v. Davis, 533 U.S. 678 (2001) (reviewing whether ICE has the statutory authority to detain an immigrant subject to a final removal order after the 90-day removal period).

Villavicencio Calderon v. Sessions, No. 18-5222, 2018 WL 3677891, at *5 (S.D.N.Y. Aug. 1, 2018); see also You, Xiu Qing v. Nielsen, No. 18-5392, 2018 WL 3677892, at *3 (S.D.N.Y. Aug. 2, 2018) (finding that the issue of whether "Respondents actions were legal is not a question of discretion, and, therefore, falls outside the ambit of § 1252(g)"). Mr. Martinez, like the petitioner in Villavicencio Calderon, is seeking review of DHS's legal authority to detain him at his I-130 interview and attempt to remove him before he has had the opportunity to finish the provisional waiver process.[4] Accordingly, § 1252(g) is inapplicable and does not strip the Court of jurisdiction over this matter.

Respondent-Defendants also contend that the Court's jurisdiction is precluded by sections 1252(a)(5) and (b)(9), which strip federal courts of jurisdiction to review challenges to an order of removal. It is well established that "[t]he REAL ID Act fundamentally altered the manner in which aliens may seek review of orders of removal. The law eliminated habeas corpus review over removal orders and provides that 'a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter.'" Verde-Rodriguez v. Attorney

[4] Judge Crotty determined that ICE agents exceeded their legal authority because they were not executing a removal order when they arrested a man delivering a pizza to an army base whose identification check when he entered the army base revealed a final order of removal entered against him years ago. Villavicencio Calderon, 2018 WL 3677891. This is even more evident here since agents knew Mr. Martinez had a deportation order and abused their authority by using it to frustrate a lawful process.

Gen. U.S., 734 F.3d 198, 201 (3d Cir. 2013) (quoting 8 U.S.C. § 1252(a)(5)). In addressing the jurisdiction stripping and related transfer provisions of the REAL ID Act, the Third Circuit has held that "only challenges that directly implicate the order of removal" are reserved to the circuit courts. See Nnadika v. Attorney Gen. of U.S., 484 F.3d 626, 632-633 (3d Cir. 2007) (holding that "the District Court retains jurisdiction" where a non-citizen "does not challenge the administrative removal order"); see also Verde-Rodriguez, 734 F.3d at 205 (explaining that Nnadika held that the REAL ID Act did not apply when the petitioner challenged the Government's adjudication and rules concerning asylee relative petitions even though the denial of relief would result in deportation); Vasquez v. Aviles,[5] 639 F. App'x 898, 901 (3d Cir. 2016) (reiterating that Nnadika "held that the district court had jurisdiction to consider [the] petition" because the petition did not "directly implicate the order of removal," as it "point[ed] to no legal error in the final order of removal") (citing id. at 632–33); see also Jennings v. Rodriguez, 138 S. Ct. 830, 840 (2018) (rejecting interpretation of § 1252(b)(9) so broad that it would render detention claims "effectively unreviewable" and risk depriving detainees of any meaningful chance for judicial review.).

Here, Mr. Martinez does not challenge the validity of the order of removal against him, and is challenging its merits in a separate proceeding in the proper forum. 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

[5] In Vasquez, which is unpublished, the Third Circuit held that the district court lacked jurisdiction pursuant to § 1252(g) to review the denial of relief under the Deferred Action for Childhood Arrivals ("DACA") program "because that decision involves the exercise of prosecutorial discretion not to grant a deferred action[.]" 639 F. App'x at 901. In that decision, the Third Circuit construed Petitioner to "claim that he was entitled to relief under DACA." Id. at 901. Here, however, Petitioner does not seek to have this Court review the discretionary decision to deny the provisional waiver; rather, he simply seeks to complete the provisional waiver process prior to any action to deport him.

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, sections 1252(a)(5) and (b)(9) are inapplicable and do not strip the Court of jurisdiction.[6] Thus, the decisions relied on by Respondent-Defendants, where the detainee sought direct review of a removal order, are distinguishable. See, e.g., Gonzalez-Lora v. Warden Fort Dix FCI, 629 F. App'x 400, 401 (3d Cir. 2015) (affirming district court's dismissal for lack of jurisdiction "[b]ecause Gonzalez-Lora's claims 'directly challenge the lawfulness of the removal order and are intertwined with the IJ's decision,'" (citing Verde-Rodriguez, 734 F.3d at 207).

B. Preliminary Injunction Staying Mr. Martinez's Removal

Mr. Martinez seeks a temporary restraining order ("TRO") enjoining Respondent-Defendants from removing him from the United States while he pursues the provisional waiver process. The government opposes this request. Because Mr. Martinez has the right to complete the process created for individuals in his position, and because the government's attempt to frustrate that process violates his rights, the Court grants Mr. Martinez's request and issues an injunction pursuant to Fed. R. Civ. P. 65(a) staying his removal until he is able to complete the provisional waiver process.

In deciding whether to grant a TRO or preliminary injunction, the Court considers: "(1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the

[6] Because the Court rejects all of Respondent-Defendants' jurisdictional arguments, it need not reach Petitioner's argument that Respondent-Defendants' reading of § 1252 would violate the Suspension Clause if applied to bar Petitioner's claims.

nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest." Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 170-71 (3d Cir. 2001). All four factors weigh in favor of granting Mr. Martinez relief.

Factors two, three, and four clearly weigh in Mr. Martinez's favor. It is undisputed that the Martinez family will be irreparably harmed if Mr. Martinez is deported before he can complete the provisional waiver process. See Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty[.]'") (citation omitted); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("[D]eportation . . . visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.). Mr. Martinez is a law-abiding person who pays his taxes. He is a supportive father and husband. He is the sole breadwinner for his family. His wife and children have already suffered from anxiety, depression, and financial instability as a result of his detention. Decl. of Vivian Martinez ¶¶ 3, 5-7. Denying Mr. Martinez the right to remain with his family as he completes the waiver process would irreparably inflict harm on Mr. Martinez, his wife, and his children.[7] Denying Mr. Martinez the opportunity to complete the waiver process would constitute the ultimate irreparable harm—deportation.

It is also clear that any harm to the government caused by staying Mr. Martinez's deportation is substantially outweighed by the harm his immediate deportation would cause his family, and that granting Mr. Martinez relief is in the public interest. The government urges the Court to consider that "[t]here is always a public interest in prompt execution of removal orders."

[7] The government argues that Mr. Martinez would be subject to a five-year bar from reentering the United States because of his in absentia order of final removal. Plaintiff-Petitioners counter that such a bar is inapplicable because Mr. Martinez had reasonable cause for missing his removal hearing. Under either scenario, Plaintiff-Petitioners have demonstrated that Mr. Martinez's deportation before he completes the waiver process would cause them irreparable harm.

Nken v. Holder, 556 U.S. 418, 436 (2009). But this case does not arise out the execution of a removal order; it involves the arrest of a gainfully employed, law-abiding individual availing himself of a lawful administrative process based on a 15-year-old removal order—hardly a "prompt" attempt to execute that order. Moreover, any interest in executing Mr. Martinez's order of removal, which will be effectuated when he leaves the country anyway, is outweighed by the interest in family unity that underscores the provisional waiver process.[8]

Finally, Mr. Martinez has demonstrated a likelihood of success on the merits so factor one also weighs in his favor. For the reasons that follow, the Court finds that Mr. Martinez has the right to complete the provisional waiver process, and that the government's attempt to detain and deport him contravene that right in violation of the Administrative Procedure Act ("APA").

1. Right to Apply for Provisional Waiver

A government agency is not free to disregard its own regulations. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954). "Regulations with the force and effect of law supplement the bare bones" of federal statutes and an agency may not act "contrary to [those] existing valid regulations. Id. at 265, 268. When regulations "affect substantial individual rights," the agency has the "obligation" and "responsibility . . . to employ procedures that conform to the law." Morton v. Ruiz, 415 U.S. 199, 232 (1974) (internal citations omitted). Under the Accardi doctrine, when the government creates a regulatory process for seeking relief, that process creates

[8] See 8 CFR 50244, 50246 ("Individuals with approved provisional waivers may experience shortened periods of separation from their family members living in the United States while they pursue issuance of immigrant visas abroad, thus reducing any related financial and emotional strains on the families."); Provisional Unlawful Presence Waivers, https://www.uscis.gov/family/family-us-citizens/provisional-unlawful-presence-waivers (last visited Aug. 31, 2018) ("This new process was developed to shorten the time that U.S. citizens and lawful permanent resident family members are separated from their relatives while those relatives are obtaining immigrant visas to become lawful permanent residents of the United States.").

"a right to seek relief" even if there is no "right to the relief itself." Arevalo v. Ashcroft, 344 F.3d 1, 15 (1st Cir. 2003) (citing Accardi, 347 U.S. at 268).

In 2013, DHS promulgated regulations through the notice and comment process that created a process for obtaining a provisional waiver. In 2016, DHS, again through notice and comment, extended that process to non-citizen spouses with final orders of removal. "These regulations create a 'right to seek' the provisional waiver even when there is no 'right to the [waiver] itself.'"[9] Villavicencio Calderon v. Sessions, et al., No. 18-5222 (S.D.N.Y. Aug. 1, 2018) (slip op.) (quoting Arevalo, 344 F.3d at 15). Mr. Martinez thus has the right to apply for a provisional waiver.

2. Violation of the APA

The APA authorizes a court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the APA, an agency may not "depart from a prior policy sub silentio or simply disregard rules that are still on the books"; to do so would be arbitrary and capricious. F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009). It is well settled that "rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency," and that a failure to follow those rules without explanation is arbitrary, capricious, and an abuse of discretion. Leslie v. Att'y Gen. of U.S., 611 F.3d 171, 175 (3d Cir. 2010).

This case involves exactly the arbitrary and capricious behavior our laws intend to prevent. DHS created a process for individuals in Mr. Martinez's exact position to apply for a waiver, and

[9] Mr. Martinez does not contend that he has a right to a provisional waiver. He simply "seeks access to the process and adjudication to which the regulations entitle him." Pet. Reply at 9, ECF No. 23.

required, as part of that process, his attendance at an interview to confirm the bona fides of his marriage. Then, based on a purported "new policy,"[10] ICE agents used that interview to prevent Mr. Martinez from completing the waiver process. If left unchecked, this "new policy" would render the provisional waiver a nullity.

Respondent-Defendants' attempt to deport Mr. Martinez by arresting him during his I-130 interview constitutes a disregard for the rights that they, on behalf of DHS, created. To attempt to remove Mr. Martinez while he was availing himself of the provisional waiver process is "arbitrary, capricious, an abuse of discretion, [and] not in accordance with law." 5 U.S.C. § 706. It plainly violates Mr. Martinez's rights under the APA. Accordingly, Mr. Martinez is entitled to an injunction enjoining his removal from the United States until he exhausts the right to complete the process of obtaining a provisional unlawful presence waiver.

Having found a violation of the APA,[11] the Court also finds that Petitioner is entitled to complete the provisional waiver process. In Leslie v. Attorney General, 611 F.3d 171, 180 (3d Cir. 2010), the Third Circuit held that when an agency promulgates a regulation protecting the fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation, and failure to comply warrants invalidation of the challenged action without regard to whether the complaining party has been prejudiced by the alleged violation. See

[10] Plaintiffs allege that an ICE agent told Ms. Martinez that this "new policy" was announced through an internal memo. Compl. ¶ 31. Respondent-Defendants' response does not deny that the policy exists.

[11] The Court notes that having found a violation of the APA, relief is warranted without reaching the issue of whether the government's actions violated the Fifth Amendment. See, e.g., Torres v. U.S. Dep't of Homeland Sec., No. 17-1840 JM(NLS), 2017 WL 4340385, at *6 (S.D. Cal. Sept. 29, 2017) (explaining that the court need not reach the claim that Defendants violated his Fifth Amendment procedural due process rights where it determined that Defendants failure to follow the termination procedures in DACA violated the APA); You, 2018 WL 3677892, at *13 (declining to reach constitutional issue after finding that Petitioner demonstrated a likelihood of success on the merits of his APA claim).

id. In contrast, where no fundamental statutory or constitutional right is implicated, and the regulation at issue is merely an agency-created benefit, a showing of prejudice is required. See id. at 179.

Petitioner argues that the provisional waiver regulations were intended to safeguard family unity, a fundamental right, and thus created a procedural right to be considered for such status upon application. See Pet. Mem. at 16 (citing Leslie, 611 F.3d at 179); Pet. Reply at 9-13 (citing Accardi, 347 U.S. at 268; Abduli, 239 F3d at 550). The Court agrees that the regulations at issue, which were created for non-citizen spouses of United States citizens, implicate the fundamental right to family unity. See 8 C.F.R. 50244, 50246; Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule, 81 Fed. Reg. 50244, 50245 (July 29, 2016); id. at 50271. However, even if the regulations at issue do not implicate any fundamental statutory or constitutional right, Petitioner has also shown that he would be prejudiced by the inability to complete the provisional waiver process, as he will be immediately deported and separated from his family for years if his ability to complete the provisional waiver process is thwarted. Irrespective of whether Petitioner ultimately qualifies for a provisional waiver, it is undisputed that the Martinez's 1-130 application has been approved and he has not had the opportunity to complete the remainder of the process.

C. Detention

Generally, detention is permitted to exceed the 90 days authorized by the Immigration and Nationality Act ("INA") for a "period reasonably necessary to secure removal." Zadvydas v. Davis, 533 U.S. 678, 699-700 (2001). But when removal is not "reasonably foreseeable," the continued detention is unreasonable and no longer permitted by the INA. Id. As Petitioner-Plaintiff's removal is no longer reasonably foreseeable, and any continued detention is also

unreasonable if he is to continue with the waiver process, Mr. Martinez's petition for habeas corpus is granted.

III. Conclusion

For the reasons set forth herein, Plaintiff-Petitioner's motion for a TRO is **GRANTED** and his petition for habeas corpus is **GRANTED**.[12] This Opinion and Order supplements and amends the Court's August 3, 2018 Order. Respondent-Defendants are **ORDERED** to stay removal of Petitioner-Plaintiff, Mr. Martinez, from the United States until he exhausts his right to complete the process of obtaining an unlawful presence waiver. Respondent-Defendants are also **ORDERED** to release Petitioner-Plaintiff, Mr. Martinez, from custody.

September 14, 2018

/s Madeline Cox Arleo
Hon. Madeline Cox Arleo
United States District Judge

[12] Defendants are directed to provide the Court with the "new policy" that served as the justification for Mr. Martinez's detention within 10 days of this Order.

Exhibit C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YOU, XIU QING, aka YU, XIAN CHIN,

Petitioner,

-against-

KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; THOMAS DECKER, in his official capacity as New York Field Office Director for U.S. Immigration and Customs Enforcement; STEVE AHRENDT, in his capacity as Warden of New Jersey Bergen County Jail; and MICHAEL SAUDINO, in his capacity as Sherriff of Bergen County, NJ,

Respondents.

18 Civ. 5392

ORDER OF RELEASE

ANALISA TORRES, District Judge:

Petitioner's requests for a temporary stay of removal and release from detention are GRANTED. The Department of Justice and the Warden of the Bergen County Jail, 160 South River Street, Hackensack, NJ 07601, are ORDERED to immediately release Petitioner, Xiu Qing You (A# 077-297-007), on his personal recognizance pending the Court's resolution of his habeas petition.

A memorandum decision shall follow in due course.

SO ORDERED.

Dated: June 20, 2018
New York, New York

ANALISA TORRES
United States District Judge

Exhibit D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YOU, XIU QING, aka YU, XIAN CHIN,

Petitioner,

-against-

KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; THOMAS DECKER, in his official capacity as New York Field Office Director for U.S. Immigration and Customs Enforcement; STEVE AHRENDT, in his capacity as Warden of New Jersey Bergen County Jail; and MICHAEL SAUDINO, in his capacity as Sherriff of Bergen County, NJ,

Respondents.

18 Civ. 5392

OPINION

ANALISA TORRES, District Judge:

On June 14, 2018, Petitioner, Xiu Qing You, a Chinese national, filed a petition for habeas corpus following his arrest and detention pursuant to a final order of removal. *See* First Am. Pet., ECF No. 5. By order to show cause hand-delivered to the Court on June 16, 2018, Petitioner sought a temporary stay of removal, and, subsequently, Pet. Reply, ECF No. 16, release from custody. At a show cause hearing on June 20, 2018, *see* Order to Show Cause, ECF No. 11, the Court issued an oral order granting the requested relief pending the resolution of the habeas petition, Order of Release, ECF No. 17. The Court issues this opinion to provide its reasons for granting Petitioner's requests.[1]

BACKGROUND

Petitioner is a 39-year-old husband to a United States citizen, with whom he has two young children. Petitioner first arrived in the United States in January 2000 without valid entry

[1] Following the Court's ruling on June 20, 2018, Petitioner filed an amended petition on July 6, 2018. *See* ECF No. 27. That petition was not before this Court, and, therefore, this opinion analyzes only the habeas petition at ECF No. 5.

documents. First Am. Pet. ¶ 15; Syed Decl. ¶ 5, ECF No. 15. He was paroled into the United States, detained, and issued a notice to appear before an immigration judge. First Am. Pet. ¶ 15; *id*., Ex. O; Syed Decl. ¶ 6.[2] On April 7, 2000, Petitioner was released from detention on a $3,000 bond. Syed Decl. ¶ 7. On December 13, 2000, an immigration judge ordered him removed to China. First Am. Pet. ¶ 16; Syed Decl. ¶ 8. Petitioner appealed, but, on November 12, 2002, the Board of Immigration Appeals ("BIA") affirmed the immigration judge's decision. First Am. Pet. ¶ 16; Syed Decl. ¶ 8. Nevertheless, U.S. Immigration and Customs Enforcement ("ICE") did not execute the removal order.

In 2008, Petitioner filed a motion to reopen his removal proceedings, which the BIA denied as untimely. Syed Decl. ¶ 9. In 2010, the BIA denied a second motion to reopen as untimely and number-barred. *Id*. In 2016, the BIA denied a third motion to reopen. *Id*.

While his struggles with the immigration system were ongoing, Petitioner began a family in the United States. In 2007, Petitioner married Yumei Chen in a traditional Chinese ceremony. First Am. Pet. ¶ 17. In 2012, the couple had their first child, a daughter. *Id.* ¶ 18. In 2013, the couple legally registered their marriage in New York City. *Id.* ¶ 17. At that time, Petitioner's wife was a legal permanent resident. *Id.* In 2014, the couple had a second child, a son. *Id.* ¶ 18.

In 2015, Petitioner's wife became a U.S. citizen and filed an I-130 petition to classify Petitioner as her immediate relative. *Id.* ¶ 20. Petitioner filed an I-485 application for an adjustment of status to legal permanent resident. *Id.* Petitioner received a notice scheduling his

[2] Aliens arriving at the border are considered "applicants for admission" into the country. *See Cruz-Miguel v. Holder*, 650 F.3d 189, 197 (2d Cir. 2011). An arriving alien may be admitted, deemed inadmissible, or, even if he might otherwise be inadmissible, "may be granted 'parole into the United States' for humanitarian or public benefit purposes." *Id.* at 198. Here, it is undisputed that Petitioner was paroled into the United States in 2000. *See* First Am. Pet. ¶ 15; *id*., Ex. O.

I-485 interview—colloquially, a "green card" interview—for May 23, 2018. First Am. Pet., Ex. N.

On May 23, 2018, Petitioner and his wife appeared at the U.S. Citizenship and Immigration Services ("USCIS") offices for the I-485 interview. First Am. Pet. ¶ 24. At the interview, the couple was questioned about their relationship. *Id.* ¶ 25. But, before being questioned on his I-485 petition, ICE officers arrested Petitioner pursuant to the 2002 order of removal. *Id.* Petitioner remained in the custody of ICE, which, prior to this Court's order releasing Petitioner, intended to deport him no later than July 1, 2018. Syed Decl. ¶ 13.

Later on the same day, USCIS granted the I-130 petition, First Am. Pet., Ex. L, but denied Petitioner's I-485 application, First Am. Pet., Ex. O. USCIS found that Petitioner was eligible for an adjustment of status, but concluded that his entry into the United States without documentation, failure to depart the country, unlawful presence, and employment were adverse factors that counseled against an exercise of discretion in favor of adjustment of status. *Id.* at 2.

Petitioner has since filed a motion to reopen the adjustment of status decision, filed for a stay of removal with the BIA, and filed a fourth motion to reopen his removal proceedings with the BIA. First Am. Pet. ¶¶ 33, 40. Additionally, on June 14, 2018, Petitioner filed the instant habeas petition arguing that his arrest and detention violated the Immigration and Nationality Act ("INA") and related regulations, the Due Process Clause of the Constitution, and the Administrative Procedure Act ("APA"). *See generally id.*

Specifically, Petitioner argues that, under the INA and the Constitution, he should have been afforded notice, an opportunity to be heard, and a determination that he was either dangerous or a flight risk before being arrested and detained on May 23, 2018. *Id.* ¶¶ 44–5, 47–48. He additionally argues that his arrest and detention at his green card interview violate both

the INA's statutory scheme permitting aliens like Petitioner to seek adjustment of status and his due process right to seek relief via adjustment of status. *Id.* ¶¶ 51–52, 54–55. Finally, Petitioner argues that USCIS committed legal error by considering irrelevant factors when the agency denied his adjustment of status application. *Id.* ¶ 51.

On June 16, 2018, Petitioner moved by order to show cause for a temporary stay of removal. The Court denied his motion, on jurisdictional grounds. ECF No. 10. Petitioner filed a motion for reconsideration, which the Court granted. ECF No. 11. The Government filed its opposition to the stay on June 19, 2018, Resps. Opp., ECF No. 14, and Petitioner filed his reply the next day, June 20, 2018, and requested release from custody, Pet. Reply. Following a show cause hearing, the Court granted Petitioner's requests for a stay of removal and release from custody pending the resolution of his habeas petition. The discussion that follows details the Court's reasoning for granting Petitioner's requests.

DISCUSSION

I. Jurisdiction

As a threshold matter, Respondents[3] argue that the Court lacks jurisdiction to grant Petitioner's requested relief. First, Respondents argue that the Court lacks subject matter jurisdiction because 8 U.S.C. § 1252(g) bars the Court from adjudicating any legal challenge that "aris[es] from the decision or action by the Attorney General to . . . execute removal orders against" Petitioner.[4] 8 U.S.C. § 1252(g); *see also* Resps. Opp. at 5–6. Second, Respondents

[3] In this opinion, the term "Respondents" refers to the federal government officials sued in their official capacities in this action. Petitioner has indicated that he intends to move the Court to strike the local government officials as respondents. Pet. Reply, at 15 n.2.

[4] The INA refers to the Attorney General as the official to whom Congress delegates its authority, but, following the creation of the Department of Homeland Security, this authority over immigration matters belongs to the Secretary of Homeland Security. *See Clark v. Martinez*,

argue that 8 U.S.C. §§ 1252(a)(5) and (b)(9) channel judicial review to the federal appellate courts via petitions for review. Resps. Opp. at 6–7. Finally, Respondents argue that § 1252(a)(2)(B) precludes district courts from reviewing a denial of adjustment of status. *Id.* at 10. Respondents' arguments are unavailing.

A. § 1252(g)

Under 8 U.S.C. § 1252(g), "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." Respondents argue that the Supreme Court's interpretation of this provision "alone" bars judicial review, *id*. at 7, but Respondents mischaracterize the Supreme Court's decision in *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (hereinafter "*AADC*").

In *AADC*, the Supreme Court rejected the contention that § 1252(g) "is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review.'" *AADC*, 525 U.S. at 482. As the Supreme Court explained, "[i]n fact, what § 1252(g) says is much narrower. The provision applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id*. (quoting § 1252(g)).

The *AADC* Court reasoned that it was appropriate to limit judicial review to these "three discrete actions" in light of legislative history. In the past, as now, the Secretary enjoyed prosecutorial discretion to decline to commence proceedings, adjudicate cases, or execute removal orders. The Secretary's decision not to prosecute certain cases had prompted litigation

543 U.S. 371, 374 (2005) (citing 6 U.S.C. §§ 251(2), 252(a)(3), 271(b)). Unless quoting the statute or precedent, the Court refers to the "Secretary of Homeland Security" or the "Secretary" as the proper official.

in other cases attempting to compel the Secretary to use her discretion not to prosecute. Essentially, "[s]ince no generous act goes unpunished, . . . the . . . exercise of this discretion opened the door to litigation in instances where the [Secretary] chose *not* to exercise it." *Id.* at 484. Specifically,

> [e]fforts to challenge the refusal to exercise such discretion on behalf of specific aliens sometimes [were] favorably considered by the courts, upon contentions that there was selective prosecution in violation of equal protection or due process, such as improper reliance on political considerations, on racial, religious, or nationality discriminations, on arbitrary or unconstitutional criteria, or on other grounds constituting abuse of discretion.

Id. at 484–85 (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, *Immigration Law and Procedure* § 72.03[2][a] (1998)). It was this reason, the *AADC* Court explained, that motivated Congress to limit judicial review of these particular, discrete acts.

Under *AADC*, therefore, § 1252(g) prohibits judicial review of challenges to the discretionary decision whether to execute a removal order. But here, the habeas petition does not challenge the discrete decision to remove Petitioner. The question before the Court is not why the Secretary chose to execute the removal order. Rather, the question is whether the way Respondents acted accords with the Constitution and the laws of this country. Whether Respondents' actions were legal is not a question of discretion, and, therefore, falls outside the ambit of § 1252(g).

Put another way: Respondents are empowered to remove Petitioner at their discretion. But they cannot do so in any manner they please. Respondents could not, for example, execute removal by dropping Petitioner on a life raft in the middle of the Atlantic Ocean. Nor, to use a less far-fetched example, could they indefinitely detain Petitioner, even for the purposes of executing a final order of removal. *Zadvydas v. Davis*, 533 U.S. 678 (2001). That courts can review "how" Respondents exercise their discretion is, therefore, an uncontroversial proposition.

See, e.g., *Pensamiento v. McDonald*, No. 18 Civ. 10475, 2018 WL 2305667, at *2 (D. Mass. May 21, 2018) (concluding that §§ 1252(a)(5), (b)(9), and (g) do not bar district courts from "review[ing] habeas challenges to unlawful immigration detention"); *Nak Kim Chhoeun v. Marin*, No. 17 Civ. 1898, 2018 WL 1941756, at *4 (C.D. Cal. Mar. 26, 2018) (concluding that §§ 1252(a)(5), (b)(9), and (g) "restrict[] district court review over claims contesting the merits or validity of a removal order," but not "the manner in which [petitioners] were re-detained" after being released); *Michalski v. Decker*, 279 F. Supp. 3d 487, 495 (S.D.N.Y. 2018) (concluding that § 1252(g) did not bar petitioner's challenge to his detention because detention "is independent from the decision or action to commence a removal proceeding").

Respondents attempt to forestall this conclusion by emphasizing that § 1252(g) prohibits judicial review of any claims "arising from" the decision to execute an order of removal. Resps. Opp. at 7. But as recently as this year, the Supreme Court has reiterated that, "when confronted with capacious phrases like 'arising from,' we . . . eschew[] 'uncritical literalism' leading to results that 'no sensible person could have intended.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (quoting *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016)). Referencing § 1252(g) as an example, the Supreme Court explained that it "did not interpret [§ 1252(g)] to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves." *Id.* at 841.

As the Supreme Court originally reasoned in *AADC*, this narrow reading is appropriate given that § 1252(g) "was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *AADC*, 525 U.S. at 485 n.9. The majority in *AADC* was unperturbed by the dissent's protest that its narrow reading parsed the statute "too finely."

Id. Even "if it did," the majority concluded, "we would think that modest fault preferable to the exercise of such a novel power of nullification." *Id*. Applied to the instant case, therefore, § 1252(g) is no bar to jurisdiction.

B. §§ 1252(a)(5) and (b)(9)

Respondents' arguments that §§ 1252(a)(5) and (b)(9) strip jurisdiction also fail. Under 8 U.S.C. § 1252(a)(5), "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal." Under § 1252(b)(9), "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order."

Respondents argue that, taken together, these provisions strip district courts of jurisdiction over any claims "arising from" orders of removal, including jurisdiction over stays of removal. Resps. Opp. at 8–10. Respondents urge that only the courts of appeals may review such claims. *Id.* However, the cases that Respondents rely upon to support their argument fail to address the Supreme Court's more recent plurality opinion in *Jennings*.[5] In *Jennings*, as discussed above, the Supreme Court disavowed judicial overreliance on "capacious phrases like 'arising from.'" *Jennings*, 138 S. Ct. at 840. More importantly, the Supreme Court held that this

[5] The only binding authority Respondents cite, albeit without discussion, are *Singh v. USCIS*, 878 F.3d 441 (2d Cir. 2017), *as amended* (Jan. 9, 2018), and *Delgado v. Quarantillo*, 643 F.3d 52 (2d Cir. 2011). Even if the reasoning of those cases were to apply here, the Court is not persuaded by Respondents' citations to *Singh* and *Delgado*. Neither the *Singh* nor the *Delgado* court had the benefit of the Supreme Court's opinion in *Jennings*. As discussed *infra*, *Jennings* rejects broad readings of the INA's jurisdiction-stripping provisions. *Jennings*, 138 S. Ct. at 840.

"capacious" language in § 1252(b)(9) does not deprive courts, including the Supreme Court, of jurisdiction to hear every possible question of law that arise from an order of removal. *Id.*

The *Jennings* Court considered several hypothetical claims a petitioner could make, such as "inhumane conditions of confinement" under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), "state-law claim[s] for assault against a guard or fellow detainee," or tort claims against a truck driver who crashes into an ICE transport bus. *Id.* The Court reasoned that such claims would "arise from actions taken to remove the aliens," but concluded that "cramming judicial review of [such claims] into the review of final removal orders would be absurd." *Id*. (internal alterations and quotation marks omitted).

The Supreme Court was especially concerned with the risk that

> [i]nterpreting "arising from" in this extreme way would also make claims of prolonged detention effectively unreviewable. By the time a final order of removal was eventually entered, the allegedly excessive detention would have already taken place. And of course, it is possible that no such order would ever be entered in a particular case, depriving that detainee of any meaningful chance for judicial review.

Id. Similarly, here, interpreting §§ 1252(a)(5) and (b)(9) to bar Petitioner's claims challenging his arrest and detention unless those claims were "cramm[ed]" into a petition for review of a removal order would render such claims "effectively unreviewable." *Id.* Petitioner's right to file a petition for review of his 2002 order of removal has long since expired. Respondents' reading of §§ 1252(a)(5) and (b)(9) would therefore permit ICE to arrest, detain, and remove Petitioner without any statutory or constitutional constraints. Indeed, Petitioner would not only be barred from bringing claims against ICE. While in ICE custody, he would also be barred from suing any official or private person for tortious conduct. This is the precise result the Supreme Court sought to avoid in *Jennings*.

To the extent that the "arising from" language renders § 1252 ambiguous, which this Court doubts in light of *Jennings*, the statute's legislative history demonstrates that Congress intended § 1252(b)(9) to "not preclude habeas review over challenges to detention that are independent of challenges to removal orders." H.R. Conf. Rep. 109-72, 175 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 300. There is, therefore, no reason to bar Petitioner's challenge here.

C. § 1252(a)(2)(B)

Finally, the Court rejects Respondents' § 1252(a)(2)(B) argument. Under § 1252(a)(2)(B), "no court shall have jurisdiction to review . . . . any judgment regarding the granting of" an adjustment of status application brought under § 1255. *See* 8 U.S.C. § 1252(a)(2)(B). As Respondents appear to recognize, however, (a)(2)(B) "does not strip courts of jurisdiction to review nondiscretionary decisions regarding an alien's eligibility for the relief" under § 1255. *Sepulveda v. Gonzales*, 407 F.3d 59, 62–63 (2d Cir. 2005).

Still, Respondents maintain that, as this Court found in *Mahmood*, the Court "could not stay removal where USCIS reached a decision by balancing adverse factors against favorable factors, even if the Court disagreed with USCIS's conclusion." Resps. Opp. at 10 (quoting *Mahmood v. Nielsen*, No. 17 Civ. 8233, 2018 WL 2148439, at *3 (S.D.N.Y. May 9, 2018)). Here, Respondents argue, "USCIS reached its decision denying Petitioner's Form I-485 based on such a balancing analysis." *Id.* Respondents maintain that this analysis is discretionary, and, therefore, squarely barred by § 1252(a)(2)(B). Although the Court agrees that its judicial review is limited to nondiscretionary decisions under § 1252(a)(2)(B), the Court concludes that (a)(2)(B) does not bar review in this case.

"[C]ourts lack jurisdiction to review USCIS's 'factfinding, factor-balancing, and exercise of discretion' under § 1252(a)(2)(B), but retain jurisdiction 'to review nondiscretionary

decisions regarding an alien's eligibility for . . . relief." *Sandhu v. United States*, 916 F. Supp. 2d 329, 333 (E.D.N.Y. 2013) (quoting *Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) and *Sepulveda*, 407 F.3d at 62–63). "[G]iven the limitation on [courts'] jurisdiction, the only relevant inquiry is whether the agency applied the correct legal standard and considered the appropriate factors." *Adebola v. Sessions*, 723 F. App'x 41, 44 (2d Cir. 2018) (summ. order) (citing 8 U.S.C. §§ 1252(a)(2)(B)(i), (D)). The Court, therefore, retains jurisdiction over Petitioner's claim for the limited purpose of conducting this "relevant inquiry." *Id.*

Accordingly, the Court rejects all of Respondents' jurisdictional arguments. As such, the Court finds no need to reach Petitioner's argument that Respondents' reading of § 1252 would violate the Suspension Clause if applied to bar Petitioner's claims. Pet. Reply, at 8–9. The Supreme Court has already provided all the guidance necessary to interpret (a)(5), (b)(9), and (g). That is, properly interpreted, § 1252 does not strip district courts of jurisdiction to hear habeas claims that are independent from judicial review of a final order of removal. And the Second Circuit has explained that § 1252(a)(2)(B) does not eliminate review of legal errors in the denial of an application for adjustment of status. Accordingly, the Court has jurisdiction to review Petitioner's claims.

II. Venue

One threshold issue remains. Respondents argue that venue is not proper in the Southern District of New York because Petitioner is being held at the Bergen County Jail, in Hackensack, New Jersey. Specifically, Respondents argue that, under the "immediate custodian rule" articulated in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), habeas challenges to detention must be brought against "the warden of the facility where the prisoner is being held," in only "the district of confinement." Resps. Opp. at 16 (quoting *Cesar v. Shanahan*, No. 17 Civ. 7974, 2018 WL

1747989, at *1 (S.D.N.Y. Feb. 5, 2018)). As this Court has recently concluded, the immediate custodian rule is a rule of venue. *Mahmood*, 2018 WL 2148439, at *4.

Respondents note, correctly, that several courts within this Circuit have applied the immediate custodian rule to bar aliens detained in New Jersey from bringing habeas petitions in this district. Resps. Opp. at 16–17 (collecting cases). Petitioner responds that "the vast majority of the cases cited by Respondents contain only a cursory analysis of the venue issue," but that, upon careful review, *Padilla* actually "*supports* the Petitioner's view that venue is proper in this district." Pet. Reply, at 16.

Petitioner argues that the *Padilla* Court was predominantly concerned with an alien exploiting the fact that there exist officials with "remote supervisory authority," like the Secretary of Defense, who may be sued in any district. *Id.* at 16–17. That concern, Petitioner argues, is not relevant here. What is relevant is that Bergen County Jail is not an ICE facility, but, rather, an ordinary jail that "rents bed space to ICE." *Id.* at 17. The only immediate custodians with legal control over Petitioner are ICE officials located in this district, and, therefore, Petitioner argues, venue is proper here. *Id.*

As an initial matter, it is an open question whether *Padilla* applies to this case. Because *Padilla* arose in the criminal context, the Supreme Court explicitly declined to address the application of the immediate custodian rule to alien detainees. *Padilla*, 542 U.S. at 435 n.8. Assuming it applies, however, the Court concludes that venue is still appropriate in the Southern District of New York given that, in this case, Petitioner's immediate custodian is not the warden of the Bergen County Jail, but, in fact, ICE officials located in this district.

In *Padilla* and *Rasul v. Bush*, 542 U.S. 466, 478 (2004), decided on the same day, the Supreme Court reaffirmed its holding in *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S.

484 (1973). In *Braden*, the Supreme Court upheld an Alabama prisoner's habeas petition brought in Kentucky based on a Kentucky "confinement that would be imposed in the future." *Padilla*, 542 U.S. at 438. The *Braden* decision relied on the understanding that "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Rasul*, 542 U.S. 466 at 478 (quoting *Braden*, 410 U.S. at 494–95). As such, the petitioner could bring a habeas petition against "the entity or person who exercise[d] legal control with respect to the challenged 'custody'" even if that person was located in a different district than the district of current confinement. *Padilla*, 542 U.S. at 438. In *Padilla*, however, the Supreme Court explained that "nothing in *Braden* supports departing from the immediate custodian rule in the traditional context of challenges to present physical confinement." *Id.*

Here, although Petitioner is challenging "present physical confinement," the facts of this case are unlike "the traditional context of challenges to present physical confinement." *Id.* The Court concludes that, in this context, predicating venue on the location of Petitioner's ICE custodians is more faithful to the Supreme Court's dictates in *Padilla* than predicating it on the location of a non-ICE contractor who has no "legal control" over Petitioner. *Padilla*, 542 U.S. at 438. Accordingly, venue is proper in this district.

III. Merits

The parties did not brief what standard applies to requests for a temporary stay of removal and release from custody. The Court, therefore, applies the "traditional" test for stays in cases involving the government, *see Nken v. Holder*, 556 U.S. 418, 426 & 435 (2009), which is substantially similar to the standard for injunctive relief that would apply for release from custody, *see Mahmood*, 2018 WL 2148439 (ordering release upon a showing of a likelihood of

success on the merits and irreparable harm). Accordingly, the Court evaluates both requests for relief together under the same test.

Under this test, "[c]ourts must consider: (1) whether the applicant has shown a likelihood of success on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies." *Kabenga v. Holder*, 76 F. Supp. 3d 480, 482 (S.D.N.Y. 2015). "Of these factors, the first two are the most critical." *Id.* (internal quotation marks omitted). And the final two factors "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435.

A. Likelihood of Success on the Merits

a. INA Claims

Petitioner makes three INA arguments. He argues that Respondents (1) were required to provide him with procedural protections, (2) violated the INA when they used the adjustment of status process to arrest and detain Petitioner, and (3) committed legal error when denying Petitioner's application for adjustment of status.

i. Procedures

Petitioner first argues that, "[i]nterpreted in light of the Constitution," his detention without notice, opportunity to be heard, or individualized determination as to whether he poses a danger or flight risk violates the INA and applicable regulations. First Am. Pet. ¶¶ 44–45. Specifically, Petitioner argues that the INA mandates detention only during a 90-day "removal period" that begins when an order of removal becomes final. *Id.* Because Petitioner's "removal period" expired some sixteen years ago, he argues that he has a right to more process under the

INA. *Id.* Upon careful consideration, the Court concludes that Petitioner has demonstrated a likelihood of success on this claim.

By its terms, the INA first directs that "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." 8 U.S.C. § 1231(a)(1)(A). Section 1231(a)(6) of the INA then provides that an alien "may be detained beyond the removal period" if the alien "has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal" or in certain circumstances that are not relevant here.[6] *Id.* § 1231(a)(6). Otherwise, "[i]f the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General." *Id.* § 1231(a)(3).

In other words, the INA lays out only two possibilities after the 90-day removal period expires for a case like Petitioner's. Under § 1231, either (1) the alien remains in detention upon a finding that he or she is dangerous or a flight risk, or (2) he or she is subject to "supervision," which essentially permits the alien to be released on certain conditions.[7] As such, the plain text of the statute does not provide ICE with the authority to detain Petitioner without a finding that his release posed a risk of danger or flight.

[6] Section 1231(a)(6) permits detention beyond the removal period in only two other circumstances: when an alien ordered removed (1) is inadmissible, or (2) is removable on the basis of certain immigration violations, crimes, or public security reasons. 8 U.S.C. § 1231(a)(6). Because Petitioner was paroled into the United States and is not removable on any of the foregoing grounds, these circumstances are not relevant to his detention claims.

[7] Indeed, in *Zadvydas*, the Supreme Court recognized that § 1231 provides a "choice . . . not between imprisonment and the alien 'living at large,'" but "between imprisonment and supervision under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696.

Respondents counter that the INA's applicable regulations at 8 C.F.R. §§ 241.4 and 241.13 empower them to revoke Petitioner's 2002 release without making the necessary findings. *See* 8 C.F.R. § 241.4(*l*)(2); *id.* § 241.13(i)(2). But §§ 241.4 and 241.13 only apply to aliens who were initially detained or released following a final order of removal pursuant to the custody review procedures at § 241.4. *See id.* § 241.4(a) (explaining that ICE authorities "may continue an alien in custody beyond the removal period . . . pursuant to the procedures described in this section"); *see also id.* § 241.13(a) ("This section establishes special review procedures for those aliens who are subject to a final order of removal and are detained under the custody review procedures provided at § 241.4 after the expiration of the removal period."). In other words, Respondents may only revoke a release pursuant to §§ 241.4 and 241.13 if they had originally granted that release pursuant to § 241.4.

Here, in 2003, it is undisputed that Petitioner was neither detained nor released pursuant to § 241.4 following his final order of removal. Indeed, he was released in 2000 before his removal order became final. *See* Syed Decl. ¶¶ 7–8. His release, therefore, could not have been pursuant to § 241.4, which only applies to detention and release after a final order of removal. Because his release was not pursuant to § 241.4, Respondents cannot revoke his release under §§ 241.4. and 241.13.

Even assuming *arguendo* that Respondents had the authority to revoke Petitioner's release under § 241.4 in May 2018, they could not detain him without providing him with notice and an informal interview. *See generally* 8 C.F.R. § 241.4(*l*). Nor could they detain Petitioner without finding that he was "a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6). Detention to facilitate removal—even imminent removal—is not permitted beyond the removal period for an alien like Petitioner except upon such findings.

Id. Regulations cannot circumvent the plain text of the statute. *Cf. Succar v. Ashcroft*, 394 F.3d 8, 10 (1st Cir. 2005) (overturning a regulation as "inconsistent" with "the language and structure" of the INA).

To the extent that there is any ambiguity in the statute, the Court's conclusion that Respondents must make the proper findings is "buttressed by 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien,'" *I.N.S. v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)), as well as regulatory history. When it adopted § 241, the Department of Justice explained that it construed the INA "to authorize [the government] to continue to detain, beyond the 90-day removal period, criminal aliens and other aliens whose release would present a risk of harm to the community or of flight by the alien." Detention of Aliens Ordered Removed, 65 Fed. Reg. 80281-01, 2000 WL 1860526 (Dec. 21, 2000). Because Petitioner has no criminal convictions, he could only be detained in 2018 as an "alien[] whose release would present a risk of harm to the community or of flight by the alien." *Id.* But no hearing was held to determine the risks of Petitioner's release. Nor would a hearing be likely to find any risk, given Petitioner's strong family ties, relationship with the community, and lack of criminal record.

Contrary to Respondents' arguments, therefore, Petitioner's detention was not "consistent with the INA and applicable regulations." Resps. Opp. at 13. Accordingly, Petitioner is likely to succeed on his claim that Respondents had no authority to detain him.

ii. Arrest and Detention

Petitioner's second statutory claim is that he followed all the "regulations and government policies to legalize his status" by applying for adjustment of status, and, therefore, that his arrest and his subsequent detention "in the middle of this process" violate the INA and

applicable regulations. First Am. Pet. ¶ 52. The Court concludes that Petitioner has also demonstrated a likelihood of success on this claim.

The Court begins with the text. Under the INA, at 8 U.S.C. § 1255, Congress provides pathways to legal residency for certain classes of aliens. These pathways permit aliens not lawfully in the United States to "adjust" their status to legal permanent resident if they meet certain requirements. As an initial matter, for an alien to apply for adjustment of status, he or she must have been "admitted or paroled into the United States." 8 U.S.C. § 1255(a). If so admitted or paroled, the Secretary "may" adjust the alien's status to that of a permanent resident "if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." *Id.*

Several other restrictions apply, however. Aliens convicted of certain crimes are generally ineligible to apply for adjustment of status because they are deemed inadmissible, *see* 8 U.S.C. § 1182(a)(2), and, therefore, not "admitted or paroled into the United States" unless the Secretary can and does waive inadmissibility. Additionally, as relevant here, aliens who work without authorization or who are in unlawful immigration status cannot apply for adjustment of status, unless they are immediate relatives, such as spouses, of citizens. 8 U.S.C. §§ 1255(c), (k). Nor is an alien who voluntarily departs or is removed eligible to apply for adjustment of status within 10 years of the date of the departure or removal. 8 U.S.C. § 1182(a)(9)(A)(ii)(I).

Here, Petitioner is not barred by the INA's many restrictions. He was paroled into the country in 2000 and has no criminal record. First Am. Pet. ¶ 15. He is married to a United States citizen—a marriage Respondents have recognized as bona fide—and he has two citizen children. *Id.* ¶¶ 17–18, 28. Petitioner is, in short, the exact type of applicant that Congress

intended to benefit when it adopted and, over many years, repeatedly amended, the complicated statutory scheme governing the adjustment of status process. Respondents' actions frustrate that scheme.

As the Supreme Court has explained, "[s]tatutory construction is a holistic endeavor." *Smith v. United States*, 508 U.S. 223, 233 (1993) (internal alterations omitted) (quoting *United Savs. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd*., 484 U.S. 365, 371 (1988)). "Just as a single word cannot be read in isolation, nor can a single provision of a statute." *Id.* Rather, "in expounding a statute, [courts] [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)).

Here, read as a whole, the INA creates "a regulatory interstice." *Ceta v. Mukasey*, 535 F.3d 639, 646 (7th Cir. 2008). "Section 1255 and the amended regulation, 8 C.F.R. § 245.2(a)(1), afford [Petitioner] an opportunity to seek adjustment of status with the USCIS," but, at the same time, he risks removal before being able to complete the adjustment of status process. *Id.* Without court intervention, therefore, such as via a stay of removal, "the statutory opportunity to seek adjustment of status will prove to be a mere illusion." *Id*. at 647; *see also Kalilu v. Mukasey*, 516 F.3d 777 (9th Cir. 2008) (explaining that the BIA's denial of a motion to reopen "rendered worthless" an alien's ability to seek adjustment of status); *Sheng Gao Ni v. Bd. of Immigration Appeals*, 520 F.3d 125, 131 (2d Cir. 2008) (discussing *Kalilu*). The Court declines to read the INA in a way that nullifies its adjustment of status scheme.

The Court's interpretation is consistent with Congress's intent in drafting the INA and adopting this specific scheme. As the Second Circuit has explained, the INA's "prevailing

purpose" is to "implement[] the underlying intention of our immigration laws regarding the preservation of the family unit." *Nwozuzu v. Holder*, 726 F.3d 323, 332 (2d Cir. 2013) (quoting H.R. Rep. No. 82-1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680); *cf. I.N.S. v. Errico*, 385 U.S. 214, 220 (1966) (interpreting several 1957 amendments to the INA that created exceptions for immediate relatives of citizens as "plainly" evidencing an "intent . . . [to] keep[] family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.").

The INA's adjustment of status scheme is perhaps one of the statute's strongest articulations of Congress's considered public policy in favor of family unity and association. And as such, "[t]he immigration laws about adjustment of status are not a haphazard compilation of provisions; they are a calibrated set of rules that govern an area of national importance." *Succar*, 394 F.3d at 26. "The statutory scheme reflects Congress's careful balancing of the country's security needs against the national interests Congress wished to advance through adjustment of status proceedings." *Id.* at 10. Those "national interests" include the preservation of the family. *Id.* at 22 ("[I]n enacting section 1255(a) in 1960, Congress expressed an intent that eligible aliens be able to adjust status without having to leave the United States, to relieve the burden on the United States citizen with whom the aliens had the requisite family or other relationship."); *see also Matter of Ibrahim*, 18 I. & N. Dec. 55, 57–58 (BIA 1981) ("The Immigration and Nationality Act makes immediate relative status a special and weighty equity.").

Despite this carefully balanced adjustment of status scheme, Respondents argue that they have authority under § 1231(a)(6) to detain Petitioner beyond the removal period. Setting aside that § 1231(a)(6) only permits Respondents to detain Petitioner if he is determined to be a danger or flight risk, the plain text of § 1231 does not address how Respondents' authority to detain interacts with an alien's opportunity to adjust his or her status. Nor do Respondents address the relationship between the INA's adjustment of status provisions and § 1231. Instead, Respondents counter that Petitioner has not "shown that he cannot seek adjustment of status, or appeal administratively or judicially if adjustment is denied, after his removal." Resps. Opp. at 14. They also argue that Petitioner has not shown that he is "entitle[d] . . . to delay his removal pending administrative review of USCIS's denial of adjustment of status." *Id.*

However, if Petitioner is removed, any application for adjustment of status would be deemed abandoned, 8 C.F.R. § 245.2(a)(4)(ii)(A), and Petitioner could not re-apply for ten years, 8 U.S.C. § 1182(a)(9)(A)(ii). Absent a stay of removal, therefore, Respondents would have thwarted Petitioner's efforts to adjust his status for at least a decade and separated him from his wife and children, who are U.S. citizens. Additionally, Respondents' arguments fail to give due consideration to the INA's comprehensive statutory scheme for adjustment of status. The central question is: Did Respondents violate that statutory scheme when they invited Petitioner to an I-485 interview for a green card, but then, rather than interview him, arrested and detained him? Placed in proper statutory context, as explained above, the answer to this question is yes.

By inviting Petitioner to interview for his green card and arresting him at his interview appointment, Respondents deployed § 1255 to effectuate the opposite of its intended outcome for aliens like Petitioner. Respondents used the adjustment of status scheme as a sword when it was

intended to be used as a shield. As such, Respondents' arrest and detention of Petitioner "upset[] the balance Congress created." *Succar*, 394 F.3d at 10.

The Court rejects arrest and detention practices predicated on manipulating the laws that Congress has passed. Congress did not intend its carefully considered adjustment of status process for a select group of aliens to become a mechanism for "gotcha" law enforcement. Nor could it, without raising serious constitutional concerns. These type of bait-and-switch tactics are not only a perversion of the statute, but also likely offensive to "the concept of ordered liberty." *Rochin v. California*, 342 U.S. 165, 169 (1952) (internal quotation marks omitted).[8]

Because courts "must assume that when drafting the INA, Congress did not intend an absurd or manifestly unjust result," *Lockhart v. Napolitano*, 573 F.3d 251, 260 (6th Cir. 2009), the Court concludes that Congress could not have intended its silence on the interplay between adjustment and removal to permit ICE to exploit the former in service of the latter. Accordingly, Petitioner has demonstrated that his arrest at USCIS's offices and his detention pursuant to that arrest likely violated the INA.

iii. Legal Error

Finally, Petitioner argues that he was refused an I-485 interview and "that USCIS conflated eligibility and discretion" by considering positive or irrelevant factors to be adverse

[8] Indeed, Respondents' actions in this case appear to bear on substantive and procedural due process interests in freedom from restraint, *see Zadvydas*, 533 U.S. at 690 ("[F]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."), substantive due process interests in family preservation, *see Southerland v. City of New York*, 680 F.3d 127, 142 (2d Cir. 2012) ("Parents have a substantive right under the Due Process Clause to remain together with their children without the coercive interference of the awesome power of the state.") (internal alterations and quotation marks omitted)), and the First Amendment right to petition the government, *see* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. Rev. 667 (2003).

factors when adjudicating his § 1255 adjustment of status application. Pet. Reply, at 12. Essentially, Petitioner argues that USCIS misapplied the law, and, therefore, "unlike an agency's unwise exercise of given discretion," USCIS's denial of Petitioner's application is subject to judicial review and should be reversed. *Id.* Petitioner has shown a likelihood of success on the merits of this claim.

As an initial matter, the implementing regulations for adjustment of status under § 1255 state that "[e]ach applicant for adjustment of status under this part *shall* be interviewed by an immigration officer." 8 C.F.R. § 245.6 (emphasis added). Although the interview may be waived when "it is determined by [USCIS] that an interview is unnecessary," there is no indication that USCIS made such a determination. Indeed, the fact that USCIS invited Petitioner to its offices for an interview suggests that the agency determined the opposite. As such, the denial of an interview would appear to be a violation of the INA's implementing regulations.

Even if Petitioner had been given an interview, USCIS, he argues, committed legal error when adjudicating his adjustment application. Respondents do not contest the merits of Petitioner's claim. Resps. Opp. at 10. Respondents argue only that, as discussed in Part I, the Court does not have jurisdiction to review USCIS's decision because review of the agency's balance of favorable and adverse factors is barred by § 1252(a)(2)(B). *Id.* As the Court has explained, it agrees that it cannot review USCIS's "factor-balancing." *Rosario*, 627 F.3d at 61. But it retains jurisdiction to determine whether USCIS committed legal error. *Adebola*, 723 F. App'x at 44.

Here, USCIS labeled several factors as "adverse" in contravention of the statutory scheme that Congress created for alien relatives of U.S. citizens. *See* Ex. O. at 2. The agency considered the facts that Petitioner entered the country "without any documentation," worked

"without authorization,"[9] was denied asylum, and was unlawfully present after his removal order became final to be "adverse" factors. *Id.* But these facts, where applicable, bear on an alien's eligibility for adjustment of status. 8 U.S.C. § 1255(c). As a result, they do not appear to be proper factors at the discretionary stage, especially where Congress specifically created an exception to these bars to eligibility for immediate relatives of citizens. *Id.*

Labeling these facts as "adverse" would not only collapse the eligibility and discretionary stages of the adjustment of status process, but also render the reasons an alien must seek relief the same reasons he is barred from relief. Surely, Congress did not intend these results. Instead, as the Court explained above, Congress intended to facilitate family unity for a case like Petitioner's. *Succar*, 394 F.3d at 10. USCIS's mislabeling of eligibility factors as "adverse" factors at the discretionary stage are inconsistent with the text, structure, and history of the INA's statutory scheme for adjustment of status.

In concluding that USCIS committed legal error, the Court does not substitute its judgment for that of the agency. The agency has discretion to determine what weight to assign each factor and how to balance favorable factors against adverse ones. But the agency cannot label as "adverse" whatever facts it pleases. *Cf. Jen Hung Ng v. I.N.S.*, 804 F.2d 534, 540 (9th Cir. 1986) ("The inclusion of an improper factor in reaching a discretionary decision is grounds for remand."). And Respondents do not argue otherwise, seemingly conceding that USCIS confused the proper factors. Accordingly, Petitioner has demonstrated a likelihood of success on this claim.

[9] The agency considered Petitioner's employment to be both a favorable and adverse factor, but "a history of employment" and "the existence of property or business ties" have long been ruled to be favorable factors in similar adjustment of status contexts. *Matter of Marin*, 16 I. & N. Dec. 581, 584–85 (BIA 1978).

b. APA Claims

Petitioner brings a final statutory claim under the APA. Petitioner argues that Respondents have violated the APA's prohibition against agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." First Am. Pet. ¶ 58 (quoting 5 U.S.C. § 706(2)(A)). Because the Court has already concluded that Respondents' actions were "not in accordance with law," the Court likewise concludes that Petitioner has demonstrated a likelihood of success on his APA claim.

c. Constitutional Claims

Because Petitioner has demonstrated a likelihood of success on the merits of his statutory claims, the Court need not reach Petitioner's constitutional claims and declines to do so. *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 149–50 (2d Cir. 2001) ("It is axiomatic that the federal courts should, where possible, avoid reaching constitutional questions.").

B. Remaining Factors

a. Irreparable Injury

The parties do not explicitly brief whether the denial of a stay of removal and release would result in irreparable injury to Petitioner or other parties interested in the proceeding. Petitioner does explain that Petitioner's detention and possible removal "have resulted in an unimaginable emotional hardship on [his] wife and children." Pet. Reply, at 6. His wife is "being treated by a psychologist as a result of the mental distress her husband's detainment and threat of deportation has had on her and the two children." *Id*. at 1. She "shows symptoms of severe depression and anxiety, [and] keeps crying in the office." *Id.* at 7.

Although, under *Nken*, 556 U.S. at 435, removal is "not categorically irreparable," the Court concludes that Petitioner has demonstrated irreparable injury in this specific case. Unlike

in cases where a removed alien may continue to pursue a petition for review from afar, *see id.*, Petitioner's removal would close his application for adjustment of status and bar him from re-applying for a decade. Additionally, removal may perpetuate grave emotional and psychological harm to his wife and children by splitting apart their family, perhaps forever. Accordingly, this factor weighs in favor of a stay of removal and release.

b. Respondents' Injury and Public Interest

As explained above, the final two factors "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. Here, Respondents argue that granting Petitioner's requests "would harm the government and the public by delaying the enforcement of United States law." Resps. Opp. at 15. Respondents contend that "[t]here is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and 'permit[s] and prolong[s] a continuing violation of United States law.'" *Id.* (quoting *Nken*, 556 U.S. at 436).

Petitioner argues that the "brief delay" created by a temporary stay of removal does not interfere with the public interest in enforcement of the law, especially, where, as here, Respondents have permitted Petitioner to live in this country for sixteen years without attempting to execute the removal order. Pet. Reply, at 11. Additionally, Petitioner argues that a stay of removal and release "would serve the public interest in not rushing to tear apart a young family." *Id.* at 3.

Although the Court agrees with Respondents that there is a public interest in enforcing immigration law, this interest does not necessarily weigh in Respondents' favor. The public interest is in enforcing *all* the immigration laws, including the laws governing adjustment of

status. Here, Respondents' actions have likely violated those laws and, therefore, the public interest also lies in preventing Respondents' further abuse of the adjustment of status scheme.

Additionally, as Petitioner argues, there is a public interest in maintaining families together and, indeed, in avoiding extreme hardship to Petitioner's citizen wife and children. The right to family integrity and association is reflected in the very statutes at issue in this case. The public interest in executing removal orders is outweighed where, as here, Petitioner is a law-abiding person, a resident in this country for eighteen years, a husband to a citizen wife, and a father to citizen children. Accordingly, the Court concludes that all factors counsel in favor of a stay of removal and release.

CONCLUSION

For the foregoing reasons, the Court concluded on June 20, 2018, that a stay of removal and release from custody pending the resolution of Petitioner's habeas petition were warranted to permit Petitioner to vindicate his rights and prevent irreparable injury.

SO ORDERED.

Dated: August 2, 2018
New York, New York

ANALISA TORRES
United States District Judge

Exhibit E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Pablo Antonio VILLAVICENCIO CALDERON,

Petitioner,

v.

Jefferson B. SESSIONS III, in his official capacity as the Attorney General of the United States; Kirstjen NIELSEN, in her official capacity as Secretary of Homeland Security; Thomas DECKER, in his official capacity as New York Field Office Director for U.S. Immigration and Customs Enforcement; and the U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondents.

18 Civ. 5222 (PAC)

OPINION AND ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

This action is about an undocumented immigrant who has been detained by Immigration and Customs Enforcement ("ICE") pending deportation. Petitioner, Pablo Antonio Villavicencio Calderon, unlawfully entered the United States in 2008. Subsequently, at an immigration proceeding in March 2010, he agreed to voluntarily depart the country by July 15, 2010. But Petitioner overstayed his welcome. Petitioner has continued to reside in this country, and as a result, the order of voluntary departure has been converted into a final order of removal.

Although he stayed in the United States unlawfully and is currently subject to a final order of removal, he has otherwise been a model citizen. Petitioner married Ms. Sandra Milena Carmona Chica, a United States citizen. He now has two children, both of whom are United States citizens. He has no criminal history. He has paid his taxes. And he has worked diligently to provide for his family.

Petitioner seeks to continue contributing to his family and community, and to that end, he commenced the process of regularizing his immigration status to become a lawful permanent resident. Specifically, he commenced the process of obtaining a provisional unlawful presence waiver, which is an initial step toward immigration status adjustment. In February 2018, Ms. Chica filed, on Petitioner's behalf, with the U.S. Citizenship and Immigration Services ("USCIS"), a petition for alien relative ("Form I-130"), requesting that USCIS recognize Petitioner as Ms. Chica's spouse. USCIS, an agency within the U.S. Department of Homeland Security (the "DHS"), is currently processing the I-130 petition, and has scheduled an interview for Petitioner. Once Form I-130 is approved, Petitioner plans to apply for permission to reapply for admission into the United States ("Form I-212") and, subsequently, for a provisional unlawful presence waiver ("Form I-601A"), as outlined in regulations promulgated by the DHS. *See infra*, pp. 13–14.

The prospect of regularizing his immigration status was set back when, on June 1, 2018, while making a pizza delivery at Fort Hamilton in Bay Ridge, Brooklyn, base security found that Petitioner had an outstanding warrant of deportation. He was held by base security until he was turned over to ICE, a law enforcement agency within the DHS, and since then, he has been detained by ICE at the Hudson County Correctional Facility in Kearny, New Jersey. ICE seeks to remove Petitioner to his country of origin, Ecuador.

On Saturday, June 9, 2018, Petitioner filed this petition for a writ of habeas corpus under 28 U.S.C. § 2241, requesting the Court to order Jefferson B. Sessions III, Kirstjen Nielsen, Thomas Decker, and the DHS ("Respondents")[1] to: (1) release him from custody; (2) enjoin

[1] Respondent Jefferson B. Sessions III is named in his official capacity as the Attorney General of the United States (the "Attorney General"). Respondent Kirstjen Nielsen is named in her official capacity as Secretary of Homeland Security in the DHS (the "Secretary"). Respondent Thomas Decker is named in his official capacity as the Field Office Director of the New York Field Office for ICE within the DHS (the "Director").

Respondents from removing him from the New York City area; and (3) stay his removal from the United States pending resolution of this petition. ECF 1. Petitioner asserts five claims, including that his present detention and impending removal violate the Administrative Procedure Act ("APA") and the Fifth Amendment.

Judge Nathan, sitting as the Part I judge, enjoined Respondents from transferring Petitioner from the New York City area and from transferring the Petitioner from the jurisdiction of the New York Field Office of the Office of Enforcement and Removal operations. She set July 20, 2018 as the hearing date, which was later adjourned to July 24, 2018. On that day, the Court heard oral argument from both parties and considered their arguments and submissions. The Court granted the petition for a writ of habeas corpus and Petitioner was immediately released.[2] This opinion explains why the petition was granted.

It should not be difficult to discern that families should be kept together rather than be separated by the thoughtless and cruel application of a so called "zero tolerance" policy. This is especially so where the organization seeking removal has also provided a pathway for a person in Petitioner's position to regularize his immigration status with minimal disruption to his family life. Petitioner should be allowed to pursue the pathway. He deserves it due to his hard work, his dedication to the family, and his clean criminal record. Rather than provide him with this opportunity, however, Respondents inexplicably want to remove him. There is no justification for this mercurial exercise of executive power. Justice demands that Petitioner be accorded an opportunity to pursue the relief the law allows. Anything less would violate the APA and the

[2] Before his release, Petitioner was directed to sign an Order of Supervised Release. Respondents claim that the Order of Supervised Release is not in conflict with the Court's order and seek the Court's approval for the supervised release. ECF 25. The Court disagrees. Petitioner shall not be subject to supervised release while the stay of removal is in force. *See infra*, pp. 17–18.

U.S. Constitution. So long as Petitioner is pursuing the relief the law allows, he may not be removed.

DISCUSSION

Petitioner seeks an order releasing him from custody and staying his removal until he exhausts his right to pursue a provisional unlawful presence waiver, an initial step towards his immigrant status regularization. Petitioner contends that his detention and impending removal violate his due process right and the APA because the detention and the impending removal interfere with his opportunity to seek the waiver. Petitioner seeks a fair opportunity to engage in the immigration process that the DHS itself has promulgated for someone in his precise position.

Respondents oppose this sensible request for relief. Respondents contend that the Southern District of New York is not proper venue for the instant petition; and even if it were, the Court lacks jurisdiction to review the Petitioner's claims. Respondents also challenge the merits of the claims.

For the reasons set forth below, the Respondents' arguments are rejected, and the petition is granted.

I. Venue

"Congress has granted federal district courts, 'within their respective jurisdictions,' the authority to hear applications for habeas corpus by any person who claims to be held 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (quoting 28 U.S.C. §§ 2241(a), (c)(3)). "The question whether the [Court] has jurisdiction over [a] habeas petition breaks down into two related subquestions. First, who is the proper respondent to that petition? And second, does the [Court] have jurisdiction over him or her?" *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004).

A. ***Petitioner has Named Proper Respondents.***

The federal habeas statute provides that the proper respondent to a habeas petition is "the person who has custody over" the petitioner. 28 U.S.C. § 2242. Generally, "the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official," *Padilla*, 542 U.S. at 435, but not in the immigration context. In the immigration context, it may be said that the "immediate custodian" rule does not control, and its applicability depends on whether the petitioner challenges the present physical detention (*i.e.*, a "core" habeas challenge) or other statutory or constitutional violations (*i.e.*, a "non-core" habeas challenge).[3]

For a non-core habeas challenge, courts in this circuit have consistently held that the proper respondent is a person or entity that has *legal custody* of the petitioner, also known as a "legal custodian." *See Garcia–Rivas v. Ashcroft*, 2004 WL 1534156, at *1 (S.D.N.Y2004); *Batista–Taveras v. Ashcroft*, 2004 WL 2149095, at *2 (S.D.N.Y. 2004); *Somir v. United States*, 354 F.Supp.2d 215, 217–19 (E.D.N.Y. 2005).

For a core habeas challenge, however, courts are divided. "[A] 'clear majority' of courts in this circuit have held that the 'immediate custodian' rule applies" even in the immigration context. *Singh v. Holder*, 2012 WL 5878677, at *2 (S.D.N.Y. 2012) (quoting *Zhen Yi Guo v. Napolitano*, 2009 WL 2840400, at *3 (S.D.N.Y. 2009)).[4] But its application has not been universal. *See Farez-Espinoza v. Chertoff*, 600 F.Supp.2d 488 (S.D.N.Y. 2009); *Reyes-Cardenas v. Gonzales*, 2007 WL 1290141 (S.D.N.Y. 2007).

[3] The Supreme Court and the Second Circuit has declined to decide whether the immediate custodian rule governs immigration cases. *Padilla*, 542 U.S. at 435 n. 8; *Henderson v. INS*, 157 F.3d 106, 128 (2d Cir. 1998).
[4] *See also Fortune v. Lynch*, 2016 WL 1162332 (S.D.N.Y. 2016); *Adikov v. Mechkowski*, 2016 WL 3926469 (S.D.N.Y. 2016); *Concepcion v. Aviles*, 2015 WL 7766228 (S.D.N.Y. 2015); *Phrance v. Johnson*, 2014 WL 6807590 (S.D.N.Y. 2014); *Santana v. Muller*, 2012 WL 951768 (S.D.N.Y. 2012).

Here, Petitioner brings both core habeas challenges (First and Second Causes of Action) and non-core habeas challenges (Third, Fourth, and Fifth Causes of Action), and asks the Court to apply the legal custodian rule to both types of challenges. Petitioner, in effect, asks the Court to depart from the clear majority rule for core challenges and conclude that the proper respondents here are the legal custodians regardless of the type of challenge.

The Court agrees with Petitioner. "[T]he appropriate respondent in a habeas suit[] depends primarily on who has power over the petitioner and … on the convenience of the parties and the court." *Henderson*, 157 F.3d at 122. "[T]he convenience of the parties and the court" disfavors selectively applying the immediate custodian rule for core challenges. *Id.* Since the non-core challenges predominate, it simply makes no sense to apply the legal custodian rule to the non-core challenges and the immediate custodian rule to the core challenges, and then litigate in separate venues. In these circumstances, "the convenience of the parties and the court" favors applying the same custodian rule to both the core challenges and non-core challenges[5], *id.*, and because the predominant non-core challenges clearly belong to legal custodians, the core challenges go along, as well.

It is also clear that the power over Petitioner is vested in legal custodians, which, again, favors application of the legal custodian rule. *First*, the detention facility here is merely providing service to ICE, pursuant to an Inter-Governmental Service Agreement ("IGSA"). That agreement provides that detainees can be released and discharged only from and to properly identified ICE personnel. Detainees cannot be released without the express authorization of ICE; ICE, and only ICE, may authorize release of any detainee. ICE is in complete control of

[5] Respondents concede that they frequently handle habeas corpus petitions involving detainees at the Hudson County facility in the Southern District of New York. *See* 07/24/2018 Tr. 13:7–15.

detainees' admission and release. With due respect to the warden of the Hudson County Correctional Facility, the IGSA places the warden in the role of a mere functionary.

Second, the warden cannot respond to merits of the claims underlying the habeas petition. The warden simply does not have any information to answer for federal authorities, nor does the warden have any reason to litigate these claims here. "[F]or the great majority of habeas cases, which involve prisoners held in penal institutions, the [immediate custodian] rule made sense, and still does." *Id.* at 122. But when the warden of the detention facility has no literal power to produce the petitioner, and cannot provide meaningful answers to important factual and legal questions, there is no reason to apply the immediate custodian rule.

Third, the Court notes ICE's tendency to detain aliens in remote custodial facilities and then insist on applying the immediate custodian rule. *Id.* at 125. For example, children separated from their parents at the Mexican border are transported to New York where they are held. The Court does not believe that this is accidental or random.[6] Rather, the Court believes ICE may be attempting to take advantage of the immediate custodian rule to frustrate detainees' connections to their support system of families and friends; retention of competent immigration counsel; and effective participation in the proceedings. This is not an appropriate for application of the immediate custodian rule.

This Court is not the first to conclude that legal custodians are proper respondents under appropriate circumstances. As *Henderson* noted, "the rules treating the immediate custodian as the only proper respondent and that person's situs as the sole correct venue have not been applied

[6] This behavior calls to mind that one of the grievances, cited by Jefferson in the Declaration of Independence, was the trial of colonists in "remote locations." Declaration of Independence (U.S. 1776) ("For transporting us beyond Seas to be tried for pretended offences."). Immigration was even then a critical issue; and Jefferson also complained of the Crown's "obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither …" *Id.*

consistently or in a rigid fashion." *Id.* at 124. The Supreme Court took a "flexible approach" in several habeas cases to hold that a legal custodian was a proper respondent "for the limited purposes of habeas corpus jurisdiction." *Id.* at 125 (quoting *Strait v. Laird*, 406 U.S. 341, 346 (1972)). Other courts in this district have also followed a similar flexible approach. *See Farez-Espinoza*, 600 F.Supp.2d 488; *Reyes-Cardenas*, 2007 WL 1290141.

Accordingly, the Court concludes that in the immigration context, when a petitioner is detained in a local facility pursuant to an IGSA with a federal agency; and the immediate custodian must seek the agency's authorization for admission or release of detainees; and further has neither knowledge nor interest in key questions, then legal custodians are proper respondents to both core and non-core challenges. Under this rule, the named respondents, who are legal custodians of Petitioner, are proper respondents to this petition.[7]

B. ***The Court has Jurisdiction over Petition.***

"[A] district court acts within its respective jurisdiction within the meaning of § 2241 as long as the custodian can be reached by service of process." *Rasul v. Bush*, 542 U.S. 466, 478–79 (2004) (internal modifications omitted). Thus, as long as Respondents can be reached by service of process under the New York law, this Court has jurisdiction. *See* Fed. R. Civ. P. § 4(e)(1).

None of the Respondents dispute that they are reachable by service of process under the New York law. Mr. Decker's office is located in New York, subjecting him to service of process. Mr. Sessions, Ms. Nielsen, and the DHS can all be reached by service of process. *See*

[7] Even if the immediate custodian rule were to govern core habeas challenges, venue would still have been proper here because objection to venue has been compromised. At least some of the Petitioner's claims are non-core habeas challenges (*e.g.*, Counts III, IV, and V), and proper respondents for such non-core habeas challenges are legal custodians. *See supra* p. 5. Accordingly, at least for the non-core habeas challenges, venue is proper in this district. Further, Respondents did not disagree that core and non-core habeas challenges should be reviewed together by one court. 7/24/2018 Tr. at 38:17–39:6. Accordingly, even if the immediate custodian rule ought to apply to core habeas challenges, objection to venue with respect to core habeas challenges (Counts I, II) has been compromised.

N.Y. C.P.L.R. §§ 302(a)(1), 313. Accordingly, the named Respondents are subject to this Court's jurisdiction, and the Court has jurisdiction over this habeas petition.

II. Subject Matter Jurisdiction

Before reaching the merits of Petitioner's claims, the Court must consider whether it has jurisdiction to adjudicate Petitioner's challenges. Respondents contend that 8 U.S.C. §1252 strips the Court of jurisdiction.

The Court disagrees. Petitioner seeks a judicial determination that: (1) he has a right to seek a provisional unlawful presence waiver; and (2) given that right, his detention and impending removal, notwithstanding such right, with no justification or explanation, violates his constitutional right and the APA. The Court has jurisdiction to review these limited issues.

A. 8 U.S.C. § 1252(g) Does Not Preclude Judicial Review.

Respondents contend that the Court lacks jurisdiction to review Petitioner's claims because 8 U.S.C. § 1252(g)[8] strips the Court of its jurisdiction. The jurisdictional bar of Section 1252(g) applies only to ICE's *discretionary* decisions in three enumerated categories ("commence proceedings, adjudicate cases, or execute removal orders"). *See Reno v. Am. Arab Anti–Discrimination Comm.*, 525 U.S. 471, 482–83 (1999). This section "does not bar all claims relating in any way to deportation proceedings," but rather serves to bar attempts to impose judicial constraints upon prosecutorial discretion pertaining to the three enumerated, discrete decisions. *Kwai Fun Wong v. United States INS*, 373 F.3d 952, 964 (9th Cir. 2004).

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

[8] Section 1252(g) provides "[e]xcept as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

order also has a right to seek relief made available by the DHS. The Court's review of ICE's legal authority is not foreclosed by 8 U.S.C. § 1252(g). *See e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001) (reviewing whether ICE has the statutory authority to detain an immigrant subject to a final removal order after the 90-day removal period).

Respondents' reliance on *Ragbir v. Homan* is misplaced. 2018 WL 2338792 (S.D.N.Y. 2018). In *Ragbir*, the petitioner asked the court to consider whether ICE had unconstitutionally decided to execute the order of removal against the petitioner on the basis of his protected speech. Judge Castel held that the court did not have subject matter jurisdiction to consider that question because the decision to remove the petitioner was a discretionary one, and Section 1252(g) strips the court's jurisdiction to review a challenge to a discretionary decision. *Id.* at *3. Ragbir's challenge to "the decision to execute the [removal] order" is fundamentally different from this Petitioner's challenge to ICE's *legal authority*. The review of the ICE's legal authority simply does not entail review of ICE's discretionary decision.

*B. **8 U.S.C. §§ 1252(a)(5), (b)(9) Do Not Strip District Court's Jurisdiction.***

Respondents also contend that under 8 U.S.C. §§ 1252(a)(5)[9], (b)(9)[10], the Court lacks jurisdiction to review Petitioner's claims because jurisdiction to review questions arising from a removal proceeding is vested in an appropriate court of appeals.

Sections 1252(a)(5) and (b)(9), however, do not strip the Court of its jurisdiction. These sections have been interpreted to strip federal district courts of jurisdiction to review either a

[9] Section 1252(a)(5) provides: "Notwithstanding any other provision of law (statutory or nonstatutory), . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter."
[10] Section 1252(b)(9) provides: "With respect to review of a final order of removal under subsection (a)(1), . . . [j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction . . . to review such an order or such questions of law or fact."

"direct" or "indirect challenge" to an order of removal. *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). But Petitioner's claims are neither direct nor indirect challenges to his order of removal. Petitioner concedes that the order of removal against him is valid and enforceable, and that, absent his right to seek a provisional waiver, Petitioner would be removed pursuant to his order of removal. *See* 6/9/2018 Tr. at 6:20–21 ("In this particular case, your Honor, we are not challenging the underlying order of removal."). He also concedes that he would be removed if he fails to obtain a provisional waiver:

> **THE COURT**: Mr. Forbes, let me ask you, what if that process did not yield the result that you are seeking? There is no guarantee that it will issue the result that you want, right?
> **MR. FORBES [Petitioner's attorney]**: That's absolutely correct. And we are not asking for --
> **THE COURT**: Then, if it fails, the petitioner will be removed, correct?
> **MR. FORBES**: That's correct, your Honor.

7/24/2018 Tr. at 18:2–10. Petitioner merely asks the Court to review whether ICE has the legal authority to remove Petitioner pursuant to an admittedly valid order of removal without affording him the opportunity to first engage in an immigration process that the DHS itself made available to people like him. That is not a challenge to the removal order.

The Court's conclusion is not inconsistent with *Delgado*. The plaintiff in *Delgado* sought "to force an adjudication on the merits of" an I-212 application that had been previously denied on a procedural ground, and the Second Circuit held that such a claim was an indirect challenge to an order of removal. *Delgado*, 643 F.3d at 55. But the plaintiff's claim in *Delgado* was fundamentally different from the Petitioner's claim here. The plaintiff's claim in *Delgado* was premised on more than a right to seek access to a lawful regulatory process; it was premised on a right to remain in the United States, that if USCIS were to reach the merits of her I-212 application, she would be granted the right to remain in the United States. That is not what Petitioner claims here. Petitioner claims only that he has a *right to seek access* to a lawful

regulatory process that the DHS makes available to people in his precise position, and seeks review of ICE's legal authority in executing an order of removal notwithstanding his right. Looked at another way, 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 claim of a right to remain in the United States. That is neither a direct nor indirect challenge to his removal order.[11]

Accordingly, the Court holds that Sections 1252(a)(5) and (b)(9) do not strip the Court's jurisdiction over the Petitioner's claims.

III. Violation of APA and Fifth Amendment of U.S. Constitution

Both the APA and the Fifth Amendment of the U.S. Constitution protect persons from an arbitrary governmental interference with the persons' rights and liberty. When a government agency makes available an immigration process to a class of persons but then deprive a member of the class a fair opportunity to engage in the process, with no explanation or justification, that is an arbitrary governmental interference. It is not unlike giving a person a job, and then taking away the tools necessary to perform the job. It is simply not right.

The Court concludes that Petitioner has a right to engage in DHS's process for obtaining a provisional unlawful presence waiver. That process completely covers the situation in which Petitioner finds himself. The Court further concludes that the execution of an outstanding removal order without any explanation or justification, in preference to Petitioner's right to seek

[11] A district court in the District of Connecticut reached the opposite conclusion under similar circumstances. In *Achbani v. Homan*, the plaintiff sought a stay of removal, claiming that "he has the right to be free from detention and removal during the pendency of his application for a provisional unlawful presence waiver and the filing of form I-601a." 2017 WL 4227649, at *4 (D. Conn. Sept. 22, 2017). Reasoning that the plaintiff was "claim[ing] a right to remain in the U.S.," the court held that the court lacked "jurisdiction under the reasoning of *Delgado*." *Id.* at *5. Respectfully, the Court is not persuaded by *Achbani*; in the Court's view, Petitioner here does not claim a right to remain in the United States.

a provisional unlawful presence waiver, is arbitrary and unjustified, in violation of the APA and the Fifth Amendment.

A. ***Petitioner has Right to Engage in Immigration Process Made Available to Him.***

i. Process for Obtaining Provisional Unlawful Presence Waiver

An alien who is not eligible to adjust his or her status in the United States must obtain an immigrant visa abroad. But if an alien travels abroad to obtain an immigrant visa while a final order of removal is pending against the alien, the alien may not return to the United States for up to 10 years even with a subsequently-issued valid immigrant visa *unless* the alien was previously granted an unlawful presence waiver of inadmissibility.

Typically, an alien cannot apply for a waiver of inadmissibility until after immigrant visa interviews are held abroad. But in 2013 and 2016, the DHS promulgated detailed regulations that permit certain individuals who are present in the United States to request from USCIS a *provisional* waiver of inadmissibility before departing the United States for consular processing of their immigrant visas. *See Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule*, 81 Fed. Reg. 50244, 50245 (July 29, 2016); *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule*, 78 Fed. Reg. 535, 536 (January 3, 2013). "This new process was developed to shorten the time that U.S. citizens and lawful permanent resident family members are separated from their relatives while those relatives are obtaining immigrant visas to become lawful permanent residents of the United States."[12] The provisional waiver is available to an alien who can demonstrate that the alien has no criminal record and is married to a United States citizen who would suffer without the alien's support in the United States. An outstanding final order of removal does not render an otherwise

[12] Provisional Unlawful Presence Waivers, https://www.uscis.gov/family/family-us-citizens/provisional-unlawful-presence-waivers (last visited Jul. 31, 2018).

eligible alien ineligible, as long as "the alien has already filed and USCIS has already granted … an application for consent to reapply for admission under section 212(a)(9)(A)(iii) of the Act and 8 CFR 212.2(j)." 8 C.F.R. § 212.7(e)(4)(iv).

DHS's regulations permit an eligible alien to obtain a provisional waiver in three steps. *First*, the alien's U.S. citizen relative (*e.g.*, a spouse) files a Form I-130 "Petition for Alien Relative" to request that the Government recognize the alien as the citizen's immediate relative. *See* 8 U.S.C. § 1154(a)(1)(A)(i). *Second*, the alien files a Form I-212 "Application for Permission to Reapply for Admission" to request permission to reapply for admission into the United States. *Third*, the alien files a Form I-601A "Application for Provisional Unlawful Presence Waiver" to request the provisional waiver of inadmissibility. An alien is granted a provisional waiver only if *each of the forms* are approved.[13]

ii. *Petitioner has Right to Apply for Provisional Unlawful Presence Waiver.*

When a government agency promulgates "[r]egulations with the force and effect of law," they supplement the bare bones" of federal statutes; the government agency must follow its own "existing valid regulations." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266, 268 (1954). The *Accardi* doctrine applies with particular force when "the rights of individuals are affected." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). Accordingly, under *Accardi*, when the Government promulgates a regulatory process for obtaining relief, a "right to seek relief" is created, even when there is no "right to the relief itself." *Arevalo v. Ashcroft*, 344 F.3d 1, 15 (1st Cir. 2003) (citing *Accardi*, 347 U.S. at 268).

Here, the DHS has promulgated, through a notice and comment process, detailed

[13] Petitioner is currently undergoing the first of the three-step process. Petitioner's wife filed the Form I-130 in February 2018, which is currently under review. On July 24, 2018, Petitioner was summoned for an interview on August 21, 2018.

regulations that make available a process for obtaining a provisional unlawful presence waiver of inadmissibility to aliens with outstanding final orders of removal. These regulations create a "right to seek" the provisional waiver even when there is no "right to the [waiver] itself." *Id.* Accordingly, the Court concludes that Petitioner has a right to apply for a provisional unlawful presence waiver.

B. ***Respondents have Violated the APA and the Fifth Amendment.***

The Court concludes that Respondents have violated the APA and the Petitioner's due process right by executing the Petitioner's order of removal with no explanation or justification notwithstanding the Petitioner's right to apply for a provisional waiver.

i. APA Violation

Under the APA, a court may "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Here, by detaining and attempting to execute Petitioner's order of removal, Respondents have attempted to strip the Petitioner's right to engage in an immigration process made available to him. Yet Respondents have provided no explanation or justification.

Respondents' attempted execution of an outstanding removal order, notwithstanding Petitioner's right to apply for the provisional waiver, is "not in accordance with law." 5 U.S.C. § 706(2)(A). Petitioner is not asserting a right to a provisional waiver; he is merely claiming "a right to try." Reply Mem. 21. The Court sees no reasoned justification for Respondents' actions, nor could Respondents provide any. *See* 7/24/2018 Tr. at 31:11–24. Instead, Respondents contend, quite erroneously, that they can wield unreviewable power to remove aliens, creating a family separation of up to 10 years, even though the DHS itself has granted a right to seek a

provisional waiver that would alleviate substantial hardship. Respondents show no concern for the rights of aliens that they themselves created. This unchecked exercise of power is exactly what the APA is designed to protect against. The Court therefore concludes that the Respondents have violated the APA by attempting to execute, with no explanation or justification, an outstanding order of removal against Petitioner that would, in effect, strip the Petitioner's right to seek a provisional waiver.

ii. *Due Process Clause Violation*

The Court reaches a similar conclusion under the Due Process Clause of the Fifth Amendment of the Constitution. The Due Process Clause requires that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. The Due Process Clause has been interpreted as a "protection of the individual against arbitrary action of government," *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998), which has both a procedural component protecting against the "denial of fundamental procedural fairness," *id.* at 845–46, as well as a substantive component guarding the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective," *id.* at 846. The Supreme Court has unequivocally stated that the due process right under the Fifth Amendment extends to aliens in removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."). As discussed above, Respondents have attempted to strip the Petitioner's right with no explanation or justification. That is a violation of due process. *See Sameena, Inc. v. U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) ("An agency's failure to follow its own regulations . . . may result in a violation of an individual's constitutional right to due process.").

The Court concludes that Respondents have violated the APA and the Due Process Clause of the Fifth Amendment. Accordingly, the petition for a writ of habeas corpus is **GRANTED**.

IV. Relief

The Court **ORDERS** Respondents to stay removal of Petitioner from the United States until Petitioner exhausts his right to seek a Provisional Unlawful Presence Waiver. Specifically, the Court orders Respondents to stay removal of Petitioner until the occurrence of one of the following events:

(1) Denial of Petition for Alien Relative on his behalf ("Form I-130");

(2) Denial of his Application for Permission to Reapply for Admission ("Form I-212");

(3) Denial of his Application for Provisional Unlawful Presence Waiver ("Form I-601A"); ***or***

(4) Approval of Forms I-130, I-212, ***and*** I-601A.

The Court further **ORDERS** Respondents to release Petitioner from custody while the stay of removal is in force. The Supreme Court has made it clear that, although the INA permits detention for a "period reasonably necessary to secure removal" beyond the statutorily authorized 90 days, "if removal is not reasonably foreseeable," the continued detention is unreasonable and no longer authorized by the INA. *Zadvydas*, 533 U.S. at 699–700.

To be clear, Respondents cannot subject Petitioner to an Order of Supervised Release while the release order is in force. Respondents contend that ICE's supervision would not contravene the Court's order and that the supervision is authorized by the INA. ECF 25. The Court disagrees. *First*, the Order of Supervised Release by ICE would be in conflict with the Court's order to release Petitioner from custody. "Custody" in the context of a federal habeas

statute includes supervised release. *See Scanio v. United States*, 37 F.3d 858, 860 (2d Cir. 1994). Accordingly, ICE's Order of Supervised Release would be in conflict with the Court's release order. Respondents do not have any authority to modify this Court's order. *Second*, contrary to the Respondents' claim, the INA does not authorized supervision here. The INA authorizes supervision only when the alien subject to a final order of removal is "pending removal." *See* 8 U.S.C. § 1231(a)(3) ("the alien, *pending removal*, shall be subject to supervision under regulations prescribed by the Attorney General." (emphasis added)). Here, the removal of Petitioner has been stayed, *see supra* p. 17, and thus the removal is no longer "pending." *Id.* Accordingly, Respondents do not have any supervision authority.

CONCLUSION

For the foregoing reasons, the Court grants the petition for a writ of habeas corpus. The Court concludes that Respondents have attempted to strip the Petitioner's right to seek a provisional waiver with no explanation or justification. That is a violation of the APA and the Petitioner's due process right. Accordingly, the Court orders Respondents to stay removal of Petitioner from the United States until Petitioner exhausts his right to seek a Provisional Unlawful Presence Waiver. Specifically, the Court orders Respondents to stay removal of Petitioner until the occurrence of one of the following events:

(1) Denial of Petition for Alien Relative on his behalf ("Form I-130");

(2) Denial of his Application for Permission to Reapply for Admission ("Form I-212");

(3) Denial of his Application for Provisional Unlawful Presence Waiver ("Form I-601A"); *or*

(4) Approval of Forms I-130, I-212, *and* I-601A.

The Court further orders Respondents to immediately release Petitioner from custody while the stay of removal is in force because removal is no longer reasonably foreseeable. Petitioner shall not be subject to ICE's supervision while the release order is in force.

Dated: New York, New York
August 1, 2018

SO ORDERED

PAUL A. CROTTY
United States District Judge

Exhibit F

Not for Publication

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HARRY PANGEMANAN, MARIYANA SUNARTO, ROBY SANGER, GUNAWAN ONGKOWIJOYO LIEM, individually and on behalf of all others similarly situated,	:	
Petitioners/Plaintiffs,	:	**Civil Action No. 18-1510 (ES)**
v.	:	**ORDER**
JOHN TSOUKARIS, Newark Field Office Director for Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, MATTHEW ALBENCE, Executive Associate Director For Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, THOMAS D. HOMAN, Acting Director of U.S. Immigration and Customs Enforcement, KIRSTJEN M. NIELSEN, Secretary of the U.S. Department of Homeland Security, JEFFERSON B. SESSIONS, Attorney General of the United States, CHARLES L. GREEN, Warden, Essex County Correctional Facility and ORLANDO RODRIGUEZ, Warden, Elizabeth Detention Center,	:	
Respondents/Defendants.	:	

SALAS, DISTRICT JUDGE

This matter having come before the Court upon Petitioners/Plaintiffs' Motion for a Temporary Restraining Order and Stay of Removal; and the Court having carefully reviewed all submissions made in support of the Motion; and Petitioners/Plaintiffs and Respondents/

Defendants having appeared before this Court on February 2, 2018; and the Court having considered the parties' arguments in open court on February 2, 2018; and the Court finding that an order is necessary to maintain the status quo until the Court determines whether it has jurisdiction over this matter, *see United States v. United Mine Workers of Am.*, 330 U.S. 258, 290 (1947); and for the reasons stated on the record and good cause having been shown,

IT IS on this 2nd day of February 2018,

ORDERED that Respondents/Defendants are hereby temporarily enjoined and prohibited from removing or causing the removal—or transferring or causing the transfer—from the United States of all named Petitioners/Plaintiffs in this action who have final orders of removal, who have been, or will be, arrested, detained or removed by ICE; and it is further

ORDERED that any such removals or transfers now pending are hereby STAYED and shall NOT proceed until further Order of this Court; and it is further

ORDERED that this Order shall apply to the removal of Petitioners/Plaintiffs and all members of the proposed class, defined as: All Indonesian nationals within the jurisdiction of the Newark ICE Field Office, with administratively final orders of removal predating 2009 and were subject to an order of supervision; and it is further

ORDERED that bifurcation is necessary such that issues of jurisdiction are determined first before proceeding to the merits; and it is further

ORDERED that Petitioners/Plaintiffs shall file an opening brief concerning jurisdiction by February 16, 2018; and it is further

ORDERED that Respondents/Defendants shall file a responsive brief concerning jurisdiction by March 2, 2018; and it is further

ORDERED that Petitioners/Plaintiffs shall file a reply brief concerning jurisdiction by March 9, 2018; and it is further

ORDERED that the Court will hold an in-person status conference, if necessary, within 7 days of issuing its Order concerning jurisdiction.

s/ Esther Salas
Esther Salas, U.S.D.J.

Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SHANTAL RAMSUNDAR,

Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States, KIRSTJEN NIELSEN, Secretary of the Department of Homeland Security, THOMAS E. FEELEY, Field Office Director, Buffalo Field Office Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, and JEFREY J. SEARLS, Facility Director, Buffalo Federal Detention Facility

Respondents.

18-CV-6430L

TEMPORARY RESTRAINING ORDER ON CONSENT TO PREVENT SHANTAL RAMSUNDAR'S REMOVAL FROM THE UNITED STATES

Upon consideration of Petitioner's Motion for Preliminary Injunctive Relief, the Petitioner's briefing, Respondents' opposition and briefing and oral argument, this Court finds that Petitioner shall be granted a further extension of the Temporary Restraining Order previously issued ex parte on June 13, 2018 (Dkt. #3) and extended on June 21, 2018 (Dkt. #10) in accordance with the Respondents' consent to such relief and that the Court need not and does not make a determination on the merits of the present motion for preliminary injunctive relief (Dkt. #2) at this time.

Accordingly, it is hereby ORDERED that, Respondents and all their respective officers, agents, servants, employees, attorneys, and persons acting in concert of participation with them are:

i) Enjoined and restrained from physically removing Petitioner Shantal Ramsundar from the United States of America until such time as the Board of Immigration Appeals decides Petitioner's pending motion to reopen, which was filed June 8, 2018, and, if such motion to reopen is denied, for ten days thereafter.

This Court has exercised its discretion to determine that no bond shall be required and that this Order shall be effective immediately.

IT IS SO ORDERED.

Dated: Rochester, New York
September 6, 2018

HON. DAVID G. LARIMER
United States District Judge