

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

Antonio de Jesus MARTINEZ and Vivian
MARTINEZ,

Plaintiffs-Petitioners,

v.

KIRSTJEN NIELSEN, Secretary, Department of
Homeland Security; THOMAS HOMAN, Acting
Director, Immigration and Customs Enforcement;
THOMAS DECKER, Director, New York Field
Office of ICE Enforcement and Removal Operations;
RONALD EDWARDS, Director, Hudson County
Correctional Facility.

Defendants-Respondents.

Case No.

**COMPLAINT AND
PETITION FOR A WRIT
OF HABEAS CORPUS**

INTRODUCTION

1. This civil rights action challenges a policy of immigration officials of separating families by detaining and deporting noncitizens who, pursuant to federal regulations, have applied to obtain legal status by virtue of their lawful marriage to American citizens. In 2013, the federal government enacted rules allowing noncitizens to remain in the United States while they seek legal status arising from their valid marriages, and in 2016, the government expanded those rules to allow noncitizens with deportation orders to remain in the country during the application process. Both of these changes were intended to promote family unity and to avoid the grievous consequences of forcing a spouse or parent to leave the United States for years to pursue status from their home country while their families remain in this country.
2. Without notice and in direct contradiction of these family-unity regulations, immigration officials recently implemented a policy of detaining and deporting noncitizens who are in the

process of applying for legal status by virtue of their marriage to an American citizen. Plaintiff-petitioner Antonio Martinez, his American-born citizen wife Vivian Martinez, and their two American-born citizen children – a newborn son and two-year-old daughter – are recent victims of this deplorable action. Excited by the promise of the new rules, Ms. Martinez applied for the waiver that would allow Mr. Martinez to remain in the United States and obtain status. Having completed the initial paperwork, the couple appeared at a federal immigration office in Manhattan on April 27, 2018 with a photo album and other evidence of their family life. At the end of the interview, Ms. Martinez was asked to step out of the room, which she did thinking the purpose was to interview each of them separately. Instead, their lawyer came out of the room and informed her that agents had seized her husband. An official later told her this was pursuant to a new policy of detaining and deporting noncitizens appearing for these interviews.

3. Mr. Martinez is now incarcerated at the Hudson County Correctional facility in Kearny, New Jersey and faces imminent deportation to El Salvador. His wife and children are devastated, his daughter suffering frequent night terrors. Ms. Martinez has lost the ability to breastfeed their son and is seeing a psychologist.
4. Upon information and belief, many other American citizens – both in the New York City area and elsewhere – have had their noncitizen spouses suddenly taken from them under this cruel new policy. The policy is unlawful under federal regulations, federal statutes, and the Due Process Clause of the United States Constitution. The plaintiff-petitioners seek immediate relief staying the deportation of Mr. Martinez and ordering his release from detention. They also seek an order invalidating the policy.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction under Art. I, § 9, cl. 2 of the United States Constitution (Suspension Clause); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1651 (All Writs Act); 28 U.S.C. § 2201 (Declaratory Judgment Act); 28 U.S.C. § 2241 (habeas corpus).
6. Venue is proper in the District of New Jersey under 28 U.S.C. § 2241(d) because Mr. Martinez is detained at the Hudson County Correctional Facility in Kearny, New Jersey and under 28 U.S.C. § 1391(b) because defendant-respondent Ronald Edwards, the warden of Hudson County Correctional Facility and the immediate custodian of Mr. Martinez, works in the district.

PARTIES

7. Petitioner Antonio de Jesus Martinez is a citizen of El Salvador who has been in the respondents' custody since April 27, 2018 and is now incarcerated at the Hudson County Correctional Facility in Kearny, New Jersey.
8. Petitioner Vivian Martinez is a U.S. citizen who was born in Queens, New York. She is the wife of Petitioner Antonio Martinez.
9. Respondent Kirstjen M. Nielsen is the Secretary of Homeland Security, the department of the federal government responsible for the enforcement of immigration laws. Secretary Nielsen is the ultimate legal custodian of Mr. Martinez. She is sued in her official capacity.
10. Respondent Thomas D. Homan is the Acting Director for ICE, the department of DHS responsible for apprehending, detaining, and removing Petitioners. Director Homan is a legal custodian of Mr. Martinez. He is sued in his official capacity.
11. Respondent Thomas Decker is the Field Office Director for the ICE-ERO New York Field Office. He is the immediate legal custodian of Mr. Martinez. He is sued in his official capacity.

12. Respondent Ronald Edwards is the director of the Hudson County Correctional Facility. He is Mr. Martinez's immediate custodian. He is sued in his official capacity.

LEGAL BACKGROUND

13. The noncitizen spouses of U.S. citizens are eligible to become lawful permanent residents of the United States despite previously having been ordered removed, but to do so, they need to leave the country in order to apply for an immigrant visa at a U.S. consulate abroad—a procedure known as consular processing.

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

15. Prior to 2013, the unpredictability of this process and long wait time outside the country deterred many noncitizen spouses from leaving the U.S. to become permanent residents. *See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Proposed Rule*, 77 Fed. Reg. 19902, 19906 (Apr. 2, 2012) (“many immediate relatives who

may qualify for an immigrant visa are reluctant to proceed abroad to seek an immigrant visa”). For those who did depart, the long wait times abroad often caused their U.S.-citizen family members precisely the type of hardship that the waivers were intended to avoid. *Id.*

16. In 2013, USCIS addressed this problem by promulgating regulations that made it possible for the spouses of U.S. citizens who had been present in the U.S. without authorization to apply for a waiver of inadmissibility for unlawful presence *prior* to leaving the U.S. to consular process. This application is known as a “stateside” waiver. In 2016, the agency expanded the stateside waiver process to make it available to noncitizens with final orders of removal—like Mr. Martinez. *See Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule*, 81 Fed. Reg. 50244, 50245 (July 29, 2016). Both regulations were promulgated through notice and comment.
17. The purpose of these amendments to federal regulations was to encourage people who would otherwise be reluctant to pursue lawful status outside the U.S. to do so and to promote family unity during the process. *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule*, 78 Fed. Reg. 536-01 (Jan. 3, 2013); 81 Fed. Reg. at 5024-01 (expansion of waiver program will “reduce[] separation time among family members” and bring about “humanitarian and emotional benefits derived from reduced separation of families”). By permitting noncitizens to obtain waivers in the U.S. prior to departing, the regulations reduced the time that a noncitizen spouse would have to spend outside the U.S. and separated from their family from months or years to a few weeks and reduced “the financial and emotional impact on the U.S. citizen and his or her family due to the [noncitizen] immediate relative’s absence from the United States.” 77 Fed. Reg. at 19907; *see also* 81 Fed. Reg. at 50245-46. This would “encourage individuals to take affirmative steps” to obtain

lawful status that they might not otherwise take, 77 Fed. Reg. at 19902-01, including an estimated 100,000 people who like Mr. Martinez became eligible for the provisional waiver process only after it was expanded in 2016. 81 Fed. Reg. at 50244.

18. USCIS's Field Manual states, "As a general rule, any alien who appears for an interview before a USCIS officer in connection with an application or petition seeking benefits under the Act shall *not* be arrested during the course of the interview, even though the alien may be in the United States illegally." USCIS Field Manual § 15.1(c)(2) (emphasis added).

STATESIDE WAIVER PROCESS

19. For noncitizen spouses with an outstanding order of removal, the process to obtain a stateside waiver now has five parts.
20. First, the U.S.-citizen or Lawful Permanent Resident spouse files a Form I-130, Petition for Alien Relative, which requires establishing that the petitioner and beneficiary have a bona fide relationship. USCIS may require an appearance at an interview to determine this.
21. Second, once the I-130 is approved, the noncitizen spouse files a Form I-212, Permission to Reapply for Admission into the United States After Deportation or Removal. As amended in 2016, the regulations governing this waiver state that it can be conditionally approved for a person with a removal order prior to that person's departure from the U.S. 8 C.F.R. § 212.2(j); 2016 Final Rule, 81 Fed. Reg. at 50262. An I-212 application filed as part of the stateside waiver process is adjudicated by the local USCIS field office, which in New York takes several months.
22. Third, once a Form I-212 is conditionally approved, a noncitizen spouse applies for a provisional unlawful presence waiver using Form I-601A, Application for Provisional Unlawful Presence Waiver. 8 C.F.R. § 212.7(e)(4)(iv) (establishing eligibility of a person with

a removal order who “has already filed and USCIS has already granted... an application for consent to reapply for admission”). This application also takes several months to adjudicate.

23. Fourth, once the noncitizen obtains a provisional unlawful presence waiver, he or she must go abroad to appear for an immigrant visa interview at a U.S. consulate. 8 C.F.R. § 212.7(e)(3)(v). The departure from the U.S. executes the prior removal order. 8 U.S.C. § 1101(g); 8 C.F.R. § 1241.7. After the interview, if the Department of State determines no other ground of inadmissibility applies, it may issue an immigrant visa.
24. Fifth, the noncitizen may travel to the United States with his or her immigrant visa. Upon admission to the United States, the noncitizen becomes a lawful permanent resident.
25. In sum, these regulations allow an otherwise eligible individual who is the spouse of a U.S. citizen or Lawful Permanent Resident and who lives in the U.S. unlawfully and with a final order of removal to come forward voluntarily, undergo the provisional waiver process, and—if all the requirements are met and the waivers granted—to depart the country to obtain an immigrant visa only once the grounds of inadmissibility that departure will trigger have been waived.

SPECIFIC FACTS

26. The petitioners, Antonio and Vivian Martinez, are a married couple who have been together for 14 years and have two children together. Their daughter, Kaylee, was born in New York on September 18, 2015 and their son, Aaron, was born on February 20, 2018, just two months before his father’s detention. Mr. and Ms. Martinez married in 2016 and reside in Queens, New York.

27. Ms. Martinez is a U.S. citizen who was born in Queens, New York. Mr. Martinez is a citizen of El Salvador who has had a removal order from the U.S. since 2003, when he was ordered removed *in absentia* at the age of 19 after failing to successfully transfer the venue in his case from Texas to New York. He went to the New York Immigration Court on the day of his hearing, but was nevertheless ordered removed by an immigration judge in Texas. His subsequent efforts to have a lawyer reopen his case were futile, with several lawyers telling him he had no options for relief and one charging him thousands of dollars for a motion he appears never to have filed.
28. Mr. Martinez has no criminal history and has had no immigration contact since he entered the U.S. in 2003. He has consistently worked and paid taxes in New York.
29. Mr. and Ms. Martinez began the provisional waiver process in 2016 based on the well-founded understanding and belief—confirmed by their then-attorney—that it would allow Mr. Martinez to waive his unlawful presence in the U.S. and ultimately depart the country for only a few weeks. The couple were unwilling to pursue consular processing without the stateside provisional waiver because doing so would require Mr. Martinez to spend a long period separated from his family, during which they feared for his safety in El Salvador.
30. After learning of the waiver process, Mr. and Ms. Martinez were assured by their then-attorney that the waiver process was available to them and would ultimately enable Mr. Martinez to consular process after a departure from the U.S. of only a few weeks.
31. The couple was scheduled for an interview on their I-130 application at 26 Federal Plaza New York, New York on April 27, 2018. The interview notice and USCIS’s own guidance and procedures indicated that the interview was solely to confirm the bona fides of the couple’s marriage. At the conclusion of their interview on April 27, the interviewer asked Ms. Martinez

to leave the room briefly—a request she understood to be part of verifying the legitimacy of their marriage through separate questioning—at which point two ICE agents entered the room and detained Mr. Martinez. Another ICE employee at 26 Federal Plaza subsequently informed Ms. Martinez that her husband’s detention was pursuant to a “new policy” implemented in New York two to three weeks before. The agent said this policy was announced through an internal memo and required that anyone with an outstanding order of removal be detained at their interview at USCIS. The agent stated that had the couple been scheduled for an interview just a few weeks earlier, Mr. Martinez would not have been detained.

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

33. The couple’s I-130 was approved less than a week later. Nevertheless, ICE has not released Mr. Martinez.

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

35. The trauma and hardship resulting from Mr. Martinez's detention were heightened by the extremely sudden and unexpected nature of his detention. The couple had no opportunity to plan for childcare or financial support, nor to prepare their children for a prolonged separation. Mr. Martinez had no opportunity to say goodbye to his wife, kids, mother, or younger siblings.
36. Ms. Martinez and the children visit Mr. Martinez each week at Hudson County Correctional Facility, where he is permitted only a 30-minute contact visit during which he can hold his daughter and newborn son in his lap but is not permitted to touch or hold hands with his wife.
37. Consistent with what an ICE officer told Ms. Martinez the day of her husband's detention, the spouses of several other U.S. citizens with outstanding removal orders have been detained at interviews at the New York USCIS Field Office since April 2018. *See, e.g., You v. Nielsen*, 18-cv-5392 (S.D.N.Y. June 20, 2018) (enjoining removal and ordering release of petitioner detained at his adjustment interview).
38. Mr. Martinez is facing imminent removal to El Salvador. On June 22, 2018, his Deportation Officer and that Officer's supervisor confirmed with Mr. Martinez's current immigration counsel, Bryan Pu-Folkes, that the government of El Salvador is expected to issue travel documents for him today, and he will be scheduled for a removal flight within days, as ICE has frequent removal flights to El Salvador. Mr. Martinez has an approved I-130 petition; yet he could be removed immediately and separated from his U.S. citizen wife, toddler, and newborn for years, simply because he relied on DHS's regulations permitting him to start down the path to permanent residency.

CAUSES OF ACTION

FIRST CLAIM

VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT AND APPLICABLE REGULATIONS

39. The Defendant-Respondents' detention and removal of Mr. Martinez from the U.S. without allowing him to complete the provisional waiver process will violate the Immigration and Nationality Act and the applicable regulations.

SECOND CLAIM

AS TO MR. MARTINEZ'S REMOVAL FROM THE U.S. - VIOLATION OF THE DUE PROCESS CLAUSE

40. The Defendant-Respondents' removal of Mr. Martinez from the United States will violate the Due Process Clause.

THIRD CLAIM

AS TO MR. MARTINEZ'S REMOVAL FROM THE U.S. - VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

41. The Defendant-Respondents' removal of Mr. Martinez from the U.S. will violate the Administrative Procedure Act's prohibition on agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

FOURTH CLAIM

REMOVAL FROM THE U.S. - VIOLATION OF THE SUSPENSION CLAUSE

42. The Respondents' removal of Mr. Martinez without any opportunity for meaningful judicial review of the unlawfulness of that removal would violate the Suspension Clause.

FIFTH CLAIM

AS TO MR. MARTINEZ'S DETENTION - VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT AND APPLICABLE REGULATIONS

43. The Defendant-Respondents' detention of Mr. Martinez violates the Immigration and Nationality Act and the applicable regulations.

SIXTH CLAIM

AS TO MR. MARTINEZ'S DETENTION - VIOLATION OF THE DUE PROCESS CLAUSE

44. The Defendant-Respondents' detention of Mr. Martinez violates the Due Process Clause.

PRAYER FOR RELIEF

WHEREFORE Mr. and Ms. Martinez respectfully request that the Court:

45. Assume jurisdiction over this matter;
46. Enjoin the removal of Mr. Martinez from the U.S. and from the jurisdiction of the New York Field Office while he is pursuing legalization by way of the provisional waiver process;
47. Order Mr. Martinez's immediate release from custody or, in the alternative, require the government to provide him with a prompt bond hearing;
48. Declare that the Respondents' policy and practice of subjecting noncitizens who undertake the initial step towards a provisional waiver to detention or removal on the basis of a final order of removal and thereby denying them the ability to avail themselves of the provisional waiver process is contrary to law;
49. Vacate the Respondents' policy and practice of subjecting noncitizens who undertake the initial step towards a provisional waiver to detention or removal;
50. Award attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504, if applicable; and
51. Grant any further relief that the Court deems just and proper.

Dated: June 22, 2018
Newark, NJ

Respectfully Submitted,

/s/ Liza Weisberg

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**Pro hac vice* application pending or forthcoming

** Admitted to New Jersey bar; application for admission to D.N.J. forthcoming