UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LILIAN PAHOLA CALDERON JIMENEZ, and LUIS GORDILLO, et al., Petitioners,	)	
vs.	)	Civil Action No. 18-10225-MLW
KIRSTJEN M. NIELSEN, et al., Defendants-Respondents.	)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

RULING

August 23, 2018
2:30 p.m.

John J. Moakley United States Courthouse
Courtroom No. 10
One Courthouse Way
Boston, Massachusetts 02210

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Mark L. Wolf, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Courtroom 10, Boston, Massachusetts, on August 23, 2018.)

THE COURT: Good afternoon. Would counsel please identify thelmselves for the record.

MR. PRUSSIA: Good afternoon, Your Honor. Kevin Prussia from Wilmer Hale on behalf of the petitioners.

MS. LAFAILLE: Good afternoon. Adriana Lafaille also for the petitioners.

MR. SEGAL: Good afternoon, Your Honor. Matthew Segal also for the petitioners.

MS SEWALL: Good afternoon. Michaela Sewall from Wilmer Hale on behalf of petitioners.

MR. COX: Good afternoon. Jonathan Cox from Wilmer Hale on behalf of petitioners.

MR. PROVAZZA: Good afternoon. Stephen Provazza from Wilmer Hale on behalf of petitioners.

MS. GILLESPIE: Good afternoon. Kathleen Gillespie on behalf of petitioners.

MS. LARAKERS: Good afternoon, Your Honor. Mary Larakers on behalf of the United States.

MR. WEILAND: Good afternoon, Your Honor. Wil Weiland on behalf of the United States.

MR. SADY: Your Honor, Michael Sady on behalf of the United States.

THE COURT: We're here today primarily so I can give you my decision on the respondents' motion to dismiss. I'm going to deliver this decision orally in part because I believe there's some urgency to clarifying and communicating what the applicable law is so the Department of Homeland Security can be on notice of that and hopefully comply with it.

The transcript will be the record of the decision. I may convert the transcript into a more formal memorandum and order, but I think in the particular circumstances of this case, it's in the public interest to give you this decision orally rather than taking what could be a long time to write something more formal.

I'm directing the parties to order the transcript on an expedited basis. And it's going to take me a good amount of time to explain the reasons for this decision, so if anybody other than me needs a break, let us know, and we'll take one.

To alleviate any suspense, I'll tell you that the motion to dismiss is being denied. In essence, I find that this court, I have habeas jurisdiction under 28 United States Code section 2241 concerning petitioners' claims relating to removal. Petitioners' claims concerning detention are not

moot, and therefore I also have jurisdiction concerning them.

In addition, for the reasons I'll explain, petitioners have stated a plausible claim on which relief can be granted regarding removal. They've also stated a plausible claim on which relief can be granted regarding detention. At the heart of the procedural due process claims in this case are regulations that give United States Citizenship and Immigration Services, CIS, the discretion to permit certain aliens with final orders of removal or deportation to remain in the United States with their U.S. citizen spouses and often their U.S. citizen children while seeking a discretionary decision by CIS that, if granted, would make him or her a lawful permanent resident after departing the United States briefly.

The key substantive issue is whether United States Immigration and Customs Enforcement, ICE, can remove or deport such an alien solely because the alien has a final order of removal without considering the fact that the petitioner has initiated the process to receive relief from that order and to be allowed to become a lawful permanent resident. The threshold issue is whether this court has jurisdiction concerning the claims in this case.

All right. For the court security officer, anybody who leaves will have to stay out while I'm delivering this decision. This is open to the public. The media is welcome. But people running back and forth are too distracting. Okay?

As I said, the provisional waiver regulations are at the heart of the procedural due process claims in this case. Ordinarily, an alien who has been unlawfully present in the United States for at least one year and then leaves the country is barred from re-entering the United States for ten years. And I may not mention all the statutory cites. They're familiar to counsel, and if I convert this into a formal memorandum and order, I will include them.

But if an alien has been in the U.S. unlawfully for more than 180 days but less than one year and then departs, he or she is ordinarily barred from re-entering the United States for three years. However, the Secretary of Homeland Security by statute has the discretion to waive these unlawful presence bars if refusing to admit an alien would, quote, "result in extreme hardship to the citizen spouse of such an alien," end quote.

The authority and responsibility to make this determination was delegated to CIS. Before 2013 an alien had to be outside the United States to apply for an unlawful presence waiver by submitting a Form I-601. In 2013, the Department of Homeland Security, DHS, recognized that this scheme caused a separation of U.S. citizen spouses and often U.S. citizen children from their husbands, their wives and their mothers for a year or more and that this inflicted a financial, emotional and humanitarian hardship that the waiver

process is intended to avoid. The scheme separated families that included at least one U.S. citizen, even though promoting family unification is an important objective of the U.S. immigration laws. Therefore, after acknowledging these interests and concerns, in 2013, the Department of Homeland Security adopted regulations to permit unlawful aliens who were immediate relatives of U.S. citizens to apply for provisional waivers of the unlawful presence bars to readmission while in the United States and to leave only briefly before being readmitted and becoming lawful permanent residents upon re-entering the country.

In 2016 these regulations were amended and expanded to make unlawful aliens with final orders of removal eligible for such provisional waivers. The Department of Homeland Security explained in promulgating the 2016 regulation that this was done to avoid the significant emotional and financial hardship that Congress aimed to avoid when it authorized the waiver.

Under the 2016 regulations, an alien subject to a final removal order and his U.S. citizen spouse may follow a five-part process to allow the alien to apply to become a lawful permanent resident without leaving the United States except for a brief trip to a U.S. consulate abroad.

First, the United States citizen spouse may file a Form I-130, Petition For Alien Relative. CIS may require an appearance at an interview to determine whether the U.S.

citizen and the alien's spouse have a bona fide marriage.

Second, the alien spouse may file a Form I-212, Permission to Reapply For Permission to the United States After Deportation Or Removal. Consistent with the 2016 regulations, aliens can file a Form I-212 and obtain conditional approval prior to their departure from the United States if they will become subject to inadmissibility on the ground of having previously been removed or having departed with a final order of removal.

Third, once a Form I-212 is conditionally approved, an alien's spouse may apply for a provisional unlawful presence using a Form I-601A, Application For Provisional Unlawful Presence Waiver.

Fourth, once an alien obtains an unlawful presence waiver, he or she must go abroad to appear for an immigrant visa interview at a U.S. consulate, after which the Department of State may issue an immigrant visa if no other inadmissibility ground applies.

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

In essence, these regulations allow an otherwise eligible individual who is the spouse of a U.S. citizen and who lives in the United States unlawfully and with a final order of removal outstanding to seek to demonstrate the bona fide nature

of his or her marriage, obtain the necessary waivers of inadmissibility, depart the country only briefly to obtain an immigrant visa, and then return to the United States to rejoin his or her family as a lawful permanent resident.

The provisional waiver application process was designed to shorten the time that a non-citizen, an alien applicant, is separated from his or her family from about a year or more to approximately one month.

The following facts are alleged concerning the petitioners in this case:

Petitioners are aliens with final orders of removal who are pursuing provisional waivers at various stages of the process. Lilian Calderon Jimenez's family brought her to the United States from Guatemala in 1991 when she was three. In 2002, when she was 15, the Board of Immigration Appeals, BIA, ordered her to voluntarily depart. When she did not, a final order of removal automatically entered.

Ms. Calderon married Luis Gordillo, a U.S. citizen, in 2016 after living with him for ten years. They have two U.S. citizen children, ages two and four. ICE arrested Calderon at her I-130 interview on January 17, 2018. On February 13, 2018, shortly after she filed the original complaint in this case, ICE released her and granted her a three-month administrative stay of removal which was later extended to August 18, 2018. CIS has approved her Form I-130 and her Form I-212 advance

waiver of the final order-based bar. She is in the process of preparing her application for an I-601A.

Lucimar De Souza, who immigrated from Brazil, was ordered removed in 2002. She married Sergio Francisco, a United States citizen, in 2006. They have a ten-year-old son who is a United States citizen. She was arrested immediately after her I-130 interview on January 30, 2018. De Souza has a pending I-212 application to lift the final order-based bar. ICE released her on May 8, 2018 after this court held that ICE was detaining her in violation of its regulations and the Fifth Amendment's guarantee of due process.

Sandro De Souza fled Brazil in 1997 after being threatened by a criminal group, entered the U.S. on a tourist visa, stayed here beyond the time authorized by that visa. He married a U.S. citizen, Carmen Sanchez, in April 2011. They live with their 20-year-old son. De Souza was ordered removed in September 2011. He voluntarily reported to ICE on June 12, 2017 while applying for an I-130 and has been under an order of supervision ever since. That means he was released rather than detained on certain conditions.

At his January 2018 check-in, ICE told Sanchez to depart the United States by March 9, 2018. He had an I-130 interview on March 1, 2018 and was not arrested. That application was approved. Because of the progress on his I-130, ICE moved his required departure date to April 24, 2018.

As a result of the order I issued at the outset of this case that petitioners not be removed during the pendency of this case, De Souza is still in the United States.

Oscar Rivas entered the United States in 2006 from El Salvador after being beaten and shot by a gang he refused to join there. He was ordered removed in 2012 and was granted a stay of removal by ICE in 2013 which has been renewed annually. He married a United States citizen, Celina Rivera Rivas, in 2016. They have two daughters, age five and seven. He has pending I-130 and I-212 applications but has not had an interview. At a March 1, 2018 check-in, ICE ordered him to depart by May 2, 2018. He, too, is still in the United States as a result of this court's order.

Finally, with regard to the petitioners, Deng Gao came to the United States from China in 2005 on a visa, was ordered removed in 2008, married Amy Chen, and then filed an I-130 in 2016. The couple has four children between the ages of a few months old and 13 years old. The couple has not had an I-130 interview yet but fears that Gao will be arrested when he appears for one.

The defendant respondents in this case include the Secretary of DHS, the acting director of ICE, the acting Boston field office director of the Enforcement and Removal Office of ICE, and the President of the United States.

The dispute over whether this court has jurisdiction

concerning petitioners' claims has been a focus of briefing and hearings. 28 United States Code Section 2241 gives district courts the jurisdiction to grant a writ habeas corpus to individuals in custody in violation of the Constitution or laws or treaties of the United States. The government did not in its briefing dispute that the petitioners are all in custody for the purpose of section 2241 because of their final orders of removal and, for four of the petitioners, their orders of supervision requiring that they appear for removal when ordered to do so. In any event, I find that the petitioners are in custody, and Chief Judge Patti Saris discussed this concept, this point, in Devitri, 290 F.Supp.3d 86 at 90.

The respondents argue that three provisions of the REAL ID ACT of 2005 codified at 8 United States Code section 1252(a)(5), (b)(9) and (g) strip this court of jurisdiction over petitioners' claims regarding removal. Section 1252(a)(5) entitled "exclusive means of review," provides that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review," including habeas review, "of an order of removal issued under any provision of this chapter."

Section 1252 (b)(9) entitled, "consolidation of questions for judicial review," provides that:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and

statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law, statutory or nonstatutory, to review such an order or such questions of law or fact.

Neither of these provisions applies to petitioners' claims. Despite its broad terms, subsection (b)(9), like subsection (a)(5), only governs review of an order of removal under section (a)(1) as stated in 8 United States Code Section 1252(b). Therefore, in St. Cyr, 533 U.S. at 313, the Supreme Court held that section 1252(b)(9), by its own terms, does not bar habeas corpus over claims not subject to judicial review under section 1252 (a)(1). The REAL ID ACT did not change the language in section 1252(b) on which St. Cyr relied. Accordingly, as the First Circuit explained in Aguilar v. ICE, "section 1252(b)(9) is a judicial channeling provision, not a claim-barring one." It does not apply to claims that "cannot be raised efficaciously within the administrative proceedings delineated by the Immigration and National Act, INA," because the failure to exercise jurisdiction over such claims "would

foreclose them from any meaningful judicial review." That's Aguilar, 510 F.3d 1, 11. However, if petitioners could raise their claims in the immigration courts and obtain review of an adverse decision of a court of appeals, this court would lack jurisdiction over them, as again explained in Aguilar.

Petitioners claim that the Department of Homeland Security's decision made by ICE to execute their removal orders without considering that they have initiated the provisional waiver process violates their rights to receive a decision on the requested waivers before they leave the United States. This claim could not "effectively be handled through available administrative process." It is too late for a petitioner to file a motion to reopen removal proceedings. There's only 90 days permitted to do that.

Respondents assert however that petitioners could raise the claim on a motion to reopen their cases, "sua sponte," which, if granted, would vacate their removal orders. However, the immigration court could not reopen petitioners' cases because, in doing so, it could not provide any relief concerning their claims. As the First Circuit explained in Pandit, 824 F.3d 1, 3, "In order for a motion to reopen to succeed, it must . . . establish a prima facie case for the underlying relief sought." Reopening petitioners' removal proceedings would make them ineligible to apply for a provisional waiver. This is the effect of 8 C.F.R. section

212.7(e)(4)(iii).

In addition, as a result of a recent decision by the Attorney General in the United States in the Matter of Castro-Tum, the immigration court could not close or stay the proceedings to make the petitioners eligible again. In any event, petitioners' claims would not be subject to judicial review of their final orders of removal or their motion to reopen them under section 1252(a)(1) in the First Circuit, a concept again discussed in St. Cyr, 533 U.S. at 313. "Judicial review" of a "final order" by a court of appeals "includes all matters on which the validity of the final order is contingent," as the First Circuit stated in Cano-Saldarriaga, 729 F.3d 25, 27. As indicated earlier, petitioners here do not challenge the validity of their underlying orders of removal or any decision on which they are contingent. They only challenge the Department of Homeland Security's, ICE's, decision to enforce the order while they are pursuing provisional waivers. In Cheng Fan Kwok, the Supreme Court held that the court of appeals could not directly review the INS district director's decision not to stay the execution of a removal order. That's 392 U.S. 206, 213. The court explained that the "application for a stay assumed the prior existence of an order of deportation," and the "petitioner did not attack the deportation order itself;" instead he "sought relief [consistent] with it." Therefore, the court of appeals could

not review the denial of the stay, the Supreme Court held. Although Cheng Fan Kwok analyzed section 1252(b)(9)'s predecessor, courts of appeals have held that, like its predecessor, that under section 1252(b)(9), courts of appeals do "not have jurisdiction over denials of petitions to ICE for a stay of removal." The Sixth Circuit reached that conclusion in Casillas, 656 F. 3d 273, 274, for example. Therefore, the court of appeals would not have a means of reviewing the claims in this case, and 1252(b)(9) doesn't strip this court of jurisdiction.

The other section on which respondents rely is 1252(g). Section 1252(g) provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Secretary of DHS to commence proceedings, adjudicate cases, or execute removal orders against any alien." It applies only to these three discrete actions, including the decision to "execute removal orders," as discussed in Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 382. ICE's decision not to stay petitioners' deportation is a decision "directly part of the decision to execute a removal order," as the Sixth Circuit wrote in Moussa, 389 F.3d 550, 554 and as Judge Saris found in Devitri, 290 F.Supp.3d 86, 91.

However, the question is not whether the action the petitioners seek to enjoin are "taken to remove an alien, but

whether the legal questions arise from such an action," as Supreme Court discussed in Jennings, 138 Supreme Court 830, 841. Petitioners argue that their claims "arise from" DHS' misinterpretation of a regulation, not the decision to execute their removal orders and, therefore, section 1252(g) does not apply in this case. Some courts of appeals have agreed with that argument. They have held that section 1252 does not apply to "a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question . . . forms the backdrop against which the Attorney General will later exercise discretionary authority." That was the conclusion in Hovsepian, 359 F.3d 1144, 1155, a Ninth Circuit decision, and Jama, 329 F.3d 630, cases decided at a time when the immigration and naturalization service was within the justice department. Those decisions emphasize that in the Reno case the Supreme Court stated that "section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." That's 525 U.S. 485 note 9.

Whether ICE can remove an applicant for a provisional waiver based solely on an order of removal, thus "failing to exercise the discretion authorized" by the provisional waiver regulations, is a question of what a regulation requires, not a claim that ICE has abused its discretion or has abused discretion that it exercised. This is discussed in St. Cyr,

533 U.S. at 307.

However, this court finds that section 1252(g) applies to the legal question raised in petitioners' claim. Although statutes must be read, where plausible, to avoid the serious constitutional questions that would arise if they stripped habeas jurisdiction, as discussed in St. Cyr at 299 to 300, "the canon of constitutional avoidance comes into play only when, after application of ordinary textual analysis, the statute is found to be susceptible of more than one construction," as the Supreme Court discussed in Jennings at 842-43. I find that section 1252(g) is not ambiguous. Unlike other provisions in 1252, such as section 1252(a)(2)(B)(ii) and 1252(a)(2)(D), it does not limit itself to "discretionary" decisions or preserve jurisdiction over "constitutional claims or questions of law." "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," as the Supreme Court said in Kucana, 558 U.S. 233, 249. Petitioners have not suggested alternative language that Congress could have used if it wanted to make any more clear that section 1252(g) covers the claims alleged here, without using a broad phrase like "relating to," which would threaten to bar jurisdiction over claims such as the challenges to detention in the execution of an order that Congress did not

intend to cover, as discussed in Zadvydas, 533 U.S. at 688.

In addition, the Supreme Court's reference to discretionary decisions in the Reno case did not say that section 1252(g) applies only to discretionary decisions notwithstanding plain language that includes no such limitation. Congress often passes statutes that sweep more broadly than the main problem they were designed to address. The terms of the statute, not the principal concerns of the enacted legislators, must govern, which is what the 8th Circuit said in Silva, 866 F.3d 938, 941. Comparable conclusions were reached by the Fifth Circuit in Foster, 243 F.3d 210, 213 and by Judge Saris in Devitri, 290 F.Supp.3d 86, 91. Although the 8th Circuit in Silva concluded that section 1252(g) contains an implied exception for habeas corpus petitioners but applies to claims for damages, it did not identify any basis in the text for that distinction. In addition, the Supreme Court explained that section 1252(g) exists not only to protect exercises of discretion from judicial review but to reduce the "deconstruction, fragmentation, and hence prolongation of removal proceedings," by avoiding "separate rounds of judicial intervention outside the streamlined process that Congress has designed." That was explained by the court in Reno at 525 U.S. at 485-87.

Petitioners assert ICE cannot execute their removal orders and thus "eliminate the availability of provisional

waivers arbitrarily or on the basis of grounds unsupported by the regulations' purposes and unrelated to an applicant's eligibility for legalization under the process." Although a legal claim, this claim is a direct challenge to the decision to execute their removal orders and seeks to enjoin removal until ICE considers their pursuit of provisional waivers. Therefore, I find that section 1252(g), if allowed to operate, would bar jurisdiction over it.

However, the suspension clause of the Constitution requires the court to exercise jurisdiction over petitioners' claim that 8 C.F.R. section 212.7, the I-601A waiver regulation, requires ICE to consider their pursuit of provisional waivers before deciding to execute their removal orders. As indicated earlier, 28 U.S.C. section 2241 gives district courts the jurisdiction to grant a writ of habeas corpus to individuals "in custody in violation of the Constitution or laws or treaties of the United States." Article I, section 9, clause 2 of the Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion that public safety may require it." In St. Cyr, the Supreme Court held that "because of that clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" That's 533 U.S. at 300.

In St. Cyr, the Supreme Court explained that the

habeas jurisdiction required by the Constitution extends to "questions of law concerning an alien's eligibility for discretionary relief," including claims, such as petitioners here, that the executive branch failed to exercise the discretion required by regulation. That's St. Cyr at 300. The court explained that in Accardi v. Shaughnessy, 347 U.S. 260, the Supreme Court was exercising habeas jurisdiction only "insofar as it was required by the Constitution." The court held in Accardi that "a deportable alien had a right to challenge the Executive's failure to exercise the discretion authorized by law." In Accardi, the Supreme Court at 347 U.S. 268 wrote:

"It is important to emphasize that the court is not here reviewing and reversing the manner in which discretion was exercised. If such were the case, it would be discussing the evidence in the record supporting or undermining petitioners' claims to discretionary relief. Rather, the petitioners object to the Board's alleged failure to exercise its own discretion contrary to existing regulations."

This distinction with regard to habeas jurisdiction concerning a claim that an agency is refusing to consider the petitioner for relief and a claim challenging the way discretion was actually exercised or the result of an exercise of discretion is recognized and discussed by the First Circuit in habeas cases such as Saint Fort, 329 F.3d 191, 203 and

Goncalves, 144 F.3d 110, 125. Therefore, as in Accardi, in this case, the Constitution requires that if it is colorable, some court have jurisdiction to review petitioners' claim that by deporting them or removing them before considering their applications for provisional waivers, the Department of Homeland Security is failing to exercise the discretion required by 8 C.F.R. section 212.7, even though the court, this court, could not review that discretion for possible abuse if it was actually exercised.

"Congress could, without raising any constitutional questions, provide an adequate substitute for habeas corpus through the courts of appeals," as the Supreme Court said in St. Cyr at 314 note 38. To do so, however, it must provide petitioners a meaningful opportunity to demonstrate that ICE will execute their removal orders "pursuant to the alleged erroneous application or interpretation of relevant law," and to seek adequate relief, here, a stay of removal under -- I'm sorry -- here, a stay of removal, until DHS complies with the regulation and considers their pursuit of provisional waivers. That concept is in Boumedienne, 553 U.S. 723, 779-80 and also discussed by Judge Saris in Devitri, 290 F.Supp.3d at 93. However, as explained earlier, the administrative process with direct review in the court of appeals, could not adequately address petitioners' challenge to the execution of their removal orders. As in Devitri, 289 F.Supp.3d at 294, if

deported, petitioners would be deprived of the very relief they assert the regulations entitle them to seek from DHS, in this case an opportunity to remain in the United States with their families until they must briefly travel abroad for their visa interviews. Therefore, if petitioners' claim is colorable, this court must exercise habeas jurisdiction over it under section 2241.

A claim is "colorable" and confers jurisdiction over it under section 2241, "if it is not so insubstantial, implausible, foreclosed by prior decisions of the Supreme Court or the First Circuit, or otherwise completely devoid of merit as not to involve a federal controversy." That's the definition provided by the Supreme Court in Steel Co., 523 U.S. 83, 89. As I will explain, I find the petitioners' claim under section 2241 is not only colorable, but it meets the higher standard of being "plausible." Therefore, this court has jurisdiction to decide it.

Moving then to the merits of the motion to dismiss, respondents have moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), alleging that petitioners have failed to state a claim on which relief can be granted. As I will explain, petitioners have alleged a procedural due process claim rooted in the provisional waiver regulations on which relief can be granted, therefore it is not necessary to decide now the viability of their other claims, including whether

family ties create a liberty interest entitling petitioners to due process or their equal protection claims with regard to removal. I am not doing so.

The motion to dismiss standard is familiar. A motion to dismiss should be denied if a plaintiff has shown "a plausible entitlement to relief." That is the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief."

In deciding a motion to dismiss under Rule 12(b)(6), the court must "take all factual allegations as true and . . . draw all reasonable inferences in favor of the plaintiff," or petitioner. The court "neither weighs the evidence nor rules on the merits because the issue is not whether plaintiffs will ultimately prevail, but whether they are entitled to offer evidence in support of their claims."

The court now finds that petitioners have stated a plausible procedural due process claim that for aliens who are pursuing provisional waivers with pending applications for an I-130 and I-212 or an I-601A, ICE may only remove them from the

United States after considering the fact that they are pursuing provisional waivers and the reasons for the provisional waiver regulations.

As I explained on May 8, 2018 and amplified in my June 11, 2018 memorandum and order in this case, the Due Process Clause of the Fifth Amendment protects the "liberty" of "all persons within the United States, including aliens, regardless of whether their presence here is lawful, unlawful, temporary, or permanent." That's what the Supreme Court wrote in Zadvydas, 533 U.S. at 678, 693. "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arrive from an expectation or interest created by other laws or policies," including regulations. The Supreme Court wrote about that in Wilkinson, 545 U.S. 209, 221. As the First Circuit in Goncalves, 144 F.3d 125, among other courts, have recognized, a regulation is for the purpose of a case like this a "law." To create a constitutionally protected interest in a benefit, a regulation must create a "legitimate claim of entitlement" to it, as the Supreme Court said in Kentucky Department of Corrections, 490 U.S. 454.

When a regulation grants an entitlement to apply for relief, "the availability of relief, or at least the opportunity to seek it, is properly classified as a substantive right" and a "legitimate expectation," even when the relief

depends on the exercise of the agency's discretion. The First Circuit said that in Arevalo, 344 F.3d 1, 11, 14. For example, the Immigration and Nationality Act in 8 U.S.C. section 1229a(C)(7), states that "an alien may file one motion to reopen." This has been held to create a right to have the BIA adjudicate the motion in cases such as Perez Santana, 731 F.3d 50, 55-56, and Devitri, 289 F.Supp.3d at 291. 8 C.F.R. section 212.7 uses comparable language. It says that "certain immigrants," including immigrants who are subject to final orders of removal, "may apply" for a provisional waiver. That's found in section 212.7(a) and (e)(4). The regulation also states that "USCIS will adjudicate a provisional unlawful waiver, a provisional unlawful presence waiver application . . ." That's in 8 C.F.R. section 212.7(e)(8).

Therefore, although the regulation does not require CIS on behalf of DHS to grant an unlawful presence waiver, it does require that the agency exercise discretion in deciding whether to do so. As the Supreme Court explained in Accardi at page 268, "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." Therefore, courts have reviewed and reversed decisions to remove an alien "the effect of which are to preclude an alien from even applying for relief" he or she is entitled to pursue under a statute or regulation.

Succar, 394 F.3d 8, 19-20, a First Circuit case explained that.

In Accardi the Supreme Court explained:

It is important to emphasize that the court is not reviewing and reversing the manner in which discretion is exercised. If such were the case, it would be discussing the evidence in the record supporting or undermining petitioners' claims for discretionary relief. Rather, the petitioners object to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations. That's Accardi at 268. A comparable point is made in Succar, 394 F.3d 29 note 28. This court may therefore decide petitioners' claim on a petition for habeas corpus under section 2241, as the First Circuit confirmed in Goncalves, 144 F.3d at 125.

This court concludes that 8 C.F.R. section 212.7 requires DHS, acting through ICE, to consider an eligible immigrant's application for a provisional unlawful presence waiver before deciding to remove him or her from the United States. The regulation entitles an eligible applicant to relief that is distinct from a waiver granted while the alien is outside of the United States. As I explained earlier, DHS in the 2016 explanation of the regulation, said "without the ability to pursue a provisional waiver, individuals who must seek a waiver of inadmissibility abroad through the Form I-601 waiver process after the immigrant visa interview may face longer separation times from their families in the United

States and will experience less certainty regarding the approval of a waiver of the three- to ten-year unlawful presence bar before departing from the United States." And these statements are found in 81 Federal Register from about 50244 to 50246.

The explanation of the regulation explains or states that the regulation was designed to avoid the "extreme," "significant emotional and financial hardship that Congress aimed to avoid when it authorized the waiver." On its website, CIS also states that the provisional waiver "process was developed to shorten the time that U.S. citizens and lawful permanent resident family members are separated from their relatives while those relatives are obtaining immigrant visas to become lawful permanent residents of the United States."

Therefore, the provisional waiver regulation protects a "prevailing purpose" of the Immigration and Nationality Act: to "implement the underlying intention of our immigration laws regarding the preservation of the family unit," language used by the Second Circuit in Nwozuzu, F.3d 323, quoting the House Report on the statute. In the INA, "Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country," the Supreme Court said in Errico, 385 U.S. 214, 220.

Accordingly, in the explanation of the 2016 regulation, DHS promised applicants that it would decide an application for provisional waiver before the alien was required to leave the United States. In describing the benefits of the 2016 regulation, DHS stated "those applying for provisional waivers will receive advance notice of USCIS' decision to provisionally waive their three- or ten-year unlawful presence bar before they leave the United States for their immigrant visa interview abroad. This offers applicants and their family members the certainty of knowing that the applicants have been provisionally approved for waivers of the three- and ten-year unlawful presence bars before departing from the United States." That's 81 Federal Register 50246. DHS also stated that "instead of attending multiple immigrant visa interviews and waiting abroad while UCIS adjudicates a waiver application as required under the Form I-601 process, the provisional waiver process allows individuals to file a provisional waiver application while in the United States and receive a notification of USCIS' decision on their provisional waiver application before departing for DOS, Department of State, consular processing of their immigrant visa applications." That's 81 Federal Register 50271.

The text of section 212.7(e) also manifests the Secretary's expectation that the alien would be in the United States until the application for provisional waiver is

adjudicated. An alien is eligible if, among other things, he or she "will depart, from the United States to obtain the immigrant visa." That's section (e)(2)(v). Eligible aliens must "provide biometrics to USCIS at a location in the United States designated by us USCIS." That's section (e)(3)(ii) and (6). And "if an alien fails to appear for a biometric services appointment or fails to provide biometrics in the United States as directed by USCIS, a provisional unlawful presence waiver application will be considered abandoned and denied." That's section (6)(ii). It would be impossible for somebody to attend the biometrics appointment "in the United States" after he or she was deported and barred from re-entering. The regulation also states that "a provisional unlawful presence waiver granted under this section does not take effect unless and until the alien who applied for and obtained the provisional unlawful presence waiver departs from the United States," among other things. That's section (e)(12).

Respondents argue that the regulation does not place constraints on ICE's discretion to execute a removal order because it states that "a pending or approved provisional unlawful presence waiver does not constitute a grant of lawful immigration status or a period of stay authorized by the Secretary," quoting section 212.7(e)(2)(i). However, in 2013, DHS characterized this provision as "making clear that approval of the provisional unlawful presence waiver is discretionary,"

and DHS wrote "does not constitute a grant of any lawful immigration status or create a period of stay authorized by the Secretary for the purpose of INA section 212(a)(9)(B), 8 United States Code section (a)(9)(B). 8 United States Code Section (a)(9)(B) defines "unlawful presence" for the purpose of determining whether and for how long an alien is inadmissible for having been illegally present in the United States. Section 212.7(e)(2)(i), therefore, indicates that a pending application does not make an alien lawfully present, meaning that if he or she remains in the United States for longer than a year while the application is pending, he or she may become subject to the ten-year bar for admission rather than a shorter three-year bar. It also clarifies that applicants are not eligible for certain immigration benefits available to aliens who are lawfully present. Unlike the statute and regulation governing stays of removal by DHS, 8 United States Code Section 1231(c)(2) and 8 C.F.R. section 241.6, the regulation does not refer to a "stay of removal" or a "stay of deportation."

Nevertheless, I find that ICE may deport an alien before CIS has the opportunity to adjudicate his or her application for a provisional waiver if it makes an individualized decision to do so based on more than the mere fact that the alien is subject to a final order of removal. In its explanation of the 2013 Rule, DHS stated that it did not intend the pending waiver application to prevent ICE from

removing all aliens applying for unlawful presence waivers. That's at 78 Federal Register 555.

Therefore, the Department of Homeland Security evidently intended that ICE be allowed in some circumstances to remove aliens who are applying for provisional waivers. However, a decision by ICE to remove an alien pursuing a provisional waiver solely because he or she has a final order of removal would, as a practical matter, eliminate that alien's right to apply for a provisional waiver and CIS' opportunity to decide the merits of the application before the alien must depart the United States and leave his or her family. The binding promises to United States citizens and their alien spouses in the provisional waiver regulations would be meaningless and their purposes would be undermined if ICE was not required to consider that an alien with a final order of removal was seeking a provisional waiver before ordering his or her removal. There is no reason to conclude that having promulgated the provisional waiver regulations in 2013 and revised them in 2016 to make aliens with final orders of removal eligible for such waivers the Secretary of DHS intended to allow ICE to ignore those regulations and their important purposes.

In essence, this case is analogous to Ceta, 535 F.3d at 643. In that case, the Seventh Circuit held on direct review, not habeas review, that although it did not generally

have jurisdiction to review an immigration judge's discretionary decision, such as the denial of a continuance, it "retained jurisdiction . . . if that denial operates to nullify some statutory right or leads inescapably to a substantive adverse decision on the merits of an immigration claim." That's Ceta at 646. The Seventh Circuit found that "the immigration judge's denial -- more specifically, the BIA's affirmation of that denial -- of Mr. Ceta's request for a continuance amounts under the circumstances of that case to a denial of his statutory right to apply for adjustment of status." It explained, at 647 to 48:

> The BIA's ruling has the effect of a substantive ruling on Mr. Ceta's application to adjust his status. Under the INA in general, an administratively final order of removal, unless appealed, must be executed within a period of 90 days. Moreover, once an alien has been removed, he may no longer obtain adjustment of status based on marriage. Because of the denial of the continuance, therefore, Mr. Ceta's statutory right to apply for adjustment of status is trapped within a regulatory interstice. Section 1555 in the amended regulation, 8 C.F.R. section 245.2(a)(1), afforded him an opportunity to seek adjustment of status with the USCIS, but he will be deported by ICE before the USCIS is able to adjudicate that application. Indeed, under the new regulatory regime, unless these subagencies engage in some minimal coordination of their

respective proceedings -- for example, by the immigration courts favorably exercising discretion, in the appropriate case, to continue to proceedings to allow the other subagency to act -- the statutory opportunity to seek adjustment of status will prove to be a mere illusion.

This reasoning is equally applicable here. Therefore, the court finds that ICE may not order the removal of an alien pursuing a provisional waiver solely on the basis that he or she is subject to a final order of removal. Rather, ICE must consider the reasons for the provisional waiver regime and the facts of the alien's particular case before deciding to order removal, which would eliminate CIS' opportunity to decide the merits of the request, and the right of the alien to pursue, and potentially receive, the provisional waiver. I note that other courts addressing the provisional waiver process have reached the same conclusion. One such case is Villavicencio, 2018 Westlaw 3584704, a recent Southern District of New York case, and Martinez v. Nielsen, Civil Action No. 18-10963, decided earlier this year in New Jersey. In addition, a similar decision was reached in You v. Nielsen, addressing the adjustment of status process. That decision is at 2018 Westlaw 3677892 at page 10. That is another 2018 Southern District of New York case.

I find that it is plausible that if this case is dismissed, ICE will deny petitioners' future requests for stays

of removal and execute their removal orders without determining whether there is a reason, other than their final orders of removal, that petitioners should be prevented from remaining in the United States to pursue provisional waivers. In their amended complaint, petitioners allege with adequate specificity a "pattern" of arrests at the CIS offices indicating that ICE was "systematically targeting for arrests, detention and removal" individuals who were applying for provisional waivers or launching that process at their I-130 interviews. This is on its face plausible.

While I have to decide the motion to dismiss based on the complaint and there are some narrow exceptions, this case is now in a posture where I've been presented some evidence in connection with the motion for preliminary injunction that's pending particularly, and while I don't rely on it, that evidence certainly reinforces the conclusion that the claim is plausible.

I note that the respondents argued for the first time at oral argument on August 20 that even if 8 C.F.R. section 212.7 entitles aliens seeking an unlawful presence waiver to obtain an exercise of discretion concerning their applications before they are deported, that entitlement only vests when they receive an approved I-212 waiver of the removal order-based bar and become eligible for a provisional unlawful presence waiver under section 212.7(e)(3) and (4). The respondents did not

present this argument in their several memoranda concerning the motions to dismiss or for preliminary injunction, therefore the petitioners did not have fair notice and an opportunity to address it in their briefs. The court did not have an opportunity to study the issue before or to make an informed study of the issue after the hearings on August 20 and 21.

The First Circuit has held that "issues averted to in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived." The First Circuit said that in Zannino, 895 F.2d 1, 17. Courts in the District of Massachusetts as well as elsewhere apply this rule. Examples are Kuznarowis, 2018 Westlaw 3213491, King International, 968 F.Supp.2d 447, 450, Coopersmith 344 F.Supp.2d 783, 790 note 5. Indeed I've applied this principle in cases before me such as De Giovanni, 968 F.Supp.2d 447, 450. And in fact I mistakenly referenced King earlier. That's the De Giovanni case.

Therefore, respondents' argument that only petitioners and putative class members with approved I-212 waivers are entitled to an adjudication of their provisional waiver applications is waived for the purpose of the motion to dismiss. The issue may be addressed if properly presented in future motions or later stages of this case.

In view of the foregoing, the motion to dismiss plaintiffs' procedural due process claims based on the provisional waiver regulations is denied. As this case will

continue in any event, it is not necessary to decide the viability of petitioners' other claims regarding removal, particularly whether their family ties create a liberty interest entitling them to due process or their equal protection claims. As I said earlier, I'm not now doing so.

I will note that the January 2017 President's Executive Order and then Secretary Kelly's memorandum implementing it are not in my view inconsistent with the ruling I just made. The memorandum states that no category, no category of aliens are totally exempt from removal. And then Secretary Kelly wrote that among I think the seven priority areas are aliens with final orders of removal. That memorandum went on to say that priorities could and should be set within those higher priority areas. For example, highest priority should be given to aliens with final orders of removal engaged in criminal activity.

The memorandum also emphasized that the Executive Order and the guidance by the then Secretary of DHS was not intended to keep officials of DHS, particularly ICE, from exercising prosecutorial discretion. So I don't mean to qualify anything I've said earlier, but the law doesn't permit ICE to deport somebody, remove somebody who has a final order of removal who is pursuing a provisional waiver solely because there's a final order of removal, but there may be other circumstances that justify removing that alien and preempting

CIS' opportunity to decide the merits of the matter, the request for a provisional waiver.

And I have deliberately not articulated, at least at this point, because I'm not ordering any remedy, what I think I might find legitimate considerations are, and they probably would be excludable for some other reason. But if there was compelling evidence that somebody who was pursuing a provisional waiver and robbed a bank, I think, the criminal activity could be taken into account by ICE in deciding whether to wait for the provisional waiver process to be complete.

The remaining claims subject to the motion to dismiss relate to detention. For the reasons I explained orally on May 8, 2018 and in my June 11, 2018 memorandum and order, plaintiffs have stated a plausible claim that respondents were detaining them without due process in violation of the Fifth Amendment and ICE's regulations as ICE was interpreting them.

The respondents now claim or assert that the detention claims are moot. I find that this contention is incorrect. More specifically, petitioners allege that ICE will, if the court vacates its April 13, 2018 order directing DHS to, among other things, not remove them from the United States during the pendency of these habeas proceedings, petitioners allege that if I vacate that order, ICE will detain them for removal and continue their detention in violation of 8 C.F.R. Section 241.4 and the Fifth Amendment due process clause.

As the First Circuit explained and other circuits have explained, "The court need not determine the standing of all plaintiffs if at least one plaintiff has standing to maintain each claim" for prospective relief. The First Circuit explained that in Dubois, 102 F.3d 1273, 1282. The D.C. Circuit reached the same conclusion in Railway Labor Executives' Association, 987 F.2d 806. In this case, the petitioners all seek the same relief.

Petitioners Calderon and Lucimar De Souza were each detained when they filed their claims. They allege colorable claims that their detention was not reasonably related to permissible purposes, and those claims were at least colorable under Zadvydas, 533 U.S. 678, 690, and under my decision in Jimenez, 2018 Westlaw 2899733. In the particular cases before me that I was deciding I found they were not just colorable, they were valid. The petitioners also allege that their detention was without the procedures required under the Fifth Amendment, which I addressed in the Calderon Jimenez decision and are cited in I believe Mathews v. Eldridge and Morrissey v. Brewer.

In addition, there was an actual and imminent threat that ICE would continue the petitioners' detention without following even its own interpretation of the post-order custody review regulation, 8 C.F.R. Section 241.4, which petitioners allege affords constitutionally inadequate procedures.

Calderon was released only after she filed this case. Her release was part of a pattern in which ICE released detainees who filed petitions for writs of habeas corpus but continued to detain other individuals without the process required under its regulations. In this litigation ICE has admitted that at least until May 2018, it frequently kept aliens in detention in violation of Section 241.4, and in May of 2018, after my May 8 decision, discovered it was detaining at least 30 aliens in violation of the regulation as ICE then interpreted it. As I have previously noted, ICE's interpretation of section 241.4 may incorrectly allow it to hold certain aliens without a custody review longer than the regulation permits.

ICE released both De Souza and Calderon. However, their claims regarding detention are not moot. There is a reasonable likelihood that ICE will violate the process they allege, and the court found, it is due, by detaining them again and continuing their detention without the required notice and opportunity to be heard. As the Supreme Court has stated in Already, LLC, 568 U.S. 85, 89, "A defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." Rather, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Respondents maintained that they may detain Calderon again to effectuate her removal.

They said that in the April 3, 2018 status report in this case. The respondents have not disclaimed an intention to detain De Souza again if this case is dismissed.

I have been told that the Boston ICE office has undertaken efforts, including internal audit, training and hiring of new staff to ensure that detainees receive notice and an opportunity to be heard before being detained for more than three months. I previously have written in this case, however, that there's evidence that the Boston ICE office has continued to violate section 241 even after the training occurred. That's reflected in my June 26, 2018 memorandum and order at page 2, citing Magistrate Judge Kelly's decision in Matias v. Tompkins, Civil Action No. 18-11056.

In addition, ICE gave De Souza a notice to depart the United States on I believe August 12, 2018 despite this court's order that she not be moved out of Massachusetts. This indicates that ICE staff might not be receiving or obeying the instructions of superiors even while this litigation is going on. In addition, the high turnover in ICE leadership creates a risk that new management will be appointed and end what I have been told are the present efforts to form ICE's detention and custody review practices. For example, I adjourned these proceedings in May 2018 to provide the then acting Boston Office Director Thomas Brophy an opportunity to devote attention to making a transition to his designated acting

successor, Todd Lyons, but Mr. Lyons was only allowed to serve for four days before he was replaced by Rebecca Adducci.

So in these circumstances the respondents have not shown that it is "absolutely clear" that petitioners cannot "reasonably expect" ICE will not violate Constitution and section 241.4 if they are detained again and thus cause them irreparable harm. The Supreme Court and courts of appeals have found that a detainee's release did not moot comparable claims brought by alien habeas petitioners where "absent action by the court, the government could re-detain the petitioner, and deny him due process, at any time." I have in mind, for example, the Ninth Circuit's decision in Diouf, 634 F.3d 1081 note 3, the Supreme Court's decision in Clark, 543 U.S. 371, 376 note 3, and the Third Circuit's decision in Rosales-Garcia, 322 F.3d 386, 395. I reach the same conclusion in this case. Therefore, it is not necessary to address petitioners' arguments that the issues regarding detention are "capable of repetition, yet evading review," or that their claims are "inherently transitory" and the request for class certification preserves a live controversy even if their individual claims become moot.

So for the foregoing reasons, the motion to dismiss is hereby denied. It's going to be necessary to update the briefing on the pending motions for preliminary injunction and class certification based on the testimony heard in hearings

this week, among other things, and I will see counsel and their clients in the lobby to talk about what an appropriate schedule and agenda for proceeding will be.

Is there anything further before we recess in the public session?

MR. PRUSSIA: Nothing from petitioners, Your Honor.

THE COURT: Court is in recess.

(Recess taken 4:03 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 24th day of August, 2018.

/s/ Kelly Mortellite

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Kelly Mortellite, RMR, CRR

Official Court Reporter