IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALYSE SANCHEZ, *et al.*,

Plaintiffs-Petitioners,

v.

KEVIN MCALEENAN, *et al.*,

Defendants-Respondents.

Civil No. 1:19-cv-01728-GJH

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION FOR PLAINTIFFS-PETITIONERS AND PROPOSED CLASS

INTRODUCTION

The Plaintiffs-petitioners respectfully move this court to preliminarily enjoin the government from detaining and removing eligible immigrants, including Plaintiffs-petitioners and members of the class, who seek to avail themselves of a process laid out by the U.S. government to obtain lawful immigration status in the United States. Numerous immigrants and their US citizen spouses in Maryland have been subjected to a bait-and-switch by the U.S. Department of Homeland Security, whereby DHS lures immigrants with required marriage interviews to the USCIS office in Baltimore, and snatches them away from their families, detaining them, and deporting them in violation of statutory and Constitutional law.

In an identical case, the Court issued a preliminary injunction on May 2, 2019 for Mr. Wanrong Lin and Ms. Hui Fang Dong, prohibiting DHS from removing Mr. Lin to China. What happened to Mr. Lin and Ms. Dong, and what has been happening repeatedly even after the Court issued the preliminary injunction, is that immigrants and their spouses are being arrested, detained and removed at interviews required of them in a process that would allow them to obtain lawful

immigration status. As this Court found, arresting immigrants at their marriage interviews is entrapment, it is a bait-and-switch, and the legal process that DHS deliberately set up for immigrants like Mr. Lin and Plaintiffs-petitioners in this case to obtain lawful immigration status, is "nullified if ICE agents can use the application process as a honeypot to trap undocumented immigrants who seek to take advantage of its protections." *Lin v. Nielsen*, No. 8:18-cv-03548-GJH, Order Granting Temporary Restraining Order, Nov. 19, 2019, 4.

These immigrant Plaintiffs-petitioners and class members, relying on federal regulations that remain fully in effect, 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 been detaining and deporting noncitizens who appear at interviews required as part of this legalization process. This Court, and 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 petitioners from custody. *Lin v. Nielsen*, No. 8:18-cv-03548-GJH, Order Granting Preliminary Injunction, May 2, 2019; *Calderon v. Nielsen*, 18-10225 MLW (D. Mass. September 21, 2018); *Martinez v. Nielsen*, 18-10963 (D. N.J., September 14, 2018).

Plaintiffs-petitioners respectfully ask this Court to order the release from custody all noncitizen Plaintiffs-petitioners who are subject to orders of supervision as a result solely of that Plaintiffs-petitioners' effort to obtain lawful status through the I-130 and provisional waiver process, and to enjoin the detention or removal of all of the noncitizen Plaintiffs-petitioners during the pendency of the lawsuit. Plaintiffs-petitioners also seek preliminary injunctive relief on behalf of the proposed class.

BACKGROUND

I. LEGAL BACKGROUND

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

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

Prior to 2013, the unpredictability of this process and long wait time outside the country deterred many noncitizen spouses from leaving the U.S. to consular process. *See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Proposed Rule*

[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).

("2013 Proposed Rule"), 77 Fed. Reg. 19902, 19906 (Apr. 2, 2012) ("many immediate relatives who may qualify for an immigrant visa are reluctant to proceed abroad to seek an immigrant visa"). For those who did depart, the long wait times abroad often caused their U.S.-citizen family members precisely the type of hardship that the waivers were intended to avoid. *Id.*

In 2013, USCIS addressed this problem by promulgating regulations that made it possible for the spouses of U.S. citizens who have been present in the U.S. without authorization to apply for a waiver of inadmissibility for unlawful presence *prior* to leaving the U.S. to consular process. *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives: Final Rule* ("2013 Final Rule"), 78 Fed. Reg. 536-01 (Jan. 3, 2013). This application is known as a stateside waiver. In 2016, the agency expanded the stateside waiver process to make it available to noncitizens with final orders of removal—like the members of the proposed class. *See Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule* ("2016 Final Rule"), 81 Fed. Reg. 50244, 50245 (July 29, 2016). Both regulations were promulgated through notice and comment.

The purpose of these amendments to federal regulations was to encourage people who would otherwise be reluctant to pursue lawful status — because it would require them to remain outside the United States for indefinite and potentially prolonged periods of time — to do so and to promote family unity during the process. 2013 Final rule, 78 Fed. Reg. 535, 536; 2016 Final Rule, 81 Fed. Reg. at 5024-01 (expansion of waiver program will "reduce[] separation time among family members" and bring about "humanitarian and emotional benefits derived from reduced separation of families"). By permitting noncitizens to obtain waivers in the U.S. prior to departing, the regulations reduce the time that noncitizen spouses must spend outside the U.S., separated from their families, and reduce "the financial and emotional impact on the U.S. citizen and his or her family due to the [noncitizen] immediate relative's absence from the United States." 2013 Proposed Rule, 77 Fed. Reg. at 19907; *see also 2016*

Final Rule, 81 Fed. Reg. at 50245-46. This "encourage[s] individuals to take affirmative steps" to obtain lawful status that they might not otherwise take, 2013 Proposed Rule, 77 Fed. Reg. at 19902-01, including an estimated 100,000 people who became eligible for the provisional waiver process when it was expanded in 2016. 2016 Final Rule, 81 Fed. Reg. at 50244.

It is important to also identify the humanitarian and emotional benefits that these regulations have particularly on immigrant communities that have systemically been disenfranchised. Poor immigrant communities, especially poor immigrant communities of color, must overcome inherent barriers in this process, such as a level of financial stability (the hiring of a lawyer to navigate the complicated legal process, the thousands of dollars in filing fees, the costs of travel to consular process) that many immigrants who are undocumented, or have final orders of removal, struggle to maintain. The regulations recognize that struggle, and the necessity of continuous income, avoiding the lasting trauma of family separation, and maintaining a family structure that would allow immigrant families to thrive as members of American society. In order to realize the humanitarian and emotional benefits that the regulations are meant to provide, ICE and other federal agencies must give meaning to those humanitarian and emotional promises and allow families to remain together while they navigate this process without detaining and deporting family members who are trying to succeed in American life.

II. STATESIDE WAIVER PROCESS

For noncitizen spouses with an outstanding order of removal, the process to obtain legal status via consular processing with 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. 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.

III. FACTS ABOUT PLAINTIFFS-PETITIONERS

A. Elmer Onan Sanchez Hernandez and Alyse Sanchez

Elmer Onan Sanchez Hernandez was born in Honduras in 1978 and his wife, Alyse Sanchez was born in the United States in 1988. Declaration of Alyse Sanchez at ¶ 1; Declaration of Elmer Sanchez at ¶ 1 attached hereto as Exhibit A. They married on August 7, 2013 and have two U.S. citizen children together: Aaron, who is three years old, and Matthew who is two years old. Declaration of Alyse Sanchez at ¶ 1. Elmer owns and works at a home remodeling company called Sanchez Painting and Remodeling LLC and Alyse works as a receptionist at a veterinary hospital. *Id.*

Elmer was ordered removed on September 6, 2005 because he never received notice of his immigration hearing. *Id.* at ¶ 3. The couple submitted their I-130 petition and it was received by USCIS on September 4, 2018. *Id.* On May 7, 2019 they went to their marriage interview at the Baltimore USCIS office. *Id.* They have completed the application for their I-212 and will be submitting their application in the near future. Declaration of Elmer Sanchez at ¶ 2 attached hereto as Exhibit A.

On May 7, 2019, Elmer, Alyse, their immigration lawyer, and an interpreter went to the interview, the USCIS officer asked questions about their marriage, and approved the I-130 petition on the spot. Declaration of Alyse Sanchez at ¶ 4. Alyse was then escorted out of the room because the USCIS officer said that he needed a supervisor to come and authenticate the case. *Id.* at ¶ 5. However, instead of a supervisor, ICE officers came to arrest Elmer, they asked how long Elmer

lived here, put him in handcuffs, and took him to the detention center without letting him see his wife or say goodbye. *Id.*

At the Frederick County Adult Detention Center, Elmer was placed in solitary confinement for a few days for unknown reasons, then moved into a small cell that housed four individuals. Declaration of Elmer Sanchez at ¶ 5 attached hereto as Exhibit A. The conditions of confinement were abusive and destructive to Elmer's health: officers would bring food at 5 o'clock in the morning and the prisoners would be given ten minutes to eat. *Id.* Any uneaten food was thrown in the trash in front of them. *Id.* Elmer was then transferred to a detention center in Pennsylvania, and finally to the Alexandria Staging Facility in Alexandra Louisiana. *Id.* at ¶ 6. In Louisiana, Elmer was given rotten food, spoiled milk, the lights were always on, no showers were allowed, and the air conditioning was on so high that the guards were wearing jackets. *Id.* There were television screens that constantly played videos of President Trump speaking to how he was going to deport everyone, with the effective purpose of extinguishing any hope the detainees might have of getting out and back to their families. *Id.* at ¶ 8.

Elmer tried to reopen his immigration case, but was denied by the immigration court in Harlingen Texas on June 3, 2019. *Id.* at ¶ 2. Elmer has no other option to obtain a Green Card except through the I-130 and provisional waiver process. *Id.*

After this case was initially filed on June 13, 2019, ICE agreed to return Elmer from Louisiana and release him to his family on an order of supervision on June 19, 2019. *Id.* at ¶ 10. Although Elmer is back home, he is still terrified that he will be put back in immigration detention and separated from his family. *Id.* at ¶ 11. When he arrived home, his kids ran to him yelling "Papi, papi!!" and do not understand what happened, or why he had to leave them. *Id.* The trauma inflicted on Elmer, Alyse, and their children is palpable: Elmer feels sad and anxious because of

what happened and exhibits symptoms of mental and emotional trauma stemming from the psychological torture of the separation from his family, and the conditions of his confinement. *Id.* at ¶ 13; Declaration of Alyse Sanchez at. ¶ 7–8. Alyse was desperate, went to crisis centers to cope, and had to lean on family to take care of the children so she could manage the stress and trauma of being separated from Elmer, and the children are confused, sad, and have had their lives disrupted because of what happened. Declaration of Alyse Sanchez at ¶ 7–11.

B. Jean Claude Nana and Amira Abbas Abdalla

Jean Claude Nana was born in Cameroon in March 1981 and his wife, Amira Abbas Abdalla was born in Sudan in February 1984. She became a naturalized U.S. citizen on December 10, 2014. Declaration of Jean Claude Nana at ¶ 1 attached hereto as Exhibit B; Declaration of Amira Abbas Abdalla at ¶ 1 attached hereto as Exhibit C. The couple married on April 14, 2017, and have known each other since about 2012 or 2013, after meeting at a mutual friend's birthday party. Declaration of Amira Abbas Abdalla at ¶ 1 attached hereto as Exhibit C. Jean Claude worked at Georgetown University Hotel as a maintenance engineer and Amira as a security officer for Allied Universal Baltimore. Declaration of Jean Claude Nana at ¶ 1 attached hereto as Exhibit B; Declaration of Amira Abbas Abdalla at ¶ 1 attached hereto as Exhibit C.

Jean Claude entered the U.S. with a B-1 visa on April 19, 2011, traveling through Gabon, and claimed asylum based on fear of political persecution, but was denied and ordered removed on May 3, 2016. Declaration of Jean Claude Nana at ¶ 3 attached hereto as Exhibit B. The Board of Immigration Appeals denied an appeal on February 17, 2017 and the U.S. Court of Appeals for the Fourth Circuit denied an appeal on October 12, 2017. *Id*. When Jean Claude's order of removal became final, his only option was to pursue legal status as the spouse of a U.S. citizen, Amira, through the I-130 and provisional waiver process. *Id*.

Amira petitioned on Jean Claude's behalf by filing an I-130 on June 1, 2017 and USCIS received the I-130 petition on September 12, 2017. *Id*. Jean Claude filed a Motion to Reopen in immigration court to reopen and challenge the removal order that had been entered against him, but the motion was denied. *Id*.

On August 22, 2018, Jean Claude and Amira went to the I-130 marriage interview at the Baltimore USCIS Office. *Id*. at ¶ 4. After the interview, Jean Claude was brought to another room where he was told he would be fingerprinted, but he was never fingerprinted. *Id*. Instead, two armed ICE officers arrested him and placed him in handcuffs. *Id*. After he was taken away, their immigration lawyer left the room to tell Amira what had happened. *Id*. Jean Claude was never given the chance to say goodbye to Amira. *Id*.

As a result of Jean Claude's detention, Amira had to move back into her parent's house because she could not afford to live on her own, and because Amira and Jean Claude helped support her parents financially, the parents have since had to move to a smaller home to deal with the financial impact of Jean Claude losing his job. Declaration of Amira Abbas Abdalla at ¶ 6 attached hereto as Exhibit C.

Jean Claude was held for nearly ten months in immigration detention, and was released on June 14, 2019 on an order of supervision when counsel in this case were notified of Jean Claude's imminent removal and negotiated with opposing counsel for his release. Declaration of Jean Claude Nana at ¶ 5 attached hereto as Exhibit B. The separation he endured, and the length of his detention has caused Jean Claude and Amira mental and emotional trauma, as well as financial hardships due to Jean Claude losing his job while in detention. Declaration of Jean Claude Nana at ¶ 7–8 attached hereto as Exhibit B; Declaration of Amira Abbas Abdalla at ¶ 7 attached hereto as Exhibit C.

C. Misael and Theresa Rodriguez Peña

Theresa Rodriguez Peña was born in January 1976 in the United States and is a U.S. citizen and Misael Rodriguez Peña was born in November 1980. Declaration of Theresa Rodriguez Peña at ¶ 1 attached hereto as Exhibit D. The two married on March 8, 2010. *Id.* Theresa works as a clerk at Royal Farms in Baltimore, Maryland, and Misael has worked in the construction industry and in restaurants in Maryland. *Id.* They have four U.S. citizen children together: Misael Jr., who is ten years old; Luis, who is nine years old; Sofia, who is six years old; and EliAna, who is four years old. *Id.* Misael has two other children who also live with them and are under their care: Maria, who is sixteen years old and Kevin, who is fourteen years old. *Id.*

Misael is from Honduras and has a final order of removal that was issued to him *in absentia*, on August 10, 2005 from an immigration court in San Antonio, Texas. *Id.* at ¶ 3, 7. He is eligible for a Green Card through the I-130 and provisional waiver process, as the spouse of a U.S. citizen. *Id.* at ¶ 4. On March 26, 2018, Theresa submitted an I-130 petition at the Baltimore USCIS office. *Id.* Their marriage interview was scheduled for May 6, 2018, but prior to the interview, their attorney, Mikhael Borgonos of the Esperanza Center of Catholic Charities in Baltimore, informed them of reports that ICE officers were arresting I-130 beneficiaries such as Misael during their marriage interviews. *Id.* They decided that Mr. Borgonos and Theresa would attend the marriage interview scheduled for May 6 without Misael, for fear that he might be arrested, detained, and deported. *Id.*

On May 6, 2019, the interviewer, Officer Byrd, asked where Misael was and Mr. Borgonos told Officer Byrd that Misael had would not attend the interview because USCIS and ICE have a practice of arresting people at their marriage interviews. *Id.* at ¶ 5. He also said to Officer Byrd

that USCIS has created a chilling effect for beneficiaries to attend these interviews by detaining and removing individuals with final orders of removal. *Id.*

When Theresa started to explain the bona fides of their marriage, Officer Byrd's supervisor, Ms. Baker, interrupted and halted the interview because Misael was not there. *Id.* at ¶ 6. She demanded to know where Misael was, causing Theresa to cry. *Id.* Mr. Borgonos again explained that Misael had not come because he was afraid that he would be arrested at the interview. *Id.* He further informed Ms. Baker that, per the recent ruling in *Lin v. Nielsen,* USCIS could not use the I-130 interview as a trap to detain and remove potentially eligible applicants. *Id.* Ms. Baker stated that Misael had a pending removal order from 2005 and Mr. Borgonos explained that the removal order was not relevant for the purpose of an I-130. *Id.* Theresa felt that in that moment, had Misael been there, he would have been arrested. *Id.* Officers Byrd and Baker ended the interview a mere 30 minutes after it began, and Theresa was not allowed to present any more information about the bona fides of their marriage. *Id.*

Theresa and Misael remain extremely anxious and fearful that, because Misael was not there at the interview, their I-130 petition will be denied and they will have to go through the process again and risk arrest. *Id.* at ¶ 7. The family would be devastated if Misael were deported back to Honduras. *Id.* The children are very scared that their father might be separated from them. *Id.* Theresa and Misael live in fear of the increased immigration raids they hear about on the news and are concerned about the psychological toll that this is taking on the family. *Id.*

D. Jose Carlos and Olivia Aldana Martinez

Jose Carlos Aldana Martinez was born in Mexico in January 1985 and Olivia Aldana was born in August 1994 in the United States and is a U.S. citizen. Declaration of Olivia Aldana at ¶ 1 attached hereto as Exhibit E. They met in June of 2017, when Olivia interviewed for a position

at an Outback Steakhouse, where Jose Carlos is the manager, began dating and married on February 24, 2018. *Id.* at 1–2. Olivia is now employed at a Dunkin Donuts, and Jose Carlos is still a Manager at Outback Steakhouse. *Id.* They have one U.S. citizen child together: Elizabeth, who was born in November 2018, and is eight months old. *Id.* They are also the caregivers for Jose Carlos' son and Olivia's step son, Liam, who is seven years old. *Id.* Since he was a toddler, Liam has dealt with developmental delays, ADHD, anxiety, and depression, and requires specialized services and care. *Id.* He has attended speech, occupational, and behavioral therapy appointments since he was three years old. *Id.*

Jose Carlos attempted to obtain legal status by filing for cancellation of removal, but the request was denied because the immigration judge found that he could not meet the continuous presence requirement. *Id.* at ¶ 3. He was issued a final order of removal by Judge Williams of the Baltimore Immigration Court on March 6, 2018. *Id.*

As the spouse of a U.S. citizen, and who is an immigrant not currently in removal proceedings, Jose Carlos is eligible for the provisional waiver process. *Id.* at ¶ 4. On May 21, 2018, Olivia submitted an I-130 petition to USCIS in Baltimore. *Id.* The interview was scheduled for June 14, 2019, but because their attorney Steven Planzer of the law firm Castaneda Planzer in Salisbury, Maryland, informed them of reports that ICE was arresting potential I-130 beneficiaries during their marriage interviews, they were nervous and did not want Jose Carlos to attend the interview. *Id.* They decided that Olivia alone would attend the marriage interview scheduled for May 6 to avoid arrest, detention, and deportation. *Id.*

During the I-130 interview on June 14, 2019, Olivia informed the interviewer that Jose Carlos was not present because he had to be at work. *Id.* at ¶ 5. The interviewer did not ask any additional questions and ended the interview. *Id.* Olivia was given a piece of paper and told by

the officer to write down that Jose Carlos could not be there and that USCIS would need to reschedule the interview. *Id.* Olivia wrote this down and left the statement with a woman at the front desk. *Id.*

Before leaving, Olivia told the interviewer that she was worried that Jose Carlos would be arrested at a future interview. *Id.* at ¶ 6. The interviewer told her that her husband would have to attend the rescheduled interview and that USCIS could not arrest anyone because they had no authority to do so, but did not say anything about ICE arresting people. *Id.*

The interview has not yet been rescheduled. *Id.* Since Olivia was not allowed to continue the interview on her own and prove the bona fides of their marriage, she and Jose Carlos will have to attend another interview and are simply waiting on a rescheduled date. *Id.*

Jose Carlos and Olivia remain extremely anxious and fearful that he might be deported. *Id.* at ¶ 7. They have trouble sleeping at night due to the constant worry that Jose Carlos will be deported, leaving Olivia to raise their infant daughter on her own. *Id.* Jose Carlos is also afraid that he will be arrested any time he leaves the house to go to work or pick up their son from his weekly therapy appointments. *Id.* They are afraid to tell Liam that his father might be deported because he would likely feel scared and confused. *Id.* In the last two years, Liam has made great strides in his development through therapy, and losing his father – the adult figure he trusts the most – would set him back significantly. *Id.* In addition, Jose Carlos is the primary breadwinner in the family. *Id.* His paycheck covers the family's most essential expenditures – rent, utilities, the car payment, and food – while Olivia's much smaller paycheck goes towards miscellaneous expenses. *Id.* Without Jose Carlos, they would be at risk of becoming homeless. *Id.*

E. Mwiti Muithi and Tatyana Muithi

Mwiti Murithi is a citizen of Kenya, and was born in May 1985. Declaration of Mwiti

Murithi at ¶ 1 attached hereto as Exhibit F. His wife, Tatyana Murithi, was born in the United States and is a United States citizen. *Id.* They met through Tatyana's sister, who was a classmate of Mwiti, started dating, then married on May 23, 2014. *Id.* at ¶ 2. Mwiti is a Technician at a pathology lab in Maryland that processes samples for skin cancer diagnosis and treatment and Tatyana is a Human Resources Generalist at Mary's Center, a community health center in Washington, DC. *Id.* at ¶ 1.

Mwiti came to the United States on an A-3 employment visa in July 2004 to work as a domestic servant for a Kenyan diplomat. *Id.* at ¶ 3. In 2006, he enrolled as a student at Montgomery College and in 2008, after his employment with the Kenyan consulate ended, he transferred to the University of Maryland College Park to study cell biology and molecular genetics. *Id.* He received an F-1 student visa on August 12, 2009. *Id.*

In 2010, while he was in school, he fell behind on his tuition payments and could not continue studying at UMD College Park, breaching his visa and triggering removal proceedings. *Id.* at ¶ 4. ICE arrested him on June 28, 2010, but he was released soon after with an ankle monitor. *Id.* He was granted voluntary departure by the immigration judge on December 8, 2010, and his ankle monitor was taken off, but he never departed. *Id.*

Because he failed to depart the country, his voluntary departure order was converted to a final removal order on April 7, 2011. *Id.* at ¶ 5. He was arrested on the evening of November 3, 2011 and detained at the Frederick County Detention Center for nine months before being released by ICE on August 17, 2012 due to ICE's inability to obtain travel documents for him. *Id.* He was able to gather enough funds to re-enroll in school and graduated with a Bachelor of Science in Molecular Biology and Genetics in May of 2017. *Id.*

Because he is the spouse of a U.S. citizen and not in removal proceedings, Mwiti is eligible to apply for provisional waivers and consular processing, and to obtain a Green Card. *Id.* at ¶ 6. On July 2, 2018, Tatyana submitted an I-130 petition to USCIS to the Potomac Regional Service Center in Arlington, VA, and the petition was transferred to the local USCIS field office in Baltimore. *Id.* An interview was initially scheduled for June 7, 2019. *Id.* Prior to the interview, Mwiti and Tatyana's immigration attorney, Eric Singer, of Singer Immigration Law Firm in Bethesda, Maryland, advised that ICE was arresting I-130 beneficiaries during their marriage interviews. *Id.* This made Mwiti and Tatyana very anxious and fearful, so their immigration lawyer postponed the interview. *Id.*

Mwiti and Tatyana have not yet received notice of a rescheduled interview, but expect that it will come soon. *Id.*

Both Mwiti and Tatyana are very worried that he will be arrested and deported. *Id.* at ¶ 7. The thought of being separated from Tatyana makes Mwiti very anxious and upset. *Id.* They want to start a family together, but have put off having children until later because they do not want to subject any children they have together to the fear that Mwiti might be deported and the resulting instability. *Id.*

F. Eric Ndula and Bibiana Ndula

Eric Ndula was born in February 1965 in Cameroon and his wife, Bibiana Ndula was born in Nigeria and immigrated to the United States. Declaration of Eric Ndula at ¶ 1 attached hereto as Exhibit G. She naturalized on May 14, 2010 and became a U.S. citizen. *Id.* They met at church in 2004, fell in love, and married on August 21, 2015. *Id.* at ¶ 2. Eric is a Machine Operator for a manufacturing company in Baltimore, and Bibiana is a Registered Nurse at Maxim Healthcare Services in Towson. *Id.* at ¶ 1. They have two U.S. citizen children together: Laura, who is almost

fourteen years old; and Kelly, who is ten years old. *Id.* They are also the primary caregivers for Bibiana's daughter – and Eric's step-daughter – Mary, who is eighteen years old. *Id.*

Eric came to the United States on May 14, 2000 to seek asylum. *Id.* at ¶ 3. He was denied, and appealed to the Board of Immigration Appeals, which denied his petition on November 13, 2002. *Id.* He appealed to the U.S. Court of Appeals for the Fourth Circuit, but it also denied his petition for review on January 13, 2004. *Id.* Eric's order of removal is now final, and because he is not currently in removal proceedings, and married to a U.S. citizen, he is eligible for a Green Card through the I-130 and provisional waiver process. *Id.* at ¶ 4.

On September 21, 2017, Bibiana submitted an I-130 petition to the USCIS office in Baltimore. *Id.* The interview was initially scheduled for August 24, 2018, but their attorney Mary Ann Berlin of the law firm Berlin & Associates, P.A. in Baltimore, Maryland, advised that ICE was arresting potential I-130 beneficiaries during their marriage interviews. *Id.* Eric and Bibiana decided to postpone the interview out of concern that he might be arrested. *Id.* The interview was rescheduled for September 17, 2018, but they postponed it again because they remained anxious that Eric might be deported. *Id.* The interview has been rescheduled for August 6, 2019. *Id.* They are still fearful that Eric will be arrested at this upcoming interview. *Id.* Ms. Berlin believes that if they tried to postpone this upcoming interview, the application would be considered abandoned. *Id.*[2]

Bibiana suffers from hypertension and sleep apnea and the stress caused by this situation has worsened her health. *Id.* at ¶ 5. Eric is scared about what might happen if he is deported back to Cameroon, where he has not lived for decades and would not be safe. *Id.* He came from a region

[2] Counsel has asked Defendants' counsel to agree not to arrest Mr. Ndula at his interview, so he may attend his interview on August 6, 2019. Counsel notes, however, that if Mr. Ndula is arrested at his interview, Counsel will file an emergency temporary restraining order in this case on his behalf.

that was once a part of British Cameroon; the political situation in Cameroon has rendered the region dangerous for non-French-speaking Cameroonians like Eric, who are being marginalized and killed by the Francophone majority. *Id.* Eric and Bibiana's children are old enough to understand what is happening and would be devastated if he were deported. *Id.*

G. The Proposed Class

Plaintiffs-petitioners are seeking to certify a class defined as any U.S. citizen and his or her noncitizen spouse who:

(1) has a final order of removal and has not departed the U.S. under that order;

(2) is the beneficiary of a pending or approved I-130, Petition for Alien Relative, filed by the U.S. citizen spouse;

(3) is not "ineligible" for a provisional waiver under 8 C.F.R. § 212.7(e)(4)(i) or (vi); and

(4) is within the jurisdiction of Baltimore ICE-ERO field office (*i.e.*, the state of Maryland).

See Am. Compl. ¶ 89 – 94.

ARGUMENT

The Court should grant a preliminary injunction enjoining ICE from detaining or removing any of the Plaintiffs-petitioners or any members of the proposed class, and ordering the release of those plaintiffs-petitioners and class members who are in ICE's custody or under an order of supervision, during the pendency of the I-130/provisional waiver process.

In order to grant this motion, the Court need not reach a final determination on any of the Plaintiffs-petitioners' claims, but must determine simply 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-petitioners 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).

I. <u>This Court Has Already Ruled That It Has Jurisdiction To Hear This Case</u>

The court has jurisdiction over the Petitioners' claims, and over this motion for a preliminary injunction enjoining class members' 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, as it did in *Lin v. Nielsen*, these provisions do not bar review. 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). As the Court found on May 2 in *Lin*, this Court should accept jurisdiction and find that a preliminary injunction is necessary here.[3]

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[3] In numerous recent analogous cases, district courts have determined that they have statutory jurisdiction over claims seeking to enjoin removal in order to effectuate statutory, regulatory, and Due Process rights. *See Pangemanan v. Tsoukaris*, 18-cv-1510 (D.N.J. Feb. 2, 2018) (ECF no. 2) (enjoining the removal of a group of Indonesian nationals with final orders of removal while their case was adjudicated); *Calderon v. Nielsen*, 18-10225-MLW (D. Mass. September 21, 2018) (ECF No. 159) (finding that the court had jurisdiction to hear case challenging DHS' attempts to remove petitioners from the US in violation of regulations allowing them to apply for provisional waivers of their inadmissibility); *Martinez v. Nielsen*, 18-10963 (D. of New Jersey, September 14, 2018) (ECF No. 25) (staying removal and ordering immediate release of petitioner with an outstanding removal order who was recently detained at his adjustment of status interview); *You v. Nielsen*, 18-cv-5392 (S.D.N.Y. June 20, 2018) (ECF no. 17) (same); *Villavicencio Calderon v. Sessions*, 18-cv-5222 (S.D.N.Y. June 9, 2018) (ECF no. 9) (enjoining removal from the New York City area of Petitioner who was detained on an outstanding order of removal despite having commenced the provisional waiver process); *Ramsundar v. Sessions*, 18-cv-6430 (W.D.N.Y. June 20, 2018) (ECF no. 8) (enjoining removal of petitioner for two months while her motion to reopen her asylum case was pending at the Board of Immigration Appeals); *see also Ragbir v. United States*, No. 2:17-CV-1256-KM, 2018 WL

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

1446407, at *11 (D.N.J. Mar. 23, 2018) (granting preliminary injunction enjoining removal for pendency of petitioner's coram nobis case). 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).

(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. Sanchez and Mr. Nana were released from detention, they are still subject to orders 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). Upon information and belief, there are numerous members of the class who were also released from immigration detention, but received orders of supervision where they must return to the Baltimore ICE office and check in. Plaintiffs-petitioners' 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. *Lin v. Nielsen*, No. 8:18-cv-03548-GJH, Order Granting Preliminary Injunction, May 2, 2019, 5–6 (rejecting 1252(a)(5) and (b)(9) as justifications to divest this court of jurisdiction because the meaning of "arise from" in *Jennings v. Rodriguez* would not cover the claims made in this case, specifically, the APA and INA claims that DHS is nullifying its own rules and regulations). *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 petitioners like Mr. Sanchez 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-petitioners' 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, Plaintiffs-petitioners' claim is also not barred by 1252(g). In *Lin,* this court recognized that the Attorney General's discretionary decision to remove Mr. Lin was not the subject of the challenge, but that Mr. Lin, like everyone in the present case, would inevitably have to self-deport if he used the provisional waiver process, and instead was challenging his inability to access the provisional waiver process that the government had made available to him per its own regulations. *Lin v. Nielsen*, No. 8:18-cv-03548-GJH, Order Granting Preliminary Injunction, May 2, 2019, 8. For this reason, 1252(g) does not preclude jurisdiction to hear this case which, as this Court recognized, poses purely legal questions, outside of what 1252(g) was meant to address.

Further, 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." *Lin v. Nielsen*, No. 8:18-cv-03548-GJH, Order Granting Preliminary Injunction, May 2, 2019, 8; *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 banc)* ("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 Plaintiffs-petitioners' 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-Petitioners Are Likely to Succeed on the Merits of their Claims, and This Court Has Already Ruled that Related Plaintiffs-Petitioners Are Likely to Succeed on the Merits of Their Claims

First, Plaintiffs-Petitioners are likely to succeed on the merits of their claims that detention and 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 Fifth Amendment. Additionally, members of the proposed class are also likely to succeed on the merits of their claims.

The regulations promulgated by DHS in 2013 and 2016 permit Plaintiffs-petitioners to do exactly what they set out to do here: seek a waiver of the ten year bar imposed by their unlawful presence and prior order of removal, while they remained at home with their family, such that they 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 Plaintiffs-petitioners and members of the proposed class, 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," 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.

Plaintiffs-petitioners Mr. and Ms. Rodriguez Peña, Mr. and Ms. Aldana Martinez, Mr. and Ms. Murithi, and Mr. and Ms. Ndula also intended to pursue a provisional waiver, but when their attorney informed them of the government's use of the I-130 interview to lure and arrest noncitizens, they were too scared to have their noncitizen spouse attend the interview, sacrificing their ability to present the strongest case for why they have a bona fide marriage and qualify for a grant of an I-130 petition. It is also clear that without the noncitizen spouse present, USCIS will not proceed with the interview, and will likely deny the I-130 petition. *See* Declaration of Olivia Aldana Martinez at ¶ 5–6 attached hereto as Exhibit E; Declaration of Theresa Rodriguez Peña at

¶ 6 attached hereto as Exhibit D. Plaintiffs-petitioners Mr. Rodriguez Peña and Mr. Aldana Martinez have been chilled in their ability to pursue a provisional waiver. Similarly, Mr. and Ms. Murithi and Mr. and Ms. Ndula have been chilled in their ability to pursue a provisional waiver because they have sought to postpone the interview precisely because they are fearful of arrest and are unsure whether to risk Mr. Murithi's and Mr. Ndula's arrest at the interview. Like Plaintiffs-petitioners and class members who were arrested at their I-130 interviews, Plaintiffs-petitioners and members of the proposed class who have not yet attended the I-130 interview because they are chilled from, and forced to abandon the provisional waiver process out of fear of arrest at the first step of the process, have had their Due Process rights violated.

In addition to the named Plaintiffs-petitioners, counsel for Plaintiffs-petitioners have been made aware of numerous other instances in which applicants with outstanding removal orders have been detained at I-130 interviews in Maryland, some of whom have likely been removed from the United States. Counsel for Plaintiffs-Petitioners have also been made aware of numerous instances in which U.S. citizens and their noncitizen spouses in Maryland have been afraid of attending their I-130 interviews, out of fear that they will be detained at the interview and removed. Declaration of Patricia Minikon at ¶ 8 attached hereto as Exhibit H.

Finally, the Plaintiffs-petitioners and the proposed class are likely to prevail in their claim that the defendants' action s 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. Sanchez, Mr. Nana, and members of the proposed class (and the Plaintiffs-petitioner in *Lin v. Nielsen*) at their 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, *Lin v. Nielsen*, No. 8:18-cv-03548-GJH, Order Granting Preliminary Injunction, May 2, 2019, 10.. In the decision granting a preliminary injunction, this Court stated that the "Defendants effectively used the I-130 interview to lure Lin to his arrest, preventing him from completing the provisional waiver process. . . [and have] taken a rule that was promulgated for one purpose and used it for the opposite purpose." *Id.* at 9. Further, "this is precisely the kind of arbitrary and capricious behavior that the APA was designed to prevent." *Id.* Like in *Lin*, 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 affecting everyone who is seeking immigration relief through the provisional waiver process.

The arguments and Court's reasoning in *Lin v. Nielsen* apply to the Plaintiffs-petitioners and the proposed class in this case. Like Ms. Dong, Plaintiffs Alyse Sanchez, Amira Abdalla, Theresa Rodriguez Peña, Olivia Aldana Martinez, Tatyana Murithi, and Bibiana Ndula submitted I-130 applications in connection with their husbands' efforts to pursue consular processing and provisional waivers. Mr. Sanchez and Mr. Nana were arrested at the couples' I-130 interviews,

were detained for over a month (Mr. Nana was detained for nearly ten months) and were released only through direct negotiation with opposing counsel, and remain in ICE custody through orders of supervision. *See* Declaration of Elmer Sanchez at ¶ 3, 10 attached hereto as Exhibit A; Declaration of Jean Claude Nana at ¶ 5 attached hereto as Exhibit B. The same misconduct by Defendants that rendered the provisional waiver program a nullity for Mr. Lin and Ms. Dong in *Lin v. Nielsen* has similarly rendered that program a nullity for the Plaintiffs-petitioners here and for the proposed class, in violation of the APA, INA, and Due Process. All of the Plaintiffs-petitioners are likely to prevail on the merits of their claims.

III. Plaintiffs-Petitioners and Proposed Class 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).

The Plaintiffs-petitioners will be irreparably harmed by the denial of an injunction barring their detention and 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."). 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). Separation through arrest and detention will similarly cause severe harm to the Plaintiffs and to the proposed class. Mr. Sanchez's near two month detention caused his wife grief to the point of having to go to a crisis center and trauma to their children, and caused Mr. Nana and his wife to lose their home because of the loss of income. Detention, like removal, separates the family in violation of the regulations intending for family unity during the provisional waiver process.

In this case, detention and removal will separate Plaintiffs-petitioners and members of the proposed class from their 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").

In its May 2 Opinion, the Court held in *Lin v. Nielsen* that Mr. Lin and Ms. Dong would both suffer irreparable harm in the absence of a preliminary injunction, finding in part that Mr. Lin "would be indefinitely separated from his wife and his three adolescent children," "his wife would suffer both the emotional harm of being separated from her husband and raising their children alone," and that she would also suffer "economic harm from losing her partner in their family-owned restaurant." *Lin v. Nielsen*, No. 8:18-cv-03548-GJH, Order Granting Preliminary Injunction, May 2, 2019, 10. The detention or removal of noncitizen Plaintiffs-petitioners or proposed class members would have an equally harmful impact.[4]

The irreparable hardship that precipitated the regulations is sadly evidenced by the harm already caused by the detention of Plaintiffs-petitioners Elmer Sanchez and Jean Claude Nana. Alyse Sanchez had to have her parents take care of her children while she figured out how to manage financially on her own income, and also went to crisis centers to deal with the stress and trauma of having her husband taken away from her. Elmer Sanchez was also traumatized by the separation from his family, and the psychological trauma of immigration detention after being arrested at the I-130 interview still haunts him. Jean Claude Nana and Amira Abdalla have also suffered financial hardship, losing their apartment and the necessary income to support Amira's parents and other members of their family.

Theresa Rodriguez Peña and Misael Rodriguez Peña are also terrified and uncertain of how to proceed given that they were not allowed to proceed with the I-130 interview without Misael

[4] Though the court was ruling on the removal of Mr. Lin (as the Defendants had already released him from custody following the TRO), the Defendants' detention of noncitizen Plaintiffs-petitioners or proposed class members during the pendency of this case obviously would have a substantially similar effect (and the detention was just as unlawful as the planned deportation).

present. Jose Carlos Aldana Martinez and Olivia Aldana Martinez, Mwiti Murithi and Tatyana Murithi, and Eric and Bibiana Ndula are also scared of what will happen at the I-130 interview, and have considered abandoning the process to avoid separation. *Id.*

Members of the proposed class will also suffer similar irreparable harm; moreover, the harm to the proposed class will be even more severe. Plaintiffs-petitioners' counsel is aware of numerous instances in which ICE has detained or removed members of the proposed class, even after Lin filed his lawsuit and the Court first found the government's conduct unlawful and issued the temporary restraining order in favor of Mr. Lin. It is likely that countless other individuals whom Plaintiffs' counsel has not identified and likely cannot identify have shared a similar fate. If the Defendants are permitted to continue detaining and removing members of the class during the pendency of this lawsuit, any final ruling by the Court in favor of the class and finding that the Defendants' conduct was unlawful will be moot for any individuals who have already been removed. It will be extremely difficult, if not impossible, for them to return to the United States and the benefits of the provisional waiver will have been lost to them. The Court's placement of reasonable restrictions on the Defendants' ability to detain and remove members of the class will simply maintain the status quo until the Court can render a final ruling on the merits of the lawsuit. *See English v. Ryland Mortg. Co.*, 2016 WL 6820365, at *2 (D. Md. Nov. 16, 2016) ("The purpose of a temporary restraining order … or a preliminary injunction is to 'protect the status quo and to prevent irreparable harm during the pendency of a lawsuit, ultimately to preserve the court's ability to render a meaningful judgment on the merits.'") (Hazel, J.) (quoting *In re Microsoft Corp. Antitrust Litig.,* 333 F.3d 517, 525 (4th Cir. 2003)).

IV. The Balance of Equities and Public Interest Militate Heavily in Favor of an 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).

This Court has already held in *Lin v. Nielsen* that "the balance of the equities also tips in favor of [Mr. Lin and Ms. Dong]," and an injunction "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." *Lin v. Nielsen*, No. 8:18-cv-03548-GJH, Order Granting Preliminary Injunction, May 2, 2019, 10. This reasoning applies equally to the Plaintiffs-petitioners in this case and to the proposed class. Any equity that the government may propose as a reason not to release any proposed class member who is currently in detention is outweighed by the government's purposeful violation of the rules and regulations' explicitly designed to maintain family unity during the provisional waiver process.

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

Far from facing harm, the government has an interest in keeping Plaintiffs-petitioners in the U.S. with their families 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").

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).

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 Plaintiffs-petitioners 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 and entrap individuals seeking to legalize their immigration status.

V. The Court Should Provide Relief that Protects Plaintiffs-Petitioners and Class Members from Undue Interference with Their Access to the Provisional Waiver Process

In light of Plaintiffs-petitioners' likelihood of success on the merits, and to prevent irreparable harm while this litigation proceeds, the Court should issue a preliminary injunction to effect the following:

With respect to the named Plaintiffs-petitioners and members of the proposed class, Defendants should be ordered to immediately release all noncitizen Plaintiffs-petitioners and

noncitizen members of the proposed class from ICE custody. This includes Mr. Elmer Sanchez and Mr. Jean Claude Nana, who are subject to ICE orders of supervision and are only subject to orders of supervision because of the Defendants' unlawful actions. Defendants should be ordered to immediately release all proposed noncitizen class members as well, who are either in immigration detention or subject to an order of supervision, and enjoin their removal.

Defendants should be enjoined from detaining and removing Plaintiffs-petitioners and members of the proposed class for the pendency of this lawsuit without authorization of this Court, and if exigent circumstances render detention prior to such authorization necessary to preserve public safety or prevent flight, notice of such detention must be provided to Plaintiffs-petitioner's counsel.

The USCIS Field Manual (the "Field Manual") supplies a ready model for injunctive relief. Recognizing that noncitizens with final orders of removal should not risk wholesale removal when they apply for benefits that the government has specifically made available to them, the Field Manual states that those noncitizens "shall not be arrested" except where the noncitizen's actions are "so egregious as to justify making an exception," including where the noncitizen "is the subject of an outstanding warrant of arrest for criminal violations," or is "a threat to the safety or well-being of another party." *See* USCIS (Field Manual) § 15.1(c)(2). These guidelines were created by USCIS to guide behavior for I-130 and other interviewees, and they could logically be adapted to protect the class and maintain the status quo in this case. Specifically, modeled upon the Field Manual's curtailment of *arrests*, a preliminary injunction should provide that a class member "shall not be *removed*" except where his or her actions are "so egregious" as to justify invoking one of the exceptions described in the Field Manual, and for reasons other than a noncitizen's final order of removal. And in order to ensure that any remedial order is applied fairly, a class member

threatened with removal should first receive notice (including notice sent to class counsel) before ICE determines whether the person will be removed or required to depart.

CONCLUSION

For the foregoing reasons, Plaintiffs-petitioners respectfully request that the Court issue a preliminary injunction.

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/s/

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