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 FOR RESPONDENTS

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November 16, 2026

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PARTIES TO THE PROCEEDING

Respondents (plaintiffs-appellees below) are four individuals: D.V.D.; M.M.; E.F.D.; and O.C.G. They are proceeding pseudonymously on behalf of themselves and class members.

Petitioners (defendants-appellants below) are: U.S. Department of Homeland Security; Markwayne Mullin, Secretary of Homeland Security; Todd Blanche, Attorney General; and Antone Moniz, Superintendent of the Plymouth County Correctional Facility. Individual petitioners sued in their official capacities have been automatically substituted for their predecessors in office. *See* Sup. Ct. R. 35.3.

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INTRODUCTION

Removal of noncitizens to third countries is governed by statutory requirements and procedural safeguards to ensure that persons are not removed to places where they face persecution or torture. The policy memorandum and implementing guidance (together, the policy) promulgated by the Department of Homeland Security (DHS) at issue here violate those requirements and constitute an end run around Congress's mandatory protections. Respondents acknowledge that DHS is authorized to remove individuals to a third country, i.e., one not identified as a country of removal during the underlying removal proceeding. But DHS cannot disregard the safeguards Congress mandated to ensure that returned individuals do not face torture or persecution.

The consequences of this policy are dire. DHS sent Plaintiff O.C.G., a Guatemalan national, to Mexico two days after an immigration judge (IJ) granted him protection from removal to Guatemala and told him that he could not be sent to Mexico because DHS had not designated it as a country of removal. Mexico then returned him to Guatemala. DHS also sent Venezuelan class members to a maximum-security prison in El Salvador, where they faced torture; other class members to South Sudan and Eswatini, where some remain imprisoned without charge; and others to Ghana, which promptly sent them to the countries from which an IJ had granted protection.

Until recently, the government acknowledged that noncitizens are entitled to basic procedural protections prior to third-country removal. When asked whether DHS could remove someone with a final order of removal to a

third country, the United States responded, "We would have to give the person notice of the third country and give them the opportunity to raise a reasonable fear of torture or persecution in that third country." Transcript of Oral Argument at 33, *Riley v. Bondi*, 606 U.S. 259 (2025) (No. 23-1270); *see also* Transcript of Oral Argument at 20-21, *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021) (No. 19-897) (similar).

The government now disavows that position, claiming that if DHS designates a different country of removal at any point after proceedings have concluded, the noncitizen is not entitled to any meaningful mechanism for seeking protection against removal to that destination. Under its theory—and as O.C.G.'s case demonstrates—there is nothing to prevent the "gamesmanship" of designating countries of removal in a manner that deprives individuals of any meaningful opportunity to seek protection. J.A. 124.

The policy blatantly disregards the statutory and regulatory framework provided by the Immigration and Nationality Act (INA) in the withholding of removal statute, 8 U.S.C. §1231(b)(3), and the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which implements the United States' obligations under the Convention Against Torture (CAT), and their implementing regulations. These authorities apply to *all* removals and require that all noncitizens subject to removal orders have an opportunity to submit mandatory protection claims. Those claims must be adjudicated in an evidentiary hearing where the applicant bears the burden of proof and the IJ must assess credibility. Nothing in the statutes or regulations exempts third-country removals from these mandatory protections and procedures. The

statutory framework also expressly provides for judicial review of adverse determinations.

DHS treats blanket diplomatic assurances as a license to dispense with determining whether a designated country is actually safe for the individual subject to removal. The boilerplate agreements on which the government relies lack any individualized assessment of the risk to the person returned. The policy provides *no* notice or opportunity to present a protection claim—even though DHS has not examined a person's individual circumstances. Notably, the government itself recognizes that the third countries to which DHS sends class members present serious risks of persecution and torture. IJs regularly grant protection to people who fear removal to these same countries, and years of State Department reports have documented significant human rights abuses in these same countries.

Without knowing that a noncitizen is Christian, DHS cannot ensure that a third country's assurances protect against religious persecution; without knowing that a noncitizen is gay, DHS cannot ensure that those assurances protect against persecution based on sexual orientation. Nor have such assurances restrained receiving countries from sending class members onward to countries from which an IJ had granted them protection.

In any event, even if blanket assurances were reliable, by regulation assurances apply only to CAT claims. No statutory or regulatory authority exists to apply diplomatic assurances to withholding of removal. The government never addresses that limitation.

Even absent boilerplate assurances, DHS's policy calls for removal within 6 to 24 hours of notice of the third country unless the individual can immediately demonstrate that they satisfy the ultimate burden of meeting the high standard for withholding or CAT protection. If they do, DHS will *consider* reopening immigration proceedings to allow them to present their fear-based claims before an IJ *or* selecting another third country. That mechanism denies the procedures Congress prescribed and negates any meaningful opportunity to obtain protection.

The government suggests that third-country removals should be permitted to effectuate the removal of serious criminals. That is wrong for two reasons. First, like Plaintiffs O.C.G. and M.M., thousands of class members and noncitizens subject to third-country removal have no criminal record at all. They are individuals granted protection against removal to a specified country but not granted durable asylum status for multiple reasons. Thus, they cannot be sent to that country. Many class members have lived here for decades, working and supporting U.S.-citizen family members, and contributing to their communities. Second, those with criminal convictions are equally entitled to the procedural safeguards mandated by law to ensure they are not sent to torture or persecution.

The government seeks to avoid scrutiny of the policy by asserting expansive readings of jurisdictional provisions that do not apply to the claims or relief sought here. The government's invocation of 8 U.S.C. §1252(a)(4), (b)(9), and (g), and FARRA §2242(d) conflicts with this Court's precedents, which repeatedly have affirmed the narrow scope of those provisions.

The government argues that Respondents' claims can only be brought in a petition for review (PFR) in the underlying proceedings before any third country is designated. That argument fails as the policy only applies after removal proceedings conclude. The challenge here is to DHS's third-country removal policy, not to the individual's underlying removal order that could be reviewed in a PFR.

Nor is classwide declaratory relief or vacatur under the Administrative Procedure Act (APA) barred by 8 U.S.C. §1252(f)(1) because it limits only lower courts' classwide injunctions, not other remedies. Even if it did, §1252(f)(1) does not apply to named Plaintiffs' individual claims, and this Court's ruling on those claims will resolve the legality of DHS's policy.

STATEMENT OF THE CASE

I. Legal Framework

A. Statutory Limits on Removal to Countries Where Persecution or Torture Is Likely

All removals, including third-country removals, are subject to 8 U.S.C. §1231(b)(3). Paragraphs 1231(b)(1) and (b)(2), which establish the sequence of countries to which DHS may remove a noncitizen, *see Jama v. ICE*, 543 U.S. 335, 341 (2005), are expressly "[s]ubject to paragraph (3)." Paragraph (b)(3) in turn reads:

> *Notwithstanding paragraphs (1) and (2)*, the Attorney General may not remove [a noncitizen] to a country if the Attorney General decides

> that the [noncitizen's] life or freedom would be threatened in that country because of the [noncitizen's] race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. §1231(b)(3)(A) (emphasis added).[1] Withholding is mandatory when a noncitizen establishes that they are more likely than not to face persecution in the country of removal. 8 U.S.C. §1231(b)(3)(A); 8 C.F.R. §§208.16(b)(2), 1208.16(b)(2).

Separately, all removals are subject to Article 3 of CAT, which provides that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 5 (1988), 1465 U.N.T.S. 85, 114 (1987). Although the treaty is non-self-executing, Congress "elect[ed]" to give it "wholesale effect . . . through implementing legislation," i.e., FARRA. *Medellín v. Texas*, 552 U.S. 491, 520 (2008); *see also* FARRA, Pub. L. No. 105-277, div. G, §2242, 112 Stat. 2681, 2681-822 (1998) (codified at 8 U.S.C. §1231 note).

Through FARRA, Congress directed that the United States may not "expel, extradite, or otherwise effect the

1. References to the Attorney General in §1231 pertain to the DHS Secretary for carrying out removals, and to the Attorney General, acting through immigration courts, when selecting countries of removal and adjudicating fear-based claims. *See* 6 U.S.C. §557.

involuntary return of any person to a country" where there are substantial grounds for believing that the person would be in danger of being subjected to torture. FARRA §2242(a), 112 Stat. at 2681-822 (emphasis added). Congress further directed the promulgation of regulations implementing CAT. *Id.* §2242(b), 112 Stat. at 2681-822; *see generally* 8 C.F.R. §§208.16-208.18, 1208.16-1208.18. CAT protections are mandatory. *See Nasrallah v. Barr*, 590 U.S. 573, 580 (2020).

The treaty, the statute, and the regulations contain no exception for third-country removals. The INA and regulations require notice of the country of removal. This designation affords the noncitizen the opportunity to present any fear-based claim regarding removal to that country. In standard proceedings under 8 U.S.C. §1229a, the IJ "shall notify" the individual of the opportunity to designate a country of removal, and "shall also identify for the record, a country, or countries in the alternative," of removal. 8 C.F.R. §1240.10(f). Similarly, DHS officers must identify the designated country when issuing orders in proceedings under 8 U.S.C. §§1228(b) and 1231(a)(5), respectively. *See* 8 C.F.R. §§238.1(f)(2) (DHS "shall designate the country of removal[.]"), 238.1(b)(2)(ii), 241.8(e) (referring to "the country designated in [the reinstated] order").

The statutes and regulations also provide an opportunity to raise fear-based claims. In IJ removal proceedings under §1229a, noncitizens may seek §1231(b)(3) and/or CAT protection. *See generally* 8 C.F.R. §§208.16-208.18, 1208.16-1208.18. In §§1228(b) and 1231(a)(5) proceedings, noncitizens who establish a reasonable fear of persecution or torture are referred for

a withholding hearing before an IJ, where they may apply for §1231(b)(3) or CAT protection. *See* 8 C.F.R. §§241.8(e), 238.1(f)(3), 208.31(e), 1208.31(e).

In protection proceedings, the IJ is the "trier of fact" and "shall determine whether the [noncitizen] has sustained [their] burden of proof, and shall make credibility determinations" in the same manner as under the asylum statute. 8 U.S.C. §1231(b)(3)(C); *see also* 8 C.F.R. §§208.16(a), (c)(4) (providing for IJ adjudication of CAT claims), 1208.16(a), (c)(4) (same); *see also* FARRA §2242(b) (directing promulgation of CAT regulations), (d) (channeling review of CAT determinations).

With respect to CAT eligibility only—*not* statutory withholding eligibility—"[t]he Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that *an* alien would not be tortured there if *the* alien were removed to that country." 8 C.F.R. §1208.18(c)(1) (emphasis added). In that situation, the Attorney General "shall determine in consultation with the Secretary of State, whether the assurances are sufficiently reliable" to permit removal "consistent with [CAT]." *Id.* §1208.18(c)(2). If so, the noncitizen's CAT claim will "not be considered further" by an IJ or the Board of Immigration Appeals (BIA). *Id.* §1208.18(c)(3).

Relatedly, CAT deferral (not CAT withholding) may be subsequently terminated after notice and an individualized hearing before an IJ, who reviews the matter *de novo*. *See* 8 C.F.R. §§208.17(d), 1208.17(d). The regulations mandate strict procedures and an individualized process, 8 C.F.R. §1208.17(d)(2)-(3), that may be modified if requested by the

noncitizen, *id.* §1208.17(e), or if there are assurances with respect to the noncitizen, *id.* §1208.17(f) (issued pursuant to the process in §1208.18(c)).

B. Judicial Review of Designations and Protection Claims

In individual removal proceedings, courts have long reviewed whether the agency properly designated a country of removal with sufficient notice of the country and the right to apply for protection. *See, e.g.*, *Kossov v. INS*, 132 F.3d 405, 408-09 (7th Cir. 1998); *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999).

Congress expressly preserved judicial review of individual protection claims. *See* FARRA §2242(d); 8 U.S.C. §1252(a)(4) (channeling review of CAT claims); *see also id.* §1252(b)(4)(D) (governing review of factual determinations underlying denials of asylum and withholding of removal). Federal courts have exercised this power for decades. *See, e.g.*, *Nasrallah*, 590 U.S. 573; *INS v. Stevic*, 467 U.S. 407 (1984).

C. Third-Country Removal Policies and Practices

1. The government has acknowledged that noncitizens must have notice and an opportunity to present fear-based claims before third-country removal. *See* Tr. of Oral Arg. at 20-21, *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021) (No. 19-897); Tr. of Oral Arg. at 33, *Riley v. Bondi*, 606 U.S. 259 (2025) (No. 23-1270).

2. The BIA has long established that where the Executive is unable to effect a removal to the designated

country and instead elects to deport the person to a third country, the agency must reopen proceedings to afford the noncitizen an opportunity to apply for protection. *See Matter of Anunciacion*, 12 I. & N. Dec. 815, 818 (BIA 1968).

3. In 2001, the former Immigration and Naturalization Service drafted Form I-913, a notice advising noncitizens of a proposed removal to an alternate country and allowing 15 days to move to reopen proceedings and apply for withholding or CAT protection. J.A. 170, 199-204. In 2020, DHS drafted a similar notice, advising noncitizens that they could seek withholding or CAT protection and that DHS would not oppose a timely motion to reopen for that purpose. *See* J.A. 205-06. Even though neither notice was published, both contemplated a procedure for presenting fear-based claims before removal to a third country.

4. On February 18, 2025, U.S. Immigration and Customs Enforcement (ICE) issued a directive instructing officers to review cases of noncitizens granted withholding of removal or CAT, and to "determine the viability of removal to a third country." J.A. 207. On March 30, 2025, two days after the district court issued a temporary restraining order (TRO), then-Secretary of Homeland Security Kristi Noem issued "Guidance Regarding Third Country Removals." J.A. 306-09. The memorandum permits removal without any notice or process if the government has received diplomatic assurances. J.A. 307. The policy does not require disclosure of which countries have given assurances, and Petitioners have not disclosed all such agreements. J.A. 32 n.15. Absent such assurances, DHS will inform the noncitizen of the intended destination; officers do not ask whether the person fears removal there

or provide information about how to seek protection. J.A. 307-08. Only if the noncitizen affirmatively expresses fear are they referred for a fear screening before a DHS officer, which generally occurs within 24 hours of referral. J.A. 308. The screening applies a "more likely than not" standard for persecution or torture, meaning the person must demonstrate full entitlement to protection at the outset. *Id.* If the person does not meet that standard, DHS may remove them without administrative or judicial review, *id.*, despite the statutory provisions for such review, 8 U.S.C. §1252(a)(4), (b)(4)(D). If they meet the standard, the case is referred to an IJ or ICE may select another country. J.A. 308-09.

On July 9, 2025, ICE issued Guidance Regarding Third Country Removals, J.A. 310-13. That guidance largely tracks the March memorandum but adds that, absent diplomatic assurances, ICE officers serve a notice identifying the country of removal. J.A. 311. ICE may remove a noncitizen within 6 to 24 hours after serving notice. J.A. 311-12.

II. Factual Background

A. Named Plaintiffs

1. Plaintiff O.C.G. is a gay man from Guatemala with no criminal history who fled that country after receiving multiple death threats because of his sexual orientation. J.A. 181-84 ¶¶ 78-89; J.A. 209-305; D. Ct. Doc. 8-4. In March 2024, DHS denied him a credible-fear interview and deported him to Guatemala. *Id.* He fled Guatemala again to Mexico, where he was kidnapped and raped, and then returned to seek protection in the United States. *Id.* DHS

reinstated the prior order and O.C.G. demonstrated a reasonable fear of persecution in Guatemala to an asylum officer. *Id.* In February 2025, an IJ granted O.C.G. withholding of removal to Guatemala. *Id.* When O.C.G. expressly stated that he also feared removal to Mexico, the IJ assured him that he could not be removed there. *Id.* Two days later, DHS deported O.C.G. to Mexico without notice, and Mexican officials quickly thereafter returned him to Guatemala, forcing him into hiding. *Id.* Petitioners submitted a sworn declaration to the district court stating that O.C.G. was provided notice and did not assert a fear of removal to Mexico but later acknowledged that the statement was false. J.A. 291-93. Following the district court's order, DHS returned O.C.G. to the United States. J.A. 290-305.

2. Plaintiff M.M., a Honduran citizen with no criminal history, twice fled Honduras after her husband severely beat her and their children. The first time, her husband found her in Mexico and threw her out of a second-floor window. J.A. 178-80 ¶¶ 68-73; D. Ct. Doc. 8-2 ¶¶ 3-13. She last arrived in 2014. *Id.* DHS issued a reinstatement order, but an IJ granted her withholding of removal to Honduras in 2021. *Id.* M.M. fears her husband would find and hurt her in a third country, as he did in Mexico. *Id.*

3. Plaintiff E.F.D., an Ecuadorian citizen, fled after the Ecuadorian police beat him for refusing to transport drugs. J.A. 180-81 ¶¶ 74-77; D. Ct. Doc. 8-3 ¶¶ 3-16. He arrived in the United States in 2015 and, after he established a credible fear of persecution in Ecuador, DHS placed him in removal proceedings under 8 U.S.C. §1229a. *Id.* At the conclusion of those proceedings an IJ granted him CAT

protection from removal to Ecuador in 2018. *Id.* He fears removal to Mexico or Guatemala, where he was kidnapped and robbed en route to the United States. *Id.*

4. Plaintiff D.V.D., a Cuban citizen who arrived in 1999, is married to a U.S. citizen and has two U.S.-citizen children. He has severe mental illnesses currently controlled by psychiatric treatment. J.A. 177-78 ¶¶ 62-67; D. Ct. Doc. 8-1 ¶¶ 4-13. In 2017, an IJ ordered him removed to Cuba. *Id.* He fears removal to countries where he will face imprisonment or persecution based on his psychiatric disorder. *Id.*

B. Treatment of Class Members

Petitioners have deported class members to third countries, exposing them to indefinite detention, torture, disappearance, and serious abuse. Some third-country removals have resulted in chain refoulement—return by the third country to the country from which the IJ granted protection, as in O.C.G.'s case. J.A. 184. As one U.S. official stated, "[t]he point [of the third-country removal policy] is to scare people." D. Ct. Doc. 240-1 at 14.

On March 31 and April 13, 2025, putative class members were removed to El Salvador via Naval Station Guantánamo Bay, without notice or the opportunity to apply for CAT protection. *See* D. Ct. Docs. 49 at 18-19, 50-11, 59-14, 59-15, 59-16, 72, 72-1, 81; J.A. 55, 280-81. They were then held incommunicado at Centro de Confinamiento del Terrorismo (CECOT), a maximum-security prison notorious for routine beatings, sexual assault, inhumane conditions, and psychological torment; they were told they would "never leave alive." D. Ct. Doc.

233-9. Contemporaneous State Department reporting documented unlawful killings in Salvadoran custody, including from physical abuse, medical neglect, gross overcrowding, inadequate sanitation, and insufficient food and water. D. Ct. Doc. 50-4 at 1-2, 7.

On May 7, 2025, DHS attempted to remove thirteen class members to Libya without meaningful notice or an opportunity to assert fear-based claims. *See* J.A. 282-83; D. Ct. Docs. 89, 99-2, 99-3. The State Department had found "reasonable grounds to believe state and nonstate actors committed crimes against humanity in Libya," documenting migrants' exposure to torture, disappearance, and sexual slavery by state and nonstate actors. D. Ct. Doc. 50-7 at 1, 20, 33-38.

On May 20, 2025, DHS began removing eight class members to South Sudan, on less than 24 hours' notice, outside business hours, and using an English-language form that all eight men refused to sign. D. Ct. Docs. 111, 118, 130-2 ¶¶ 8-10. DHS concluded that none expressed a fear, despite their refusals. D. Ct. Doc. 130-2 ¶ 10; Stay Appl. 13. DHS ultimately deported them to South Sudan, where they were immediately detained; several remain indefinitely detained in a guarded complex amid sweltering heat and with little electricity. D. Ct. Doc. 233-1 ¶¶ 7-12, 46; D. Ct. Doc. 233-2 ¶¶ 4-20.

DHS has also deported class members to Eswatini without notice, where many remain detained indefinitely in a maximum-security prison, some since July 2025. D. Ct. Docs. 233-1, 233-2, 233-6. They were denied access to counsel for nine months. *Id.*; D. Ct. Doc. 233-3.

Class members have also been subject to chain refoulement, either forcibly returned or pressured to return by the receiving country to countries from which they had won protection.

- A woman protected from removal to Sierra Leone was deported to Ghana and immediately returned to Sierra Leone, where she was forced into hiding. D. Ct. Doc. 233-8 ¶¶ 11-13. Ghanaian officials physically overpowered her as she pleaded for protection, saying they were "acting on instructions" to send her back. *Id.*

- A man granted protection from The Gambia due to his sexual orientation was told by Ghanaian officials that, under ICE's orders, his "final destination" was The Gambia. D. Ct. Doc. 233-7, Ex. A. After he was deported there, he too went into hiding. *Id.*

- A man protected from removal to Iran was deported to Nicaragua, where officials referred to an agreement with the United States requiring his deportation to Iran. D. Ct. Doc. 233-18. A Nicaraguan official kicked him in the stomach until he signed paperwork agreeing to deportation there. *Id.*

- Officers in Eswatini told another class member that they did not believe he had protection from removal to Chad and threatened him with years in prison if he refused to agree to deportation there. D. Ct. Doc. 233-17.

- Class members deported to Mexico have faced violence and persecution. *See, e.g.*, D. Ct. Docs. 233-14, 233-10, 8-15 ¶ 28.

Additionally, the State Department has documented unlawful killings, disappearances, torture, life-threatening prison conditions, and arbitrary detention in Mexico, including generalized torture by security forces and targeting of migrants by state and nonstate actors. D. Ct. Doc. 50-5 at 1, 8, 26.

SUMMARY OF ARGUMENT

The INA, FARRA, and their implementing regulations prohibit sending noncitizens to countries where they likely will face persecution or torture. That prohibition applies to *all* removals, yet DHS's policy permits third-country removal without the notice and opportunity to seek protection that Congress and the Constitution require. Respondents do not challenge their removal orders or the Executive's authority to remove them to a third country. Rather, they challenge DHS's policy, which plainly disregards their statutory, regulatory, and due process rights *prior to* a removal to a country that was not previously designated in removal proceedings.

Petitioners' frontline argument is that their policy is immune from any judicial review. But neither §1252 nor FARRA bars judicial review of the policy. First, Petitioners' reliance on 8 U.S.C. §1252(g) is misplaced, as that statute bars only challenges to the agency's *discretionary* determinations to "commence proceedings, adjudicate cases, or execute removal orders." Here, Respondents do not challenge the agency's decision to execute their

removal orders, but instead, raise a legal challenge to the policy, which violates mandatory protections that DHS must provide in advance of any third-country removal. Petitioners' expansive reading of the statute ignores this Court's repeatedly narrow construction of §1252(g) and is inconsistent with the overall structure of the statute.

Petitioners' claim-channeling arguments are similarly far afield. The policy applies only after removal proceedings have concluded, when an individual has a final removal order and no pending removal proceeding in which to raise a protection claim. Because the need for protection from a third country arises *after* removal proceedings have concluded—only after DHS selects that country—the claim could not have been raised in the earlier proceedings and could not be channeled through a petition for review of the existing removal order. Moreover, Respondents do not challenge any decision denying a claim for statutory withholding or CAT protection. To the contrary, they challenge the policy precisely because it denies them notice and the opportunity to even file a claim for protection from removal to the newly identified country. As such, §1252(a)(4), (b)(9), and FARRA §2242(d) are inapplicable. Indeed, those provisions confirm that Congress expressly contemplated judicial review of protection claims—not a process that prevents presenting claims at all. As O.C.G.'s case illustrates, DHS's policy authorizes the agency to wait until after the conclusion of removal proceedings to select a different country of removal, thereby foreclosing any opportunity to raise a protection claim relating to the third country.

On the merits, "[e]veryone . . . agrees that the [noncitizen] may not be removed to a country where he

will be persecuted or tortured." Stay Appl. 3. Yet DHS's policy provides for removals to third countries where class members are indisputably facing persecution and torture, while depriving them of any meaningful notice or opportunity to even raise fear-based claims. When Petitioners claim to have categorical diplomatic assurances, DHS authorizes its officers to deport class members without *any* notice and *any* process. Remarkably, Petitioners contend this blanket assurance is sufficient to categorically ensure "that *no alien* will be tortured in that country." Petitioners' Brief (Br.) 37. But the regulations authorize reliance on diplomatic assurances only through an individualized process for CAT deferral, and neither the withholding statute nor the regulations provide any authority for relying on diplomatic assurances. Moreover, in granting withholding and CAT protection with respect to those very same countries, IJs regularly recognize that those governments are unable or unwilling to protect noncitizens from persecution and torture. Similarly, courts of appeals regularly adjudicate petitions for review of withholding and CAT claims related to these countries.

The diplomatic assurance aspect of the policy thus violates the withholding statute, FARRA, the implementing regulations, and due process by:

- Failing to provide any notice of the intended country of removal;

- Failing to provide any opportunity to raise any protection claim;

- Relying on diplomatic assurances to bypass statutory withholding protections where the regulations authorize diplomatic assurances only for CAT claims;

- Relying on boilerplate, categorical assurances without regard to the individual facts of the case;

- Relying on categorical assurances that cannot feasibly account for non-governmental actors; and

- Depriving individuals of any opportunity to seek judicial review, as provided by statute.

Where DHS intends to remove an individual to a country that has not provided blanket assurances, the policy is likewise unlawful. In those cases, DHS provides only 6 to 24 hours' notice and no meaningful opportunity to present a fear-based claim. The policy thus violates the statutory and regulatory framework and due process by:

- Failing to provide meaningful notice in advance of removal;

- Carrying out removal within 6 to 24 hours after notice;

- Failing to inform noncitizens of the process to present any fear-based claim;

- Failing to provide a meaningful opportunity to be heard by requiring the detained individual to demonstrate full entitlement to withholding or CAT protection within 24 hours; and

- Depriving individuals of their statutory right to seek judicial review of denied fear-based claims.

As to due process, Petitioners fail to even acknowledge this Court's recent admonition that "notice roughly 24 hours before removal, devoid of information about how to exercise due process rights to contest . . . removal, surely does not pass muster" for purposes of the Due Process Clause. *A.A.R.P. v. Trump*, 605 U.S. 91, 95 (2025); *see also Trump v. J.G.G.*, 604 U.S. 670, 673 (2025).

Finally, this Court need not reach the questions regarding 8 U.S.C. §1252(f)(1) as the statute's restriction on relief by its terms does not apply to named Plaintiffs' individual claims. A ruling on those claims necessarily will resolve the same legal questions presented by the class. But regardless, §1252(f)(1) does not prohibit classwide declaratory relief or setting aside the policy under the APA as that provision's text and title confirm that it is narrowly focused on limiting the lower courts from entering classwide injunctions. Moreover, §1252(f)(1) expressly preserves this Court's authority to grant classwide injunctive relief.

ARGUMENT

I. Congress Did Not Bar Judicial Review

A. 8 U.S.C. §1252(g) Does Not Bar Review

1. Respondents do not contest Petitioners' authority to remove class members to a country not previously designated in a removal order. Nor do they challenge a discretionary decision or action authorizing the agency

to move forward with the execution of a removal order. Instead, they challenge an agency-wide *policy* that violates statutory and constitutional mandates.

Subsection 1252(g) does not bar such a claim. That provision limits jurisdiction over claims "arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders." But it is not a "general jurisdictional limitation." *Reno v. Am.-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 482 (1999). Instead, it is "discrete" and "much narrower." *Id.* Justice Scalia's foundational opinion in *AADC* establishes that §1252(g) "was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Id.* at 485 n.9. It thus "give[s] some measure of protection to 'no deferred action' decisions and similar discretionary determinations," *id.* at 485, protecting "the Executive['s] . . . discretion to abandon the endeavor" of removal, *id.* at 483. As discussed in *AADC*, Petitioners' interpretation is inconsistent with the structure of the statute, the backdrop to its enactment, and how it was applied immediately thereafter. *Id.* at 483-85.

As this Court reaffirmed in *Jennings v. Rodriguez*, §1252(g) does not "sweep in any claim that can technically be said to 'arise from' the three listed actions." 583 U.S. 281, 294 (2018) (plurality opinion). In *AADC*, the Court further underscored the provision's narrow scope by listing the "many other decisions" that are closely related to those listed in §1252(g), but that do *not* implicate the "discrete" actions over which Congress limited jurisdiction. *See* 525 U.S. at 482. Those "decisions . . . include various provisions in the final order that is the product of the adjudication." *Id.* They also include "decisions to open an

investigation, to surveil the suspected violator, [and] to reschedule the deportation hearing." *Id*. If the decision to open an investigation (a preliminary step to commencing proceedings) and the rescheduling of the deportation hearing (part of adjudicating cases) are not implicated by §1252(g), then a challenge to procedures to determine humanitarian protection claims prior to removal similarly cannot implicate the execution of a removal order.

Here, Respondents do not challenge the Executive's determination to refrain from exercising such prosecutorial discretion—they do not challenge a discretionary decision or action to execute a removal order. Instead, they challenge a policy denying protections mandated by statute.

2. This Court's decision in *Noem v. Abrego Garcia*, 145 S. Ct. 1017 (2025), necessarily rejected Petitioners' expansive reading of the statute. Mr. Abrego Garcia had been granted withholding of removal to El Salvador under §1231(b)(3). *Id.* at 1018. Nonetheless, DHS removed him to El Salvador, where he was imprisoned in CECOT. *Id.* The district court held the removal likely violated the statutory protection and granted a preliminary injunction ordering the government to facilitate his release and return to the United States. *Id.*; *see also* Application to Vacate Injunction at 79a, *Noem v. Abrego Garcia*, No. 24A949 (U.S. Apr. 7, 2025). The government sought emergency relief from this Court, arguing that §1252(g) applied to a challenge to removal after a withholding grant because "the execution of a removal order necessarily involves deciding where the [noncitizen] will go." *Id.* at 18. This Court did not accept that sweeping view of §1252(g), and instead left the injunction's central requirement in place,

stating that the order properly required the government to "'facilitate' Mr. Abrego Garcia's release from custody in El Salvador and to ensure that his case was handled as it would have been had he not been improperly sent to El Salvador." 145 S. Ct. at 1018. Just as §1252(g) did not bar the challenge to an unlawful removal in *Abrego Garcia*, it does not bar Respondents' claims.

3. Nor does §1252(g) bar judicial review of categorically unlawful policies. On the government's interpretation, this Court would have lacked jurisdiction to review the challenged policy in *DHS v. Regents of the University of California*, 591 U.S. 1 (2020). But there this Court reaffirmed the "narrow" scope of the provision. *Id.* at 19. The plaintiffs challenged DHS's decision to revoke the Deferred Action for Childhood Arrivals (DACA) program, which shielded certain noncitizens—including those with removal orders—from removal. *Id.* at 9-15, 27 (stating that DACA had as its "defining feature . . . the decision to defer removal"). Although the case plainly concerned a policy of "forbearance of removal," *id.* at 19, this Court held that §1252(g) was inapplicable, *id.* at 9, reaffirming that §1252(g) is directed at discretionary decisions in individual cases, not statutory and constitutional challenges to agency policies.

Here, the challenged policy addresses neither deferred removal nor prosecutorial discretion. Instead, it addresses the process to obtain statutory forms of protection.

4. Subsection 1252(f)(2) further reinforces this Court's jurisdictional holdings in *AADC, Jennings*, and *Regents*. That provision expressly contemplates that courts may "enjoin the removal of [a noncitizen]" in certain

circumstances. Significantly, in *Nken v. Holder*, this Court held that paragraph (f)(2) does not govern stays of removal pending adjudication of petitions for review. 556 U.S. 418 (2009). Instead, the provision addresses other cases where courts may enjoin removal where there is "clear and convincing evidence" that "*execution of such order* is prohibited as a matter of law." 8 U.S.C. §1252(f)(2) (emphasis added). The fact that §1252(f)(2) confers jurisdiction over execution of removal orders that are prohibited "as a matter of law" confirms that §1252(g) is limited to *discretionary* decisions. It makes no sense to read §1252(g) as barring *all* claims related to execution of removal orders if §1252(f) affirmatively provides review of legal claims. Thus, §1252(f)(2) further confirms that §1252(g) is narrowly tailored to *discretionary* decisions seeking to constrain the Executive from commencing proceedings, adjudicating those proceedings, or executing removal orders. Notably, *Abrego Garcia* provides a recent example confirming that courts may enjoin plainly unlawful removals, particularly where the claim arises *after* removal proceedings end.

5. Petitioners also assert that a "removal order is simply an order concluding that the alien is deportable or ordering deportation," Br. 20 (citation modified), and that §1252(g) thus protects the agency's decisions "whether, when, and where to remove the alien," Br. 16 (emphasis omitted). But they ignore that the destination of removal is not a matter of unfettered discretion. Section 1231(b)(2) "provides four consecutive removal commands." *Jama*, 543 U.S. at 341. DHS must follow those statutory commands.

Moreover, it has no discretion to disregard the statutory restrictions on removal under §1231(b)(3) or FARRA.[2]

Petitioners argue that *AADC*'s interpretation of the statute "make[s] jurisdiction 'dependent upon the merits.'" Br. 18 (quoting *Garland v. Aleman Gonzalez*, 596 U.S. 543, 554 (2022)). But determining whether the challenged action is *discretionary* does not require resolving whether it is *lawful*. It requires identifying only the nature of the challenged action—whether the government's conduct is mandated or limited by law. Only if, under that initial determination, the action is not discretionary may the reviewing court then determine whether it also comports with the law. *Cf. Jennings*, 583 U.S. at 293-95 (plurality opinion) (determining first the type of claim at issue, rather than the merits, to assess whether §1252(b)(9) barred review).[3]

6. Further, Petitioners' position is inconsistent with the "strong" "presumption favoring judicial review." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020)

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2. As the First Circuit explained, Petitioners' premise that third-country removals "execute" class members' removal orders is also flawed because removal orders must identify the country of removal and require DHS to comply with §1231(b)'s constraints. J.A. 15-16; *see also* 8 C.F.R. §1240.12(d); *Ibarra-Perez v. United States*, 154 F.4th 989, 997 (9th Cir. 2025).

3. The distinction between jurisdiction and the merits is not absolute; the inquiries may overlap. *See Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420, 434-35 (2017); *Brownback v. King*, 592 U.S. 209, 217 (2021). Indeed, *AADC* looked *to the merits* in rejecting a jurisdictional argument, explaining that an unlawfully present noncitizen has "no constitutional right to assert selective enforcement as a defense against his deportation." 525 U.S. at 488.

(citation modified). Petitioners' position would allow the Executive to determine the legality of its own actions, even when the policy plainly conflicts with §1231(b)(3) and FARRA. That reading raises serious constitutional and separation-of-powers concerns. *See Kucana v. Holder*, 558 U.S. 233, 237 (2010) ("Separation-of-powers concerns, moreover, caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain.").

7. Finally, even if §1252(g) were interpreted broadly, this *is* the "rare case in which the alleged basis of [unconstitutionality] is so outrageous" that exercising jurisdiction is warranted. *AADC*, 525 U.S. at 491. As the record demonstrates, DHS's policy exposes class members to indefinite imprisonment, persecution, and torture. *Supra* Stmt. II.B.

B. Section 1252 and FARRA's Claim-Channeling Provisions Are Inapplicable

1. Section 1252(b)(9) does not apply. Petitioners' argument, that review of the challenged policy "must occur—if anywhere—only in judicial review of the final order," Br. 22 (citation modified), is illogical: the policy, on its face, pertains only to individuals with final removal orders "who have no ongoing proceedings in which to raise a claim under [8 U.S.C. §1231(b)(3)] or [CAT]." J.A. 307 n.2. Subsection (b)(9), together with subsection (a)(5), channels review of removal orders and claims "arising from" actions taken in removal proceedings through a petition for review as the "sole and exclusive means" of judicial review. *Jennings*, 583 U.S. at 293-94 (plurality opinion) (reading "arising from" narrowly to avoid

results that "'no sensible person could have intended'"). Respondents, however, do not challenge any questions of law or fact "arising from any action taken or proceeding brought to remove" them. 8 U.S.C. §1252(b)(9). Instead, their challenge arises from DHS's post-proceedings policy. As Petitioners acknowledge, a third country is one "not identified in the removal order." Br. 2.

2. Claims concerning third-country protections do not arise until *after* removal proceedings conclude and cannot receive "meaningful . . . judicial review" through those proceedings. *Jennings*, 583 U.S. at 293 (plurality opinion). Nor do Respondents challenge which third country DHS has designated for removal; instead, they challenge the denial of access to statutory, regulatory, and constitutional protections required before removal to that country. Indeed, PFRs are decided "only on the administrative record on which the order of removal is based." 8 U.S.C. §1252(b)(4)(A); *see also Nasrallah*, 590 U.S. at 582 (explaining that final removal orders include only rulings by the IJ or BIA affecting the removal order's validity). The statutory language limits review to claims encompassed in the removal proceeding itself, not claims that arise afterwards. *See Regents*, 591 U.S. at 19 (holding §1252(b)(9) "is certainly not a bar where . . . the parties are not challenging any removal proceedings"). As the First Circuit recognized, "this is a case about the procedures DHS must follow when, after it decides to remove a person, it chooses to remove them to a country not identified in the removal order." J.A. 27.

3. Petitioners do not dispute the district court's findings that establish that third-country claims cannot be raised in a petition for review. J.A. 76-85. As the district

court explained: (i) protection in removal proceedings is limited to the proposed countries of removal; (ii) changing country conditions and diplomatic relations make future persecution or torture risks in third countries impossible to assess during removal proceedings; (iii) the asylum, withholding, and CAT application does not provide a meaningful mechanism to list unknown third countries; and (iv) motions to reopen do not safeguard third-country protection claims. *See id.*

4. The lower courts were correct to reject Petitioners' "extreme" reading of the statute that would render Respondents' claims "effectively unreviewable." *Jennings*, 583 U.S. at 293 (plurality opinion). This Court has similarly exercised jurisdiction over claims challenging government policies that would otherwise foreclose access to the judicial review Congress made available. *See Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 63 (1993) (permitting a challenge that otherwise "would effectively exclude an applicant from access even to the limited administrative and judicial review," and leaving no formal denial to appeal or administrative record for judicial review); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (holding that a statutory bar on judicial review did not foreclose systemic challenges to agency procedures, as Congress was "most unlikely" to have intended to bar claims where applicants were prevented from assembling adequate records). Here, class members cannot challenge the policy in removal proceedings because DHS does not designate the third country until after removal proceedings conclude.

Petitioners also attempt to analogize §1252(b)(9) to other purported judicial-review bars. Br. 23 (citing 8 U.S.C. §§1231(a)(5), (h), 1252(a)(2)(B)-(C)). But, like

§1252(b)(9), the reach of those provisions is limited by their terms and by statutory exceptions.

5. Likewise, 8 U.S.C. §1252(a)(4) and FARRA §2242(d) channel review of individual CAT claims to PFRs, and limit challenges to the regulations implementing CAT. But Respondents do not challenge any CAT regulation or denial of an individualized CAT determination and thus do not raise "any cause or claim under [CAT]" or "under [FARRA §2242]." 8 U.S.C. §1252(a)(4); FARRA §2242(d).[4] Instead, Respondents bring an APA challenge to an agency policy and practice that makes it impossible to even present a claim for CAT protection. J.A. 21, 69. Moreover, §1252(a)(4) presumes claims challenging CAT denials *will* be presented and *will* be judicially reviewed, *Nasrallah*, 590 U.S. at 582-83, yet the policy denies class members any opportunity to even present third-country claims, much less obtain review of a denial. Indeed, "the entire thrust of this litigation is that [Petitioners] have foreclosed [Respondents'] ability to create an administrative record on which CAT claims might be based." J.A. 88; *see also* J.A. 76-86.

6. Petitioners effectively concede FARRA supplies a "substantive liberty interest" for Respondents' due process claim, Br. 24, but fail to recognize that the class's

4. Petitioners' citation to *Ardestani v. INS*, 502 U.S. 129 (1991), to broaden the reading of "under" is misplaced. Br. 24. *Ardestani* did not involve a jurisdictional statute and thus does not implicate the "strong" "presumption favoring judicial review." *Guerrero-Lasprilla*, 589 U.S. at 229 (citation modified); *Jennings*, 583 U.S. at 293-94 (plurality opinion) (interpreting "arising from" to avoid "depriving [a] detainee of any meaningful chance for judicial review").

due process claim challenges the lack of procedures to protect that interest, not any substantive protections provided by CAT or FARRA. That FARRA informs the liberty interest does not transform an independent due process claim into a claim "under" CAT or FARRA for purposes of §2242(d). The First Circuit recognized this, correctly affirming the district court's holding that "the class's fear-of-torture-related claim arises under the APA, not the FARRA/CAT." J.A. 23-24. It is irrelevant that CAT is "a non-self-executing treaty," Br. 24, because FARRA §2242(d) is not implicated where "no challenge is made . . . to the FARRA regulations." *Saint Fort v. Ashcroft*, 329 F.3d 191, 201 (1st Cir. 2003). Here, Respondents do not challenge the regulations; instead, they contend the policy violates them. And Respondents do not challenge "any other determination made with respect to application of the policy [in FARRA §2242(a)]." FARRA §2242(d).

II. DHS's Third-Country Removal Policy Is Unlawful

A. The Policy Violates §1231(b)

1. Section 1231(b)(3) and its implementing regulations protect noncitizens from removal to countries where their "life or freedom would be threatened" on a protected ground. 8 U.S.C. §1231(b)(3)(A); 8 C.F.R. §§208.16, 1208.16; *cf.* Br. 31. The prohibition is mandatory: Petitioners have "no discretion to deny relief" to an eligible noncitizen. *Moncrieffe v. Holder*, 569 U.S. 184, 187 n.1 (2013). The statute applies to all removal countries, including third countries raised after removal proceedings. Both §§1231(b)(1) and (b)(2) expressly make country selection "[s]ubject to paragraph (3)" while §1231(b)(3)(A) provides

that (b)(3)'s prohibitions apply "[n]otwithstanding paragraphs [b](1) and [b](2)."

Subparagraph (b)(3)(A) establishes the substantive prohibition on removal, (B) lists exceptions, and (C) prescribes procedures for determining whether (A)'s prohibition applies. Petitioners' reading is "inconsist[ent] with the design and structure of the statute as a whole." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013). Allowing the Executive to "choose" whether to follow the mandatory procedures in (C), Br. 34, substitutes its policy preferences for Congress's mandate.

2. Section 1231(b)(3)(C) instructs that "[i]n determining whether [a noncitizen has established a persecution claim], the trier of fact shall determine whether the [noncitizen] has sustained the [noncitizen's] burden of proof, and shall make credibility determinations, in the manner described in [the asylum statute]." 8 U.S.C. §1231(b)(3)(C); *see also id.* §1158(b)(1)(B)(ii)-(iii); *see also* 8 C.F.R. §§208.16(b), 1208.16(b). Pursuant to the regulations, only IJs are vested with the authority to make these determinations. *See* 8 C.F.R. §§208.16(a) (asylum officers must refer withholding claims to IJs to make final eligibility determination), 1208.16(a) (same), 208.31(e) (asylum officers must refer reasonable fear claims to IJs for full adjudication of withholding claim), 1208.31(e) (same). Moreover, the statute expressly contemplates that these determinations will be subject to judicial review. 8 U.S.C. §1252(b)(4)(D); *see also Stevic*, 467 U.S. at 407.

3. Petitioners disregard the plain language of §1231(b)(3)(C), insisting it does not "mandate the use of a trier of fact in the first place" and that the Executive

can simply "choose[]" to use them. Br. 34. But the statute does not make triers of fact, assessment of evidence, or credibility determinations optional. Petitioners' reading is "at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citation modified). The only authority Petitioners offer—H.R. Rep. No. 109-72 (2005)—does not support their contrary position. Br. 34.

Petitioners wrongly rely on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), to claim that Congress was "silent" and the Executive has free rein to dispense with statutory and regulatory mandates. Br. 31-32. First, the statute and implementing regulations establish procedures for adjudicating withholding claims. 8 U.S.C. §1231(b)(3)(C); 8 C.F.R. §§208.16, 1208.16. Second, *Vermont Yankee* addressed administrative rulemaking and only bars courts from devising procedures beyond those required by law; it does not stop courts from enforcing independent statutory or constitutional requirements. 435 U.S. at 543-44.[5]

4. The policy does not safeguard §1231(b)'s statutory and regulatory protections. When the government claims blanket diplomatic assurances, the policy provides

5. Despite Petitioners' argument, Br. 32, 34, the expedited removal statute's hearing requirement does not displace the statutory and regulatory requirements of a trier of fact and IJ hearings to adjudicate withholding claims. *See* 8 C.F.R. §1208.16(a); *see also Stevic*, 467 U.S. at 424.

no notice or process at all. J.A. 307, 311. Petitioners justify their failure to provide *any* process by pointing to regulations that permit individualized diplomatic assurances to bar consideration of CAT claims. Br. 37-38; *see also* 8 C.F.R. §1208.18(c), 1208.17(f). But the CAT regulations do not govern statutory withholding claims. There is no authority for applying diplomatic assurances to negate withholding claims. Indeed, where Congress intended to limit withholding of removal, it did so explicitly. *See* 8 U.S.C. §1231(b)(3)(B). Petitioners effectively ask the Court to add an ineligibility category that Congress did not include. *See Jama*, 543 U.S. at 341 ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . . .").

5. Moreover, Petitioners rely on blanket assurances that third-country nationals, as a class, will not be subjected to persecution or torture in the receiving state. *See* Investigations Lab, *The Reading Room: Third Country Removal Agreements* 2025–2026, UC Berkeley Sch. of L., Hum. Rts. Ctr., https://hrc.berkeley.edu/the-reading-room.html (last visited Nov. 11, 2026) (collecting 35 documents covering 29 countries and noting that 6 additional countries' agreements remain unpublished). Notably, the assurances do not account for persecution or torture by nonstate actors, *see* J.A. 32 n.15, 129 & n.89, and do not guard against chain refoulement (such as in Plaintiff O.C.G.'s case and that of other class members), *see* J.A. 290-91.

Petitioners wrongly assert that "[b]oth persecution and torture require governmental involvement," implying that a foreign government's word should thus end the matter. Br. 41. But withholding, like asylum, only requires

that the government be "unable or unwilling" to protect against persecution, not inflict it. 8 C.F.R. §1208.1(e). Relatedly, CAT does not require the *government* to be the torturer, only torture "at the instigation of, or with the consent or acquiescence of, a public official." 8 C.F.R. §1208.18(a)(1); *see, e.g.*, *Nasrallah*, 590 U.S. at 577 & n.1 (alleged torture by Hezbollah).

6. Petitioners nevertheless rely on these assurances to eliminate individualized process. They do so despite evidence of prolonged detention, beatings, sexual assault, inhumane conditions, disappearances, and chain refoulement following third-country removals—evidence consistent with the U.S. government's own prior assessment of human rights conditions in those countries. *Supra* Stmt. II.B; D. Ct. Docs. 233-1 to 233-14, 233-17 to 233-25 (describing abuses and traumas experienced by individuals removed to third countries); C.A. Doc. 118513219, at 6-7 (Sept. 23, 2026) (detailing risk of ongoing harms to class members). In fact, the Executive itself regularly grants fear-based protection to individuals from the very countries in which DHS claims class members will not be persecuted or tortured. *See, e.g.*, *Adjudication Statistics: Asylum Decisions by Nationality*, Exec. Off. for Immigr. Rev., https://www.justice.gov/eoir/media/1344846/dl?inline (last visited Nov. 11, 2026) (approximately 6,100 such asylum grants in fiscal year 2024). Treating boilerplate, categorical assurances as dispositive prevents individuals from testing whether the agreements address the particular risks they face, as the statute requires.

As the district court noted, the agency cannot determine whether blanket assurances address an

individual's risk without first examining the facts that may place that person in danger. J.A. 127-29, 137-38. For example, without knowing a noncitizen's particular religion, DHS cannot ensure a third country's assurances protect against religious persecution; without knowing that a noncitizen is gay, DHS cannot ensure that assurances protect against persecution based on sexual orientation.

7. *Munaf v. Geren*, 553 U.S. 674 (2008), and *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), are inapposite. Br. 38-41. Those cases dealt with extraordinary circumstances, namely, wartime transfers of prisoners detained overseas. Here, however, the statutes constrain the Executive's authority and provide procedural protections, including judicial review. *Munaf* was "careful to clarify that no [CAT] claim had been raised" and *Kiyemba* concluded the petitioners "could not raise CAT claims in habeas." J.A. 135-36. And, contrary to Petitioners' suggestion, Br. 40, both cases involved assurances concerning specific conditions applicable to particular detainees. *Munaf*, 553 U.S. at 702; *Kiyemba*, 561 F.3d at 514. Respondents do not seek intervention in the political branches' assessment of "practices in foreign countries," *Munaf*, 553 U.S. at 700-01; instead, they challenge whether those assessments may displace mandatory statutes.

8. Even absent diplomatic assurances, the policy's 6-to-24-hour notice period does not provide a meaningful opportunity to present a claim. In this short period, the policy requires a noncitizen to demonstrate full entitlement to their fear-based claim, "what would be expected of them in a full hearing on the merits." J.A. 125 n.86. A noncitizen cannot in that time communicate with counsel, let alone

gather testimony, corroborating declarations, expert affidavits, and country-conditions evidence regarding a country they may know nothing about, all of which may be required to establish their claim. *See generally* D. Ct. Docs. 59-9, 59-10, 59-11; *Matter of G-C-I-*, 29 I. & N. Dec. 176, 177-84 (BIA 2025) (addressing evidentiary record for withholding claims); *Matter of D-J-L-*, 29 I. & N. Dec. 485, 486-89 (BIA 2026) (same, for CAT). Those who fail the screening "will be removed," J.A. 308, 312, with no administrative appeal or judicial review, despite Congress's express provision for review of withholding determinations, *see* 8 U.S.C. §1252(b)(4)(D).

9. Petitioners speculate that the First Circuit "presumably would demand" 10 days to raise a fear claim and 15 days to challenge an adverse finding, Br. 31, but the court imposed no such deadlines. It instead directed the parties to raise "[a]ny lingering questions about the meaning of the final judgment" with the district court. J.A. 47 n.21. BIA precedent expressly states that proceedings should be reopened "for the designation of another country of deportation," *Matter of Anunciacion*, 12 I. & N. Dec. at 818, and both DHS and its predecessor agency drafted notices providing written notice and a 15-day automatic stay of removal to allow an unopposed motion to reopen removal proceedings, *see* J.A. 170, 199-206.

10. Finally, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court held that 8 U.S.C. §1231(h) does not prohibit enforcing §1231 rights through an independent statute. The Court rejected the argument that §1231(h) barred review, explaining it "simply forbids courts to construe *that section*" as creating a cause of action; it does not foreclose reliance on another statute—there, 28 U.S.C.

§2241—that independently authorizes judicial review. *Id.* at 687-88. Like the habeas statute in *Zadvydas*, the APA "grants the federal courts authority to answer [the] question [presented here]," *id.* at 699, as the First Circuit recognized, *see* J.A. 35. Petitioners also err in arguing that *Zadvydas* is "inapposite" because the noncitizens there did not invoke a "right or benefit" under §1231(h), Br. 33, ignoring that the Court held that §1231(a)(6) contains a statutory limitation on indefinite detention, *Zadvydas*, 533 U.S. at 687-99. Thus, contrary to Petitioners' contention, both cases are based on rights under §1231.

Since *Zadvydas*, the Court has repeatedly considered whether DHS actions comply with statutory limitations when raised via another statute (like habeas), notwithstanding §1231(h). *See generally Jama*, 543 U.S. 335 (addressing compliance with §1231(b)(2)); *Abrego Garcia*, 145 S. Ct. 1017 (enforcing statutory right to withholding).

Finally, Petitioners provide no textual support in arguing that §1231(h) channels review of §1231(b) claims exclusively through petitions for review. Br. 32-33. That reading again ignores *Zadvydas*. Nor do §1252(a)(5) and (b)(4) permit review of third-country removal claims because they always arise *after* a final removal order.

B. The Policy Violates CAT, FARRA, and the Implementing Regulations

1. FARRA/CAT and its implementing regulations require notice and an opportunity to present a claim before an IJ prior to any third-country removal. *See* J.A. 38-42. This interpretation "coheres with the FARRA §2242(d)'s textual contemplation of an administrative hearing and

judicial review" and ensures consistency between the regulations governing withholding of removal and CAT protection. J.A. 39 (citing *Clark v. Martinez*, 543 U.S. 371, 380 (2005)).

Like withholding, the regulations require CAT eligibility to be determined after an evidentiary hearing where the noncitizen bears the burden of proof. *See* 8 C.F.R. §§208.16(c), 1208.16(c). FARRA channels review of these individual CAT "claims" and "determination[s]" to the PFR process, presupposing that IJs will adjudicate CAT claims. FARRA §2242(d). Moreover, the regulations require IJ fact-finding and/or referrals. *See* 8 C.F.R. §§208.16(a), (c)(4), 1208.16(a), (c)(4), 208.31(e), 1208.31(e).

2. Similar to their §1231(b) arguments, Petitioners err in asserting that, because FARRA and the regulations do not establish a separate process for adjudicating third-country CAT claims, the CAT regulations do not apply. Br. 36. To the contrary, there is no statutory or regulatory basis to exempt third-country claims from the regulatory framework.

3. On its face, the policy omits the basic protections required by FARRA and its implementing regulations. Where a country has issued blanket assurances that noncitizens "will not be persecuted or tortured," DHS removes noncitizens there without *any* notice or process—all based on boilerplate agreements, generally involving third countries' agreements to accept class members for monetary payments. *See* J.A. 307, 311; D. Ct. Doc. 240 at 1. This lack of any individualized process eviscerates the statutory and regulatory framework, which provides for both administrative and judicial review of CAT claims.

The policy also violates 8 C.F.R. §§208.18(c)(2) and 1208.18(c)(2), which restrict CAT claims when the government obtains an *individualized* assurance that the noncitizen will not be tortured. First, unlike the policy, the regulations do not permit removal absent notice of the destination country. *See, e.g.*, *Khouzam v. Att'y Gen.*, 549 F.3d 235, 259 (3d Cir. 2008) (interpreting the CAT regulations to "afford[] notice and an opportunity to test the reliability of th[e] assurances in a hearing"). There can be no meaningful credibility determination when the assurances are boilerplate, countrywide agreements.

Second, only the Attorney General, after referral from and in consultation with the Secretary of State, may determine whether such assurances are "sufficiently reliable." 8 C.F.R. §§208.18(c)(2), 1208.18(c)(2). The agency cautioned that "[c]ases will be handled under this provision only if such assurances are actually forwarded to the Attorney General by the Secretary of State for consideration under this special process." 64 Fed. Reg. 8478, 8484 (Feb. 19, 1999) (noting that the Attorney General may not delegate the role except to the Deputy Attorney General). However, the policy only requires assessment by the Secretary of State.

Finally, the regulation contemplates *individualized* assurances. As the district court explained, it "repeatedly refers in the singular to '*an* alien' whom the foreign government may assure will not be tortured if '*the alien*' is removed there." J.A. 128 (quoting 8 C.F.R. §208.18(c)(1)). This "may seem semantic, focused on a single word, a small one at that. But words are how the law constrains power." *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021).

That reading is confirmed by former State Department Legal Advisor John Bellinger, who explained in 2008 that diplomatic assurances must be directed to "a particular individual" for whom the U.S. government has "secur[ed] explicit, credible assurances that the individual will not be tortured." D. Ct. Doc. 50-9 at 7; *see also* 64 Fed. Reg. at 8484 (anticipating that diplomatic assurances "will be rare").[6] Petitioners offer no textual basis for their contrary reading. Br. 37. The text points the other way: "[t]o an ordinary reader," the use of "the indefinite article 'a'" suggests a singular referent. *Niz-Chavez*, 593 U.S. at 161-62.

4. Even where Petitioners do not rely on diplomatic assurances, the policy violates FARRA and the regulations because it fails to provide meaningful notice or opportunity to be heard given its 6 to 24 hours' notice, heightened standard, and lack of review. *Supra* Arg. II.A.

C. The Policy Violates Due Process

1. It is "well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993); *see also J.G.G.*, 604 U.S. at 673 (same). That protection extends to class members because "the Due Process Clause protects [a noncitizen] subject to a final order of deportation." *Zadvydas*, 533 U.S. at 693-94 (citation omitted). Here, the parties agree that Congress mandated that class members may *not* be removed to a country where it is more likely than not they will be persecuted

6. The 2011 Office of Inspector General Report reported only four cases. J.A. 130 n.91.

or tortured. Such "risk of deportation," the potential for serious physical harm or death, and the statute's mandatory language are "plainly sufficient to mandate constitutionally fair procedures." *McNary*, 498 U.S. at 491. Petitioners do not assert otherwise. *See* Br. 38.

2. For this right to be meaningful, notice and an opportunity to be heard are "the minimum requirements of procedural due process [that] must be observed." *Meachum v. Fano*, 427 U.S. 215, 226 (1976) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) (affirming that Congress's authority regarding the admission of noncitizens "must respect the procedural safeguards of due process" when implementing legislation).

Consistent with this principle, the final judgment recognizes class members' entitlement to the most basic of due process protections: "timely and adequate notice" and "the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citation modified). In the immigration context, as elsewhere, notice must be provided "within a reasonable time and in such a manner as will allow them to actually seek . . . relief in the proper venue before such removal occurs." *J.G.G.*, 604 U.S. at 673; *see also Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950) ("The means employed [of providing notice] must be such as one desirous of actually informing the [other party] might reasonably adopt to accomplish it."). "[N]otice roughly 24 hours before removal, devoid of information about how to exercise due process rights to contest that removal, surely does not pass muster" under the Due Process Clause. *A.A.R.P.*, 605 U.S. at 95.

The opportunity to be heard is equally fundamental. This Court has "long held that 'no person shall be' removed from the United States 'without opportunity, at some time, to be heard.'" *Id.* (quoting *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903)); *see also A.A.R.P.*, 605 U.S. at 97-98 (holding that plaintiffs were "entitled to constitutionally adequate notice prior to any removal, in order to pursue appropriate relief").

3. DHS's policy violates these principles by relying on assurances to deprive class members of any notice or opportunity to be heard whatsoever and, absent assurances, gives only 24 hours' notice or less. Any notice provided is, at best, threadbare: officers need only identify the country of removal, without any information about seeking protection. As *A.A.R.P.* explains, "'24 hours'" notice provided in a manner "devoid of information" about how to challenge removal does not comport with due process. 605 U.S. at 94. Moreover, under the policy anyone who expresses fear must then establish full entitlement to protection at an interview within 24 hours of notice, providing no meaningful opportunity to compile evidence such claims require or any opportunity for further review. *See id.* at 94-95. "[A]mbush[ing] aliens" with such "last-minute notice[]" is an end-run around the protections Congress mandated. *Niz-Chavez*, 593 U.S. at 171.

4. Petitioners claim that blanket assurances covering all noncitizens facing removal satisfy due process, regardless of how long class members have lived here or what protections they previously received. Br. 38-42. But blanket assurances are not authorized by the withholding statute and regulations. And FARRA's

implementing regulations mandate individualized inquiries and review. *Supra* Arg. II.B. The Executive is not free to dispense with the "trier of fact" and attendant statutory protections, *see* 8 U.S.C. §1231(b)(3)(C), or to ignore that fear-based claims are subject to administrative and judicial review. *Supra* Arg. II.A & B; *see United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544-47 (1950) (affirming that even for "an alien denied entry," "[w]hatever the procedure authorized by Congress is, it is due process"); *Yamataya*, 189 U.S. at 100-02 (similar, for recently admitted noncitizen).

Nor can Petitioners invoke "foreign policy," or "intergovernmental communication" as authority for assurances where the statutes and regulations provide no such authority. Br. 39-40. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations . . . , it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion). Moreover, "many decisions affecting foreign relations . . . require congressional action," including in the immigration context. *Zivotofsky v. Kerry*, 576 U.S. 1, 16 (2015).

Petitioners also contest that diplomatic assurances may be permissible only if individualized and subject to judicial review. Br. 40-41. For CAT, that conclusion accords with FARRA's implementing regulations, longstanding practice, and circuit precedent. Petitioners again err in relying on *Munaf*, Br. 40-41, which is inapposite. *Supra* Arg. II.A.7.

Nor is "compliance with Section 1231 and CAT" only "a matter for the political branches." Br. 40. Congress mandated protections and procedures to which due process attaches and expressly provided for judicial review of withholding and CAT determinations. The agency may not sidestep Congress's statutory framework by agreeing with a foreign government that U.S. immigration laws should not apply. *See, e.g.*, *Abrego Garcia*, 145 S. Ct. at 1018.

5. Petitioners fare no better in defending the policy where no diplomatic assurances exist. Ignoring *A.A.R.P.* and *J.G.G.*, Petitioners rely on *DHS v. Thuraissigiam*, 591 U.S. 103 (2020), to claim that if the expedited-removal procedures satisfy due process, so too does DHS's policy. Br. 43-44. But *Thuraissigiam* held that a person apprehended at or immediately following entry "has only those rights regarding admission that Congress has provided by statute." 591 U.S. at 140. Even if class members are only entitled to the rights that Congress provides, Respondents seek access to the rights Congress provided by statute—rights that are meaningless without an opportunity to access them. *See, e.g.*, *A.A.R.P.*, 605 U.S. at 94-95; *Galvan*, 347 U.S. at 531; *Yamataya*, 189 U.S. at 100-01. Petitioners cannot provide *less* than the statutes require.

The expedited-removal process provides no support to Petitioners. Most people in expedited removal have recently arrived and any fear-based claims arise in that admissions process. *See, e.g.*, 86 Fed. Reg. 46906, 46908-09 (Aug. 20, 2021); 89 Fed. Reg. 48710, 48723 (June 7, 2024). Class members are in a fundamentally different situation:

many received removal orders years ago, were granted protection, and have built lives here.[7]

Petitioners also fail to recognize that the policy deprives class members of basic procedural protections that are included in the expedited-removal process. Noncitizens in expedited-removal proceedings must only meet a lower standard for the "credible fear interview" (CFI) to determine whether they will be transferred for full proceedings before an IJ, 8 U.S.C. §1225(b)(1)(B)(v). Even where DHS makes a negative credible-fear determination, they receive a written decision and may obtain review in an IJ hearing. *Id.* §1225(b)(1)(B)(iii). By contrast, under DHS's policy, if a person manages to express fear, they must immediately demonstrate full entitlement to protection, despite the voluminous evidence these claims typically require, including declarations, witness testimony, and country-conditions reports. They have no entitlement to a written decision or chance for review of an adverse determination; instead, they are summarily expelled. *Supra* Arg. II.B. The policy provides them far *less* than the process for expedited removal, and "surely does not pass muster" under the Due Process Clause. *A.A.R.P.*, 605 U.S. at 95.

6. Petitioners claim, without record support, that class members are "particularly unlikely" to face persecution or torture. Br. 44. The record belies that

7. Many were only ineligible for asylum due to the one-year filing deadline, 8 U.S.C. §1158(a)(2)(B). Others were ineligible based on rules later found unlawful. *E. Bay Sanctuary Covenant v. Trump*, No. 18-CV-06810-JST, 2026 WL 1256873 (N.D. Cal. May 7, 2026); *Las Americas Immigrant Advoc. Ctr. v. U.S. DHS*, 783 F.Supp.3d 200 (D.D.C. 2025).

claim: removed class members face indefinite and incommunicado detention, torture, and chain refoulement despite withholding and CAT orders. *Supra* Stmt. II.B. Nor do Petitioners account for risks that cut across international boundaries. For example, a gay person would understandably fear persecution in any country that systematically persecutes gay people. *See, e.g.*, D. Ct. Doc. 233-7 ¶ 5 & Ex. A; J.A. 148; *Kumar v. Wamsley*, 817 F.Supp.3d 1059, 1067 (W.D. Wash. 2025).

7. Finally, Petitioners err in relying on *Thuraissigiam*. Br. 45. The protections that Congress enacted require meaningful notice to be given effect. *See A.A.R.P.*, 605 U.S. at 94.

Petitioners' argument seeking to expand the entry fiction also relies on false assumptions and ignores relevant precedent. The class *excludes* individuals subject to expedited removal under §1225(b)(1). Nor are class members seeking admission, lawful status, or challenging their removal orders. This case is like *Zadvydas*, which addressed persons who had already been ordered removed and were subject to §1231's detention and removal provisions, just as Respondents are. *Zadvydas* reaffirmed that "the Due Process Clause protects [a noncitizen] subject to a final [removal] order," because "once [a noncitizen] enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." 533 U.S. at 693-94. *Zadvydas* did not break new ground, merely agreeing with this Court's longstanding holding that a noncitizen

"is surely a 'person'" protected by due process, even if unlawfully present. *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

This Court has repeatedly affirmed that noncitizens are entitled to notice and opportunity to challenge removal. *See, e.g.*, *A.A.R.P.*, 605 U.S. at 94; *J.G.G.*, 604 U.S. at 671; *see also Flores*, 507 U.S. at 296, 309. Ultimately, Petitioners acknowledge that this Court's precedent holds that "once an alien is physically present within the United States, the Due Process Clause applies." Br. 47.

III. Section 1252(f)(1) Precludes Injunctions, Not Other Classwide Remedies

1. This Court need not address whether the district court had authority to enter classwide declaratory relief and APA vacatur under 8 U.S.C. §1252(f)(1). Regardless of the scope of classwide remedies available to the district court, it is undisputed that §1252(f)(1) did not preclude that court from granting declaratory relief or relief under 5 U.S.C. §706(2) to the named Plaintiffs. And by resolving the merits of their individual claims, this Court's decision will establish binding precedent resolving the legal questions presented on behalf of the class. In addition, as §1252(f)(1) expressly provides that its limitations on classwide relief do not extend to this Court, it can provide class remedies consistent with the individual relief. As such, this Court may provide classwide remedies consistent with any relief provided to named Plaintiffs.

2. The plain language demonstrates that 8 U.S.C. §1252(f)(1) does not prohibit declaratory relief or APA vacatur. Petitioners concede that §1252(f)(1) does not bar *all* classwide relief. Br. 26-27. Instead, they argue

the statute precludes a declaratory judgment that "contemplates a *follow-on injunction*." *Id.* at 27. That interpretation is untethered from the text.

"By its plain terms, and even by its title, [§1252(f)(1)] is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§1221-1231, but specifies this ban does not extend to individual cases." *AADC*, 525 U.S. at 481-82; *see also Nielsen v. Preap*, 586 U.S. 392, 403 (2019) (plurality opinion) ("Whether the *Preap* court had jurisdiction" under §1252(f)(1) to grant injunctive relief "is irrelevant because the District Court had jurisdiction to entertain the plaintiffs' request for declaratory relief. . . ."); *Biden v. Texas*, 597 U.S. 785, 800 (2022) (similar).

In asking this Court to equate injunctive relief with declaratory relief or APA vacatur, Petitioners eschew the statute's title—"Limit on injunctive relief"—and its text, which bars courts from "enjoin[ing] or restrain[ing] the operation" of specified INA provisions, without mentioning declaratory relief. 8 U.S.C. §1252(f)(1); *see also Biden*, 597 U.S. at 798 (Section 1252(f)'s "title . . . makes clear the narrowness of its scope"). Petitioners argue that "restrain" extends §1252(f)(1) beyond injunctions, Br. 26, but "restrain and enjoin" is a "common doublet" referring to injunctive relief, including injunctions and restraining orders. Bryan A. Garner, Garner's Dictionary of Legal Usage 295, 317 (3d ed. 2011); *see also* Fed. R. Civ. P. 65 (providing for "Injunctions and Restraining orders"); *Arevalo v. Ashcroft*, 344 F.3d 1, 7 (1st Cir. 2003) ("This distinction between 'enjoin' and 'restrain' mirrors an identical distinction expressly made in the Hobbs Act,

28 U.S.C. §2349(a) & (b)—a statute that [8 U.S.C. §1252] (a)(1) explicitly incorporates."); *California v. Arizona*, 452 U.S. 431, 432 (1981) (using "enjoined and restrained" to describe an injunction).

In *Aleman Gonzalez*, after reviewing the terms "restrain" and "enjoin," this Court concluded: "[p]utting 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 the specified statutory provisions." 596 U.S. at 550 (emphasis added). Thus, whether declaratory relief and vacatur might loosely be described as limiting how the Executive chooses to enforce the statute is beside the point; the statutory terms "enjoin or restrain" are terms of art describing injunctive relief, not declaratory relief or vacatur.

This Court rejected a similar argument with respect to §1252(f)(2) in *Nken*, holding that a stay of removal is not encompassed by that provision. 556 U.S. at 428-32. The Court narrowly interpreted the term "enjoin" to exclude stays of removal, even though a stay may have a "functional overlap" with an injunction on the operation of the removal system. *Id.* at 428-29.

3. Section 1252(f)(1) also includes a carve-out for this Court's authority to issue classwide *injunctive* relief, demonstrating it was not intended to eliminate all classwide remedies. As explained in *Biden*, "[i]f section 1252(f)(1) deprived lower courts of subject matter jurisdiction to adjudicate any non-individual claims under sections 1221 through 1232, no such claims could ever arrive at this Court, rendering the provision's specific

carveout for Supreme Court injunctive relief nugatory." 597 U.S. at 799. The statutory text thus forecloses Petitioners' expansive interpretation.

4. The text of the neighboring provisions further demonstrates that §1252(f)(1) does not prohibit declaratory relief or vacatur under the APA. To "ascertain[] the plain meaning" of §1252(f)(1), "the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Congress expressly barred declaratory relief in the preceding subsection at §1252(e)(1)(A) ("no court may— enter declaratory, injunctive, or other equitable relief") but omitted mention of declaratory or "other equitable relief" from §1252(f)(1). That contrast is presumed intentional, particularly because Congress enacted both provisions in the same legislation. *Nken*, 556 U.S. at 430-31; *Kucana*, 558 U.S. at 249.

5. Ultimately, Petitioners concede that §1252(f)(1)'s text does not bar all classwide declaratory relief. They argue instead that Congress must have meant to distinguish between declaratory judgments that are not "coercive" and declaratory judgments that may later be enforced by individual injunctions. Br. 26-27; *id.* at 27 ("A court may not accomplish in two steps . . . what Congress has forbidden it to do in one . . . ."). But the text of the statute bars only classwide injunctions, not individual injunctions. There is nothing to preclude classwide declaratory relief from providing the basis for a subsequent *individual* injunction. Indeed, §1252(f)(1) expressly permits individual injunctive relief. *See Aleman Gonzalez*, 596 U.S. at 550. Thus, it is entirely consistent with the statute for a class member "to

immediately seek an injunction grounded on the authority of the declaratory judgment." Br. 27 (citation omitted).

6. Nor does the possibility that a declaratory judgment may later support an individual injunction transform the declaratory judgment into an injunction; the two remedies remain distinct. *See Steffel v. Thompson*, 415 U.S. 452, 461 n.11 (1974). While a "declaratory judgment might serve as the basis for issuance of a later injunction to give effect to the declaratory judgment," *id.*, any "follow-on injunction" remains a separate remedy and Petitioners err in conflating the two, Br. 27. Petitioners also conflate the practical effect of a declaratory judgment with an injunction. "The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy." *Steffel*, 415 U.S. at 467 (citation omitted). While declaratory relief is binding on the parties, it "is not ultimately coercive" as it does not allow for threat of contempt. *Id.* at 471 (citation omitted); *cf.* Fed. R. Civ. P. 57, advisory committee note to 1937 adoption (contrasting declaratory judgment with coercive relief).

7. This Court has similarly declared that vacatur is "a less drastic remedy" than an injunction, which may be applied where the "extraordinary relief of an injunction" is not warranted. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010).[8] Vacatur does not "'prevent[]' officials from acting by eliminating their authority to do so." Br. 30. Rather, it simply "reinstat[es]

8. The APA likewise treats vacatur as distinct from injunctions, separately authorizing courts to set aside agency action, 5 U.S.C. §702, issue preliminary relief, *id.* §705, and compel agency action, *id.* §706(1).

the rules previously in force." *Action on Smoking & Health v. Civ. Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983). Petitioners may continue to execute third-country removals. Vacatur only prohibits DHS from employing the unlawful policy. Vacatur also differs from an injunction in that it operates on the unlawful agency policy itself, not on the implementing officials. *See* J.A. 144-45. Moreover, Petitioners' concerns about "universal vacatur," Br. 29 n.5, are not at issue here because Respondents only seek vacatur as to the class.

8. Petitioners invoke *California v. Grace Brethren Church*, 457 U.S. 393 (1982), and *Samuels v. Mackell*, 401 U.S. 66 (1971), to suggest that a bar to injunctive relief may also bar declaratory judgments. Br. 28. But as explained in *Steffel*, "[t]he only occasions where this Court has disregarded these 'different considerations' and found that a preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases in which principles of federalism militated altogether against federal intervention in a class of adjudications." 415 U.S. at 472. *Grace Brethren* rested on such federalism concerns raised by the Tax Injunction Act, rendering that case of "limited relevance." J.A. 44. *Samuels* similarly rested on state comity concerns. 401 U.S. at 70-73; *see also Steffel,* 415 U.S. at 461-62 (distinguishing *Samuels*).

Grace Brethren is also inapposite because the Court examined a statute broader than §1252(f)(1), which barred orders that "suspend" tax collection, not just orders that enjoin or restrain actions. 457 U.S. at 407-08; *see also Alli v. Decker*, 650 F.3d 1007, 1014 (3d Cir. 2011) (distinguishing *Grace Brethren*). Finally, *Grace Brethren* did not address a statute that explicitly barred declaratory relief in

one subsection, but omitted that bar in the very next subsection, as Congress did here.

CONCLUSION

The Court should affirm the court of appeals' judgment.

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November 16, 2026

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APPENDIX — STATUTORY AND REGULATORY PROVISIONS

1. 8 U.S.C. § 1158(b)(1) provides:

Asylum

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion,

nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency

between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

2. 8 C.F.R. § 208.31 provides:

Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

(a) *Jurisdiction.* This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. USCIS has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(b) *Initiation of reasonable fear determination process.* Upon issuance of a Final Administrative Removal Order under § 238.1 of this chapter, or notice under § 241.8(b) of this chapter that an alien is subject to removal, an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.

(c) *Interview and procedure.* The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable fear

determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government, and may present evidence, if available, relevant to the possibility of persecution or torture. The alien's representative may present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and the length of the statement. If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant's country or nationality, or if the applicant is stateless, the applicant's country of last habitual residence. The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct errors therein. The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture. The alien shall be determined to have a reasonable fear of persecution if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, unless the alien appears to be subject to one or more of the mandatory bars to being

granted withholding of removal under the Act contained in section 241(b)(3)(B) of the Act and the alien fails to show that there is a reasonable possibility that no mandatory bar applies, if the asylum officer considers such bars. The alien shall be determined to have a reasonable fear of torture if the alien establishes a reasonable possibility that he or she would be tortured in the country of removal.

(d) *Authority.* Asylum officers conducting screening determinations under this section shall have the authority described in § 208.9(c).

(e) *Referral to Immigration Judge.* If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I–863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals.

(f) *Removal of aliens with no reasonable fear of persecution or torture.* If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate

whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(g) *Review by immigration judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. The immigration judge's review shall proceed under the procedures set forth in 8 CFR 1208.31(g).

3. 8 C.F.R. § 238.1 provides:

Proceedings under section 238(b) of the Act.

(a) *Definitions.* As used in this part the term:

Deciding Service officer means a district director, chief patrol agent, or another immigration officer designated by a district director, chief patrol agent, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs, so long as that person is not the same person as the Issuing Service Officer.

Issuing Service officer means any Service officer listed in § 239.1 of this chapter as authorized to issue notices to appear.

(b) *Preliminary consideration and Notice of Intent to Issue a Final Administrative Deportation Order; commencement of proceedings—*

(1) Basis of Service charge. An issuing Service officer shall cause to be served upon an alien a Form I–851, Notice of Intent to Issue a Final Administrative Deportation Order (Notice of Intent), if the officer is satisfied that there is sufficient evidence, based upon questioning of the alien by an immigration officer and upon any other evidence obtained, to support a finding that the individual:

(i) Is an alien;

(ii) Has not been lawfully admitted for permanent residence, or has conditional permanent resident status under section 216 of the Act;

(iii) Has been convicted (as defined in section 101(a)(48) of the Act and as demonstrated by any of the documents or records listed in § 1003.41 of this chapter) of an aggravated felony and such conviction has become final; and

(iv) Is deportable under section 237(a)(2)(A)(iii) of the Act, including an alien who has neither been admitted nor paroled, but who is conclusively presumed deportable under section 237(a)(2)(A)(iii) by operation of section 238(c) of the Act ("Presumption of Deportability").

(2) Notice.

(i) Removal proceedings under section 238(b) of the Act shall commence upon personal service of the Notice of Intent upon the alien, as prescribed by 8 CFR 103.8. The Notice of Intent shall set forth the preliminary determinations and inform the alien of the Service's intent to issue a Form I–851A, Final Administrative Removal Order, without a hearing before an immigration judge. The Notice of Intent shall constitute the charging document. The Notice of Intent shall include allegations of fact and conclusions of law. It shall advise that the alien: has the privilege of being represented, at no expense to the government, by counsel of the

alien's choosing, as long as counsel is authorized to practice in removal proceedings; may request withholding of removal to a particular country if he or she fears persecution or torture in that country; may inspect the evidence supporting the Notice of Intent; may rebut the charges within 10 calendar days after service of such Notice (or 13 calendar days if service of the Notice was by mail).

(ii) The Notice of Intent also shall advise the alien that he or she may designate in writing, within the rebuttal period, the country to which he or she chooses to be deported in accordance with section 241 of the Act, in the event that a Final Administrative Removal Order is issued, and that the Service will honor such designation only to the extent permitted under the terms, limitations, and conditions of section 241 of the Act.

(iii) The Service must determine that the person served with the Notice of Intent is the person named on the notice.

(iv) The Service shall provide the alien with a list of available free legal services programs qualified under 8 CFR part 3 and organizations recognized pursuant to 8 CFR part 292, located within the district or sector where the Notice of Intent is issued.

(v) The Service must either provide the alien with a written translation of the Notice of Intent or

explain the contents of the Notice of Intent to the alien in the alien's native language or in a language that the alien understands.

(c) *Alien's response—*

(1) Time for response. The alien will have 10 calendar days from service of the Notice of Intent or 13 calendar days if service is by mail, to file a response to the Notice of Intent. In the response, the alien may: designate his or her choice of country for removal; submit a written response rebutting the allegations supporting the charge and/or requesting the opportunity to review the Government's evidence; and/or submit a statement indicating an intention to request withholding of removal under 8 CFR 208.16 of this chapter, and/or request in writing an extension of time for response, stating the specific reasons why such an extension is necessary.

(2) Nature of rebuttal or request to review evidence.

(i) If an alien chooses to rebut the allegations contained in the Notice of Intent, the alien's written response must indicate which finding(s) are being challenged and should be accompanied by affidavit(s), documentary information, or other specific evidence supporting the challenge.

(ii) If an alien's written response requests the opportunity to review the Government's evidence, the Service shall serve the alien with a copy of the

evidence in the record of proceeding upon which the Service is relying to support the charge. The alien may, within 10 calendar days following service of the Government's evidence (13 calendar days if service is by mail), furnish a final response in accordance with paragraph (c)(1) of this section. If the alien's final response is a rebuttal of the allegations, such a final response should be accompanied by affidavit(s), documentary information, or other specific evidence supporting the challenge.

(d) *Determination by deciding Service officer—*

(1) No response submitted or concession of deportability. If the deciding Service officer does not receive a timely response and the evidence in the record of proceeding establishes deportability by clear, convincing, and unequivocal evidence, or if the alien concedes deportability, then the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Removal Order that states the reasons for the deportation decision. The alien may, in writing, waive the 14–day waiting period before execution of the final order of removal provided in a paragraph (f) of this section.

(2) Response submitted—

(i) Insufficient rebuttal; no genuine issue of material fact. If the alien timely submits a rebuttal to the allegations, but the deciding Service officer finds that deportability is established by clear,

convincing, and unequivocal evidence in the record of proceeding, the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Removal Order that states the reasons for the decision of deportability.

(ii) Additional evidence required.

(A) If the deciding Service officer finds that the record of proceeding, including the alien's timely rebuttal, raises a genuine issue of material fact regarding the preliminary findings, the deciding Service officer may either obtain additional evidence from any source, including the alien, or cause to be issued a notice to appear to initiate removal proceedings under section 240 of the Act. The deciding Service officer may also obtain additional evidence from any source, including the alien, if the deciding Service officer deems that such additional evidence may aid the officer in the rendering of a decision.

(B) If the deciding Service officer considers additional evidence from a source other than the alien, that evidence shall be made a part of the record of proceeding, and shall be provided to the alien. If the alien elects to submit a response to such additional evidence, such response must be filed with the Service within 10 calendar days of service of the additional evidence (or 13 calendar days if

service is by mail). If the deciding Service officer finds, after considering all additional evidence, that deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding, the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Removal Order that states the reasons for the decision of deportability.

(iii) Conversion to proceedings under section 240 of the Act. If the deciding Service officer finds that the alien is not amenable to removal under section 238 of the Act, the deciding Service officer shall terminate the expedited proceedings under section 238 of the Act and shall, where appropriate, cause to be issued a notice to appear for the purpose of initiating removal proceedings before an immigration judge under section 240 of the Act.

(3) Termination of proceedings by deciding Service officer. Only the deciding Service officer may terminate proceedings under section 238 of the Act, in accordance with this section.

(e) *Proceedings commenced under section 240 of the Act.* In any proceeding commenced under section 240 of the Act which is based on deportability under section 237 of the Act, if it appears that the respondent alien is subject to removal pursuant to section 238 of the Act, the immigration judge may, upon the Service's request, terminate the case and, upon such termination,

the Service may commence administrative proceedings under section 238 of the Act. However, in the absence of any such request, the immigration judge shall complete the proceeding commenced under section 240 of the Act.

(f) *Executing final removal order of deciding Service officer—*

(1) Time of execution. Upon the issuance of a Final Administrative Removal Order, the Service shall issue a Warrant of Removal in accordance with § 241.2 of this chapter; such warrant shall be executed no sooner than 14 calendar days after the date the Final Administrative Removal Order is issued, unless the alien knowingly, voluntarily, and in writing waives the 14–day period.

(2) Country to which alien is to be removed. The deciding Service officer shall designate the country of removal in the manner prescribed by section 241 of the Act.

(3) Withholding of removal. If the alien has requested withholding of removal under § 208.16 of this chapter, the deciding officer shall, upon issuance of a Final Administrative Removal Order, immediately refer the alien's case to an asylum officer to conduct a reasonable fear determination in accordance with § 208.31 of this chapter.

(g) *Arrest and detention.* At the time of issuance of a Notice of Intent or at any time thereafter and up to

the time the alien becomes the subject of a Warrant of Removal, the alien may be arrested and taken into custody under the authority of a Warrant of Arrest issued by an officer listed in § 287.5(e)(2) of this chapter. The decision of the Service concerning custody or bond shall not be administratively appealable during proceedings initiated under section 238 of the Act and this part.

(h) *Record of proceeding.* The Service shall maintain a record of proceeding for judicial review of the Final Administrative Removal Order sought by any petition for review. The record of proceeding shall include, but not necessarily be limited to: the charging document (Notice of Intent); the Final Administrative Removal Order (including any supplemental memorandum of decision); the alien's response, if any; all evidence in support of the charge; and any admissible evidence, briefs, or documents submitted by either party respecting deportability. The executed duplicate of the Notice of Intent in the record of proceedings shall be retained as evidence that the individual upon whom the notice for the proceeding was served was, in fact, the alien named in the notice.

4. 8 C.F.R. § 241.8 provides:

Reinstatement of removal orders.

(a) *Applicability.* An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:

(1) Whether the alien has been subject to a prior order of removal. The immigration officer must obtain the prior order of exclusion, deportation, or removal relating to the alien.

(2) The identity of the alien, i.e., whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation, or removal. In disputed cases, verification of identity shall be accomplished by a comparison of fingerprints between those of the previously excluded, deported, or removed alien contained in Service records and those of the subject alien. In the absence of fingerprints in a disputed case the alien shall not be removed pursuant to this paragraph.

(3) Whether the alien unlawfully reentered the United States. In making this determination, the

officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of Service data systems available to the officer.

(b) *Notice.* If an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

(c) *Order.* If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

(d) *Exception for applicants for benefits under section 902 of HRIFA or sections 202 or 203 of NACARA.* If an alien who is otherwise subject to this section has applied for adjustment of status under either section 902 of Division A of Public Law 105–277, the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), or section 202 of Public Law 105–100, the Nicaraguan Adjustment and Central American Relief Act (NACARA), the provisions of section 241(a)(5) of the Immigration and Nationality Act shall not apply. The immigration officer may not reinstate

the prior order in accordance with this section unless and until a final decision to deny the application for adjustment has been made. If the application for adjustment of status is granted, the prior order shall be rendered moot.

(e) *Exception for withholding of removal.* If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture pursuant to § 208.31 of this chapter.

(f) *Execution of reinstated order.* Execution of the reinstated order of removal and detention of the alien shall be administered in accordance with this part.

5. 8 C.F.R. § 1208.31 provides:

Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

(a) *Jurisdiction.* This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. DHS has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(b) to (d) [Reserved by 89 FR 105402]

(e) *Referral to Immigration Judge.* If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I–863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 1208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals.

(f) *Removal of aliens with no reasonable fear of persecution or torture.* If the asylum officer determines

that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(g) *Review by immigration judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to de novo review by an immigration judge upon the alien's request. The immigration judge's review shall, where relevant, include review of the asylum officer's application of any bars to withholding of removal pursuant to 8 CFR 208.31(c). If the alien requests review of the asylum officer's negative decision regarding reasonable fear, the asylum officer shall serve the alien with a Form I–863, Notice of Referral to Immigration Judge. The record of determination, including copies of the Form I–863, Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Form I–863, Notice of Referral to Immigration Judge, and the complete record of determination with the immigration

court. Upon review of the asylum officer's negative reasonable fear determination:

> (1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.
>
> (2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and for Withholding of Removal. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.
>
> > (i) The immigration judge shall consider only the alien's application for withholding of removal under 8 CFR 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.
> >
> > (ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under 8 CFR 1208.16.

6. 8 C.F.R. § 1240.1 provides:

Immigration judges.

(a) *Authority.*

(1) In any removal proceeding pursuant to section 240 of the Act, the immigration judge shall have the authority to:

(i) Determine removability pursuant to section 240(a)(1) of the Act; to make decisions, including orders of removal as provided by section 240(c)(1)(A) of the Act;

(ii) To determine applications under sections 208, 212(a)(2)(F), 212(a)(6)(F)(ii), 212(a)(9)(B)(v), 212(d)(11), 212(d)(12), 212(g), 212(h), 212(i), 212(k), 237(a)(1)(E)(iii), 237(a)(1)(H), 237(a)(3)(C)(ii), 240A(a) and (b), 240B, 245, and 249 of the Act, section 202 of Pub.L. 105–100, section 902 of Pub.L. 105–277, and former section 212(c) of the Act (as it existed prior to April 1, 1997);

(iii) To order withholding of removal pursuant to section 241(b)(3) of the Act and pursuant to the Convention Against Torture; and

(iv) To take any other action consistent with applicable law and regulations as may be appropriate.

(2) An immigration judge may certify his or her decision in any case under section 240 of the Act to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges under sections 101(b)(4) and 103 of the Act.

(b) *Withdrawal and substitution of immigration judges.* The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified. If an immigration judge becomes unavailable to complete his or her duties, another immigration judge may be assigned to complete the case. The new immigration judge shall familiarize himself or herself with the record in the case and shall state for the record that he or she has done so.

(c) *Conduct of hearing.* The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.

(d) *Withdrawal of application for admission.* An immigration judge may allow only an arriving alien to withdraw an application for admission. Once the issue of inadmissibility has been resolved, permission to withdraw an application for admission should ordinarily be granted only with the concurrence of the Service. An immigration judge shall not allow an alien to withdraw an application for admission unless the alien, in addition to demonstrating that he or she possesses both the intent

and the means to depart immediately from the United States, establishes that factors directly relating to the issue of inadmissibility indicate that the granting of the withdrawal would be in the interest of justice. During the pendency of an appeal from the order of removal, permission to withdraw an application for admission must be obtained from the immigration judge or the Board.

7. 8 C.F.R. § 1240.10 provides:

Hearing.

(a) *Opening.* In a removal proceeding, the immigration judge shall:

(1) Advise the respondent of his or her right to representation, at no expense to the government, by counsel of his or her own choice authorized to practice in the proceedings and require the respondent to state then and there whether he or she desires representation;

(2) Advise the respondent of the availability of pro bono legal services for the immigration court location at which the hearing will take place, and ascertain that the respondent has received a list of such pro bono legal service providers.

(3) Ascertain that the respondent has received a copy of appeal rights.

(4) Advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government (but the respondent shall not be entitled to examine such national security information as the government may proffer in opposition to the respondent's admission to the

United States or to an application by the respondent for discretionary relief);

(5) Place the respondent under oath;

(6) Read the factual allegations and the charges in the notice to appear to the respondent and explain them in non-technical language; and

(7) Enter the notice to appear as an exhibit in the Record of Proceeding.

(b) *Public access to hearings.* Removal hearings shall be open to the public, except that the immigration judge may, in his or her discretion, close proceedings as provided in § 1003.27 of this chapter.

(c) *Pleading by respondent.* The immigration judge shall require the respondent to plead to the notice to appear by stating whether he or she admits or denies the factual allegations and his or her removability under the charges contained therein. If the respondent admits the factual allegations and admits his or her removability under the charges and the immigration judge is satisfied that no issues of law or fact remain, the immigration judge may determine that removability as charged has been established by the admissions of the respondent. The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an

institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues.

(d) *Issues of removability.* When removability is not determined under the provisions of paragraph (c) of this section, the immigration judge shall request the assignment of DHS counsel, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading. The alien shall provide a court certified copy of a Judicial Recommendation Against Deportation (JRAD) to the immigration judge when such recommendation will be the basis of denying any charge(s) brought by DHS in the proceedings against the alien. No JRAD is effective against a charge of deportability under former section 241(a)(11) of the Act or if the JRAD was granted on or after November 29, 1990.

(e) *Additional charges in removal hearings.* At any time during the proceeding, additional or substituted charges of inadmissibility and/or deportability and/or factual allegations may be lodged by DHS in writing. The alien in removal proceedings shall be served with a copy of these additional charges and allegations. The immigration judge shall read the additional factual allegations and charges to the alien and explain them to him or her. The immigration judge shall advise the alien, if he or she is not represented by counsel, that the alien may be so represented, and that he or she may be given a reasonable continuance to respond to the additional

factual allegations and charges. Thereafter, the provision of § 1240.6(b) relating to pleading shall apply to the additional factual allegations and charges.

(f) *Country of removal.* With respect to an arriving alien covered by section 241(b)(1) of the Act, the country, or countries in the alternative, to which the alien may be removed will be determined pursuant to section 241(b)(1) of the Act. In any other case, the immigration judge shall notify the respondent that if he or she is finally ordered removed, the country of removal will in the first instance be the country designated by the respondent, except as otherwise provided under section 241(b)(2) of the Act, and shall afford him or her an opportunity then and there to make such designation. The immigration judge shall also identify for the record a country, or countries in the alternative, to which the alien's removal may be made pursuant to section 241(b)(2) of the Act if the country of the alien's designation will not accept him or her into its territory, or fails to furnish timely notice of acceptance, or if the alien declines to designate a country. In considering alternative countries of removal, acceptance or the existence of a functioning government is not required with respect to an alternative country described in section 241(b)(1)(C)(i)-(iii) of the Act or a removal country described in section 241(b)(2)(E)(i)-(iv) of the Act. *See* 8 CFR 241.15.