No. 26-426

IN THE
Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Petitioners,

v.

D.V.D., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

Brief *Amicus Curiae* of America's Future in Support of Petitioners

RICK BOYER
Lynchburg, VA 24506

PATRICK M. MCSWEENEY
Powhatan, VA 23139

WILLIAM J. OLSON*
William J. Olson, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae America's Future is a nonstock, nonprofit organization, exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code. It is dedicated, *inter alia*, to the correct construction, interpretation, and application of law. This *amicus* participates actively in the public policy process and has filed numerous *amicus curiae* briefs in federal and state courts, including 12 in this Court over the last two years supporting Applications for stays of district court injunctions issued to stop policy changes by the second Trump Administration.

This *amicus* filed *amicus* briefs in this case in this Court supporting the Government's two applications for stay. *See* U.S. Supreme Court Docket No. 24A1153, Brief *Amicus Curiae* of America's Future, et al. in Support of Application for Stay (June 5, 2025) and Docket No. 26A406, Brief *Amicus Curiae* of America's Future in Support of Application for Stay (September 28, 2026).

STATEMENT OF THE CASE

This *amicus* offers the following rather detailed Statement of the Case in an effort to demonstrate how extraordinary the actions of one federal district court, and the First Circuit, have been. A review of how this district court has attempted to control the enforcement

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

of immigration laws and the conduct of our nation's foreign policy will speak as loudly as any argument that could be made as to why Congress denied to the district courts the very powers which this district court has exercised.

On January 20, 2025, President Trump issued Executive Order 14165, entitled "Securing Our Borders," reversing policies of the Biden Administration. *See* 90 *Fed. Reg.* 8467. On or about February 18, 2025, the Department of Homeland Security ("DHS") issued a Directive to the Enforcement and Removal Operations ("ERO") division of Immigration and Customs Enforcement ("ICE"). That Directive instructed ERO officers to review the cases of aliens granted withholding of removal or protection under the Convention Against Torture ("CAT") to determine the availability of removal to a third country. In the case of aliens under prior orders of removal who could not be removed because the countries designated in removal orders were unwilling to take them, ERO addressed how they would be removed instead to "third countries," *i.e.*, countries not named on the initial removal order, as permitted by law.

On March 23, 2025, four illegal aliens filed suit in the district court for the District of Massachusetts, seeking a temporary restraining order ("TRO") and other injunctive relief against the Directive. *See D.V.D. v. United States Dep't of Homeland Sec.*, 2025 U.S. Dist. LEXIS 59422 at *2 (D. Mass. 2025) ("*D.V.D. I*"). The district court considered two claims for relief — one under CAT and one under 8 U.S.C.

§ 1231(b)(3)(A), which states, "the Attorney General may not remove an alien to a country **if the Attorney General decides** that the alien's life or freedom would be threatened in that country...." (Emphasis added.)

On March 28, 2025, the district court issued a TRO on statutory claims limited to the named plaintiffs, which was followed by issuance of a Memorandum Opinion on March 29, 2025. However, **the TRO on CAT claims** was not limited to the named plaintiffs, but **was made applicable to "all similarly situated individuals**." *D.V.D. I* at *9 (emphasis added). The district court cursorily rejected the Government's challenge to the court's jurisdiction based on multiplee statutes constraining federal court involvement, including the following. *See id.* at *3.

- 8 U.S.C. § 1252(g) states: "Except as provided in this section ... **no court shall have jurisdiction** to hear any cause or claim by or on behalf of any alien...." (Emphasis added.)
- 8 U.S.C. § 1252(a)(5) states: "a petition for review filed with an appropriate **court of appeals** in accordance with this section shall be the **sole and exclusive means for judicial review** of an order of removal entered or issued under any provision of this chapter." (Emphasis added.)
- 8 U.S.C. § 1252(b)(9) states: "Except as otherwise provided in this section, **no court shall have jurisdiction**, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or

> 1651 of such title, or by any other provision of law (statutory or nonstatutory), **to review such an order**...." (Emphasis added.)

The district court declared that the threatened removals did not actually constitute "orders of removal" because some of the illegal aliens might not be sent to countries listed as destinations on their original removal orders, but to "third countries" instead — even though removal to third countries is authorized by law. *D.V.D. I* at *3, *5.

The Government sought a stay from the First Circuit, which was denied for the curious reason that the circuit court simply did not know whether it had jurisdiction to stay the district court's TRO. *See D.V.D. v. United States Dep't of Homeland Sec.*, 2025 U.S. App. LEXIS 8338 (1st Cir. 2025) ("*D.V.D. II*").

On April 18, 2025, the district court entered a preliminary injunction against the Directive on the assumption that the statutes barring judicial review would not apply if the removals were unlawful on the merits. The court stated that "this Court will not construe section 1252(g) to immunize an unlawful practice from judicial review.... What Plaintiffs challenge is Defendants' authority to effectively depart from the removal orders by designating new countries for removal...." *D.V.D. v. United States Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 377 (D. Mass. 2025) ("*D.V.D. III*"). The court's theory to evade limitations on its power was that if the removals were viewed as illegal by the court, that would deprive DHS of their authority to act, and "section 1252(g) shields

only discretionary decisions concerning ... the deportation process." *Id*. The district court granted a sweeping preliminary injunction to institute and implement **what the court believed to be better** than the procedures established by Congress and the Department of Homeland Security. The district court ordered the Government to follow procedures it preferred:

> [P]rior to removing any alien to a third country, *i.e.*, any country not explicitly provided for on the alien's order of removal, Defendants must: (1) provide written notice to the alien — and the alien's immigration counsel, if any — of the third country to which the alien may be removed...; (2) provide meaningful opportunity for the alien to raise a fear of return for eligibility for CAT protections; (3) move to reopen the proceedings if the alien demonstrates "reasonable fear"; and (4) if the alien is not found to have demonstrated "reasonable fear," provide meaningful opportunity, and a minimum of 15 days, for that alien to seek to move to reopen immigration proceedings. [*Id*. at 392-93.]

The district court then went even further and **certified a class** of all persons subject to a final removal order who DHS proposed to transfer to a "third country" not listed on their original removal order. *Id*. at 378, 386. Through this device, the district court apparently believed it was authorized to issue what was effectively a nationwide injunction — a power which was denied to district courts later by

this Court's June 27, 2025 decision in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025).

On April 30, 2025, the district court extended its April 18, 2025 preliminary injunction to apply to all federal agencies, and on May 7, 2025, the district court entered another order, styled by the court as a "clarification," prohibiting DHS from allowing other agencies to perform the removals the court had enjoined DHS from effectuating. *D.V.D. v. United States Dep't of Homeland Sec.*, 2025 U.S. Dist. LEXIS 88472 (D. Mass. 2025). On May 16, 2025, the First Circuit denied the Government's emergency motion for a stay of the April 18, 2025 preliminary injunction.[2]

On May 20, 2025, the district court entered another order with respect to several individuals who had been transported to South Sudan. The order directed DHS to "maintain custody and control of class members currently being removed to South Sudan or to any other third country, to ensure the practical feasibility of return if the Court finds that such removals were unlawful." *D.V.D. v. United States Dep't of Homeland Sec.*, 2025 U.S. Dist. LEXIS 98733, *4 (D. Mass. 2025).

On May 21, 2025, the district court acted again to "clarify" its *D.V.D. III* order for "'meaningful opportunity'" for an alien to raise fear of return for CAT purposes. The court ruled that "**a minimum of**

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[2] *D.V.D. v. United States Dep't of Homeland Sec.*, No. 25-1393, "Order of Court," Dkt. 00108286763 (May 16, 2025).

ten days" was required as "meaningful opportunity" as a matter of due process. *D.V.D. v. United States Dep't of Homeland Sec*., 2025 U.S. Dist. LEXIS 98774 at *3 (D. Mass. 2025).

On May 23, 2025, the district court ordered DHS to **return one plaintiff**, O.C.G., who had already been transferred to Mexico, and thence home to Guatemala. *D.V.D. v. United States Dep't of Homeland Sec*., 2025 U.S. Dist. LEXIS 99236 (D. Mass. 2025).

On May 26, 2025, the district court denied the Government's motion for reconsideration and to stay its preliminary injunction. *D.V.D. v. United States Dep't of Homeland Sec*., 2025 U.S. Dist. LEXIS 99230 (D. Mass. 2025). The following day, the Government filed in this Court their first Application for Stay, which was granted.[3]

In the evening of the same day that his preliminary injunction was stayed by this Court,[4] District Judge Murphy issued an order asserting that its May remedial order "remains in full force and effect, **notwithstanding today's [Supreme Court[**

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[3] U.S. Supreme Court, No. 24A1153, "Application for a Stay of the Injunction Issued by the United States District Court For the District of Massachusetts and Request for an Immediate Administrative Stay " (May 27, 2025) ("App. Stay I").

[4] *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (June 23, 2025).

stay of the Preliminary Injunction."[5] That required DHS to file in this Court a "Motion to Clarify the Court's June 23, 2025 Order,"[6] leading to a rare "clarifying" ruling.

> On June 23, we stayed the April 18 preliminary injunction pending disposition of any appeal and petition for writ of certiorari. **Later that day, however, the District Court issued a minute order stating that the May 21 remedial order "remain[ed] in full force and effect," "notwithstanding" our stay** of the preliminary injunction.... The only authority it cited was the dissent from the stay order. The Government has moved for "an order clarifying" our stay.... The motion for clarification is granted. Our June 23 order stayed the April 18 preliminary injunction in full. The May 21 remedial order cannot now be used to enforce an injunction that our stay rendered unenforceable.... **[A] claim that a lower court has failed to give effect to an order of this Court is properly addressed here**.... "Assuming as we do" that the District

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[5] *D.V.D. v. Dep't of Homeland Sec.*, 25-cv-10676, Doc. 176, Electronic order ofJudge Bryan e. Murphy (June 23, 2025) (emphasis added).

[6] U.S. Supreme Court, No. 24A1153, "Motion for an Order Clarifying this Court's June 23, 2025, Order Granting a Stay of the Injunction Issued by the United States District Court for the District of Massachusetts and Request for an Immediate Administrative Stay of the District Court's May 21, 2025, and June 23, 2025, Orders" (June 24, 2025).

> Court will now conform its order to our previous stay and cease enforcing the April 18 injunction through the May 21 remedial order, **we have no occasion to reach the Government's other requests for relief**.... If the Government wishes to seek additional relief in aid of the execution of our mandate, it may do so through mandamus. [*Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2627, 2629-30 (July 3, 2025) (emphasis added).][7]

On February 3, 2026, the circuit court held oral argument on DHS's appeal of the preliminary injunction, then on February 20, 2026, remanded for dissolution of the preliminary injunction.[8] On February 25, 2026, the district court issued its final judgment, granting Plaintiffs' Motion for Summary Judgment on Counts I and IV by imposing four procedural requirements on the department's removal of class members, and declaring the "Third Country Removal" policy "unlawful and SET[TING] ASIDE that policy." *D.V.D. v. United States Dep't of Homeland Sec.*, 821 F. Supp. 3d 102, 167-68 (D. Mass. February 25, 2026) ("*D.V.D. IV*").

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[7] Between the two previous orders of this Court last summer, the First Circuit dismissed an appeal from the TRO. *See D.V.D. v. United States Dep't of Homeland Sec.*, 2025 U.S. App. LEXIS 25000 (1st Cir. June 30, 2025).

[8] *D.V.D. v. United States Dep't of Homeland Sec.*, 2026 U.S. App. LEXIS 11895 (1st Cir. Feb. 20, 2026).

After oral argument on May 13, 2026, the First Circuit issued its opinion on September 18, 2026, stating: "we **vacate** on standing grounds the two declarations pertaining to DHS's statutory obligation to seek to remove class members to countries they have designated, or of which they are subjects, nationals, or citizens, prior to removing them to third countries. We otherwise **affirm** the final judgment." *D.V.D. v. United States Dep't of Homeland Sec.*, 2026 U.S. App. LEXIS 28742 at *51 (1st Cir. Sep. 18, 2026) ("*D.V.D. V*") (all emphasis original).

Five days after the First Circuit's decision, at 8:20 pm on September 23, 2026, the Plaintiffs-Appellees filed an Emergency Motion in the circuit court,[9] which a panel granted three hours later, at 11:36 pm, ordering that "the March 16, 2026, stay pending appeal is dissolved."[10]

The next day, on September 24, 2026, the Government filed another Application for a Stay ("App. Stay II")[11] in this Court, explaining that shockingly, the First Circuit's September 23 order had been issued

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[9] U.S. Court of Appeals for the First Circuit, No. 26-1212, "Emergency Motion to Clarify the Effectiveness of this Court's Decision or, In the Alternative, Confirm the Stay is Lifted or Issue the Mandate" (Sept. 23, 2026).

[10] U.S. Court of Appeals for the First Circuit, No. 26-1212, "Order of the Court" (Sept. 23, 2026).

[11] The Government's second filing in this Court was captioned not as an application for stay, but rather as a Motion to Clarify. *See* n.6, *supra*.

without providing time for the Government to respond (*see* App. Stay II at 2) as well as short-circuiting the timeline for issuing a mandate under F.R.App.P. 40(d)(1), 41(b). On September 29, 2026, this Court stayed the February 25, 2026 order and judgment of the district court, treated the application as a petition for a writ of certiorari, and granted it.

Discussed above are just a few of the many orders issued by the district court as it sought to assume control over DHS enforcement. At no time, in any of those orders and opinions, did the district court feel obligated to give meaningful consideration to the Government's interest in removing persons illegally in the United States, and discouraging other aliens from similarly violating the law if they knew that if they arrived illegally, they would be removed, to a third country, if necessary. Moreover, at no time did the district court feel the need to give consideration to the importance of protecting the American People from those who had committed crimes in the United States, and were likely to commit further crimes, including sex offenses and murder. *See* Brief for the Petitioners ("Pet. Br.") at 3 ("Criminal aliens — including class members here who have been convicted of murder, armed robbery, sexual assault of minors and the mentally disabled, and more — have ravaged American communities."). Despite clear congressional limitations on its jurisdiction, the district court found "implicit" procedural rights in statutes that did not provide them, preventing the Trump Administration from employing reasonable procedures for enforcing our nation's immigration laws as written.

STATEMENT

The district court judge has issued a truly remarkable set of injunctions, class certifications, clarifications, threats of contempt, orders to nonparty Government entities, and other rulings and statements, seeking to rewrite the nation's immigration laws from a district court bench in Boston. The district court judge responsible was nominated by President Biden in March 2024, reported from committee on a party line vote, and confirmed without a single Republican Senator voting aye. He received his judicial commission on December 6, 2024, not long before he was assigned this case in March 2025. Northeastern University Law School constitutional law professor Jeremy R. Paul explained the reality of President Biden's appointment of district judges (termed "Biden judges"), including this particular district court judge:

> The Democratic president's federal court nominees will "make a huge difference in a variety of cases during the Trump administration...." "There will be a tremendous amount of litigation during the [incoming] administration...." "**Because of Biden judges, there will be a lot of initial victories [at the district court level]**." [John Micek, "Biden tapped a former Worcester public defender as a federal judge. Why it matters," *MassLive* (Dec. 10, 2024) (emphasis added).]

The Chief Justice has stated correctly: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges."[12] However, it appears that not all judges have received that memo. It is becoming apparent to the American People that there are certain judges who believe that their office gives them the authority to defy both the President and Congress, as they act, even though Congress expressly has denied them authority, to prevent the immigration enforcement changes which the People elected the current Administration to put into effect. The First Circuit has declined repeatedly to restore order, and therefore, this is a matter that, again, requires corrective action by this Court.

SUMMARY OF ARGUMENT

The Statement of the Case, *supra*, demonstrates what can happen when lower federal courts circumvent statutory limitations on their jurisdiction to assume control over and micromanage our nation's immigration policies. This is particularly dangerous when the immigration policies intersect with foreign policy, as they do when the issue is removal to third countries.

Section I, *infra*, explains how the district court's injunctive and declaratory relief provided not just to the Plaintiffs-Appellees, but to a broad class, violate the text of not one, but multiple different congressional limitations on the powers of lower federal courts. The

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[12] Mark Sherman, "Roberts, Trump spar in extraordinary scrap over judges," *AP* (Nov. 21, 2018).

courts below were so hostile to the notion that they could be limited in giving relief to illegal aliens awaiting removal that it is easy to get the impression that they believe they could circumvent such restrictions at will. As a result, Section II, *infra*, re-asserts the basis for the power of Congress to limit the authority of the lower federal courts.

Section III, *infra*, analyzes the manner in which the lower courts manufactured "due process" rights for illegal aliens, finding them "implicit" in the very statutes which empower the federal government to remove them expeditiously. Lastly, Section IV, *infra*, shows the danger of allowing federal courts to meddle in removal procedures, especially where it involves our nation's foreign policy and national security involving removals of illegal aliens to foreign countries.

ARGUMENT

I. THE DISTRICT COURT ACTED *ULTRA VIRES* IN VIOLATING MULTIPLE CONGRESSIONAL LIMITATIONS ON FEDERAL COURT JURISDICTION.

The courts below worked hard to find a rationale to evade restrictions imposed by multiple congressional limitations on federal court jurisdiction set out in 8 U.S.C. section 1252, designed to govern "Judicial review of orders of removal." That section contains four separate limitations on federal court jurisdiction over removals, and the district and circuit courts manufactured a path around each. This *amicus* lacks the resources, and the space, to address the cases

which the lower court believes support their interpretation of these statutes, and therefore will only offer an analysis of the text.

In reviewing how the lower courts rationalized their own authority, the following question should be kept in mind. Assuming Congress **really** wanted to **severely restrict** judicial review of matters involving removal of illegal aliens, is there any language Congress could have used that these particular lower courts would have found sufficient to divest them of the judicial power to do what they wanted to do?

A. 8 U.S.C. section 1252(g).

First, 8 U.S.C. section 1252(g), entitled "Exclusive jurisdiction," states that unless otherwise provided:

> **no court shall have jurisdiction** to hear any cause or claim by or on behalf of any alien **arising from the decision or action** by the Attorney General to [i] commence proceedings, [ii] adjudicate cases, or [iii] execute **removal orders** against any alien under this Act. [8 U.S.C. § 1252(g) (emphasis added).]

The circuit court understood the district court to have ruled that this limitation only applied to prosecutorial discretion over individual removal decisions, not policy changes that govern many individual such challenges. *See D.V.D. V* at *18. The circuit court agreed with this view because, *inter alia*, "[r]emoval orders are not mere directives that noncitizens be removed [but] must

'identify a country...' [and] [t]he class does not contest its removability...." *Id.* at *19.

The lower courts' interpretation reads language into the statute, and leads to several irrational results. First, there is no statutory language on which these courts base their reading of the statute to restrict the limitation on review to matters of "prosecutorial discretion." Second, these courts would allow a group of plaintiffs, such as the four illegal aliens[13] here, to challenge individual removal orders en masse, when they clearly could not bring such challenges individually. Under this interpretation, all that an immigration rights lawyer would need to do to challenge enforcement decisions is to join claims by two or more illegal aliens being removed. Third, this reading gives a peculiarly narrow meaning and effect to the statutory phrase "arising from," so that a claim by an alien to the decision to remove that alien does not "**aris[e] from the decision or action**" to remove that alien. As the Government argues, a "claim about where an alien will be removed is, ipso facto, a 'claim' 'arising from the decision or action' to 'execute [a] removal order[].' 8 U.S.C. 1252(g)." Pet. Br. at 16 (emphasis added).

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[13] The circuit court follows the lead of the Plaintiffs-Appellees, never once referring to Plaintiffs as illegal aliens, and never even using the "politically correct" term "undocumented" aliens.

B. 8 U.S.C. section 1252(b)(9).

Section 1252(b) governs "Requirements for review of orders of removal." It provides, in relevant part, the following requirements for review of an order of removal:

> Judicial review of **all questions of law and fact, including interpretation and application of constitutional and statutory provisions**, **arising from** any action taken or proceeding brought to remove an alien from the United States under this title ... shall be available only in **judicial review of a final order** under this section. Except as otherwise provided in this section, **no court shall have jurisdiction**, by habeas corpus ... or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.
> [8 U.S.C. § 1252(b)(9) (emphasis added).]

The rather clear language of this section was likewise disregarded on the theory that "this is not a case that seeks review of an order of removal, the decision to seek removal, or the process by which removability is determined." *D.V.D. V* at *30. Again, Congress uses the broad language "arising from" to describe its scope of claims to which it applies, described as "any action taken or proceeding brought to remove a alien...." Again, one must ask, if Congress really wanted to limit judicial review, what language would have been deemed sufficient by the lower courts. Again, the answer would appear to be none.

C. 8 U.S.C. section 1252(a)(4).

The courts below[14] also rejected the Government's assertion of 8 U.S.C. section 1252(a)(4), which addresses "Claims under the United Nations Convention," which the circuit court describes as "fear-of-torture claims." *D.V.D. V* at *11.

> a **petition for review** filed with an appropriate **court of appeals** in accordance with this section shall be the **sole and exclusive means for judicial review** of any cause or claim under the United Nations **Convention Against Torture** and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment.... [8 U.S.C. § 1252(a)(4) (emphasis added).]

The courts below relied on the Convention Against Torture as a foundation for its creation of a due process notice and hearing requirement:

> third-country removals under the Guidance do not comport with the notice-and-hearing requirements imposed by the Fifth Amendment's Due Process Clause with respect to ... regulations, which implement Article 3 of the international Convention Against Torture ("CAT") by prohibiting removal of all class

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[14] In *DVD I,* the district court addressed 8 U.S.C § 1252(a)(5), not § 1252(a)(4), but the circuit court in *DVD V* addressed 8 U.S.C. § 1252(a)(4) and also § 1252(f)(1).

> members to countries where they likely would be tortured. [*D.V.D. V* at *10.]

Nevertheless, these Plaintiffs-Appellees failed to file any such petition for review in the First Circuit.

D. 8 U.S.C. section 1252(f)(1).

As to any type of claim that could survive the three jurisdiction-stripping provisions identified above, there is an additional limit on the remedy that may be applied. As to remedy, 8 U.S.C. section 1252(f)(1) provides that:

> **Regardless of the nature of the action or claim** or of the identity of the party or parties bringing the action, **no court (other than the Supreme Court)** shall have jurisdiction or authority **to enjoin or restrain** the operation of the [third-country removals] provisions ... other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated. [8 U.S.C. § 1252(f)(1) (emphasis added).]

This provision bars exactly the type of broad, class-wide relief that was imposed by the district court. The Government's position is correct that the courts below "attempted to 'end-run' Section 1252(f)(1) by reframing the relief as a series of class-wide declarations and a universal vacatur." Pet. Br. at 25. The circuit court asserted that the language "enjoin or restrain" applies only to injunctions (*D.V.D. V* at *47-48) but not

declaratory judgments. This view gives effect to the verb "enjoin" but disregards the term "restrain" as if it were mere surplusage. The actions taken by the courts below, if allowed to go into effect, most certainly would "restrain" the enforcement of immigration laws through the use of third-country removals.

E. The Courts below Have Refused to Give Reasonable Interpretation to Multiple Separate Jurisdiction-Stripping Statutory Provisions.

After realizing that there are four different statutory provisions which expressly limit the authority of the lower federal courts over removals, one would think that these courts would understand that Congress most certainly wanted to limit their jurisdiction. Nonetheless, in their effort to assert judicial authority over Trump Administration removal decisions, the lower courts have circumvented four separate congressionally imposed limitations on their judicial authority. After reviewing the atextual arguments by the circuit court to deny effect to any of the congressional limitations on jurisdiction, one is left with the impression that the court was hostile to the very notion of its authority being limited. Nevertheless, this Court has been clear that:

> the "operation of the provisions" is a reference "not just to the statute itself but to **the way that [it is] being carried out**." ... Putting these terms together, §1252(f)(1) generally **prohibits lower courts from entering injunctions** that order federal officials to take

> or to refrain from taking actions to enforce, implement, or otherwise carry out [removals of classes of aliens]. [*Garland v. Gonzalez*, 596 U.S. 543, 550 (2022) (emphasis added).]

Because the district court does not feel that the "third country removal" process squares with its idea of "due process," the court believes it has the right to override the procedures established by the Department of Homeland Security in exercising authority granted it by Congress.

II. THE COURTS BELOW DEFIED THE AUTHORITY OF CONGRESS TO LIMIT THE JURISDICTION OF THE LOWER FEDERAL COURTS.

The district court also rebels against Congress's decision to place **review** of administrative alien removal decisions **only** in the federal Courts of Appeals, and the power "to enjoin or restrain" their operation of **injunctive** remedy **only** in this Court. The district court made its disapproval of the law clear by quoting a First Circuit case for the proposition that the actual physical removal of an alien is "'wholly collateral to, the removal process,' not 'arising from' it." *D.V.D. III* at 371. In the district court's view, once a removal order is entered, anything else relating to the actual removal is reviewable. Although the court is entitled to disagree with Congress's decision, it is not entitled to ignore it or evade it.

It is beyond question that Congress can limit the jurisdiction of a district court. Article III states, "The

judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III. In 1789, Congress passed, and President Washington signed, the Judiciary Act of 1789, which created the first lower federal courts, including district courts, and outlined the limits of their jurisdiction.[15] "[T]he Circuit Courts were created by an act of Congress, and they are not authorized to exercise jurisdiction in any case except where the jurisdiction was conferred by an act of Congress." *United States v. Eckford*, 73 U.S. 484, 488 (1868).

Jurisdictional limitations are not new, nor are they untested in this Court. In 1869, in *Ex Parte McCardle*, this Court recognized Congress's power under Article III to strip it of appellate jurisdiction. William McCardle, a newspaper publisher, printed articles critical of the Reconstruction program and was jailed by the military. He applied for a writ of habeas corpus with a federal district court, and the case was appealed to this Court. Fearful that the Court would strike down the Reconstruction program, Congress passed a law stripping this Court of appellate jurisdiction over habeas appeals. In *McCardle*, this Court properly acknowledged Congress's power to strip it of jurisdiction and conceded it had no jurisdiction to hear McCardle's appeal. *Ex Parte McCardle*, 74 U.S. 506 (1869).

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[15] National Archives, "Federal Judiciary Act (1789)."

Nor is *McCardle* an outlier. This Court recognized the principle again a half-century later for the lower courts:

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. **Every other court created by the general government derives its jurisdiction wholly from the authority of Congress**. **That body may give, withhold or restrict such jurisdiction at its discretion**, provided it be not extended beyond the boundaries fixed by the Constitution.... The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it.... And the jurisdiction having been conferred **may, at the will of Congress, be taken away in whole or in part**.... [*Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (emphasis added).]

Even more recently, this Court stated: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 330 (1938). In 1943, this Court repeated the principle, this time citing an array of past cases.

> The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them **in the exact degrees**

> **and character which to Congress may seem proper for the public good**." [*Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (emphasis added) (citations omitted).]

This Court has recognized Congress's authority to limit lower court jurisdiction as expressly sourced in the Constitution.

> **To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely**. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority; **certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them**.... The existence of the Judicial Act itself ... furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law. [*Cary v. Curtis*, 44 U.S. 236, 245 (1845) (superseded by statute on other grounds) (emphasis added).]

Nor is Congress the only branch to recognize this authority. Indeed:

> [w]hen Chief Justice John Roberts was Special Assistant to the Attorney General during the

> Reagan Administration, he wrote a 27-page document defending the constitutional power of Congress to limit federal court jurisdiction.... Roberts concluded that Congress's constitutional authority to make exceptions to federal court jurisdiction is so clear that only a new constitutional amendment could deny it.[16]

III. THE COURTS BELOW MANUFACTURED DUE PROCESS RIGHTS FOR ILLEGAL ALIENS NOT SOURCED IN THE RELEVANT STATUTES.

The district court read an ephemeral "due process" requirement into the statute. In its summary judgment order, the court stated, "the Court construes section 1231(b)(2) to require notice and an opportunity to present claims for statutory withholding of removal under section 1231(b)(3)." *D.V.D. IV* at 146-47. The circuit court agreed, stating that the Government would need to have information which it admits that the statute does not require (*id.* at 147), allowing it to invent a "notice and hearing" requirement that appears nowhere in the text, with a bald assertion:

> **[T]he statute need not state the particulars** of these procedural rights for their existence to be evident in the structure of § 1231(b) and in the specific guarantees provided by § 1231(b)(3). Indeed, immigration

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[16] Phyllis Schlafly, "Can Congress Limit Federal Court Jurisdiction?" *EagleForum.com* (Jan. 25, 2006).

> **statutes are often construed to mean more than what they plainly say**. [*D.V.D. V* at *35-36 (emphasis added).]

The district court was clear as to the source of this due process right of illegal aliens to notice and hearing — it was asserted to be "implicit" in 8 U.S.C. § 1231(b)(3) by the Plaintiffs-Appellees:

> **The class contends** that carrying out removals without providing these two essential components of due process [notice and hearing] ignores legal requirements **implicit** in the scheme permitting their removal to a country not identified in their removal orders. [*D.V.D. V* at *20 (emphasis added).]

Then, the Plaintiffs-Appellees actually argued that the "notice and hearing" requirements were not new, but that they were already in the regulations, even though they had not been previously recognized.

> [The Class] does not seek to engraft "additional procedures" onto the FARRA/CAT regulations; rather, it contends that effective notice and a meaningful opportunity to raise fear-of-torture claims are **implicitly** guaranteed by those regulations **as they currently exist** and that the Guidance is unlawful because it conflicts with these **existing regulations**. [*Id.* at 27, n.7 (emphasis added).]

As authority for these remarkable propositions, the circuit court cited *Zadvydas v. Davis*, 533 U.S. 678 (2001), which it asserted "read an implicit limitation" into a post-removal statute such that the noncitizen could not be detained indefinitely but rather only for the "period reasonably necessary to bring about that alien's removal." *Id.* at 689. *D.V.D. V.* at *36. There is significant difference between a decision which seeks to avoid invalidating a statute, by holding that a noncitizen may not be held indefinitely, and the decision below, which granted noncitizens new rights. Based on this, the circuit court affirmed the district court's conclusion that "third-country removals under the Guidance do not comport with the notice-and-hearing requirements **implicit** in 8 U.S.C. § 1231(b)(3), and related regulations...." [*D.V.D. V* at *10 (emphasis added). This constitutes judicial legislation, not judicial construction.

It is particularly difficult to read an "implicit right" into section 1231(b), as the courts did, when section 1231 provides its own rule of statutory construction which denies to a court the power to create a "procedural right" "enforceable ... against the United States." It reads: "Nothing in this section shall be construed to **create** any substantive or **procedural right** or benefit that is legally **enforceable** by any party **against the United States** or its agencies or officers or any other person." 8 U.S.C. § 1231(h) (emphasis added). The circuit court asserts that "DHS fails to explain why § 1231(h) should be read to permit judicial review under § 1252(a)(5) and (b)(4) but preclude judicial review under non-INA statutes that authorize claims based on a failure to comply with the

requirements and limitations of § 1252(b)(2) and (c)...." *D.V.D. V.* at *37-38. The answer would appear to be that this is exactly what sections 1252(b)(2) and (c) require. Allowing judicial review of statutory provisions expressly providing for judicial review while denying judicial review[17] to create "implicit" rights would appear to be a reasonable distinction, fully consistent with the statutory construction rule of section 1231(h).

By now it is abundantly clear that these lower courts simply object to the Trump Administration sending removable illegal aliens to "third countries" even though that removal is clearly authorized by law.

> (vii) If **impracticable, inadvisable, or impossible** to remove the alien to each country described in a previous clause of this subparagraph, **another country** whose government will accept the alien into the country. [8 U.S.C. § 1231(b)(2)(E) (emphasis added).]

The district court never discussed, and apparently would prefer, that removable illegal aliens remain in the United States rather than being sent to a third country that the Government has determined to be appropriate. The district court demonstrated no appreciation for the fact that some illegal aliens are so

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[17] § 1252(b)(2) begins: "The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." § 1252(c) sets out "Requirements for petition [for review or habeas corpus]."

problematic that the countries to which they otherwise would have been removed (*e.g.,* the country from which the alien was admitted; prior residence; place of birth) will not accept them. The operative assumption of the district court appears to be that it would be better for murderers, convicted sex offenders, or others to stay in the United States than to be removed to a country which will accept them. *See* Pet. Br. at 3, 8, and 9 n.2. The matter of returning illegal aliens is complex and fraught with nuance, which is why the process is entrusted to the executive, and federal courts such as the Massachusetts district court are expressly excluded from participating in the process. 8 U.S.C. § 1252(f)(1). The district courts are also prohibited from revising the statutory process as implemented by DHS, but the result, not the law, appears to be at the core of this district court's decisionmaking.

The district court judge elevated his personal view over the view of the one official elected by all the People of the United States when he flatly stated he: **"does not share the same disregard for probable due process violations" as the Trump Administration.** *D.V.D. I* at *6 (emphasis added). In acting more like a public defender searching for any plausible argument to use, the court expressed no respect for the congressionally devised immigration scheme he sought to alter. Here, the district court invents new due process violations and then invents due process rights. As this court has noted, "an alien in respondent's position has only those rights regarding admission that Congress has provided by statute.... Because the Due Process Clause provides nothing more, it does not require review of that

determination or how it was made." *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 140 (2020).

If this case is to be decided based on policy grounds, another important consideration should be put on the table. If an alien does not want to risk removal to a third country, that person should not illegally enter the United States. And, most certainly, if he enters the United States, he should not commit crimes in our country such that he is placed at the top of the list for removal. By obeying the law, an alien could completely avoid the risk of being removed to a third country, and would have no need to assert supposed "due process" rights never enacted by Congress.

IV. THE CASE BELOW ILLUSTRATES THE UNWORKABLE FOLLY OF "FOREIGN POLICY BY JUDGE."

The Statement of the Case section of an appellate brief is often useful primarily to provide the posture of the case as it comes to an appellate court. This case is an exception, and this *amicus* has attempted to set out a detailed Statement of the Case which reveals the impossibility of the Department of Homeland Security enforcing our nation's immigration laws while being directed by a federal district court judge who appears committed to preserving the status quo. And of all immigration laws, the removal of illegal aliens to a third country requires "delicate diplomatic negotiations with third countries to accept these aliens.... [and] 'significant logistical difficulties' to

coordinate flights, pilots, crews, country clearances, and foreign law-enforcement across multiple countries." Pet. Br. at 11. Thus, every such removal involves the conduct of our nation's foreign policy. Although federal law provides guidance on where the illegal alien is sent, in the end, it entrusts the matter to the Department of Homeland Security — not a district court.

The course of proceedings below reveals how severely the lower courts impeded the Executive Branch in carrying out its duties under immigration law. The district court granted motion after motion filed by Plaintiffs to protect illegal aliens from the consequences of their illegal acts, while giving no deference to the branch of government entrusted with the duty to remove illegal aliens. If this type of judicial intervention is permitted, the work of DHS will be put on hold as the Justice Department will be required to respond on short notice, or no notice, to a bevy of motions and orders entered *ultra vires*.

On the immigration front, the human costs have already been incalculable. As immigration officials have scrambled to keep up with the orders of hostile judicial micro-managers, the worst-of-the-worst violent criminal aliens have gamed the system, escaping back into the general population, sometimes for years, to commit still more heinous crimes against Americans. *See* Pet. Br. at 3.

Not surprisingly, as the Government points out, many of these criminal aliens' countries of origin were happy to unload their worst criminals on America and

are usually unwilling to take them back. "As a result, criminal aliens are often allowed to stay in the United States for years on end, victimizing law-abiding Americans in the meantime." App. Stay I at 2. As a result of the open borders policy pursued by prior Administrations which refused to follow federal law, now DHS has been given the task of finding a "third country" willing to take these hard cases at all — then hope that nation doesn't change its mind while a district court judge usurps Executive Branch authority, disrupting "delicate diplomatic negotiations that would be undermined by lengthy delays." Pet. Br. at 3.

Congress recognized that "[s]uch delicate and difficult judgments about international relations fall beyond the judicial ken." *Does v. Taliban*, 101 F.4th 1, 12 (D.C. Cir. 2024). Moreover, they defy a judicial timeline. Foreign policy judgments such as these cannot be subjected to briefing schedules imposed by any of 400 federal district judges serving in 94 district courts. That is why such "difficult and complex [questions] in international affairs ... are committed to the Legislature and the Executive, not the Judiciary." *Zivotofsky v. Kerry*, 576 U.S. 1, 5 (2015). The judiciary is wholly unprepared to handle such matters. As a practical matter, decisions like the one below make conduct of foreign policy impossible. If not stopped by this Court, the problem will spread as other federal courts will believe themselves empowered to run our nation's foreign policy whenever a suit is filed.

The public confidence in the federal judiciary is at an all-time low, in the wake of one of "the largest"

drops in confidence "Gallup has ever measured."[18] When the public realizes that the policy changes for which they elected a President can be thwarted for years by a single federal district judge, they will realize they have "ceased to be their own rulers," and that confidence will sink further. It is up to this Court to restore the rule of law by reining in this pattern of judicial excess.

CONCLUSION

This Court should reverse the judgment of the circuit court, and return the case with instructions to dismiss the complaint.

Respectfully submitted,

RICK BOYER
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, VA 24506

PATRICK M. MCSWEENEY
3358 John Tree Hill Rd.
Powhatan, VA 23139

WILLIAM J. OLSON*
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
October 30, 2026

Attorneys for Amicus Curiae

[18] Benedict Vigers and Lydia Saad, "Americans Pass Judgment on Their Courts," *Gallup.com* (Dec. 17, 2024).