UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Antonio de Jesus MARTINEZ and Vivian MARTINEZ, Plaintiffs/Petitioners, v. KIRSTJEN NIELSEN Secretary, Department of Homeland Security THOMAS HOMAN Acting Director, Immigration and Customs Enforcement THOMAS DECKER Director, New York Field Office of ICE Enforcement and Removal Operations and RONALD EDWARDS Director, Hudson County Correctional Facility. Defendants/Respondents.	Civil Action No. 18-10963

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

INTRODUCTION

The Plaintiffs respectfully move this court for a temporary restraining order halting the government's imminent removal of Antonio Martinez – a longtime New York resident who is married to an American-citizen wife and who is the father of two American-citizen children – from the United States and ordering the government to release him from custody. Relying on federal regulations that remain fully in effect, he and his wife, Vivian Martinez, have begun the process of applying for a special waiver that permits noncitizens to remain in the United States while seeking legal status arising through their valid marriages to American citizens. Without notice and in direct contradiction to those regulations, immigration officials recently adopted a policy of detaining and deporting noncitizens who appear at interviews pursuant to this waiver process.

On April 27, 2018, the couple appeared at a federal immigration office in Manhattan for what they understood a routine interview to confirm the bona fides of their marriage, bringing along a family photo album and other evidence of their family life. At the end of the joint interview, officials asked Ms. Martinez to step out of the room, which she did without concern, thinking the officer now would be interviewing each of them separately. Instead, Mr. Martinez's lawyer later came out of the interview room and informed her that agents had seized her husband.

Mr. Martinez is now being held at the Hudson County Correctional Facility in Kearny, New Jersey, and faces imminent deportation to El Salvador. His Deportation Officer reports that El Salvador is issuing him a travel document today, June 22, meaning he may be deported imminently unless his removal is stayed.

In light of this dire situation, the plaintiffs-petitioners seek a temporary restraining order. The threat of Mr. Martinez's immediate deportation plainly poses a risk of irreparable harm, and the plaintiffs-petitioners can demonstrate a sufficient likelihood of succeeding on their claims that

deporting Mr. Martinez would violate the regulations that expressly authorize the waiver process he undertook, would violate related federal statutes, and would violate the Due Process Clause. Finally, considerations of public interest and a balancing of the equities favor the plaintiffs-petitioners. For all these reasons, they respectfully urge the Court to grant their motion for a temporary restraining order until this Court can fully address the merits of this case.

LEGAL BACKGROUND

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

Departure from the United States can trigger several grounds of inadmissibility, however. 8 U.S.C. 1182(a). Two of the most common apply to anyone who has left the U.S. after spending over a year here without authorization, 8 U.S.C. § 1182(a)(9)(B)(i)(II), 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

[1] The standard for an I212 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).

for a waiver of inadmissibility can itself take over a year, during which time a non-U.S. citizen spouse who has left the country must remain abroad. In most cases, this means a prolonged family separation.

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

In 2013, USCIS addressed this problem by promulgating regulations that made it possible for the spouses of U.S. citizens who had been present in the U.S. without authorization to apply for a waiver of inadmissibility for unlawful presence *prior* to leaving the U.S. to consular process. *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*: *Final Rule* ("2013 Final Rule"), 78 Fed. Reg. 536-01 (Jan. 3, 2013). This application is known as a stateside waiver. In 2016, the agency expanded the stateside waiver process to make it available to noncitizens with final orders of removal—like Mr. Martinez. *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 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 reduced the time that a noncitizen spouse would have to spend outside the U.S., and separated from their family, and reduced "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 would "encourage 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. Martinez became eligible for the provisional waiver process only after it was expanded in 2016. 2016 Final Rule, 81 Fed. Reg. at 50244.

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, which in New York takes several months. Fu-Polk Decl. ⁋ 8.

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"). This application also takes several months to adjudicate. Fu-Polk Decl. ⁋ 8.

Fourth, once the noncitizen obtains a provisional unlawful presence waiver, he or she must go abroad to appear for an immigrant visa interview at a U.S. consulate. 8 C.F.R. § 212.7(e)(3)(v). The departure from the U.S. executes the prior removal order. 8 U.S.C. § 1101(g); 8 C.F.R. § 1241.7. After the interview, if the Department of State determines no other ground of inadmissibility applies, it may issue an immigrant visa.

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

FACTS ABOUT PLAINTIFFS

The petitioners-plaintiffs, Antonio and Vivian Martinez, are a married couple who have been together for 14 years and married for two. Antonio Martinez Decl. ⁋ 3. They have two children together. Their daughter was born in New York on September 18, 2015 and their son was born on February 20, 2018, just two months before his father's detention. *Id.* at ⁋ 6.

Mrs. Martinez is a U.S. citizen who was born in Queens, New York. Mr. Martinez is a citizen of El Salvador who has had a removal order from the U.S. since 2003, when he was ordered

removed *in absentia* at the age of 19 after failing to successfully transfer the venue in his case from Texas to New York. *Id.* at ¶ 9. Mr. Martinez has no criminal history and has had no immigration contact since he entered the U.S. in 2003. He has consistently worked and paid taxes in New York. *Id.* at ¶ 7.

Mr. and Mrs. Martinez began the provisional waiver process in 2016 based on the understanding and belief that it would allow Mr. Martinez to waive his unlawful presence in the U.S. and ultimately depart the country for only a few weeks before returning with his residency. Vivian Martinez Decl. ¶¶ 10-11. The couple did not want Mr. Martinez to spend a long period separated from his family, during which they feared for his safety in El Salvador. *Id.* But after learning of the waiver process, Mr. and Mrs. Martinez were assured by their then-attorney that the waiver process would enable Mr. Martinez to consular process after only brief a departure from the U.S. Antonio Martinez Decl. ¶ 11. 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. Martinez with final orders of removal.

The couple was scheduled for an interview on their I-130 application at 26 Federal Plaza, New York, New York on April 27, 2018. Vivian Martinez Decl. ¶¶ 10-11. The interview notice indicated that the interview was solely to confirm the bona fides of the couple's marriage. *See* Vivian Martinez Decl. ¶¶ 11-12. At the conclusion of their interview on April 27, the interviewer asked Mrs. Martinez to leave the room briefly—a request she understood to be part of verifying the legitimacy of their marriage through separate questioning, *id.* ¶ 12—at which point two ICE agents entered the room and detained Mr. Martinez. Antonio Matrinez. Decl. ¶ 16. Another ICE employee at 26 Federal Plaza subsequently informed Mrs. Martinez that her husband's detention was pursuant to a "new policy" implemented in New York two to three weeks before. Vivian

Martinez Decl. ⁋ 13. The policy was announced through an internal memo and required that anyone with an outstanding order of removal be detained at their interview at USCIS. *Id.* The agent stated that had the couple been scheduled for an interview just a few weeks earlier, Mr. Martinez would not have been detained. *Id.*

Mr. Martinez has been detained at the Hudson County Correctional Facility in Kearny, New Jersey since April 27, 2018.

Mr. Martinez's detention and possible deportation have caused his wife and children significant and ongoing harm. Mrs. Martinez began suffering anxiety attacks and was recently prescribed medication for depression and anxiety. Vivian Martinez Decl. ⁋ 6. She has been unable to continue breastfeeding their newborn son. *Id.* at ⁋ 6. The couple's two-year old daughter, who has a close relationship with her father and for whom Mr. Martinez has been the primary caretaker since the birth of their son, regularly awakens at night screaming for her father and has developed night terrors. *Id.* at ⁋ 5. She has also undergone a significant change in behavior since he was detained. Mr. Martinez's mother, who is a Lawful Permanent Resident and resides in New York, also relied on him for financial support and for assistance in a range of tasks including managing services and evaluations for his younger sister, who is a U.S. citizen with special needs. *Id.* at ⁋ 9.

The trauma and hardship resulting from Mr. Martinez's detention were heightened by the extremely sudden and unexpected nature of his detention. *Id.* at ⁋ 13. The couple had no opportunity to plan for childcare or financial support, nor to prepare their children for a prolonged separation or say goodbye. Antonio Martinez Decl. ⁋ 16.

Consistent with what an ICE officer told Mrs. Martinez the day of her husband's detention, the spouses of several other U.S. citizens with outstanding removal orders have been detained at I130 interviews at the New York USCIS Field Office since April 2018. *See, e.g., You v. Nielsen*,

18-cv-5392 (S.D.N.Y. June 20, 2018) (enjoining removal and ordering release of petitioner detained at his I-130 interview).

Mr. Martinez is facing imminent removal to El Salvador. On June 20, 2018, his Deportation Officer confirmed with Mr. Martinez' current immigration counsel, Bryan Pu-Folkes, that the government of El Salvador has issued travel documents for him, and he will be scheduled for a removal flight as soon as space is available. Pu-Folk Decl. ¶ 3. His Deportation Officer further confirmed that ICE removal flights depart for El Salvador every few days. *Id.*

ARGUMENT

I. THE COURT SHOULD GRANT A TEMPORARY RESTRAINING ORDER.

The Court should grant a temporary restraining order enjoining ICE from removing Mr. Martinez from the New Jersey-New York area and ordering his release from custody during the pendency of the provisional waiver process.

In order to grant this motion, the Court need not reach a final determination on any of the Martinez's claims, but simply must determine whether they have pled their claims sufficiently to allow the Court time to fully adjudicate the pending claims. The Third Circuit considers four factors in determining whether to grant a temporary restraining order: "(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 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) (upholding grant of preliminary injunction).[2] These factors weigh heavily in favor of granting a temporary

[2] Courts in the Third Circuit apply the same standard for considering grants of temporary restraining orders and preliminary injunctions. *See, e.g. Int'l Foodsource, LLC* v. *Grower Direct Nut Co. Inc.*, No. 16 Civ. 3140, 2016 WL 4150748, at *6 (D.N.J. Aug. 3, 2016).

restraining order, because the Martinez's have a high likelihood of success on the merits, the hardship Mr. Martinez and his family are already facing is devastating, and the government will experience no hardship if ordered to comply with regulations and guidance it has itself promulgated.

A. The Petitioner-Plaintiffs Will Suffer Irreparable Harm If an Injunction Does Not Issue.

Mr. and Mrs. Martinez will be irreparably harmed by the denial of an injunction barring Mr. Martinez's removal from the U.S. and ordering his release during the pendency of the provisional waiver process. "Removal visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted." *Leslie,* 611 F.3d at 181 (quoting *Bridges v. Wixon,* 326 U.S. 135, 154 (1945)) (internal quotations omitted); 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 in this circuit 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. Martinez from his family for several years—precisely the hardship that DHS documented and addressed in the regulations creating the provisional waiver process. 2016 Final Rule, 81 FR 50244-01 (noting that consular processing, absent a stateside waiver, can cause "lengthy separations of immigrant visa applicants from their U.S. citizen or LPR spouses, parents, and children, causing financial and emotional harm"); 2013 Proposed Rule, 78 FR 536-01 ("DHS anticipates that the changes made in this final rule will result

in a reduction in the time that U.S. citizens are separated from their alien immediate relatives, thus reducing the financial and emotional hardship for these families").

The irreparable hardship that precipitated the regulations and that Mr. Martinez's removal will cause his family is sadly evidenced by the harm already caused since he was detained. His wife describes the impact of his detention on their two-year old daughter:

> Now, Kaylee screams for her dad every night and nothing I do seems to calm her down. She has started to have night terrors. When we visit Antonio in detention, he tries to reassure her that I will be there to keep her safe at night, but she still cries out for him, screaming, "I want daddy!"… Kaylee has also started throwing tantrums during the day and becomes inconsolable, especially in the late afternoon when Antonio used to come home from work.

Vivian Martinez Decl. ⁋5. Mrs. Martinez herself is similarly devastated. After Mr. Martinez was detained, she describes, "I started having anxiety attacks and feeling depressed… I'm now on medication for anxiety and depression and am seeing a psychologist. Because of the medication, I was forced to stop breastfeeding Aaron and my milk production has stopped." Id. at ⁋ 6. The family is not able to relocate with Mr. Martinez because of their lack of family support and the extreme violence in El Salvador, which is on par with that of many war zones. Antonio Martinez Decl. ⁋ 24.

B. The Martinez's Are Likely to Succeed on the Merits of Their Claims that Mr. Martinez Should Receive a Stay of Removal.

1. The Martinez's Are Likely to Succeed on the Merits of their Claims because Statutes, Regulations, and the Constitution Bar Mr. Martinez's Immediate Removal to El Salvador.

First, Petitioners 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.

The regulations promulgated by DHS in 2013 and 2016 permit Mr. and Mrs. Martinez to do exactly what they set out to do here: seek a waiver of Mr. Martinez'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 [I212] application for consent to reapply for admission"); 8 C.F.R. § 212.2(j) (providing for conditional approval of an [I212] 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. Martinez, the government has rendered these regulations at best a nullity and at worst an intentional trap. That is unlawful. Under 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); *Leslie v. Att'y Gen. of U.S.*, 611 F.3d 171, 175 (3d Cir. 2010) (discussing "long-settled principle that rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency").

And where rights implicate a fundamental right, the Third Circuit has held that no showing of prejudice is necessary to obtain relief. *Leslie*, 611 F.3d at 179. 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, 504–06 (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. Martinez at his interview, Antonio Martinez Decl. ¶ 16, and reported institution of a policy that, as of mid-April 2018, anyone attending an interview who has a prior order of removal will be detained and removed, *see* Vivian Martinez Decl. ¶ 13, have effectively abrogated the provisional waiver regulations and have done so *sub silentio* and without notice and comment. That is quintessentially arbitrary and capricious agency action.

2. The Court Has Jurisdiction to Temporarily Stay Mr. Martinez's Removal.

The court has jurisdiction over the Petitioners' claims, and this motion for a Temporary Restraining Order enjoining Mr. Martinez's removal under Art. I, § 9, cl. 2 of the United States Constitution (Suspension Clause); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § (All Writs

Act); 28 U.S.C. § 2201 (Declaratory Judgment Act); and 28 U.S.C. § 2241 (habeas corpus). Although the Government may argue that the INA's jurisdiction-stripping provisions bar review, these provisions do not bar review for the reasons below. More importantly, as the preliminary matter, there can be no question that the Court has jurisdiction to determine its own jurisdiction. *United States v. United Mine Workers of America*, 330 U.S. 258 (1947). In light of the imminent nature of Mr. Martinez's removal, the Court should accept jurisdiction to determine its own jurisdiction, and to allow time for a more thorough analysis of these issues.

In numerous recent analogous cases, district courts have determined that they have statutory jurisdiction over claims seeking to enjoin removal in order to effectuate statutory, regulatory, and Due Process rights. *See Pangemanan v. Tsoukaris*, 18-cv-1510 (D.N.J. Feb. 2, 2018) (ECF no. 2) (enjoining the removal of a group of Indonesian nationals with final orders of removal while their case was adjudicated); *You v. Nielsen*, 18-cv-5392 (S.D.N.Y. June 20, 2018) (ECF no. 17) (staying removal and ordering immediate release of petitioner with an outstanding removal order who was recently detained at his adjustment of status interview); *Villavicencio Calderon v. Sessions*, 18-cv-5222 (S.D.N.Y. June 9, 2018) (ECF no. 9) (enjoining the removal of the petitioner from the New York City area who was detained on an outstanding order of removal despite having commenced the provisional waiver process); *Ramsundar v. Sessions*, 18-cv-6430 (W.D.N.Y. June 20, 2018) (ECF no. 8) (enjoining removal of petitioner for two months while her motion to reopen her asylum case is pending at the Board of Immigration Appeals); *see also Ragbir v. United States*, No. 2:17-CV-1256-KM, 2018 WL 1446407, at *11 (D.N.J. Mar. 23, 2018) (granting preliminary injunction enjoining removal for pendency of petitioner's coram nobis case). As these decisions recognize, the Real ID Act cannot be read so broadly as to foreclose all district court review of non-discretionary legal claims.

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

Mr. Martinez's inability to access the petition for review process—because he does not challenge a final order of removal, *see Kumarasamy v. Attorney Gen. of U.S.*, 453 F.3d 169, 172 (3d Cir. 2006), *as amended* (Aug. 4, 2006)—necessarily vests jurisdiction over his claims with the district court. Where a petitioner like Mr. Martinez 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"); *cf. Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005) (the purpose of the statute was to prevent multiple challenges to an order of removal). As the First Circuit has explained, "section 1252(b)(9) is a judicial channeling provision, not a claim-barring one." *Aguilar v. ICE* , 510 F.3d 1, 9-12 (1st Cir. 2007).

Moreover, Mr. Martinez'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). 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 Mr. and Mrs. Martinez's claims, or in the alternative because if they do those provisions violate the Suspension Clause as applied, this court has jurisdiction over their case.

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

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

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

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

Mr. Martinez plainly presents neither a risk of flight nor a danger to the community. He has willingly provided DHS with his address, work history, and the intimate details of his life as part of a process to obtain lawful status that necessarily involves leaving the country at its conclusion. *Id*. ¶¶ 6-7, ¶ 19. He has every incentive to follow that process. Moreover, DHS has not suggested, nor would it have any basis to suggest, that he poses a danger to the community.

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

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

Yet DHS has failed to follow those regulations here. When a person's release under 8 U.S.C. § 1182(d)(5)(a) is revoked, the relevant custody regulation directs that "the alien will be notified of the reasons for the revocation of his or her release . . . [and] will be afforded an initial informal interview promptly after his or her return to [DHS] custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification." 8 C.F.R. §

241.4(l)(1). Mr. Martinez never received a notification stating DHS's reasons for suddenly detaining him, nor has he had an interview or other opportunity to respond to them or explain why his detention is unnecessary. Antonio Decl. ¶ . Moreover, the government's apparent justification for detaining Mr. Martinez—a new blanket policy of detaining anyone who arrives for an interview to pursue the provisional waiver process—finds no support in the regulations and violates his right to due process. The custody regulations provide a list of potential considerations to inform the discretionary decision to imprison a previously released individual, none of which is a blanket policy of detention. *See* 8 C.F.R. § 241.4(l)(3). Nor is imminent removal sufficient to redetain a person. *See* 8 C.F.R. § 241.4(l)(2) (listing bases for revocation of release); *see also Alexander v. Attorney Gen. U.S.*, 495 F. App'x 274, 277 (3d Cir. 2012) (holding that even where removal is imminent, detainee may be able "to prevail on an alternative ground predicated on regulatory non-compliance"). Indeed, the regulations explicitly provide for release under an order of supervision if DHS determines "that the alien would not pose a danger to the public or a risk of flight, without regard to the likelihood of the alien's removal in the reasonably foreseeable future." 8 C.F.R. § 241.13(b)(1) (emphasis added).

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

Cir. 1999) (holding that to comport with due process, custody review must entail "individualized analysis of the alien's . . . present danger to society and willingness to comply with the removal order").[3] Accordingly, Mr. Martinez is likely to prevail on his claims challenging his ongoing detention.

3. The Court has Jurisdiction to Determine Whether Detention is Unlawful

It is well-established that district courts have jurisdiction to review unlawful executive detention, both because the INA does not strip this jurisdiction from the courts and because the Suspension Clause requires such jurisdiction. *I.N.S. v. St. Cyr*, 533 U.S. 289, 305 (2001) (holding that the Suspension Clause protects noncitizens even if they lack immigration status in the U.S.).

D. Defendants/Respondents Will Not Suffer Greater Harm From a Preliminary Injunction.

The third *Highmark* factor—"whether there will be greater harm to the nonmoving party if the injunction is granted," 276 F.3d at 170–71—plainly weighs in favor of granting the temporary restraining order. 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). Far from facing harm, the government has an interest in keeping Mr. Martinez 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*,

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

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. Martinez, a hardworking, law-abiding spouse and father, will ultimately prevail in his attempts to obtain lawful status also militate in favor of his release and continued presence with his family. Antonio Martinez Decl. ¶¶ 7-8; Fu-Pol Decl. ¶ 8-9 (the fact that Mr. Martinez has no criminal record and a long history of residence in the U.S. and that his "family is already suffering significant hardship due to Mr. Martinez's detention" make him a strong candidate for the necessary waivers).

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

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

Granting a temporary restraining order will serve another vital public interest central to the purpose of the provisional waiver process: promoting public trust and the integrity of the provisional waiver process. The regulation is intended to encourage those in positions similar to Mr. Martinez'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.

CONCLUSION

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

Dated: June 22, 2018
Newark, NJ

Respectfully Submitted,

/s/ Liza Weisberg
Farrin Anello*
Alexander Shalom
Liza Weisberg
Jeanne LoCicero
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
89 Market Street, 7th Floor
P.O. Box 32159
Newark, NJ 07102
Tel: (973) 642-2084

Paige Austin*
Jordan Wells**
Christopher Dunn*
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor,
New York, NY 10004
Tel: (212) 607-3300

**Pro hac vice* application pending or forthcoming
** Admitted to New Jersey bar; application for admission to D.N.J. forthcoming