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 *AMICUS CURIAE* THE BORDER PROJECT IN SUPPORT OF RESPONDENTS


Charles R.A. Morse
Kevin Marien
JONES DAY
250 Vesey Street
New York, NY 10281

Micah M. Doak
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002

Ashley Huebner
JONES DAY
110 N. Wacker Dr.,
Suite 4800
Chicago, IL 60606

Gregory M. Shumaker
Noel J. Francisco
*Counsel of Record*
Jennifer L. Swize
David Wreesman
Anne Bennett Osteen
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

S. Matthew Krsacok
JONES DAY
150 W. Jefferson Ave.,
Suite 2100
Detroit, MI 48226

*Counsel for* Amicus Curiae

## TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTEREST OF *AMICUS CURIAE* .....1

SUMMARY OF ARGUMENT.....2

ARGUMENT .....5

I. THE STATUTORY SCHEME AND IMPLEMENTING REGULATIONS REQUIRE A COUNTRY-SPECIFIC DETERMINATION BY A TRIER OF FACT. .....5

A. Removal Proceedings Under 8 U.S.C. § 1229a. .....5

B. Withholding of Removal Under 8 U.S.C. § 1231(b)(3). .....8

C. Withholding of Removal Under CAT and FARRA. .....9

D. In Removal Proceedings, a Trier of Fact Resolves Fear Claims Only as to the Designated Country. .....10

II. THE POLICY IS CONTRARY TO THE LEGAL FRAMEWORK. .....12

A. The Policy. .....13

B. Z.M.'s Experience Shows How the Policy Works. .....14

C. The Policy Conflicts with the Statute and Implementing Regulations. .....17

CONCLUSION .....23

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*A.M.A.S. v. Mullin*,
No. CV-26-06601-PHX-JCH, 2026
WL 3026123 (D. Ariz. Oct. 6, 2026).....21

*E. Bay Sanctuary Covenant v. Trump*,
No. 18-CV-06810-JST, 2026 WL
1256873 (N.D. Cal. May 7, 2026) .....17

*INS v. Aguirre-Aguirre*,
526 U.S. 415 (1999).....3

*Johnson v. Guzman Chavez*,
594 U.S. 523 (2021).....3, 11

*Las Americas Immigrant Advoc. Ctr. v.*
*U.S. Dep't of Homeland Sec.*,
783 F. Supp. 3d 200 (D.D.C. 2025).....17

*Matter of Acosta*,
19 I. & N. Dec. 211 (BIA 1985).....20

*Matter of I-S- & C-S-*,
24 I. & N. Dec. 432 (BIA 2008).....8

*Matter of S-S-F-M-*,
29 I. & N. Dec. 207 (A.G. 2025) .....20

*Sadychov v. Holder*,
565 F. App'x 648 (9th Cir. 2014).....12

*She v. Holder*,
629 F.3d 958 (9th Cir. 2010) ..... 12

**STATUTES**

8 U.S.C. § 1101 ..... 7

8 U.S.C. § 1158 ..... 7, 9, 18, 22, 23

8 U.S.C. § 1225 ..... 5, 6, 19

8 U.S.C. § 1228 ..... 5

8 U.S.C. § 1229a ..... 2, 5–7

8 U.S.C. § 1231 ..... 3–9, 11, 17–20, 22, 23

8 U.S.C. § 1252 ..... 10

Foreign Affairs Reform and
Restructuring Act of 1998,
Pub. L. No. 105-277, div. G, § 2242,
112 Stat. 2681, 2681-822 (1998) .... 9, 10, 18, 20, 23

**OTHER AUTHORITIES**

8 C.F.R. § 208.16 ..... 3, 7, 10, 18, 23

8 C.F.R. § 208.17 ..... 11

8 C.F.R. § 208.18 ..... 20, 22

8 C.F.R. § 208.30 ..... 6

8 C.F.R. § 208.31 ..... 5, 6, 19

8 C.F.R. § 209.2 ..... 3

8 C.F.R. § 1003.6 ..... 8

8 C.F.R. § 1003.10 ..... 8, 19

8 C.F.R. § 1208.16 ..... 3, 7, 10, 18, 23

8 C.F.R. § 1208.17 ..... 11, 19

8 C.F.R. § 1208.18 ..... 19, 20, 22

8 C.F.R. § 1208.31 ..... 19

8 C.F.R. § 1240.10 ..... 3, 6

8 C.F.R. § 1240.11 ..... 7

8 C.F.R. § 1240.12 ..... 3

88 Fed. Reg. 31314 (May 16, 2023) ..... 11

89 Fed. Reg. 81156 (Oct. 7, 2024) ..... 11

Pranav Baskar & Hamed Aleaziz, *U.S. Deports Nine Migrants in Secret, Ignoring Legal Protections*, N.Y. TIMES (Feb. 14, 2026) ..... 22

Robbie Corey-Boulet & Emmanuel Bruce, *Ghana Took in Trump's Deported West Africans. Then It Forced Them Home*, REUTERS (Jan. 16, 2026) ..... 21

Off. of Chief Immigr. Judge, U.S. Dep't of Just., Exec. Off. for Immigr. Rev., *Immigration Court Practice Manual* (2026) ..... 6, 7

S. Ct. Rule 37.6 ..... 1

## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* the Border Project, a pro bono initiative of Jones Day, provides legal assistance to noncitizens in U.S. immigration proceedings.[1] Since its inception in 2014, the Project has represented over 700 clients, primarily noncitizens seeking asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

For over a decade, the Border Project has maintained a permanent, full-time office in Laredo, Texas. The Project's work includes delivering Know Your Rights presentations at three Laredo-area detention facilities, consulting with noncitizens who have protection-based claims, and representing clients in bond and removal proceedings. As immigration laws and policies have shifted, the Border Project's work has shifted with them. The Project has taken on matters involving the impact of immigration enforcement on families and the Migrant Protection Protocols, and it has increasingly pursued habeas relief and protection from third-country removal for detained clients. To date, over 2,750 Jones Day attorneys and staff have devoted over 660,000 pro bono hours to this initiative.

Since DHS issued its Guidance Regarding Third Country Removals, dated March 30, 2025, and ICE issued its July 9, 2025 implementing memorandum (together, the policy), J.A. 306–13, the Project has

---

[1] Pursuant to Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *Amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

represented dozens of individuals who were granted statutory withholding of removal or CAT protection only to be identified for possible third-country removal under the policy. This experience gives the Project a firsthand view into how the policy works in practice and why it is inconsistent with the statutory and regulatory scheme.

Many of *Amicus*'s clients have established that they would face persecution or torture if returned to the countries they fled, and they may face similar danger in third countries to which the government seeks to send them. *Amicus* is committed to ensuring that these noncitizens receive the protection Congress afforded them. Drawing on its clients' experiences, *Amicus* submits this brief to illustrate how the policy operates in practice and why it is inconsistent with the statutory and regulatory scheme. *See* Resp. Br. 30–40.

## SUMMARY OF ARGUMENT

Congress has established a comprehensive scheme for determining whether noncitizens may be removed and, if so, to which countries. Most relevant here, § 240 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1229a, requires an immigration judge to "conduct proceedings for deciding the inadmissibility or deportability of" a noncitizen ("removal proceedings"). *Id.* § 1229a(a)(1). Unless the INA provides otherwise, those proceedings are the "sole and exclusive procedure" for determining whether the noncitizen may be removed. *Id.* § 1229a(a)(3). The immigration judge decides any application for "relief or protection from removal," *id.* § 1229a(c)(4)(A), and identifies the country or countries to which removal

"may in the first instance be made," 8 C.F.R. § 1240.12(d); *see id.* § 1240.10(f).

Noncitizens in removal proceedings who fear persecution or torture may seek three principal forms of protection: asylum, statutory withholding of removal, and protection under the regulations implementing CAT. A grant of asylum allows an individual to remain in the United States and eventually seek permanent residency and citizenship. 8 C.F.R. § 209.2; *see INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999). Statutory withholding and CAT protection are narrower. They do not displace the removal order: the immigration judge orders the noncitizen removed to the designated country of removal and then withholds or defers removal as to that particular country based on the likelihood that the noncitizen will face persecution or torture there.

Relevant here are statutory withholding and CAT protection, which are adjudicated country by country. The noncitizen must show that it is more likely than not that he or she would be persecuted or tortured in "the proposed country of removal." 8 C.F.R. §§ 208.16(b), (c)(2), 1208.16(b), (c)(2); 8 U.S.C. § 1231(b)(3). The trier of fact (an immigration judge, acting as the Attorney General's delegate pursuant to § 1231(b)(3)) therefore considers evidence about conditions in that country and the noncitizen's fear of being removed there. "In short, withholding-only relief is country-specific." *Johnson v. Guzman Chavez*, 594 U.S. 523, 536 (2021).

The policy replaces this statutory and regulatory scheme with two routes of its own. If the State Department deems a country's general "diplomatic

assurances" credible, a noncitizen may be removed to that country without more. Otherwise, the noncitizen receives notice that removal to a third country is imminent, but officers "will not affirmatively ask" whether the noncitizen fears removal there. J.A. 307, 311. Unless the noncitizen volunteers a fear "within 24 hours" of being notified of the third country—or, in "exigent circumstances," as few as six hours—removal "may proceed." J.A. 311–12. If the noncitizen does express a fear, ICE refers her to USCIS, which "will generally screen" the noncitizen "within 24 hours of referral." J.A. 308, 312. USCIS considers "whether the alien would more likely than not be persecuted on a statutorily protected ground or tortured in the country of removal," which is the ultimate merits standard for statutory withholding of removal and CAT protection. J.A. 308, 312. An immigration judge hears the noncitizen's fear claim only if the noncitizen meets that standard in the USCIS screening and only if ICE elects not to designate yet another country (which would restart the process). J.A. 308–09, 312–13. Neither route provides the country-specific determination by the "trier of fact" that § 1231(b)(3)(C) requires. *See infra* Sections I–II.

The Border Project's experience representing detained clients illustrates how the policy's two routes are inconsistent with the statutory and regulatory scheme for removal. Neither route provides the required notice and opportunity to be heard before a neutral trier of fact. They also create a risk of "chain refoulement"—a return, by way of a third country, to the country from which noncitizens were found to need protection. Border Project clients have faced imminent removal without official notice of the

destination country or notice to counsel—with the government's initial moves sometimes taking place on holiday weekends or late at night. Under such conditions, communicating with an attorney—if the noncitizen has one—is exceedingly difficult. Placing the burden on the noncitizen to affirmatively state a fear within 6-to-24 hours of notice, and to meet the ultimate merits standard within the next 24 hours, conflicts with Congress's carefully constructed scheme for removal.

This Court should affirm the First Circuit's judgment.

## ARGUMENT

### I. THE STATUTORY SCHEME AND IMPLEMENTING REGULATIONS REQUIRE A COUNTRY-SPECIFIC DETERMINATION BY A TRIER OF FACT.

#### A. Removal Proceedings Under 8 U.S.C. § 1229a.

When the Department of Homeland Security seeks to remove a noncitizen from the United States, it generally must initiate removal proceedings under 8 U.S.C. § 1229a.[2] Although DHS initiates those

[2] In certain situations, DHS may subject a noncitizen to an initial fear screening process before an asylum officer rather than initiating removal proceedings. These screenings—credible-fear interviews and reasonable-fear interviews—apply only to specific categories of noncitizens: those who are apprehended at a port of entry or shortly after entering the country, *see* 8 U.S.C. § 1225(b)(1) (credible-fear interviews), and those convicted of certain aggravated felonies or subject to a reinstated removal order after reentering unlawfully, *see* 8 U.S.C. §§ 1228(b), 1231(a)(5); 8 C.F.R. § 208.31 (reasonable-fear interviews). In either case, a noncitizen who receives a negative determination may seek review by an immigration judge. A noncitizen who receives a positive credible fear determination is

proceedings, an immigration judge conducts them. *Id.* § 1229a(a)(1). Section 1229a sets out the procedures for the proceedings and guarantees the noncitizen key rights, including notice of the proceedings and the charges, the privilege of counsel at no expense to the government, and a reasonable opportunity to present and examine evidence. *Id.* § 1229a(a)–(c).

Removal proceedings begin with one or more "Master Calendar" status hearings, during which the immigration judge takes pleadings from the noncitizen regarding DHS's charges of inadmissibility or removability. 8 C.F.R. § 1240.10(c); Off. of Chief Immigr. Judge, U.S. Dep't of Just., Exec. Off. for Immigr. Rev., *Immigration Court Practice Manual* § 3.14 (2026) [hereinafter *Immigration Court Practice Manual*]. During these initial Master Calendar hearings, the immigration judge also designates a country of removal, after both the noncitizen and DHS have had an opportunity to request which country be designated. 8 C.F.R. § 1240.10(f).

Although 8 U.S.C. § 1231(b)(1) and (b)(2) govern the sequence for selecting countries of removal, in practice the designated country is almost always the noncitizen's country of citizenship. Immigration judges may designate alternate countries—and DHS may request them, *see* 8 C.F.R. § 1240.10(f)—but in

---

referred to an immigration judge for full § 1229a removal proceedings, and a noncitizen who receives a positive reasonable fear determination is referred to an immigration judge for withholding-only proceedings. 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. §§ 208.30(f), 208.31(g). Withholding-only proceedings mimic removal proceedings except that a removal order has already been issued for a specific country and the only relief from removal a noncitizen can seek is withholding of removal or CAT protection.

the Border Project's experience, that almost never happens.

Designating the country of removal early is critical because it dictates how the noncitizen must frame her fear-based claims. Asylum turns on whether the noncitizen faces persecution in her country of nationality or citizenship. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1). Statutory withholding and CAT protection, by contrast, depend on whether she faces persecution or torture in the proposed *country of removal*. *Id.* § 1231(b)(3); 8 C.F.R. §§ 208.16(c), 1208.16(c); *see id.* § 1240.11(c)(1). In practice, because the designated country of removal is typically the country of citizenship, noncitizens almost always present all three claims as to the same country.

Once preliminary matters are resolved, the immigration judge schedules an "Individual Calendar" merits hearing on the noncitizen's applications for relief. *See* 8 C.F.R. § 1240.11(c)(3); *Immigration Court Practice Manual*, *supra*, § 3.15. Before that hearing, the noncitizen may submit declarations, country-conditions reports, expert affidavits, and legal briefing demonstrating her eligibility for relief and corroborating the likelihood of future harm. *See* 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.11(c)(3); *Immigration Court Practice Manual*, *supra*, § 3.18.

At the merits hearing, the noncitizen and any witnesses testify and face cross-examination. 8 U.S.C. § 1229a(b)(4)(B). Hearings typically last several hours. If the immigration judge finds the noncitizen eligible for asylum, the judge grants asylum and closes the proceedings. If the noncitizen is ineligible

for asylum but qualifies for statutory withholding or CAT protection, the judge enters a removal order to the designated country but simultaneously prohibits removal there. *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 434 (BIA 2008). Either party may appeal to the Board of Immigration Appeals, which automatically stays the decision. 8 C.F.R. § 1003.6(a).

### B. Withholding of Removal Under 8 U.S.C. § 1231(b)(3).

A statutory withholding order forbids removing a noncitizen to a country where her "life or freedom would be threatened" because of her "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). Once the noncitizen establishes eligibility, withholding is mandatory. *Id.*

Section 1231(b)(3) dictates what is decided, who decides it, and how. *See* Resp. Br. 31–32. *First*, the statute defines the question as country-specific: the "Attorney General may not remove" a noncitizen "to a country if the Attorney General decides that [her] life or freedom would be threatened *in that country* because of" a protected ground. 8 U.S.C. § 1231(b)(3)(A) (emphasis added). *Second*, that text assigns the determination to the "Attorney General," *id.*, who acts through immigration judges as his delegate adjudicators, 8 C.F.R. § 1003.10(a) (immigration judges "act as the Attorney General's delegates in the cases that come before them"). *Third*, the statute prescribes how the adjudicator—the "trier of fact"—makes that decision: "the trier of fact shall determine whether the alien has sustained the alien'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) (incorporating *id.* § 1158(b)(1)(B)(ii)–(iii)). Under those incorporated rules, the trier of fact weighs "credible testimony along with other evidence of record," may require corroborating evidence that the applicant can reasonably obtain, and assesses credibility under the "totality of the circumstances." *Id.* § 1158(b)(1)(B)(ii)–(iii).

### C. Withholding of Removal Under CAT and FARRA.

CAT's implementing regulations follow a similar structure. Through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Congress enacted CAT's protections into U.S. law. Congress declared it "the policy of the United States 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," regardless of physical presence in the United States. Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681, 2681-822 (1998) (codified at 8 U.S.C. § 1231 note). That statutory prohibition reaches not only direct removal, but also any official action that would "otherwise effect" an involuntary return to a country where the noncitizen would face risk of torture. *Id.* Like § 1231(b)(3)(A), that command is both person- and country-specific: it asks whether a particular "person" faces torture in a specific "country." *Id.* Congress directed the Executive to implement this policy by regulation, *id.* § 2242(b), and channeled judicial review into petitions reviewing final removal orders—presupposing that immigration judges will review CAT claims, *id.*

§ 2242(d); 8 U.S.C. § 1252(a)(4). Under those regulations, the applicant must show that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. §§ 208.16(c)(2), 1208.16(c)(2). The adjudicator—"the immigration judge"—must consider "all evidence relevant to the possibility of future torture," including conditions in that country, to "determine whether the alien is more likely than not to be tortured in the country of removal." *Id.* §§ 208.16(c)(3)–(4), 1208.16(c)(3)–(4).

### D. In Removal Proceedings, a Trier of Fact Resolves Fear Claims Only as to the Designated Country.

A Border Project client's experience illustrates how these proceedings work in practice. Z.M. was born into generational chattel slavery in Mauritania, where a well-connected family subjected her to daily sexual abuse, violence, and exploitation. That family has since obtained a warrant for her arrest and maintains close ties with Mauritanian law enforcement. Dkt. 3 at 12; Dkt. 18 at 20–21.[3] Z.M. has no criminal history.

Z.M. entered the United States in December 2024. Dkt. 1 at 6. After she established a credible fear, DHS filed a Notice to Appear with the immigration court, placing her in removal proceedings. She then applied for asylum, withholding of removal, and CAT protection. *Id.* At the Master Calendar hearing, the immigration judge designated Mauritania—Z.M.'s

[3] All citations to "Dkt." refer to the docket in Z.M.'s case before the United States District Court for the Southern District of Texas, Case No. 5:26-cv-00070.

country of citizenship—as the country of removal, making it the focus of all three of her claims. At the merits hearing, the judge heard Z.M.'s testimony and reviewed an extensive record of persecution in Mauritania. Neither DHS nor the judge ever raised the prospect of removal to any other country. *Id.* at 8.

On July 28, 2025, the immigration judge ordered Z.M. removed to Mauritania but granted withholding under § 1231(b)(3) and withholding and deferral of removal under CAT. Dkt. 1-1 at 1. The judge stated that the court also would have granted asylum but for the Biden Administration's Circumvention of Lawful Pathways (CLP) and Securing the Border (STB) rules, which restricted asylum eligibility for certain noncitizens who crossed the southern border. *See* Dkt. 33-1 at 1; 88 Fed. Reg. 31314 (May 16, 2023); 89 Fed. Reg. 81156 (Oct. 7, 2024). The July 2025 order withheld and deferred removal to Mauritania and named no other country of removal. Dkt. 1-1 at 1. It became final a month later when DHS declined to appeal. *See* Dkt. 29-1 at 1–2.

Z.M.'s case shows the statutory and regulatory scheme at work. Because the withholding and CAT inquiries are country-specific, an immigration judge's grant of protection withholds or defers removal only *as to the designated country*. *See Guzman Chavez*, 594 U.S. at 536 (withholding "prohibits DHS from removing the alien to that particular country") (emphasis omitted); 8 C.F.R. §§ 208.17(b)(2), 1208.17(b)(2) (CAT deferral applies to "the country in which it has been determined that the alien is likely to be tortured"). After all, a trier of fact can apply the statute's burden-of-proof and credibility rules only to a specific country: no adjudicator can decide whether

a person faces danger without knowing where she would be sent. Notice of the proposed country is therefore a precondition to the determination the statute requires. By the same token, applicants are "not entitled to have the agency adjudicate claims of relief that relate to a country that nobody is trying to send them to."[4] J.A. 84, 123 (quoting *Sadychov v. Holder*, 565 F. App'x 648, 651 (9th Cir. 2014)); *see also She v. Holder*, 629 F.3d 958, 965 (9th Cir. 2010).

In removal proceedings, then, noncitizens cannot litigate fear claims as to undesignated countries. And in Z.M.'s case, no trier of fact ever considered whether she would face persecution or torture anywhere other than Mauritania.

## II. THE POLICY IS CONTRARY TO THE LEGAL FRAMEWORK.

The policy is contrary to the procedures Congress has prescribed. Under the policy, no trier of fact decides whether a noncitizen would face persecution or torture in a newly designated country. Instead, the policy replaces the required adjudication with one of two routes: a general "diplomatic assurance" from the proposed country of removal or, if no assurance deemed credible by the State Department is forthcoming, a USCIS screening—triggered only if the noncitizen volunteers a fear of removal within 24 hours of being notified of the destination. If she does

[4] Immigration judges sometimes explicitly assure noncitizens that they need address only the designated country of removal. For example, when named Respondent O.C.G. asked whether he needed to seek protection from Mexico, the immigration judge told him he "only needed to worry about the country of removal already identified on his removal order." J.A. 299.

not, no country-specific review takes place. The statutory and regulatory scheme does not permit either route.

### A. The Policy.

Under the first route, if the proposed country "has provided diplomatic assurances that aliens removed from the United States will not be persecuted or tortured" and the State Department "believes those assurances to be credible," the noncitizen "may be removed without the need for further procedures" and without receiving notice of where she is being sent. J.A. 307, 311.

Under the second route, which applies if the United States has not received such assurances or the State Department does not deem them credible, DHS must inform the noncitizen of the proposed country, but officers will not "affirmatively ask" whether she fears being removed there. J.A. 307, 311.

Unless the noncitizen affirmatively states a fear within 24 hours of receiving notice, ICE may proceed with removal. J.A. 312. In "exigent circumstances," ICE may remove the noncitizen as soon as six hours after notice, so long as she is given "reasonable means and opportunity to speak with an attorney prior to removal." J.A. 311. Few detained noncitizens will know how to invoke the policy's procedures during these brief windows, which are often consumed by facility transfers and the accompanying logistics. *See* Resp. Br. 35–36. If the noncitizen does state a fear in time, ICE refers her to USCIS, which "will generally screen" her—potentially remotely—within 24 hours. J.A. 308, 312. In that screening, USCIS applies the ultimate merits standard: "whether the alien would

more likely than not be persecuted on a statutorily protected ground or tortured in the country of removal." *Id.* If the noncitizen fails to meet that standard, "the alien will be removed." *Id.* And even if she satisfies it, she is not guaranteed a hearing in removal proceedings: for someone previously in removal proceedings—including members of the Respondent class—ICE "may" move to reopen, or it "may choose to designate another country for removal" and restart the policy's process again. J.A. 308–09, 312–13.

### B. Z.M.'s Experience Shows How the Policy Works.

For almost five months after the order withholding and deferring Z.M.'s removal to Mauritania became final, Z.M. remained in detention, and DHS said nothing about removing her to a third country. Dkt. 1 at 6; Dkt. 1-2 at 2.

Then, in January 2026, DHS sought to remove Z.M. to an undesignated third country. On Saturday, January 17, going into the Martin Luther King, Jr. holiday weekend, Z.M. noticed that her commissary account had been emptied, often a sign of an impending transfer of the detainee to another facility to be staged for removal. Dkt. 1-2 at 2. Indeed, an employee of CoreCivic (the private contractor that runs ICE's Laredo Processing Center) told Z.M. that she would be moved to Louisiana as early as January 18 or 19 in order to be removed to an unnamed country on Tuesday, January 20, the day after the holiday. 2026 WL 922314, at *1 (S.D. Tex. Jan. 18, 2026) (TRO Order). The government did not give written notice to Z.M. or her counsel, or provide any identification of

the country of removal, or make any inquiry as to any fear-based claims. That evening, Z.M. spoke with her Border Project counsel at Jones Day and relayed what the contractor had said. Dkt. 1-2 at 2.

The next day, Sunday, January 18, counsel emailed ICE officials to ask for the proposed country and timeline and to request "a prompt fear interview" before any removal. Dkt. 17-1 at 2. An ICE official replied that Z.M. would be moved to Louisiana "in preparation for removal to a safe third country," that ICE would give notice "in accordance with current requirements," and that, "[i]f her case warrants, she will be referred to USCIS accordingly." *Id.* at 1. ICE still named no country. Later that Sunday, counsel filed an emergency complaint, mandamus petition, and TRO application in the Southern District of Texas, and the court issued a TRO within hours. That order barred the government from transferring Z.M. outside the district or removing her from the United States while the court considered the merits of her claims. TRO Order, 2026 WL 922314, at *1, *3.

The government did not identify a country of removal until Friday, January 23, when an ICE officer informed Z.M. that the government intended to remove her to Equatorial Guinea. In a court filing the same day, the government stated that "on or about January 16, 2026," Z.M. "was approved for removal to a safe third country, specifically Equatorial Guinea." Dkt. 17 at 2–3.

On February 13, 2026, the court converted the TRO into a preliminary injunction, barring Z.M.'s transfer or removal to any third country unless the government provided at least 10 days' notice of the

proposed destination and an opportunity to reopen her removal proceedings to seek fear-based protection as to that country. 2026 WL 917484, at *1, *13 (S.D. Tex. Feb. 13, 2026) (PI Order). The court held that "blanket assurances" are "no substitute for an individualized determination," and a USCIS screening is inadequate because withholding requires objective evidence and an evidentiary hearing before a neutral adjudicator. *Id.* at *9. The government moved for reconsideration. Dkt. 26 at 1, 6.

On May 19, 2026, the government filed a declaration that ICE now intended to remove Z.M. to Cameroon "on or about May 26th, 2026 absent any stay or temporary restraining order." Dkt. 29-1 at 2. According to the declaration, Cameroon had given "diplomatic assurances" on December 8, 2025, that deportees removed under its third-country agreement "will not be subjected to persecution or torture," and the State Department had deemed those assurances "credible" on January 7, 2026. *Id.* Cameroon then accepted Z.M. in response to an ICE "elevation request," with her "placement on the manifest for this charter serv[ing] as the travel document." *Id.* ICE stated that it would "follow the March 30th, 2025 memorandum," *id.*, under which a noncitizen covered by a credible assurance "may be removed without the need for further procedures," J.A. 307, 311. The district court reiterated that its injunction barred Z.M.'s removal absent notice and an opportunity to reopen. Dkt. 30 at 1–2.

Events in immigration court ultimately mooted the government's reconsideration motion and its efforts to remove Z.M. After district courts vacated the CLP

and STB rules[5]—restoring Z.M.'s eligibility to seek asylum—she moved in June 2026 to reopen her removal proceedings. The immigration judge who had presided over her initial proceedings reopened the case and granted her asylum, consistent with an earlier finding that she would have qualified for asylum all along but for the now-vacated rules. Dkt. 33-1 at 1. DHS did not appeal, and Z.M. was released shortly afterward. Dkt. 33 at 2.

All told, Z.M. spent 579 days in detention, and her representation in district court required more than 1,041 hours of counsel time. Had the district court not granted preliminary relief enjoining the government's removal efforts under its policy, Z.M. would today be in Equatorial Guinea (or Cameroon—or refouled back to Mauritania), notwithstanding her ultimate eligibility for asylum.

### C. The Policy Conflicts with the Statute and Implementing Regulations.

As Z.M.'s experience illustrates, the policy is inconsistent with the statutory and regulatory scheme. Statutory withholding and CAT protection both require a trier of fact to decide whether a noncitizen faces persecution or torture *in the proposed country of removal*. Specifically, § 1231(b)(3) requires a "trier of fact" to weigh evidence and evaluate credibility to determine whether a noncitizen "has demonstrated" that her "life or freedom would be threatened" on a protected ground in the country of

---

[5] *See 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. Dep't of Homeland Sec.*, 783 F. Supp. 3d 200 (D.D.C. 2025).

removal. 8 U.S.C. § 1231(b)(3)(C). Congress's enactment of CAT protections, and their regulatory implementation, likewise directs "the immigration judge" or adjudicator to determine whether the noncitizen is more likely than not to be tortured "in the country of removal." 8 C.F.R. §§ 208.16(c)(4), 1208.16(c)(4); *see also* FARRA § 2242(a).

When DHS designates a country during removal proceedings, a trier of fact decides that question. If DHS instead waits until the removal order is final and then names a new country, the policy bypasses that determination, replacing it with either a generalized diplomatic assurance to the State Department or, if the noncitizen affirmatively states a fear within 6-to-24 hours, a single USCIS screening generally conducted within the next 24 hours. J.A. 307–13. In short, the policy contravenes § 1231(b)(3)'s core requirement by waiting to name the country of removal until after the removal order is final. Petitioners "may not do in two steps what they are barred from doing in one." Pet. Br. 4.

As the district court explained in Z.M.'s case, a USCIS screening "fails to provide for the opportunity to have an evidentiary hearing" to present objective evidence showing the risk of persecution or torture in a third country (for Z.M., Equatorial Guinea or Cameroon) or the risk of chain refoulement (sending a noncitizen to a country that will then return her to a country where she faces persecution or torture—for Z.M., Mauritania). PI Order, 2026 WL 917484, at *9. A screening conducted on the policy's 6-to-24-hour timetable, with no record, cannot apply the burden-of-proof and credibility rules of § 1158(b)(1)(B)(ii)–(iii). *See supra* Section I.B. Fear screenings are supposed

to serve as gateways to a trier of fact, with immigration-judge review of unfavorable results. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (credible fear); 8 C.F.R. §§ 208.31, 1208.31 (reasonable fear). Yet the policy makes a negative screening the final word, as the government conceded in Z.M.'s case. Dkt. 17 at 9. Even a positive screening does not guarantee a hearing by a trier of fact: ICE "may" move to reopen, or it may simply designate another country and restart the process. J.A. 308–09, 312–13.

The diplomatic-assurances route likewise contravenes the legal framework, since it likewise affords neither notice nor a trier of fact. To start, the State Department assesses the credibility of these assurances, not the "Attorney General"—the decisionmaker Congress specified. 8 U.S.C. § 1231(b)(3)(A).[6] Moreover, § 1231(b)(3)(A) asks whether "the alien's life or freedom would be threatened" because of "the alien's" protected characteristics. That is an individualized question that a general, country-wide assurance cannot answer. *See* 8 C.F.R. §§ 1208.17(f), 1208.18(c) (restricting consideration of CAT claims based on

[6] Petitioners quote § 1231(b)(3) as forbidding "the government … from 'remov[ing] an alien to a country if *the* [*government*] decides that the alien's life or freedom would be threatened in that country.'" Pet. Br. 31 (quoting 8 U.S.C. § 1231(b)(3)(A) (emphasis and alterations added by Petitioners). That is not what the statute says. Congress did not assign the decision whether an alien's life or freedom would be threatened to the "government" writ large—it assigned that decision to "the Attorney General," a term that includes his delegate adjudicators, immigration judges. 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1003.10(a).

*individualized* diplomatic assurances); Resp. Br. 32–33, 37–40.

The government argues that a "foreign government is capable of representing that such conduct will not occur under its watch" because "persecution and torture require governmental involvement." Pet. Br. 41. Not quite. Persecution includes harm "inflicted… by persons or an organization that the government was unable or unwilling to control." *Matter of S-S-F-M-*, 29 I. & N. Dec. 207, 209 (A.G. 2025) (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985)) (cited at Pet. Br. 41). And torture includes harm inflicted by *private actors* with a public official's "acquiescence." 8 C.F.R. §§ 208.18(a)(1), 1208.18(a)(1). Those are precisely the kinds of threats a foreign government's generalized assurance does not and cannot address. *See* Resp. Br. 33–35; *cf.* J.A. 32 n.15 ("[W]e have some difficulty seeing how a receiving country can credibly provide blanket assurances … unless it intends to provide them with some sort of affirmative protection against rogue agents and non-state actors, who can be persecutors within the meaning of § 1231(b)(3) and torturers within the meaning of the FARRA/CAT." (citations omitted)).

Z.M.'s case illustrates this flaw and the accompanying risk of chain refoulement. Under the statute, the government is prohibited from "*effect[ing]* the involuntary return of any person to a country" where she would face torture—a requirement not limited to direct removal. FARRA § 2242(a) (emphasis added). But a non-individualized assurance from a third country does not necessarily address whether that country will send the noncitizen onward.

Z.M.'s case illustrates this problem. She was enslaved and abused by private actors: a Mauritanian family that obtained a warrant for her arrest and maintains close ties with Mauritanian law enforcement. That family's connections created a meaningful risk that removing Z.M. to Equatorial Guinea would result in harm or persecution there or refoulement to Mauritania. Dkt. 3 at 12; Dkt. 18 at 20–21. As of January 2026, when the government tried to remove Z.M., Equatorial Guinea had reportedly already refouled eight of the nine third-country deportees it had received. PI Order, 2026 WL 917484, at *11 (citing *The Africa Report*, Jan. 16, 2026). One of the noncitizens refouled from Equatorial Guinea was, like Z.M., a Mauritanian national who fled hereditary slavery. Robbie Corey-Boulet & Emmanuel Bruce, *Ghana Took in Trump's Deported West Africans. Then It Forced Them Home*, REUTERS (Jan. 16, 2026). Before their refoulement—and notwithstanding any assurances provided by the Equatorial Guinean government—deportees to Equatorial Guinea were "subjected to verbal abuse, beatings, and recurring threats that they could be killed and buried where nobody would ever find them" and "repeatedly told to return to their countries of origin." *A.M.A.S. v. Mullin*, No. CV-26-06601-PHX-JCH, 2026 WL 3026123, at *2 (D. Ariz. Oct. 6, 2026). Under the policy, no trier of fact would have weighed any of this evidence before Z.M. was removed.

The government's own declaration in Z.M.'s case shows why the assurance track fails to offer meaningful protection in practice. When the government later sought to remove Z.M. to Cameroon, the assurance ICE relied on was not about her. It was

a general assurance covering all "aliens removed … pursuant to the Third Country Removal agreement." Dkt. 29-1 at 2. The declaration attributes the credibility finding to "the Department of State" and never mentions the Attorney General. *Id.*; *see* 8 C.F.R. §§ 208.18(c)(2), 1208.18(c)(2). In the chain the declaration describes—agreement, generalized assurance, State Department finding, name submission, acceptance, charter manifest—no trier of fact ever addressed whether Z.M. herself would face persecution or torture in Cameroon, or whether Cameroon would return her to Mauritania. *See, e.g.*, Pranav Baskar & Hamed Aleaziz, *U.S. Deports Nine Migrants in Secret, Ignoring Legal Protections*, N.Y. TIMES (Feb. 14, 2026) (reporting on third-country deportees sent to Cameroon subsequently returned to their home countries); Dkt. 32 at 3 n.4 (collecting additional sources).

According to Petitioners, § 1231(b)(3)(C) contains only an "oblique reference" to a "trier of fact" rather than a "mandate" to use one "in the first place." Pet. Br. 34 (citation omitted). But § 1231(b)(3)(C) is explicit: "In determining whether an alien has demonstrated" a threat to life or freedom, "the trier of fact shall" decide whether the noncitizen has sustained her burden of proof and make credibility determinations under § 1158(b)(1)(B)(ii)–(iii). 8 U.S.C. § 1231(b)(3)(C). Congress thus expressly dictated *who* makes the withholding determination (a trier of fact) and *how* (under § 1158(b)(1)(B)(ii)–(iii)). These are not options—they are requirements. *See* Resp. Br. 31–32. Whenever the Executive decides whether a noncitizen has made the showing

§ 1231(b)(3)(A) requires, it must do so through a trier of fact applying those rules.

Finally, Petitioners contend that "Section 1231(b) does not mandate any procedural requirements for assessing whether removal to a third country should be withheld based on a fear of persecution." Pet. Br. 31. That is incorrect. Section 1231(b)(3)(A) bars removal to *any country* where a noncitizen's "life or freedom would be threatened" based on a protected ground. Section 1231(b)(3)(C) then expressly states that a "trier of fact shall determine whether" the noncitizen "has demonstrated that [her] life or freedom would be threatened." That procedural requirement applies to all countries of removal, not merely the country the immigration judge initially designated at DHS's request. CAT's implementing regulations likewise direct the adjudicator to decide the torture question for "the country of removal," with no exception for countries named after the removal order becomes final. 8 C.F.R. §§ 208.16(c)(3)–(4), 1208.16(c)(3)–(4).

## CONCLUSION

Section 1231(b)(3), FARRA, and their implementing regulations ask whether *a particular* noncitizen faces persecution or torture in *the designated country of removal*. And that question is assigned to a *trier of fact*. *See* 8 U.S.C. § 1158(b)(1)(B)(ii)–(iii); 8 C.F.R. § 1208.16(c). Removal proceedings answer that question for the designated country. The policy, in contrast, never requires a trier of fact to answer it for newly designated countries. One of its tracks substitutes a general assurance from a foreign government for an individualized, context-specific

adjudication; the other merely provides a screening, only if the noncitizen affirmatively states a fear, and even then without review of an adverse decision.

Z.M.'s case illustrates how the policy works in practice. She learned of her impending removal by happenstance from a contractor's employee, not from ICE. Halting her removal took emergency litigation over a holiday weekend. For a week, ICE declined to identify the country it had chosen for her removal. And when the government ultimately sought to remove her, it relied on a general diplomatic assurance that did not address whether it was more likely than not that she would be persecuted or tortured in the country to which she was to be removed, or whether that country would send her back to Mauritania, where an immigration judge had already found she faced harm. That procedure is contrary to the legal scheme, which requires notice of the proposed country of removal and an opportunity to present fear claims before a trier of fact.

The Court should affirm.

November 23, 2026

Respectfully submitted,

Gregory M. Shumaker
Noel J. Francisco
*Counsel of Record*
Jennifer L. Swize
David Wreesman
Anne Bennett Osteen
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

Charles R.A. Morse
Kevin Marien
JONES DAY
250 Vesey Street
New York, NY 10281

Micah M. Doak
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002

Ashley Huebner
JONES DAY
110 N. Wacker Dr.,
Suite 4800
Chicago, IL 60606

S. Matthew Krsacok
JONES DAY
150 W. Jefferson Ave.,
Suite 2100
Detroit, MI 48226

*Counsel for* Amicus Curiae