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 *AMICI CURIAE* AMERICAN IMMIGRATION COUNCIL AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The American Immigration Council (Council) is a non-profit organization that strives to strengthen the United States by shaping immigration policies and practices through innovative programs, research, and advocacy grounded in evidence, compassion, justice, and fairness. The Council regularly litigates around issues involving noncitizens' rights in immigration proceedings and appears as *amicus curiae* before this Court and the courts of appeals.

The American Immigration Lawyers Association (AILA), founded in 1946, is a national, non-partisan, non-profit association with over 18,000 members, including lawyers and law professors. AILA seeks to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice. AILA's members practice regularly before immigration agencies, the courts of appeals, and this Court.

Because *amici* have substantial experience in this area, they address the third question presented: whether the government's Guidance on third-country removals is unlawful.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States has long guarded against sending noncitizens to countries where they would be persecuted or tortured. The Guidance issued by the Department of Homeland Security (DHS)[2] effectively

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] We refer to the DHS memoranda issued on March 30 and July 9, 2025, together as the Guidance. See J.A. 306-313.

abandons that mandatory statutory obligation. It allows DHS to remove noncitizens to a country never considered in their removal proceedings. If that country offered a general diplomatic assurance against mistreatment (the "assurance track"), the noncitizen receives no notice at all; otherwise (on the "non-assurance track"), they may receive as little as six hours' notice before removal to the third country. The noncitizen is not asked whether they fear harm there. If they nevertheless raise such a fear, they must meet their ultimate burden to prove eligibility for protection at a "screening" interview with a DHS officer, generally within 24 hours, to avoid removal to that country. If the officer rejects the claim, the noncitizen may be removed without any review. As the courts below correctly held, none of this can be squared with governing law, which requires meaningful notice and a meaningful opportunity to raise fear-based claims before deportation to a third country.

A. Three sets of provisions forbid this result.

First, 8 U.S.C. § 1231(b)(3) bars removal to any country where a noncitizen's life or freedom would be threatened because of a protected ground, directing a "trier of fact" to (1) decide whether that person established the prospect of harm and (2) make necessary credibility determinations.

Second, under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), a nation may not send a person to "another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." As implemented through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), CAT bars the involuntary return of any

person to a country where there are substantial grounds for believing they will be tortured.

Third, the regulations implementing Section 1231(b)(3) and CAT/FARRA authorize only immigration judges (IJs), and not DHS officers, to grant or deny applications for Section 1231(b)(3) and CAT protection. And the statutes permit judicial review of those decisions.

B. The Guidance violates each of these requirements. Section 1231(b)(3) and its implementing regulations require an individualized determination, with at minimum the possibility of IJ review, as to the specific country of removal; in no case is that made available by the Guidance. And the Guidance independently violates the CAT/FARRA regulations, which require a meaningful opportunity to raise a fear of torture and allow only for individualized assurances that torture will not occur in the recipient country. The government's principal answer is that Section 1231(b) is silent on procedure, making imposition of procedural requirements by a court impermissible. But that is wrong on both counts: The law is not silent and the courts below did not impose any specific procedures. Rather, the courts correctly held that the Guidance is contrary to the *existing* statutory and regulatory scheme.

C. Those violations are enough to resolve this case. But if any doubt remains, the constitutional-avoidance canon resolves it because the government's reading raises grave due process concerns.

ARGUMENT

The Guidance cannot be reconciled with the clear statutory and regulatory rules that prevent the

removal of noncitizens to countries where they may be tortured or persecuted. The discussion that follows begins with a description of those rules, which the government's presentation obscures. *Amici* then show the numerous ways in which the Guidance conflicts with those rules.

I. WITHHOLDING AND CAT PROTECTIONS REQUIRE MEANINGFUL PROCESS, INCLUDING IJ REVIEW.

Section 1231(b)(3), CAT/FARRA, and their implementing regulations provide for mandatory protections and detailed process to ensure that noncitizens are not involuntarily returned to any country where they are likely to face persecution or torture. These protections apply regardless of whether the noncitizen has a final order of removal. Withholding-of-removal protection under Section 1231(b)(3) and protection under CAT are country-specific and are tied to an order of removal to a specified country. See 8 C.F.R. § 1208.22.

A. Seeking withholding and CAT protection

Section 1231(b)(3) and its implementing regulations prohibit removing a noncitizen to any country where it is "more likely than not" that the noncitizen's "life or freedom would be threatened" because of one of five protected grounds, subject to four statutory exceptions. 8 U.S.C. § 1231(b)(3)(A)-(B); 8 C.F.R. §§ 208.16(b), 1208.16(b). They implement the United States' nonrefoulement obligation under Article 33 of the Refugee Convention. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987).

Article 3 of CAT, as implemented by FARRA and regulations, similarly requires "withholding" or "deferral" of removal to a country where it is "more likely

than not" the noncitizen would be tortured. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, 113, 114 [hereinafter CAT]; Foreign Affairs Reform and Restructuring Act of 1998 § 2242, Pub. L. No. 105-277, Div. G., 112 Stat. 2681-761, 2681-822, codified as note to 8 U.S.C. § 1231; 8 C.F.R. §§ 208.16(c), 208.17, 1208.16(c), 1208.17(a); 28 C.F.R. § 200.1. CAT deferral has no exceptions. *Ibid.*

Section 1231(b)(3) and CAT protections are mandatory—"the Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility." *Moncrieffe* v. *Holder*, 569 U.S. 184, 187 n.1 (2013). Consistent with these obligations, every noncitizen in the United States, including those with removal orders, may seek withholding (if eligible) and CAT protection as to each proposed country of removal. See 8 C.F.R. §§ 208.2, 208.3, 1208.4(b).

B. Selection of removal countries

Before effectuating a removal, the government must follow a four-step process to determine where to send a noncitizen, "prescribed by 8 U.S.C. § 1231(b)(2)." *Jama* v. *Immigr. & Customs Enf't*, 543 U.S. 335, 337 (2005); see also 8 U.S.C. § 1231(b)(1)-(3).[3] First, the noncitizen must be given the

[3] Section 1231(b)(1) applies to certain noncitizens placed in removal proceedings immediately upon arrival. It requires sequencing similar to Section 1231(b)(2), but without the designation opportunity, and prioritizes certain transit countries over countries of citizenship or other ties. As with Section 1231(b)(2)(E)(vii), third-country removal is permitted only if removal to "each" above-described country "is impracticable, inadvisable, or impossible." 8 U.S.C. § 1231(b)(1)(C)(iv).

opportunity to designate a country of removal. 8 U.S.C. § 1231(b)(2)(A). Second, if DHS[4] cannot remove a noncitizen to the designated country (or if a noncitizen declines to designate one), DHS must remove them to their country of citizenship. *Id.* § 1231(b)(2)(D). Third, if the noncitizen cannot be removed to one of those options, DHS "shall" remove them to a country where the noncitizen has one of six potential ties. *Id.* § 1231(b)(2)(E)(i)-(vi). Finally, only where it is "impracticable, inadvisable, or impossible to remove the [noncitizen] to each country described" above, DHS may seek removal to an alternative country where a noncitizen has few or no ties. *Id.* § 1231(b)(2)(E)(vii).

The statute establishes, however, that if a noncitizen "would face persecution or other mistreatment in the country designated" under the above statutory provisions, they must receive an individualized determination regarding their eligibility for protection. *Jama*, 543 U.S. at 348; 8 U.S.C. § 1231(b)(1)-(2) (removal country selection process is "subject to paragraph (3)"), 1231(b)(3)(A) (restricting removal "[n]otwithstanding paragraphs (1) and (2)").

II. THE GUIDANCE VIOLATES 8 U.S.C. § 1231, FARRA, AND THEIR IMPLEMENTING REGULATIONS.

The Guidance cannot be squared with the requirements outlined above. As noted, Section 1231(b)(3)

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[4] Statutory references to the Attorney General apply to the DHS Secretary when carrying out removals (see 8 U.S.C. § 1103(a)(1)) and to the Attorney General through the immigration courts when providing notice of the selected countries for removal and resolving claims that the noncitizen fears persecution or torture (see 6 U.S.C. § 557).

and CAT/FARRA bar removal of a noncitizen to any country otherwise permitted under the statutory scheme if the person's life or freedom would be threatened in that country on account of a protected ground or they would likely be tortured. 8 U.S.C. § 1231(b)(3)(A); FARRA § 2242(a), 112 Stat. at 2681-822. The statutes and their implementing regulations require notice and a meaningful opportunity for a noncitizen to establish such a threat.

But the Guidance does not satisfy these requirements. On both the assurance and non-assurance tracks, it effectively precludes noncitizens from asserting withholding and CAT claims, while eliminating the required individualized IJ determination. The assurance track—where removal happens with *no* prior notice—presents additional problems: the statute and regulations do not permit assurances to ever dispense with a statutory withholding claim, while the Guidance far exceeds the cabined role of assurances prescribed in the CAT regulations.[5]

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[5] The Guidance also circumvents Section 1231's mandatory sequencing of potential removal countries by authorizing removal to a country that has "*not previously been designated* as the country of removal" without any reference to the selection process required by Section 1231(b)(1) or (2). J.A. 307 (emphasis added). Congress's "consecutive removal commands" are not discretionary. *Jama*, 543 U.S. at 341. Yet the Guidance does not identify any process by which the government makes the findings that would allow it to skip to the final step of removal to "another country whose government will accept" the noncitizen. 8 U.S.C. § 1231(b)(2)(E)(vii).

A. The Guidance impermissibly denies the individualized determination that withholding and CAT protection require.

The Guidance is "not in accordance with law" (5 U.S.C. § 706(2)(A)) because it disregards the statutory and regulatory requirements that (1) noncitizens receive a meaningful opportunity to assert withholding and CAT claims; (2) such claims be resolved through individualized adjudication before an IJ, including, at a minimum, a low-threshold screening interview with the right to de novo IJ review of any negative screening determination; and (3) noncitizens must have a path for judicial review of denied claims.[6]

1. Withholding and CAT are mandatory protections that limit every removal-country choice.

A noncitizen subject to removal must have an opportunity to assert a claim for withholding or CAT protection as to any country of removal: these protections are mandatory and specific to the person and the identified country of removal.

Each of those features is apparent from the relevant text. As to withholding under Section 1231(b)(3), "[n]otwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or

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[6] The Guidance's incompatibility with existing regulations is alone a sufficient basis for affirmance, as an agency must follow its "existing valid regulations." *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 268 (1954); accord *Fort Stewart Schs.* v. *Fed. Lab. Rels. Auth.*, 495 U.S. 641, 654 (1990). Compliance with agency procedures is especially important where, as here, "the rights of individuals are affected." *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974).

freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A); accord 8 C.F.R. §§ 208.16(d)(1), 1208.16(d)(1) (withholding "shall be granted if the applicant's eligibility * * * is established" before an IJ). As to CAT protection, "[i]f the adjudicator determines that the alien is more likely than not to be tortured in the country of removal, the alien is eligible for protection under [CAT]." 8 C.F.R. § 208.16(c)(4); see also FARRA § 2242(a), 112 Stat. at 2681-822; CAT, *supra*, art. 3 (barring return to a particular "country" or "State" where the person faces a danger of torture).

First, withholding and CAT's removal protections are mandatory where eligibility is established. *Moncrieffe*, 569 U.S. at 187 n.1. But those mandatory protections would be illusory if the government could simply refuse to provide an opportunity to establish eligibility in the first place.

Second, the removal bars are person-specific. Statute and regulation refer repeatedly to "the alien," asking whether "the alien's life or freedom" would be threatened because of "the alien's" protected characteristics or "the alien" would more likely than not be tortured. The question is thus whether a specific *individual* faces persecution or torture. See *Garland* v. *Aleman Gonzalez*, 596 U.S. 543, 550 (2022) (Congress "employed a singular noun ('an alien')"); *Nielsen* v. *Preap*, 586 U.S. 392, 407-408 (2019) (discussing import of definite article "the" identifying a specific person or thing). Only a meaningful individualized determination can answer that question.

Third, withholding and CAT protection are granted only as to a specific country that DHS has

proposed for removal and to which a noncitizen may not be removed. *Johnson* v. *Guzman Chavez*, 594 U.S. 523, 535-536 (2021). But the prohibitions on removal to persecution and torture apply to every removal country statutorily authorized. See *supra* Part I; 8 C.F.R. §§ 208.17(b)(2), 1208.17(b)(2) (noncitizen granted CAT deferral may still be removed but only to "another country *where he or she is not likely to be tortured*" (emphasis added)).

Because these protections extend to every potential removal country but require country-specific determinations before protection may be granted, each new removal country necessarily requires its own determination. See *Guzman Chavez* v. *Hott*, 940 F.3d 867, 879 (4th Cir. 2019) (removal to an alternative country requires a new opportunity to seek protection), rev'd on other grounds sub nom. *Johnson* v. *Guzman Chavez*, 594 U.S. 523 (2021). Such a determination can be made only if a noncitizen has a meaningful opportunity to assert fear of persecution or torture *as to that country*. A proceeding that addressed only the countries designated in a removal order therefore cannot resolve the risk of persecution or torture as to a country DHS *later* selects for removal. As the court below noted, the withholding and CAT obligations contain "no exception for third-country removals," and DHS may not "create such an exception from whole cloth." J.A. 36. Bypassing individualized determinations merely because DHS selects a removal country after initial proceedings conclude would render these mandatory provisions meaningless—and the Court does not "lightly conclude that Congress enacted a self-defeating statute." *Quarles* v. *United States*, 587 U.S. 645, 654 (2019).

2. Only IJs have authority to grant withholding and CAT protection, after an individualized adjudication.

Statute and regulation also specify *who* makes final protection determinations and *how*: an IJ, after notice, the opportunity to submit a request for protection, an evidentiary hearing, and a determination pursuant to detailed regulatory requirements and standards.

First, the withholding statute makes plain the nature of the adjudication required. It contemplates a claimant who must "demonstrate[]" a likelihood of persecution, a "burden of proof," evidence to be weighed, and a "trier of fact" who "shall" assess the evidence and "shall" make credibility findings, applying the standards Congress prescribed for asylum. 8 U.S.C. § 1231(b)(3)(C) (cross-referencing Section 1158(b)(1)(B)(ii)-(iii)'s asylum burden and credibility rules); see *Fact-finder*, Black's Law Dictionary (8th ed. 2004) ("trier of fact" denotes "jurors in a trial or administrative-law judges in a hearing" who "hear testimony and review evidence to rule on a factual issue").

The incorporated asylum provisions confirm this. These provisions direct the "trier of fact" to evaluate testimony and corroboration; assess credibility under "the totality of the circumstances," including the applicant's "demeanor, candor, or responsiveness"; and weigh the applicant's testimony "along with other evidence of record" to decide whether corroboration is needed. 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii). Such standards require a proceeding in which the applicant testifies, a record is developed, and a factfinder observes and evaluates the witness.

Because third-country removals may occur only "subject to" the withholding statute (8 U.S.C. § 1231(b)(1), (2)), including the adjudication specified in Section 1231(b)(3)(C), any third-country removal policy can be lawful only if it provides for a meaningful adjudication of withholding claims.

Second, regulations make clear that only an IJ, *not* a DHS officer, may be the "trier of fact" adjudicating withholding and CAT claims. 8 C.F.R. §§ 208.16(a), (c)(4), (d)(1), 208.17(a)-(b), 1208.16(a), (c)(4), (d)(1), 1208.17(a)-(b), 1240.1(a)(1)(iii).[7] The Court has similarly identified the trier of fact in withholding cases as an IJ. See *Garland* v. *Ming Dai*, 593 U.S. 357, 373 (2021) ("the factfinder—here the IJ—makes findings of fact").

Those regulations further detail the individualized adjudicative proceeding required for withholding and CAT claims. 8 C.F.R. §§ 208.16-18, 1208.16-18. Every noncitizen present in the United States may file a withholding or CAT application for each proposed country of removal. *Supra* Part I. DHS's "Asylum and Withholding of Removal" regulations (8 C.F.R. §§ 208.1-25) and parallel Executive Office for Immigration Review regulations (*id.* §§ 1208.1-25) are all-encompassing: they "apply to *all* applications for * * * withholding of removal under [Section 1231(b)(3)], or under [CAT]," except where regulation specifically authorizes an initial fear screening before consideration of a full application. 8 C.F.R.

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[7] Asylum officers may make *preliminary* withholding and CAT eligibility findings for certain expedited-removal applicants, but they must refer the case to an IJ either to be ultimately granted or to review an adverse determination de novo. 8 C.F.R. §§ 208.30(f), 208.16(a), 1240.17(i).

§§ 208.1(a)(1), 1208.1(a)(1) (emphasis added). And where an initial fear screening results in a finding of credible or reasonable fear, the "Asylum and Withholding of Removal" regulations apply. *Id.* §§ 208.30(f), 208.31(e), 1208.30(f), (g)(iv)(B)-(C), 1208.31(e), (g)(2).

When immigration court adjudication occurs, statute and regulation require an IJ to notify the noncitizen of the designated country of removal and any alternative countries permitted under 8 U.S.C. § 1231(b)(2), as well as the right to pursue withholding and CAT as to those countries. 8 C.F.R. §§ 1240.10(f), 1240.11(c)(1)(i); see 8 U.S.C. § 1229a(c)(4). The statute and regulations also provide a right to counsel at no expense to the government, generally require the applicant to submit an application and demonstrate eligibility for protection based on submission of testimony or other evidence, and provide for an evidentiary hearing on disputed facts, creation of a record, and the right to examine evidence and cross-examine witnesses. 8 U.S.C. § 1229a; 8 C.F.R. §§ 1208.2(b), (c)(2)-(3), 1208.16-18, 1208.31(e), 1240.1-17.

A noncitizen denied withholding or CAT protection in withholding-only or full removal proceedings may appeal to the Board of Immigration Appeals (BIA). 8 C.F.R. §§ 208.31(e), 1208.31(e), (g)(2)(ii), 1240.15. A noncitizen may seek judicial review of any administrative CAT or withholding denial by filing a petition for review of the underlying final removal order in the court of appeals. 8 U.S.C. § 1252(a), (b)(9).

In short, these provisions require notice and a meaningful opportunity to be heard—including sufficient time to prepare evidence necessary to carry the

noncitizen's burden of proof—before a noncitizen is deported to a country where he or she fears persecution or torture.

3. Where fear screening is authorized, it places a low burden on the applicant, and IJ review is available.

In limited circumstances, a noncitizen may be required to satisfy a fear screening by an asylum officer before submitting a full withholding or CAT application. The hallmarks of such screenings—where regulations permit them at all—are that the screening standard is low and IJ review of a negative finding is always available.

Previously deported noncitizens may be subjected to reinstatement of the prior removal order by a DHS officer. 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8. Nonlawful permanent residents who have certain convictions are subject to administrative removal by a DHS officer. 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1(b)(1). In both summary processes, DHS must provide notice of the designated country of removal (8 C.F.R. §§ 238.1(b)(2)(ii), (f)(2), 241.8(e)), and the noncitizen may pursue withholding and CAT protection by demonstrating a "reasonable possibility" of persecution or torture in a screening interview with an asylum officer (*id.* §§ 241.8(e), 238.1(f)(3); see 8 C.F.R. §§ 208.31, 1208.31).[8] The interviewing officer must

[8] See Form M-488, Information about Reasonable Fear Interview, perma.cc/UJ64-UMY9 (providing instructions on how to seek protection for noncitizens subject to reasonable-fear process); Form I-851, Notice of Intent to Issue a Final Administrative Removal Order, https://immigrantdefenseproject.org/wp-content/uploads/practice-advisory-administrative-removal-under-238b.pdf at App. A (same).

"determine that the alien has an understanding of the reasonable fear determination process." *Id.* § 208.31(c). The noncitizen may be represented by counsel and present evidence and will be provided an interpreter if needed. *Ibid.* A positive screen sends the case to "withholding-only" proceedings before an IJ. *Id.* §§ 208.2(c)(2), 208.16, 208.31(e), 1208.2(c)(2), 1208.31(e), (g)(2).

Credible-fear screening in expedited removal[9] follows the same pattern. The asylum officer determines whether there is a "significant possibility" that the noncitizen can establish eligibility for asylum, withholding, or CAT protection. 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. §§ 208.30, 1208.30. Interview procedures resemble reasonable-fear screenings. 8 C.F.R. § 208.30(d). A positive finding leads to full removal proceedings before an IJ or to an asylum merits interview reviewable by an IJ. *Id*. §§ 208.30(f), 208.14(c)(1).

Each of these screening mechanisms provides a right to de novo IJ review of an adverse determination. 8 C.F.R. §§ 208.30(g)(1), 1208.31(g), 1003.42(d). The statute further authorizes judicial review, except of negative credible-fear determinations (which Congress expressly barred), by filing a petition for review of the underlying final removal order in the court of appeals. 8 U.S.C. § 1252(a), (e)(5).

Screening aims to weed out "frivolous claims," while also fulfilling U.S. treaty obligations by allowing

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[9] "Expedited removal" refers to proceedings under 8 U.S.C. § 1225(b)(1), not administrative removal under Section 1228(b). See Form M-444, Information About Credible Fear Interview, perma.cc/GQ32-XLSE (instructions on how to seek protection for noncitizens undergoing credible fear interviews).

those with a genuine reasonable fear "to receive a hearing before an immigration judge at which they can establish their entitlement to appropriate relief." *Alvarado-Herrera* v. *Garland*, 993 F.3d 1187, 1194-1195 (9th Cir. 2021). The noncitizen's burden of proof at the screening stage was intentionally set at a lower level than the ultimate merits burden, which generally requires proving that persecution or torture is "more likely than not" (see 8 C.F.R. § 208.16(b)-(c)). Screening is designed to be rapid, so a low threshold takes account of the lack of the necessary time to prepare evidence to prove ultimate eligibility. *Id.* § 208.31(b)-(c) (reasonable-fear determination must generally be made "within 10 days of the referral"). The "reasonable possibility" burden is satisfied by demonstrating a 10% chance of harm, and a "significant possibility" burden is even less demanding. *DHS* v. *Thuraissigiam*, 591 U.S. 103, 109 (2020); *Cardoza-Fonseca*, 480 U.S. at 440.

4. The Guidance violates statutory and regulatory requirements.

In all cases, the Guidance departs from these legal requirements, denying noncitizens necessary protections. See, *e.g.*, *Portillo* v. *Catletti*, 2026 WL 3016414, at *1-2 (S.D.N.Y. 2026) (describing how noncitizen subjected to the Guidance was given late notice of removal country, no chance to present evidence, and a fear screening that ignored chain-refoulement risk).

On the diplomatic assurance track, the Guidance contemplates *no* notice of third-country removal and *no* opportunity to apply for withholding or CAT protection. Removals based on generalized assurances violate the legal framework detailed above.

Cases on the non-assurance track are likewise flawed.

First, the extremely short notice period—*at most* 24 hours and as few as six hours—during which the noncitizen must affirmatively articulate a fear of removal is inadequate. Such short notice effectively forecloses finding counsel, let alone investigating the danger of removal to a newly identified country; for noncitizens who are detained, even scheduling a law-library appointment can take days.[10]

Arguing to the contrary, the government suggests that expedited procedures on this track are adequate because class members "have had a prior opportunity to raise withholding or CAT claims." U.S. Br. 44. But that is nonsensical because those proceedings never addressed, and could not address, the previously unidentified third country. See J.A. 76-85, 123-124, 239-243, 267-269 (explaining impossibility of raising fear-based claim as to an unknown removal country); *Matter of B-S-A-N-*, 30 I&N Dec. 145, 148 (BIA 2026) ("[A]n applicant is not entitled to adjudication of an application for withholding of removal to a country that nobody is [yet] trying to send them to.") (quoting *Su Hwa She* v. *Holder*, 629 F.3d 958, 965 (9th Cir. 2010)).

Instead, they addressed withholding only as to the countries designated "for the record." 8 C.F.R. § 1240.10(f); see *id.* § 208.16(b)-(c) (withholding and

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[10] See*, e.g.*, Detainee Handbook Supplement, Stewart Detention Center at 24, *Barrientos* v. *CoreCivic, Inc.*, No. 4:18-cv-70 (M.D. Ga. Aug. 26, 2022), Dkt. No. 255-10 ("Detainees should expect about three business days * * * for processing [of a request to use the law library].").

CAT procedures as to "the proposed country of removal"). Because withholding and CAT are country-specific, "if a noncitizen who has been granted [protection] as to one country faces removal to an alternative country, then she must be given notice and an opportunity to request withholding of removal to *that* particular country." *Hott*, 940 F.3d at 879. Until recently, the government agreed. *Infra* at 22-23.

Second, those able to express fear regarding removal to the new country within the abbreviated notice period are subject to a novel form of "screening" not authorized by any statute or regulation. The regulations require IJ adjudication of withholding and CAT claims and authorize fear screening only as an initial step in expedited removal (credible fear) or reinstatement or administrative removal (reasonable fear). The Guidance impermissibly imposes a "screening" requirement in *all* cases.

Third, even if a fear screening were permitted under the regulations, the Guidance uses an invented standard. Instead of a *preliminary* assessment using a *less demanding* threshold standard (see 8 C.F.R. §§ 208.30-31), the Guidance requires the noncitizen to prove their ultimate entitlement to protection: that persecution or torture in the newly designated country is "more likely than not." J.A. 308; U.S. Br. 44. The regulations require definitive evaluation of that burden of proof only in evidentiary proceedings before an IJ (8 C.F.R. § 208.16), after "full consideration" of the claim (*id.* §§ 208.30(g)(1), 208.31(g), 1003.42(d)). This makes good sense, as a screening asks only whether a claim warrants full adjudication, not whether it

succeeds.[11] See *Thuraissigiam*, 591 U.S. at 109-110 (during screening, applicant "need not show that he or she is in fact eligible for asylum").

Fourth, the Guidance does away with review by the IJ—the crucial "trier of fact." 8 U.S.C. § 1231(b)(3)(C); 8 C.F.R. §§ 208.16 (requiring IJ to decide withholding and CAT applications), 208.30-31 (requiring opportunity for IJ review of negative fear screening). No statute or regulation permits a DHS officer to unilaterally deny withholding or CAT protection without even the option of IJ review. Yet the Guidance purports to do just that.

Fifth, in taking a contrary view, the government errs by requiring magic words referring to the "specific context of third-country removals." U.S. Br. 36. This ignores that Section 1231(b)(1) and (2), which authorize third-country removals, are expressly subject to the protections provided by (b)(3). Similarly, the regulations provide no exceptions for third-country removals. Generally phrased regulations necessarily apply to third-country removals regardless of whether they explicitly announce that fact.

The government's cursory citation to regulations authorizing removal to another country from which protection has not been granted adds nothing. U.S. Br. 36. It is certainly true that, after CAT protection is granted, the regulations still allow removal to "another country where he or she is not likely to be

[11] DHS itself has found "no evidence" that heightened-screening standards "resulted in more successful screening out of nonmeritorious claims." Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18092 (Mar. 29, 2022).

tortured." 8 C.F.R. §§ 208.17(b)(2), 1208.17(b)(2). But that argument begs the question whether these countries *are* in fact likely to torture (or persecute) people sent there (that is what the class members in this litigation seek to demonstrate through adequate notice and opportunity to be heard). Answering that argument by pointing to language allowing removals to safe third countries is a non sequitur. Unless the government's view is that no noncitizen can face persecution or torture in more than one country, it makes little sense to prevent noncitizens from raising new claims when the government identifies a new removal country.

Indeed, if the government were correct that the governing statutes and regulations have nothing to say about third-country removals, the result would be that "what happens in removal proceedings simply does not matter" because "[t]he Government could designate any location in its initial order" and then later "deport the noncitizen to a country of the Government's choosing." *DHS* v. *D.V.D.*, 145 S. Ct. 2153, 2161 (2025) (mem.) (Sotomayor, J., dissenting); accord J.A. 124 (noting government's position would allow it to avoid fully litigating protection claims by simply not proposing the "actual country of removal" during removal proceedings). That understanding of the law cannot be right—and, unsurprisingly, has been rejected by numerous district courts across the nation.[12]

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[12] See, *e.g.*, *Martinez Mejia* v. *Mullin*, 2026 WL 3322162 (E.D. Va. 2026); *Harina* v. *Francis*, 2026 WL 3306310 (S.D.N.Y. 2026); *Birjani* v. *Warden*, 2026 WL 3306744 (D.N.M. 2026); *Liech* v. *Mullin*, 2026 WL 2920342 (D. Md. 2026); *Ansumana S.* v. *Blanche*, 2026 WL 2606655 (D. Minn. 2026); *Takletsadik* v. *Guadian*, 2026 WL 2614243 (D. Md. 2026); *Gach* v. *Mullin*, 2026 WL

B. The diplomatic assurances contemplated in the Guidance are unlawful.

The procedural guarantees described above may not be overridden by the Guidance's *categorical* assurances. The only mention of diplomatic assurances in statutory or regulatory text is a regulation allowing for use of *individualized* assurances, and only in the CAT context. 8 C.F.R. § 208.18(c)(2). Yet when a country provides *generalized* assurances that "aliens removed from the United States will not be persecuted or tortured," the Guidance provides no notice—not even of the existence of the assurances—nor any procedures for noncitizens to seek fear-based protection. J.A. 306-313. This elimination of all procedural protections precludes the government from complying with its statutory obligations not to remove noncitizens to countries where they face persecution and torture.

1. Blanket diplomatic assurances have no statutory or regulatory basis.

At the outset, the Guidance's reliance on general diplomatic representations about the treatment of

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2529695 (D. Neb. 2026); *Youboty* v. *Mullin*, 2026 WL 2169059 (E.D. Pa. 2026); *Condecore* v. *Blanche*, 2026 WL 2034638 (M.D. Fla. 2026); *Marfo* v. *Raycraft*, 2026 WL 2017177 (N.D. Ohio 2026); *Aboretugn* v. *Cole*, 2026 WL 1999299 (S.D. Tex. 2026); *D.J.R.R.* v. *Genalo*, 2026 WL 1746716 (E.D.N.Y. 2026); *Dia* v. *Raycraft*, 2026 WL 1476507 (W.D. Mich. 2026); *Pacheco* v. *Baltazar*, 2026 WL 1223414 (D. Colo. 2026); *Escobar* v. *Chestnut*, 2026 WL 622121 (E.D. Cal. 2026), report and recommendation adopted as modified, 2026 WL 1069797 (E.D. Cal. 2026); *Mbaba* v. *Perez*, 2026 WL 917484 (S.D. Tex. 2026); *Kumar* v. *Wamsley*, 817 F. Supp. 3d 1059 (W.D. Wash. 2025); *Sagastizado* v. *Noem*, 802 F. Supp. 3d 992 (S.D. Tex. 2025); see also *Aden* v. *Nielsen*, 409 F. Supp. 3d 998 (W.D. Wash. 2019).

deportees is ultra vires. There is *no* exception to the right to pursue withholding where a country has provided diplomatic assurances; and even under CAT, assurances must be individualized.

Under the CAT regulations, "[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. §§ 208.18(c)(1), 1208.18(c)(1). Next, the Attorney General must determine "whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3" of CAT. *Id.* §§ 208.18(c)(2), 1208.18(c)(2).

These provisions—through their references to "an alien" and "the alien"—require individualized assurances that consider the particular risks faced by a specific noncitizen. See *supra* Part II.A. As the Third Circuit explained, the regulations "create a procedure for making an individualized determination, in every case, as to whether particular diplomatic assurances are sufficient to permit removal under FARRA." *Khouzam* v. *Attorney Gen.*, 549 F.3d 235, 254 (3d Cir. 2008). That holding confirms what the text suggests: the regulations demand "individualized determinations in [the noncitizen's] fact pattern." *Ibid.*

DHS and DOJ officials in past administrations of both parties endorsed this plain-text reading. In 2011, for example, the DHS Inspector General reported a department-wide "consensus * * * that assurances need to be and are case specific, not country specific. Each individual case is different, depending on the alien and the circumstances." U.S. Dep't of Homeland Sec., Office of Inspector Gen., OIG-11-100, *DHS*

Detainee Removals and Reliance on Assurances 20 (2011). Similarly, at a 2005 Senate hearing, the Attorney General explained that assurances require "a case-by-case analysis" and that "each case is very fact-specific." *Oversight of the USA PATRIOT Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15, 42 (2005) (statements of Alberto R. Gonzales, Att'y Gen. of the U.S.).

2. The Guidance's reliance on assurances violates Section 1231(b)(3), CAT, and implementing regulations for additional reasons.

In addition, reliance on diplomatic assurances is inconsistent with the broader statutory and regulatory context.

First, in addition to being unauthorized, applying assurances to withholding claims under Section 1231(b)(3) violates the statutory requirement, described above, of individualized review of such claims. DHS cannot satisfy Section 1231(b)(3) with an assurance because Congress has specifically instructed that "the trier of fact" shall assess an individual's eligibility for protection. 8 U.S.C. § 1231(b)(3)(C). Moreover, the statute refers to what the government "decides" (*id.* § 1231(b)(3)(A)), and "a decision is a 'judicial or agency determination after consideration of the facts and the law'" (*Dec* v. *Mullin*, 171 F.4th 940, 946 (7th Cir. 2026) (quoting *Decision*, Black's Law Dictionary (12th ed. 2024))). It simply cannot be said that the agency has considered the relevant facts if the agency completely disregards an individual's circumstances.

Second, diplomatic assurances *cannot* provide the protection required by Section 1231(b)(3), which reaches harm caused by private actors. "Persecution"

includes harm inflicted by "persons or an organization that the government was unable or unwilling to control." 8 C.F.R. § 208.1(e). State-issued assurances cannot bind non-state actors whose harmful acts are also covered by Section 1231(b)(3). See *Negusie* v. *Holder*, 555 U.S. 511, 536 n.6 (2009) (Stevens, J., concurring in part).

Similarly, under CAT, "rogue agents and non-state actors" can perpetrate torture, provided at least some public officials acquiesce in the torture through either actual knowledge or willful blindness. J.A. 32 n.15; see, *e.g.*, *Johnson* v. *Arteaga-Martinez*, 596 U.S. 573, 576 (2022) (noncitizen "was beaten violently by members of a criminal street gang" in Mexico and feared that if he returned "he would be persecuted or tortured again with the acquiescence of government officials"). It is thus difficult to imagine how categorical assurances could ever comply with CAT. As the district court below explained, "[w]hile a government could theoretically promise, in the abstract, not to commit torture, it cannot plausibly rule out private torture * * * without knowing at least the *name* of the person whom it is purportedly pledging to protect, let alone the individualized risks they might face." J.A. 129.

Third, even without the risk of uncontrolled private bad actors, the significance of these assurances is highly questionable. The immigration courts (within DOJ), asylum officers (within DHS), and federal courts regularly find persecution and torture likely in the very countries providing assurances. See, *e.g.*, *Navarro Cerritos* v. *Blanche*, 186 F.4th 209, 241-244 (4th Cir. 2026) (likelihood of torture in El Salvador); Appeal ID 5507687 (BIA May 28, 2025) (likelihood of

torture in Uzbekistan); Appeal ID 5205028 (BIA Feb. 16, 2023) (likelihood of torture in Sierra Leone); Appeal ID 5527777 (BIA Aug. 4, 2025) (reopening proceedings based on new evidence of persecution and torture in Cameroon)[13]; cf. Hum. Rts. Ctr., U.C. Berkeley Sch. of L., *Architecture of Cruelty: Third Country Removal Agreements and the Second Trump Administration* 34 (Sept. 2026), perma.cc/3GWX-NG9D (noting El Salvador, Sierra Leone, and Cameroon have provided assurances).

III. THE GOVERNMENT'S CONTRARY ARGUMENTS FAIL.

A. *Vermont Yankee* is inapplicable.

Against the statutory and regulatory language, the government's principal contention is that the statute "is generally silent on the procedures the government must employ" in making withholding and CAT decisions, and that the courts below erred by imposing procedures the agencies have not chosen to adopt. U.S. Br. 31 (citing *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524 (1978)). But this case is nothing like *Vermont Yankee*. In that case there was "no doubt" that the agency procedures satisfied "at least the statutory *minima*," yet the appeals court dictated additional requirements intended to achieve the "best" result. *Id.* at 546, 548-549. Here, the law is not silent, nor did the lower courts impose any specific procedures. Rather, the courts correctly found that the government's policy is not "consistent with

[13] Unpublished BIA decisions are available through the Executive Office for Immigration Review's FOIA reading room, available online (https://foia.eoir.justice.gov/app/ReadingRoom.aspx), by placing the "Appeal ID" in the "Folder Name" search field.

the applicable statutes and regulations that presently govern fear-of-persecution claims" because it fails to provide meaningful notice and opportunity to be heard. J.A. 36. Even if the Court concludes that the current regulatory scheme does not dictate precisely what steps the agency must take whenever it effectuates third-country removals, the holding below that the Guidance departs from statutory, treaty, and existing regulatory obligations is not the sort of micromanaging *Vermont Yankee* rejected.

B. The government's textual arguments fail.

The government also is wrong in contending that Section 1231(b)(3)(C)'s trier-of-fact language, added in 2005, merely standardizes credibility assessments and does not require that a trier of fact actually decide anything. U.S. Br. 33-34. When Congress enacted this provision, withholding claims had long been decided by IJs. Congress legislated against that background, telling the existing adjudicator how to assess burden and credibility. On this, the Conference Report is express, explaining that the new standards were intended to "allow Immigration Judges and the BIA to follow commonsense standards in assessing the credibility of asylum applicants." H.R. Rep. No. 109-72, at 167 (2005). It grounded those standards in "the expertise that Immigration Judges bring to this task," noting that "'[a]n immigration judge alone is in a position to observe an alien's tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence.'" *Ibid.* (quoting *Sarvia-Quintanilla* v. *INS*, 767 F.2d 1387, 1395 (9th Cir. 1985)). And it extended those "same standards" to "withholding of removal applications." *Id*. at 169. Congress thus was instructing

the IJs who already decided these claims, not authorizing the Executive to dispense with IJs.

The government also posits that IJ review is required only where, as under Section 1225(b)(1)(B)(iii)(III), Congress expressly required it. U.S. Br. 32, 34. That comparison is misplaced. Congress spelled out procedures in Section 1225 because it was creating a new summary removal scheme specifically excepted from judicial review. 8 U.S.C. § 1252(e)(5). Having created that exception to full adjudicatory procedures, Congress specified the safeguards that would accompany it, which included review by an IJ in specified circumstances. In contrast, all other withholding and CAT applications arise within the ordinary system, in which IJs have long adjudicated such claims and judicial review is available. *Id.* §§ 1228(b)(3), 1252(a), (b)(9).

If anything, Section 1225 confirms respondents' reading. Even where Congress authorized screening in place of a full hearing, it required that a noncitizen whose claim DHS rejects receive IJ review. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). It would be anomalous to read Section 1231(b)(3) to permit DHS to remove noncitizens to countries no adjudicator has ever considered, on the basis of a screening that no IJ reviews.

C. Section 1231(h) does not bar this suit.

Amici agree with respondents that *Zadvydas v. Davis*, 533 U.S. 678 (2001), forecloses the government's reading of Section 1231(h). Resp. Br. 36-37. The government argues that "if Section 1231 did not exist, respondents would have no claim." U.S. Br. 33. But Section 1231 is what authorizes third-country removals in the first place, so without it DHS could not remove class members to third countries at all.

Respondents do not invoke a right "create[d]" by Section 1231 but rather seek to hold DHS to that power's limits, which the APA directs courts to enforce. 5 U.S.C. § 706(2)(C).

Moreover, reading Section 1231(h) to bar that review would defy "the presumption favoring judicial review of administrative action" (*Kucana* v. *Holder*, 558 U.S. 233, 251 (2010)), which this Court has "consistently applied * * * to immigration statutes" (*Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 229 (2020) (citation modified)).

IV. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES REJECTING THE GOVERNMENT'S IMPLAUSIBLE READING OF THE STATUTES AND REGULATIONS.

Section 1231(b)(3), FARRA, and their implementing regulations definitively require DHS to provide adequate process to raise the risk of persecution or torture prior to removal. But if any doubt remains, the constitutional-avoidance canon resolves it because the government's contrary view raises serious questions about the constitutionality of the statutory and regulatory scheme under the Due Process Clause.

A. The Court reads statutes that confer mandatory protections to require fair procedure, absent explicit language to the contrary.

If it is "fairly possible" to construe a statute to avoid "a serious doubt of constitutionality," that construction "should be adopted." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).[14] This canon presumes "that

[14] The canon also applies to regulations. See *Weaver* v. *U.S. Info. Agency*, 87 F.3d 1429, 1436 (D.C. Cir. 1996) (citing *Rust* v.

Congress did not intend" a possibly unconstitutional alternative; it is "a means of giving effect to congressional intent, not of subverting it." *Clark* v. *Martinez*, 543 U.S. 371, 381-382 (2005). Thus, "this Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary." *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979).

The Court has applied the presumption of constitutionality to immigration statutes for over a century. In *Yamataya* v. *Fisher*, it refused to read the immigration laws to permit executive officers to deport a noncitizen without "opportunity to be heard upon the questions involving his right to be and remain in the United States." 189 U.S. 86, 101 (1903). "An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears." *Ibid.*

B. Respondents' reading is, at a minimum, a plausible construction of the text.

The avoidance canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Clark*, 543 U.S. at 385. Respondents clear that threshold easily.

DHS "may not remove" a noncitizen to a country "if the Attorney General decides" that the noncitizen's life or freedom would be threatened there. 8 U.S.C. § 1231(b)(3)(A). Like the statute in *Califano*, this command is mandatory; a provision that says removal "may not" occur if a certain fact is found "at least

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Sullivan, 500 U.S. 173, 190-191 (1991)); *Kisor* v. *Wilkie*, 588 U.S. 558, 575 (2019) (regulations are construed using the "traditional tools" of construction).

imposes on the [government] a duty to decide" that fact, and to do so carefully and accurately. 442 U.S. at 693-694 & n.8. Congress specified how that decision is made. See 8 U.S.C. § 1231(b)(3)(C). FARRA likewise contemplates individual determinations with specific procedures. See FARRA § 2242(d), 112 Stat. at 2681-822; 8 C.F.R. §§ 208.16(c)(2)-(3), 1208.16(c)(2)-(3). A burden of proof presupposes a party who can carry it; a credibility determination presupposes testimony; and no one can carry a burden, or testify, about a country not yet identified. The government therefore is wrong to assert that nothing in the text of governing law "even remotely supports the imposition of the procedures mandated below." U.S. Br. 35 (citation and internal quotation marks omitted). Indeed, the government's previous agreement with respondents' construction (Resp. Br. 2; *supra* at 22-23) confirms that the construction is at least plausible.

The cases on which the government relies provide a helpful contrast to the statutes and regulations at issue here. In *Jennings* v. *Rodriguez,* the respondents "d[id] not engage in any analysis of the text" and "d[id] not even attempt to defend" a textual basis for the procedures demanded. 583 U.S. 281, 298 (2018). And in *Arteaga-Martinez*, the Court held that the statute at issue "says nothing about bond hearings before immigration judges or burdens of proof, nor does it provide any other indication that such procedures are required." 596 U.S. at 581. Here, the textual basis is express, and Section 1231(b)(3)(C), FARRA, and the regulations provide the references missing in *Arteaga-Martinez*. They name the decisionmaker ("the trier of fact"), the burden ("the alien's burden of proof"), and a relevant inquiry ("credibility determinations").

C. The government's reading would raise serious constitutional concerns.

The avoidance analysis also asks whether a proposed statutory reading raises "serious constitutional doubts." *Clark*, 543 U.S. at 381. The government's reading of the statute and regulations plainly does.

The constitutional defects in the government's position are addressed at length by respondents. Resp. Br. 40-47. Very briefly, it is long-established that the Due Process Clause protects noncitizens facing removal, including those under final orders.[15] See *Trump* v. *J.G.G.*, 604 U.S. 670, 673 (2025) (per curiam); *A.A.R.P.* v. *Trump*, 605 U.S. 91, 94-95 (2025) (per curiam); *Zadvydas*, 533 U.S. at 693. Yet the government's approach would permit removal with no notice, and with no meaningful opportunity to be heard at all. In the district court, the government confirmed that its position allowed removal with no notice even where the noncitizen would be killed on arrival in a third country, so long as DHS did not know that would happen—and under the Guidance, DHS never asks or

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[15] *Amici* agree with respondents that all class members have due process rights with respect to Congress's mandatory prohibitions on removal to persecution or torture. Resp. Br. 44-47. But even if some unadmitted class members lacked due process protections here (U.S. Br. 45-47), the Court rejected a similar argument from the government in *Clark*, instead holding that when a statute is construed to avoid constitutional concerns in some applications it must have the same meaning in all applications. *Clark*, 543 U.S. at 380-382. The class includes noncitizens who were lawfully admitted, who have lived here for years, and whose right to due process the government does not dispute. J.A. 247; see U.S. Br. 47. The serious doubts that the government's reading raises for those noncitizens fix the statutory and regulatory meaning for everyone. *Clark*, 543 U.S. at 380-382.

provides the noncitizen sufficient opportunity to establish that likelihood. D. Ct. Doc. 44, at 29 (Mar. 28, 2025); see *Stanley* v. *Illinois*, 405 U.S. 645, 657 (1972) (constitutional violation where "[a] procedure forecloses the determinative issues"). The Due Process Clause was designed to avoid such outcomes. An interpretation authorizing them raises grave constitutional doubts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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