UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LILIAN PAHOLA CALDERON JIMENEZ and LUIS GORDILLO, et al., Individually and on behalf of all others similarly situated.	)	
Plaintiffs-Petitioners,	)	Civil Action No. 18-10225-MLW
v.	)	
KIRSTJEN M. NIELSEN, et al.,	)	
Defendants-Respondents.	)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

HEARING

May 3, 2019

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

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1 P R O C E E D I N G S
2 (Case called to order.)
3 THE COURT: Good morning. Would counsel please
4 identify themselves for the court and for the record.
5 MS. LAFAILLE: Good morning, Your Honor. Adriana
6 Lafaille for the petitioners.
7 MS. CANTIN: Good morning, Your Honor. Shirley Cantin
8 of Wilmer Hale for the petitioners as well.
9 MR. PROVAZZA: Good morning, Your Honor. Steve
10 Provazza of Wilmer Hale for the petitioners.
11 MR. COSTELLO: Good morning, Your Honor. Matt
12 Costello of Wilmer Hale also for the petitioners.
13 MS. McCULLOUGH: Good morning, Your Honor. Colleen
14 McCullough for the petitioners.
15 MS. GILLESPIE: Good morning, Your Honor. Kathleen
16 Gillespie for the petitioners.
17 MR. WEILAND: Good morning, Your Honor. Wil Weiland
18 for the United States.
19 MS. LARAKERS: Good morning, Your Honor. Mary
20 Larakers on behalf of the United States.
21 MR. KANWIT: Good morning, Your Honor. Thomas Kanwit
22 on behalf of the United States.
23 THE COURT: Okay. Yes. I received a notice that Todd
24 Lyons' term as acting field office director had expired and
25 former deputy field office director Marcos Charles has

1 succeeded him. Mr. Charles states he will continue Mr. Lyons'
2 relevant policies and practices. Is all that correct?
3 MS. LARAKERS: Yes, Your Honor.
4 THE COURT: And is Mr. Charles here?
5 MS. LARAKERS: Yes, Your Honor.
6 THE COURT: So it's my understanding that all of the
7 prior representations made to the court on behalf of ICE
8 relating to this case remain reliable and, among other things,
9 Mr. Charles has final decisionmaking authority for DHS for the
10 purposes of this case. Is that also correct?
11 MS. LARAKERS: Yes, that's my understanding, Your
12 Honor.
13 THE COURT: Okay. Thank you. And then you reported
14 that the parties' efforts -- I do understand that you worked at
15 this -- to settle this case didn't succeed. But after I decide
16 the motion to dismiss, or the remainder of it, and perhaps
17 class certification issues, you'll resume those discussions.
18 Did I read your report accurately?
19 MS. LAFAILLE: Yes, Your Honor. And that resistance
20 came from the government. But yes, we're always willing to
21 engage in those discussions.
22 THE COURT: Okay. Correct?
23 MS. LARAKERS: Yes, Your Honor.
24 THE COURT: All right. So we're here today with
25 regard to at least initially the defendants' motion to dismiss.

1 It's my present intention to hear argument on the various
2 issues essentially in the order I described in my April 29
3 order, to then decide -- and it's my goal to do all of this
4 orally, hopefully today -- the class certification issues,
5 particularly the class definition issues. I think I'll
6 probably ask you after I decide -- if I deny the motion to
7 dismiss with regard to any count or theory, I propose that we
8 address what are the implications for the definition of the
9 putative class. And then after class certification is decided,
10 it will be necessary to determine if there are remaining
11 discovery disputes. But do the parties want to be heard on and
12 essentially proceeding in that framework?
13 MS. LARAKERS: Yes, Your Honor. I think that makes
14 sense.
15 MS. LAFAILLE: Agree, Your Honor.
16 THE COURT: All right. Then as on April 29, I issued
17 an order, number 238, indicating that I intended to hear
18 argument on the issues presented in the following order,
19 recognizing that to some extent several of the issues,
20 including the question of when a due process right vests, are
21 interwoven with others. But I want to start with the
22 Administrative Procedures Act claim and then move to the
23 Immigration and Nationality Act related regulations claim, then
24 go to whether there's a due process right to apply for and
25 receive a decision regarding a Form 130 petition and a Form 112

1 petition while in the United States.

2 I said previously that I would then go to whether the

3 citizen spouses have a liberty interest for due process

4 purposes, I may put that after the Equal Protection argument,

5 and then class certification and discovery.

6 So why don't we start with the respondents' motion to

7 dismiss the Administrative Procedures Act claim.

8 MS. LARAKERS: Yes, Your Honor.

9 THE COURT: Hold on one second. Okay. Go ahead.

10 MS. LARAKERS: So, Your Honor, our primary position

11 with regard to the APA claim is that this court lacks

12 jurisdiction to review this claim under 1252(g). Your Honor

13 already found that 1252(g) applies to petitioners' claims

14 because they arise out of ICE's discretionary decision to

15 execute their removal order. And while the Suspension Clause,

16 as Your Honor found, may provide review in a habeas context,

17 the Suspension Clause does not apply to the APA by its plain

18 terms. The suspension --

19 THE COURT: Well -- okay. Go ahead.

20 MS. LARAKERS: So the Suspension Clause only applies

21 to the suspension of the writ of habeas corpus. It says

22 nothing about the APA.

23 THE COURT: But this is an APA claim raised in a

24 habeas corpus proceeding, isn't it?

25 MS. LARAKERS: Yes, Your Honor, and the government

1 doesn't dispute that there may be situations where an APA claim
2 and a habeas claim can proceed at the same time. That's not
3 what we're arguing here. We're arguing that there is no review
4 under the APA because there's a statute that precludes review.
5 So if there wasn't 1252(g), it very well may be that the APA
6 and habeas case could proceed at the same time if the habeas
7 didn't provide another adequate remedy. But that's no the
8 issue here.
9 The issue here is whether Section 1252(g) precludes
10 review under the APA. And it's clear that it does because this
11 court has already found that Section 1252(g) applies to
12 petitioners' claims, and but for the Suspension Clause, this
13 court wouldn't have jurisdiction over this action. And because
14 the Suspension Clause only applies to habeas actions, it can't
15 be applied in the APA context.
16 So as Your Honor knows, the suspension clause deals
17 particularly with the suspension of the writ of habeas corpus.
18 It says nothing about the Administrative Procedures Act. The
19 Administrative Procedures Act precludes review to the extent
20 that another statute precludes review. And here 1252(g)
21 clearly does.
22 I don't know if Your Honor has any further questions
23 about our claim that the claims actually do fall under Section
24 1252(g).
25 THE COURT: Well, at the moment, I do think they fall

1 under 1252(g). But I also understand that under the APA, 5
2 U.S.C. Section 703, judicial review of a claim can occur in any
3 applicable form of a legal action, including habeas corpus.
4 MS. LARAKERS: Yes, Your Honor.
5 THE COURT: So if the statute provides for review of
6 an APA claim and habeas corpus proceedings, and this is a
7 habeas corpus proceeding, why can't it be reviewed here?
8 MS. LARAKERS: Because the APA also precludes review
9 to the extent that another statute precludes review.
10 So Section 1252(g) would overrule the later sections
11 in the APA allowing -- ordinarily allowing for review, Your
12 Honor. And the government doesn't dispute that ordinarily the
13 APA does allow for review when a person comes into the court
14 claiming that an agency wronged them in some way. However, in
15 this particular circumstance, because Section 1252(g) applies,
16 that specific portion overrules, precludes --
17 THE COURT: But the reason we're here in habeas is
18 because the defendants are in custody for the purposes of
19 habeas corpus. So in what kind of a habeas corpus proceeding
20 would a court have the power to review an APA claim?
21 MS. LARAKERS: So perhaps Your Honor in -- in any
22 habeas corpus proceeding that doesn't happen under 1252(g). So
23 I think, for example, if the habeas claim had something to do
24 with, the person was in custody but also had something to do
25 with a direct violation of the regulation --

1 THE COURT: Like what?
2 MS. LARAKERS: Your Honor, I can't think of one off
3 the top of my head.
4 THE COURT: Well, you can't think of one. This is
5 a -- first of all, that was off the top of your head. You're
6 well prepared. But if you can't think of one, it renders 5
7 U.S.C. Section 703 meaningless. It says APA claims can be
8 reviewed in habeas proceedings, but you can't -- if I adopt
9 your argument, you can't think of any habeas proceeding in
10 which the court could review a claim.
11 MS. LARAKERS: Your Honor, I'm sure I could. The
12 issue I'm having is to think of a claim, a habeas claim that
13 wouldn't also result from -- that wouldn't also preclude --
14 1252(g) wouldn't also preclude it.
15 THE COURT: Exactly, exactly.
16 MS. LARAKERS: 1226(c), Your Honor, so --
17 THE COURT: Timeout.
18 MS. LARAKERS: Sorry, Your Honor.
19 THE COURT: You live with this. Here, you're going to
20 have to explain to me or remind me what 1226(c) is. You know,
21 yesterday I'm doing a criminal case. Today I'm doing an
22 immigration case. 1226(c) is what?
23 MS. LARAKERS: Okay. Well, let me back up, Your
24 Honor. I think maybe an easier context to go into is the
25 prisoner context, Your Honor. A prisoner could bring a claim

1 stating that not only is his particular detention unlawful but
2 also it's contrary to a regulation, like a Board of Prisons
3 regulation as well, and that the prison is not only
4 violating -- not only is his detention unlawful under the
5 Constitution but it's also unlawful because the regulation
6 provides otherwise. Perhaps in that situation there could be a
7 habeas claim and an APA claim. However, here we have Section
8 1252(g) as specific provisions of the INA to deal with. And
9 those specific provisions of the INA overrule those later
10 provisions in the APA.
11 THE COURT: What the provisions of the INA?
12 MS. LARAKERS: 1252(g), Your Honor.
13 THE COURT: That strips the court of jurisdiction to
14 do?
15 MS. LARAKERS: To review claims arising from any
16 action taken to execute a removal order.
17 THE COURT: But I mean, I have to go back to what I
18 wrote in Jimenez, but here they're not challenging a specific
19 decision. They're challenging a whole regime. Do you have any
20 cases that support the argument you just made?
21 MS. LARAKERS: Yes, Your Honor. They're mostly
22 included in my motion to dismiss briefing.
23 THE COURT: What's the best of them for you?
24 MS. LARAKERS: Well, Your Honor, the best of them is
25 probably AADC, but also in Candra v. Cronen, Judge Saris held

1 that the APA claim couldn't be reviewed either.
2 THE COURT: Let me see that.
3 You're talking about 361 F. Supp. 148 I think --
4 MS. LARAKERS: Yes.
5 THE COURT: -- with regard to the APA claim. Where
6 does she discuss the APA claim?
7 MS. LARAKERS: In my briefing, Your Honor.
8 THE COURT: No, in the Candra decision.
9 MS. LARAKERS: It's with regard to the children's
10 claim, I believe, Your Honor.
11 THE COURT: It says, "The government first points to
12 1252(g), but the provision by its plain language applies only
13 to claims brought by or on behalf of an alien. Count II is not
14 brought by or on behalf of Candra but the Candra children, who
15 are U.S. citizens."
16 MS. LARAKERS: So if you look at page -- I've got to
17 find the pin cite. I think it's 158. So Judge Saris says,
18 "The Candra children's APA claim is likely within the
19 jurisdictional bar to the extent that it seeks an injunction or
20 a stay." And then, "Furthermore, the government makes a strong
21 argument that ICE's decisions on stay applications are
22 committed to agency discretion by law."
23 The relief sought in this case, Your Honor, is in part
24 a stay of the final order of removal, at least until Your Honor
25 pointed out ICE considers a provisional waiver process. So ICE

1 cannot --

2 THE COURT: I'm sorry. Go ahead.

3 MS. LARAKERS: So Your Honor, the petitioners seek a

4 stay of removal until the procedures are complied with under

5 the Fifth Amendment. So because they seek a stay of removal,

6 it falls under -- their claims arise from the decision to

7 execute a removal order, and it's barred by 1252(g), and the

8 APA also precludes review.

9 THE COURT: I'm just taking a closer look at Judge

10 Saris's decision.

11 MS. LARAKERS: Yes, Your Honor, and --

12 THE COURT: Wait. I'm reading this.

13 MS. LARAKERS: Sorry.

14 THE COURT: But it goes on. This is at the end of

15 page 158. "The Candra children are also seeking a declaration

16 that ICE has instituted a new policy of denying all stay

17 applications in contravention of its own regulations requiring

18 consideration for multiple factors without going through the

19 required rulemaking process. The court likely has jurisdiction

20 to examine a challenge to the agency's decision to revoke a

21 rule without going through the rulemaking process."

22 That's precisely the contention here. So Judge Saris,

23 it appears to me, in Candra is agreeing with the petitioners in

24 this case, as the judge in Maryland did yesterday in the Lin

25 case that they cited as additional authority.

1 MS. LARAKERS: Well, Your Honor, with regard to the
2 Lin case --
3 THE COURT: Wait a minute. Let's go back to Judge
4 Saris. I asked you in effect a compound question. Why
5 isn't -- isn't the claim here not -- they're not attacking one
6 particular decision. They're saying, as I understand it, the
7 provisional waivers were issued through the APA process and now
8 they're being ignored, and the policy -- something that was
9 supposed to promote the opportunities for American citizens to
10 stay together with their wives and children, promote family
11 values, is actually being used as a trap because they get
12 called in for their I-130 interviews and arrested and are
13 detained and are subject to removal. But my understanding is
14 the claim in this case is the claim, the type of claim that
15 Judge Saris said would survive in Candra.
16 MS. LARAKERS: Your Honor, the government doesn't
17 agree with the entire decision. I think we agree with the
18 portion that says that 1252(g) applies. So to the extent that
19 the -- and I know that the opinion later on explains the other
20 part of the claim but our contention is that you can't separate
21 out those claims, the claim itself arising from the decision to
22 execute a removal order. And but for ICE's decision to execute
23 a removal order, there would be no claim in this court. There
24 would be no one that has standing to bring the claim. So the
25 proof is there in the relief that the petitioners seek in the

1 form of a stay of removal. And, Your Honor, we also have to
2 think about the fact that in Colon v. Carter the First Circuit
3 said that, you know, "Although we do not lightly interpret a
4 statute to confer unreviewable power, the ultimate analysis is
5 always one of Congress' intent."
6 THE COURT: And a number of District Courts at least
7 have addressed this APA issue, one as recently as yesterday in
8 a preliminary injunction context. And a number of District
9 Courts have found the APA claim is plausible. It survives a
10 motion to dismiss.
11 Are there district or circuit cases that address this
12 specific claim, comparable claim that the APA is in effect
13 being repealed without going through the required process and
14 come out in favor of the government?
15 MS. LARAKERS: Your Honor, I think that's, you know,
16 it's a -- Your Honor, I do not know. There may be some in my
17 prior motion to dismiss briefings, because I think the
18 supplemental briefing was -- I know, Your Honor, it was focused
19 more on the fact that assuming that 1252 applies as Your Honor
20 already found. I don't have the cases written down right here
21 that I may have cited in previous briefing, and I cannot --
22 THE COURT: So you can't think of one?
23 MS. LARAKERS: Your Honor --
24 THE COURT: Because there are -- okay.
25 MS. LARAKERS: Your Honor, ultimately here, you know,

1 it's a question of Congressional intent. But for ICE's
2 decision to execute an order of removal, there would be no
3 plaintiff with standing in this court; therefore, their claims
4 have to arise from the decision to execute a removal order, and
5 1252(g) bars that claim.
6 Your Honor, also 701(a)(2) also precludes their claim
7 to the extent that it's -- to the extent that execution of
8 removal orders are within the sole discretionary authority of
9 ICE.
10 THE COURT: They're not attacking -- I think I wrote
11 about this in detail in Jimenez. They're not attacking a
12 particular discretionary decision. They're attacking an
13 alleged wholesale refusal to follow the law that the
14 provisional waiver regulations constitute.
15 MS. LARAKERS: So perhaps, Your Honor, it would be
16 helpful to move on to the merits of their APA claim to show
17 that that's not really what they're asking for in this court.
18 Because I think it's clear that, when you look at the
19 regulations, it's the discretion that they're attacking and not
20 the -- and not the program as a whole.
21 So if we look specifically at the rulemaking
22 challenge, there can be no rulemaking challenge where the
23 petitioners fail to point to a single portion of the rule that
24 has been changed. I think indeed the rule itself encompasses
25 for administrative priorities to change, and it states very

1 clearly in the Federal Register comments that, you know, as I
2 said over and over again in the briefing, that it doesn't
3 protect from an institution of removal proceedings or in fact
4 being removed from the United States. And of course that
5 argument is much stronger with regard to people who don't yet
6 have an approved I-212, but it also applies to people who have
7 a pending I-601A, as the Federal Register comments say, that a
8 pending or approved provisional waiver does not protect an
9 individual from removal.
10 THE COURT: And didn't I address the implications of
11 that in my prior, I call it Jimenez decision?
12 MS. LARAKERS: You did with regard to due process,
13 Your Honor, and it may be true that there could be a due
14 process interest here at least with regard to the I-601 people
15 as you found, but just because there's a due process interest
16 does not also mean that there's been a violation of the
17 regulation and a corresponding right that is found in the text
18 of the regulation. Those are two separate distinct inquiries.
19 THE COURT: I don't think -- I don't understand --
20 well, anyway. I understand their argument to be that the
21 provisional waiver regulations, the constellation, emerge from
22 the process required by the Administrative Procedures Act.
23 They can be revoked if those procedures are followed, but they
24 can't just be reversed, nullified, without following those
25 procedures, and therefore there's a violation of the APA and

1 the decision not to follow the provisional waiver regulations,
2 which are laws, is arbitrary and capricious. It's essentially
3 the same argument as I see it at the moment under two headings.
4 But that's the argument, I think.
5 MS. LARAKERS: And Your Honor, perhaps that would be
6 true with a different regulation. Perhaps making a regulation
7 a nullity would be true if that regulation spoke on or wasn't
8 just merely silent but didn't have the language that we have in
9 the Federal Register comments and in the regulation here, and I
10 think that's what makes the key difference here; that the
11 Federal Register comments themselves say that even an approved
12 or a pending 601A doesn't protect an individual from removal,
13 that it actually builds into that the agency actually thought
14 about when they were enacting it about the policies of DHS
15 changing, such that it may not be in the future as it was in
16 the previous administration that people applying for the I-601A
17 were not enforcement priorities. Those priorities have changed
18 and the regulation built that into it because it says in
19 accordance with current DHS policies, governing --
20 THE COURT: Just one second. Stop. Okay, go ahead.
21 MS. LARAKERS: So I have several places where it can
22 be found. It can be found at the 2013 regulations, at 554 and
23 again at 555.
24 THE COURT: Let me -- what page?
25 MS. LARAKERS: 554 and then again at 555.

1 THE COURT: I think I have the right pages. What is
2 the language you want me to look at?
3 MS. LARAKERS: It starts with, "DHS reminds the
4 public" --
5 THE COURT: Okay.
6 MS. LARAKERS: -- "that the filing or approval of a
7 provisional unlawful presence waiver application will not," and
8 then it goes on and the last sentence, "protect an alien from
9 being placed in removal proceedings or removed from the United
10 States in accordance with current DHS policies governing
11 initiation of removal proceedings and the use of prosecutorial
12 discretion."
13 So again, Your Honor, while a regulation or a claim of
14 this type could possibly be reviewable under the APA as I think
15 many courts have found with regard to the DACA litigation,
16 that's not the case here because we have regulations that say
17 that it shall not protect someone from being removed from the
18 United States.
19 And that's the key here. The APA claim and the INA
20 claim are very closely intertwined in that way, and without
21 being able to point to a specific provision in the provisional
22 waiver regulations other than this general purpose that is
23 being violated or changed, there can't be a rulemaking
24 challenge, and there can't be a violation of the APA, and there
25 can't be an INA claim either. They all flow from each other.

1 Because at the minimum petitioners would have to show the
2 portion of the regulation that's being changed. But when the
3 regulation contemplated that, administrative priorities changed
4 and said clearly there is no due process right, that these
5 regulations do not protect an individual from being removed.
6 Where that's what the regulations say, there can be no
7 rulemaking challenge that removing an individual suddenly
8 changed that rule.
9 And indeed I think it's clear when you look at
10 petitioners' argument and other than this purpose of the
11 regulations, they can't point to a portion of the regulation
12 that would be expressly violated, and so that's the lens
13 through which we have to view the APA claim and the INA claim.
14 It's a very strict statutory regulatory analysis.
15 And, you know, I went on to the merits because that
16 also shows that 1252(g) applies, because it shows that they're
17 not actually attacking the text of the regulation. They're
18 attacking the discretionary decision that is inherent in the
19 regulations.
20 THE COURT: How is that different than the argument I
21 rejected in my September 2018 Jimenez decision? I quoted the
22 Supreme Court in Accardi. I said it's important to emphasize
23 the court is not reviewing the manner in which discretion was
24 exercised. If such were the case, it would be discussing the
25 evidence in the record supporting or undermining petitioners'

1 claims to discretionary relief rather the court objects to
2 DHS's alleged failure to exercise its own discretion contrary
3 to existing valid regulations. And I quoted Succar. "The
4 Attorney General cannot categorically refuse to exercise
5 discretion favorably for classes deemed eligible by the
6 statute. This court may therefore decide petitioners' claim on
7 a petition for habeas corpus under 28 United States Code
8 Section 2241," citing the First Circuit decision in Gonsalves.
9 How is this analysis different than that?
10 MS. LARAKERS: So, Your Honor, it goes back to what
11 the regulation required in Accardi and what the regulation
12 required in Succar.
13 THE COURT: Basically you're saying -- and you can
14 make this argument -- it's not personal -- that I was wrong in
15 Jimenez. The question -- and I've continued to think about
16 that. But, but, the question I'm asking you, which you haven't
17 answered yet, is, assuming without your conceding that my
18 analysis was right in Jimenez, how is the argument you're
19 making now materially different than the one I rejected last
20 September?
21 MS. LARAKERS: Your Honor, because the standards are
22 different. The standards in due process are different than
23 those in the statutory interpretation, in the regulatory
24 interpretation context, which is what we're dealing with in an
25 APA rulemaking challenge, and it's what we're dealing with in

1 the INA challenge. And I think Jennings clearly stands for
2 that proposition.
3 Now, Your Honor, as you know, our position is that
4 with regard to a positive law, such as where the regulation --
5 where the due process right claim is coming from a section of
6 positive law such as a regulation, there has to be very --
7 there has to be some sort of textual hook there. But I
8 recognize at least for the purposes of this argument that the
9 Due Process Clause is more flexible than a statutory
10 interpretation or regulatory interpretation argument.
11 And the statutory interpretation and the regulatory
12 interpretation argument is what we're talking about here in the
13 APA and the INA claim. So it has to be a much stricter
14 analysis. So if we look at Accardi and if we look at the
15 statutory or the regulatory interpretation section in Accardi
16 and then look at that section in Succar, we see things that we
17 do not see in the regulations here. Namely, even in Accardi,
18 the Supreme Court recognized that the decisive fact was that
19 the regulation required DHS -- sorry -- the board was required,
20 as it still is, to exercise its own judgment when considering
21 appeals. The regulation said, I believe it used the word
22 "shall," but it was express language. It required the result.
23 And the same thing is true with the regulation in
24 Succar, except for that was an even stronger case because that
25 was with regard to the statutory right. The statute itself,

1 not merely the regulation, made people eligible, a whole class
2 of people eligible.
3 THE COURT: But these -- Christine, I just want them
4 to listen to the argument.
5 The provisional waiver regulations make a class of
6 people eligible for discretionary decisions, I think, by DHS as
7 to whether they ought to be allowed to stay in the United
8 States while pursuing waivers, you know, during the provisional
9 waiver process. It's analogous.
10 MS. LARAKERS: So it makes an individual eligible, I
11 suppose you could say eligible for a discretionary decision.
12 That wasn't the regulation in Accardi, and it wasn't the
13 regulation or the statute in fact in Succar. Those regulations
14 and statutes didn't allow. It was mandated that the person
15 shall be considered.
16 Here, that's not the case. This regulation not
17 only -- not only does it not give a stay of removal, which is
18 what petitioners seek in the interim, but it expressly says
19 that it shall not protect from removal. And because there's no
20 textual hook here as there was in Accardi and as there was in
21 Succar, there can be no corresponding APA right, no rulemaking
22 challenge and no INA claim.
23 And Your Honor, again, you know that doesn't conflict
24 with the Due Process Clause necessarily because I think for
25 purposes of this -- you know, purposes of your September 21

1 order, you recognize that the Due Process Clause may be a
2 little bit more flexible.
3 THE COURT: Where did I do that?
4 MS. LARAKERS: Well, Your Honor --
5 THE COURT: I mean, I wasn't talking about the APA or
6 the INA at all. These issues have come into focus essentially
7 since December.
8 MS. LARAKERS: Yeah. So Your Honor, if we look at
9 the -- I'm just trying to express how it's not necessarily
10 adverse to your September 21 order because your September 21
11 order was talking about the Due Process Clause and here we're
12 talking about the interpretation of a statute and a regulation.
13 And I think Jennings stands for the proposition that a
14 constitutional claim and a statutory claim are different things
15 and they have different standards. And the statutory -- in
16 order to find a statutory or regulatory right, you have to look
17 in the text of the regulations and find that right as they did
18 in Accardi, as they did in Succar, and here, because that
19 language is not at all present. And it's not just language
20 that, you know, makes it seem like someone should be able to
21 apply.
22 THE COURT: Following the language I read from Jimenez
23 at page 387, I wrote, "The court concludes that 8 C.F.R.
24 Section 212.7 requires DHS, as acting through ICE, to consider
25 an eligible alien's application for a provisional unlawful

1 presence waiver before deciding to remove him or her from the
2 United States. The regulation entitles an eligible applicant
3 to relief that is distinct from a waiver granted when an alien
4 is outside of the United States." But I found a right in
5 Section 212.7.
6 MS. LARAKERS: Your Honor, I would say that that
7 analysis was done under the Due Process Clause. And while
8 obviously I made arguments strenuously against that, and the
9 government doesn't take that position that there's a due
10 process interest here at all, I think there is more -- Your
11 Honor could find more flexibility in the Due Process Clause
12 perhaps.
13 But I think Jennings makes it very clear that a
14 statutory interpretation argument, a regulatory interpretation
15 argument is a strict analysis, and you have to find that
16 textual hook that requires the relief sought. And as in
17 Accardi, as in Succar, as in Jennings even, without that
18 textual hook, there can be no claim that the respondents
19 violated the regulations themselves, even if, you know, as the
20 Jennings court recognized, there could be a Due Process Claim.
21 You know, Jennings remanded it for the due process question.
22 So, you know, while I'll make arguments later that to
23 the extent that it's a portion of positive law where the
24 petitioners claim that the due process right comes from a
25 section of positive law, such as a regulation, it should be

1 confined to the regulation itself, while I'll make that
2 argument, I think it's -- you know, it's certainly a much
3 stricter analysis and there is a lot of case law about how
4 strict the analysis has to be in a statutory and regulatory
5 interpretation claim.
6 And I think if we view, if we view this APA claim and
7 this INA claim as just merely interpreting the statute at hand,
8 it's very clear that this regulation, that this statute and
9 regulatory scheme, when interpreted by its plain terms, does
10 not allow the relief sought by petitioners even if Your Honor
11 finds that the Due Process Clause does.
12 THE COURT: And let's say I was wrong in finding that
13 1252(g) strips jurisdiction. I noticed that the judge in
14 Maryland yesterday is among those who disagreed with that
15 analysis. Would that end the inquiry, if I were to change my
16 mind on 1252(g) and not find the authority to review under the
17 Suspension Clause?
18 MS. LARAKERS: Well --
19 THE COURT: What are the implications of that for your
20 argument?
21 MS. LARAKERS: Then we would move on to the other
22 section of APA precluding review, which is Section 701(a)(2).
23 Your Honor, those arguments are similar to the ones under
24 1252(g), but I think that, when we look at AADC and the dicta,
25 the long dicta by Justice Scalia, we see that these types of

1 claims that petitioners are bringing are more akin to selective
2 enforcement claims that, you know, I've got factors that you
3 didn't consider, I've got things in my file that you should
4 have considered before you decided to execute my removal order.
5 And those are, you know, discretionary decisions at the height
6 of executive power that are not suitable for judicial review.
7 And so I think we would look at 701(a)(2) to see if
8 that separate section that precludes review of decisions that
9 are within the executive -- within the agency's sole
10 discretion, whether that also precludes review. And of course
11 that overlaps with the 1252(g) argument.
12 But Your Honor doesn't -- Section 1252(g), going back
13 to that, it does apply and you can see that it applies when you
14 look at whether there's any cognizable claim under the INA,
15 whether there's any cognizable claim that the respondents
16 violated the regulation. When there's no cognizable claim that
17 the person violated the regulation, then you can see that what
18 they're really challenging is discretion. Because if there's
19 no violation of the regulation --
20 THE COURT: They're alleging you ignored the
21 regulation and violated it by not -- you know, you understand.
22 In my Jimenez decision, I'll call it, I didn't decide that
23 nobody who had applied for a provisional waiver or at any stage
24 couldn't be removed. I only ordered that you had to consider
25 the fact that the person was seeking a provisional waiver.

1 MS. LARAKERS: Yes, Your Honor, and I understand those
2 practical considerations as I think you made very clear. But
3 for the purposes of this, you know, legal argument, it's clear
4 that they're challenging the discretion because they're
5 challenging that a factor wasn't considered. They're saying
6 that the 601A regulations should have been considered in that
7 discretionary decision to execute their removal order, and that
8 challenge that there's something lacking in ICE's discretion
9 here, and I think even it's part of this court's proposed
10 relief that there be something added, that there be something
11 added to that discretion. And I think that's why Your Honor
12 found that their claims are encompassed within Section 1252(g),
13 because the regulations themselves don't say that they're
14 required to the relief that they seek, so they're seeking to
15 add on something to ICE's discretionary authority, a new
16 factor, and that necessarily falls within ICE's discretionary
17 authority.
18 THE COURT: Okay. I recognize that there's a
19 relationship between the APA claim and the INA claim, but I
20 think it will be easiest for me to hear the argument on them
21 separately, and you can continue to point out the relationship
22 between the arguments. But how do the petitioners respond to
23 this, please?
24 MS. LAFAILLE: So, Your Honor, before I get into the
25 substance of that, I do want to note, and I know we'll discuss

1 this later, but so I don't lose the thought, that all of these
2 arguments are all-or-nothing arguments. All of them, you know,
3 the claim either rises or falls with regard to the class as a
4 whole. And, you know, I think it certainly will be relevant
5 later that there's no distinction here being drawn between
6 people at different stages of the provisional waiver process.
7 THE COURT: You mean for the APA --
8 MS. LAFAILLE: Correct, Your Honor.
9 THE COURT: This is part of the reason I put the APA
10 first. A, I thought it was your strongest argument. B, I
11 thought that if I don't dismiss your APA claim, then your class
12 definition is appropriate. These are all tentative views.
13 I'll give you a preview of coming attractions. My
14 tentative view is that your APA and INA claims survive the
15 motion to dismiss, that your Due Process Claim vests -- and now
16 I'm -- when you have an approved, what, I-230? Although I may
17 be confusing the numbers.
18 MS. LAFAILLE: Either and I-130 or an I-212, Your
19 Honor.
20 THE COURT: You have to have an approved I-212.
21 That's the defendant's argument if they accept there's a Due
22 Process Claim. I don't think the Equal Protection claim is
23 plausible because at the moment, and of course this is a huge
24 issue, is the test Arlington or is the test Hawaii, but I think
25 the test is Hawaii. But there might be a subclass for due

1 process purposes if my tentative views, which might change,
2 that's narrower than the APA class that I would probably
3 certify if I don't dismiss the APA claim. But I think that's
4 consistent with what you were just saying about all or nothing,
5 that if the APA claim is not dismissed, then your class
6 definition is the appropriate one?
7 MS. LAFAILLE: Yes, Your Honor. And obviously we'll
8 have lots to talk about --
9 THE COURT: Later, but go ahead.
10 MS. LAFAILLE: -- with regards to due process and
11 equal protection.
12 THE COURT: You've got a lot to talk about concerning
13 the APA and the INA. I told you what my tentative view is.
14 MS. LAFAILLE: Yes, Your Honor.
15 What happened in this case, Your Honor, was that the
16 government enacted regulations that were designed to keep
17 families together, and then it all but erased them. And that
18 conduct falls in the heartland of what the APA prohibits.
19 Now, the government is misreading the APA in a very
20 important way. The government conduct violates the APA when it
21 is arbitrary and capricious or not in accordance with law. And
22 although, you know, we think -- and we think the court has
23 already held that the government conduct here was not in
24 accordance with law. It's also --
25 THE COURT: What conduct?

1 MS. LAFAILLE: That the annihilation of these
2 regulations was not in accordance with law. It's also the case
3 that this was a reversal of policy that is arbitrary and
4 capricious under the APA. And that's the case because even
5 when the government acts within the bounds of its statutory and
6 regulatory authority, it still cannot simply change its course
7 without reasoned explanations and reasoned considerations of
8 relevant nonarbitrary factors. And none of that is present in
9 this case.
10 What we have here is a regulation that is on the books
11 that is all but wiped out, and we have eligibility for relief
12 being made into, at best, a sport of chance. Those are things
13 that are arbitrary, clearly arbitrary and capricious under all
14 of the Supreme Court's case law.
15 With regards to the jurisdictional arguments being
16 made, Your Honor, this claim falls outside of 1252(g) because
17 it is a claim that the government, as Judge Saris acknowledged
18 in Candra, this is a claim that the government wholesale
19 reversed its regulations without following the proper procedure
20 and without giving reasons for doing so. That kind of claim is
21 not encompassed by 1252(g).
22 THE COURT: Here. Remind me of what 1252(g) says.
23 MS. LAFAILLE: It bars jurisdiction for claims by or
24 on behalf of any alien arising from a decision or action by the
25 Attorney General to commence proceedings, adjudicate cases, or

1 execute removal orders. And here what we're challenging, Your
2 Honor, is not a decision or action to execute removal orders.
3 Here what we're challenging is a decision that rules on the
4 books do not have to be followed. Even if 1252(g) applied to
5 the claims of the non-citizens in this case, the Suspension
6 Clause would still protect this court's jurisdiction, and
7 that's because, as this court acknowledged, 703 of the APA
8 allows judicial review under the APA to occur in any
9 appropriate proceeding, including habeas corpus. And the APA
10 requires courts to find unlawful government conduct that is
11 arbitrary and capricious. So the Suspension Clause's
12 protection for consideration of legal and constitutional claims
13 encompasses these claims because they're plainly legal claims.
14 And finally, Your Honor, with regards to the argument
15 that there is essentially no law to apply, this is an extremely
16 narrow exception to the APA's jurisdiction, and we think it's
17 foreclosed by this court's prior order. There clearly is law
18 here to apply. Your Honor wrote at length about that law and
19 about what the regulation here requires.
20 THE COURT: Are there -- didn't Judge Saris decide or
21 indicate that 1252(g) didn't apply to the APA argument?
22 MS. LAFAILLE: Yes, Your Honor, and I don't actually
23 have --
24 THE COURT: Candra?
25 MS. LAFAILLE: -- I don't actually have Candra in

1 front of me, but she did, as Your Honor pointed out, note that
2 the court likely has jurisdiction to examine a challenge to the
3 agency's decision to revoke a rule without going through proper
4 procedures.
5 THE COURT: Okay. Is there additional argument you'd
6 like to make on this?
7 MS. LAFAILLE: Not unless Your Honor has questions.
8 THE COURT: What do you think are the other decisions,
9 I think they would be District Court decisions, that best
10 explain and support the reasoning you contend is correct?
11 MS. LAFAILLE: So Your Honor is aware, the cases,
12 specific cases specifically on point is are the Martinez v.
13 Dicensio and Lin decisions, but I also think that the Supreme
14 Court's decisions on arbitrary and capricious review like
15 F.C.C. v. Fox and Judulang v. Holder make it extremely clear
16 that the actions of the government here are arbitrary and
17 capricious.
18 THE COURT: And Lin, the Lin decision you provided
19 yesterday is a second Lin decision; essentially there's
20 yesterday's in conjunction with the preliminary injunction?
21 MS. LAFAILLE: Correct, Your Honor.
22 THE COURT: All right. The briefing on this
23 Administrative Procedures Act claim, which is Count 4, is
24 thorough, and the argument has tested but not altered my
25 tentative view that the motion to dismiss Count 4 should be

1 denied, therefore I'm denying it.
2 In summary, the reasons for denying it are as follows:
3 Petitioners argue that respondents have violated the
4 Administrative Procedures Act or APA for two reasons. One,
5 that ICE has altered substantive rules without notice and
6 comment rulemaking and without consideration of the reliance
7 interests created by the regulations in violation of 5 United
8 States Code Section 553. That contention is made in the
9 amended complaint in paragraphs 123 to 27.
10 Second, petitioners allege that detaining and removing
11 noncitizen petitioners without allowing them to follow the
12 provisional waiver procedures is arbitrary and capricious and
13 in violation of 5 United States Code Section 706(2)(a) because
14 that represents an abandonment of the binding promises provided
15 by the regulations and is a decision not based on "a
16 consideration of the relevant factors" nor "tied . . . to the
17 purposes of" the regulations, as required by Judulang, 565 U.S.
18 42 at 53, 55.
19 And I've decided previously in this case in the due
20 process context that respondents have a duty to consider the
21 fact that an alien and his or her spouse are seeking a
22 provisional waiver in deciding whether to remove somebody. I
23 haven't decided that everybody pursuing a provisional waiver
24 has a right not to be removed. Both APA claims are reviewable
25 by this court. Contrary to petitioners' contention -- well,

1 I'm of the view that Section 1252(g) does strip this court of
2 jurisdiction and therefore the Suspension Clause of the
3 Constitution is implicated, something I wrote about in detail
4 in Jimenez, 334 F. Supp. 3d 370, in this case.
5 Courts differ on that issue, and if review is not
6 stripped by 1252(g), the authority to review exists. If it is
7 stripped by 1252(g), the Suspension Clause provides the
8 opportunity and obligation for this court to exercise
9 jurisdiction over the APA claims. And the discussion of
10 1252(g) in Jimenez is at 334 F. Supp. 3d 384 to 85.
11 Under the APA, 5 United States Code Section 703,
12 judicial review of a claim can occur in "any applicable form of
13 legal action, including . . . habeas corpus," as Judge Saris
14 noted in Putnam, 441 F. Supp. 2d 253 at 255 to 56, citing
15 cases. In addition, the bar to review an agency action that's
16 committed to agency discretion by law in 5 U.S.C. Section
17 701(a)(2) does not apply here because petitioners' APA claim,
18 like its Due Process Claim, challenges ICE's "failure to
19 exercise its own discretion" as opposed to any particular
20 discretionary determination, as I discussed in Jimenez, 334 F.
21 Supp. at 385.
22 On the merits, petitioners plausibly allege that the
23 respondents have violated the APA by effectively repealing,
24 without explanation, the provisional waiver regulations, 5
25 United States Code Section 551, Sections 4 and 5. An agency

1 may not "depart from a prior policy sub silentio or simply
2 disregard rules that are still on the books," as the Supreme
3 Court wrote in F.C.C. v. Fox Television, 556 U.S. 502 at 513 to
4 15. More specifically, "An agency changing its course must
5 supply a reasoned analysis," and the court may not infer the
6 agency's reasoning from mere silence, as the Supreme Court said
7 in State Farm, 463 U.S. 29 at 57. The Supreme Court has stated
8 that the APA "mandates that agencies use the same procedures
9 when they amend or repeal a rule as they've used to issue a
10 rule in the first instance." That's Perez, 135 Supreme Court
11 1199 at 1206.
12 Here it's alleged and plausibly alleged that ICE's
13 decision to remove individuals before they can pursue the
14 provisional waiver process constitutes a substantial change in
15 course from DHS's prior policy which was promulgated after
16 notice and comment. By extending the benefits of the
17 provisional waiver regulations to aliens with final removal
18 orders in 2016, DHS allowed individuals pursuing an unlawful
19 presence waiver, an I-601, to be considered for the relief of a
20 provisional waiver while in the United States. Failure to give
21 consideration to applications for this relief and in fact
22 rendering it impossible for individuals to pursue the relief by
23 arresting them in some instances at the beginning of the
24 process while they're in a government office applying for an
25 I-130 effectively reverses that policy.

1 This change in course was not the result of any notice
2 and comment rulemaking or reasoned analysis in the Federal
3 Register -- or the Federal Register.
4 Multiple other District Courts have found nearly
5 identical APA claims concerning the provisional waiver process
6 to be plausible. These decisions include Lin v. Nielsen, a
7 November 19, 2018 District of Maryland case, and a reiteration
8 of the analysis in that case in a May 2, 2019 decision on
9 preliminary injunction, which at pages 8 to 10 has reasoning
10 with regard to the merits of the motion to dismiss that I think
11 is succinct and correct.
12 Another District Court decision rejecting the argument
13 the government makes here is the De Jesus Martinez, 341 F.
14 Supp. 3d 400 at 410, a 2018 New Jersey decision. In the
15 Southern District of New York the same argument was rejected in
16 Villavicencio, 330 F. Supp. 3d 944 at 958.
17 Petitioners also state a plausible claim that
18 respondents' failure to consider participation in the
19 provisional waiver process in enforcement decisions is
20 arbitrary, capricious and abuse of discretion or otherwise not
21 in accordance with law as required by 5 U.S.C. Section 706
22 because that policy is not in accordance with the purposes and
23 proper functioning of the immigration laws, which the Supreme
24 Court said is required in Judulang, 565 U.S. at 55.
25 In assessing an APA claim in the immigration context,

1 courts assess whether the agency action is "tied, even if
2 loosely, to the purposes of the immigration laws or the
3 appropriate operation of the immigration system." More
4 specifically, this court's reasoning in its September 21, 2018
5 decision finding that removal of petitioners without
6 consideration of participation in the provisional waiver
7 process would render "meaningless" the "binding promises" of
8 the provisional waiver regulations indicates that DHS's conduct
9 may not be tied or is not tied to the purposes of the
10 immigration law or at least the "appropriate operation" of the
11 immigration laws. Something I discussed in Jimenez, 334 F.
12 Supp. at 389.
13 Although ICE maintains statutory authority to deport
14 individuals, including individuals participating in the
15 provisional waiver process, this court has previously held that
16 ignoring participation in the provisional waiver process
17 entirely does not accord with a prevailing purpose of the
18 Immigration and Nationality Act or its regulations. I have
19 referred to the INA as the parties have.
20 So for those reasons, the motion to dismiss Count 4 is
21 denied. I don't know -- are the arguments concerning the
22 parameters of the putative class the same or different with
23 regard to the INA?
24 MS. LARAKERS: Same or different, like, as the due
25 process?

1 THE COURT: No, not due process. Due process I think
2 is different. You're running ahead on that one at the moment.
3 Let me do the following. And anything I decide particularly
4 with regard to class certification can be changed. In fact,
5 class certification can be changed at any time in the course of
6 the case, as can any ruling until the case is over.
7 But at the moment, the proposed class definition is --
8 petitioners seek certification of a class defined as any U.S.
9 citizen and his or her noncitizen spouse who has, one, a final
10 order of removal and has not departed the United States under
11 that order; two, is the beneficiary of a pending or approved
12 I-130 petition for alien relatives filed by the U.S. citizen
13 spouse; three, is not ineligible for a provisional waiver under
14 8 C.F.R. Section 212.7(e)(4)(i), or 6 and 4, is within the
15 jurisdiction of Boston ICE-ERO field office comprising
16 Massachusetts, Rhode Island, Connecticut, Vermont, New
17 Hampshire and Maine. That's the requested definition of the
18 putative class?
19 MS. LAFAILLE: Yes, Your Honor.
20 THE COURT: And it's petitioners' argument that for
21 the APA claim at least that's the correct definition. That's I
22 think what you meant earlier by saying this is all or nothing.
23 MS. LAFAILLE: Yes, Your Honor.
24 THE COURT: All right. Now, understanding that the
25 government objects to the APA ruling, the ruling denying the

1 request to dismiss the APA claim, if you accept, as you must,
2 that I've denied the motion to dismiss, has the government --
3 and I'm not deciding now whether class certification is
4 appropriate. But does the government assert that petitioners'
5 proposed definition of the putative class is defective in some
6 way with regard to the APA claims, not the Due Process Claims?
7 MS. LARAKERS: Yes, Your Honor. It's defective
8 because it includes people who do not yet have an approved
9 I-212, so it goes back to my textual argument. Just like
10 there's no due process right, there's no textual hook making it
11 unlawful to remove an individual who doesn't have an approved
12 I-212. So it's the same analysis. It's just a different
13 standard under the APA claim.
14 THE COURT: Well, I think I've just rejected that
15 argument, though, for APA purposes. Ms. Lafaille, why is this
16 a correct definition based upon the APA ruling I just made?
17 MS. LAFAILLE: So, with the APA claim what we have is
18 a wholesale government practice and a change in policy, as Your
19 Honor just found. And the question here that would be relevant
20 to class scope is one of standing. And the question would be
21 who has standing to challenge that violation of the APA.
22 We've laid out in our briefs how every petitioner and
23 class member in this case has standing to challenge that
24 because of the very substantial risk that they face that these
25 regulations that were designed to help them keep their families

1 together will in fact result in their families being torn
2 apart. The government has not challenged at all our arguments
3 about standing and our arguments that petitioners and the
4 putative class members are all clearly within the zone of
5 interest for the relevant statutes.
6 MS. LARAKERS: So Your Honor, I think now that we know
7 that the APA claim isn't going to be dismissed, I think as you
8 know and I think as petitioners would agree, the INA claim
9 falls within the APA. Because the INA isn't its own
10 independent grounded jurisdiction. It has to be reviewed under
11 some sort of statute. So it would be reviewed under the
12 Administrative Procedures Act to the extent that plaintiffs
13 claim that it's a violation of the provisional waiver
14 regulations to remove them. So it would fall under that
15 contrary to law portion.
16 Our claims aren't arising -- our claim that it should
17 be -- the class at the very least should be limited isn't so
18 much related to their rulemaking challenge but more related to
19 whether those individuals without an approved I-212, whether it
20 was a violation of the INA to -- whether it's a violation of
21 the INA to remove them.
22 THE COURT: Before I do the class certification, I
23 think -- and I thought there might be some difference for class
24 certification differences between the APA and the INA. But is
25 there more you'd like to say about the merits of your INA --

1 your motion to dismiss under the INA and regulations.
2 MS. LARAKERS: Not much, Your Honor. Just that this
3 is akin to, this is a statutory interpretation, regulatory
4 interpretation, so we have to look at the text of the
5 regulation itself. And because the text of this regulation
6 does not cabin discretion, in fact, it expressly says that, you
7 know, as I've repeated many times, that it doesn't protect an
8 individual from removal, that there can be no textual hook
9 there required for their statutory or regulatory argument.
10 And I think Jennings very clearly stands for that
11 proposition, that you cannot turn a regulation or statute into
12 its polar opposite. And because this regulation and the
13 Federal Register comments say no interim benefits because they
14 say that a person shall not be protected from removal, even by
15 filing an I-601A, granting a stay of removal even in the
16 interim would be turning that language into its polar opposite,
17 and that's not allowed by Jennings. And I think Jennings is
18 the key case at hand here. It's a statutory interpretation
19 case.
20 And importantly, Your Honor, the petitioners don't
21 make an argument that -- a constitutional avoidance argument,
22 nor could they. So when you're looking at interpreting a
23 statute or a regulation, you're looking at whether the text of
24 the regulation itself allows for the result that you seek. And
25 whether you're looking at it under just pure statutory

1 regulatory interpretation or whether you're looking to avoid a
2 certain interpretation to avoid constitutional concerns,
3 whatever it is, it still has to be a plausible -- it still has
4 to be a plausible interpretation of the regulation. And here I
5 think petitioners have said that they don't make it a
6 constitutional avoidance argument, that it's just based on the
7 regulation itself.
8 THE COURT: I don't think either party cited Smith,
9 508 U.S. 23, where the Supreme Court says that statutory
10 construction is a holistic endeavor. It's a familiar concept.
11 You don't look at, you know, one provision or one line alone.
12 You look at the express language in the context of the whole
13 statute. And the purpose is manifest by the words in the
14 statute. And I think that has implications here.
15 MS. LARAKERS: If you look at the statute
16 holistically, a statutory interpretation argument isn't an
17 argument about the purposes of the regulation. Statutory and
18 regulatory interpretation requires a close examination of the
19 text, and a close examination of the text here says that an
20 individual -- that the provisional waiver doesn't protect an
21 individual from being removed, and it certainly doesn't protect
22 an individual from being removed prior to when they have a
23 I-212 approved.
24 That gets into my second argument, which I won't make
25 here right at this point in time, but it's a strict analysis.

1 I think the leading case on this has to be Jennings. And even
2 taking into account this holistic approach, petitioners fail to
3 point to a single part in the regulation other than its spirit
4 and purpose.
5 THE COURT: But it's essentially I think -- and I'll
6 listen -- the same argument, that even in the due process
7 context, I didn't find that somebody seeking a provisional
8 waiver couldn't be deported, just that it had to be considered.
9 Regulations like statutes are laws. I wrote about that at
10 length previously. And the regulations create the provisional
11 waiver process, and the argument, as I understand it under the
12 INA -- and that's where you're correct in saying it's closely
13 linked to the APA -- is that ICE is ignoring the provisional
14 waiver process and removing people without considering the
15 process and to some extent rights at some point created by the
16 provisional waiver process, and that's arbitrary or capricious
17 or contrary to law, contrary to the regulations, which are
18 laws. So what's wrong with that analysis?
19 MS. LARAKERS: So I think we can look at this as sort
20 of like a funnel, right? At the very -- the rights get limited
21 as we go down the funnel. And at the very tip of that funnel
22 is their claim that respondents violated the regulations
23 themselves, which requires a close look at the text. Maybe
24 perhaps, you know, as Your Honor stated, you don't have to
25 find -- I think the rulemaking challenge in that sense is a

1 little bit different. A challenge to an overarching policy
2 that, as Your Honor may find, is a sub silentio departure is
3 also different from whether respondents actually violate the
4 texts of the regulations themselves. I think no one disputes
5 that the new Executive Order replaced the old priorities. But
6 here, that's not the challenge.
7 THE COURT: The order can't replace the regulations.
8 MS. LARAKERS: Yes, Your Honor. And I think that's
9 why you've found that there may be a rulemaking challenge, but
10 it doesn't follow, it doesn't follow that there's a challenge,
11 that they can state a challenge for a violation of the
12 regulations themselves because that requires a strict
13 interpretation of the text.
14 THE COURT: Well, it may be useful to go back to the
15 standard that applies to a motion to dismiss, and that is, is
16 there a plausible claim? Because I can consider the Executive
17 Order. It's referenced in the complaint, I believe. But the
18 question here is, is there a plausible claim. They're alleging
19 that the provisional waivers were not considered at all. Maybe
20 you'll show that they were considered, or they'll fail to prove
21 they weren't considered at all, or since the relief that's
22 being sought is prospective, right, declaratory relief, you
23 know, maybe if ICE was doing it wrong, unlawfully previously,
24 it's not doing it unlawfully anymore. This goes to questions
25 of injunctive relief. Anyway.

1 But why is this their claim not plausible?
2 MS. LARAKERS: Their claim isn't plausible because
3 they even fail to point to text in the regulation itself that
4 is violated when respondents remove an individual without
5 considering the provisional waiver process. They have to be
6 able to point to text. That's what Jennings stands for. And
7 that may be a holistic approach of the text, maybe not just
8 looking at one portion of the text. But even looking at the
9 text as a whole, you still get the same result.
10 And Your Honor, I think it's -- we should look at, you
11 know, a case that this court has cited before, Ceta v. Mukasey.
12 I think that gives us a good example here. Now, that
13 regulation at issue in Ceta said that it would ordinarily be
14 appropriate for an immigration judge to grant a continuance in
15 the event that a person has a right to an adjustment -- can
16 adjust status in the United States. Perhaps if there were
17 similar language in this statute that it shall ordinarily be
18 appropriate for ICE to grant a stay of removal or it shall
19 ordinarily be appropriate or ICE shall consider when a person
20 has a 601A waiver or if it even mentioned ICE at all in a way
21 that required something on behalf of ICE. But the regulation
22 didn't. And in fact it says the exact opposite by saying it
23 shall not protect from removal.
24 So when we look at those two cases, we see that that
25 cabining on discretion isn't present in this statute. So you

1 can't have -- there can be no plausible claim that ICE is
2 required to consider the provisional waiver process by the
3 regulatory statute. And again, Your Honor, it doesn't mean
4 that there's no Due Process Claim. It doesn't mean that
5 there's -- those standards are different. It just means that
6 there's no statutory claim here, a claim for the violation --
7 and I keep on saying statutory but Your Honor understands it's
8 regulatory -- there can be no claim for a violation of the
9 regulations themselves. And that sums up our argument, Your
10 Honor.
11 THE COURT: Okay. And the response is?
12 MS. LAFAILLE: Your Honor, just briefly because I
13 think the court's prior order addresses this. The plain
14 language that Ms. Larakers refers to is the provision of the
15 regulations creating the provisional unlawful presence waiver.
16 Yes, it doesn't prohibit removal in any specific case, but it
17 can't be interpreted to say that every beneficiary should be
18 removed as soon as they come into contact with the government.
19 And that's the policy that was being applied here.
20 THE COURT: All right.
21 Well, the motion to dismiss Count 1, the claim based
22 on the Immigration and Nationality Act, INA, and related
23 regulations is denied because plaintiffs, petitioners have
24 stated a plausible claim on which relief can be granted.
25 As the parties recognize, this claim overlaps to some

1 degree with the APA claim. As I've held last year in this
2 case, 334 F. Supp. 3d at 387, 8 C.F.R. Section 212.7 "requires
3 DHS, acting through ICE, to consider an eligible alien's
4 application for a provisional unlawful presence waiver before
5 deciding to remove him or her from the United States."
6 Respondents now assert that the Supreme Court's ruling
7 in Jennings precludes a statutory claim because the plain text
8 of the INA cannot be interpreted to require the relief
9 petitioners seek, which I interpret to be consideration of the
10 provisional waiver process that's been applied for or invoked.
11 Nor can the statute -- the government also argues that the
12 statute cannot be interpreted in the manner advocated by
13 petitioners without triggering the canon of constitutional
14 avoidance, which respondents say "has no application" in the
15 absence of "more than one plausible construction." That's
16 Jennings, 138 Supreme Court at 842.
17 I think it's a correct statement of the general
18 principle in Jennings, but it's really not relevant to the
19 analysis here. The INA and its regulations are properly
20 interpreted as requiring consideration of the provisional
21 waiver process and the court doesn't rely on any constitutional
22 or constitutional avoidance principle. "Statutory construction
23 is a holistic endeavor," as the Supreme Court wrote in Smith,
24 508 U.S. 233.
25 Here the INA and provisional waiver regulations create

1 a statutory scheme that begins with the filing of an I-130 and
2 goes up to the point of submitting an I-601A. That scheme
3 would be nullified if the relevant regulations were interpreted
4 as allowing the government to make it impossible for an
5 individual to apply for a provisional waiver by arresting or
6 detaining the individual while pursuing the I-130. This
7 relates to the discussion of Ceta, 535 F. 3d 639 at 646, in
8 Jimenez, 334 F. Supp. 3d at 386 to 90, and another relevant
9 case is Kalilu, 548 F. 3d 1215.
10 The reasoning of a recent Southern District of New
11 York case is, I find, instructive and persuasive. That case
12 essentially reinforces the reasoning in my September 2018
13 decision in this case with regard to petitioners' due process
14 claim and also applies to the claim under the INA and
15 associated regulations. The case to which I refer is You, 321
16 F. Supp. 3d 451 at 465, denying a motion to dismiss an INA
17 claim by interpreting the regulatory scheme as a whole and
18 specifically "declin[ing] to read the INA in a way that
19 nullifies its adjustment of status scheme."
20 To the extent, if any, that the regulations are
21 ambiguous -- and I don't find them ambiguous for the pertinent
22 purpose -- to the extent there's ambiguity, deference under
23 Chevron or Auer should not be afforded to DHS's interpretation
24 of them because DHS's position qualifies as a "post hoc
25 rationalizatio[n] advanced by an agency seeking to defend past

1 agency action under attack," Bowen, 488 U.S. 212-213, to which
2 in Auer, 519 U.S. at 462, the Supreme Court noted deference is
3 not due because there is "reason to suspect that the
4 interpretation does not reflect the agency's fair and
5 considered judgment."
6 Essentially here, the argument under the APA is
7 essentially the flip side of the INA argument and analysis, and
8 that is that ICE, Department of Homeland Security, does not
9 have the discretion to ignore the provisional waiver
10 regulations and to in effect nullify them without considering
11 them and deciding whether to remove certain aliens who are
12 seeking relief under the provisional waiver process.
13 So now I think it may be, particularly under the APA,
14 appropriate to decide what the parameters of a putative class
15 would be, given those two rulings. I don't even have a
16 tentative view at the moment as to how I'm going to come out on
17 the question of whether citizen spouses -- well, I do have a
18 tentative view, not as well informed as most of my tentative
19 views, how I would come out on whether U.S. citizen spouses
20 have a liberty interest for due process purposes.
21 What's the argument, Ms. Lafaille, that they have --
22 even if they don't have a liberty interest, they're in the APA
23 class? I think I know what it is, but I'm not confident.
24 MS. LAFAILLE: So for the same reasons I mentioned
25 earlier, Your Honor, the citizens here have standing to raise

1 APA claims based on the violations that this court has just
2 recognized. They are clearly within the zone of interest of
3 the Immigration and Nationality Act. The U.S. citizens here
4 are the ones that initiate the process by petitioning for their
5 U.S. citizen spouse. And they are injured clearly by the
6 government conduct here.
7 THE COURT: Okay. And what's the government's
8 argument, that the proposed definition of the class is not
9 appropriate for APA and INA purposes, putting aside due process
10 for the moment?
11 MS. LARAKERS: Your Honor, it doesn't have to do with
12 the U.S. citizen petitioners. It's about the alien
13 petitioners. Because, you know, as I've stated, you know, a
14 person who doesn't have an approved I-212 cannot even apply for
15 a I-601A. So that's our argument. If you want to hear more
16 about those reasons, I can tell you, but I don't want to --
17 * * * * * * * * * * *
18 THE COURT: Okay. I think -- this was fully briefed,
19 as I understand it, and I'll rule on it. For the purposes of
20 the APA and the INA, the petitioners seek certification of a
21 class defined as any U.S. citizen and his or her noncitizen
22 spouse who has, one, a final order of removal and has not
23 departed the U.S. under that order; two, is the beneficiary of
24 a pending or approved I-130 petition for alien relative filed
25 by the U.S. citizen spouse; three, is not ineligible for a

1 provisional waiver under 8 C.F.R. Section 212.7(e)(4)(1) or
2 (vi); and four, is within the jurisdiction of Boston ICE-ERO
3 field office comprising Massachusetts, Rhode Island,
4 Connecticut, Vermont, New Hampshire and Maine. I find that
5 that is the appropriate definition of the putative class for
6 APA purposes and also INA purposes.
7 Respondents assert that the scope of an APA and INA
8 based class should not include aliens "who are not even
9 facially eligible to apply for a provisional waiver or who
10 clearly do not fit into the group of individuals the
11 provisional waiver was designed to help." However, the class
12 is not overbroad for the purposes of the APA claim because all
13 petitioners have standing under the APA. Plaintiffs asserting
14 APA claims must establish both Article III standing and be
15 arguably within the zone of interests to be protected or
16 regulated by the statute allegedly violated. That's the test
17 of Match-E-Be-Nash, 567 U.S. at 224. Here, respondents do not
18 dispute the fact that noncitizens with pending I-130
19 applications are within the "zone of interests" protected by
20 the INA. In any event, those noncitizens are within the zone
21 of interest protected by the INA.
22 Indeed, all of the alien putative class members suffer
23 Article III injury in fact because they face substantial risk
24 that they'll be arrested, detained or removed due to DHS's
25 failure to consider their pursuit of lawful status. That's the

1 test of Lujan, 504 U.S. 555 at 560, 61. In addition, all
2 putative class members also fall within the INA zone of
3 interests. This test is lenient. Under the APA a plaintiff
4 has standing unless her interests are "so marginally related to
5 or inconsistent with the purposes implicit in the statute that
6 it cannot reasonably be assumed that Congress intended to
7 permit the suit," as the D.C. circuit wrote in National
8 Petrochemical, 287 F. 3d 1130 at 1147.
9 Notably, it is sufficient that the interest sought to
10 be protected is "arguably" within the zone of interest to be
11 protected as the Supreme Court said in Bennett, 520 U.S. 154 at
12 175. Citizen spouses are also arguably or also in the zone of
13 interests even if they do not have a due process -- have a
14 liberty interest for due process analysis, something I have not
15 yet decided.
16 All the class members' interests are related to the
17 promises and purposes of the INA because they are either aliens
18 applying for lawful status based on family ties or are citizen
19 spouses assisting in that process. This court has already
20 recognized the purpose of the INA is to keep families together,
21 in particular to provide noncitizen family members with an
22 avenue to obtain lawful status in order to promote the
23 integrity of the family unit. I wrote about that in Jimenez,
24 334 F. Supp. 3d at 387, citing cases.
25 Courts have consistently found that applicants for

1 lawful status under the INA fall into the statute zone of
2 interest. That was the decision of the Second Circuit in
3 Mantena, 809 F. 3d 721 at 733, the Sixth Circuit in Patel, 732
4 F. 3d 633 at 637, and in National Association for the
5 Advancement of Colored People v. Trump, 298 F. Supp. 3d 209 at
6 235. In addition, in Hawaii v. Trump, which was vacated on
7 other grounds, the Ninth Circuit had little trouble concluding
8 that the citizen plaintiff was within the zone of interests of
9 the INA to challenge, providing standing, EO2 based on his INA
10 statutory claim because he asserted the travel ban, which was
11 at issue in that case, prevented his mother-in-law from
12 reuniting with her family. That's 859 F. 3d 741 at 766.
13 It's now almost noon. I think it would be helpful to
14 me to recess now. When we resume, I want to hear argument on
15 the Due Process Claim and then the Equal Protection claim and I
16 think finally the standing of the citizen spouses. Given the
17 ruling that I just made with regard to the scope of the APA and
18 INA class, is there any practical effect of how I come out on
19 whether the citizen spouses have standing -- have a liberty
20 interest for due process purposes?
21 MS. LAFAILLE: There may not be, Your Honor. I mean,
22 it's possible that at the end of the case there could be
23 differences between the relief, although I don't think that
24 there would be, but I don't think for this juncture of the case
25 there is.

1 THE COURT: That's part of the reason I put it down at
2 the end. I thought if I defined the class for APA purposes the
3 way I've defined it, the citizen spouses are in the case. And
4 whether they're in the case for a Due Process Claim as well as
5 an APA claim can be decided later. The Supreme Court couldn't
6 reach a consensus. The First Circuit hasn't addressed this at
7 all since 1970 and not after Din. It's a fascinating issue.
8 But there are a lot of fascinating issues in this case. And if
9 the citizen spouses are in the case anyway, I might defer
10 deciding that. What does the government think?
11 MS. LARAKERS: Your Honor, as of right now I can't
12 think of a difference. The only difference I could possibly
13 think of is if it mattered with regard to the scope of any
14 discovery order. But I can't -- I still can't think of a
15 practical reason. I just want to flag that in case it comes up
16 in the future.
17 THE COURT: No. It is. And as you've probably
18 noticed, I'm not averse to deciding issues, hard issues, but
19 there are so many of them. If they don't make a difference, I
20 may not decide it now. But if there comes a point where it
21 does make a difference, then I would decide it.
22 MS. LARAKERS: Okay.
23 THE COURT: So you're not waiving anything. Just
24 thinking about being practical, okay?
25 MS. LARAKERS: Yes, Your Honor.

1 THE COURT: All right. It's about 12:00. I'd like
2 you to come back at 2:15. As I told you, at the moment my
3 tentative, not final, view is that the government is right with
4 regard to when the due process right -- when the interest
5 creating a right to due process vests. I think Kentucky
6 Department of Corrections, which I've discussed previously, is
7 an important case for this analysis.
8 And then with regard to the Equal Protection claim, I
9 think the answer turns on what's the right question. Is it the
10 standard in Arlington? If it's the standard in Arlington, I
11 think the petitioners would prevail. If it's the standard in
12 Hawaii, I think the government would prevail. And I know
13 Hawaii has been distinguished in other contexts like DACA or
14 TPS, but in both of the -- at least for TPS, which I think was
15 Judge Casper's case, there were people who -- it dealt with
16 petitioners who were in the United States lawfully and there
17 was no stated national security or public safety rationale
18 purpose to the action at issue. But the Executive Order that's
19 at the heart of the equal protection argument petitioners make
20 in this case says that it's being issued for national security
21 and public safety purposes. And I tell you that so you can
22 think about the implications of that tentative analysis.
23 And I haven't -- we may take another break after that.
24 I haven't looked closely at class certification. Let's just
25 say for the APA class, is it the government's contention that

1 the requirements for class certification are not met?
2 MS. LARAKERS: Your Honor did clear up some of them,
3 but we have a new one that hasn't been heard before about the
4 jurisdiction part because there are people who are fresh out of
5 removal proceedings who could have, not even theoretically,
6 could have actually raised their claim in removal proceedings
7 with regard to the provisional waiver process, appealed that,
8 and appealed that through the administrative appeals process --
9 THE COURT: These are people who had their removal
10 proceedings when?
11 MS. LARAKERS: After 2016 and who were also married
12 during those removal proceedings. So they would have had the
13 full benefit of the regulations.
14 THE COURT: So the question is whether they should be
15 in the class?
16 MS. LARAKERS: Right.
17 THE COURT: I ordered you to have two days available
18 for this. I'm trying to do this in a way we don't have to come
19 back on Monday. So we'll see where we are, because I'm trying
20 to keep up with you, but there's a lot to keep up with.
21 All right. Court is in recess.
22 (Recess taken 11:56 a.m. - 12:14 p.m.)
23 THE COURT: Good afternoon.
24 MR. KANWIT: Good afternoon, Your Honor.
25 THE COURT: We should move to the motion to dismiss

1 Count 2, the refinement of the due process analysis. I
2 previously found that the petitioners have a liberty interest
3 rooted in the provisional waiver regulations, but it only
4 emerged in the course of the litigation that there was a
5 dispute as to when that liberty interest vests.
6 So as I understand it, the petitioners allege that it
7 vests at the outset of the I-130 application stage, and the
8 respondents assert that it vests only when an alien has a
9 conditionally approved I-212 and therefore a right to have his
10 or her 601A petition decided while he or she is in the United
11 States. Is that a fair statement of the issue?
12 MS. LAFAILLE: Your Honor, just a clarification. My
13 understanding had been that the court had ruled for purposes of
14 the motion to dismiss that the vesting argument was waived. My
15 understanding was that we were discussing it for purposes of
16 commonality as it relates to class scope and class
17 certification.
18 THE COURT: Well, I didn't -- no. You can argue that,
19 but this only came into sharp focus -- well, into focus at all
20 in the course of matters. And I think in December I ordered
21 that you go back to your briefs, consolidate your arguments,
22 but I didn't prohibit new arguments. And I don't think this is
23 a -- I mean, this is the argument I anticipated.
24 MS. LAFAILLE: Okay.
25 THE COURT: But is that essentially the point that I

1 respond to your -- I mean, you can make the argument if you
2 want, but I didn't -- all right. I'm prepared and I think it's
3 appropriate to decide the merits of this and to not treat it as
4 waived. Although it wasn't developed earlier in December I
5 essentially, I think, afforded a second bite at the apple.
6 So it's the government's motion to dismiss. As I
7 said, I'm tentatively of the view that the government's
8 position is correct and that under the Kentucky Department of
9 Corrections line of cases, which I discussed in my September
10 decision in this case, there would have to be a right to
11 something for there to be, rooted in a regulation, for there to
12 be a liberty interest for due process purposes. And it now
13 seems to me that there's a liberty interest once there's an
14 approved I-212 and the interest is in having the 601A
15 adjudicated while the alien is in the United States, but I
16 don't at the moment think it's created earlier by any statute
17 or regulation.
18 And the petitioners argue that's an absurd result. It
19 might be, or at least an odd one. But at the moment it seems
20 to me the legally correct one and one that's not as odd or
21 arguably unfair as it might be if the due process argument
22 claim was the only claim, but the APA and INA claims have
23 survived. So the people who don't have a -- who would not
24 have, on my current analysis, a due process claim are still in
25 the case and in the class.

1 But anyway. What's the government's argument, please?
2 MS. LARAKERS: So Your Honor, you defined the issue
3 correctly. What decides this issue is what standard is
4 applicable. And that -- or what framework, I think as we've
5 called it in our briefs. The proper legal framework is
6 Kentucky, Castle Rock, Roth, Sullivan, these Supreme Court
7 cases that are determining whether a due process right exists
8 from a source of positive law. And that positive law can be a
9 contract, it can be a regulation, it can be a statute.
10 But when analyzing whether a source of positive law
11 creates a due process interest, it requires the court to look,
12 to examine closely the language of the regulations and to find
13 whether there's a legitimate claim of entitlement. And the
14 legitimate claim of entitlement test is a procedural test for
15 due process rights in general, but when we're looking at
16 whether there's a legitimate claim of entitlement arising from
17 a regulation or a statute or a contract, the proper framework
18 is Kentucky, Town of Castle Rock, Roth, and as Your Honor has
19 mentioned.
20 So what all of these cases have in common is they
21 found that the due process right is limited to what the
22 regulation says. And whether there's -- whether you say that
23 it's mandatory language or when you look closely at the
24 language to determine whether there was some cabined
25 discretion, you're looking for essentially the same thing,

1 which is language in the regulation that confers a due process
2 interest.
3 I won't go into it. I think this court knows that
4 this is the framework that's applicable. The objection that
5 petitioners raise in their brief to this framework is that it's
6 not applied in immigration cases. That's not true as is stated
7 in the briefing. Many courts have cited these cases, including
8 Kentucky and Roth and Sullivan, in determining whether a
9 regulation or a statute, immigration regulation or statute
10 creates a due process right. And, you know, those cases as
11 listed in my brief are Mendez-Garcia, Ruiz-Diaz.
12 THE COURT: Slow down. This has got to be written
13 down, but I also have to hear it and process it.
14 MS. LARAKERS: Sorry. So there are two Ninth Circuit
15 cases, Mendez-Garcia and Ruiz-Diaz. Mendez-Garcia is 840 F. 3d
16 655.
17 THE COURT: I'm sorry. So in Mendez-Garcia, what page
18 would you like me to look at?
19 MS. LARAKERS: I think the pin cite is 655.
20 THE COURT: 655?
21 MS. LARAKERS: Yes.
22 THE COURT: Hold on just a second.
23 Are you talking about the language in Mendez-Garcia
24 that says, "While aliens are entitled to a procedurally fair
25 hearing, aliens have no fundamental right to discretionary

1 relief from removal for the purposes of due process and Equal
2 Protection," or something else?
3 MS. LARAKERS: That part, but I think both of these
4 Ninth Circuit cases, they were looking at whether -- not just
5 whether a person has discretionary -- a right to a specific
6 result in the discretionary relief, but they were also looking
7 at, that was also going to preclude them from applying for
8 future relief as well.
9 So I think that the important thing that I take from
10 these Ninth Circuit cases is that even where the decision was
11 going to preclude the alien from applying for some future form
12 of relief, such as adjustment of status, which I think was the
13 issue with these cases, the Ninth Circuit still held that
14 because the regulation didn't give them a right to have that
15 considered that they didn't have a due process interest.
16 THE COURT: Hold on just one second. What's the cite
17 for Ruiz-Diaz, please?
18 MS. LARAKERS: 703 F. 3d 484. Sorry. I'm not sure if
19 I put down the pin cite. I think that's the pin cite that I
20 was using.
21 THE COURT: That's okay. We should be able to find
22 it. But I'm looking at Mendez-Garcia and I don't see any
23 citation to say Kentucky Corrections.
24 MS. LARAKERS: It may have been Roth. Some of them
25 cited Roth. Some of them cited Sullivan. I don't think they

1 cited Kentucky, but those Supreme Court cases.

2 THE COURT: I don't --

3 MS. LARAKERS: Or Town of Castle Rock.

4 THE COURT: Actually, I don't see any of those where

5 I'm looking. Here it is, maybe on a later page. Okay. Here

6 it is. "Nonetheless, we held that aliens could not claim their

7 due process rights were violated because they had not

8 identified a legitimate claim of entitlement to have the

9 petitions approved before their visas expire."

10 MS. LARAKERS: Right.

11 THE COURT: And they cite Roth there.

12 MS. LARAKERS: Right. So the Supreme Court cases

13 stand for the proposition, first, you know, Kentucky stands for

14 the proposition that there must be, you know, some sort of

15 mandatory language. Other Supreme Court cases, while not

16 stating expressly that mandatory language is required, still

17 require the same thing. They looked at what the regulation

18 required, and they found that, unless the person met the

19 requirements of the regulation, then they didn't have a due

20 process interest, or in Roth, I think it was the contract,

21 didn't meet the terms of the contract nor due process interest.

22 Those standards have been applied in immigration cases

23 across the circuits. In the Ninth Circuit in the cases I've

24 mentioned. Also in the Tenth Circuit, the Tenth Circuit case

25 actually cites Kentucky. That's Aguilar-Aguilar, 700 F. 3d

1 1238. And then there's the Third Circuit case in Mudric, which
2 is 469 F. 3d 94. And the relevant quote that I pulled from
3 that is, "In making a request for immigration benefits,
4 aliens" --
5 THE COURT: Hold on a second. I think 1238, that's
6 where Aguilar-Aguilar starts. Let me see if I can find the
7 pertinent part. Okay. Why don't you --
8 MS. LARAKERS: And then in Mudric, the Third Circuit
9 case, they stated that in making a request for immigration
10 benefits, aliens only have those statutory rights granted by
11 Congress, you know, or those regulatory rights.
12 So Your Honor, here, you know, this is a correct
13 framework because we're looking at whether a due process
14 interest arises from a source of positive law, which is a
15 regulation. The regulation here requires that an individual
16 have an I-212 before applying for -- an approved Form I-212
17 before applying for the relief sought, and therefore the
18 Supreme Court and the other circuit courts, which have applied
19 it to immigration cases, forecloses any argument that says that
20 the due process right vests earlier.
21 THE COURT: And the right in this case is to have the
22 I-610 -- I-601A adjudicated while the alien is in the United
23 States?
24 MS. LARAKERS: Yes, Your Honor, that's another
25 important distinction.

1 And as Your Honor has recognized, this is a strict
2 analysis, but it's not going to cause an absurd result,
3 especially since we still have INA and APA claims on the table
4 now.
5 The retroactively framework that petitioners cite does
6 not apply. The retroactivity framework has a test that you
7 can't apply in this case because there's no retroactive statute
8 at hand, so I'm not even sure how to go about that analysis.
9 But to the extent that petitioners borrow the facts from those
10 cases and attempt to analogize, those cases aren't analogous to
11 people who don't have an approved I-212, because in each one of
12 those cases there was nothing standing in the way in between
13 the alien and applying for that relief, except for the
14 retroactive statute. There was only one barrier in the way,
15 and that was the retroactive statute. Here there are multiple
16 barriers in the petitioners' way, an I-130 and an approved
17 I-212.
18 And in fact in St. Cyr the alien would have been
19 eligible for 212(c) relief at the time of their plea under the
20 law in effect. And same thing with Accardi. The regulation
21 required DHS to exercise its discretion, and the alien was
22 immediately going to receive that relief upon the court
23 striking down the retroactive legislation.
24 And to the extent that petitioners say that it
25 enhances the significance, it's simply not the test. It's not

1 the framework. The framework is, you know, Kentucky, Sullivan,
2 Roth, the framework is not Fernandez-Vargas or this
3 retroactivity framework. And to interpret the case, the
4 petitioners want to interpret the due process interests in the
5 way the due process the petitioners wish would be inconsistent
6 with those Supreme Court cases.
7 THE COURT: Okay. Thank you.
8 MS. LAFAILLE: So Your Honor, let me start by
9 addressing Kentucky and then move on to a couple of our other
10 arguments.
11 No one disputes that the general idea expressed in
12 Kentucky, the need for a legitimate claim of entitlement, is
13 required. So when we talk about Kentucky being applied in the
14 immigration context, yes, we always need to show a legitimate
15 claim of entitlement. The question is how to show that. And
16 in the prison context -- the courts have acknowledged over and
17 over and over that the prison context is an incredibly unique
18 context. Prisoners do not have the same rights as people
19 outside of prison in any constitutional realm, not in the First
20 Amendment, not under the Equal Protection Clause. I can't
21 think of a context where the rights of prisoners are equivalent
22 to the rights of people outside of prison.
23 Because prisoners -- the lives of prisoners are highly
24 regulated, there's a need to distinguish between those
25 regulations that create a right for prisoners to sue on them

1 and create that legitimate claim of entitlement, and those
2 regulations that are just providing guidance to prison
3 officials.
4 We don't have that problem in the immigration context.
5 It is well established that when a form of discretionary relief
6 is created, and this court has acknowledged it, a due process
7 interest attaches not to the ultimate result but to the right
8 to have that application considered according to the required
9 criteria. That's all we're talking about here.
10 The question that Kentucky addresses is whether
11 there's a due process interest. That's a question this court
12 has already answered. The answer is yes.
13 The question Kentucky does not address is whether
14 there is -- excuse me -- when that right attaches. And for a
15 whole host of reasons, we think it's quite clear that the due
16 process right here that this court already recognized is
17 present not merely when someone is at the final stage of the
18 three application forms that are filed within the United States
19 but is also present when someone is filing an I-130.
20 THE COURT: So your argument is that an alien has a
21 right to a decision on her I-130 and then a right to a decision
22 on her I-212, not any particular decision, but a decision.
23 That's the argument?
24 MS. LAFAILLE: Yes, Your Honor.
25 THE COURT: And I think Kentucky and other cases on

1 which the government relies seem to focus on whether there are
2 criteria, where if you meet those criteria, then you win, then
3 you get the relief that you're seeking. And in this case, the
4 argument is that there are no such criteria that limit ICE's
5 discretion until you have an approved I-212.
6 So is it correct that you need -- I mean, once you
7 have an approved I-212, then the government agrees you have a
8 right to have your 601A decided while you're in the United
9 States. Is there anything comparable earlier, or do you say
10 you don't need that?
11 MS. LAFAILLE: So we think it is comparable. But let
12 me let me take that piece by piece. So we view this
13 holistically and not in separate steps. This court has already
14 recognized the right to have that 601A application adjudicated.
15 That's created by the provisional waiver regulations. Of
16 course you also -- separately you have I-130 -- you know, the
17 government can't simply burn your I-130 applications. They
18 can't simply burn your I-212 applications. I think we've
19 established that due process rights attach to those
20 applications, particularly the I-130, which is actually the
21 grant is mandatory if you satisfy the criteria.
22 THE COURT: Here. So the I-130 requires that you show
23 your marriage is genuine; and if you show your marriage is
24 genuine, DHS has no discretion to deny giving you the I-130?
25 MS. LAFAILLE: Correct. So the government has

1 conceded here that due process interests attach to each of
2 these applications.
3 THE COURT: No, I don't think -- no, they haven't.
4 You mean each of the --
5 MS. LAFAILLE: Not to the adjudication in the United
6 States. They've conceded that there's a right to a fair
7 adjudication of an I-130, of an I-212. Of course the question
8 we're discussing here is whether there's a right to follow a
9 process within the United States that encompasses the I-130,
10 the I-212, and the I-601A, and we think there is for a couple
11 of reasons.
12 THE COURT: Let me ask you a question. This is
13 helpful. But if you prevail on your APA and/or INA arguments,
14 does this one make any difference?
15 MS. LAFAILLE: Quite possibly not, Your Honor. But
16 you know, I don't -- of course it depends, you know, if the
17 court thinks -- and we think the remedies would be quire
18 comparable regardless of the claim.
19 THE COURT: No. Part of the reason I ask is, you
20 know, I'm going to strive to get a legally correct answer. But
21 when you argue that the government's position is absurd, it
22 might -- sometimes the law requires surprising results. But it
23 wouldn't be so absurd if there are other grounds on which you
24 could get relief. You know, the fact that somebody has a
25 right -- you know, you're arguing there's a right to have an

1 I-130 decided and a right to have an I-212 decided, and I think
2 I've ruled earlier today that you're correct and that the right
3 is derived -- well, maybe I haven't gotten quite that far. But
4 that the government can't just ignore the provisional waiver
5 process. And the I-130 is the first step in the process.
6 MS. LAFAILLE: Right, Your Honor.
7 THE COURT: And maybe -- we're not focused on this,
8 and I haven't had to decide it, and to my knowledge ICE is no
9 longer doing it. But, you know, there's the argument if you
10 arrest people when they arrive for their or at their I-130
11 interview, that violates the APA. That would be one of your
12 arguments, wouldn't it?
13 MS. LAFAILLE: Yes.
14 THE COURT: So it's not that a petitioner -- if my
15 tentative view is my final view, and it might not be, it
16 wouldn't mean that the petitioners, you know, have no way to
17 get the benefit of the provisional waiver process. It just
18 means they don't have a valid due process claim until they get
19 an approved I-212.
20 Anyway. I was just trying to figure out the practical
21 implications of this.
22 MS. LAFAILLE: I see Your Honor 's point about the
23 practical consequences. But I still think it's important to
24 get this right in terms of our clients and their due process
25 rights.

1 THE COURT: It's important to the administration of
2 justice to get it right.
3 MS. LAFAILLE: Absolutely. And, Your Honor, I think
4 there are a couple of reasons why we think that the right
5 answer here really does look at the entire process and not
6 simply the 601A form. And the first is that the right that
7 Your Honor already recognized, the due process right, is not
8 simply limited, should not be limited, we think, to the 601A
9 form. And that's because -- I think of immigration sometimes
10 as a Rube Goldman [sic] machine.
11 THE COURT: As what?
12 MS. LAFAILLE: Rube Goldberg, excuse me. I always
13 forget the name of the machine.
14 THE COURT: A Rube Goldberg machine?
15 MS. LAFAILLE: Exactly. It's a bit of a Rube Goldberg
16 machine, Your Honor. Yes, it's true that the agency realized
17 that it could have a profound impact on people's lives by
18 turning one small knob. But there is no sense in which the
19 agency thought that the project it was undertaking was to turn
20 that knob. The agency understood very well that what it was
21 doing when it turned that knob was creating a process that
22 would transform people's lives.
23 And so the right that this court recognized has to
24 understand -- has to take account for what the regulation was
25 actually doing. It wasn't creating the 601A form. It was

1 tying together a process comprised of three different
2 applications. And the evidence that that's what the agency was
3 doing is throughout the rulemaking.
4 THE COURT: But that sounds like your APA claim.
5 MS. LAFAILLE: Your Honor, these claims are certainly
6 connected. But when Your Honor recognizes that the regulations
7 created a due process right, that right was not limited to the
8 application form. That right encompasses what the agency
9 created, and the agency created a process.
10 THE COURT: Yeah, but I wasn't asked to focus on, you
11 know, previously on particular stages of the process or
12 particular regulations or the words in the form. I thought
13 maybe you would find something in the form and you'd argue that
14 it must not be there. Anyway.
15 But as I say, this sounds like your APA argument.
16 They can't ignore the process that the regulations set up, and
17 I think I've already ruled that that's a claim on which relief
18 can be granted. You know, the issue here is when does it
19 become a due process claim and exist as well as an APA and INA
20 claim.
21 MS. LAFAILLE: Right. And I think Your Honor has
22 already held that it becomes a due process claim when a form of
23 relief that the agency created is being abridged. And the form
24 of relief that the agency created is a process. We know that
25 because when the agency said what are the costs of this process

1 to the people undertaking it, it didn't account just for the
2 cost of filing a 601A form. It said the costs of this process
3 are the costs of filing an I-130 application, filing a
4 provisional waiver application, legal fees, travel abroad, et
5 cetera. That's how the agency viewed what it was doing, and it
6 recognized that the number of I-130 applications filed was
7 going to increase. And it recognized that what it was doing
8 was trying to bring people out of the shadows and make it
9 possible for them to apply for legal status, and that's a
10 process that begins with a filing of an I-130.
11 But I'll move on to my next argument, Your Honor,
12 which is, even if Your Honor does not accept that the agency
13 created one process, it's still the case that the due process
14 right that attaches to the 601A form is abridged when the
15 government cuts off access to that application. And that's
16 true whether the government makes a blacklist of people who are
17 going to be denied provisional waivers no matter what, as in
18 Accardi. It's true if the government barricades the door to
19 the building that you need to go to.
20 THE COURT: Well, that one I've already decided. I
21 said they can't -- they can exercise discretion, but they have
22 to consider that somebody is pursuing the provisional waiver
23 process and they can't just categorically remove people who are
24 pursuing that process. I mean, that's what I wrote in
25 September.

1 MS. LAFAILLE: That's right, Your Honor, and the
2 interference with that right, even if the right is limited to
3 the 601A process, the interference with that right doesn't
4 happen only when someone has a pending 601A. If the government
5 barricaded the doors, no one would say they haven't interfered
6 with your right to walk in and file a 601A application.
7 THE COURT: But you don't have a right to file a 601A
8 petition until you have an approved I-212. Is that right?
9 MS. LAFAILLE: That's right, Your Honor. But it's a
10 little bit ironic for the government to fault our clients for
11 not having approved I-212s when it's walking in and arresting
12 them the moment they file a precursor application at an I-130
13 stage. It's not a question of when the right is present. It's
14 a -- it's not a question of what the right attaches to for the
15 purposes of this part of our argument. It's when the
16 government interferes with it.
17 THE COURT: But I want to -- let's say you had no due
18 process claim here but you had an APA claim. Keep it simple.
19 So do you think you could prevail on the APA claim by proving
20 that the government is not, you know, permitting people to file
21 their I-130s or their I-212s?
22 MS. LAFAILLE: Yes, yes, we do. But I mean, you know,
23 obviously the government has --
24 THE COURT: But that's in part because -- or that's
25 because the regulations say, you know, if you have an order of

1 removal and you have a citizen spouse, you can apply for an
2 I-130, and if you -- and then there is something mandatory. So
3 they have to give it to you if you show your marriage is
4 genuine. That's not discretionary, right?
5 MS. LAFAILLE: Right. And, Your Honor --
6 THE COURT: Does the government agree with that?
7 MS. LARAKERS: Your Honor, I mean, there are a couple
8 of exceptions to that, but generally yes. It says "shall
9 approve" in the statute, I believe.
10 THE COURT: So why doesn't that meet the requirements
11 of Kentucky Department of Corrections?
12 MS. LARAKERS: Because it's a completely separate
13 application, Your Honor. That it's not -- the question as you
14 posed it is whether you have a right to obtain a decision on
15 your I-601A within the United States. That's the liberty
16 interest.
17 THE COURT: Now I'm compartmentalizing it. It's not
18 the way it's been argued. It's not the way I've thought about
19 it. But, you know, Kentucky says if -- I think Kentucky says,
20 you know, to have a liberty interest, a statute or regulation
21 has to provide that if you meet certain requirements, the
22 government has to do something. So with regard to the 601A, if
23 you have a conditionally approved I-212, the regulations, I
24 understand, require that the 601A be adjudicated while the
25 alien is in the United States, right?

1 MS. LARAKERS: Your Honor, as you know, we don't agree
2 with that, but I understand that's what your interpretation is,
3 yes.
4 THE COURT: Right. All right. So why isn't the I-130
5 process analogous? In other words, you filed an application,
6 you say the alien -- who files the application, the spouse,
7 citizen spouse?
8 MS. LARAKERS: Spouse.
9 THE COURT: Citizen spouse files the application --
10 it's interesting -- files the application, decides, you know,
11 not to stay in the shadows but pursue the established legal
12 process. Do the regulations -- and these are not rhetorical
13 questions. I haven't looked at the regulations recently or
14 with this question in mind. And the regulations say that the
15 application and spouse are entitled to an interview at some
16 point?
17 MS. LARAKERS: No, they don't always get an interview.
18 It's dependent and up to the agency's discretion.
19 THE COURT: So whether you get an interview is
20 discretionary. But it does say if you show your marriage is
21 genuine, your I-130 must be approved. That's not
22 discretionary. If they make the required showing, they get the
23 I-130, correct?
24 MS. LARAKERS: Yes, Your Honor.
25 THE COURT: So why doesn't that create a liberty

1 interest, possibly, for the citizen spouse in the I-130?

2 MS. LARAKERS: Your Honor, that's not -- that question

3 doesn't need to be answered, and I think, Your Honor --

4 THE COURT: Why?

5 MS. LARAKERS: Because it doesn't -- because it's what

6 the 601A regulations require.

7 THE COURT: Well, why --

8 MS. LARAKERS: First let me answer the question. The

9 answer to the question at least within the Ninth Circuit was

10 the only one to have made this distinction between the due

11 process and the regulation, and the statutory requirements.

12 Because the statute requires a certain result in the I-130. So

13 there's never really been a question that needed to be answered

14 about whether there's a corresponding due process interest

15 because if USCIS, if they meet their burden and USCIS doesn't

16 approve their application, then they're in violation of the

17 statute itself.

18 THE COURT: But that's going to be true -- that would

19 be true concerning the 601A as well. If you remove somebody

20 with a conditionally approved I-212, under my analysis, you'd

21 be violating a regulation and you would be violating the

22 alien's right to due process. Nobody has made this argument.

23 Is there a reason you haven't made this argument?

24 MS. LAFAILLE: Right, Your Honor. This is precisely

25 where I was going. We've been focused on the fact that this is

1 one comprehensive process and we don't think the mandatory
2 language requirement of Kentucky is relevant to the immigration
3 context.
4 THE COURT: Okay. At the moment I do.
5 MS. LAFAILLE: If that's where we are, the I-130
6 application has mandatory language not merely making the
7 adjudication mandatory but entitling individuals, these
8 couples, to a result.
9 THE COURT: But this is what I asked you to brief in
10 December. I think I'm the one who raised this possibility that
11 hadn't been briefed as of December that, you know, was language
12 in the statutes, the regulations, the forms, that satisfied the
13 Kentucky standard for the I-130 and/or the I-212. But you
14 didn't -- I don't think you addressed that in your briefs. So
15 I thought you looked and found there wasn't a good arguable
16 basis for that.
17 MS. LAFAILLE: No. I think, and as I recall we
18 addressed this at the last hearing and the government conceded,
19 that an I-130 grant is mandatory when the conditions are
20 satisfied. I believe that is in our brief. But it's true that
21 we've been focused on presenting this argument as a process.
22 But to focus in on the I-130, Your Honor, this is a mandatory
23 application, and the conduct we've alleged in the complaint is
24 one of systemic interference with the I-130 application.
25 THE COURT: I know. But let me see the regulation,

1 please. What's the regulation for the I-130?
2 MS. LAFAILLE: Let me find that, Your Honor. So it's
3 8 USC 1154(b).
4 THE COURT: 1154(b)?
5 MS. LAFAILLE: Yes.
6 THE COURT: It says, "Investigation, consultation,
7 approval, authorization to grant preference status. After an
8 investigation of the facts in each case and after consultation
9 with the Secretary of Labor with respect to petitions to accord
10 status under," two sections of this title, "the Attorney
11 General shall, if he determines that the facts stated in the
12 petition are true and that the alien on behalf of whom the
13 petition is made is an immediate relative or is eligible for
14 preference, approve the petition." So that's mandatory.
15 MS. LAFAILLE: Right, Your Honor. And what we have
16 here, Your Honor, if we recall the facts as they're happening
17 is that practically everyone as far as we know who files an
18 I-130 application -- you know, this is getting into the
19 discovery, if I might do that a little bit.
20 THE COURT: That's okay. Go ahead.
21 MS. LAFAILLE: This is at ECF 148, I believe. When
22 this case was filed in February 2018, the Lawrence field office
23 emailed ICE to say, you know, we keep getting more of these
24 final order I-130 folks and sent ICE a list of 23 people. ICE
25 wrote back that it was going to detain 21 of them. So

1 practically everyone, Your Honor, that was filing an I-130 was
2 being funneled into a system that was not going to unify their
3 family, which was the purpose of filing an I-130, but was going
4 to result in the detention and removal of the noncitizen
5 spouse. And any U.S. citizen spouse who was aware that that's
6 what was happening could not possibly file an I-130.
7 THE COURT: But is it your argument that 1154(b), what
8 I just said, satisfies the requirements of Kentucky and that
9 line of cases?
10 MS. LAFAILLE: The requirements of the mandatory
11 language component of Kentucky?
12 THE COURT: Yes.
13 MS. LAFAILLE: Absolutely, Your Honor.
14 THE COURT: Well, why didn't you make it before when I
15 invited you to so I could have focused on it before today?
16 Because I have that. I must have focused on it previously
17 because I've got it circled from prior hearings.
18 I'll ask the government again. Why doesn't that
19 satisfy -- if Kentucky is the right test, which is what I came
20 in here believing, why doesn't that create a liberty interest?
21 MS. LARAKERS: Because of the way the liberty interest
22 is formed in this case. It has to be connected to having it be
23 done within the United States, Your Honor. And their argument
24 with regard to the provisional waiver process, that interest is
25 worked in with regard to the I-601A.

1 THE COURT: But my memory is that -- I mean, was it
2 Ms. Calderon, she was arrested after her I-130 was approved?
3 MS. LARAKERS: Yes.
4 THE COURT: But somebody else I've dealt with was
5 arrested before his -- he went for his interview and he was
6 arrested before he had it. Do I remember that right?
7 MS. LAFAILLE: I think that was one of the
8 consolidated, Junqueira maybe or one of those cases, I think.
9 THE COURT: I see. So the issue is do you have a
10 right to it in the United States.
11 MS. LARAKERS: Right, Your Honor. And they have to
12 establish that at each step in the process. And I think
13 that's -- that's why it's not briefed here because that "within
14 the United States" part isn't satisfied at the I-130 point or
15 at the I-212 point, and it's not satisfied in the I-212
16 regulations, as you have tentatively stated, that you're
17 entitled to it when you have -- that you're entitled to apply
18 for a 601A, once you have an I-130, you have to have an
19 approved I-212. They have to establish a due process right at
20 each step to have that application adjudicated from within the
21 United States at each step of the process. The I-601A doesn't
22 do that, as Your Honor's tentative view is right now.
23 THE COURT: Well, let's look at what I wrote, though,
24 in Jimenez about this. I'm talking about my decision last
25 September. I was talking about provisional waiver in September

1 as embracing all three. This is putting it under a microscope
2 that based on a belated argument -- I'm on page 367. I said, I
3 quoted the legislative history. DHS stated that without the
4 ability to pursue a provisional waiver -- although that was in
5 brackets so that's not the exact language -- individuals who
6 must seek a waiver of inadmissibility abroad through a form
7 I-601 waiver process after the immigrant visa interview may
8 face longer separation times from their families in the United
9 States and will experience less certainty regarding the
10 approval of a waiver of the three- to ten-year unlawful
11 presence bar before leaving the United States.
12 The regulation was designed to avoid the extreme and
13 significant emotional and financial hardship that Congress
14 aimed to avoid when it authorized the waiver. On its website,
15 CIS states that the provisional waiver process was developed to
16 shorten the time U.S. citizens and lawful permanent resident
17 family members are separated from their relatives. I said,
18 Therefore the provisional waiver regulation protects a
19 prevailing purpose of the INA.
20 Accordingly, in the explanation to the 2016
21 regulation, DHS promised applicants it would decide an
22 application for provisional waiver before the alien was
23 required to leave the United States. In describing the
24 benefits of the 2016 regulation, DHS said those applying for
25 provisional waiver, which I now understand to mean 601A, will

1 receive advance notice of USCIS's decision before they leave
2 the U.S. The legislative history that I quoted is talking
3 about the I-601A. Anyway.
4 MS. LARAKERS: Your Honor, if I may, I think because I
5 remember back in December when we were talking about this and
6 talking about the possibility of briefing it, you stated and
7 the government's position would be that even if that you have a
8 right in those earlier applications, you don't have a right to
9 pursue them from within the United States. And that language
10 that you just quoted makes it seem like, once somebody has a
11 pending I-601A, that it connects an individual's staying in the
12 United States with the application.
13 The I-130 regs -- and this wasn't briefed, but the
14 I-130 regs and the I-212 regs and the statutes that I do have
15 cited in my brief do not do that. There is no connection in
16 between like there may be in the I-601A regulations and
17 stated -- between staying in the United States and that
18 application. So that's the reason why the 601A -- somebody
19 with an approved I-212 may meet the standard in Kentucky
20 because there's that language but someone with a merely I-130
21 or an I-212 doesn't. Because it doesn't -- those regulations
22 don't have that same recognition that an alien has a final
23 order of removal, first of all, and still made that relief
24 available and said that they are going to receive a decision on
25 that relief knowing full well that they had a final order of

1 removal.
2 Those are not hallmarks of those other statutes.
3 That's presumably why the petitioners didn't brief it and
4 presumably why they're relying principally and solely on the
5 I-601A regulations and whether those regulations create the due
6 process right. And as Your Honor has correctly stated, that
7 test is Kentucky. And while you may be able to satisfy that
8 test when you have an approved I-212, because the statute --
9 because the regulation says something about giving a decision
10 while -- giving a decision on the I-601A, which you can only do
11 within the United States, that may satisfy the test of
12 Kentucky, but it doesn't stand for the same proposition that
13 you can do that at earlier steps in the process. And that's
14 the reason why that wasn't briefed, Your Honor. And I think
15 Your Honor --
16 THE COURT: Okay. I -- I'm sorry. Go ahead.
17 MS. LARAKERS: I don't have the cases in front of me,
18 but when we came back from recess on that December afternoon, I
19 cited several cases, and they were in the motion to reopen
20 context, but it's similar here, where the circuit court said
21 that the IJ didn't have to consider the fact that you were
22 eligible for adjustment of status or eligible to file some form
23 of immigration relief. The alien did not have an interest in a
24 motion to reopen just so that they could go file an I-130 and
25 apply for adjustment of status. So I think those cases are

1 very persuasive here. I can get them for you. I stated them
2 on the record.
3 THE COURT: You may get a chance to do it, but let's
4 go back to the petitioners. Thank you.
5 MS. LAFAILLE: So Your Honor, I think there are two
6 points that I want to focus on. One is how to understand when
7 a due process right that attaches to the 601A is violated. And
8 the notion that that right can only be violated when there's a
9 pending 601A is -- I just don't see how that can be squared
10 with, for example, INS v. St. Cyr.
11 In St. Cyr, there was a vested right to a 212C -- what
12 was called a 212C application that existed even though the
13 noncitizen was not eligible to file a 212C application at that
14 time. He would only become eligible to file that application
15 if he later came into removal proceedings. The court found
16 that there was a vested right, at the time that he pleaded
17 guilty to a crime and entered into a plea that preserved
18 eligibility for 212C relief, there was a vested right to that
19 212C relief. And the framework for that, the Supreme Court
20 recognized in Fernandez-Vargas, is whether there's been a step
21 that enhances the significance of a later step in the process.
22 THE COURT: This is St. Cyr?
23 MS. LAFAILLE: This is St. Cyr, Your Honor.
24 Now, the government says, you know, those cases are
25 retroactivity cases. And yes, the question we're asking here

1 is not is there, you know, is the presumption against
2 retroactivity applicable. We're not answering a question about
3 retroactivity here. But retroactivity derives from due
4 process. Retroactivity concerns exist when there are due
5 process rights that are hindered.
6 THE COURT: Hold on just one second.
7 MS. LAFAILLE: Okay.
8 THE COURT: Okay. I'm sorry. Go ahead.
9 MS. LAFAILLE: So Your Honor, to the question of
10 whether --
11 THE COURT: Actually, go back a little bit.
12 MS. LAFAILLE: So the notion that the government
13 introduced this concept of vested rights and, you know, now
14 doesn't want to look at pretty much the only legal context in
15 which vested rights are discussed, which is the retroactivity
16 context, which again derives from due process law. The reason
17 we have this whole area of law is to protect our due process
18 rights.
19 THE COURT: But I think there are some First Circuit
20 retroactivity cases that I thought were consistent with the
21 government's argument, Santana.
22 MS. LAFAILLE: What the government points to in those
23 cases is that there were individuals who had filed applications
24 for particular relief. But nothing in those cases says that
25 that's a requirement for the right to be recognized. And in

1 St. Cyr, in fact, a Supreme Court case, which as far as I know
2 trumps the First Circuit, the noncitizen was not eligible to
3 file the application form, and yet he had a vested right to
4 that form that existed at the time that he pleaded guilty.
5 THE COURT: Here. Do you remember where in St. Cyr
6 this is?
7 MS. LAFAILLE: I could find that, Your Honor. So for
8 example, page 321.
9 THE COURT: 321.
10 MS. LAFAILLE: You know, a few lines into the
11 paragraph that starts at the top of 321. "A statute has" --
12 THE COURT: Wait, wait, wait. I've got to find it.
13 How does it start?
14 MS. LAFAILLE: So the sentence that starts, "A statute
15 has retroactive effect."
16 THE COURT: Okay.
17 MS. LAFAILLE: And again, the connection between this
18 and due process is that a statute has retroactive effect when
19 it would impinge due process rights.
20 THE COURT: Hold on a second.
21 MS. LAFAILLE: "A statute has retroactive effect when
22 it takes away or impairs vested rights acquired under existing
23 laws or creates new obligations, imposes a new duty or attaches
24 a new disability in respect to transactions or considerations
25 already past."

1 THE COURT: All right. But it's talking about vested
2 rights.
3 MS. LAFAILLE: Which, as far as I know, is what we're
4 talking about here.
5 THE COURT: I know. And that's what -- I thought the
6 Kentucky line of cases gave the standard for determining when
7 rights vested.
8 MS. LAFAILLE: No, Your Honor, not at all. Kentucky
9 talks about the existence of a right. It tells us nothing
10 about when that right vested and when someone has engaged in
11 precursor conduct that enhances the significance of that later
12 right.
13 THE COURT: Where is the language in --
14 MS. LAFAILLE: So that's in Fernandez-Vargas, which
15 explained what happened in St. Cyr. And that's at note 10 in
16 Fernandez-Vargas. Unfortunately, I can't seem to --
17 THE COURT: I have it here. Just a second. Well, I'm
18 not sure I understand how Fernandez-Vargas helps you. What's
19 the point?
20 MS. LAFAILLE: So Fernandez-Vargas is talking again
21 about when rights vest, and rights vest when an individual has
22 taken some action that will elevate the claim to relief above
23 the level of hope. And what the Supreme Court noted as the
24 touchstone is in St. Cyr the individual had taken an action,
25 mainly the guilty plea, that enhanced the significance of that

1 I-212 form that he would later become eligible to file if and
2 when he came into removal proceedings. Your Honor --
3 THE COURT: So your argument is that a whole universe
4 of people who might apply for I-130s is not -- all those people
5 who might apply don't have a liberty interest and a due process
6 right but those who do apply have such a vested right.
7 MS. LAFAILLE: Exactly, Your Honor. And that's
8 because the thing, the connection between the -- in St. Cyr,
9 the court connected the guilty plea to the I-212 application.
10 And, you know, again, the guilty plea happening in an entirely
11 different legal system, right? The criminal legal system
12 versus the immigration relief that the noncitizen would later
13 be eligible for in immigration court. Those were sufficiently
14 connected to recognize a vested right.
15 Here we have something much more connected. We have
16 an I-130 which is the form that starts the process of seeking
17 lawful status through your spouse and the 601A application, the
18 form that is necessary to complete that process without
19 prolonged family separation. And that is the only way that
20 these noncitizens can gain lawful status again without being
21 separated from their families for years.
22 So if I could just maybe summarize, Your Honor, what
23 we've talked about here. Your Honor has already recognized a
24 due process right that attaches to the 601A. We've argued, you
25 know, in part because this is a Rube Goldberg machine where the

1 agency just turned a knob and created a process that that right
2 attaches to a process. But even if the right attaches, the
3 right created by the provisional waiver regs attaches only to
4 the 601A, it has vested when someone files an I-130. And when
5 the government prevents you from ever filing an I-601A by
6 arresting everyone who walks in the door for an I-130
7 interview, they have violated the due process right that
8 attaches to the 601A.
9 THE COURT: And they've also violated the APA and the
10 INA, you would argue.
11 MS. LAFAILLE: Yes, Your Honor. And I think the last
12 point, Your Honor touched on the I-130. It's true that -- I
13 don't think the I-130 and in a general context -- you know,
14 I-130s can be filed by siblings. They can be filed to petition
15 for people who are overseas. I don't think the I-130 generally
16 creates a right for the person to be in the United States. But
17 what's happening here -- but the I-130 does create a due
18 process interest in the adjudication of an I-130. And what's
19 happening here is that noncitizens who have a right -- and
20 their citizen spouses who have a right to file I-130s and get
21 them adjudicated cannot possibly do so because they know that
22 if they file that application, their noncitizen spouse will be
23 arrested and detained and deported. And that in itself is an
24 interference with the due process right that attaches to the
25 I-130 itself.

1 THE COURT: Well, does this depend on a factual
2 argument that I can't rely on in a -- well, maybe you have the
3 allegation in your complaint.
4 MS. LAFAILLE: We do, Your Honor. We think the facts
5 support it, but yes.
6 THE COURT: But then, you know, Mr. Lyons, among
7 others, have told me they stopped arresting. Now, maybe I
8 can't take that into account on a motion to dismiss.
9 MS. LAFAILLE: I think that's right, Your Honor. I
10 mean, that would go to a question of mootness and the propriety
11 of injunctive relief. But I don't think a voluntary cessation
12 during the course of litigation is particularly relevant here.
13 THE COURT: You're taking me back. I've written about
14 this in this case. Do you know where in the complaint those
15 allegations are? Maybe I'll give you time --
16 MS. LAFAILLE: Sure. And Your Honor actually quoted
17 them, which I think will be easier for me to find. So this is
18 at -- and I have the ECF page numbers of Your Honor's opinion,
19 not the Federal Reporter.
20 THE COURT: You're talking about my September
21 decision?
22 MS. LAFAILLE: Yes. So Your Honor has already
23 acknowledged these allegations.
24 THE COURT: I already what?
25 MS. LAFAILLE: Your Honor has already acknowledged

1 these allegations of a pattern of arrests indicating that ICE
2 has been systematically targeting for arrest, detention and
3 removal individuals who are applying for provisional waivers or
4 launching that process at their I-130 interviews. And Your
5 Honor went on to say that claim is plausible.
6 THE COURT: I said what?
7 MS. LAFAILLE: That claim is plausible. This is near
8 footnote 2. I don't know the page number.
9 THE COURT: Just a minute. Here it is. Can I have
10 some small Post-Its, please.
11 334 F. Supp. 3d 390, I say, "In their amended
12 complaint petitioners allege with adequate specificity a
13 pattern of arrests at CIS offices indicating that ICE has been
14 systematically targeting for arrest, detention, and removal
15 individuals who are applying for provisional waivers or
16 launching that process at their I-130 interviews. This claim
17 is plausible." That's what you have in mind?
18 MS. LAFAILLE: Yes, Your Honor.
19 THE COURT: All right. Well, I think this fits pretty
20 neatly under the APA theory, and I have to -- and why does this
21 create the kind of vested interest necessary to support a due
22 process claim?
23 MS. LAFAILLE: Well, it creates a due process claim
24 because our clients' ability to access a legal process is being
25 stymied.

1 THE COURT: A legal process is what?
2 MS. LAFAILLE: To access a legal process that begins
3 with the filing of an I-130 application and continues to the
4 other forms that we've discussed.
5 THE COURT: And the right to access the legal process
6 is established by what?
7 MS. LAFAILLE: Well, we think there are multiple
8 sources of that. We think the 601A applications establish it,
9 and also the I-130 statute establishes that as to the I-130.
10 THE COURT: The 601A essentially says that you have a
11 right to pursue the process in the United States, and the
12 government argues that the I-130 statute doesn't say you have a
13 right to pursue that process in the United States.
14 MS. LAFAILLE: Correct, Your Honor. And our clients
15 are being stymied from beginning the provisional waiver process
16 and from pursuing an I-130 in the United States or elsewhere
17 because the place they live is the United States, and the
18 moment they file that form, they're setting themselves up for
19 family separation. And no one knowing what the government
20 conduct was could possibly proceed to file that form.
21 THE COURT: All right. Well, if the government would
22 like to respond briefly, you can. I may have to think about
23 this one a little further. Or further, I don't know how
24 little.
25 MS. LARAKERS: So three points. First, as Your Honor

1 mentioned, it does sound a lot like their APA claim. There may
2 be a challenge to the policy of arresting people at the I-130
3 office such that they can't get to the 601A process, but that
4 doesn't mean -- and there may be a challenge to the way that
5 policy was conducted and whether it's arbitrary and capricious,
6 but that doesn't mean there's a due process right.
7 And as Your Honor mentioned, how we determine whether
8 there's a due process right is focused on Kentucky. And not
9 only that, Your Honor, but applying this -- enhancing the
10 significance footnote from a Supreme Court case in this way
11 would be inconsistent with Kentucky and Roth and Sullivan. So
12 that's the primary issue here. Not that these cases can't
13 coexist, not that the retroactivity framework can't coexist
14 with Roth, but applying this retroactivity framework where it
15 doesn't apply because it doesn't concern a retroactive statute
16 in a way that would be inconsistent with Kentucky and Sullivan
17 and Roth is not permitted.
18 And I think that the fact that they can't point to a
19 case especially within the First Circuit, where the court has
20 gone that far to declare a due process right where an
21 individual is not eligible for the relief sought yet, that
22 makes it clear that these two ideas aren't supposed to overlap
23 in this particular circumstance. And I think the Supreme Court
24 recognized that because in Fernandez-Vargas, if we go to page
25 46 --

1 THE COURT: Hold on a second. Let me get it, please.
2 Page 46?
3 MS. LARAKERS: Yes.
4 THE COURT: Okay.
5 MS. LARAKERS: So the Supreme Court was -- this is
6 around where that footnote is, I believe. The Supreme Court
7 says, "For that matter, he could have married the mother of his
8 son and applied for adjustment of status during that period, in
9 which case he would at least have a claim, about which we
10 express no opinion."
11 THE COURT: Hold on just one second.
12 MS. LARAKERS: So the Supreme Court is clearly saying
13 here "about which we express no opinion." So while it may be a
14 theoretical possibility that this could be applied to vested
15 rights as petitioners say, it can't be applied in this
16 particular way here not only because the Supreme Court hasn't
17 even clearly said that that would have given him a due process
18 right under a retroactivity analysis but also because applying
19 it in this way is clearly much broader than the Supreme Court
20 has ever gone with regard to Kentucky and Roth and broader than
21 the First Circuit has ever gone. And in fact, in one of those
22 First Circuit cases -- it slips my mind which one -- but they
23 said that it would be throwing out the application. And that's
24 the issue; that the individual had a pending application and
25 this would mean that they would be throwing that application

1 away. And that's what we're looking at in the --
2 THE COURT: But I think the petitioners' argument is
3 this is the functional equivalent of throwing a potential 601A
4 application away. You can't get to 601A if you get arrested
5 when you're at CIS for your I-130 interview.
6 MS. LARAKERS: Yes, Your Honor, and I recognize that.
7 But as you've also stated, that sounds like a problem with the
8 overall policy, which is an APA claim and not --
9 THE COURT: I don't think I said it was a problem with
10 the policy. The APA claim doesn't relate to a policy. It
11 relates to a law, a set of regulations that, you know, last
12 year I was dismayed to find that apparently ICE in this area
13 didn't even know existed, the detention regulations they were
14 systematically violating. This is not a policy argument.
15 MS. LARAKERS: So, Your Honor, the fact that the First
16 Circuit hasn't gone any further in that analysis makes it clear
17 that these retroactivity claims cannot overlap with -- they can
18 exist, they can coexist, but they cannot overlap with Kentucky.
19 And as soon as you apply this retroactivity, enhancing the
20 significance test in a way that not only goes broader than a
21 retroactivity case has ever gone but also conflicts with the
22 mandatory language requirement and the legitimate expectation
23 of entitlement test, then you have an issue. And that's the
24 reason why you can't -- the court shouldn't go any further down
25 that line of cases.

1 THE COURT: All right. It's 3:35. I'm going to
2 continue to think about this and maybe beyond today. We're
3 going to take a break until 3:45, and then I want to hear your
4 Equal Protection argument, okay? Court is in recess.
5 (Recess taken 3:31 p.m. - 3:46 p.m.)
6 THE COURT: I'm going to take the due process claim
7 under advisement. I want to do some additional reading and
8 thinking about it, but let's move to the Equal Protection
9 argument.
10 As I said briefly earlier today, I think the key
11 question or the key threshold issue is defining the test. If
12 it's the Arlington Heights test, the motion to dismiss probably
13 fails. If it's the Trump v. Hawaii test, it probably succeeds.
14 So I think it would be helpful if the argument started by
15 addressing the test.
16 MS. LARAKERS: Me first? Okay.
17 THE COURT: Go ahead.
18 MS. LARAKERS: Yes, Your Honor. Our position is that
19 it is -- that the applicable test is Hawaii because this case
20 concerns a core executive power. And as Your Honor mentioned,
21 it also -- which is national security. So to that end it
22 actually --
23 THE COURT: Core executive power being immigration?
24 MS. LARAKERS: Immigration. And that being heightened
25 by it concerning national security. And I think not only -- we

1 don't need to only look at Hawaii but we also look to AADC as
2 well and Scalia's dicta, which comes out very strong against
3 selective enforcement claims, especially in the immigration
4 context, because of the executive's power over immigration and
5 because of the scope of that power. And, you know, Trump v.
6 Hawaii is the applicable test. And a District Court has --
7 even though it doesn't concern the Fifth Amendment -- I mean
8 the Fourteenth Amendment, it does talk about discrimination and
9 that's what --
10 THE COURT: What does?
11 MS. LARAKERS: Trump v. Hawaii. So it's talking about
12 the same discrimination and whether there's -- in that case
13 whether it was discriminatory against Muslims. So we're
14 talking about discrimination here, so that point, petitioners'
15 point about it not concerning the Fourteenth Amendment isn't --
16 THE COURT: It's an Establishment Clause case --
17 MS. LARAKERS: Yes.
18 THE COURT: -- Trump.
19 MS. LARAKERS: Right. But still considering
20 discrimination against a particular group of people. So there
21 is no -- it's a distinction without a difference, Your Honor,
22 because we're still looking at discrimination here. And a
23 District Court has applied Trump v. Hawaii in the Fourteenth
24 Amendment context, and that's the decision, the Eastern
25 District of New York decision in Alharbi v. Miller. And the

1 government's position is that that court got it right with
2 regard to applying it in the Fourteenth Amendment context.
3 Specifically, the court said that we have to be conscious of
4 the Supreme Court's admonition that any rule of constitutional
5 law --
6 THE COURT: What page are you on?
7 MS. LARAKERS: Sorry. You know what, Your Honor? I
8 don't have the page. It's towards the end of the opinion, Your
9 Honor. I apologize, I don't have the page. I may be able to
10 find it here.
11 THE COURT: It's probably around 21 or 22.
12 MS. LARAKERS: Yes. I'm looking for it in here.
13 Anyway, Your Honor, the court there took Trump v. Hawaii,
14 applied it in the Fourteenth Amendment context and said the
15 court seemed to be especially aware that this is an area of
16 core executive power, that we have to be aware that any
17 constitutional ruling that would inhibit the flexibility of the
18 president to make decisions in this core executive area should
19 be adopted with only the greatest caution. And here, where we
20 have an Executive Order, that is actually facially neutral as
21 to national origin, as to race, as to any of the
22 classifications petitioners cite in their complaint, it's very
23 clear that the court shouldn't go any further. The court --
24 the order at issue in Alharbi was actually specific procedures
25 that applied to Yemeni documents.

1 THE COURT: I'm sorry. Say that again, please.
2 MS. LARAKERS: It was a specific policy with regard to
3 the treatment of documents from Yemen. Even where there was a
4 classification made on national origin grounds, the court said
5 that we still have to be aware of Trump v. Hawaii and that
6 admonition. Here where we have a facially neutral Executive
7 Order that cites national security and which says that it shall
8 be applied equally, that admonition should be especially clear.
9 And Your Honor, that's all I have, unless you have questions.
10 THE COURT: Okay. And why does -- I think you've
11 answered implicitly why the Arlington Heights test doesn't
12 apply. But why don't I hear from the petitioners, and maybe
13 you'll respond.
14 MS. LAFAILLE: Thank you, Your Honor. I have to say I
15 think this was an area where I was a bit alarmed, and I'm going
16 to have to push the court a bit on its view of Trump v.
17 Hawaii. I'm just --
18 THE COURT: On whether it applies or what it means?
19 MS. LAFAILLE: Whether it applies, Your Honor. I
20 think --
21 THE COURT: Right. Well, I think it's a big issue.
22 MS. LAFAILLE: Right, Your Honor. And I think we are
23 light years away from Trump v. Hawaii in this case, and
24 applying it I think would be a very troubling expansion of the
25 government's authority to racially discriminate against

1 noncitizens living in the United States.
2 I'm just not aware of any case that holds that
3 policies that openly discriminate against -- I'm sorry -- that
4 are openly motivated by animus, racial animus against
5 noncitizens living in the United States, and that's the
6 allegation we've made here, are not an Equal Protection
7 violation, particularly when the government is not engaged in
8 legitimate applications of the immigration laws.
9 And I think -- let me just unpack that a little bit
10 because there are several areas where I think this is
11 fundamentally different from Trump v. Hawaii. So one goes to
12 this, to the noncitizens living in the United States. All of
13 the noncitizens, everyone in our class by definition is living
14 here.
15 THE COURT: They're living here, but they're living
16 here unlawfully at the moment.
17 MS. LAFAILLE: Yes, Your Honor. But we've always
18 recognized that constitutional rights apply to people who are
19 here, whether they're here lawfully or not. That's
20 fundamental, they're in a fundamentally different place than
21 people who are overseas. I mean, take Ms. Calderon, who has
22 been here since she was a toddler. These are people with deep
23 ties to the United States. They're parts of American families,
24 deeply embedded in our communities.
25 The second distinction I want to make is with regards

1 to this national security point. In Trump v. Hawaii, the
2 policy that was being challenged was itself the policy that was
3 being justified on national security grounds. No one is
4 saying, I have never heard the government say that it is
5 depriving the noncitizens in our class of the opportunity to
6 pursue provisional waivers and that that is justified by
7 national security concerns. We've never heard that when the
8 government wrote about why it detained Ms. Calderon, when it
9 wrote about why it detained De Souza. We have never heard the
10 government attempt to justify its conduct here by reference to
11 national security concerns that apply specifically to the class
12 at issue.
13 THE COURT: Can I take that into account properly in
14 deciding a motion to dismiss?
15 MS. LAFAILLE: Yes, Your Honor. I think that's
16 because that's the challenged -- I mean, this goes to what is
17 the challenged conduct and whether that conduct relates to
18 national security. And the challenged conduct here is the
19 government's application of rules designed to help our
20 noncitizen plaintiffs stay with their U.S. citizen families in
21 the United States. No one has said that that is justified by
22 national security concerns. And finally, what I think is, you
23 know, perhaps --
24 THE COURT: I'm not sure that tells me why I can take
25 their arguments into account in deciding a motion to dismiss.

1 MS. LAFAILLE: Well, there is no -- there is
2 nothing -- let me put this way. There is nothing in the
3 Executive Order which I think Your Honor can look at, it's
4 mentioned in our complaint --
5 THE COURT: Right.
6 MS. LAFAILLE: -- that links the treatment of
7 noncitizen plaintiffs to national security concerns. And
8 there's nothing about the actions that are going on in this
9 case that indicates that they implicate national security
10 concerns. What we're talking about is American families trying
11 to legalize the status of their noncitizen spouse.
12 THE COURT: Basically this is an argument because I've
13 been asking, you know, what's the practical effect of this.
14 I've found that -- I didn't dismiss the APA and INA claims. At
15 least with regard to the APA, if the government went through
16 the required process, they could revoke the regulation of the
17 provisional waiver regulations, the whole process but
18 particularly the last step. And if they did that, your clients
19 would need to have a constitutional argument.
20 MS. LAFAILLE: Right, Your Honor. And I think more
21 broadly this is an area where, you know, in the day and age
22 that we live in, a ruling expanding Trump v. Hawaii into the
23 context of government animus against noncitizens living in the
24 United States I think would be a dangerous precedent, and you
25 know --

1 THE COURT: Anything I decide is not a precedent. If
2 it has some persuasive value, somebody will follow it. In some
3 of these cases judges have disagreed with me on 1252(g). But
4 anyway.
5 MS. LAFAILLE: The last reason, Your Honor, why I
6 think this would be a vast expansion of Trump v. Hawaii is that
7 the premise of Trump v. Hawaii is that the government was
8 engaged in conduct that the INA authorized. And the challenges
9 there were saying you can't engage in that conduct for these
10 reasons. But the premise of the ruling was that the government
11 had the authority under the INA to engage in that conduct.
12 THE COURT: That is, exclude people from the U.S.?
13 MS. LAFAILLE: Correct, Your Honor. And here, the
14 court has already found the government is not engaged in a
15 legitimate enterprise, and I think that's a fundamental
16 distinction between this and Trump V Hawaii. It also goes
17 to --
18 THE COURT: Do you explain this in your brief?
19 MS. LAFAILLE: Yes, we do, Your Honor.
20 Your Honor, I'm just looking for one piece of language
21 that I wanted to highlight for the court.
22 THE COURT: In your brief?
23 MS. LAFAILLE: No. In Trump v. Hawaii actually.
24 THE COURT: All right. I seem to have lost the --
25 again. I've got them, I've got them. Trump v. Hawaii.

1 MS. LAFAILLE: Right, Your Honor. It's at the top of
2 Justice Kennedy's concurrence. Justice Kennedy's vote was
3 necessary to form the majority.
4 THE COURT: Just one second. Do you know what page?
5 MS. LAFAILLE: Page --
6 THE COURT: The Equal Protection discussion starts on,
7 looks like page 35, and you might be looking for page 36
8 possibly?
9 MS. LAFAILLE: I'm looking at Justice Kennedy's
10 concurrence, in what I have as page 2423 of the Supreme Court
11 Reporter.
12 THE COURT: I've got the wrong version.
13 MS. LAFAILLE: I think I have another printout that
14 doesn't have U.S. Reporter pages.
15 THE COURT: Well, all I have is the Westlaw version of
16 it.
17 MS. LAFAILLE: I'm just looking at Justice Kennedy's
18 concurrence.
19 THE COURT: Here. See if you can find it. We'll find
20 it.
21 MS. LAFAILLE: It could be page 27 of just the Westlaw
22 numbers.
23 THE COURT: Okay. I have Justice Kennedy's
24 concurrence. It starts on 2423.
25 MS. LAFAILLE: Right. So even that, Your Honor,

1 acknowledges that government action can still be subject to
2 judicial review to determine whether or not it is inexplicable
3 by anything but animus.
4 THE COURT: Right. And in fact, that is what I've
5 thought about. And there's a generally applicable Executive
6 Order that on its face says it's concerned about national
7 security and public safety. And some American citizens commit
8 crimes and some aliens in the United States commit crimes. You
9 know, why is it inconceivable that a president would feel --
10 well, can't deport all the U.S. citizens who, you know, I
11 regard as being risks of committing serious crimes but here are
12 people here, people who are here unlawfully, I have the
13 authority to remove them and I think the country will be safer.
14 Why is that --
15 MS. LAFAILLE: Right, but I think the critical
16 distinction is the government has already -- excuse me -- the
17 court has already found that the government has been
18 unlawfully, arbitrarily and capriciously depriving our clients
19 of the opportunity to seek lawful status within the United
20 States. Unlike in Trump v. Hawaii --
21 THE COURT: But that could be because -- I found it
22 under regulations and I found a due process right that I now
23 have said I'd consider when does it vest. And maybe I'll
24 reconsider that. But the issue here is not whether there's a
25 right or a due process right. The issue here is whether

1 there's also a right under the Equal Protection Clause.
2 MS. LAFAILLE: That's right, Your Honor.
3 THE COURT: And that I haven't decided yet.
4 MS. LAFAILLE: That's right. And when we're
5 considering whether government conduct was impermissibly
6 motivated by animus, it makes a difference whether there is any
7 other explanation for that conduct. And here, where the court
8 has already found that that was illegitimate conduct, I see no
9 reason, I can't fathom an explanation for a policy that seeks
10 to stand in the way of people who are eligible to gain their
11 lawful status in the United States and seeks to harm those
12 individuals. And when we have the allegations that we have in
13 the complaint, which plausibly allege racial animus on the part
14 of decision makers, I think that's enough for this initial
15 stage to survive -- to establish a plausible claim as, you
16 know, courts have found in the TPS and DACA context.
17 THE COURT: I mean, this is a hard question. I was
18 talking shorthand, and I don't know if I said what the right
19 question is, what the right standard is I think is a hard
20 question, although there are a lot of hard questions. In the
21 DACA and TPS -- well, in the TPS context like Judge Casper's
22 case, El Centro I think, it's temporary protected status. So
23 these are people who are authorized to be in the United States,
24 and now that lawful status is being taken away from them, and
25 there was no stated national security reason for doing it.

1 Here, your clients are in the country unlawfully, and
2 the Executive Order cites national security and public safety
3 concerns. And if Trump v. Hawaii is the right test, I'm not
4 supposed to, I think -- I'm supposed to give a lot of deference
5 to the stated reasons and not probe them.
6 MS. LAFAILLE: And Your Honor, I think there might be
7 questions remaining about how exactly one would -- you know,
8 what standard of scrutiny would apply to these claims in the
9 immigration context, but I think what we're talking about here
10 is something more preliminary. In any kind of civil action,
11 someone's statements are allowed to evidence their intent. And
12 we're talking about an exception to that, you know, almost
13 universal rule that applies to a context where the government
14 is acting at the height of its authority in the national
15 security context with regards to noncitizens outside of the
16 United States and is engaged in the legitimate exercise of the
17 immigration laws. None of those things are true here. We have
18 a government engaged in unlawful conduct directed at
19 noncitizens within the United States, and the question here is
20 are we allowed to consider, as we would --
21 THE COURT: Also, I suppose it's also directed in a
22 way against citizens.
23 MS. LAFAILLE: Absolutely, Your Honor.
24 THE COURT: This goes to whether there's a liberty
25 interests that the citizen spouses have, and I need to look at

1 the I-130 regulations. I think in that context, they're the
2 ones who apply for the I-130. They're not going to be
3 deported.
4 MS. LAFAILLE: Again, Your Honor, the question here is
5 one of plausibility, and we're asking whether this court should
6 take what I think --
7 THE COURT: But if the question is is there a
8 plausible claim on which relief can be granted, and some of the
9 decisions I've read I think confuse these two things.
10 Plausibility is I believe factual, but, you know, a claim on
11 which relief can be granted asked, you know, if the alleged
12 facts are plausible and then proven, does that violate the
13 Equal Protection Clause. And although my understanding of the
14 law can change or evolve, I think I'm required now to decide
15 what I believe the applicable legal standard is. Do you agree
16 with that?
17 MS. LAFAILLE: I do, Your Honor, but I think that the
18 only way that we get to ignore the statements is if we say that
19 there is simply no such thing as an Equal Protection claim
20 brought by noncitizens in the United States.
21 THE COURT: I don't think it would go that far. I
22 think, you know, the issue is these statements were made, and
23 maybe there's a plausible claim that racial animus was a
24 motivating factor. But if there were other motivating factors
25 as some of these cases recognize there often are and one or

1 more of them was legitimate, like national security or public
2 safety, does that mean there's not a viable Equal Protection
3 claim?
4 MS. LAFAILLE: Again, Your Honor, what I think Your
5 Honor said is very important because it's critical here that
6 we're not engaged in a legitimate exercise of immigration law,
7 and this court has already found that. And so whatever
8 legitimate --
9 THE COURT: Not engaged in what?
10 MS. LAFAILLE: In a legitimate application of
11 immigration law. And that's what this court has already found.
12 THE COURT: I found that you have a plausible claim.
13 MS. LAFAILLE: Yes. If the facts as we've stated them
14 are true, the government is not engaged in something that is
15 otherwise legitimate, and, you know --
16 THE COURT: Because it's violating the -- it violated
17 APA.
18 MS. LAFAILLE: Unlike in Trump v. Hawaii where we had
19 something the court thought the executive branch was clearly
20 exercising authority that it had. The question is should it
21 deny the executive branch the opportunity to exercise that
22 authority because of claims that the reason it was exercising
23 that authority in that case, you know, violated the
24 Establishment Clause.
25 THE COURT: So actually that's a distinction I confess

1 I haven't thought about carefully, the statute that gives the
2 president a lot of authority in deciding who to allow in the
3 United States and a lot of discretion in deciding who to
4 exclude. Here there are regulations that set up the
5 provisional waiver process, and those are laws, and they bind
6 the president, and I have found that they've been violated.
7 Okay. What more would you like to say? So what's the
8 Arlington test? Is that the test you argue applies?
9 MS. LAFAILLE: Yes, Your Honor. And you know, we're
10 looking there at whether animus was one motivating factor.
11 And, you know, we think -- we've alleged that it was, and we
12 think that, given the very strong statements which the
13 government is not denying evidence animus, we have, you know, I
14 think well satisfied the plausibility standard there.
15 THE COURT: All right. Would the government like to
16 respond to that?
17 MS. LARAKERS: Briefly. You know, petitioners keep
18 saying that we are not within the realm of the authority that
19 we're allowed to execute, that we're not clearly executing
20 authority that the government has, but that conclusion is
21 precluded by AADC where Scalia says that in all cases
22 deportation is necessary to bring an end to an ongoing
23 violation of United States law. And the contention --
24 THE COURT: Let me get this. This is American --
25 MS. LAFAILLE: Arab Anti-Defamation --

1 THE COURT: -- v. Reno?
2 MS. LAFAILLE: Yes.
3 THE COURT: Let me get it.
4 MS. LARAKERS: So I'm on page 491, and I'm pulling
5 this particular quote, but it's that entire section.
6 THE COURT: Hold on. 491?
7 MS. LARAKERS: 491.
8 THE COURT: Okay.
9 MS. LARAKERS: I'm pulling this particular quote, but
10 it's that entire dicta in that session where Justice Scalia
11 talks about the vast amount of discretion that the executive
12 has over this field. And he says, you know, that the
13 contention that a violation must be allowed to continue because
14 it has been improperly selective is not powerfully appealing.
15 THE COURT: Hold on just one second. What's the
16 ongoing violation of U.S. law in this case?
17 MS. LAFAILLE: That the individuals, the petitioners
18 are -- the alien petitioners are here without lawful status,
19 and it's the same one Scalia was talking about in the AADC.
20 THE COURT: Here they were deporting somebody believed
21 to be part of a terrorist organization.
22 MS. LAFAILLE: Yes, Your Honor. But Justice Scalia's
23 dicta I don't think is limited to that. I think it's very
24 broadly talking about prosecutorial discretion within these
25 three fields, one of them being the execution of removal

1 orders.

2 THE COURT: Well, there's a general -- I mean, this
3 comes up in say Title VII cases. There are at-will employees
4 and they can be fired for no reason but you can't fire them
5 because of their race.

6 MS. LARAKERS: Yes, Your Honor, and I understand that.
7 But the authority we're talking about here is the authority to
8 issue the Executive Order that the president did in this case.
9 And that Executive Order, unlike petitioners suggest,
10 doesn't -- you know, it does build in a certain level of
11 discretion, and it doesn't say that you have to remove every
12 single provisional waiver applicant. As Your Honor yourself
13 pointed out, it has things about establishing priorities
14 within, you know, each field office and that it's not
15 inconsistent with the Executive Order to consider the
16 provisional waiver process. Your Honor yourself has said that.

17 So I think the Executive Order is clearly within
18 authority that the president has the power to do. And for that
19 reason and for the reasons the Supreme Court stated, that
20 admonition in Trump v. Hawaii, that's why the petitioners can't
21 state an Equal Protection claim here. And again, Your Honor, I
22 would just point also to Alharbi because we think a reading of
23 that case gives us the proper framework we should be applying
24 here as well.

25 THE COURT: Well, I'm going to give some further

1 thought to the Equal Protection claim, too.
2 Now, there may be one more issue, and I may even be
3 able to decide it.
4 Well, there's more than one issue. I'm not going to
5 try to decide today whether the citizen spouses have a liberty
6 interest for due process purposes, although I think that
7 argument -- that issue might relate to the I-130. It's a
8 question that's not briefed, but this was raised in the context
9 of the APA claim. The defendants assert there's no
10 jurisdiction over -- this may have been made in the context of
11 the due process claim more generally, but there's a contention
12 that the defendants assert there's no jurisdiction over aliens
13 ordered removed after the expansion of the provisional waiver
14 eligibility on August 29, 2016.
15 MS. LARAKERS: Yes, Your Honor.
16 THE COURT: Do you want to speak to that briefly? And
17 this relates to the scope of the APA class, right?
18 MS. LARAKERS: Yes, and to the due process class,
19 because it applies to, it speaks to who this court has
20 jurisdiction over, so the entire, all the claims.
21 As Your Honor knows, the government's position is that
22 1252(g) bars all the claims, and Your Honor found that this
23 court had jurisdiction under the Suspension Clause.
24 Specifically, Your Honor stated that the substitute here, in
25 order to be adequate, has to provide for a stay of removal

1 until DHS considers the alien's pursuit of the provisional
2 waivers authorized by the statute.
3 THE COURT: Actually, hold on for just a minute. Now
4 what did I do with my copy of my Jimenez decision? See if you
5 can find Jimenez.
6 MS. LARAKERS: This is on page --
7 THE COURT: I'm looking for my Jimenez decision. We
8 can cut through this a little bit.
9 Are you finding it? Would you go back and see if I
10 left my Jimenez decision in the lobby, please? I have the
11 pertinent -- I've got it. September 21. 382 is what I want.
12 382. Okay. Why don't you go ahead.
13 MS. LARAKERS: Okay. So Your Honor, in talking about
14 what the procedure needed to be in order to be adequate, you
15 stated that it would have to provide for a stay of removal
16 until DHS considers the alien's pursuit of the provisional
17 waivers authorized by statute and DHS regulations. The
18 procedure available to petitioners who were in removal
19 proceedings after the expansion of the provisional waiver
20 process and who were also married at that time had such an
21 adequate remedy. They could have raised the issue that they
22 should not have been -- not only not receive a removal order
23 but should not have been placed in removal proceedings at all
24 because this provisional waiver is available to them, they
25 could have made that claim in front of the IJ where an ICE

1 attorney also would have been present to consider it to that
2 end. But they could have raised that issue in their removal
3 proceedings and stated to the IJ that they can't have a removal
4 order entered against them until they receive that waiver.
5 THE COURT: Does that got to the validity of the
6 order?
7 MS. LARAKERS: It wouldn't go to the validity of the
8 order itself likely, Your Honor, but that's not an issue. I
9 see where you're going, but that's not an issue because the
10 circuit court could have still reviewed that claim because it
11 is a constitutional claim and a question of law.
12 THE COURT: How could the Court of Appeals have
13 reviewed the claim if I'm right that 1252(g) strips all courts
14 of the right to review?
15 MS. LARAKERS: Well, first because it wouldn't yet be,
16 you know, a claim arising from the execution. If it's a
17 removal order, he would still be in proceedings. And second,
18 1252(a)(2(D) has been construed as a savings clause by the
19 First Circuit. And the First Circuit has held twice that that
20 savings clause and the jurisdiction of the Court of Appeals as
21 a whole encompasses at least the same parameters as a habeas
22 court did prior to the enactment of the REAL ID Act.
23 THE COURT: Well, the 1252(g) is in the REAL ID Act?
24 MS. LARAKERS: It was before and yes after. The REAL
25 ID Act is what made it clear that habeas jurisdiction is no

1 longer available in the District Court either. So the First
2 Circuit has found that they have jurisdiction, you know,
3 particularly under 1252(a)(2)(D) to review questions of
4 constitutional questions and questions of law, regardless of --
5 THE COURT: What case?
6 MS. LARAKERS: Enwonwu.
7 THE COURT: Which one?
8 MS. LARAKERS: Enwonwu, E-n-w-o-n-w-u. That's 438 F.
9 3d, and I think the pin cite is 33.
10 THE COURT: The pin cite is what?
11 MS. LARAKERS: 33, I believe.
12 THE COURT: They said that Enwonwu involved only pure
13 questions of law. Does the instant case involve only pure
14 questions of law?
15 MS. LARAKERS: The constitutional question and
16 question of law. So yes, Your Honor, it is a pure question of
17 law whether ICE is required under the regulations to consider
18 whether someone is pursuing a provisional waiver before they
19 remove them. And that also happens to be a constitutional
20 question, which is in the same jurisdictional statute that
21 they're citing. It's the (a)(2)(D) refers to constitutional
22 questions.
23 THE COURT: The case involves facts. Right now there
24 are alleged facts. But there has to be factfinding. They
25 don't do factfinding in the Court of Appeals.

1 MS. LARAKERS: Your Honor, the IJ would have already
2 done that factfinding, so they would have been able to look at
3 the facts that the IJ found and determine whether this
4 individual who is presumptively eligible to pursue a
5 provisional waiver, whether it is unlawful to enter a removal
6 order against them or unlawful not to terminate their
7 proceedings immediately because they have this avenue of relief
8 available to them. And that would have given the same exact
9 relief that this court is issuing: the ability to have ICE
10 consider it, the ability to be able to have their proceedings
11 terminated, or their removal order not entered in order so that
12 they can pursue this process.
13 And had they raised that during their removal
14 proceedings, it would have been reviewable by the Court of
15 Appeal under 1252(a)(2)(D) and the Court of Appeals could have
16 issued relief that was appropriate, whether it be allowing the
17 final order of removal but staying the removal. It could have
18 done multiple different things, terminated proceedings, stayed
19 the removal. It could have done many different things, but it
20 certainly would have provided relief for these particular
21 petitioners.
22 It's also important to note that Mehilli, that's
23 M-e-h-i-l-l-i, where the First Circuit stated that that 1252
24 (a)(2)(D) section which refers to the circuit court's review of
25 constitutional questions and questions of law is actually a

1 jurisdictional grant on the -- on the circuit court.
2 THE COURT: And how does this differ from what I
3 decided in Jimenez at 382 when I held that "Petitioners' claims
4 would not be subject to judicial review in the First Circuit
5 under 1252(a)(1) of their final orders of removal or motions to
6 reopen them. Judicial review of a final order by a Court of
7 Appeals includes all matters on which the validity of the final
8 order is contingent. As indicated earlier, petitioners do not
9 challenge the validity of their orders of removal or any
10 decision on which they're contingent. Rather they only
11 challenge ICE's decision on behalf of DHS to enforce the order
12 while they're pursuing provisional waivers."
13 MS. LARAKERS: So in two respects, Your Honor, first,
14 these petitioners didn't need to file a motion to reopen. The
15 named petitioners all had their removal orders entered years
16 ago before they could even claim that they could pursue a
17 provisional waiver because it was before the provisional waiver
18 was even available and because they weren't married to U.S.
19 citizens at the time.
20 But these petitioners don't have to file a motion to
21 reopen. They could have raised this claim the first time, the
22 first time they were placed in removal proceedings, that there
23 is this relief available to them and that they should be
24 allowed to pursue that relief.
25 And the second reason is 1252(a)(2)(D) was not -- we

1 discussed it, but it was not discussed at length with regard to
2 it being a jurisdictional grant. And that's the second piece
3 of this puzzle. It wasn't as applicable to the petitioners, to
4 the named petitioners, because this court had already found
5 that the motion to reopen process was not adequate.
6 But here, we need to answer the question of whether
7 the circuit court could review that question of law. And it
8 clearly can under Section 1252(a)(2)(D), as the circuit court
9 has held twice. And again, that form of relief can come in
10 many different ways. It could be a stay of removal. It could
11 be remanded to the IJ to terminate proceedings. It could have
12 been many different ways. But the circuit court could have
13 done something to allow the person to pursue the provisional
14 waiver.
15 THE COURT: And what does the petitioner say?
16 MS. LAFAILLE: This is not a meaningfully different
17 argument than the one Your Honor already decided. The
18 petitioners here are not challenging their final -- the
19 validity of their final orders of removal. And, you know, to
20 say that the Court of Appeals on a petition for review can
21 consider legal claims and constitutional questions doesn't
22 answer the question legal claims and constitutional questions
23 about what. It's legal claims and constitutional questions
24 that go to the validity of the order. And if the First Circuit
25 grants a petition for review, the result is that someone is

1 back in removal proceedings, not that they get to pursue the
2 provisional waiver process. In fact, the cruel irony of the
3 government's position is that if any of our clients were back
4 in removal proceedings, they would be ineligible to pursue the
5 provisional waiver process.
6 THE COURT: Say that again, please.
7 MS. LAFAILLE: If our clients were back in removal
8 proceedings, they would be ineligible to pursue the provisional
9 waiver process. So for exactly the same reasons that Your
10 Honor recognized previously, there is no mechanism for these
11 particular legal claims to be raised in a petition for review.
12 THE COURT: All right. I'm going to think about this
13 one a little further, too. Some things have come into sharper
14 focus.
15 MS. LARAKERS: One brief point, Your Honor. They said
16 that the irony is that they will be placed back into removal
17 proceedings. As I said, that is not the only relief the Court
18 of Appeals could have issued. The Court of Appeals could have
19 let the final order of removal live and stayed their removal
20 until the provisional waiver process ended. They could have
21 remanded it to the IJ to terminate the proceedings. Those are
22 things that would -- in those situations, would have allowed
23 the individual to pursue the provisional waiver, would have
24 allowed them to be eligible. They would no longer be in
25 removal proceedings or ineligible to pursue the process if the

1 circuit court had done those two remedies available to them
2 that they have done before.
3 THE COURT: So this is the issue that affects the
4 scope of the class, and the argument is helpful. The question
5 is where do we go from here, and I'll see you briefly in the
6 lobby with the court reporter to assess that. I could have you
7 back on Monday. I might want to wait a little longer, but I
8 want to talk about the implications of what I've already
9 decided for the progress of the case. Court is in recess.
10 (Recess, 4:37 p.m.)
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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 the foregoing transcript is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter to the best of my skill and ability.

Dated this 11th day of May, 2019.

/s/ Kelly Mortellite

____

Kelly Mortellite, RMR, CRR

Official Court Reporter