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 OF IMMIGRATION AND CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Charlotte S. Butash
COVINGTON & BURLING LLP
30 Hudson Yards
New York, NY 10001

David M. Zionts
Counsel of Record
Hassan Ahmad
Laura E. Lowry
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000
dzionts@cov.com

November 23, 2026

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Third-Country Removals Are Punishment. 4

A. Congress Required Safeguards Against Persecution and Torture but Did Not Address Whether Third-Country Removals May Operate as Punishment. 7

B. In Practice and in Effect, Third-Country Removals Are Punishment. 8

1. The Executive Branch's Third-Country Removals Are Intended to Punish. 9

2. Third-Country Removals Are Punitive in Effect. 12

II. As Punishment, Third-Country Removals Are Subject to Constitutional Limits. 19

CONCLUSION 24

APPENDIX: Full List of *Amici Curiae* 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Abrego Garcia v. Noem,
777 F. Supp. 3d 501 (D. Md. 2025) 10

Bell v. Wolfish,
441 U.S. 520 (1979) 11, 20, 21

Delgadillo v. Carmichael,
332 U.S. 388 (1947) 13

Dep't of Com. v. New York,
588 U.S. 752 (2019) 9

Dep't of Homeland Sec. v. D.V.D.,
145 S. Ct. 2153 (2025) 11

Ellingburg v. United States,
607 U.S. 163 (2026) 4, 8

Estelle v. Gamble,
429 U.S. 97 (1976) 20

Farmer v. Brennan,
511 U.S. 825 (1994) 20, 21

Fong Yue Ting v. United States,
149 U.S. 698 (1893) 5, 13

INS v. Lopez-Mendoza,
468 U.S. 1032 (1984) 6

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 4, 9, 11, 12, 14, 15

Mercado v. Noem,
800 F. Supp. 3d 526 (S.D.N.Y. 2025)..... 11, 14

Nguyen v. Scott,
796 F. Supp. 3d 703 (W.D. Wash. 2025)..... 10

Padilla v. Kentucky
559 U.S. 356 (2010)..... 5

Trop v. Dulles,
356 U.S. 86 (1958)..... 5, 6, 9, 10, 13

Wong Wing v. United States,
163 U.S. 228 (1896)..... 5

Statutes

8 U.S.C. § 1231 ..... 3, 7, 23

Foreign Affairs Reform and Restructuring
Act of 1998, Pub. L. No. 105-277, 112
Stat. 2681 ..... 7, 22

Regulatory Materials

28 C.F.R. § 200.1 23

Legislative History

*Revision of Immigration, Naturalization,
and Nationality Laws: Joint Hearings
Before the Subcomms. of the Comms. on
the Judiciary*, 82d Cong. 540 (1951)..... 8, 9

S. Comm. on Foreign Rels., Minority Staff, *At What Cost? Inside the Trump Administration's Secret Deportation Deals* (Feb. 2026)..... 15

S. Rep. No. 82-1137 (1952)..... 9

Other Authorities

Marcos Alemán & Regina Garcia Cano, *What to Know About El Salvador's Mega-Prison After Trump Sent Hundreds of Immigrants There*, Associated Press (Mar. 16, 2025) 3

Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458 (2009) 13

Dep't of Homeland Sec., *DHS Releases Statement on Major Victory for Trump Administration and the American People on Deporting Criminal Illegal Aliens to Third Countries* (June 23, 2025) 17

Dep't of Homeland Sec., *ICYMI - Deputy Secretary Edgar: "An Illegal Immigrant Killed Two Teenagers in My Community. Under the Trump Administration, He Will Face Justice"* (May 13, 2025) 10

Hum. Rts. Watch, *"To Scare People": US Expulsions of Third-Country Nationals to Countries in Africa* (Oct. 2026) 15, 17, 18, 22

Memorandum from Todd M. Lyons, Acting Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, Third Country Removals Following the Supreme Court's Order in *Department of Homeland Security v. D.V.D.*, No. 24A1153 (July 9, 2025)..... 11

David Nakamura & Adam Taylor, *How Trump Turned a Refugee Bureau into a $410 Million Deportation Operation*, Wash. Post (Sep. 21, 2026) 16

Megha Rajagopalan et al., *Immigrants Are Being Systematically Returned Home Despite Court Orders*, N.Y. Times (Nov. 9, 2026) 10

Ariel G. Ruiz Soto, *U.S. Third-Country Deportation Agreements Are More About Fear than Numbers*, Migration Pol'y Inst. (Mar. 31, 2026) 18

Audrey Singer, William A. Kandel & Hillel R. Smith, Cong. Rsch. Serv., IF13295.4, *Immigration Removals to Third Countries* (updated Oct. 23, 2026)..... 14

Gianna Toboni et al., *60 Minutes Transcript: How Some Deportees End Up in Countries U.S. Judges Ruled Off Limits*, CBS News (Oct. 25, 2026).. 10, 18, 21, 23

Video posted by Kristi Noem (@EnvoyNoem), X (Mar. 27, 2025, 19:08 ET).....14

INTEREST OF *AMICI CURIAE*[*]

Amici curiae, listed in the Appendix, are law professors and legal academics whose research, writing, and teaching focus on immigration and constitutional law. They have no personal stake in the outcome of this case. Their sole interest is in assisting the Court in understanding constitutional principles of immigration and criminal law relevant to the resolution of this case.

---

[*] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Deportation—though itself a severe measure—has traditionally been treated as a civil, not penal, sanction. But that distinction has limits. This Court has long held that, when government action is intended to punish, or functions as punishment in substance, the Constitution requires courts to treat it as such, regardless of label.

Removal of a person not to a country of which they are a national, but to a third country with which they may have no ties at all, crosses that line. Congress authorized third-country removal under the Immigration and Nationality Act ("INA") and insisted that it be carried out subject to protections against persecution and torture. But Congress did not address whether such removals may operate as punishment. Their punitive nature is made clear by both Executive intent and the procedure's practical effect. Here, the Executive has framed third-country removal in explicitly punitive terms and implemented it in ways disproportionate to, and thus inexplicable by, any legitimate regulatory aim. That alone suffices to recognize third-country removal as punishment.

Separately, and independent of the Executive Branch's intent, the substance of third-country removal as implemented demonstrates its penal nature. Unlike ordinary deportation, it does not return individuals to the country designated in their removal proceedings, typically a country where they hold citizenship or legal rights. Instead, it forcibly transfers them often to countries with which they have no real connection, and often without lawful status or protection from onward removal. Some of

these countries forcibly transfer people directly to prisons. *See, e.g.*, Marcos Alemán & Regina Garcia Cano, *What to Know About El Salvador's Mega-Prison After Trump Sent Hundreds of Immigrants There*, Associated Press (Mar. 16, 2025), https://perma.cc/8C23-YSDB. And although the U.S. Government must guarantee that individuals will not be sent to any country where they face the prospect of persecution, *see* 8 U.S.C. § 1231(b)(3)(A), third-country removals in practice violate that refoulement assurance. As a result, the third-country removal process before this Court functions as a form of punitive exile, imposing hardship far beyond routine administration of immigration laws.

Recognizing removal to third countries as punishment does not collapse the civil-criminal distinction set out above. To the contrary, it preserves it by delineating a constitutional boundary. Once that line is crossed, the constitutional limits attendant to punishment apply. The Constitution's Due Process Clause and the Eighth Amendment do not permit such penal exile without meaningful safeguards, and the mere fact that this punishment is effectuated through the vehicle of immigration law does not untether it from normal constitutional rules. In sum, third-country removals as implemented constitute punishment and therefore trigger constitutional protections. Procedural safeguards—notice, an opportunity to be heard, and judicial review—are necessary but not always sufficient. Even when those requirements are met, a removal may still violate the Due Process Clause or the Eighth Amendment if it exposes the individual to severe harm. Courts must therefore evaluate the individualized facts of each

case and determine whether removal to the country selected by the Department of Homeland Security ("DHS") violates the procedural or substantive protections of the Constitution.

DHS's policy permits removal to any country that has offered some generalized diplomatic assurances "without the need for further procedures," and for all other countries it offers as little as 24 hours' notice before removal. J.A. 307, 311. DHS defends that regime on the premise that third-country removal is a routine incident of executing a civil removal order. *See* Pet'rs Br. 8, 20. That premise is wrong. In deciding whether DHS's policy satisfies the Due Process Clause, this Court should account for the fact that the policy governs the imposition of punishment.

ARGUMENT

I. Third-Country Removals Are Punishment.

This Court has long distinguished between government sanctions that are civil in nature and those that are penal. That distinction does not simply reflect the line between proceedings that happen to be labeled civil or criminal. Sanctions are properly understood as punishment—even if imposed in civil proceedings—when Congress "plainly employed the sanction . . . as a punishment" or, if intent is unclear, when the sanction's design and operation reveal a punitive purpose or effect. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165–66 (1963); *see also Ellingburg v. United States*, 607 U.S. 163, 165 & n.1 (2026) ("Assessing whether a statutory scheme is civil or criminal is first of all a question of statutory construction" and, secondarily, a question of whether "the statutory scheme is so punitive either in purpose

or effect as to negate the Government's intention to deem it civil." (cleaned up)).

That inquiry under *Mendoza-Martinez* is especially important in the immigration context, where courts have often fielded questions regarding when the Government crosses over from civil immigration enforcement to criminal punishment. As the immigration system has become increasingly criminal in nature, the traditional civil-criminal boundary has blurred and, in some cases, the system has imposed consequences as severe as criminal penalties without affording the constitutional protections that would accompany formal criminal sanctions. In *Padilla v. Kentucky*, the Court recognized an obligation for defense counsel to advise criminal defendants of the potential deportation consequences of criminal convictions. 559 U.S. 356, 367 (2010). At the same time, this Court has "'long recognized that deportation is a particularly severe "penalty,"' . . . but it is not, in a strict sense, a criminal sanction." *Id.* at 365 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

Although the Court has not treated deportation—standing alone—as punishment, it has recognized that sanctions resembling banishment or denationalization cross the constitutional line into punishment. *See Trop v. Dulles*, 356 U.S. 86, 100–02 (1958) (plurality opinion) (concluding "that use of denationalization as a punishment is barred by the Eighth Amendment"); *cf. Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (concluding that a person could not be subjected to "infamous punishment at hard labor" without constitutional protections). Deportation to a *third country* does exactly that.

Unlike ordinary removals, it sends an individual to a country with which they have no connection—a country not designated for removal by either an immigration judge or by DHS in the underlying removal proceedings. These individuals often lack lawful status, durable ties, or the protection of the law in the third country. In this way, DHS has created a system of international exile that puts people at risk of statelessness, where even the limited rights they may possess may be "subject to termination at any time." *Trop*, 356 U.S. at 101–02 (plurality opinion). That bears little resemblance to the administrative immigration process courts have long deemed "purely civil." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

The traditional *Mendoza-Martinez* framework shows that third-country removals cross the constitutional threshold into punishment. The manner in which the Executive Branch carries out third-country removals matters. Since early 2025, the Executive Branch has repeatedly framed third-country removal as imposing consequences, deterrence, and incapacitation—core aims of punishment. Independently, under the second *Mendoza-Martinez* prong, the multi-factor test confirms the same conclusion. Third-country removal imposes severe disabilities, mirrors historical exile, advances retribution and deterrence, and is excessive relative to any plausible regulatory purpose. Properly applied, those factors show that third-country removals differ not merely in degree but in kind from traditional immigration enforcement and so constitute punishment.

A. Congress Required Safeguards Against Persecution and Torture but Did Not Address Whether Third-Country Removals May Operate as Punishment.

When Congress enacted a statutory scheme governing the detention and removal of noncitizens, it authorized removal to countries other than the one designated in removal proceedings, including, as a final fallback, to any "country whose government will accept the alien into that country." 8 U.S.C. § 1231(b)(2). Congress ensured that protections would attach to third-country removal, but it did not address whether such removals may operate as punishment.

As an initial matter, Congress made clear that third-country removals must be carried out in a manner that safeguards against persecution and torture. The removal authority in § 1231(b)(2) is expressly "[s]ubject to" § 1231(b)(3), which bars removal "to a country" where the individual's life or freedom would be threatened. 8 U.S.C. § 1231(b)(2), (b)(3)(A). And Congress has made it the policy of the United States not to effect the involuntary return of any person to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture. Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, tit. XXII, § 2242, 112 Stat. 2681, 2681-822 (codified as Note to 8 U.S.C. § 1231). The record also reflects that Congress viewed third-country removal as unlikely and "remote"—Congress assumed the authority would be "far down the list" and exercised sparingly. *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the*

Subcomms. of the Comms. on the Judiciary, 82d Cong. 540 (1951) [hereinafter *Joint Hearings*].

Although Congress insisted on safeguards for third-country removal, it did not address whether the power could be used to impose the hardships of removal to a third country as a sanction. The *Mendoza-Martinez* inquiry must therefore proceed to DHS's purpose and the sanction's effect.

B. In Practice and in Effect, Third-Country Removals Are Punishment.

Because the statutory text does not resolve whether Congress intended third-country removals to serve as punishment, courts must look elsewhere to understand the nature of such removals. *See Ellingburg*, 607 U.S. at 165 n.1 ("If the text and structure of a statute do not demonstrate that Congress intended criminal punishment, the statute may still be deemed criminal or penal if the party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the Government's intention to deem it civil." (cleaned up)). First, in light of the deference historically accorded to the Executive Branch in immigration enforcement, courts should look to the Executive's intent in analyzing whether third-country removals constitute punishment in practice. Second, and independently, the *Mendoza-Martinez* factors make clear that third-country removals are plainly punitive in effect. In sum, whether a court looks to the Executive's intent in practice or the nature of the sanction in effect, both paths compel the same conclusion: third-country removals are punishment.

1. The Executive Branch's Third-Country Removals Are Intended to Punish.

Congress delegated immigration enforcement to the Executive Branch, which exerts practical control over how the statutory tools operate. *See Mendoza-Martinez*, 372 U.S. at 168–69; *see also* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 460–65 (2009). When the legislature authorizes a removal mechanism and leaves its implementation to executive discretion, courts should look to executive intent to resolve the punishment inquiry. *See* S. Rep. No. 82-1137, at 31–32 (1952); *Joint Hearings*, *supra*, at 540, 715. In that posture, the operative question becomes how the branch wielding the power is using it: whether the Executive is employing third-country removal as a narrow administrative action or as a sanction designed to impose hardship and condemnation. *Cf. Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019) (holding that courts need not accept implausible administrative justifications where the record shows otherwise).

As of late, the intent has not been ambiguous: third-country removals have been publicly framed and operationalized in terms that track the traditional aims of punishment—retribution and deterrence—and implemented in ways that maximize condemnation. *See Mendoza-Martinez*, 372 U.S. at 168–69 (recognizing that traditional aims include "retribution and deterrence"); *see also Trop*, 356 U.S. at 96 (concluding that penal purpose can be shown by intent "to reprimand the wrongdoer, to deter others, etc."). Senior Administration officials have used explicitly punitive vocabulary, describing

third-country removal as a set of "consequences," *Abrego Garcia v. Noem*, 777 F. Supp. 3d 501, 518 (D. Md. 2025), promising to "punish criminals," *see* Dep't of Homeland Sec., *ICYMI – Deputy Secretary Edgar: "An Illegal Immigrant Killed Two Teenagers in My Community. Under the Trump Administration, He Will Face Justice"* (May 13, 2025), https://perma.cc/3JAU-ZWWJ; *see also* Megha Rajagopalan et al., *Immigrants Are Being Systematically Returned Home Despite Court Orders*, N.Y. Times (Nov. 9, 2026), https://perma.cc/WWL4-A6W2 ("[S]enior administration officials have said they believe that stories about deportees in perilous situations overseas will encourage immigrants to voluntarily leave the United States.").

Indeed, the President himself has warned that those who remain unlawfully "face punishments including . . . sudden deportation in a place and manner solely of our discretion." *Nguyen v. Scott*, 796 F. Supp. 3d 703, 733–34 (W.D. Wash. 2025) (taking judicial notice of an official statement). DHS has likewise defended the program in the language of crime control, insisting that third-country removals "have stopped crimes from happening." Gianna Toboni et al., *60 Minutes Transcript: How Some Deportees End Up in Countries U.S. Judges Ruled Off Limits*, CBS News (Oct. 25, 2026), https://perma.cc/8W5Y-CAGE (interview with James Percival, Gen. Couns., Dep't of Homeland Sec.). And DHS's brief serves as yet another example: it justifies DHS's policy by emphasizing that those subject to it include individuals with "serious criminal histories" who have "ravaged American communities." Pet'rs Br. 2–3.

At the same time, officials have warned that targets could end up in notorious foreign detention settings—while the program has included removals to prisons, war-torn states, and destinations where refoulement risks are acute, *see, e.g., Mercado v. Noem*, 800 F. Supp. 3d 526, 575–76 (S.D.N.Y. 2025); *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (Mem.) (2025) (Sotomayor, J., dissenting) (compressed notice; inability to assess risks); Memorandum from Todd M. Lyons, Acting Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, Third Country Removals Following the Supreme Court's Order in *Department of Homeland Security v. D.V.D.*, No. 24A1153, at 1 (July 9, 2025), https://perma.cc/3BEG-DRTJ. The Executive's own posture—treating third-country removal as a highly publicized enforcement effort aimed at consequences, deterrence, and incapacitation—supplies precisely the kind of punitive-intent evidence that is often missing in civil-sanction cases. *See Mendoza-Martinez*, 372 U.S. at 168–69; *see also Bell v. Wolfish*, 441 U.S. 520, 538–39 (1979) (recognizing that due process turns on whether a restriction is imposed "for the purpose of punishment" or is "excessive" relative to a legitimate nonpunitive purpose). In short, where Congress left unstated whether third-country removal may serve punitive purposes and entrusted implementation to executive discretion, the Executive Branch's practices—targeting, moral condemnation, dissuasion, and retributive "consequences"—are probative indicators of whether third-country removal is intended as punishment in fact.

2. Third-Country Removals Are Punitive in Effect.

When congressional intent to punish is unclear, courts assess the nature of the government sanction to determine whether the sanction is, in effect, punitive. *See Mendoza-Martinez*, 372 U.S. at 165–66. In *Mendoza-Martinez*, the Court identified several factors relevant to this analysis: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only upon a finding of scienter; (4) whether its operation promotes the traditional aims of punishment (retribution and deterrence); (5) whether the behavior to which it applies is already a crime; (6) whether an alternative regulatory purpose can be assigned to it; and (7) whether it appears excessive in relation to any such alternative purpose. *See id.* at 168–69. These factors demonstrate that third-country removals function as punishment rather than neutral administration of the immigration system.

Affirmative Disability. Third-country removal imposes a severe and affirmative restraint. Unlike ordinary removal to a country of nationality, third-country removal often strips individuals of any realistic access to legal status, social membership, or governmental protection. Individuals are frequently deposited in countries where they lack citizenship, lawful residence, linguistic competence, family ties, or political rights—often with no lawful means of remaining or relocating. The result is not mere geographic relocation but enforced legal and social dislocation tantamount to exile and denationalization, which this Court has recognized as among the most

severe forms of punishment. *See Trop*, 356 U.S. at 101–02 (plurality opinion) (recognizing that denationalization "is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development"). Third-country removal replicates those effects in practice, even if not in name.

Historical Recognition as Punishment. Historically, banishment and exile have been paradigmatic punishments. This Court has sometimes distinguished deportation from banishment. *Compare Fong Yue Ting*, 149 U.S. at 730 ("The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment."), *with Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."). This distinction rests on the premise that deportation returns individuals to their own countries, where they can mitigate the effects of removal. Not so for third-country removal. Removal to a country with which the individual has no connection or opportunity to obtain durable lawful status is tantamount to banishment; it renders the individual effectively stateless and produces the same condition the Court condemned as cruel and unusual punishment in *Trop*: loss of the "right to have rights." 356 U.S. at 102 (plurality opinion).

Traditional Aims of Punishment: Retribution and Deterrence. Third-country removals as of late unmistakably advance retribution and deterrence, the "traditional aims of punishment" this Court identified in *Mendoza-Martinez*. *See* 372 U.S. at 168. Executive

officials have publicly described third-country removal as a set of "consequences," framed it as a tool to hold accountable and incapacitate disfavored individuals, and emphasized its deterrent effect on others. *See, e.g.*, Video posted by Kristi Noem (@EnvoyNoem), X (Mar. 27, 2025, 19:08 ET), https://x.com/EnvoyNoem/status/1905034256826408982 [https://perma.cc/8NNW-7MQE] (former DHS Secretary Noem explaining, "If you come to our country illegally, [third-country removal] is one of the consequences you could face"). Indeed, DHS openly "contends that third-country removals deter unlawful migration and encourage self-deportation of unlawfully present aliens." Audrey Singer, William A. Kandel & Hillel R. Smith, Cong. Rsch. Serv., IF13295.4, *Immigration Removals to Third Countries* 2 (updated Oct. 23, 2026), https://perma.cc/5JQS-AYJP [hereinafter CRS, *Third-Country Removals*]. DHS has also highlighted the harshness of receiving conditions and the suffering imposed as a feature, not a flaw, of the policy—serving to deter others. *See Mercado*, 800 F. Supp. 3d at 575 ("Statements from senior officials suggest that harsh conditions of confinement are a deliberate feature of the enforcement program intended to induce self-deportation and to deter illegal immigration."). Where a sanction is designed and publicized to condemn conduct and deter others, it operates as punishment regardless of its civil label.

The deterrent design of the program is no secret. In August 2025, a DHS spokesperson warned: "If you come to our country illegally and break our laws, you could end up in CECOT, Alligator Alcatraz, Guantánamo Bay, or South Sudan or another third

country." Hum. Rts. Watch, *"To Scare People": US Expulsions of Third-Country Nationals to Countries in Africa* 3 (Oct. 2026), https://perma.cc/TDN3-GEC8 [hereinafter HRW, *To Scare People*]. An unnamed Government official was even more candid with Senate Foreign Relations Committee staff: "With countries like Palau or Eswatini, the point is that the Administration can threaten people that they will literally be dropped in the middle of nowhere. The point is to scare people." *Id.* (quoting S. Comm. on Foreign Rels., Minority Staff, *At What Cost? Inside the Trump Administration's Secret Deportation Deals* 14 (Feb. 2026)). A sanction whose avowed function is to make examples of some in order to frighten others pursues general deterrence—a "traditional aim[] of punishment." *Mendoza-Martinez*, 372 U.S. at 168.

Deterrence is also achieved through the hardship deportees face after transfer. Human Rights Watch found that in every receiving country it examined, "many—if not most—people transferred by the United States have been left with no practical option but to return to their home countries regardless of the harms they face there." HRW, *To Scare People*, *supra*, at 1–2. All 15 people transferred to the Democratic Republic of the Congo in April 2026, for example, reportedly held U.S. judicial orders barring their return home; by late September, none remained in the country, and 11 had returned to their countries of origin. *Id.* at 47. On arrival, some have been confined in countries where they committed no crime: the men sent to Eswatini, for example, were placed immediately in a maximum-security prison and given no opportunity to challenge their detention. *Id.* at 60, 63–64. And class members have reported "in

interviews and legal complaints, that they have been subjected to inhumane conditions—beaten by armed guards, denied food and prohibited from communicating with lawyers or their families." David Nakamura & Adam Taylor, *How Trump Turned a Refugee Bureau into a $410 Million Deportation Operation*, Wash. Post (Sep. 21, 2026), https://perma.cc/8YVG-TMTT. People held in South Sudan have described going "days without eating," collecting rainwater when drinking water ran out, and being held "incommunicado" for months, while guards solicited thousands of dollars from their families—most of which, families say, the guards kept. Joseph Falzetta, *US Deportees in South Sudan Went Hungry as Guards Pocketed Money from Relatives, Families Say*, Associated Press (Nov. 20, 2026), https://perma.cc/PBD2-7LMW. A reporter who visited the five individuals still held there this month found them confined behind a locked gate under constant guard, barred from leaving or contacting anyone, and receiving, most of the time, roughly three liters of water every two days for drinking, bathing, and sanitation. Nicholas Kristof, Opinion, *Trump 'Disappeared' Them in 2025. I Found Them, Locked Up and Famished.*, N.Y. Times (Nov. 18, 2026), https://perma.cc/T9NA-QB4K. One man was locked in his room for three days without food as punishment for asking for clean water. *Id.* Another was reportedly locked in his room for days, let out only to eat, for complaining about a lack of soap. Falzetta, *supra*. A policy that relies on hardship to pressure people into abandoning protections a U.S. immigration court has granted them operates, in substance, as punishment.

Scienter and Connection to Criminal Conduct. DHS's policy applies to all class members, including those with no criminal history. But for those with a criminal history, third-country removal operates in practice as an additional sanction layered on top of completed criminal punishment and is imposed after conviction, incarceration, and completion of a sentence. Indeed, DHS has framed such removals as interchangeable with confinement in facilities designed to punish alleged criminals. *See* HRW, *To Scare People*, *supra*, at 3; Dep't of Homeland Sec., *DHS Releases Statement on Major Victory for Trump Administration and the American People on Deporting Criminal Illegal Aliens to Third Countries* (June 23, 2025), https://perma.cc/8PDX-9KMS. As one man sent to South Sudan after completing his prison term put it, "This was a double punishment. They were making each of us serve an additional sentence." HRW, *To Scare People*, *supra*, at 81. That close linkage to criminal conduct further supports its punitive character.

Absence of Legitimate Purpose and Excessiveness. Even assuming third-country removal serves the regulatory purpose of facilitating removal where countries of origin refuse repatriation, DHS's implementation of the sanction is excessive relative to that goal. Far from a last resort, DHS issued internal guidance in February 2025 directing that entire categories of noncitizens—including those whom immigration judges had found eligible for withholding of removal or Convention Against Torture ("CAT") protection—"should be considered for third-country removals." *Id.* at 1–2. And the receiving countries "in return receive millions of

dollars in aid or other benefits from the U.S." Toboni et al., *supra*. These data reflect a systematic program rather than the exceptional use of a last-resort measure.

The Government has negotiated agreements with more than 30 countries, underscoring that third-country removal has become a standard enforcement tool rather than a contingent response to repatriation barriers. *See* Ariel G. Ruiz Soto, *U.S. Third-Country Deportation Agreements Are More About Fear than Numbers*, Migration Pol'y Inst. (Mar. 31, 2026), https://perma.cc/C8U4-2RUT; HRW, *To Scare People*, *supra*, at 14, 95. The costs are staggering too: a Senate Foreign Relations Committee minority report estimated the cost of transfers to Eswatini at $413,333 per person and to Rwanda at $1.1 million per person. HRW, *To Scare People*, *supra*, at 59, 91. The Government even flew a Mexican national more than 8,000 miles to South Sudan, at an estimated $91,000, rather than return him to Mexico, which "always accepts its nationals back." *Id.* at 84–85. This scale and institutionalization render the sanction grossly disproportionate to any asserted nonpunitive purpose. Under *Mendoza-Martinez*, such excessiveness strongly indicates that the regime functions as punishment: it shows not reluctant immigration regulation but an embraced enforcement mechanism designed to maximize hardship—hallmarks of penalization.

* * *

No single *Mendoza-Martinez* factor is dispositive. But here, all factors point in the same direction. Third-country removal imposes severe disabilities, mirrors historically punitive sanctions, advances

retribution and deterrence, is justified by arguments about criminalized conduct, and does so in a manner excessive to any legitimate regulatory aim. So, under this Court's precedent, it constitutes punishment. That conclusion does not require reclassifying all deportation as punishment. It applies narrowly to third-country removals, which differ not merely in degree but in kind from traditional immigration enforcement. Nor does that conclusion necessarily lead to a prohibition on all third-country removals; it merely requires that DHS abide by the Constitution's limits on punishment.

II. As Punishment, Third-Country Removals Are Subject to Constitutional Limits.

Because third-country removals constitute punishment under this Court's precedent, they trigger heightened constitutional protections similar to those that attach to criminal sanctions. As a procedural matter, for example, third-country removal requires meaningful notice, an opportunity to be heard, and judicial review. Substantively, a removal could impose such significant harm as to violate the Due Process Clause or the Eighth Amendment's prohibition on cruel and unusual punishment. These substantive constitutional limitations are inherently case-specific. Removal to a stable democracy with robust refugee protections differs from removal to a warzone; removal to an unknown country differs from removal to a country that offers familial or social connection. This Court should therefore consider whether DHS's procedures permit that kind of case-specific evaluation, including an opportunity for individuals to explain why they should not be sent to

DHS's chosen destination, before DHS imposes the punishment of third-country removal.

The Eighth Amendment and Due Process inquiries enable courts to engage in this case-specific inquiry, drawing lines at the most egregious cases while leaving open questions about removals that present closer calls until such cases are actually presented. To evaluate the constitutionality of third-country removals, courts can draw on frameworks developed in the incarceration context. Under the Eighth Amendment, post-conviction prisoners challenging conditions of confinement generally must demonstrate that officials acted with "deliberate indifference" to a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994); *see also Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (establishing that "deliberate indifference" to serious medical needs constitutes cruel and unusual punishment). Pretrial detainees—whose conditions are governed by the Due Process Clause—must establish that there was "an expressed intent to punish on the part of detention facility officials" or the restriction was "excessive in relation to" any legitimate regulatory purpose. *Wolfish*, 441 U.S. at 538 (citation omitted). As a result, the constitutional analyses under the Eighth Amendment and Due Process Clause will involve similar questions of punitive intent and deliberate indifference that drive the *Mendoza-Martinez* analysis, *supra* Part I.B.2.

Constitutional challenges to third-country removal are strongest when individuals would be removed into violent circumstances, or where the individuals have been granted protections against removal in the United States. Removal to an active warzone, for

example, may expose individuals to conditions of violence and danger that constitute a "deliberate indifference" to a substantial risk of serious harm, *Farmer*, 511 U.S. at 828, or that are "excessive in relation to" any legitimate regulatory purpose, *Wolfish*, 441 U.S. at 538. Removals to foreign prisons likewise may subject individuals to indefinite incarceration in facilities notorious for harsh conditions.

Third-country removal is especially dangerous for individuals who have already been granted withholding of removal or protection under the CAT because the receiving country may return them to the country from which the United States is barred from removing them. A grant of withholding or CAT protection as to one country "does not bar DHS from designating another country for removal," CRS, *Third-Country Removals*, *supra*, at 2, and some third-country deportees have reportedly "been subsequently repatriated to the same home countries they fled." *Id.*

Moussa Diawara's experience illustrates the danger. *See* Toboni et al., *supra*. An immigration judge ruled in 2012 that Diawara could not be returned to Mali, the war-torn country he had fled. *Id.* Yet in July 2026, after 25 years in the United States and with no criminal record, the Government arrested Diawara outside his Houston-area home, detained him for three weeks without access to his lawyer or a judge, and flew him to Ghana, a country where he had never been. *Id.* DHS justified the removal based on Ghana's "diplomatic assurances for his safety." *Id.* But Ghanaian officials detained Diawara, denied him phone calls, and within five days forced him onto a flight to Mali, where he was left without money or

identification and sleeping on a bench. *Id.* The U.S. Government's own paperwork listed his destination as "Mali." *Id.* And Diawara was not alone: of the 19 passengers on his flight whom journalists reached, 17 reported that Ghana quickly returned them, against their will, to countries that U.S. immigration judges had ruled they should not be returned to. *Id.*

That experience reflects a broader pattern. Ghana returned at least 22 people to likely harm in their home countries despite U.S. immigration judges having granted protection against such return in each case, and by September 2026 had sent nearly everyone deported there from the United States to their home countries. HRW, *To Scare People*, supra, at 71. Equatorial Guinea likewise sent about 30 people to their countries of origin, many of whom held U.S. protection orders, *id.* at 50, 55, notwithstanding its express assurance that transferees would not face persecution or torture "in any other country to which [it] may subsequently transfer them," *id.* at 56. The Government has also sent at least a dozen LGBT individuals, including refugees protected from return because of their sexual orientation or gender identity, to African countries that criminalize same-sex relations. *Id.* at 5. Such onward returns implicate the prohibition on refoulement, which reaches returns effected "in any manner whatsoever," including transfer to a country that will not protect against further removal. *Id.* at 112; *see also* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681, 2681-822, *codified as* 8 U.S.C. § 1231 (stating that it shall be U.S. policy "not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which

there are substantial grounds for believing the person would be in danger of being subjected to torture"); *see also* 28 C.F.R. § 200.1 (providing that "[a] removal order . . . shall not be executed in circumstances that would violate Article 3 of the" CAT, which prohibits refoulement).

The question before this Court is whether DHS's policy satisfies the Due Process Clause. For any country that has provided generalized diplomatic assurances, DHS's policy permits "the alien [to] be removed without the need for further procedures," without any individualized consideration of whether removal to that destination would expose the person to severe harm. J.A. 307, 311. For all other countries, DHS "will generally wait at least 24 hours following service of the Notice of Removal before effectuating removal," will not ask whether the individual fears removal, and will entertain only fears the individual "affirmatively" expresses within that window. J.A. 308, 311; *see* Pet'rs Br. 9, 45. In undefined "exigent circumstances," that window shrinks to six hours. CRS, *Third-Country Removals*, *supra*, at 2. And as Diawara's case shows, a generalized diplomatic assurance offers little protection against onward refoulement. *See* Toboni et al., *supra*. In answering the question presented, this Court should account for the punitive character of third-country removal and determine whether procedures of this kind afford the notice and opportunity to be heard that the Constitution requires before such punishment may be imposed.

CONCLUSION

Applying this Court's established doctrine, third-country removals constitute punishment—not mere civil enforcement—and thus trigger constitutional protections by which DHS must abide.

Respectfully submitted,

David M. Zionts
Counsel of Record
Hassan Ahmad
Laura E. Lowry
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000
dzionts@cov.com

Charlotte S. Butash
COVINGTON & BURLING LLP
30 Hudson Yards
New York, NY 10001

Counsel for Amici Curiae

November 23, 2026

APPENDIX

FULL LIST OF *AMICI CURIAE*[1]

Pedro Gerson, Assistant Professor of Law at the Chicago-Kent College of Law

Evangeline Abriel, Clinical Professor of Law at Santa Clara University School of Law

Cori Alonso-Yoder, Assistant Professor of Law and Director of the Immigration Clinic at the University of Maryland Carey School of Law

Lenni Benson, Chaired Distinguished Professor of Immigration and Human Rights Law at New York Law School

Matthew Boaz, Assistant Professor of Law at the University of Kentucky Rosenberg College of Law

Richard Boswell, Professor of Law at University of California College of the Law, San Francisco

Stacy Brustin, Professor of Law Emeritus & Director, Immigration Law & Policy Initiative at The Catholic University of America

Kristina Campbell, Professor of Law and Director, Beatriz and Ed Schweitzer Border Justice Initiative at Gonzaga University School of Law

Emily Chertoff, Associate Professor of Law at Georgetown University Law Center

---

[1] The views of *amici* expressed here do not necessarily reflect the views of the institutions with which they are affiliated, whose names are included solely for identification purposes.

Alison Dinzeo, Robert M. Steptoe and James D. Steptoe Professor of Law and Director of the Immigration Law Clinic at West Virginia University College of Law

Jocelyn Dyer, Clinical Associate Professor/Director, Immigrant & Refugee Advocacy Clinic at Catholic University of America, Columbus School of Law

Dorien Ediger-Seto, Professional Research Scholar at New York University School of Law

Denise Gilman, Clinical Professor of Law at University of Texas School of Law Immigration Clinic

Luke Hall, Visiting Associate Clinical Professor at University of Iowa College of Law Immigration Clinic

Lindsay Harris, Professor of Law at University of San Francisco School of Law

Mackenzie Heinrichs, Associate Professor of Law at University of Utah S.J. Quinney College of Law

Mary Holper, Clinical Professor at Boston College Law School

Lauren Hughes, Assistant Clinical Professor of Law & Director of the Immigrant Rights Clinic at W&L University School of Law

Danielle C. Jefferis, Schmid Professor for Excellence in Teaching and Associate Professor of Law at the University of Nebraska College of Law

Kevin Johnson, Distinguished Professor of Law Emeritus at UC Davis

Elizabeth Jordan, Assistant Professor and Director, Immigration Law and Policy Clinic at University of Denver Sturm College of Law

Jennifer Koh, Professor of Law and Co-Director, Nootbaar Institute on Law, Religion, and Ethics at Pepperdine Caruso School of Law

Chris Kozoll, Assistant Professor of Law at Brandeis School of Law

Margaret Kuehne Taylor, Adjunct Professor of Law at University of Maryland Carey School of Law

Theo Liebmann, Clinical Professor of Law at Hofstra Law School

Aly Madan, Adjunct Professor of Law at New England Law Boston

Marie Mark, Assistant Professor of Law at CUNY School of Law

Katie Meyer, Professor of Practice at Washington University School of Law

Jennifer Moore, Professor of Law at University of New Mexico School of Law

Daniel Morales, Professor and Dwight Olds Chair in Law at University of Houston Law Center

Nancy Morawetz, Professor of Law at New York University School of Law

Elora Mukherjee, Jerome L. Greene Clinical Professor of Law and Director, Immigrants' Rights Clinic at Columbia Law School

Lori Nessel, Professor of Law, Director Immigrants' Rights/International Human Rights Clinic at Seton Hall University School of Law

Jaya Ramji-Nogales, Professor of Law at Temple University

Abel Rodríguez, Associate Professor of Law at Wake Forest University School of Law

Carrie Rosenbaum, Faculty Affiliate at UC Davis School of Law

Anne Schaufele, Associate Professor & Co-Director, Immigration and Human Rights Clinic at University of the District of Columbia David A. Clarke School of Law

Erica Schommer, Clinical Professor of Law at St. Mary's University

Kelly Shanahan, Clinical Teaching Fellow at University of Minnesota Law School

Sarah Sherman-Stokes, Clinical Professor of Law at Boston University School of Law

Doug Smith, Lecturer in Immigration and Human Rights Law at Brandeis University

Maureen Sweeney, Law School Professor at University of Maryland Carey School of Law

Tania N. Valdez, Albert J. Ruffo Assistant Professor of Law, Santa Clara University School of Law

Amelia Wilson, Assistant Professor and Director, Immigration Justice Clinic at Elisabeth Haub School of Law at Pace University