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

MOTION HEARING

May 16, 2019

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P R O C E E D I N G S

(Case called to order.)

THE COURT: Good afternoon. Would counsel please identify themselves for the court and for the record.

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

MS. LAFAILLE: Good afternoon, Your Honor. Adriana Lafaille for the petitioners.

MS. CANTIN: Good afternoon, Your Honor. Shirley Cantin for the petitioners.

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

MR. COSTELLO: Good afternoon, Your Honor. Matt Costello, Wilmer Hale for the petitioners.

MR. PROVAZZA: Good afternoon, Your Honor. Stephen Provazza of Wilmer Hale for the petitioners.

MS. GILLESPIE: Good afternoon, Your Honor. Kathleen Gillespie for the petitioners.

MR. WEILAND: Good afternoon, Your Honor. Will Weiland for the United States.

MS. LARAKERS: Good afternoon, Your Honor. Mary Larakers for the United States.

MS. PIEMONTE: Good afternoon, Your Honor. Eve Piemonte for the respondents.

THE COURT: Okay. And is acting regional director

Marco -- it is Chavez -- present?

MS. LARAKERS: Marcos Charles, yes, Your Honor.

THE COURT: I can't read my own writing. Thank you.

Yesterday I issued an order giving you the proposed agenda for today. I said I intend to or aim to decide orally the motion to dismiss concerning petitioners' equal protection and due process vesting claims.

Second, reserve judgment on the contention that the citizen spouses have a liberty interest in remaining in the United States with their alien spouses and therefore a right to due process before their alien spouses are removed, reserving judgment because at the May 3 hearing the parties agreed that that issue would have no practical effect on discovery or anything else. The open issue left by the Supreme Court or the open question on that left by the Supreme Court may be clarified as we proceed in this case.

I said I might hear argument, further argument on respondents' contention concerning subject matter jurisdiction over the claims of individuals ordered removed after August 29, 2016, that I would hear argument on discovery issues and address scheduling.

Is there something else that ought to be on the agenda?

MS. LAFAILLE: Your Honor, petitioners' motion for class certification is still pending.

THE COURT: Yes. I didn't note that. All right.

Yes. After -- before the discovery issues we'll see what kind of class my rulings have defined, or classes possibly. Anything else?

MS. LARAKERS: No, Your Honor.

THE COURT: So I have done a lot of work since I saw you last on the equal protection issue. And for reasons that I will explain in detail, the respondents' motion to dismiss Count 3, the equal protection claim, is being denied. Count 3 alleges that Executive Order 13768 and the execution of final orders of removal against petitioners are motivated by a desire to discriminate based on race and national origin. As I said, the motion to dismiss this claim is denied.

In Trump v. Hawaii, a case on which the respondents heavily rely, the Supreme Court rejected the plaintiffs' challenge under the Establishment Clause to Proclamation 9645, the so-called "travel ban," which indefinitely barred entry by nationals from six predominantly Muslim countries. The plaintiffs argued that the proclamation's primary purpose was to discriminate against Muslims. The court applied rational basis review in evaluating the proclamation, holding that "courts must consider not only the statements of a particular President, but also the authority of the Presidency itself."

Importantly, the policy at issue in Hawaii was directed at aliens living outside of the United States. The

Supreme Court wrote, reiterating a principle it had addressed before, that "foreign nationals seeking admission have no constitutional right to entry." That's at 138 Supreme Court 2419. And as I understand it, aliens outside of the jurisdiction of the United States are generally not entitled to constitutional protections.

By contrast, the Supreme Court has found that aliens living inside the United States, including those whose presence is unlawful, have a right to equal protection under the Fifth Amendment. That ruling was made in Plyler v. Doe, 457 U.S. 202, 210 in 1982, essentially reaffirming a comparable ruling in Yick Wo v. Hopkins, 118 U.S. 356, 368-69. In Plyler, the Supreme Court wrote that "we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government." That's at 457 U.S. page 210. Petitioners in the instant case reside in the United States unlawfully. Many have resided here for a long time. Therefore, under Plyler, petitioners have a constitutional right to Fifth Amendment equal protection. That distinguishes this case from Trump v. Hawaii.

In Arlington Heights v. Metro Housing Development Corp., the Supreme Court stated the test for determining whether a facially neutral policy, such as President Trump's Executive Order 13768, violates equal protection under the

Fifth Amendment. The Supreme Court stated at 429 U.S. 265-66, To establish an equal protection claim, "plaintiffs must prove racially discriminatory intent or purpose," and that requires more than establishing only a disproportionate impact. The Supreme Court went on to say, however, "When there is proof that a discriminatory purpose has been a motivating factor in the decision, judicial deference [to the President] is no longer justified."

Importantly, the Supreme Court in Arlington Heights clarified that the plaintiffs need not establish that the "challenged action rested solely on racially discriminatory purposes." That's at page 265. The Supreme Court wrote that, "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' motive." Rather, plaintiffs need only demonstrate that an improper, discriminatory motive constituted "a motivating factor in the decision." That's at 265-66. This determination involves "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." More specifically, the Supreme Court explained that such evidence may include: "the impact of the official action"; "the historical background of the decision;" "the specific sequence of events leading up to the challenged decision;" "departures from the normal procedural sequence;"

and any "substantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached;" the "legislative or administrative history," including "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."

Therefore, petitioners in the instant case need not allege that discrimination was the sole or primary purpose of Executive Order 13768 and the Department of Homeland Security's removal policies following from that order. Instead, petitioners must only plausibly allege that discrimination was one motivating factor. The Executive Order 13768, "Enhancing Public Safety in the Interior of the United States," issued on January 25, 2017 states that "interior enforcement of our Nation's immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety."

For present purposes, the court accepts as true that the Executive Order was motivated at least in part by a desire to protect national security and public safety.

However, that is not the end of the inquiry. Rather, under Arlington Heights, petitioners have stated an equal protection claim on which relief can be granted if they

plausibly allege that discrimination was another motivating factor.

Petitioners' allegations concerning President Donald Trump's statements and policies allege a plausible claim that racial animus was one reason for the Executive Order. As described earlier, under Arlington Heights, the court may consider "contemporary statements by members of the decisionmaking body," as well as the "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes." That is Arlington Heights at 267-68.

With regard to this case, during the 2016 Presidential campaign, Mr. Trump allegedly referred to Mexican immigrants as criminals and rapists. This is alleged in paragraph 111 of the Amended Complaint. Since becoming President, he has questioned why the United States could not have more immigrants from a predominantly white country, Norway: as he indicated he would like less immigration from "shithole" countries such as Haiti, El Salvador and African countries; and he has stated that Haitians "all have AIDS." These comments are "contemporary statements" from the ultimate decisionmaker that support an inference that a desire to remove racial minorities from the United States was a motivation for issuance of the Executive Order and related policies.

Similarly, animus can be inferred from other executive

decisions in the same general time period as the promulgation of the Executive Order and DHS's decision to prioritize final-order aliens for removal without regard to their participation in the provisional waiver process. In particular, petitioners allege that President Trump rendered one million aliens unlawfully present in the United States by rescinding the Deferred Action For Children Arrivals, or DACA, program and limited opportunities to become citizens for Lawful Permanent Residents in the military. This historical evidence of policies that could reasonably be regarded as motivated by racial animus contributes to making petitioners' equal protection claim plausible.

Under Arlington Heights, a "substance departure" from normal procedures, usual procedures, can also be construed as evidence of racial animus. Here, Executive Order 13768, according to which DHS justifies its decision to circumvent the provisional waiver process by arresting and detaining aliens at the first step of that process, was issued less than five months after DHA extended the provisional waiver process to individuals with final orders of removal. The arrests and detentions of the named petitioners began only a year later. That's in the Amended Complaint, paragraph 65-66, 82 and 91. The plausibly alleged nullification of the provisional waiver process that I found on May 3 so shortly after its creation represents a sudden and substantial change of policy and

procedure, further supporting an inference of an invidious discriminatory motive for the Executive Order.

I note that in their Memorandum in Further Support of Their Motion to Dismiss, docket number 220 at pages 24-25, respondents in only one sentence assert that petitioners' equal protection claim "is nothing more than a selective enforcement claim." This contention is not developed and is therefore deemed waived under the doctrine enunciated in Zaninno, 895 F. 2d 1, 17. In any event, the court finds that petitioners' claim is not properly characterized as challenging selective enforcement. Unlike a selective enforcement claim, petitioners are not contending that a particular enforcement action is being applied to them but not to others who, except for their national origin or race, are similarly-situated. This contrasts to Reno v. American-Arab Discrimination Committee, 525 U.S. 471, 491. Therefore, petitioners have plausibly alleged an equal protection claim on which relief can be granted, and the motion to dismiss with regard to Count 3 is being denied.

Although not material to the outcome of the motion to dismiss, which I've denied for the reasons I just stated, I note that the instant case is distinguishable from Trump v. Hawaii in another important respect. In applying rational basis review, the Supreme Court in Hawaii emphasized that the President retained "broad discretion" under the Immigration and

Nationality Act to "suspend the entry of aliens into the United States." That's at page 2408. More specifically, the court stated, "by its terms, Section 1182(f) exudes deference to the President in every clause." There, the court found that the President had "undoubtedly" fulfilled the sole requirements set forth in the statute: that is, that the President find the entry of the covered aliens "would be detrimental to the interests of the United States." The court rejected plaintiffs' "request for a searching inquiry into the persuasiveness of the President's justifications" based on "the broad statutory text and the deference traditionally accorded the President in this sphere."

However, in contrast to the President's broad statutory authority to issue Proclamation 9645, DHS's authority to deport petitioners in the instant case is limited by statute and regulation. More specifically, although the INA grants the executive the authority to remove aliens present unlawfully, the INA and regulations issued pursuant to it impose limiting requirements as well. In particular, as this court has held, DHS's failure to consider an alien's participation in the provisional waiver process before instituting an enforcement action would violate the Constitution and the INA by nullifying the provisional waiver process itself. The broad judicial deference afforded in Hawaii based on the President's express statutory authority to issue Proclamation 9645 is, therefore,

not justified in this case where the President's statutory authority to restrict access to the provisional waiver process for those eligible to pursue it either does not exist, or is at least more limited. And I have in mind Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579, 635-36. There, Justice Jackson, Robert Jackson in 1952 wrote that "When the President acts pursuant to an express or implied authority of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these circumstances only, may it be said, for what it's worth," Justice Jackson said, "to personify federal sovereignty."

Finally, the class petitioners seek to have certified is correctly defined as it proposes it for the equal protection claim. It's the class I indicated on May 3 I would certify for alleged violations of the Administrative Procedures Act and the Immigration and Nationality Act. That is, a class that is defined as any citizen and his or her noncitizen spouse who has a final order of removal and has not departed the U.S. under that order; two, is the beneficiary of a pending or approved I-130 petition for alien relative filed by the U.S. citizen spouse; and, three, is not ineligible for a provisional waiver under 8 C.F.R. Section 212.7(e)(4)(i) or (vi); and, fourth, is within the jurisdiction of the Boston ICE-ERO field office comprising Massachusetts, Rhode Island, Connecticut, Vermont,

New Hampshire, and Maine.

Respondents argue that the proposed definition of the equal protection class is not appropriate because the class is not limited to individuals of a particular race or national origin. However, all members of the proposed class are properly within the scope of the class as to Count 3 because they all have standing to challenge the allegedly discriminatory policy on equal protection grounds.

In Craig v. Boren, the Supreme Court held that the female had standing to assert a gender-based discrimination claim that males between 18 and 20 had been denied equal protection because she herself suffered an economic injury on account of this policy. Boren instructs that an individual need not be part of the group against which a policy allegedly discriminates to challenge it, as long as she suffers some injury -- in Boren it was economic injury -- caused by the allegedly discriminatory policy.

In the instant case, all members of the putative class, even those not part of a racial or ethnic group that is the subject of the alleged discriminatory animus motivating Executive Order 13768, are nevertheless injured by it. More specifically, all putative class members are injured by DHS's policy of ordering removal or detention of an alien solely because she is subject to a final order of removal because each faces a substantial risk of arrest, detention and/or removal

without consideration of their participation in the provisional waiver process.

All class members, therefore, have standing to challenge the Executive Order in DHS's removal policies based on the Order. Accordingly, they are all properly included within the scope of the class for purposes of the equal protection claim in Count 3.

With regard to the motion to dismiss the due process claim, that is Count 2, I've previously denied the motion to dismiss the full claim. The remaining issue is the scope of the due process class. That is determined by when the liberty interest I found in my September 2018 memorandum and order vests. I now find that that liberty interest is created or vests when the alien has an approved I-130 and a conditionally approved I-212 as the respondents have argued for the purpose of this vesting issue.

As this court recognized in its September 21, 2018 memorandum and order, 334 F. Supp. 3d at 386, in order to have a due process interest in a certain benefit arising from regulations, the regulations must create a "legitimate claim of entitlement" to it, as the Supreme Court said in Kentucky Department of Corrections, 490 U.S. 454 at 460. The court continues to find that the Kentucky Department of Corrections case provides the correct framework for analysis for cases involving due process interests in immigration relief, contrary

to petitioners' assertion that the decision in Kentucky Department of Corrections should be limited to prison cases.

The language of a regulation, in particular "mandatory language," including "specific directives to the decisionmaker if the regulations' substantive predicates are present, a particular outcome must follow," continues to be the principal, if not essential, indicator of whether the regulations create a "legitimate claim of entitlement." That's discussed in Kentucky Department of Corrections at 461-63, and also in cases such as Town of Castle Rock, 545 U.S. at 757-58, and Aguilar, 700 F. 3d 1238 at 1244.

As this court recognized in the September 2018 decision, the language of the provisional waiver regulations establish a right to receive an answer concerning a provisional waiver, an I-601A, in the United States. I discuss this in Jimenez, 334 F. Supp. 3d at 387-89. However, there is no language in the statute or regulations governing the I-130 or the I-212 or in the I-601A form establishing a right to receive an answer regarding an I-130 or an I-212 while the alien is in the United States. Instead, petitioners continue to argue that the "design and purpose" of the I-601A regulation was to create a single process for relief and that it would be "absurd" to interpret the regulations as allowing ICE to remove individuals at the outset of that process. However, while the existence of a process relief -- I'm sorry -- while the existence of a

process for relief supplies the basis for the plausible APA and INA claims that the court has previously found are adequately alleged, the due process/legitimate entitlement case law does not support its application to petitioners' due process claim.

The Kentucky Department of Corrections line of cases continues to instead emphasize the importance of the language of the regulations. Supreme Court and First Circuit case law also indicate that a "legitimate claim of entitlement" does not "vest" until an individual is eligible to apply for and receive the relief sought. I have in mind American Manufacturers Mutual Insurance Company, 526 U.S. 40, 60-61 and Martel v. Fridovich, 14 F. 3d 1, 2. It is particularly evident in the line of First Circuit immigration cases concerning retroactivity, upon which the parties rely. Those cases include Santana, 731 F. 3d at 60, Goncalves, 144 F. 3d at 114, Arevalo, 344 F. 3d 1, 7. In the instant case, an individual is not eligible to apply for a provisional waiver, an I-601A, until he or she has obtained an approved I-130 and a conditionally-approved I-212 form. Accordingly, the right does not vest until those applications have been adjudicated.

I will add that in the oral argument on May 3, 2019, petitioners contended that INS v. St. Cyr indicates that individuals who have submitted I-130 forms have a vested interest in a provisional waiver. St. Cyr is 121 Supreme Court 2271. In particular, petitioners claim that St. Cyr precludes

interpreting the First Circuit decisions in Santana, Arevalo and Goncalves as indicating that an individual must be eligible for the relief sought to have a vested interest in the relief. However, St. Cyr does not alter my analysis with regard to Count 2 and when the liberty interest is created.

It is true that St. Cyr would have needed to eventually be in removal proceedings to apply for Section 212(c) relief. Nevertheless, for the purposes of determining whether he had a vested right, the court regarded St. Cyr as "eligible" at the time of his guilty plea. The court stated that an alien would have a vested interest if he, "would have been eligible for Section 212(c) relief at the time of their plea," or of his plea. That's at 2293. The fact that St. Cyr was not yet in removal proceedings did not lead the Supreme Court to deem him not "eligible," at least for the purpose of ascertaining his vested interest. The court, in effect, treated placement in removal proceedings as concerning the practical availability of relief in the future, but not eligibility for it.

Indeed, other language in the decision suggests that the distinction between subject to deportation and being "in" deportation proceedings was not material to the eligibility determination. The court wrote: "two most important legal consequences ensued from respondent's entry of a guilty plea in March 1996: (1) He became subject to deportation, and, (2) he

became eligible for a discretionary waiver of that deportation under the prevailing interpretation of Section 212(c)." That's in St. Cyr at 2287. As this quotation indicates, St. Cyr became "eligible" for 212(c) relief -- and therefore had a vested interest in it -- by becoming subject to deportation.

Thus, the Supreme Court's reasoning in St. Cyr does not persuade this court that an individual not yet eligible to obtain, or apply for, a particular form of immigration relief can nevertheless have a due process interest in that relief.

So that's the ruling on the second point.

As I said, I'm reserving judgment on whether a citizen spouse has a liberty interest in remaining in the United States with his or her alien spouse and therefore a right to due process before the alien spouse is removed. On May 3, at pages 53 to 4 of the transcript, draft transcript, the parties agreed that in view of my other rulings on the motion to dismiss issues, this question has no practical effect.

As I indicated earlier, in view of the fact that this issue was left open by the Supreme Court in Kerry v. Din, it might be clarified by the Supreme Court or the First Circuit during the pendency of this case. I find it's most appropriate to defer deciding the issue.

I think the remaining issue before class certification is whether the court has subject matter jurisdiction over the claims of individuals ordered removed after August 29, 2016.

Generally speaking, the court has the authority to revise any ruling before final judgment and to revise decisions concerning class definition as well. I find now that the court does have subject matter jurisdiction over aliens with final orders of removal issued after August 29, 2016. However, if there is jurisprudence that emerges during the pendency of this case on this issue that you think might be material to the analysis, might either reinforce my decision or prompt me to revise it, you're specifically directed to bring that authority to my attention.

However, with regard to this issue, respondents claim that the court does not have subject matter jurisdiction over the claims of class members ordered removed after the Department of Homeland Security expanded the provisional waiver process to persons with final orders of removal on August 29, 2016. More specifically, respondents contend that because this subset of individuals could have raised their legal and constitutional claim in their initial removal proceedings with review in the Court of Appeals under 8 USC Section 1252(a)(2(D), they had an adequate substitute for habeas corpus and therefore this court cannot exercise subject matter jurisdiction over their claims as a result of the Suspension Clause of the Constitution. The court does not find this contention to be meritorious.

It is true that unlike the rest of the petitioners in

this case, the subset ordered removed after August 29, 2016 were not prevented from seeking review in the Court of Appeals of their final orders of removal on the basis that it was too late to file a motion to reopen. However, in the September 21, 2018 memorandum and order in this case, the court held that petitioners would not be unable to adequately raise their claim in the Court of Appeals for a separate and independent reason. In particular, their claims did not challenge the validity of their removal orders, and I should have said I think that petitioners would not have been able to adequately raise their claims in the Court of Appeals.

As I wrote in September 2018, "In any event petitioners' claims would not be subject to judicial review in the First Circuit under Section 1252(a)(1) of their final orders of removal or their motions to reopen them." I cited St. Cyr at 313. "Judicial review of a final order by a Court of Appeals," I wrote, "includes all matters on which the validity of the final order is contingent," and I cited cases.

As indicated earlier, petitioners do not challenge the validity of their orders of removal or any decision on which they are contingent. Rather, they only challenge ICE's decision on behalf of DHS to enforce the order while they are pursuing provisional waivers. Just as with all the other members of the putative class, the subset of class members ordered removed after August 29, 2016 are only challenging

ICE's decision on behalf of DHS to enforce the order while they are pursuing provisional waivers. The subset's constitutional and legal claims therefore do not go to the validity of their removal orders. Accordingly, in the circumstances of this case, the Court of Appeals could not have served as an adequate substitute for the subset's claims through the exercise of jurisdiction under 8 United States Code Section 125(a)(2)(D). I wrote about that in Jimenez, 334 F. Supp. 3d at 385. I was quoting or referencing the Supreme Court's decision in St. Cyr, 433 U.S. at 314 and 381. As a result, the Suspension Clause is implicated because there is not an adequate substitute that would have allowed for a stay of removal. Therefore the court has subject matter jurisdiction over the putative class members ordered removed after August 29, 2016.

All right. So with regard -- I think that brings us to class certification. I haven't understood that there was any dispute about the propriety of certifying a class. The dispute was on what the definition of the class should be. And I think I've decided the issues necessary to define the class. But do the parties agree with that or have a different view?

MS. LARAKERS: Your Honor, we did have a different view under the -- specifically under the due process claim.

THE COURT: Yeah, the due process class -- okay. I said I decided all the issues but I didn't say what the class was. I think there has to be a subclass for the due process

claim that's narrower than the class on the other claims. And on the due process claim, it will be limited to individuals who have conditionally approved I-212s. Is that your position?

MS. LARAKERS: Yes. There were other points in my briefing about whether even individuals in that proposed class would be entitled to the same relief that petitioners seek. I understand that that argument is diminished if the relief is only consideration. However, because petitioners seek much broader relief than consideration, then it certainly -- then our position is that that class can't even be certified for purposes of the relief that they seek, which is much broader than consideration.

THE COURT: How do the petitioners respond to that?

MS. LAFAILLE: Your Honor, I do think that Your Honor's resolution of the scope issues resolves really all the disputed issues with regards to class certification.

With regards to Mrs. Larakers's claim that the relief -- it's not apparent to me right now that the relief we seek under any claim is distinct. You know, some of these issues of course may be fleshed out when, after discovery, we can hone exactly what we think the appropriate relief is. But it's not the case that what we seek is vastly different than consideration. You know, I think the question is how to ensure that consideration is adequate and what are the remedies that are necessary to do so.

THE COURT: And going back to my -- let me have the discovery file. I addressed this in my December 7, 2018 order. The class is being certified for the purpose of declaratory relief. I left open the question whether there could be class-wide injunctive relief. And if we get to the point where the petitioners on some or all claims are entitled to be or found to be entitled to some form of declaratory relief, you know, exactly what the declaratory judgment would be -- in fact, I'm going to talk to you about that in the context of the discovery disputes -- will be an issue that needs to be resolved. But I don't think that it's necessary to or appropriate to decide that question now.

With regard to the Administrative Procedure Act, the Immigration and Nationality Act and equal protection claims, as I said on May 3, I believe, I'm certifying a class defined as follows: Any United States citizen and his or her noncitizen spouse who has: one, a final order of removal and has not departed the U.S. under that order; two, is the beneficiary of a pending or approved I-130 petition for alien relative filed by a United States citizen spouse; 3, is not ineligible for a provisional waiver under 8 C.F.R. Section 212.7(e)(4)(i) or (vi) -- that's (4)(1) or (6); and, four, is within the jurisdiction of Boston ICE, the Boston ICE-ERO field office, which is comprised of Massachusetts, Rhode Island, Connecticut, Vermont, New Hampshire and Maine.

With regard to the due process subclass, in that subclass are only aliens who meet the other criteria and have an approved I-130 and a conditionally approved I-212.

Okay. And as I said earlier, and may have said twice, I'm reserving judgment on the question of whether a citizen spouse has a liberty interest in remaining in the U.S. with his or her alien spouse and therefore a right to due process before the alien spouse is removed. The Supreme Court didn't decide that issue in Kerry v. Din. There's no First Circuit decision. It has no practical effect for the progress of this case, and I think -- I'll hope for guidance from the Supreme Court or the First Circuit before deciding the merits of that claim.

Now -- what?

MS. LARAKERS: I apologize, Your Honor. I think there is one remaining issue with regard to class certification, and that's on the detention claims which we dealt with at the beginning of this case.

As I understand, they have a detention-related procedural due process claim and detention-related claim for the violation of the regulations. So I think that there would have to at least be a separate class for the detention claims.

THE COURT: Defined how?

MS. LARAKERS: Your Honor, certainly not defined as the way they put it here because the claims -- for example, even as this court held last year, the Post-Order Custody

Review regulations are applicable to people who are detained, post-order detention detained under 1231(a)(6), which is what we've been calling the discretionary detention and not mandatory detention, which is under 1231(a)(1), which says that the Attorney General shall detain an alien during the first 90 days of the removal period. Their class isn't defined whether, you know --

THE COURT: This is going back. I don't think any of the named petitioners were detained within 90 days.

MS. LARAKERS: Right, Your Honor. But there are certainly some who could be.

THE COURT: I understood that it was the petitioners' position that this didn't have to be decided now.

MS. LAFAILLE: That's right, Your Honor.

THE COURT: Why?

MS. LAFAILLE: Your Honor, we do think that the detention claims are class-wide because this is conduct that every class member is at risk of being subject to.

THE COURT: You need to raise your voice or speak into the microphone.

MS. LAFAILLE: Apologies, Your Honor. We don't think that it needs to be decided right now, for practical purposes. We started this case at a time when the government was attempting to detain and remove most of our clients. Certainly. You know, where this case goes, the remedy with

regards to removal will of course impact how frequently the government is going to be detaining people and what the necessary remedies, if any, might be with regards to detention. So I think it might be appropriate to leave for later in the case and to assess then whether there are any remedies being sought with regards to detention and how to treat the class certification issues in that regard.

MS. LARAKERS: So Your Honor, we would obviously prefer that it be decided now. We think it's a very easy issue for the court to decide class certification on that count. Because I think it's very clear, looking back at your court's order, perhaps what the court may perceive that class to be.

THE COURT: Where did you address this in your briefs?

MS. LARAKERS: I can pull that up for you.

THE COURT: Anyway. Just go ahead.

MS. LARAKERS: So -- and I think it may have practical purposes. And the last thing I'm sure we all want to do is be back here arguing the same motion later. It could have practical purposes, specifically I think in discovery when we look at the due process claim. Your Honor, along with saying that it's a violation --

THE COURT: When do you think -- how do you think the class should be defined? I don't think there's a dispute that the Rule 23 criteria for defining a class are satisfied, so now we're talking about definition. What definition do you

advocate?

MS. LARAKERS: So it would have to be at least limited to people who are in 1231(a)(6) detention, that discretionary detention portion. So it would have to -- the class would have to look like the petitioners -- the fact pattern from the named petitioners in this case. So it would have to be people whose removal period has run for purposes of the Post-Order Custody Review regulations.

THE COURT: But what I didn't decide is whether the removal period ran before any of them were detained. What I found, as I recall, is even on the government's argued position, which I don't think is the way ICE was construing it, my sense is that, until the litigation in this case, people in this regional office had no idea there were any regulations that they had to follow. But this actually goes to another point that I was going to raise next.

Let's just pause for a minute because -- I'm certifying this class under Rule 23(b)(2). And under Rule 23(c)(3)(ii)(A), giving notice to the class is discretionary. Now, neither party has said anything to me about giving notice. You seem to assume that it's not necessary to give necessary or appropriate to give notice to the members of the class. Is that the petitioners' position?

MS. LAFAILLE: Your Honor, I think it might be useful for us to discuss that with the government and perhaps get back

to the court.

MS. LARAKERS: Your Honor, this is a non-opt-out class, so regardless of notice to the class, the relief is going to apply to the class as a whole. There's not a class member that can opt out of the relief. That specific rule you're referring to I think is, you know, very important in cases where, you know, obviously there's a mandatory rule about opting out in those cases as well. But I think particularly in this type of Rule 23(b)(2) class which concerns constitutional issues, I don't think notice to the class would necessarily -- we can talk to petitioners, and maybe --

THE COURT: Well, but I'm trying to figure out perhaps why I should decide this issue, and conceivably, for example, it could affect discovery. But I also -- and along those lines, this is something I've commended, continue to commend if it's going to continue. Are the parties assuming that ICE will continue to provide the monthly reports to the petitioners that it has been providing?

MS. LARAKERS: Your Honor, we assume that that is a provision that we've agreed to as parties in exchange for staying the preliminary injunction motion. So as long as the preliminary injunction is stayed, we understood the court to order that reporting being given to the petitioners.

THE COURT: Is that petitioners' understanding?

MS. LAFAILLE: Yes, Your Honor.

THE COURT: All right. So your intention is to continue that reporting, and I think that's positive. And will that reporting assist the petitioners in knowing whether they think a class member is being, in their view, unlawfully removed and give you sufficient notice and give the class members sufficient notice to try to seek judicial relief?

MS. LAFAILLE: Your Honor, unfortunately at this time, no. The reporting that we asked for when the government was in a shutdown was more robust. And it would have -- we asked and we have asked again for the government to give us, to identify when it detains a class member or to identify when it makes a decision on a stay of removal involving a class member. The reporting we're getting is very useful, but it covers a limited interaction, which is the interaction of people who are checking in with ICE on orders of supervision. So it's useful, but unfortunately it's not a complete picture.

MS. LARAKERS: Your Honor, we believe that that reporting is appropriate for practical reasons as well because it shows the people who are people -- generally people who are checking in aren't being selected for removal for other reasons, such as criminal history. So it gives the petitioners a good snapshot of a person without criminal history coming into ICE and how ICE is making those decisions. If a person is -- practically speaking, as I understand, if a class member is being detained outside of the pool of people who were

checking in, it's because there's another reason why ICE may want to remove them, for example, if they have criminal history. So it gives the petitioners a snapshot of who have facts that are similar to the named petitioners in this case. So that's why we believed it was appropriate in scope, practically speaking.

MS. LAFAILLE: And what Ms. Larakers just said about the ways that ICE is limiting itself to people with perhaps criminal convictions, that's precisely the kind of thing we would like to be able to verify by getting the slightly more robust reporting that we've requested.

THE COURT: I mean, I had this under -- I think there are things you're going to need to confer on, and this is going to need to be one of them. There are a lot of complicated issues in this case, and I try to get deeply into them. And this one really is not teed up for me in the sense of being briefed, but part of what the respondents are looking for is some time after this to confer.

But in terms of on the agenda to confer after today are, one, notice to the class. And I just looked at this quickly, but it's a (b)(2) class and Rule 23(c)(2)(A), it says, "For a (b)(1) or (b)(2) class, for any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class."

And I mean, this is just sort of an almost intuitive

observation. If the respondents are giving the petitioners sufficient information so the petitioners who, now their class counsel -- I don't know if I have to appoint you as class counsel. I guess not. It's not a securities case. But if they have sufficient notice to know whether they think in a case of an individual alien who's in the class the removal -- well, if the individual alien and that alien is in the class and they want to seek some judicial relief, if they know enough, then it may not be necessary or appropriate. It's not legally required, but it may not be appropriate to give notice to the class because, you know, their interests will be protected.

If the petitioners don't have sufficient information and have to rely -- maybe the class member should be told you're in this class, and, you know, the case is seeking to assure that you're allowed to pursue the provisional waiver process or to have it considered; and if you think it's not being considered, you can contact your lawyers, and they can go to the judge. So to me, at the moment, these things seem to be related.

MS. LARAKERS: Your Honor, we think it would be good for us to confer about that and then report back to you. At this point in time I can say that, you know, any sort of notice to the class, to the entire class would be burdensome if it's not at least limited to people who ICE has interactions with

right now. Because there are many people who are conceivably going through the I-130, the I-212, the I-601A process who aren't checking in with ICE and who isn't on I guess ICE's radar.

And after speaking with my client, you know, it's been very clear that to narrow those people down who ICE does not already have regular contact with would be very difficult because it requires, you know, searching through USCIS databases and cross-checking lists with ICE and determining from perhaps individual A Files where people filed their applications. So I think we will absolutely confer on it and report back, but those are our thoughts right now and how that class notice would have to be limited, if any is given. But after we see their reasons for having the class notice, then we would be able to more fully respond.

THE COURT: I don't think the petitioners are advocating class notice. At this point I'm something of a steward for the class. I am, I have a fiduciary responsibility to the class. And I mean, in this case I don't think the petitioners want to prompt more interactions between ICE and class members who are not now having any interactions. But this is just something that hasn't been focused on by the parties, apparently, as well as by the court, so this is on the an agenda to be discussed. But I think if I had to give notice to the class or I decided to give notice to the class, then

there might be a more urgent reason to define the potential class now, who gets notice. If I'm satisfied that it's not necessary or appropriate to give notice to the class, then the petitioners' proposal might be fine.

MS. LARAKERS: And Your Honor, if I may briefly refine what I said earlier. I don't think the parties have -- I don't think there's any dispute under what specific detention statute the Post-Order Custody Review regulations apply to. There is a separate question, as Your Honor pointed out, about when that clock begins for purposes of the Post-Order Custody Review, but there is no dispute that I could, you know, recognize in briefing about whether people are detained under 1231(a)(6). Because, as we I think conceded in our briefing, their removal periods for the purposes of the detention statute, which is 1231(a)(1), mandatory detention or 1231(a)(6) permissive discretionary detention had run.

What was the -- the only thing in dispute, which would be handled at the merits stage, is when that POCR clock begins. But that does not affect the scope of the class, so you wouldn't need to decide that issue.

THE COURT: They could have -- well, I haven't gone back and studied what I said and wrote a year ago, but it could because it may be that you have no authority to detain anybody after that 90 days. And whatever it is, if you have the authority to detain what I know I left open -- I found that

even on the government's argument about the meaning of the regulations is if, you know, the clock starting running when somebody was found, the regulations were being violated, there may well be a requirement that you give a detention review much earlier than six months.

MS. LARAKERS: Yes, and the class that we say it must at least be limited to would be consistent with that relief. We're only saying that the class would be limited to people who are detained under 1231(a)(6), which is people who, generally speaking, 90 days has passed since the entry of their removal order.

And I think -- you know, I can't speak for petitioners, but I don't remember that specific point being disputed since all the named petitioners have had their removal orders run a long time ago, and also I will recognize that the people in this proposed class, it's very likely that there will be much more of them who look like the named petitioners who are in 1231(a)(6) detention. But the possibility that there may be people in that mandatory detention period is what makes the difference and why I had to bring it up.

THE COURT: All right. Well, I haven't focused on that, but you're going to need to confer about this. I might be wrong, but at the moment I see some relationship between notice and defining a class for detention purposes, which petitioners think is not necessary. We do have a lot to do.

Now, with regard to conferring, you did tell me again as recently as May 3, it was in your earlier reports, that once I decide the motion to dismiss, you would renew, maybe particularly if I ordered you but I didn't have to order you, your efforts to see if you can reach some agreement to resolve the whole case. And I think things are in a better position than they were a year ago, and it's in part because, you know, you've fought hard over what you should fight hard about and have reached some agreements, too.

So are the parties still willing, now that you know what I've decided on the motion to dismiss, to go back and try to see if you can resolve all or a good part of this case?

MS. LAFAILLE: Yes, Your Honor.

MS. LARAKERS: Yes, Your Honor.

THE COURT: Okay. All right.

MS. LAFAILLE: Your Honor, could I just interject something about the named representatives. I was going to say something else about notice, class notice, which I'll skip. But the petitioners are not at this time seeking to have Lilian Calderon and Luis Gordillo appointed as class representatives because they've left of the United States for consular processing.

THE COURT: There are two of them? I only remembered one.

MS. LAFAILLE: Luis, Mr. Gordillo is Lilian's husband.

THE COURT: Mr. Calderon?

MS. LAFAILLE: Yes. Mr. Gordillo. Although they could be class representatives, given that there are four other couples --

THE COURT: Well, maybe they could or maybe they couldn't. They might be atypical. We discussed this a little last time maybe in the lobby. All right. So the named plaintiff's class representatives are who?

MS. LAFAILLE: So it's the four remaining couples which is Amy Chen and Deng Gao, Oscar and Salina Rivas, Sandro De Souza and Carmen Sanchez, who I can also address in a moment, and Lucimar De Souza and Sergio Francisco.

THE COURT: All right.

MS. LAFAILLE: I did also want to highlight something about Mr. De Souza. He is with the government's -- with the government's agreement, after some discussions that arose from this case, the government has filed a motion to reopen his immigration proceedings, which we expect will be granted any day. It's been taking a few months, but we expect that to be granted. So I leave that to the court's discretion. He's in the proposed class right now, but he may fall out of it any day.

THE COURT: Okay. So the implication of that is should he be a class representative because he might soon not be, correct?

MS. LAFAILLE: Correct, Your Honor.

THE COURT: Well, what do you propose?

MS. LAFAILLE: Your Honor, we don't have a strong feeling. I think it would be fine for him to be a class representative, recognizing that, you know, his situation may be changing.

THE COURT: And then if it changes, you would move to have him removed as a class representative?

MS. LAFAILLE: We could certainly do that, Your Honor.

THE COURT: I think we'll leave it that way. If it gets to the point -- because I think what you're communicating to me, if I understand it right, is at the moment he's in the class and he's typical of the other class members. But if his proceedings are reopened, at a minimum he won't be typical and maybe he won't be in the class?

MS. LAFAILLE: Correct, Your Honor.

THE COURT: Do you have any idea when there's likely to be a decision on reopening?

MS. LAFAILLE: I would have thought it would have happened already. The motion has been pending since November.

THE COURT: It's a joint motion?

MS. LAFAILLE: Yes, Your Honor.

THE COURT: All right. I'm not appointing Mr. De Souza as a class representative. But if your predictions don't prove to be prophetic and his case is not reopened, you can

move to have him added as a class representative. Okay?

MS. LAFAILLE: Yes. Thank you, Your Honor.

THE COURT: All right. I've looked at the discovery issues, and I think it would be helpful if you give me an overview of them and if I give you some guidance, but I don't have the sense that the discovery disputes can be resolved or all resolved today. What's the overview of the -- actually, hold on just a second.

Do you want to give me an overview on discovery?

MS. CANTIN: Good afternoon, Your Honor. So the main overview is that for the last five months the parties have been trying, consistent with this court's orders, to work in good faith to move forward with discovery. But the bottom line is, notwithstanding our best efforts, the government refuses to produce a single additional document beyond what Your Honor ordered last summer.

We had hoped that, given what transpired at the May 3 rulings, that Your Honor's rulings would have signaled to the government that this case is proceeding and that discovery would be inevitable. Unfortunately, it appears that, absent an order from Your Honor and this court, the government does not intend to produce anything or to engage in discovery. And while we have no doubt that respondents' counsel is in good faith trying to move this case forward, it's really become clear that their client respondents will not engage absent a

court order from Your Honor that discovery is open in this case. And given that this court order is the gating item for this case to move forward, petitioners may request today that Your Honor issue an order for discovery to begin.

THE COURT: All right. Actually I didn't understand that it was the respondents' view -- so if discovery begins, you're not asking me to order any particular discovery where there's a dispute. You're just asking me to say it's time for discovery to begin?

MS. CANTIN: Yes. As we understand it, there are two issues. The main issue right now is currently we understand that discovery is not open, and because that order is in place, the government refuses to engage.

THE COURT: Well, yeah, I did stay discovery. That's why I thought your motion to compel was premature. But now I've ruled on the motion to dismiss. The case is going to go on. We'll have discovery. I'll listen to the government, but, you know, I know the government says it's limited to the record as a typical APA case. However, my present view -- see if this is helpful guidance -- is, first of all, the APA is only one of the I think four remaining claims. There's an INA claim. The government views that as the same as the APA claim at the moment. I don't. But even aside from that, there's the equal protection claim. So discovery on the equal protection claim for the class, which is defined as the petitioners proposed it,

it's time to get on with that. And I think that's, as far as I know, the same discovery you would want for the APA claim and the INA claim as well.

I also think that the usual rule about review of a record concerning the APA -- in an APA case is not the right principle here. The APA claim is that the regulations, the plausible APA claim is that the regulations were repealed without going through the Administrative Procedure Act. It's not that -- and that that is arbitrary and capricious. So then the petitioners would have to have discovery relevant to whether the respondents were regularly failing or are regularly failing to consider -- this is something I want to get into sharper focus -- the provisional waiver regulations and requirements in ordering people with final orders of removal to depart the United States. Is that helpful from the petitioners' perspective?

MS. CANTIN: That is helpful. And if we can anticipate, Your Honor, that discovery is beginning, that is very helpful to the parties to be able to move this case forward.

THE COURT: And then you'd need to confer to see what discovery you agree on and what you disagree on. But here. Let me hear from the respondents.

MR. WEILAND: Yes, Your Honor. I would like actually an opportunity to be heard because I think there's more nuance

to our assertion of filing a certified administrative record than we've previously been able to discuss. And we have appreciated the way the court has unpacked this case methodically, and I think addressing the APA, INA, EPE claims in the same sort of fashion would benefit from what we propose.

It is my clients' position that they intend to submit a certified administrative record addressing the 2016 regulatory change and that that regulation will show one of two things: Either the petitioners' position about when and what penumbra of rights was created when the regulation was promulgated was considered by DHS in a notice and comment in compliance with 5 U.S.C. 553 and either rejected such that ICE's actions haven't been contrary to anything within the regulation or adopted by DHS, at which point in time the court would have the factual basis it needs to rule on the regulatory review on the rule-making claim.

THE COURT: Here, I understand the argument in the way that I view the petitioners' position and the rulings that I've made. They don't argue that the 2016 regulations didn't result from a process that complied with the APA. They argue that they're not being followed or they weren't being followed. And this may relate to the scope of discovery, that they at least weren't being followed, and it seems to me that the record that you're describing would be relevant, it would be discoverable and possibly helpful to you if it provides a basis for saying

ICE wasn't required to consider the regulations, which I doubt will be the case. But we'll see what it says. And I mean, I have seen some of what it says and wrote about it last year. But I don't think that that would be sufficient, unless I were to bifurcate discovery, and I don't think that's a good idea at the moment.

MR. WEILAND: Yes, Your Honor. And I concur with you mostly, in that I don't think the petitioners are raising a challenge to how the 2016 regulation was promulgated, whether or not it complied with 5 U.S.C. 553.

What my clients are asserting is that the stance petitioners have taken is that ICE has deviated from the rule that was considered and promulgated by DHS. If DHS in the proper procedures under 553 actually did consider petitioners' position and rejected it, ICE hasn't deviated from anything in violation of the rule because it was noticed. It was commented on by DHS in 2016.

If, however, that certified administrative record doesn't support or shows or -- actually supports petitioners' position that DHS actually did intend to create a penumbra of rights under the provisional waiver that would exercise ICE's discretion or what they had to consider, then Your Honor would have the factual basis from that to determine that ICE is not doing that --

THE COURT: How would I have the factual basis unless

they get discovery on what ICE is doing?

MR. WEILAND: Well, the second prong, and this is the other part of our argument, is, Your Honor has already ordered -- had already conducted discovery in this case. You had depositions of three acting field office directors from ICE Boston. I believe a couple of them were even put on the stand. I was only here for a portion of the hearing, so I can't recall them all. I think I was here in August where Ms. Adducci testified. And I think they were questioned at some length about what the practices and procedures of ICE Boston were at the time.

And so in order to attack the discovery in a methodical matter, as I think this case demands because it is complex and has a lot of moving parts, we think the rule exists for a reason, that the certified administrative record is put before Your Honor and then petitioners come with their specific assertions of why it needs to be supplemented, what they want to supplement it with, such that it paints a complete picture. But until there's a certified administrative record entered into the case, Your Honor, I don't know how you even begin the analysis.

THE COURT: Well, I don't think there's going to be any objection to your giving them or giving me the record. The question is, then what? Let me -- I keep saying something, and I'm not sure -- here, Ms. Larakers, you want to listen to this.

It might turn out to be very important and helpful to you.

MR. WEILAND: My apologies, Your Honor.

THE COURT: Here is a question that I have in mind. This is a case for declaratory relief, not at the moment for injunctive relief. It might be. But even if it were for injunctive relief, I wrote about this -- I wrote about this briefly in the December 7 order, docket number 193. One of my -- let's say it's declaratory relief. What am I being asked to declare; that an alleged or proven past practice of ICE was unlawful, it was inconsistent with the regulations which are a form of law, or am I being asked to declare that what ICE is now doing is unlawful? Because my sense, understanding, is that ICE is now behaving differently than it did or was performing a year ago. And that could affect -- it might or might not affect discovery. It may be everything that's transpired is relevant.

If I were doing an injunction, as I wrote on December 7, you know, the Farmer v. Brennen standard would apply, and I would have to decide not only whether the government had violated the law, but whether it was likely to do so in the future, once I had said what the law was. And to some extent in deciding the motion to dismiss and having to decide what states a claim on which relief could be granted, I've told you what as of now I think the law is, for example, on equal protection.

So I mean, this relates to my continuing encouragement of you to talk settlement. And it's possible since now I'm talking about settlement, we ought to go into the lobby. But, you know, it might be, that based on the information ICE is now providing or somewhat more but a manageable amount more information, you know, there's not a serious concern that the regulations, as the petitioners interpret them, are being violated now. So the case gets stayed, and, you know, there may be a change in ICE's performance over time. But if there's a material change, then the stay could be lifted. Anyway.

But with regard to discovery, your argument is what? I should get the record of the -- I don't even know what I would decide. I get the record. Then what?

MR. WEILAND: Right, Your Honor. So my clients' position is that they should be permitted to file this certified administrative record that reflects the decisionmaking that occurred in 2016 because that would shed light on the legal question before you.

THE COURT: And this is -- I haven't thought about this very much. I don't think there's a problem with their filing the record. The problem comes if that's going to be the only evidence on which the respondent asks me to decide say the equal protection claim.

MR. WEILAND: Yes, Your Honor. And this is where we think doing this methodically -- because the record would also

-- we believe the APA claim addresses the unlawful, unconstitutional assertions of counsel, so the INA claims and the EP claims. We believe the habeas due process is a separate pillar that you haven't discussed yet, Your Honor. But in that, once the record is filed, there's only a few exceptions, but petitioners need to show more than just the motion to dismiss has been denied, Your Honor. They have to show what they think needs to be added to the record so that Your Honor is capable of making a decision.

And this somewhat bleeds over into our habeas due process/good cause question. We think there's an ample amount of evidence already available to this court and to the petitioners that we do intend to supplement with the certified administrative record and that it may be that after folks have seen it, there's no need to supplement the record, for which the burden and expense of going through discovery may be unnecessary. Unpacking it, as I currently stand before Your Honor, and I haven't seen this record yet, it hasn't been produced, it's a somewhat laborious task and something we need to confer with --

THE COURT: Well, it's too bad you haven't been producing it. I mean, at least going back two weeks I denied the motion to dismiss on a couple of things. But go ahead. It's just been two weeks. Go ahead.

MR. WEILAND: I assure you my clients have been

working diligently on that. If the factual record as developed already through the expedited discovery Your Honor ordered earlier and the administrative record that my clients desire to submit satisfies the need for you to be able to make the decision on the legal issue in question here, which I also -- I'm not -- I understand that declaratory relief is whether or not ICE was or was not or should or should not take into consideration or is required to take into consideration the provisional waiver when deciding whether or not to enforce a final order of removal.

THE COURT: I think at a minimum, and arguably at a maximum, I should be deciding whether ICE is required to consider the provisional waiver provisions. And I just looked quickly at it because now we're just sort of morphing into this stage. In my St. Patrick's Day Parade decision in 1995, South Boston Allied War Veterans Council v. Boston, 873 F. Supp. 891 at 905, I talk about the Declaratory Judgment Act and how it's discretionary; a court doesn't even have to -- the fact that a party is entitled to ask for declaratory judgment doesn't mean the court has to issue one. And so I think sharpening the question that I'm being asked to declare an answer on might be helpful and might or might not affect the parameters of discovery.

Anyway. So how do the -- but I think what you're proposing is that you assemble the administrative record, you

produce it to the plaintiffs. Maybe you file it with the court, but once I have the administrative record you look and decide what else, you know, do they want -- and they might tell you in advance what else they're going to want, so it's going to take a long time to get it, if it doesn't get delayed. But anyway, go ahead.

MS. CANTIN: Your Honor, as I understood Mr. Weiland's argument, those are directed towards the Administrative Procedures Act. And we welcome this record. We suspect that we're going to find that record insufficient and we will want it supplemented. But that's what the APA -- we will welcome the record and review it, but that doesn't mean the other discovery should be on hold.

Your Honor has now allowed the equal protection claim to proceed, the INA claim to proceed, a subclass with a due process claim to proceed, and we're entitled to discovery for those standalone claims. And what we're seeking is discovery of how and when it come to pass that the Boston ERO suddenly decided to start detaining, arresting and removing noncitizens with no consideration of the provisional waiver process. We want to know the individuals who made that decision, the factors that were considered in making that decision, how that decision was carried out, and what are ICE's current policies on how to treat noncitizens who are on this path.

THE COURT: And at the moment, the last is the most

important to me: What are they doing now? And if what they're doing now seems to be consistent with the law or sufficient that you're not going to press for an answer -- because if you press for an answer, it may not be the answer you want. You don't have the due process class that you hoped for, for example. Then, you know, you might agree to stay the case, or I might exercise my discretion and say, you know, in the current posture, there's not good reason to invest the time and effort, which is limited for any judge or court, you know, to decide this issue because it doesn't appear that they're violating the law right now. There may be good reason to believe they were violating the law. These are just observations, thoughts in mind.

MS. CANTIN: And Your Honor's observation is the same one we shared with the government that what ICE is doing now, what current policies they're implementing is useful for petitioners to know, if anything, to inform the type of relief we might seek. It would inform settlement decisions and what we'd be asking for in that posture.

THE COURT: And what more do you want to know about what they're doing now?

MS. CANTIN: We don't know anything as to what they're doing now. As Your Honor pointed out, we received the limited reporting, but Ms. Lafaille explained that that is very limited to people checking into the Burlington office. We haven't seen

anything since Your Honor compelled them to produce things in August.

THE COURT: But you weren't receiving anything when you were finding -- you know, aliens were finding you as lawyers, and you're running in here and arguing successfully that this one is being unlawfully detained, or once a case was brought, people were released from detention. And, you know, nobody's evidently come to you in this publicized case and said, you know, my rights are being violated; please represent me; please go tell the judge, because I'm in the putative class.

MS. CANTIN: Nobody's come to me personally, Your Honor, but I would defer that question to Ms. Lafaille to see if she can speak to that.

THE COURT: I meant sort of all of you generally.

MS. CANTIN: I understand that.

MS. LAFAILLE: Right. Your Honor, we have worked with the government over the pendency of this case when being alerted of certain individuals. We're aware of certain habeas cases pending before this court involving putative class members, but by no means do I think that we have regular access to information or that we are getting aware of all our class members.

THE COURT: And again, and this is just to help inform your discussions. I had the first of these detention cases.

It could have been two years ago today. I know it was in May of 2017. And the petitioner was taken into custody when he was at his I-130 interview. And there was a motion for preliminary injunction. We came to lunchtime, I signaled evidently clearly that I was likely to interpret the regulations the way the petitioner was advocating, not the way the government was advocating. And now in a more deliberate way I've done that with regard to the detention regulations. And the parties agreed to a settlement of that case that afternoon. But I remember being told, you know, were there other people arrested at the CIS office on the same day or in the same way, and I was told, yes, there were four others, if I remember right, and one has an immigration lawyer, and we don't know where the other three are because the Department of Homeland Security won't tell us. They say there's a privacy interest.

So I suppose what they're saying is they can only -- and this again goes to the notice issue. There may be people who are in the class who are getting removed and they don't know there's a case, and they don't know they have lawyers, so they want some more information.

MS. CANTIN: If I may raise one more issue, Your Honor, to the point we don't know what the government is currently doing. For example, we understand that currently I-130 interviews are not being scheduled at the CIS offices, and we don't understand why that is. That's just one of the

areas we'd like to understand.

THE COURT: Maybe one thing that should be done, I may be interpreting silence as meaning there are no problems. Maybe you ought to update the depositions that you took. Because those depositions were last July, I think, right?

MS. CANTIN: That's correct. It was in the summer of last year. And we do --

THE COURT: Would it help to take a deposition, say, of Mr. Charles and see what's going on? I mean, whoever it is. I don't know who the head of CIS.

MS. CANTIN: That is helpful, but to make that deposition meaningful it would be helpful if the government would produce documents to our document request so that we can be focused in our questioning.

THE COURT: Actually, that's not the way I was taught to litigate. You'll be waiting forever. You're not going to be stuck with one deposition. If you go and take a deposition and he tells you, We're doing A, B and C, and then you make a document request and you get documents and there's reason to think that Mr. Charles is not doing A, B and C, I'll let you ask him again. But if I were you, I'd want to ask him the questions soon. Maybe even before he has the documents.

MS. CANTIN: We appreciate that. And this goes to our other discovery request, is that we intend to notice depositions for Christopher Cronen, who we understood, as

Mr. Lyons testified before Your Honor, that Boston ERO was responding to Mr. Cronen's directive to stop individuals that were showing up at I-130.

THE COURT: Didn't Mr. Cronen go to Washington about a year and a half ago or longer? He's in Washington.

MS. CANTIN: I understand.

THE COURT: I mean, it's not that you -- I'm primarily interested in what's going on now. I mean, what I'm evolving toward is saying, you know, why don't you take Mr. Charles' deposition in the next two weeks while you're conferring about the parameters of discovery and settlement. And, you know, you might get answers that persuade you it would be okay to agree to a stay of this case as long as they continue to give you certain information so you can monitor whether there's been some adverse, from your perspective, material change in circumstances.

MS. CANTIN: Your Honor, if I may also request that, because based on the limited discovery you ordered last summer, we found out that, you know, ERO was colluding directly with CIS to orchestrate these detentions and arrests and removals, and they were coordinating in realtime. In fact, I believe I read an email where ERO requested CIS to delay a marriage interview because certain officers were getting a late start that morning.

So we would also respectfully request to depose

somebody from the CIS side of the house who is working with ERO in orchestrating these detentions and arrests. And for efficiency purposes, we would like to do all of this discovery at once so we're not coming to Your Honor in piecemeal fashion.

THE COURT: It would be a lot more efficient if you got some answers and got some regular reporting and then we didn't have to litigate all of this and wait for months.

I don't know. Is there a reason I shouldn't authorize one deposition of ICE and one deposition of CIS?

MR. WEILAND: Yes, Your Honor. Because we have been providing information. We have provided to them and to this court the declaration of Mr. Charles, that he is continuing the actions of Mr. Lyons, who was the FOD for the longest period during this case. I don't think there's any basis to doubt the veracity of that. I haven't heard anything. The man's been in the job a week or two, the exact date is lost on me right now. And also, we are reporting beyond just I believe the Burlington office. It's all the check-ins, and it's a monthly report with where they are in the process.

THE COURT: The CIS point seems to me a different one.

MR. WEILAND: Yes, Your Honor.

THE COURT: I've ordered that people -- that ICE has to consider that people are pursuing the provisional waiver process, but at least for due process purposes you have to have an I-130. If they're not giving any I-130 interviews, how are

you ever going to --

MR. WEILAND: Well, that's news to me, Your Honor. I would like the chance to ask my clients whether or not that assertion has any merit to it. I can't say that to you here, but we've never heard anything like that before, or at least I personally have not.

I'm not sure what deposing USCIS officials will reveal about what ICE is doing when deciding to enforce a final order of removal. I think to the extent that petitioners have alleged that USCIS was colluding, that's already been provided. I'm not certain that's entirely improper for officials involved in enforcing the immigration laws of the United States to talk.

THE COURT: Declaratory judgment is a discretionary remedy. An injunction is an equitable remedy. If we just look at the due process claim and the detention claim, well, say the due process claim where I've just held you have to have a conditionally approved I-212 to have a due process claim, but if ICE and CIS is, if the Department of Homeland Security said, Well, if we stop giving interviews for I-130s, there will not be anybody who ever has a due process right because the judge has told us it doesn't vest until later, you know, that would be a fact, if it were a fact, that might well be material to how I exercise my discretion on whether to issue a declaratory judgment at all.

MR. WEILAND: Yes, Your Honor, but I don't think you

need to order a deposition to establish that fact. I intend to walk out of this hearing and put it right to my client, and I'm certain we would be able to answer that forthright because that's a pretty extreme assertion.

THE COURT: I don't know. It may be extreme, but you're talking about the burden of document discovery, and I'm saying if they get to ask some questions, cross-examine on a declaration, either, A, they may decide they don't need all of that discovery, or B, you might have a stronger argument that I should exercise my discretion -- because this is discretionary, what's unduly burdensome -- to say the burden is too great; you've already had his deposition.

MR. WEILAND: Certainly, Your Honor, we would prefer the less burdensome.

THE COURT: I know, but it may be less burdensome to let the witness answer some questions, and then they'll have a better idea of what he says, and I assume he'll be prepared and he'll be candid and we'll see where it goes.

MR. WEILAND: Yes, Your Honor.

MS. CANTIN: Your Honor, and I do understand why the government is pushing back so hard, because based on the sliver of information we saw last summer, candidly, that discovery was illuminating and eye-opening and nothing short of alarming.

THE COURT: Well, that's nice. I mean, that's not nice, but -- I don't know. I'm telling you that even though

you didn't ask for it, I'm leaning toward ordering that you get comparable discovery now. Last summer you had a deposition. And did I order that they produce some finite documentary discovery? Did you get some documents in connection with the depositions last summer?

MS. CANTIN: Those were the alarming ones I just referenced, Your Honor, yes. So thank you. We do appreciate that we'll be getting the depositions.

THE COURT: Well, I haven't decided that yet. I just suggested it.

MS. CANTIN: If I could, just one final note, I think Your Honor is aware, we've previewed, but this is a case of national importance. It's the only case in the country where we have the potential to find out and to understand what has happened between 2017 and 2018, and our clients deserve to know what happened; why, when there was a rule on the books, that that rule was summarily disregarded.

THE COURT: Well, you know, I have the authority to decide actual cases and controversies, and I think we need to do a little work on the Declaratory Judgment Act. You would like to know, your clients would like to know, but I just have to think about what's appropriate. And, you know, a year ago we were talking about, you were presenting to me the most fundamental issue: Is a person with a constitutional right not to be deprived of liberty without due process being deprived of

that right? And that was an urgent matter. It had profound human consequences, and it got the highest priority.

Now, if there's not something comparable but there's an interest in knowing, you know, what happened two years ago, if it's not continuing and there's not a threat that it's going to resume, I'd have to think about what's most appropriate for the court to do in those circumstances.

MS. CANTIN: Understood, Your Honor. And to the point of figuring out what's going on now, that's the paramount importance, then I do think the discovery we all just talked about would be helpful on that front. So thank you.

THE COURT: I'll see counsel in the lobby.

(Adjourned, 4:35 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that 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 21st day of May, 2019.

/s/ Kelly Mortellite

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Kelly Mortellite, RMR, CRR

Official Court Reporter